The Role of Independent Non-Executive Directors in Resolving Corporate Governance Disputes: A Framework of Conciliation for Effectively Addressing Controversies Within Shareholders, Stakeholders and the Board of Directors

Rodrigo Quintero Bencomo*

Abstract: Independent non-executive directors are key corporate governance officers who deserve a prominent role in the corporate form, given their multiple and beneficial attributes. From our perspective, it is because of those attributes that independent non-executive directors can play an outstanding role in the company's response to corporate governance-related disputes within shareholders, stakeholders and the Board of Directors, as well as Boardroom disputes. Conciliation, for that purpose, can be an efficient method for resolving corporate governance disputes, and, in this sense, independent non-executive directors can serve as conciliators, providing their appropriate judgement to the corporate governance-related controversy. This article has the purpose of studying the role of independent non-executive directors in successfully addressing corporate governance disputes and to create a constructive framework based on conciliation for these figures to play a role as conciliators for the amicable resolution of corporate governance disputes over the company's decision-making that may arise between the groups listed above.

Keywords: independent non-executive directors; beneficial attributes; amicable resolution of corporate governance disputes; conciliation; conciliators.

Table of contents: 1. Introduction. – 2. Independent Non-Executive Directors: Brief Considerations on the Reasons for their Significance in Corporate Governance and the Reasons for their Role in resolving Corporate Governance Disputes. – 2.1. Independence: a Free, Impartial and Detached Judgement. – 2.2. Background of Knowledge and Experience: a Wise and Comprehensive Judgement. – 2.3. Integrity and Ethical Adequateness: a Fair, Honest and Credible Judgement. – 2.4. Service to Board Accountability and Checks and Balances. – 2.5. Service in Key Committees. – 3. Identifying Corporate Governance Disputes. – 3.1. Between Shareholders and the Board of Directors. – 3.2. Intra-stakeholders' Disputes and Disputes between Stakeholders and the Board. – 3.3. Boardroom Disputes. – 4. Board Effectiveness and Corporate Governance Dispute Resolution. – 5. Avoiding Litigation for resolving Corporate Governance Disputes: preventing the Paralysis of Corporate Governance Bodies. – 6. Our Framework: Independent Non-Executive Directors as Conciliators. – 6.1. Criticism to Some Methods considered for Corporate Governance Dispute Resolution: Special Litigation Committees, Arbitration and Mediation. – 6.2. Conciliation as an Internal, Amicable Process or Method to resolve Corporate Governance Disputes: Independent Non-Executive Directors as Conciliators for Corporate Governance Dispute Resolution. – 7. Conclusions.

1. Introduction

Decision-making is not exempt from the possibility of disputes. Recent studies surrounding corporate governance agree that the company's ownership and management, this is, shareholders and directors, are not the only individuals interested in the economic success of the corporate form[1]. Investors, employees, consumers, users, customers, creditors, even government agencies, and, definitely, a considerable number of parties have a reasonable interest in the company's positive

*Rodrigo Quintero Bencomo is a Lawyer, graduated at University Rafael Urdaneta (Venezuela). He is founder and former President of the Laboratory of Social Sciences Strategic Analysis, University Rafael Urdaneta (Venezuela). He is author of several articles in the areas of Commercial Law, Corporate Law, Procedural Law, Private International Law and Arbitration."

1. See Dr. Vikas Bairathi, *Corporate Governance: A Suggestive Code*, 2 International Research Journal 753, 754 (2009), available at https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.392.6274&rep=rep1&type=pdf (last visited April 20, 2021). See also Victoria Baurnfield, *Stakeholder theory from a management perspective: Bridging the shareholder/stakeholder divide*, 31 Australian Journal of Corporate Law 187, 191 (2016); Virginia Harper Ho, *"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 The Journal of Corporation Law 61, 69 (2010).

outcome, which may be achieved through implementing an effective governance system, and embracing good corporate governance practices disciplined in multiple voluntary, rather than statutory, codes along the world.

Therefore, all those parties previously mentioned are entitled to "satisfy themselves that an appropriate governance structure is in place"[2], in words of the Cadbury Report. Given the importance of their stakes in the company, the roles of shareholders and stakeholders in corporate governance rapidly transcended from a somehow neutral and uncaring behavior towards the company's decisions, to guaranteeing the accountability, transparency and liability in the decisions of the Board and, even further, to an effective and sometimes determinant influence on how the company is, or should be, directed to their best interests[3].

Harmony in finding a balance between all those concurring interests in corporate governance is not easily attained, and this tends to elicit controversies between these parties and the members of the Board of Directors in every governance system. Indeed, the relevant parties listed above serve only their own interests, aiming to condition the company's day-to-day to its fulfillment, and, it has to be said, even if that means undermining other group's interests and rights that disagree with each other; shareholders, stakeholders or groups of interests, and the Board, even every director, all have an economic project for the company that not necessarily coincide with that of the counterparts, and they all exert their pressure mechanisms to ensure its realization.

Disputes, given that the stakes are so high, are imminent. However, codes of good governance in the United Kingdom, in the United States, in Germany, and in various important countries where commercial institutions have sponsored or developed a code of good

---

2. See The Committee on the Financial Aspects of Corporate Governance and Sir Adrian Cadbury, *The Financial Aspects of Corporate Governance* *14 (Gee 1992), available at https://ecgi.global/sites/default/files//codes/documents/cadbury.pdf (last visited April 18, 2021).

3. See Dr. Vikas Bairathi, *Corporate Governance: A Suggestive Code* at 753 and n 3 (cited in note 1) (L.V.V. Iyer, quoted by Bairathi, defines corporate governance as 'a set of systems and processes which ensure that a company is managed to the best interests of all the stakeholders', which highlights their importance for corporate governance).

corporate governance, have omitted to design a mechanism intended to resolve its disputes: an observation which leads us to believe that all codes rely on the effectiveness of negotiation and other dispute resolution methods, amicable or not.

Nevertheless, the reality is that corporate governance disputes tend to escalate to significant degrees, which could seriously threaten the very existence of the corporate form itself or, at least, endanger the ordinary operations and the economic value and trust of the company. Litigation and arbitration, no matter how cost-effective and prompt the second one might be, are even more disruptive to the company's day-to-day when a conflict escalates to those contentious procedures[4].

The imminent disruption of the company caused by eventual disputes between shareholders, stakeholders and the Board highlights the need for an internal mechanism for an amicable resolution of disputes. Nonetheless, this would not be enough: in fact, effectively addressing corporate governance disputes requires individuals with sufficient professional probity and ethical aptitude, familiarized with the company's concurring interests, but necessarily independent from all those groups of interests in order to have a clear judgement on how to approach the controversy successfully.

Independent non-executive directors can provide the controversy with the professional rectitude and ethical adequateness, both necessary to resolve corporate governance-related disputes. Their multiple attributes in the company are the basis for which they are considered a reference of good corporate governance by shareholders, stakeholders and their fellow directors[5], and it can be of utility for resolving conflicts that may arise in the company's decision-making.

Furthermore, we believe independent non-executive directors' background and importance in corporate governance allows to develop a constructive framework for them to assume the delicate mission

4. See Alexander R. Rothrock, *Special Litigation Committees and the Judicial Business Judgment Morass – Joy v. North*, 32 DePaul Law Review 933, 964 (1983), available at https://via.library.depaul.edu/cgi/viewcontent.cgi?article=2291&context=law-review. (last visited April 20, 2021).

5. See Indrajit Dube and Aparup Pakhira, *Role of Independent Director in Corporate Governance*, 9 Corporate Board: Role, Duties & Composition 50, 55 (2013), available at https://virtusinterpress.org/IMG/pdf/10-22495_cbv9i1art5.pdf (last visited April 18, 2021).

of addressing the disputes or controversies that arise between shareholders, stakeholders and the Board of Directors, and between the executive directors in the performance of their managerial functions, without the need to appeal to litigation, arbitration, or any contentious mechanisms aimed at the heteronomous resolution of corporate governance controversies. Instead, we submit independent non-executive directors have the attributes and the ability to serve as conciliators for resolving corporate governance disputes.

Therefore, this article has the purpose of studying the role of independent non-executive directors in successfully addressing corporate governance disputes and to create a constructive framework of conciliation for these figures to play a role as conciliators for the amicable resolution of internal corporate governance-related controversies.

2. Independent Non-Executive Directors: Brief Considerations on the Reasons for their Significance in Corporate Governance, and the Reasons for their Role in resolving Corporate Governance Disputes

The rise of independent non-executive directors as significant Board members and as important officers for corporate governance relates to the articulation of those principles that justify and guide the theoretical conception of corporate governance. Among them there is the need to held the executive branch of the company accountable for their managerial functions and actions; to guarantee a check and transparency in its performance; to secure internal mechanisms of checks and balances within the Board; and to reassure that their exercise of power is oriented to serve the best interest of every stakeholder.

Independent non-executive directors can be defined as non-managerial corporate officers and independent Board members called to discharge various functions and responsibilities in corporate governance and to serve in crucial committees.

Since the first report on corporate governance was published in the United States by the American Bar Association's Subcommittee on the Functions and Responsibilities of Directors in 1976, and followed by the widely known Cadbury Report in 1992, the Hempel Report

in 1998, and the Higgs Report in 2003[6], independent non-executive directors are generally regarded as highly significant corporate governance officers, and occupy a fundamental position on the Board of Directors in every governance system.

The significance that lies behind independent non-executive directors is in their multiple attributes for which they are considered benchmark figures: indeed, they are regarded as the officers that truly embody good corporate governance practices. Among them it can be highlighted their independence, background, knowledge and experience, service to accountability, integrity and ethical adequateness, and service to key committees for corporate governance[7]. Each of these reasons deserve a separate study.

