# The Hohfeldian Concept of Share in Limited Liability Companies: A View from the Common and Civil Law Traditions

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> Much of the difficulty, as regards legal terminology, arises from the fact that many of our words were originally applicable only to physical things; so that their use in connection with legal relations is, strictly speaking, figurative or fictional. The term, "transfer," is a good example.
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> —Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 24 (1913).

## I. INTRODUCTION

This Article draws upon the question: How do restrictions on transfers of shares of limited liability companies (LLCs) affect the "physiology" and "morphology" of property rights in those shares? The purpose of this Article is to scrutinize the effects such restrictions have on the definition of property rights members of LLCs hold in their shares. In this context, I use the term "un-consented transfer of shares" as my laboratory. Frequently, the operating agreements of these companies foresee that members who wish to sell their shares in the company must seek the consent of the other members or the management

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board for the transfer of shares. This is the case because LLCs, like their European counterparts, have a closed nature. Unlike corporations, LLCs are not typically designed to capture public investment. Therefore, the shares of LLCs are not supposed to be freely sold to third-party investors outside the company, unless their members agree otherwise. An un-consented transfer of shares stands for a transfer by a member of the company (seller) for which consent was not sought. For example, section 18-702 of the Delaware LLC Act provides that a LLC interest is assignable in whole or in part except as provided in the LLC operating agreement.[1] Likewise, Louisiana Revised Statutes section 12:1330

1. Delaware Limited Liability Company Act, DEL. CODE ANN. tit. 6, § 18-702 (2018) (Assignment of a limited liability company interest) provides the following:

> (a) A limited liability company interest is assignable in whole or in part except as provided in a limited liability company agreement. The assignee of a member's limited liability company interest shall have no right to participate in the management of the business and affairs of a limited liability company except as provided in a limited liability company agreement or, unless otherwise provided in the limited liability company agreement, upon the affirmative vote or written consent of all of the members of the limited liability company.
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> (b) Unless otherwise provided in a limited liability company agreement:
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> (1) An assignment of a limited liability company interest does not entitle the assignee to become or to exercise any rights or powers of a member;
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> (2) An assignment of a limited liability company interest entitles the assignee to share in such profits and losses, to receive such distribution or distributions, and to receive such allocation of income, gain, loss, deduction, or credit or similar item to which the assignor was entitled, to the extent assigned; and
>
> (3) A member ceases to be a member and to have the power to exercise any rights or powers of a member upon assignment of all of the member's limited liability company interest. Unless otherwise provided in a limited liability company agreement, the pledge of, or granting of a security interest, lien or other encumbrance in or against, any or all of the limited liability company interest of a member shall not cause the member to cease to be a member or to have the power to exercise any rights or powers of a member.
>
> (c) Unless otherwise provided in a limited liability company agreement, a member's interest in a limited liability company may be evidenced by a certificate of limited liability company interest issued by the limited liability company. A limited liability company agreement may provide for the assignment or transfer of any limited liability company interest represented by such a certificate and make other provisions with respect to such certificates. A limited liability company shall not have the power to issue a certificate of limited liability company interest in bearer form.
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> (d) Unless otherwise provided in a limited liability company agreement and except to the extent assumed by agreement, until an assignee of a limited liability company interest becomes a member, the assignee shall have no liability as a member solely as a result of the assignment.
>
> (e) Unless otherwise provided in the limited liability company agreement, a limited liability company may acquire, by purchase, redemption or otherwise, any limited liability company interest or other interest of a member or manager in the

foresees that "[u]nless otherwise provided in the articles of organization or an operating agreement, a membership interest shall be assignable in whole or in part."[2] The Delaware LLC Act as well as the Louisiana Revised Statutes are "default" statutes. As a consequence, if members do not agree on a certain matter in their operating agreements, then the respective default provision of the LLC law will apply.

