

Background note

The business judgement rule: A comparative analysis

2023 OECD-Latin America Roundtable
on Corporate Governance

This background note compares the adoption of the Business Judgement Rule and similar safe harbours in seven Latin American countries and in four jurisdictions from other regions.

The note served as one of the references to session 2 of the 2023 meeting of the OECD Latin America Roundtable on Corporate Governance on 27-28 November in Sao Paulo, Brazil.

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Introduction

The business world's uncertainty, complexity, and multidisciplinary nature poses several challenges, especially for members of boards of directors in publicly-held companies. In general, corporate laws' provisions on directors' liability are mainly based on the attribution of fiduciary duties, which are indefinite concepts. The interpretation of fiduciary duties challenges not only the directors themselves when making decisions, but also the courts when applying such concepts in specific cases submitted to them only after the facts have occurred. In other words, this regulatory strategy establishes a duplicate control:

- *ex-ante*, providing a guidance for directors' actions in flexibly defined fiduciary legal duties; and
- *ex-post*, which enables an equitable assessment by the courts whenever the duties were potentially not adequately fulfilled.

Adequate guidance and regulation on directors' decision-making process is of paramount interest to companies, their shareholders, their stakeholders, and the directors themselves, who are often held directly and personally responsible from a legal point of view. A global perception of growing risks exists, primarily due to the significant increase in the civil liability insurance market, such as D&O insurance (S&P Global, 2021), and in corporate and succession planning aimed at protecting directors' and officers' personal assets (Stafford and Schindlinger, 2019, p.99).

There are at least four adverse effects if courts often review directors' business decisions.

- 1) Directors may not want to accept the potential liability of deciding in favour of an investment in a project that, despite a high expected return adjusted to risk, has some chance of failure, what is often the case for innovative projects. If directors do not have the incentive to make such decisions, the capacity of companies to develop new technologies would be jeopardized and, therefore, the growth of the economy as a whole may also be harmed.
- 2) Disincentives would be created in the attraction (and maintenance) of qualified professionals to hold positions on boards of directors due to the fear of being held personally liable in an unrestricted and recurring manner.
- 3) If management decisions are constantly reassessed and therefore become questionable as a rule, trust in the companies by business partners, employees, other stakeholders, and shareholders would be undermined.
- 4) The frequent recourse to administrative and judicial courts to review business decisions would clog these bodies, impeding them to adjudicate other relevant corporate disputes.

This paper aims to investigate the dissemination of the "business judgment rule" ("BJR"), which is a remedy against the possibility of the frequent and undue review of directors' decisions. It is a theory developed in British and US courts based on the fiduciary duties of diligence and loyalty applicable to boards of directors' members in publicly-held companies. This "standard of judicial review" allows administrative and court judges to re-evaluate, if some conditions are met, directors' decision-making processes and even hold them legally and personally responsible. The goal of the BJR is, on the one hand, to ensure good governance within organizations and, on the other hand, to preserve margins of decision-making freedom for directors. This theory was incorporated in the new Subprinciple V.A.1 in the revised 2023 G20/OECD Principles of Corporate Governance with the following language: "Board members should be protected against litigation if a decision was made in good faith with due diligence".

In a nutshell, the BJR requires that directors act:

- To the benefit of corporate interests;
- In good faith and with disinterest; and
- With due diligence and care, making well-informed, conscious decisions.

This paper makes a comparative analysis of how the BJR has been applied and developed by the Courts of Delaware in the United States, which was one of the main places of origin of this theory, and in other ten jurisdictions that are relevant for OECD Latin America Roundtable on Corporate Governance participants: Argentina, Brazil, Chile, Colombia, Costa Rica, France, Mexico, Peru, Spain, and the United Kingdom. The analysis was organized in a table and aimed to highlight some of their unique characteristics when compared to the original rule, segmenting them according to the following criteria:

- Case Law BJR: in the United States and the United Kingdom, where the theory has been developed originally in court decisions; or
- Broadly Defined Duty of Care: in other cases where the BJR is little used or not used at all in local precedents, even though a general legal definition of the fiduciary duty of care exists. The Brazilian scenario stands out in this group, as the BJR has been significantly developed by Brazil's Securities and Exchange Commission based both on the generic legal fiduciary duty of diligence and incorporating, where applicable, the precedents in Delaware.