In addition, we submit that independent non-executive directors have the ability to play a constructive role in effectively resolving corporate governance disputes, given the free, impartial, detached, wise, comprehensive, fair, credible and honest judgement they can provide. And this is thanks to the three attributes (i.e. independence; background of knowledge and experience; integrity and ethical adequateness) which will be further explained in the next paragraphs in order to give basis to the framework of conciliation that we intend to propose afterwards.

2.1. Independence: a Free, Impartial and Detached Judgement

This type of non-executive directors is mainly characterized by the independence with which they enter the Board of Directors, as they are hired by the company on a part-time basis and maintain no working relationship nor business partnership with the corporate form and related parties.

---

6. See Brian R. Cheffins, *The History of Corporate Governance* *19 (Law working papers No 184, January 2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1975404 (last visited April 18, 2021) (In this article, Cheffins does a chronological line on the history of corporate governance departing from its American origins, and notwithstanding the landmark importance of UK reports on the subject).

7. See Dube and Pakhira, *Role of Independent Director in Corporate Governance* at 58 (cited in note 5).

Independent non-executive directors can be considered as such from various perspectives. First, they are independent from the company, as they are not linked with it on a permanent working relationship basis. Moreover they are required by various codes of good corporate governance like the German *Deutscher Corporate Governance Kodex* to have sufficient independence from the corporate form[8], and "not having sustained, not even indirectly, with the company or related parties, relations that condition their independence of judgement", as disciplined by the *Definizioni* of the Italian *Codice di Corporate Governance*[9]. In addition, they are independent from the company's ownership, as they should not be related in any form to the existing shareholders' nuclei[10], and tend to exclude themselves from their sphere of influence when it comes to their individual judgement, as will be studied further. Finally, they are independent from the company's management (i.e. from executive directors) as these managerial officers play no part in the appointment and remuneration of independent non-executive directors; this premise is fundamental, as the main reason for hiring independent non-executive directors in the light of corporate governance reports and codes is to held executive directors accountable for their stewardship.

Furthermore, the independence of non-executive directors is usually measured by criteria or standards of independence determined by the codes of good corporate governance or by mandatory legislation,or both, and even by the company's annual report. In general terms, to

---

8. See Regierungskommission, *Deutscher Corporate Governance Kodex* C(II) (March 20, 2020), available at https://www.dcgk.de//files/dcgk/usercontent/en/download/code/191216_German_Corporate_Governance_Code.pdf (last visited April 18, 2021). Recommendation C(II)(6) *in fine* of this Code, states: "Within the meaning of this recommendation, a Supervisory Board member is considered independent if he/she is independent from the company and its Management Board, and independent from any controlling shareholder". Recommendation C(II)(7) implements the standards by which that independent is measured.

9. See Il Comitato per la Corporate Governance, *Codice di Corporate Governance* *3 (Borsa Italiana 2020), available at https://www.borsaitaliana.it/comitato-corporate-governance/codice/2020.pdf (last visited April 18, 2021). Article 1 of the *Codice*, indicates: "gli amministratori non esecutivi che non intrattengono, né hanno di recente intrattenuto, neppure indirettamente, con la società o con soggetti legati a quest'ultima, relazioni tali da condizionarne l'attuale autonomia di giudizio".

10. See Manuel Olivencia, *El buen gobierno de las sociedades* 21 (ETNOR 1999).

measure the level of independence of a non-executive director, certain practical conditions of relevance concur; for instance, in Spain, according to article 529 of the *Ley de Sociedades de Capital* (the Corporate Enterprises Act)[11], the independence of a non-executive director will be seriously compromised, *inter alia*, if they were previously employed by the company as executive directors and a reasonable time has not elapsed since the working relationship was terminated; if they receive any remuneration other than their fee as non-executive directors; if they have a material business relationship with the company, among others.

In other countries, like the United Kingdom, Recommendation 10 of the *UK Corporate Governance Code* sets standards of independence, but allows companies to create their own criteria and to determine which of their non-executive directors they consider independent in their annual statements[12]. This recommendation is also regarded as a good practice by the Organization for Economic Cooperation and Development (henceforth, OECD), agreeing in its Principles that "it is desirable that boards declare who they consider to be independent and the criterion for the judgement"[13].

The independence required to non-executive directors is crystallized through the judgement they are called to exercise on diverse corporate matters. As pointed by the Cadbury Report, those corporate officers "should bring an independent judgement to bear on issues of strategy, performance, resources, including key appointments, and standards of conduct"[14]. Indeed, given their independence, the judgement which this type of non-executive directors offer to

11. Art. 529 co. 4 (a) Real Decreto Legislativo 02 July 2010, no. 1.

12. See The Financial Reporting Council, *The UK Corporate Governance Code* art. 10 (July 2018), available at https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF (last visited April 19, 2021).

13. See Organization for Economic Cooperation and Development, *G20/OECD Principles of Corporate Governance*, 54 (OECD Publishing 2015), available at https://www.oecd-ilibrary.org/docserver/9789264236882-en.pdf?expires=1618823180&id=id&accname=guest&checksum=9DAF903594A6F4EEDB3C6A8BAD71C3DF (last visited April 19, 2021).

14. See The Committee on the Financial Aspects of Corporate Governance and Sir Adrian Cadbury, *The Financial Aspects of Corporate Governance* at 21 (cited in note 2).

the company's affairs is reputed to be reasoned and cautious for the delicacy of their own standing within the Board of Directors. On one hand, they have to contribute to the achievement of a certain degree of Board effectiveness through their wise advice, and their ability to identify business opportunities, weighing risks and predicting possible scenarios for the decisions taken by the Board; but, on the other hand, they must guarantee a check on the company's stewardship, and controlling that resources are being well-administered to the best interest of the company[15].

Independence of judgement is the attribute which justifies the preponderant role that independent non-executive directors play in corporate governance, thus leading stakeholders and shareholders to trust these members of the Board on various corporate issues[16]. In addition, several codes of good corporate governance have included on their principles and recommendations the presence of a reasonable number of independent non-executive directors in the Board[17].

---

15. See Gavin J. Nicholson and Geoffrey C. Kiel, *Can directors impact performance? A case based test of three theories of corporate governance*, 15 Corporate Governance: An International Review, 585, 588 (2007), available at https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1467-8683.2007.00590.x (last visited April 19, 2021). See also Renée Adams, et al., *The Role of Boards of Directors in Corporate Governance: A Conceptual Framework and Survey**1 (National Bureau of Economic Research Working Paper No 14486 November 2008), available at https://www.nber.org/system/files/working_papers/w14486/w14486.pdf (last visited April 19, 2021) (A question on whether independent non-executive directors can really contribute to the effectiveness of the Board of Directors was raised by empirical studies coming mainly from economy scholars, such as Adams, Hermalin and Weisbach, Nicholson and Kiel, among others. Both of these studies arrived at inconclusive results).

16. See Derek Higgs, *Review of the role and effectiveness of non-executive directors* *9 (The Department of Trade and Industry 2003), available at https://ecgi.global/sites/default/files/codes/documents/higgsreport.pdf (last visited April 20, 2021). Some reports on corporate governance embrace the idea of summoning this type of non-executive directors to the Annual General Meeting. In this report, Higgs affirms that all non-executive directors should attend the Annual General Meeting "to discuss issues that are raised in relation to their role".

17. See, for example, Regierungskommission, *Deutscher Corporate Governance Kodex* C(II)(6) (March 20, 2021); Il Comitato per la Corporate Governance, *Codice di Corporate Governance* art. 2 (Borsa Italiana 2020); The Financial Reporting Council, *The UK Corporate Governance Code* principle G (July 2018), available at https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF (last visited April

Hence, for those reasons, independence can be regarded as the most important attribute for which they are considered a reference of good corporate governance, and it has led to calls for "strengthening the role of independent directors"[18].

Moreover, in the process of resolving corporate governance disputes, independence constitutes an essential pillar for independent non-executive directors to constructively address the disputes that arise, because it allows them to exercise a free, impartial, and detached judgement.

Since they are not linked with the company on a permanent working relationship basis, nor linked with shareholders or stakeholders, they will be free to express their opinions and judgement on the dispute with liberty and without influence, pressure or coercion by the parties involved, or those interested in a determined outcome. For the same reason, they will be able to render an impartial and unbiased judgement; in words of the Higgs Report, "these individuals bring a dispassionate objectivity that directors with a closer relationship to the company cannot provide"[19].

Finally, independent non-executive directors can provide a detached judgement, because they are not involved in the controversy as parties and have no interest whatsoever in the outcome of the controversy, other than securing its amicable resolution.

2.2. Background of Knowledge and Experience: a Wise and Comprehensive Judgement

Independent non-executive directors are preceded by their background of knowledge and experience on corporate affairs, as they require particular expertise, know-how, practice and awareness to

---

19, 2021); Recommendation 8 *in fine* of The Norwegian Corporate Governance Board *the Norwegian Code of Practice for Corporate Governance* *31 (October 17, 2018), available at https://nues.no/wp-content/uploads/2018/10/NUES_eng_web_okt2018_2.pdf (last visited April 20, 2021).

18. Gérard Charreaux and Peter Wirtz, *Corporate Governance in France* *4 (Cahier du FARGO No 1070201 Université de Bourgogne February 2007), available at https://crego.u-bourgogne.fr/images/stories/wp/1070201.pdf (last visited April 20, 2021).

19. See Higgs, *Review of the role and effectiveness of non-executive directors* at 35 (cited in note 16).

understand issues of significant complexity regarding the various scenarios that surround the company's day-to-day, in order to deliver the best proficiency in the performance of their functions and responsibilities.

Indeed, the reports that followed the Cadbury Committee's labour in the world, particularly in the United Kingdom, insisted on the "high professional qualification" of independent non-executive directors[20]. Hence, various reports deemed essential that suitable candidates to an independent non-executive directorship gather exceptional corporate skills and experience. Companies, on the other hand, should weigh more heavily a possible applicant with a commendable background to be nominated to the position, as a result of a transparent and merit-based procedure.