Empirically, operating agreements often refer to the effects of breaching a clause providing for restrictions on transfers. In some cases, the LLC agreement establishes that any attempt to make any sale of, or create, incur, or assume any encumbrance with respect to any membership units will be null and void and ineffectual and shall not be binding upon the managing member, if there is one, or the company. Non-transferring members will have all rights and remedies available under the agreements. Additionally, it is sometimes submitted that the purported transferee will have no rights or privileges in or with respect to the company, and the company will not give any effect in the company's records to that attempted sale or encumbrance. Alternatively, there are operating agreements in which it is established that in case shares are transferred against the provisions of the agreement they should be redeemed. Furthermore, in some cases it is also agreed that any transfer, assignment, encumbrance, pledge, hypothecation, or transfer, which shall result in the termination of the relevant company for federal income tax purposes, will be null and void *ab initio* and of no legal force or effect whatsoever. Other contractual clauses stipulate, in addition, that after a

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limited liability company. Unless otherwise provided in the limited liability company agreement, any such interest so acquired by the limited liability company shall be deemed canceled.

2. *Id.* § 1330 (Assignment of membership interest) states:

A. Unless otherwise provided in the articles of organization or an operating agreement, a membership interest shall be assignable in whole or in part. An assignment of a membership interest shall not entitle the assignee to become or to exercise any rights or powers of a member until such time as he is admitted in accordance with the provisions of this Chapter. An assignment shall entitle the assignee only to receive such distribution or distributions, to share in such profits and losses, and to receive such allocation of income, gain, loss, deduction, credit, or similar item to which the assignor was entitled to the extent assigned.

B. Unless otherwise provided in the articles of organization or an operating agreement, the pledge of or granting of a security interest, lien, or other encumbrance in or against any or all of the membership interest of a member shall not cause the member to cease to be a member or to have the power to exercise any rights or powers of a member.

C. Unless otherwise provided in a written operating agreement and except to the extent assigned by agreement, until an assignee of a membership interest becomes a member, the assignee shall have no liability as a member solely as a result of such assignment.

transfer of any part of a membership interest is executed the membership interests transferred shall continue to be subject to the terms and provisions of the relevant agreement and any further transfers are required to comply with all the terms and provisions of the agreement. At times, it is also set forth that a transfer of any units in the company entitles the transferee of such units to receive only the economic interests. The transferee obtains no right to vote or participate in the management of the business and affairs of the company. Notwithstanding the foregoing, a transferee shall be included within the term "member" for the respective purposes of the agreement, except for purposes of the rights of a member to purchase units of other members. The transferor remains a member of the company with all rights to vote and manage unless and until non-transferring members owning a majority of the outstanding units in the Company (other than the units held by the transferor or the transferee) consent, in their sole discretion, which can be unreasonably withheld, to make the transferee a member.

The exclusive transfer of economic rights to the transferee gives members of the company flexibility. Management rights, however, are influenced by property-rights principles. Therefore, the free transfer of managing rights is restricted pursuant to the way the concept of transfer is tailored in the agreement. The agreements, in general, adopt a broad concept of transfer. For example, transfer means sell, assign, convey, contribute, distribute or give. It may mean transfer by operation of law, whether directly or indirectly, voluntarily or involuntarily. The meaning can comprise the transfer upon foreclosure of a pledge, encumbrance, hypothecation or mortgage. The reason why restrictions on transfers and members rights are so detailed in the agreements has largely to do with this broad concept, which encompasses several forms of bargaining. Members enjoy management rights and economic rights, which they have to account for each and every time they transfer their units. The effects of the un-consented transfer of shares determined in the agreements echo this dual structure of the shares. Besides, they are reflective of the multiple layers of bargaining covered by the concept of transfer.

In view of the partial unenforceability of the un-consented transfer of shares, for only economic rights can be transferred, it is crucial to understand how the share sale and purchase agreement (SSPA) is affected and the effects restrictions have on the definition of members' property rights in their shares. This begs a careful study of the nature of the shares (are they composed of management rights, economic rights, or other types of rights?). Answering this question is a very

important task that will enable the definition of property rights in shares and clarify which rights can be lawfully transferred. It will open the floor to revisiting and rethinking old principles of property law, such as the principle of *numerus clausus.* It will establish the ground for a new conceptualization of property rights, which does not rely so much on an individualistic perception of the institution. Finally, it will provide room to explore whether it is possible to create an alternative system of transfer of property rights in shares through the adoption of a principle of abstraction and a principle of separation, which is dominant in German contract law and other German-speaking countries.[3]