Following the table below, some recommendations are listed for legislators and other policy makers, suggesting ways to improve how this topic is handled to help it become more uniform and aligned with its development from a global perspective.

Comparative table

COUNTRY	MAIN RULES	RELEVANT DECISIONS	CONDITIONS AND SCOPE	INAPPLICABILITY
<p><u>United States</u> CASE LAW BJR</p>	<ul style="list-style-type: none"> - § 8.3.1 in the Revised Model Business Corporation Act. - § 4.01(c) of the American Law Institute's Principles of Corporate Governance. - § 102 (b) 7 Delaware General Corporation Law. 	<ul style="list-style-type: none"> - Briggs v. Spaulding, US Supreme Court, 141 U.S. 132 1891. - Smith v. Van Gorkom, Delaware Supreme Court, 488 A. 2d 858 (1985). - Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986) - In re Caremark Inc. Derivative Litigation (Del. 1996) - In re Enron Corp. Sec., Derivative & ERISA Lit (Del. 2003) - In Re CompuCom Systems, Inc., Stockholders Litig. (Del. 2005) - Gantler v. Stephens, 965 A.2d 695 (Del. 2009) - Marchand v. Barnhill 212 A.3d 805 (Del. 2019) - In re McDonald's Corporation Stockholder Derivative Litigation, C.A. No. 2021-0324-JTL (Del. Ch. Jan. 25, 2023 - National Center for Public Policy Research v. Schultz et al., No. 2:22-cv-00267 (Del. September 11, 2023) - In re Mindbody, Inc. Stockholder Litigation, C.A. No. 2019-0442-KSJM, memo. op. (Del. Ch. Mar. 15, 2023). - Simeone v. The Walt Disney Company (Del. Ch. June 27, 2023). 	<ul style="list-style-type: none"> - Depending on the degree of a director's conflict of interest, three theories have been developed: (a) BJR for decisions made independently and with disinterest; (b) "enhanced scrutiny" when a potential conflict of interest exists; and (c) "entire fairness" when an actual conflict of interests exists. - Case-by-case analysis (the context must be considered). - Protects "honest" judgment errors, as well as reasonable and legal decisions. - Business decisions are not reviewed if there is mere (unjustified) disagreements on the part of shareholders (mere criticisms). - It is applicable when only financial loss exists. - The BJR does not protect directors when their decisions were misguided, unfortunate, not technically oriented, or disastrous. - Omissions are protected if the decision not to act has been reflected. - Directors need to monitor and supervise the company's business (appropriate procedures, protocols, and monitoring system), preventing them from ignoring warnings (red flags). 	<ul style="list-style-type: none"> - Fraud, illegalities, conflicts of interest, administrative failures, collusion, conspiracies, gross negligence, or acts beyond one's authority. - When false and untrue information is included in a voting form for meeting resolutions.
<p><u>Argentina</u> BROADLY DEFINED DUTY OF CARE</p>	<ul style="list-style-type: none"> - Ley General De Sociedades N° 19.550, Artículos 59 y 274. 	<ul style="list-style-type: none"> - No relevant precedents were found. 	<ul style="list-style-type: none"> - The civil liabilities requirements apply similarly (unlawful acts, presence of damage, causal link, and a connection factor). - Requires professionalism and competence for the role of manager. - Liability encompasses actions or omissions resulting in damage and losses. - Standard of behavior for managers and company representatives. 	<ul style="list-style-type: none"> - Liability does not exist when the fault is mild (only when misconduct or gross negligence is found).
<p><u>Brazil</u> BROADLY</p>	<ul style="list-style-type: none"> - Artigo 1.011 do Código Civil de 2002. 	<ul style="list-style-type: none"> - STJ – Resp 1.349.233 – SP (2012/0113956-5, Relator: Ministro LUIS FELIPE SALOMÃO, 	<ul style="list-style-type: none"> - Sub-duties to be protected by the BJR: (i) get informed, prepare; (ii) qualify for the role, participate in all acts 	<ul style="list-style-type: none"> - In general, directors can only be held legally liable for their actions for intent,