Higgs affirms that "(i)dentifying individuals of suitable quality and background is essential for a high performing board", and recommends that the nomination committee "should evaluate the balance of skills, knowledge and experience on the board and, in the light of this evaluation, should prepare a description of the role and capabilities required for a particular appointment"[21]. Similarly, the Tyson Report, following Higgs, upholds that "(d)iversity in the backgrounds, skills, and experiences of (non-executive directors) enhances board effectiveness by bringing a wider range of perspectives and knowledge to bear on issues of company performance, strategy and risk", and recommends companies to encourage and actively support further training of their non-executive officer's skills and knowledge[22].

In the light of experience, primarily in the United Kingdom, a study conducted by Pass exposed that the recommendations of a background

---

20. See Olivencia, *El buen gobierno de las sociedades* at 22 (cited in note 10).

21. See Higgs, *Review of the role and effectiveness of non-executive directors* at 39 (cited in note 16).

22. See Laura Tyson, *The Tyson Report on the Recruitment and Development of Non-Executive Directors* *1–2 (London Business School July 2003), available at http://facultyresearch.london.edu/docs/TysonReport.pdf (last visited April 20, 2021) (In this report, Tyson highlights the importance to harmonize non-executive director's training offers by the market with the general needs of every company, and, for that, it is recommended "an initiative to bring together companies and training providers to establish guidelines to ensure that training programmes for directors are providing what is needed, and that useful information about such programmes is easily accessible on a timely basis").

of experience and expertise have, for instance, furthered the hiring by large companies of former executive directors as independent non-executive directors, given their corporate trajectory, which is largely reputed to be abundant in experience, knowledge, skills, and interpersonal abilities beneficial to communications between the members of the Board[23].

The previous tendency highlighted by Pass brings us mixed opinions: on one hand, former executive directors can be the foremost suitable candidates for independent non-executive directorships; but, on the other hand, this would raise questions on their true independence or links with the company, if they served as executive officers in the company that now hires them as independent non-executive directors. The issue can be easily addressed by preventing former executive officers from being hired as independent non-executive directors by the same companies in which they previously served.

However, it has to be noted that according to Pass' study, there are also other backgrounds of knowledge and experience that are also appropriate for serving as independent non-executive directors[24], such as those involved in politics, government departments and academia.

In addition to the importance of this attribute for their daily corporate functions, we believe that these qualities allow independent non-executive directors to play a constructive role as conciliators in corporate governance-related disputes resolution. Indeed, they can provide a wise judgement on the dispute since their knowledge, experience and expertise allows them to assess the controversy very carefully and judiciously, and provide their objective view on how the dispute may be resolved to the best interest of the parties involved and of the company, rather than siding with one of the parties. For that purpose, and given that background, they will balance the interests and needs of the

23. See Christopher Pass, *Corporate Governance and The Role of Non-Executive Directors in Large UK Companies: An Empirical Study* *4 (University of Bradford School of Management Working Papers Series No 25, 2002), available at https://www.researchgate.net/publication/235271160_Corporate_Governance_and_the_Role_of_Non-executive_Directors_in_Large_UK_Companies_An_Empirical_Study (last visited April 20, 2021) (Indeed, Table 6 of the paper, which examines the background of non-executive directors, observed that 165 out of 317 current non-executive directors surveyed for the study were former executives).

24. See Pass, *Corporate Governance and The Role of Non-Executive Directors in Large UK Companies* at 25 (cited in note 23).

parties involved with those of the company, and the economic reality, in order to give, besides their wise judgement, a clear and feasible solution to the dispute. Lastly, independent non-executive directors will provide a comprehensive judgement to the dispute, assessing every scenario and procuring broad and effective solutions.

2.3. Integrity and Ethical Adequateness: a Fair, Honest and Credible Judgement

In corporate governance, ethical adequateness and integrity are concepts responding to the need of directing the Board's doings to serve only the greater good of the company and of its groups of interests, in order to prevent malpractices and the eventual failure of the corporate form, triggered by directors' wrongdoings[25]. Integrity and ethical adequateness in corporate governance also entail that the members of the Board of Directors are able to provide their judgement, compromise and honesty to the company, and to grant a decision-making process free of any purpose other than the company's benefit[26].

The importance of ethics in corporate governance was first underlined by the Olivencia Report. That landmark report on corporate governance in Spain acknowledged that ethics is "an index of quality", without which "there can be neither value nor worth" of any corporate form, public or private[27]. Major scandals triggered the failure of large companies across the world due to unethical and dishonest practices of executive directors. This, and the recognition of the need for ethical standards in corporate governance as a proxy for quality (based on the

---

25. See Nobuyuki Demise, *Business Ethics and Corporate Governance in Japan*, 44 Business & Society 211, 214 (2005), available at https://journals.sagepub.com/doi/abs/10.1177/0007650305274914 (last visited April 18, 2021).

26. See Financial Reporting Council, *The UK Corporate Governance Code* Principles A–B (July 2018), available at https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF (last visited April 19, 2021). In particular, the last paragraph of Principle "B." states: "All directors must act with integrity, lead by example and promote the desired culture".

27. Olivencia, *El buen gobierno de las sociedades* at 7 (cited in note 10).

very origins of Commercial Law)[28], gave rise to the need to introduce in corporate governance a figure that complies with ethical standards, with the ability to impose them in their judgement and conduct over corporate affairs.

Independent non-executive directors can be regarded as the response to the ethical necessity in corporate governance. The Tyson Report considers that there is "no doubt that integrity and high ethical standards are essential for effective (non-executive directors)"[29]; in other words, every non-executive director, outside independent director or inside non-executive officer, should embrace integrity and ethics in the discharge of their functions. Furthermore, independent non-executive directors, as they are not permanently linked with the company, and given their independence of judgement, assume a higher ethical role in corporate governance.

Certainly, the particular attributes of independent non-executive directors have led authors García-Sánchez, Frías Aceituno and Rodríguez Domínguez to believe such non-managerial officers have an "ethical commitment" to the company's governance system, and also that their ethical compromise crystallized with the assumption by independent non-executive directors of a "responsibility to safeguard the interests of shareholders and investors", since they "supervise the senior management and ensure that business ethics form part of the organizational culture" and are "less reluctant to investigate / prevent cases of fraud"[30].

Indeed, as previously noted, the independence, background and service to the accountability of independent non-executive directors may guarantee that these officers will detect, uncover and warn

28. See Lodovica de Stefano, *Contrarre con l'impresa: profili soggettivi ed oggettivi* 9 (unpublished PhD dissertation, Università degli Studi di Milano-Bicocca 2010) (The author highlights the historical importance of morality and ethics as the basis of modern Commercial Law, given their standing as a primal regulation for the commercial phenomenon during feudalism, a historical period on which farm-dependent economies and incipient markets were regulated by a body of "moral, rather than scientific, norms", which prevailed over a statutory regulation of commerce).

29. Tyson, *The Tyson Report on the Recruitment and Development of Non-Executive Directors* at 4 (cited in note 22 .

30. Isabel María García-Sánchez, José Valeriano Frías Aceituno and Luis Rodríguez Domínguez, *The ethical commitment of independent directors in different contexts of investor protection*, 18 Business Research Quarterly 81, 84 (2014).

shareholders and stakeholders of possible irregularities or acts that may constitute fraud and other unethical and sometimes criminal practices on which the executive branch may incur.

Besides, we believe that integrity and ethics also provide the capacity to independent non-executive directors for playing a constructive role as conciliators in the resolution of corporate governance-related disputes.

Indeed, as highlighted by the Tyson Report, non-executive directors and, above all, independent non-executive directors need to embody "integrity" and obey "high ethical standards", in order to discharge their functions and responsibilities in the company[31]. Furthermore, Nordberg recognizes independent non-executive directors as those "who increasingly act as the moral compass for the enterprise", which has led to a "new emphasis" on their role in the company[32].

This emphasis on the independent non-executive directors' role in the company, to which the author refers due to their moral and ethical standards, can justify, in fact, their inclusion in the resolution of corporate governance disputes, as they will be able to provide, from our point of view, a fair, honest and credible judgement.

We submit independent non-executive directors can give a fair judgement because, besides their detachment and professionalism, they will be able to assess the controversy and determine which may be the best solution for the conflicting parties and the company. Also, independent non-executive directors will provide an honest judgement, since the ethical standards they are compelled (and committed) to follow[33], will encourage them to bring a real, truthful evaluation and solution for the dispute. Finally, they can also give a credible judgement, because their ethical standards, combined with their background (both for which they are considered a reference of good corporate governance) will make their judgement trustworthy

31. See Tyson, *The Tyson Report on the Recruitment and Development of Non-Executive Directors* at 4 (cited in note 22).

32. Donald Nordberg, *The Ethics of Corporate Governance*, 33 SSRN Electronical Journal 1, 2 and 11 (2007), available at https://ssrn.com/abstract=1004038 (last visited April 20, 2021) .

33. See García-Sánchez, Frías Aceituno and Rodríguez Domínguez, *The ethical commitment of independent directors in different contexts of investor protection* at 84 (cited in note 30).

and reliable for shareholders, stakeholders, executive directors, and for the parties in conflict.

2.4. Service to Board Accountability and Checks and Balances

In corporate governance, Board accountability and checks and balances within the Board are related: "Board accountability", although a very disputed notion, is a process by which the members of the Board of Directors provide transparent, accurate and honest financial statements and accounts to the shareholders on the company's economic performance[34]. Whereas "checks and balances" within the Board is a notion consisting of a structure of internal mechanisms destined to guarantee a convenient distribution of corporate power among the members of the Board of Directors[35].

These notions of Board accountability and checks and balances, particularly when it comes to the measures taken by executive directors in the discharge of their managerial responsibilities and faculties, are the strongest pillar and the essence of corporate governance. Indeed, corporate governance is built on the basis that the company's executive branch should exercise their power to the best of their ability and with sufficient liberty to secure the economic success of the corporate form. However, this liberty is not absolute, and executive directors should be held accountable for their actions[36], guiding their conduct to attend the interests of shareholders and stakeholders, and to allocate corporate functions to the different members of the Board.