This Article is structured in the following manner. Part II dwells on a definition of consent *lato* and *stricto sensu*. The purpose of these definitions is to distinguish between those situations in which an overall authorization is required by the law for the execution of a transaction from those situations in which compliance with specific requirements such as the consent of the company, pre-emption rights, and other types of restrictions are demanded by the law or the company's articles. On one hand, this Part tries to understand if consent *lato* and *stricto sensu* are part of the SSPA. On the other hand, it tries to explain how these two forms of consent are liable to affect the validity of the SSPA. Part III focuses on the characteristics of the shares. It argues that, physiologically, rights in shares are similar to property rights. This Part also pays attention to the morphology of shares and tries to describe their structure. Part IV suggests a reconceptualization of property rights based on a new reading of classical principles of property and contract law such as the principles of *numerus clausus,* consensualism, abstraction, and separation. Part V concludes.

## II. THE DUAL COMPLEXITY OF CONSENT AND THE VALIDITY OF THE SHARE SALE AND PURCHASE AGREEMENT

The idea of legal pleiotropy, that is, the unintended consequences for legal rules and legal institutions stemming from the interaction of market and law explains how contractual arrangements are likely to affect the structure of property rights. This is true of contractual arrangements such as the requirement of consent on the transfer of shares. This requirement is usually foreseen by default in statutory law and introduced in the operating agreements of LLCs. Specifically, by

3. There is no abstraction principle in Austria. There is only the principle of separation. *See* Robert A. Riegert, *The West German Civil Code, Its Origin and Its Contract Provisions*, 45 TUL. L. REV. 48 (1970) (dwelling upon the principle of abstraction in German civil law; additionally, it refers to the Swiss Civil Code).

providing restrictions on transfers, LLC law "tames" the property rights members hold to determine the use of their assets, the return from those assets, and the free transfer of their assets, given the nature and purpose of the business form.[4] In this context, the distinction between *consent lato sensu* and consent *stricto sensu* is important to explain how the dynamics of property rights in LLCs vary whenever the operating agreement of the company foresees restrictions on the transfer of property rights in shares.

Consent *lato sensu* comes from the idea that some kind of approval or authorization of a third party to the transfer is needed. So, the reverse side of consent *lato sensu* is a general restriction in the law that can be opted out of by the parties. It is reflective of the policy adopted by the legislature in the sense it could have selected other types of rules to attain the governance purposes of the company. Consent *stricto sensu* is the idea that there is an intention of the parties to create legally enforceable obligations. The need to obtain consent in these circumstances is determined by the imposition of specific restrictions (which may be established by the law or by the parties) such as the requirement to obtain the consent of the company, shareholders or directors, pre-emption rights or rights of first refusal, buy-sell agreements, and other types of restrictions. The difference lies in the fact that a specific party has to agree on the transfer. Therefore, consent *stricto sensu* is the reverse side of a specific restriction included by the parties in the articles of association. The concept also summons up a variety of restrictions that are very different and may be recombined in an unexpected fashion in the companies' articles.[5]

Because I am concerned with the governance of relationships between corporate constituencies and third parties, this construction is based on the distinction between the internal and external relations of the

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4. *See* Lécia Vicente, *The Tale of the Silver Fox: The Co-Evolution of Property Rights and Contractual Arrangements in Limited Liability Companies*, 26 S. CAL. INTERDISC. L.J. 189 (2016).

5. My work deals not so much with defining each type of restriction and treating it individually as in understanding the effects that restrictions in general have on the delineation of property rights of shareholders and on the governance of the company. This is of interest to me because I think that stronger property rights are likely to enable more efficient bargaining. *See* ANTONIO B. PERDICES HUETOS, CLAUSULAS RESTRICTIVAS DE LA TRANSMISION DE ACCIONES Y PARTICIPACIONES (1997). The author describes each restrictive technique such as clauses determining the requirement of consent, pre-emption rights, and *rescate*. He understands that these different forms of restrictions despite having a corporate nature affect the supposed act of transmission (*el supuesto de hecho de la transmission*) and, consequently, affect the capacity of disposition of the transferor. Hence, for him the key for the study of restrictions is the analysis of each type of restriction used in each clause.