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DEFINED DUTY OF CARE + CASE LAW BJR	- Artigos 153 e 159, §6º da Lei das Sociedades por Ações de 1976.	<p>Julgamento: 06/11/2014, T4 - QUARTA TURMA.</p> <p>- STJ – Resp 1.610.938, Relator: Ministro PAULO DE TARSO SANSEVERINO, Julgamento: 09/08/2016, TERCEIRA TURMA.</p> <p>- STJ – Resp 1130103, Relator: Ministro CASTRO MEIRA, Julgamento: 19/08/2010, SEGUNDA TURMA.</p> <p>- PAS CVM nº 19957.009118/2019-41. j. 24.05.2022</p> <p>- PAS CVM Nº 05/2016, j. 26.02.2021</p> <p>- PAS CVM Nº 06/2016, j. 03.11.2020</p> <p>- PAS CVM Nº 19957.001575/2020-21, j. 30.06.2020</p> <p>- PAS CVM Nº 19957.005981/2016-86, j. 19.11.2019</p> <p>- PAS CVM Nº RJ2005/1443, j. 10.05.2006</p>	<p>required, and cannot act with negligence; (iii) monitor, including general and routine supervision of the organization's activities; (iv) seek information necessary for the decision-making process in question; (v) examine critically, weighing costs, time, and inconveniences that investigations may cause to the organization and third parties; (vi) intervene when necessary; (vii) and not make serious errors (e.g., decisions bearing disproportionate risk or contrary to the law and articles of association).</p> <p>- Analysis must only consider the circumstances at the time of the decision: manager's powers and limitations; time, structure, and resources available; corporate purpose; decision-making context; values and risks involved.</p>	<p>negligence, excess of authority, or failure to fulfill their fiduciary duties (principle of trust).</p>
<u>Chile</u> BROADLY DEFINED DUTY OF CARE	- LEY Nº 18.046, Artículo 41º (Sociedades Anonimas).	- No relevant precedents were found.	<p>- General rule of duty of care and liability for damages caused due to intentional misconduct or gross negligence.</p> <p>- The focus is on the general principle of good faith.</p>	- Does not cover omissions, negligent acts, or fraud.
<u>Colombia</u> BROADLY DEFINED DUTY OF CARE	- Ley 222 de 1995, artículo 23.	<p>- Almedar Tarazona y otros v. Alexander Ilich León Rodrigues (Pharmabroker SAS) 2013-801-082 (2013).</p> <p>- María del Pilar Luque de Shaefer v. Luque Torres Ltda. 2014-801-054 (2014).</p> <p>- Morocota Gold SAS v. Wbeimar Alejandro Rincón Ocampo y Luz Mery Martínez 2014-801-084 (2015).</p> <p>- José Gerardo Díaz y Orlando Jaimes v. Ana Yolanda Villamizar 800-35 (2017).</p>	- The due diligence's focus includes the assumption of risks in the course of business and the company's and members' interests, including: the development of the corporate purpose; strict compliance with legal and statutory provisions; ensuring compliance with tax obligations; safeguarding and protecting the company's commercial and industrial secrets; refraining from using privileged information; treating members with equity and comply with their right to supervision; and refraining from acting in conflicts of interest.	<p>- Theory developed gradually from 2013 onwards for protecting minority shareholders (still not fully established).</p> <p>- Does not address neglected omissions causing losses.</p> <p>- Does not address violations of the duty of loyalty (intentional misconduct, bad faith, or conflicts of interest).</p>
<u>Costa Rica</u> BROADLY DEFINED DUTY OF CARE	- Código de Comercio, Artículo 189.	- No relevant precedents were found.	- Rule concerning general duty of diligence applicable to executive board's and board of directors' members.	<p>- Managers with no specific designation are not held liable.</p> <p>- Does not encompass managers who were aware of the facts and could have prevented them from occurring or mitigated their consequences.</p> <p>- Not applicable to the execution of</p>