34. See Andrew Keay and Joan Loughrey, *The Framework for Board Accountability in Corporate Governance*, 35 Legal Studies 252, 258 (2018).

35. See María Gutiérrez Urtiaga and María Isabel Sáez Lacave, *El mito de los consejeros independientes*, 2 Revista para el Análisis del Derecho 4, 9 (2012).

36. See The Committee on the Financial Aspects of Corporate Governance and Cadbury, *The Financial Aspects of Corporate Governance* at 9 (cited in note 2) (As said by the Cadbury Report, "(t)he country's economic success depends on the drive and efficiency of its companies. Thus the effectiveness with which their boards discharge their responsibilities determines Britain's competitive position. They must be free to drive their companies forward, but exercise that freedom within a framework of effective accountability". In other words, a balance should be reached between the necessary freedom for executive directors to discharge their functions and responsibilities, with a corporate structure of accountability and transparency.)

Thus, those notions studied above require two structures: one to effectively guarantee a check and accountability of the executive branch's decisions, and another one to secure checks and balances in order to prevent arbitrary exercise of power given its concentration on the hands of a single executive director or group of managerial officers. Independent non-executive directors serve both.

On one hand, independent non-executive directors serve the corporate structure of accountability. Indeed, their independence and background allow them to evaluate the financial statements, statements of compliance, and the information submitted to them, as well as to vigilantly monitor the company's performance. For enhancing the results of accountability, it has been recommended in the United Kingdom, a country with a shareholder-oriented governance system and a unitary board, the appointment of a senior independent director with direct access to the company's owners[37]. Whereas in Germany, a country with a stakeholder-oriented governance system and a dual board, it was suggested the appointment of independent non-executive directors to the *Aufsichstrat*, the Supervisory Board, in which are represented major stakeholders, such as the employees[38]. This direct contact between independent non-executive directors, shareholders and stakeholders increases the effectiveness of accountability, as it allows independent non-executive directors to satisfy themselves that groups of interests will be informed of any possible irregularity detected by them, avoiding censure by the executive branch.

On the other hand, independent non-executive directors serve the corporate structure to secure checks and balances on the powers of executive directors. As affirmed by Urtiaga and Sáez Lacave, "corporate law is traditionally based on the fact that the wide managerial powers of administrators can only justify themselves if there is any kind of

37. See James Kirkbride and Steve Letza, *Can the Non-Executive Director be an Effective Gatekeeper? The Possible Development of a Legal Framework of Accountability*, 13 Corporate Governance: An International Review 541, 542 (2005). The authors also highlight that the figure of a senior independent non-executive director faced criticism on the grounds that "(i)t would create a dualist position of a dual chairmanship and a dual board", at p. 543.

38. See Víctor Manuel Martín-Martínez, *Tendencias actuales de gobierno corporativo: Comparativa de los consejos de administración de Alemania, EE.UU., Japón y España*, 24 Revista Universitaria Europea 95, 102 (2015).

check and balances that guarantees administrators' accountability to shareholders"[39]. Independent members of the Board guarantee such checks and balances, because, given their ability to report irregularities to stockholders and stakeholders, they encourage those groups of interests to take action against the executive directors' wrongdoing by exercising their pressure mechanisms, in order to control, demote, or even depose the managerial officer accused of misconduct.

In summary, independent non-executive directors are officers serving in both major corporate structures of accountability by holding executive directors liable for their actions, evaluating the reports on the company's performance, and by denouncing irregularities directly to groups of interests in the company.

2.5. Service in Key Committees

Independent non-executive directors, given their corporate skills and aptitudes, are called to serve in various key committees in the corporate form.

Despite the differences between the normally shareholder-oriented, unitary Board system adopted by companies from the United States, the United Kingdom and from other European and Latin-American countries, and the stakeholder-oriented, dual Board structure adopted by companies of countries like Germany, Poland, and others, both systems agree in recommending independent non-executive directors' service in three key committees: the nominations committee, the remuneration committee, and the audit committee[40].

Also, countries that have a shareholder-oriented, unitary Board governance system, reports on corporate governance and codes of

39. Gutiérrez Urtiaga and Sáez Lacave, *El mito de los consejeros independientes* at 9 (cited in note 35).

40. For example, the 2003 Combined Code of corporate governance in the United Kingdom, as highlighted by Mallin, observes that "(i)n all of these committees, the independent non-executive directors are very important as they should bring their objective judgement to these roles", encouraging companies to appoint independent non-executive directors to those key committees. Christine A. Mallin, *Corporate governance developments in the UK*, in Christine A. Mallin (ed.), *Handbook on International Corporate Governance* 3, 6 (Edward Elgar Publishing Limited 2006).

good practices recommend a sufficient number of independent non-executive directors serving in the Board of Directors.

The Cadbury Report suggests requiring "a minimum of three non-executive directors" as members of the Board, two of which "should be independent"[41] according to the standards of independence established in every code. Likewise, the Brazilian *Código das Melhores Práticas de Governança Corporativa* highlights the "especial importance" of independent non-executive directors in companies with dispersed capital, "on which the predominant role of the Board must be counterbalanced"[42].

On the other hand, in countries with a stakeholder-oriented, dual Board governance system, like Germany, the *Deutscher Corporate Governance Kodex* recommends that the *Aufsichstrat*, the Supervisory Board, "shall include what it considers to be an appropriate number of independent members from the group of shareholder representatives, thereby taking into account the shareholder structure" and that "a Supervisory Board member is considered independent if he/she is independent from the company and its Management Board, and independent from any controlling shareholder[43].

In summary, independent non-executive directors, notwithstanding the different orientations and tendencies of corporate governance systems across the world, serve and play a significant role on key committees, enhancing good corporate governance.

3. *Identifying Corporate Governance Disputes*

We previously identified the independent non-executive directors' attributes that justify their preponderant role in corporate governance,

41. The Committee on the Financial Aspects of Corporate Governance and Cadbury, *The Financial Aspects of Corporate Governance* at 21 (cited in note 2).

42. Instituto Brasileiro de Governança Corporativa, *Código das Melhores Práticas de Governança Corporativa* *45 (2015), available at https://edisciplinas.usp.br/pluginfile.php/4382648/mod_resource/content/1/Livro_Codigo_Melhores_Praticas_GC.pdf (last visited April 20, 2021).

43. See Regierungskommission, *Deutscher Corporate Governance Kodex* C(II) (March 20, 2020), available at https://www.dcgk.de//files/dcgk/usercontent/en/download/code/191216_German_Corporate_Governance_Code.pdf (last visited April 18, 2021).

as well as those attributes which, in particular, give them the ability to serve as conciliators for resolving corporate governance-related disputes. In this chapter, we will delimit our conciliation framework by identifying on which of the controversies surrounding corporate governance may the independent non-executive directors discharge their service as conciliators.

Corporate governance disputes may arise for various reasons, and many factors are to be considered when identifying a possible controversy. Our study, however, will identify three kind of disputes on corporate governance which may arise between relevant parties, and around which our framework may be *prima facie* circumscribed: first, disputes between shareholders and the Board of Directors; second, intra-stakeholder disputes and disputes between the stakeholders and the Board of Directors; and third, disputes between the member of the Board, i.e, Boardroom disputes.

3.1. Between Shareholders and the Board of Directors

Prior to the publication of the first reports on corporate governance and codes of good practices in 1976 and 1992, the role of shareholders in corporate governance was limited, but that restraint or moderation of the ownership's involvement in their own companies was due to a somehow uncaring behavior of shareholders towards corporate affairs; in fact, in the United States, according to Livingston, shareholders in public companies were "known for their indifference to everything about the companies they own except dividends and the approximate price of the stock"[44].

However, the aftermath of notorious scandals of corporate fraud, misconduct and other wrongdoings by executive directors that affected several large companies across the world and that deeply damaged shareholders' value and investors'[45] trust brought the need to procure

44. See generally Joseph Livingstone, *The American Stockholder* (J. B. Lippincott Company 1958).

45. Cases like Enron and Parmalat were deemed as grave cases of corporate fraud and wrongdoing by those companies' executive officers at the expense of its shareholders, which triggered a crisis of confidence in executive directors worldwide. Jeffrey Cohen, Yuan Ding, Cédric Lesage and Hervé Stolowy, *Corporate Fraud and Managers´ Behavior: Evidence from the Press*, 95 Journal of Business Ethics 271, 279 (2010).

shareholder's direct involvement in corporate governance, or "shareholder activism", a tendency which, according to Ingley and van der Walt, "(s)hareholder activism has emerged over the past two decades as a growing force to be reckoned with by management and boards of corporations"[46].

The notion of shareholder activism is a vindication to the shareholdership status in their own companies[47] that recognizes the importance of their role in the corporate form as owners and which gives shareholders, whether individually or in coordinated groups, the ability to present and enforce their own initiatives oriented to enhance the company's performance in the Annual General Meeting[48]; in fact, as noted by Goranova and Verstegen, corporate governance and company's performance are the target of shareholder activism, which has caused "an evolution from a market-based to a political model of corporate governance"[49].

Enhanced shareholder activism gave way for institutional shareholders or investors to involve more profoundly in corporate governance issues. Gillan and Starks observe that "(a)s institutions' ownership has increased, their role as shareholders has also evolved"[50] and, rather than selling their shares when a company underperforms, they prefer to be directly involved in corporate governance to enhance the company's performance and also to prevent further economic harm to the company by massively selling large holdings.

---

46. C.B Ingley and N.T van der Walt, *Corporate Governance, Institutional Investors and Conflicts of Interest*, 12 Corporate Governance: an International Review 534, 535 (2004).