parties to the SSPA. In other words, I am interested in the effects the SSPA has toward the company and other third parties and the effects it has on the parties to the SSPA themselves. I then try to discover if and to what extent consent, generally speaking, is part of the SSPA, and what the consequences arising from its breach are, considering the legal scheme of transfer of property in different jurisdictions.[6] This is a different approach from that taken by Perdíces Huetos, who, dealing with similar issues in Spanish law, submits a solution for the un-consented transfer that does not differentiate between effects toward the company and effects between the parties. He argues that, due to the configuration of Spanish contract law, which is influenced by German and Roman laws, restrictions do not affect the SSPA but absolutely impede the execution of the transfer toward the parties, the company, and any other third party. The transfer, but not the SSPA, is absolutely void. On one hand, he distinguishes between the effects restrictions have on the act of transmission, and on the other hand he distinguishes between the effects they have on the contract that causes the contractual obligations. Hence, for him, the key to study the restrictive phenomenon rests on the analysis of the technique used in each restrictive clause of the company's articles to grasp in which way it affects the supposed act of transmission.[7] For me, the key lies in understanding how restrictions mold property rights and influence their transmission pursuant to different principles of contract and property law in different jurisdictions.

Un-consented transfers illustrate how members frequently ignore the rule-set they have selected to govern the operating agreement of their company. Therefore, these actions do not stand for the operation of consent *lato sensu*.[8] Instead, in practical terms, they represent a rejection of the body of law shareholders have selected.[9] In other words, consent *lato sensu* and consent *stricto sensu*, that is to say, the requirement to

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6. This exercise will help to understand the validity of the contract between the parties, even when it has no effects towards the company. It will also help define property rights in shares and discover how "tamed" they actually are.

7. HUETOS, *supra* note 5, at 51-54.

8. I am approaching corporate law from a contractual perspective due to the default nature of the rules at stake. But this approach is not taken unwarrantedly. These defaults are introduced in the operating agreement of the company. The operating agreement is a contract. This contract has a *sui generis* nature. It lacks the bilateral features of a standard sales contract, for example. The contract of the company is drafted to regulate the internal affairs of the company.

9. *See* Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) (explaining how members of the diamond industry, by creating a system of private governance, reject the application of law to their affairs); *see also* Larry E. Ribstein, *Limited Liability Unlimited*, 24 DEL. J. CORP. L. 407 (1999) (referring to the unsuitability of default rules).

obtain approval for a transaction in general, and the concretion of such requirement through the inclusion of particular restrictions, are not always in tune because shareholders fail to obtain the relevant consent. Between executing a SSPA, or waiting until consent is obtained, the transferor opts to execute it, especially if they are driven by opportunistic behavior, and the applicable rules cannot be strongly enforced. This begs the question: does the SSPA necessarily rest upon consent, after all?[10] In my view, the answer is "no." I do not think that the contractual obligations deriving therefrom necessarily need consent to be generated. However, it is difficult to generalize across different jurisdictions a statement that neither consent *lato sensu* nor consent *stricto sensu* are part of the sales contract. The answer to the question may depend on the purpose of a legal prohibition or limitation. The answer to the question will depend on whether or not to fulfill its purpose the prohibition or limitation would need to void the SSPA. It also depends on the content of the contract itself and upon what the parties agreed. For instance, the transferor may want to include a clause in the agreement with a prohibition or limitation in order to avoid liability for *culpa in contrahendo*.

This can be better illustrated by zooming in on the picture of the internal relationship of the parties to the SSPA. This is where it becomes tricky. Let us imagine that the SSPA does not need consent to produce effects between the parties. Then, the un-consented transfer is liable to be valid between them. This has been the understanding of some Portuguese, Italian, and Spanish jurisprudence. Perhaps, this has been the case in Portugal and Italy due to the fact that the consensual principle, by which property is transferred by mere consent of the parties, prevails in these jurisdictions. The case of Spain is more complicated, as it does not adopt the consensual principle, but some confusion has reigned in academia and jurisprudence as to the effects of the un-consented transfer. For the most part, this was due to the wording of the law, which first determined the absolute voidness of transfers in breach of restrictions,