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				<p>resolutions adopted at shareholders' meetings, as long as they are not clearly illegal or contrary to the company's articles of association or regulatory rules.</p> <ul style="list-style-type: none"> - Not applicable to directors who expressed their disagreement in writing or those absent from the resolution acts.
<p>France BROADLY DEFINED DUTY OF CARE</p>	<ul style="list-style-type: none"> - Code de Commerce, Art. 223-22. 	<ul style="list-style-type: none"> - No relevant precedents were found. 	<ul style="list-style-type: none"> - Includes three target audiences: the company itself, shareholders, and creditors (indirectly). - Includes respect for legal and statutory rules. 	<ul style="list-style-type: none"> - Respect for management discretion as long as the pros and cons of each viable alternative are considered. - Does not include irresponsible risk-taking. - Does not include decision-making guided by higher corporate bodies, as long as it is in accordance with the law.
<p>Mexico BROADLY DEFINED DUTY OF CARE</p>	<ul style="list-style-type: none"> - Ley General de Sociedades Mercantiles Federal, Artículo 157. - Ley de Concursos Mercantiles, Artículo 270 Bis-2 (for insolvent companies). 	<ul style="list-style-type: none"> - No relevant precedents were found. 	<ul style="list-style-type: none"> - Liability associated with roles and legal and statutory provisions, including confidentiality regarding information and matters of which they are aware due to their positions and for up to one year after their term of office ends, except when requested by court or administrative authorities. - Directors have fiduciary duties to exercise their business judgment within the insolvent company's best interests for the benefit of creditors while seeking to maximize the business' economic value for potential residual values to shareholders. 	<ul style="list-style-type: none"> - Does not apply if directors act in good faith, in compliance with applicable legal and statutory requirements, based on information provided by relevant employees, external audit, or independent experts, the capacity and credibility of which do not provide grounds for reasonable doubt, or if they adopted the most appropriate alternative within their legal assessment and the damages of which could not be expected; or if they act in compliance with meetings' resolutions, as long as they are in accordance with the law.
<p>Peru BROADLY DEFINED DUTY OF CARE</p>	<ul style="list-style-type: none"> - Artículo 171 da Ley N° 26887 (Ley General de Sociedades). - Artículo 154 del Anteproyecto de la Ley General de 	<ul style="list-style-type: none"> - No relevant precedents were found. 	<ul style="list-style-type: none"> - General rule on the duty of diligence in the exercise of the position with "...diligence of an orderly merchant and a loyal representative...". - Includes the duty to maintain confidentiality regarding the company's business and information to which they have access even after their term of office expires. 	<ul style="list-style-type: none"> - Not identified.