47. Tulio Ascarelli, *Principios y Problemas de las Sociedades Anónimas* 48 Imprenta Universitaria (1951) (Ascarelli affirms that the shareholder's relationship with the company creates a "status" for them; this "status" recognizes rights and duties for shareholders to exercise, and that they must be free to exercise those rights and discharge their duties within the company; thus, shareholder activism can be recognized as the corporate governance response to the general need to enhance shareholder's status within the company).

48. Daniel Bouton, *Promoting Better Corporate Governance In Listed Companies*, 5 Mouvement des Entreprises de France (MEDEF 2002).

49. Maria Goranova and Lori Verstegen Ryan, *Shareholder Activism: A Multidisciplinary Review*, 40 Journal of Management 1230, 1231 (2013).

50. Stuart L. Gillan and Laura T. Starks, *Corporate governance proposals and shareholder activism: the role of institutional investors*, 57 Journal of Financial Economics 275, 279 (2000).

Moreover, in the United States, the direct involvement of institutional shareholders in corporate governance as a measure to avoid selling their shares by enhancing the company's performance, supposed the progressive disregard of the well-known "Wall Street Walk" or "Wall Street Rule", i. e. selling shares of underperforming companies[51]. Instead, activist institutional shareholders will be determined to influence the firm's decision-making by using their shares' power.

Nevertheless, shareholder activism and, in particular, institutional shareholders' activism tends to raise disputes or conflicts of interests between the institutional ownership and the company's management. Indeed, in the Annual General Meeting, shareholders, institutional or not, extend their initiatives and proposals in order to enhance the company's performance. If the initiative receives the approval of the majority of the shareholders, the Board of Directors will be obliged to enforce it, by their duty of loyalty to the company and its shareholders[52].

Despite being approved, the proposals can be disregarded by the Board of Directors, and particularly by executive directors. Various forms of disregard can be identified: for instance, the initiative approved in the Annual General Meeting can suffer changes by the same executive branch of the company that deviate from the initial plan of the shareholders, and, also, can be completely omitted by the executives. Naturally, shareholders will raise their protests over the executive directors' reluctance to deliver the proposal. However, relevant circumstances may concur, and their reticence might have proper grounds: for example, the proposal may be impossible in the company's current situation, or at least impracticable in the terms it was formulated.

51. See Anat R. Admati and Paul Pfleider, *The "Wall Street Walk" as a Form of Shareholder Activism*, 315 Working Paper Stanford Law School 1, 1 (2005) (the cited authors affirm that the "Wall Street Walk seems to be an alternative to activism", but actually "appears to be inconsistent with it", thus recommending the study of the "Wall Street Walk", instead, as "a form of shareholder activism").

52. See generally Vicenç Ribas Ferrer, *Aproximación al estudio del deber de lealtad del administrador de sociedades* (tesis doctoral, Universidad Autónoma de Barcelona 2004), available at https://www.tesisenred.net/bitstream/handle/10803/5206/vrf1de2.pdf?sequence=1&isAllowed=y (last visited April 18, 2021). Ribas Ferrer even believes that, if directors breach their duty of loyalty by disregarding a shareholder-approved initiative, their acts against that initiative will be void.

The previous example is one of the many situations which may occur in the company's relationship between activist shareholders and the Board. The conclusion that has to be noted is that, in fact, shareholder activism, and, in particular, institutional shareholder activism, widens the scenario of possibilities of eventual conflicts between activist institutional owners and the Board of Directors, and especially with the executive directors.

Yet, even with those possibilities, a framework for an effective dispute resolution between activist shareholders (institutional or not) and the Board of Directors has not been developed by mandatory laws or codes of good corporate governance. Instead, it has sparked the use by activist shareholders of contentious mechanisms such as derivative actions against executive members of the Board, which threaten the company's value and trust by investors[53].

Hence, in the following chapters, recommendations will be made to develop a framework of conciliation to effectively address corporate governance-related dispute resolution, based on independent non-executive directors' role as conciliators to the dispute.

3.2. Intra-Stakeholders' Disputes and Disputes between Stakeholders and the Board

Both mandatory laws and codes of good corporate governance across the world, even in countries with a shareholder-oriented corporate governance system, have embraced the stakeholder theory. Explained by Ansoff, the stakeholder theory "maintains that the objectives of the firm should be derived by balancing the conflicting claims of the various "stakeholders" in the firm"[54]. Two consequences have derived from the admission of the stakeholder theory in the regulatory framework of corporate governance. On the one hand, the notion of stakeholder is wide in both voluntary codes and statutory or mandatory laws. On the other hand, it has led corporate governance to adopt the objective of serving the best interest of every stakeholder,

53. See also Zhong Zhang, *The shareholder derivative action and good corporate governance in China: Why the excitement is actually for nothing,* 28 Pacific Basin Law Journal 174, 189 (2011).

54. Igor Ansoff, *Corporate Strategy* 33 (McGraw-Hill 1965).

or, at least, finding a balance between them all. Both consequences, given their relevance to our following study, deserve to be analyzed separately.

Indeed, the notion of stakeholder has been widened in order to include in the company's governance structure "(a)ny identifiable group or individual on which the organization is dependent for its continued survival" according to Freeman and Reed[55]. Thus, many voluntary codes regard various groups of interests as "stakeholders", and give them a preponderant influence in corporate governance. The Japan's Corporate Governance Code is particularly instructive concerning the notion of stakeholder: in its General Principles, it states that companies should recognize "that their sustainable growth and the creation of mid- to long-term corporate value are brought as a result of the provision of resources and contributions made by a range of stakeholders", and includes in its notion of stakeholder the "employees, customers, business partners, creditors and local communities"[56].

Moreover, authors like Freeman and Reed highlight that "from the standpoint of corporate strategy, stakeholder must be understood in the wide sense", given that this will allow the corporate form to analyze "all external forces and pressures whether they are friendly or hostile"[57]. Therefore, the stakeholder theory demands a progressive widening of the notion of stakeholder, in order to identify every external force with the power to influence corporate strategy and analyze the scales of their power, including stockholders, employees, consumers, customers, suppliers, creditors, business partners, government agencies, communities, among others.

Moreover, the stakeholder theory guides corporate governance to serve the best interest of every stakeholder. This entails that the Board of Directors' disposition to act and decide on behalf of the company to the "benefit of its members"[58], according to Section 172 of the United

---

55. See R. Edward Freeman and David L. Reed, *Stockholders and Stakeholders: A New Perspective on Corporate Governance*, 3 California Management Review 88, 89 (1983).

56. Tokyo Stock Exchange, Inc., *Japan's Corporate Governance Code* art. 2 (2018), available at https://www.jpx.co.jp/english/news/1020/b5b4pj000000j-vxr-att/20180602_en.pdf (last visited April 20, 2021).

57. Freeman and Reed, *Stockholders and Stakeholders* at 91–92 (cited in note 55).

58. *Companies Act 2006*, Ch. 46, Sec. 172.

Kingdom's Companies Act. This is also a very illustrative example of the presence of the notion of stakeholder in shareholder-oriented corporate governance systems. In fact, the same Section 172 of the Companies Act, disciplines the "(d)uty to promote the success of the company" which falls on every director and requires them to regard as important issues a set of matters in their managerial actions, such as "the interests of the company's employees", the "need to foster the company's business relationship with suppliers, customers and others", and "the impact of the company's operations on the community and the environment". Thus, every director and the Board as a whole must act in the way that could best serve the interests of every stakeholder, and not only shareholders.

However, the wide notion of stakeholder and the preponderant role given to them in corporate governance can spark disputes, which can occur within the different stakeholders (intra-stakeholder disputes) or within stakeholders and the Board.

First, disputes can arise between different stakeholders because of their heterogenic and divergent interests, which they demand the company to satisfy. As highlighted by Carney, Gedajlovic and Sur, far from trying to reach consensus, stakeholders "are frequently in conflict", and "jealously divided against another"[59]. Hence, if stakeholders' interests collide, disputes could arise among them in order to decide upon which interests shall prevail in the company. For instance, if employees demand their wages to be increased, they can face the opposition of creditors, who will support a more financially-conservative strategy for the company; furthermore, while business partners may discourage the company from considering an environmentally friendly policy in order to promote their industrial projects, local communities may resist such actions and plans.

Second, and finally, disputes can occur between the stakeholders and the Board of Directors. Certainly, if executive directors deviate from the proposed initiatives of an individual or a group of stakeholders, affected stakeholders will exert their pressure abilities to constrain the executives to fulfill their interests. Such a conflictual context can threaten the stability of the company. For instance, if the

59. See Michael Carney, Eric Gedajlovic and Sujit Sur, *Corporate Governance and Stakeholder Conflict*, 15 Journal of Management and Government 483, 489 (2013).

workforce demands a pay rise and the Board of Directors goes against it, employees might refuse to resume their job and enact a work stoppage. Moreover, if a dispute arises between the executive branch and the customers, these parties may refrain from purchasing or requiring the company's products or services, *ergo*, harming the company's economic position.

3.3. Boardroom Disputes

As noted before, decision-making is not exempt from the possibility of disputes, and those disputes may also arise between the directors within the Board. The sources of those disputes are various, but in general Boardroom disputes may be caused by disagreements between its members when defining the agenda or the corporate strategy, in the light of the preponderant role given to shareholders and stakeholders in corporate governance[60].

The corporate context implies that directors have to balance and ponder the interests of shareholders and stakeholders while guaranteeing the company's stability and economic success. Therefore, disputes may arise between directors within the Board. This is the place where the initiative, proposal or strategy raised by a director has to be approved or enacted. Every internal debate will revolve around the shareholders' interests, as well as balancing the stakeholders' interests or deciding which of them should prevail. Moreover, directors may be more inclined to disagree and defend their initiatives and proposals, rather than engaging in a constructive dialogue. This is due to their liability in the case they don't satisfy the interests of the shareholdership, and also because of the economic harm that stakeholders' disputes can cause to the company, Even more alarming, and despite their liability, disputes can also occur when behind an initiative or

60. See International Finance Corporation, *Boardroom Disputes: How to Manage the Good, Weather the Bad, and Prevent the Ugly* 8 (2015), available at https://www.ifc.org/wps/wcm/connect/4d816348-7c63-48ba-95a2-849574020d0a/Boardroom_Disputes_Practical_Guide_for_Directors.pdf?MOD=AJPERES&CVID=kHGE9QV (last visited, april 2021).

proposal of a director underlies the satisfaction of its own interests, to the detriment of the company[61].