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10. I am referring to consent *lato* and *stricto sensu.* I am not referring to consent as the manifestation of intention to create legally enforceable obligations. *See* STEPHEN A. SMITH, CONTRACT THEORY 214 (2004) (referring to domestic agreements and explaining that these agreements are not intended to be legally binding: "Domestic agreements are different from ordinary commercial agreements. Specifically, they are not bargains in the ordinary sense of the term; the parties do not enter them to gain personal advantages. Rather, domestic agreements are made in order to promote the parties' *shared* interests. This shared interest lies both in the subject matter of the agreement . . . and in the goal of strengthening the relationship itself. Domestic agreements are therefore both expressive of, and a constitutive feature of the parties' relationship. Making (and performing) such agreements is an integral part of what it means to be in a relationship, and part of the reason they are valuable.").

and later, after it was changed, foresaw that transfer in those circumstances would have no effects toward the company. It deliberately left the parties aside of the negative effects of the un-consented transfer.[11] In France, where the consensual principle equally prevails,[12] legal doctrine and courts have held that the un-consented transfer is void.[13] Case law shows that parties to the sales contract often dispute this understanding and argue that the contract is perfect and executed once they have agreed on the terms and conditions of such contract, including the price. Nevertheless, courts have sustained that rules on the transfer of shares such as article L 223-14 have a mandatory nature. Therefore, their breach, courts have spelled out, determines that the SSPA is absolutely void. Acts that are absolutely void are damaged at the root, as if they had never been entered into and between the parties. Yet, the fact that voidness may prescribe in three years[14] suggests that legal doctrine when referring to voidness actually implies a relative voidness that can only be claimed by the interested parties until a certain point in time.[15] It follows that if the un-consented transfer is relatively void, it can still be confirmed because the essential element of the sales contract, that is, the capacity of the transferor to dispose of her property rights in the shares, has not been wholly uprooted.

As to the American LLC, there are some LLC agreements, which, under the wing of the applicable default rule, specifically regulate the

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11. See article 20 of Law of 17 July 1953 and article 112 of the Royal Legislative Decree 1/2010, 2 July, which is currently in force and keeps the previous wording of the law when it was altered.

12. The consensual principle in French law derives from article 1583 of the Civil Code. It sets that "Elle est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur à l'égard du vendeur, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé." ("(It [the contract] is perfect between the parties and the ownership is acquired as of right by the buyer with regard to the seller as soon as they have agreed on the thing and on the price, although the thing has not yet been delivered nor the price paid."). For a translation of the French Civil Code by David W. Gruning, Professor of Law, Loyola University, School of Law, New Orleans, see https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations (last visited Apr. 1, 2018).

13. It is not always clear whether jurisprudence refers to relative or absolute voidness of the sales contract.

14. *See* PHILIPPE MERLE & ANNE FAUCHON, DROIT COMMERCIAL: SOCIETE COMMERCIALES 248 (13th ed. 2009) ("Si la cession était réalisée sans que le project ait été notifié à la société et aux associés, elle serait nulle. La nullité pour violation de l'aticle L. 223-14 se prescrit par trois ans.") ("If the transfer is executed without the proposal be notified to the company and the shareholders, it will be void. Voidness for breach of article L. 223-14 prescribes after three years.").

15. I adopt a broad sense of interested parties to include not only the parties to the sales contract, but also the company and other third parties such as creditors.

effects of the un-consented transfer.[16] These transfers are also termed by the respective LLC agreements as improper or prohibited transfers. There is a first type of clause establishing that any attempted transfer not strictly in accordance with the provisions of the LLC agreements will be void *ab initio* and of no force or effect whatsoever, provided that any such attempted transfer might be a breach of the agreement, notwithstanding that such attempted transfer is void. LLC agreements go on to establish a second type of clause where other negative consequences are delineated such as the transferee not having managing rights or the right to participate in the business or affairs of the company, to receive any reports or obtain information concerning the company, to inspect or copy the company's book records, to receive economic interests in the company, to receive upon dissolution and liquidation of the company the net amount otherwise distributable to transferor. A third type of clause provides that, except as otherwise required by the law, the company and the manager shall treat an un-consented transfer as void and shall recognize the transferor as continuing to be the owner of the membership interest purported to be transferred. However, LLC agreements also state that if the company is required by law to recognize an un-consented transfer, the transferee shall be treated as an assignee with respect to the membership interest transferred and may not be treated as a member with respect to the membership interest transferred unless it is admitted as a member. For the most part, in these cases the transferee is often entitled to receive economic interests. A fourth type of clause is one in which transferees are entitled to receive only economic interests to which the transferor of such units would have otherwise been entitled. The transferee has no right to vote or participate in the management of the business and affairs of the company.[17] In these circumstances, the transferor remains a member of the company with all rights to vote and manage until non-transferring members (often owning a majority of the outstanding units of the companies) consent to make the transferee a member. A fifth type of clause conditions the validity and effectiveness of the transfer to a written instrument, payment to the company of its reasonable expenses, the compliance with relevant state and federal securities and tax laws, or any other kind of requirements for that matter.