COUNTRY	MAIN RULES	RELEVANT DECISIONS	CONDITIONS AND SCOPE	INAPPLICABILITY
	Sociedades (2018).		<ul style="list-style-type: none"> - Managers' liability for illegal acts or against statutory provisions, intentional misconduct, abuse of power, or gross negligence. 	
<u>Spain</u> BROADLY DEFINED DUTY OF CARE	<ul style="list-style-type: none"> - Ley de Sociedades de Capital de 2010, Artículos 225 y 226. 	<ul style="list-style-type: none"> - Sentencia de la Audiencia Provincial de Madrid (s. 28) 312/2009 - STS 214/1991, 11.11.1991. - STS 443/1998, 17.11.1998. - STS 169/2002, 25.02.2002. - STS 5157/2005, 20.06.2005 - STS 386/2007, 29.03.2007. - STS 991/2012, 17.01.2012. 	<ul style="list-style-type: none"> - The nature of each manager's position and their assigned roles must be considered always in the company's best interests. - It involves adequate dedication and the adoption of precise measures to direct and control the company's business. - Managers can and must demand that the company provide adequate and necessary information to fulfill their obligations. 	<ul style="list-style-type: none"> - Not applicable to decisions made in bad faith, in conflicts of interests, with insufficient information, and based on inadequate decision-making procedures. - Do not include decisions that personally affect other managers and related persons that may authorize managers to take advantage of the company's commercial opportunities.
<u>United Kingdom</u> CASE LAW BJR	<ul style="list-style-type: none"> - 2006 Companies Act, Section 174. 	<ul style="list-style-type: none"> - Crookshanks v. Turner (1723) VII Brown 255. - City Equitable Fire Insurance Co. Ltd (1925) Ch 407. - Lister v Romford Ice and Cold Storage Co. Ltd (1957) AC 555. - Norman v Theodore Goddard (1991) BCLC 1028. - Re D'Jan of London Ltd. (1993) BCC 646. - Dorchester Finance Co. Ltd v. Stebbing (1989) BCLC 498. 	<ul style="list-style-type: none"> - Duty of diligence includes acting with experience and skills expected of directors based on their education and background. - Directors must prioritize appropriate decision-making processes, especially in relation to corporate matters (creating value for the company), ensuring the adequate formalization of meetings' minutes, reading technical documents submitted to them, and adopting appropriate resolution processes. Accepting reality, not being mindlessly optimistic, being rational, acting in a non-negligent manner, focusing on details, and constantly seeking information and advice from internal and external experts make up an adequate decision-making process. - Directors must participate in meetings of subsidiaries to which they are called, even if this is not a commercial practice. - The judge's analysis must consider the manager's degree of predictability, proximity (causal link), and discretion concerning the case under analysis. - Directors must act in good faith; delegate roles appropriately; and promote cost reduction when the company faces financial difficulties. 	<ul style="list-style-type: none"> - Directors act intermittently in meetings and sometimes in committees. Therefore, they are not required to monitor the company's business constantly but must reasonably act as expected of a professional in their position (subjective and objective tests). - Convictions typically occur when directors inappropriately rely on third-parties' opinions (management or external advisors), fail to seek advice, act negligently, disregard the creditors' interests, fail to decide, or fail to act.

Conclusion

As seen in the comparative analysis, jurisdictions are increasingly developing the scope and limitations of directors' fiduciary duties and the standards for their subsequent analysis by judicial and administrative authorities. The "business judgment rule" has been originally developed by British and American courts and is now disseminated across some other jurisdictions in different ways. In most cases, it is applied by courts within a standard interpretative scope, as follows:

- 1) Expected directors' behaviors: proactivity, critical sense, attention, dedication, care, consistent interest, and professionalism;
- 2) Interpretation: general standard of conduct with a wide range of content (range of possible behaviors); interpretation must be subsequent and on a case-by-case basis. It must also be based on the company's best interests and focus on the procedures adopted (procedural legitimacy) and not just on the decision results;
- 3) Sub-duties of directors' fiduciary duties: qualify for the position (technical capacity, experience, and specific knowledge); manage the organization well; keep themselves informed about the organization's business and risks; investigate facts, especially those deemed as red flags by technical areas or that draw the director's attention; and supervise/monitor the implementation of decisions made; and
- 4) Directors' decision-making process: must be well-informed and reflected upon by considering costs, time, inconvenience, benefits, and resistance (complete analysis of the risks involved).

Jurisdictions may find different solutions to protect board members against litigation if a decision was made in good faith with due diligence. One may be to adopt in a statutory law the BJR by specifying the standards of review of directors' and officers' decisions, especially those made by boards of directors' members in publicly-held companies, by the courts and administrative bodies. Another policy – which may be complementary to the first one – would be for the legislators, courts, and regulators to provide greater details on the scope of fiduciary duties to be observed by corporate directors in their respective legal systems, including by listing behaviors and even more practical recommendations based on examples.

As recognized in the annotations to Subprinciple V.A.1 of the G20/OECD Principles of Corporate Governance, "[p]rotecting board members and management against litigation, if they made a business decision diligently, with procedural due care, on a duly informed basis and without any conflicts of interest, will better enable them to assume the risk of a decision that is expected to benefit the company but which could eventually be unsuccessful".

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