4. Board Effectiveness and Corporate Governance Dispute Resolution

Given the heterogeneity of corporate governance, scholars have exhaustively insisted on the need to enhance the Board of Directors' effectiveness in the company, by questioning its actual role and importance for the corporate form. Many theories have been developed to explain how the managerial function of the Board determines the company's economic success.[62] Nevertheless, scholars endorsing these theories were unable to conclude whether the Board tells the difference in the company's performance[63]. The idea of enhancing the Board effectiveness, however, remains intact, and this notion creates a prism of pursuing a progressive improvement of the Board of Directors' value.

Cossin argues that the notion of Board effectiveness is based on four pillars: the first being the "people and builds on their quality, focus and dedication"; the second being "information architecture"; the third being, "structures and processes"; and the fourth being "group

---

61. See Biserka Siladi, *The role of non-executive directors in corporate governance: an evaluation* * 9 (master thesis, Faculty of Business and Enterprise Swinburne University of Technology 2006), available at https://researchbank.swinburne.edu.au/file/9609a3bd-fb2d-48ec-bd73-bd533a1f6065/1/Biserka%20Siladi%20Thesis.pdf (the author highlights that conflicts of interests are a main concern for the agency theory, as this theory also "suggests that professional managers can, by virtue of their superior knowledge and expertise, gain advantage of the firm's owners").

62. See also G. Tyge Payne, George S. Benson and David L. Finegold, *Corporate Board Attributes, Team Effectiveness, and Financial Performance*, 542 Journal of Management Studies 1, 5 (2008).

63. See Nicholson and Kiel, *Can directors impact performance? A case based test of three theories of corporate governance* at 15 (cited in note 16). See also Adams, Hermalin and Weisbach, *The Role of Boards of Directors in Corporate Governance* at 2 (cited in note 15) (in their introduction, Nicholson and Kiel direct the reader's attention to the many articles and papers guided to determine if the Board of Directors actually play a positive role in the company's performance, and highlight the fact that every author or paper quoted failed to achieve a conclusive result. Also, Hermalin, Adams and Weisbach argue that people question the importance of the corporate boards, since "their day-to-day impact is difficult to observe").

dynamics"[64]. Regarding the third pillar, i.e., structures and processes, the same author highlights that "there are many processes beyond the straight running of the Board", including "evaluation processes, the strategy process, the risk process"[65], among others. However, the notion of "structures and processes", *prima facie*, does not seem to include an internal, amicable dispute resolution process. Structures and processes should be intended to direct immediate attention to corporate governance disputes which may arise within the members of the Board, or between the Board of Directors and shareholders or stakeholders.

An internal amicable dispute resolution process oriented to resolve the previously identified corporate governance disputes is necessary, as a result of the combination between the notion of Board effectiveness and corporate governance disputes resolution. Cossin himself admits that Board effectiveness is enhanced if potentially disruptive disagreements and disputes "are minimized while discussions remain rich and challenging"[66]. In fact, we believe that the effectiveness of the Board of Directors can also be measured both by the presence of an appropriate, efficient and operational internal, amicable corporate governance disputes resolution process or structure in the company. Indeed, a Board of Directors and, in general, every company must be able to assume the resolution of their own disputes, with their own mechanisms, structure and processes.

For that purpose, we submit that conciliation is a suitable process of internal and amicable corporate governance dispute resolution and that, given their ability to provide a free, impartial, detached, wise, comprehensive, fair, credible and honest judgement, independent non-executive directors can play a prominent role as conciliators in that appropriate process. We will further elaborate on that proposal; nevertheless, this premise intends to highlight, in summary, that the notion of Board effectiveness entails that a company must be able to resolve their own corporate governance disputes, by designing an

64. See Didier Cossin, *The Four Pillars of Board Effectiveness* 4 (Institute for Management Development 2014).
65. *Ibid.*
66. *Id.* at 6.

appropriate, efficient and operational internal, amicable dispute resolution process or structure.

5. Avoiding Litigation for resolving Corporate Governance Disputes: preventing the Paralysis of Corporate Governance Bodies

In corporate governance, litigation appears to be the most frequent consequence of an escalated dispute, mainly in controversies between shareholders and executive directors. The deviation from the shareholders' agreed initiatives in the Annual General Meeting by the executive branch, or infringements to the fiduciary duty falling on the directors creates an internal dispute which will result in shareholder litigation, if that controversy escalates.

Indeed, shareholder litigation appears to be oriented primarily to a shareholders' condemn of every deviation or violation of the fiduciary duty by the directors. For this purpose, case law and scholars have comprehensively studied the "shareholder derivative action", which can be defined in the words of Loewenstein as "a means for shareholders to redress a breach of fiduciary duty by an officer or director"[67]. Notwithstanding, Appel believes that shareholder derivative action, or, more generally, shareholder litigation rights "have a complementary relationship with alternative governance mechanisms", and that "(t)his relationship is driven, in part, by settlements"[68]. This means that a derivative action is not only destined to condemn any deviation from the fiduciary duty of directors (or even not destined at all to that purpose), but to implement changes in corporate governance, with settlements between the directors and the litigant shareholder.

Shareholder litigation, however, from our point of view, brings more harmful than positive consequences for the company. Empirical data, according to Rizzo, have found that shareholder litigation and even the sole threat of lawsuits or claims results in economic harm to the company along with "negative economic consequences on

67. Mark J. Loewenstein, *Shareholder Derivative Action and Corporate Governance*, 24 Delaware Journal of Corporate Law, 1, 1 (1999).

68. See Ian Appel, *Governance by Litigation* 26 (Social Sciences Research Network 2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2532278 (last visited, April 20, 2021).

shareholders"[69]. In other words it is counterproductive for shareholders to litigate against the directors on behalf of the corporation because they actually damage their own economic standing as shareholders.

In addition to the economic harm litigation causes to both parties involved, a company immersed in shareholder litigation tends to suffer negative consequences on its reputation and image. In fact, litigation entails a serious risk of breach of the company's confidential information and a potential loss of trust of its partners. Moreover, in foreign corporations, shareholder litigation worsens its disadvantages, as problems of jurisdiction and governing laws may arise[70].

Notwithstanding the several problems and disadvantages of shareholder derivative litigation, which have sparked an interesting debate between many scholars on how to reduce corporate contention[71], the consequence of shareholder derivative litigation that deserves our main attention at this point is the imminent paralysis of the corporate governance bodies in detriment of the company's stability.

Authors like Ramsay highlight that "shareholder litigation may involve a role for a number of bodies"[72], mainly for directors. In this regard, Rizzo affirms that derivative litigation entails that "shareholders sue directors or officers on behalf of the corporation"[73]. The corporate governance structure itself, thus, is compromised, since the directors or managers sued for their alleged managerial misconduct will direct their complete attention to provide a response against the lawsuit[74]. Moreover, they will refuse to comply with shareholder requirements,

69. See A. Emanuele Rizzo, *Afraid to Take a Chance? The Threat of Lawsuits and its Impact on Shareholder Wealth* * 32 (Center for Economic Research 2018), available at https://business.uc3m.es/seminarios/filesem_1516902182.pdf (last visited April 20, 2021).

70. See Yaad Rotem, *The Law Applicable to a Derivative Action on Behalf of a Foreign Corporation – Corporate Law in Conflict,* 46 Cornell International Law Journal 321, 326 (2013). See also Minon Myers, *Fixing Multi-Forum Shareholder Litigation*, 2 Brooklyn Law School Review 467, 468 (2014).

71. See generally G. Richard Shell, *Arbitration and Corporate Governance*, 67 North Carolina Law Review 518, 519 (1989). See also Jared I. Wilson, *The Consequences of Limiting Shareholder Litigation: Evidence from Exclusive Forum Provisions*, 47 Journal of Corporate Finance 2, 49 (2020).

72. See Ian Ramsay, *Corporate Governance, Shareholder Litigation and the Prospects for a Statutory Derivative Action*, 15 UNSW Law Journal 149, 151 (1992).

73. See Appel, *Governance by Litigation* at 6 (cited in note 68).

74. See Rizzo, *Afraid to Take a Chance?* at 1 (cited in note 69).

furthering managerial misconduct. This situation could also cause division within shareholders, directly threatening the paralysis of the company's governance bodies, and harming its stability. In addition to this risk of paralysis of the corporate governance bodies, some legal systems allow very invasive precautionary injunctions on corporate governance to be petitioned by the plaintiff shareholder. For example, the judicial suspension or removal of directors[75], a judicial overseeing of the Board by appointing an overseer or supervisor[76], or a co-administration regime[77]. These precautionary measures or injunctions are particularly invasive and disruptive of corporate governance (as corporate governance is their main target), and Courts have the ability to provide them, if it is the plaintiff shareholder demand, to the detriment of the company's stability.

All those factors and negative consequences lead us to believe that, as a general premise, litigation should be avoided to resolve corporate governance disputes, as it will potentially result in the company's paralysis, or, at least, will harm the stability of the corporate form. This premise, however, from our point of view, cannot be satisfied without an internal, amicable dispute resolution process or structure, as previously recommended. Hence, an internal and amicable corporate governance dispute resolution process or structure is needed to avoid corporate litigation. For that purpose, we regard independent non-executive directors serving as conciliators, as an appropriate answer to provide a free, impartial, detached, wise, comprehensive, fair, honest and credible judgement (henceforth referred to as "an effective judgement") and solution to corporate governance disputes that may arise between relevant parties, thus eschewing any form of litigation.