16. See, for example, Delaware, New York, and Louisiana LLC laws. They provide for default rules regarding the transfer of shares, which the parties are free to contract around.

17. This is an extension of what is provided by the law. *See, e.g.*, Delaware Limited Liability Company Act, DEL. CODE ANN. tit. 6, § 18-702 (2018) (assignment of limited liability company interest). Sometimes, despite the fact that transferees are only entitled to obtain economic rights, they may be included in the term "member" pursuant to the terms of the LLC agreement.

In these cases, consent *lato* and *stricto sensu* have the ability to deprive the parties to the SSPA of their capacity to execute it.[18] The costs of execution would be prohibitive.

In the United Kingdom, directors may decline to sanction or recognize any instrument of transfer or refuse to register an un-consented transfer.[19] Moreover, the transferor is deemed to remain the holder of the share until the transferee is entered in the register of members in respect thereof. Setting aside a discussion about the nature of the register (is it constitutive or merely declarative?), the power directors have to register or not the transfer determines only the validity of the sales contract between the parties, and not towards the company and other non-transferring shareholders. (No transferee can be a shareholder of a company only within the internal relationship she has with the transferor.) United States and United Kingdom courts alike tend to adopt an objective approach to contracts. They refuse to make final and concluded opinions about a particular provision in the articles of the company or LLC agreements. They evaluate the articles, and judge parties' rights, duties, obligations, and further responsibilities in light of the articles' contractual framework. Courts in the United Kingdom reckon the transfer issue in a complex fashion. For instance, according to *In re Copal Varnish Co.*,[20] first, parties enter into the contract of sale, which is followed by the execution of an instrument of transfer containing an agreement by the buyer to accept the shares subject to the restrictions imposed by the articles of association. In *In re Copal Varnish Co.*, the buyer or transferee was given an equitable interest in shares. However, there was no acceptance of that transfer by the board of directors, neither was there registration. The court submitted that even when the share is passed, it is necessary that the name of the transferee be effectively registered for the completion of the transfer.

As to the Spanish law, there is a first type of clause in the articles of association that provides that transfers in breach of the restrictions have no effects toward the company and are not registered in the members' register. Additionally, the exercise of the political rights in the share is automatically suspended. A second type of restriction stresses that if

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18. The fact that consent *lato sensu* and *stricto sensu* deprive the parties to the SSPA of the ability to execute it is an effect of legal pleiotropy. Legal pleiotropy suggests that LLC law is likely to affect general principles of property law to the point that property is rather transferred according with the way shares are designed than with the way property is generally transferred in the United States.

19. Previously, directors could decline or refuse to register discretionarily. The law has changed in this regard, and now they have to justify it.

20. *In re* Copal Varnish Co. [1917] 2 Ch. 349 [UK].