---

75. See Olga N. Sirodoeva-Paxon, *Judicial Removal of Directors: Denial of Director's License to Steal or Shareholders' Freedom to Vote*, 50 Hastings L J 97, 102 (1998).

76. See Hugo A. Aguirre, *Acerca de la conveniencia de nombrar un veedor de parte en las veedurías societarias*, 9 Congreso Argentino de Derecho Societario 127, 128 (2004). See also Marta Alicia Toledo, *Medidas Cautelares Societarias: En especial suspensión provisoria de los derechos sociales e intervención judicial*, 9 Congreso Argentino de Derecho Societario 781, 785 (2004).

77. See generally Art. 113, *Texto Ordenado de la Ley de Sociedades Comerciales* 1894, Ley n. 19.550 (it is a possible judicial precautionary injunction existing mainly in Latin-American countries).

6. Our Framework: Independent Non-Executive Directors as Conciliators

We previously reviewed the notion of Board effectiveness applied to corporate governance disputes resolution and the need to avoid any form of litigation, thus preventing the risk of paralysis of corporate bodies and company's instability. The common conclusion we have reached on both subjects is that an internal and amicable dispute resolution process or structure is needed to provide the necessary attention and solutions to controversies arising within the company's previously identified relevant parties.

In addition to those conclusions, we proposed independent non-executive directors to serve as conciliators for resolving corporate governance disputes. Being conciliation that internal and amicable dispute resolution process, independent directors should serve as conciliators.

Therefore, in the next point, we will develop our framework for that proposal by elaborating two fundamental aspects: first, some criticism to the so-called "special litigation committees", arbitration and mediation, as methods considered for resolving corporate governance disputes by scholars and institutions; second, conciliation in corporate governance, the reasons for which we regard this method as appropriate to resolve corporate governance disputes and the role of independent non-executive directors as conciliators.

6.1. Criticism to Some Methods Considered for Corporate Governance Dispute Resolution: Special Litigation Committees, Arbitration and Mediation

Methods like special litigation committees, arbitration and mediation have been regarded as appropriate procedures or mechanisms to resolve corporate governance disputes. According to Murdock, since landmark cases like Zapata Corp. v. Maldonado[78] and Auerbach v. Bennet[79], special litigation committees emerged as important mechanisms to shareholder derivative actions in many states of the United

78. *Zapata Corp v. Maldonado* 430 A 2d 779 (Del Sup 1979).
79. *Auerbach v. Bennett* 93 N.E.2d 994 (N.Y. 1979).

States such as Massachusetts, North Carolina, Alabama and Iowa[80]. In addition to special litigation committees, the OECD has developed a Work Programme on corporate governance and dispute resolution, emphasizing arbitration and mediation as potential alternatives to address corporate governance disputes[81].

Special litigation committees deserved the interest of several scholars in Corporate Law. Indeed, these figures are committees appointed by the Board of Directors mainly as a "defensive strategy in response to shareholders' derivative suits" according to Steinberg, composed by independent non-executive directors, and directed to exercise their judgement on the merits or grounds of the shareholder's lawsuit[82]. The main issues surrounding special litigation committees are their relationship with the so-called "business judgement rule"[83], and, notably, the committee's ability to terminate the shareholder derivative action[84]. In particular, the last issue raises many pros and cons, because the committee's ability to dismiss shareholders' derivative lawsuits entails a conflict between the "business judgement rule" and the right of shareholders to pursue a sanction against a breach of the fiduciary duty of directors. Subject which remains controversial within scholars and case law[85].

On the other hand, arbitration and mediation have also emerged as alternatives to resolve corporate governance disputes. Indeed, according to Shell, arbitration is an alternative dispute resolution mechanism

---

80. See Charles W. Murdock, *Corporate Governance: The Role of Special Litigation Committees*, 68 Wash L Rev 79, 89 (1993).

81. See Organization for Economic Cooperation and Development, *The Quality of Corporate Law and the Role of Corporate Law Judges* 10 (OECD Publishing 2015).

82. See Marc. L. Steinberg, *The Use of Special Litigation Committees to Terminate Shareholder Derivative Suits*, 35 U Miami L R 1, 2 (1980).

83. See Mary A. Lopatto, *Hasan v. Clevetrust Realty Investors The Business Judgement Rule and Procedural Review of the Special Litigation Committee*, 34 Cath U L Rev 790, 792 (1985) (according to Lopatto, the business judgement rule "is based on the notion that directors, in the course of performing their duties on behalf of a corporation, take risks and make mistakes for which they should not be held legally accountable", unless the shareholders are able to prove the director's wrongdoing).

84. See George W. Dent, *The Power of Directors to Terminate Shareholder Litigation: The Death of the Derivative Suit?*, 75 Case Western University School of Law Faculty Publications 96, 97 (1981).

85. See Steinberg, *The Use of Special Litigation Committees to Terminate Shareholder Derivative Suits* at 35 (cited in note 82).

of high reputation in corporate governance, given its "equity and efficiency above strict observance of legal norms", its cost-effectiveness, rapidness, and the reduced "judicial involvement in the arbitration process" and the limited "judicial review of arbitration awards"[86]. Moreover, mediation, defined as "a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, but with the parties in ultimate control of the decision to settle"[87], has gained scholars attention not only for "helping solve corporate governance disputes in a more efficient and effective way", but to "help manage conflicts" and "prevent disputes"[88].

However, although these methods are widespread in the companies' conflict management policy on corporate governance, we believe that they may not be convenient nor sufficient to address the different identified disputes related to the company's governance.

From our perspective, special litigation committees are irreconcilable with the enhanced role of shareholders and the liability of directors as pillars of the modern conception of corporate governance. First, we believe special litigation committees undermine shareholders' role in corporate governance and weaken directors' liability[89] because, since Zapata Corp. v. Maldonado,[90]special litigation committees (displacing the Courts) can dismiss the shareholder's lawsuit, thus preventing shareholders from holding a director that breached its fiduciary duty accountable for its wrongdoings, to the detriment of their rights as shareholders. Additionally, a special litigation committee is not oriented to solve the dispute between the plaintiff shareholder and the directors, but to judge and decide on the merits of the shareholders' lawsuit. For those reasons, we believe special litigation

86. See Shell, *Arbitration and Corporate Governance* at 519 (cited in note 71).

87. Centre for Effective Dispute Resolution, *The CEDR Mediator Handbook: Effective Resolution of Commercial Disputes* at 47 (CEDR ed. 2004).

88. See Eric M. Runesson and Marie-Laurence Guy, *Mediating Corporate Governance Conflicts and Disputes* 24 (Global Corporate Governance Forum 2007).

89. See The Committee on the Financial Aspects of Corporate Governance and Cadbury, *The Financial Aspects of Corporate Governance* at 9 (cited in note 2).

90. See Steinberg, *The Use of Special Litigation Committees to Terminate Shareholder Derivative Suits* at 35 (cited in note 82).

committees are not appropriate for resolving corporate governance disputes.

In this context, we also consider that arbitration is neither an appropriate method to resolve corporate governance disputes. Parties in conflict normally appeal to arbitration as an alternative to avoid the elevated costs and delay in the ordinary justice system. However, as highlighted by López de Argumedo Piñeiro, "despite the notorious idea of the brevity of the arbitration proceeding, the truth is that their length is longer than what is normally thought"[91], and, additionally, their considerable length reduces their cost-effectiveness. This is why, in an article previously quoted, Shell himself warns that arbitration "is not without risk, and it is unlikely to be a panacea for the complexities and expense of public shareholder litigation"[92]. Moreover, the same risks to the company's image persist in corporate governance arbitration. Thus, in corporate governance-related disputes, arbitration equals litigation in its pernicious effects and, in consequence, we also regard arbitration as an inadequate method to provide a solution to corporate governance disputes.

Also, while mediation may be a more suitable method for corporate governance disputes than special litigation committees and arbitration, it requires a third party's intervention as mediator, which brings us three reasons to argue against this mechanism: first, mediation for corporate governance disputes is normally institutionalized or carried outside the company, rather than conducting those proceedings internally within the corporate form, thus imminently decontextualized from the company's day-to-day; second, the third party serving as mediator, albeit skilled, is strange to the company, and will probably lead the parties to produce an all but comprehensive solution; third, the mediator understands its role limited to assisting the parties to reach a bilateral solution between them, being proscribed from issuing any judgement or concrete feasible solution to the dispute[93].

---

91. See Álvaro López de Argumedo Piñeiro, *Medidas Cautelares en Arbitraje Internacional y Nacional* 1 (Uría y Menéndez 2003).

92. See Shell, *Arbitration and Corporate Governance* at 574 (cited in note 71).

93. See Ursula Caser and Nuno Ramos, *The Institutionalization of Mediation: Reflections from an expert panel,* 9 Oñati International Institute for the Sociology of Law 516, 526 (2019).

Finally, and notwithstanding the previous reasons, all those methods, whether special litigation committees, arbitration and mediation, have been studied by scholars mainly as mechanisms that would work only to solve disputes between shareholders and the Board of Directors, thus inapplicable to intra-stakeholders disputes and disputes between stakeholders and the Board, and to Boardroom disputes.

Therefore, a more adequate or appropriate method for resolving those corporate governance disputes previously identified is required. For that purpose, we will elaborate our reasons on why we regard conciliation as the appropriate method and, more importantly, how independent non-executive directors can successfully serve as conciliators for corporate governance dispute resolution.

6.2. Conciliation as an Internal, Amicable Process or Method to resolve Corporate Governance Disputes: Independent Non-Executive Directors as Conciliators for Corporate Governance Dispute Resolution

Conciliation can be defined in the words of the Law Reform Commission as "an advisory, consensual and confidential process, in which parties to the dispute select a neutral and independent third party to assist them in reaching a mutually acceptable negotiated agreement"[94]. Often wrongly confused with mediation, conciliation is an amicable dispute resolution mechanism that entails a third party acting as conciliator, whose role is not limited to facilitate the parties' encounters (like in mediation[95]), but to provide advice and solutions to the disputes, from its independent and neutral point of view.

Furthermore, the active role trusted to the conciliator on the dispute, which comprises its judgement, advice and solutions to the controversy, is not to be confused with a judge or arbitrator-alike decisional power. In conciliation both parties only intend to have the conciliator's intercession, advice, judgement and possible solutions to the dispute, not the final word on it[96]. Thus, the reader should bear

94. See Law Reform Commission, *Alternative Dispute Resolution: Mediation and Conciliation* 17 (LRC 2010).

95. See *ibid*.

96. See Alberto Blanco-Uribe Quintero, *La conciliación, el arbitraje y la transacción como métodos de resolución de conflictos administrativos*, 57 Revista de la Facultad de Derecho 13, 17 (2002).

in mind that the word "judgement" here used is to be interpreted as "assessment" or "evaluation" of the conciliator on the controversy, and not as "rule" or "decision". Therefore, conciliation is an autonomous, consensual and bilateral dispute resolution mechanism, oriented to have the parties settling their own differences with the advisory role of the conciliator.

Therefore, and based on the previous definition and considerations, we may define conciliation as an amicable, autonomous, consensual, bilateral and confidential process, through which the conflicting parties select an independent and neutral person (or persons), a conciliator, whose role is to provide his judgement and advise to the parties, in order to guide them to settle their dispute, and, if required, to propose the solutions regarded as adequate for the resolution of the dispute.

In this sense, conciliation has been considered as a mechanism to resolve disputes related to corporate governance by Runesson and Guy[97]; but, in fact, Runesson and Guy's article, albeit very profound and illustrative, interchanges the words "mediation" and "conciliation", thus mistakenly overlapping two distinct concepts. Therefore it can be inferred that conciliation has not been duly considered for corporate governance dispute resolution, since it has not been individualized nor studied apart from mediation.

Instead of recommending mediation given our previous arguments, we regard conciliation as a better mechanism for corporate governance dispute resolution and as an internal and amicable process to settle all the previously identified corporate governance-related disputes, and between the company's relevant parties.

The previous claim is based mainly on three reasons. We will address them separately. First, conciliation is a practical and comprehensive method to address corporate governance disputes; second, conciliation distances itself from the problems inherent in litigation, arbitration and mediation; third, the active role of the conciliator enhances the effectiveness of conciliation to settle corporate governance disputes. We will address them separately.

---

97. See Runesson and Guy, *Mediating Corporate Governance Conflicts and Disputes* at 24 (cited in note 88).

First, from our point of view, conciliation is a practical and comprehensive method to address corporate governance disputes, because is capable of being conducted inside the company, this is, as an internal corporate governance dispute resolution process or structure, and also because, different from litigation and arbitration, conciliation is not primarily circumscribed to disputes between shareholders and the Board of Directors, instead can be conducted to resolve governance-related intra-stakeholder controversies, disputes between stakeholders and the Board, and Boardroom disputes.

Indeed, conciliation can be regarded or listed within the corporate organization as the internal and amicable method by which corporate governance disputes that may arise between the company's relevant parties are addressed, thus offering the parties in conflict an internal, amicable and autonomous alternative to outside, contentious, institutionalized and heteronomous processes like litigation, arbitration and mediation. In addition, contrary to litigation and arbitration, an internal conciliation process is more inclusive and comprehensive with stakeholders, since stakeholders have no general, derivative action-alike legal remedy against the directors' wrongdoings; hence, stakeholders will be able to urge the company to conduct a conciliation process to provide immediate and effective attention to potential stakeholders' claims against the Board. The same alternative is offered to executive directors disagreeing with their colleagues within the Board of Directors on corporate affairs: with conciliation, conflicting executive directors will have an alternative to settle their disputes internally, without harming shareholders nor stakeholders, employing independent non-executive directors' services as conciliators, as it will be further elaborated.

All these reasons lead us to regard conciliation as a more practical and comprehensive method to address corporate governance disputes.

Second, conciliation distances itself from the problems inherent in litigation, arbitration and mediation. Litigation and arbitration imply a dispute is submitted to a judiciary court or an arbitral tribunal and mediation is normally conducted by an alternative dispute resolution institution. Therefore, as every institutionalized dispute, litigation, arbitration and mediation, all three entail elevated costs, delays and risks. Instead, since the idea of conciliation we submit in this article is conciliation as an internal mechanism or process within the corporate

form oriented to resolve corporate governance disputes, the costs, further delays and risks of will be substantially reduced or dispensed with.

Third and final, we believe that the active role of the conciliator enhances the effectiveness of conciliation to settle corporate governance disputes. Corporate governance disputes can be very disruptive of the company's day-to-day and they can represent a threat to the life of the corporate form; hence, they require a prompt solution. While in mediation the third party serving as mediator is compelled to refrain from issuing any judgement or solution to the controversy and litigation and arbitration require a procedure to be conducted for the judge or the arbitrators to decide on the controversy, an internal conciliation process entails an active conciliator, able to express its judgement, opinions, advice and solutions to the parties, prompting a rapid response to the dispute.

The third reason for which we regard conciliation as a better mechanism to resolve corporate governance disputes finally leads us to the main premise of this article: independent non-executive directors as conciliators.

Our framework starts from the idea of conciliation as an internal and amicable method. However, conciliation, solely or merely, is not enough. Instead, an internal corporate officer, familiarized with the company but distanced from the conflict, with the necessary attributes and skills, will be the adequate person (or persons) to serve as conciliator, without which the conciliation process will not successfully address the controversy.

Independent non-executive director agrees with such characteristics: first, they serve the company, albeit not attached to it on a permanent working relationship basis; second, they are familiarized with the company, since, as directors, they receive information and discuss corporate strategy; third, they should be necessarily distanced from the conflict in order to serve as conciliators; and fourth, they have the sufficient attributes and skills to, as previously explain, provide an effective judgement on the controversy, oriented to procure a solution to corporate governance-related disputes.

In addition to their ability and adequateness to serve as conciliators, we find that independent non-executive directors are also suitable conciliators in the light of the United Nations Commission

on International Trade Law (henceforth, UNCITRAL) rules on conciliation[98].

Indeed, Article 7 of the 1980 UNCITRAL Conciliation Rules indicates that a "conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their disputes", being these type of directors, in fact, independent and impartial, as previously explained.

Moreover, the same Article 7 of the UNCITRAL Conciliation Rules institutes that a conciliator "will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things (...) the usages of the trade concerned and the circumstances surrounding the dispute"; at this point, it has to be remembered that, as directed in the Tyson Report[99] and recognized by Pass[100], independent non-executive directors have sufficient ethical probity and aptitude and are considered a reference of those standards by many relevant parties in the corporate form, thus contributing to guide themselves as conciliators by the principles of objectivity, fairness and justice. Furthermore, their background of knowledge and experience, as well as their professionalism, give them the ability to assess the circumstances surrounding the dispute, and recommend a wiser and more comprehensive solution.

7. *Conclusion*

Prior to developing our framework, we found it necessary to analyze the different attributes of independent non-executive directors which deserved them their prominent role in the corporate form. We found that from three of them, their independence, background of knowledge and experience, and integrity and ethical adequateness, derives independent non-executive directors' ability to serve as conciliators for resolving corporate governance disputes.

98. UN Commission on International Trade Law, *UNCITRAL Conciliation Rules* (1980).

99. See Tyson, *The Tyson Report on the Recruitment and Development of Non-Executive Directors* at 2 (cited in note 17).

100. See Pass, *Corporate Governance and The Role of Non-Executive Directors in Large UK Companies* at 25 (cited in note 3).

In addition to the analysis of independent non-executive directors' relevant attributes, we identified three categories of corporate governance-related disputes to which our framework may be applied: first, intra-stakeholders' disputes, and disputes between the different stakeholders and the Board of Directors; second, disputes between the shareholders and the Board of Directors; third, Boardroom disputes.

Furthermore, two theoretical points were addressed: Board effectiveness and corporate governance dispute resolution, and the need to avoid litigation in order to prevent the paralysis of corporate bodies. When studying the first point, we found that the notion of Board effectiveness applied to corporate governance dispute resolution entails an internal and amicable corporate governance dispute resolution structure or process. Moreover, we determined the need to avoid any form of litigation, whether judicial litigation or arbitration, since judicial injunctions and precautionary measures combined with the elevated costs, delay and risk these contentious procedures entail, make both litigation and arbitration harmful to the company's life and standing, as well as to the shareholders' wealth.

We regarded all these previous points as necessary to develop a theoretical basis for the constructive framework we proposed. We also intended to display sufficient empirical evidence to support this basis, mainly when addressing independent non-executive directors' attributes and the different corporate governance-related disputes we identified, to which we believe our framework may offer a constructive alternative resolution method. It is worth noting that the reader may want to direct its attention to the authors to whom we refer throughout this article for more empirical evidence.

Although further work is needed to bring a more exhaustive and comprehensive framework for conciliation and the role of independent non-executive directors in resolving corporate governance disputes, our main conclusion at this point is that, independent non-executive directors can serve as conciliators for resolving corporate governance disputes, given their prominent role in the corporate form and their beneficial attributes, which, applied to that kind of controversies, translate into their ability to provide an effective judgement on the controversy.

Our framework can be summarized as it follows. Conciliation has proved itself to be a practical internal and amicable process to address

corporate governance-related disputes. On the one hand, this is due to the combination between the notion of board effectiveness applied to corporate governance dispute resolution. On the other hand, it has to be considered the need to avoid any form of litigation in order to prevent the paralysis of corporate bodies. Independent non-executive directors, given their beneficial attributes, have the ability to serve as conciliators and provide an effective judgement, aimed at advising the parties in conflict on the best solutions to address and settle their disagreements