procedures especially related to the exercise of pre-emption rights are not complied with, the company may ignore all transfers, and consequently, the buyer may not exercise any shareholder rights in the company. There is a third type of clause that makes the un-consented transfer unenforceable until the moment the company is informed about the transfer. A fourth type of clause, besides determining the no-effects toward the company rule, adds that the company will refuse to register the transfer in the members register. A fifth type of clauses establishes transfers are void (*ab initio*) if executed in breach of the provisions of the law or the articles. In some cases, the articles of the company were altered to become reflective of the law. They started by determining the voidness of the transfer because this was what the law first provided, but later changed the effects of the un-consented transfer, once the law changed. The un-consented transfer, then, after the law changed became unenforceable only toward the company. Spanish courts have adopted different approaches to the un-consented transfer, in particular as a result of the doctrinal debate around the changes in the law. In general, courts considered that the un-consented transfer was valid between the parties and was likely to be avoided. They dwell, however, on the issue of the lack of consent that should have been obtained, as required by the law or the articles when they adopt the default rule. Courts try to clear up whether the lack of consent determines the innate incapacity of the transferor to sell the property rights she owned in the shares.[21] Advocates of this theory argue that the causal contract, however, should be considered valid and enforceable. For the most part, this is in line with the particular Spanish regime of transmission of property. In Spain, property is not transferred by mere consent of the parties. It takes an additional element for property to be transferred. Spanish laws, within the tradition of roman laws, differentiate the title from the mode of acquisition. This is called the theory of title and mode (*teoría del título y el modo*). It provides that title only creates contractual obligations, but that property is only transferred after the delivery or possession of the thing. This is valid for all contracts liable to transfer ownership such as a sales contract. Furthermore, it applies both to immoveable and moveable property.[22] Thus, the Spanish regime of transfer of property puts the

21. This is another effect of legal pleiotropy. In fact, it seems that Spanish courts have been discussing whether consent has a constitutive effect of property rights. Putting it differently, they have been dwelling on the effects that consent has on the physiological and morphological structure of property rights.

22. *See* Joaquín Sánchez Cebrián, *Teoria General de la Transmissión de Bienes y el Registro de la Propriedad en España*, 30 REVISTA DE DERECHO 3 (2008).

French consensual principle aside and adopts a legal model closer to the contract laws of German and German-speaking countries. Also deviant from the consensual principle are U.S. and U.K. laws.[23] In the United States, under U.C.C. § 2-401 (passing title), the parties can generally decide when title passes.[24] By default, it passes upon performance. In the United Kingdom, ownership in movables passes when parties agree on the moment it should pass. Delivery, payment, or register play no role on the transfer of ownership. Therefore, the consensual principle in force in Portugal, Italy, and France does not apply.[25]

Legal pleiotropy affects the way shareholders exercise the rights they hold under the sales contract and the fashion in which property rights are transferred. In the cases where the SSPA is deemed valid between the parties, but the transferee cannot exercise any rights toward the company, the transferor has, in fact, transferred empty property rights in the share. This has much to do with the sort of rights shareholders intend to transfer and are actually transferring with the execution of the SSPA. For example, their ownership derives from the articles of association of the company to which the transferor is a party. Restrictions are set forth, or saying it the other way around, the requirement to obtain consent to a transfer is included in the articles pursuant to the nature and purpose of the company. What could possibly justify that the transferee becomes a party to the articles of association? The default in civil law is that everyone can choose with whom he wishes to contract. Corporate law is an exception because it permits transfers without unanimous consent.

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23. I use the word "deviant" in the text. Nevertheless, it is interesting that for a commentator who has been educated in a country that adopts the separation of title and modus, the perception may be that the French system that adopts the consensual principle is unusual, which is moreover limited to specific obligations.

24. *See* THOMAS W. MERRIL & HENRY E. SMITH, THE OXFORD INTRODUCTION TO U.S. LAW: PROPERTY (2010); JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY (2d ed. 2005); JOSEPH WILLIAM SINGER, PROPERTY (5th ed. 2017); ALLAN E. FARNSWORTH, CONTRACTS (4th ed. 2004).

25. Not only the United States and the United Kingdom, but also even some civil law jurisdictions do not follow the consensual principle. The same result provided by U.S. law can generally be achieved with a *constitutum possessorium.* For example, Austrian law, § 428 ABGB, which also foresees *tradition brevi manu*, foresees the establishment of the *constitutum possessorium* unless there is a specific prohibition such as in the case of the creation of a security interest. Portugal (article 1264 of the Civil Code) and Italy (article 1140 of the Civil Code) also foresee this legal institution.

## III. THE PHYSIOLOGY AND MORPHOLOGY OF PROPERTY RIGHTS IN SHARES

Private limited liability companies (PLLCs) analyzed hereto include the Portuguese *sociedade por quotas*, the Italian *Società a responsabilità limitata* (S.r.l), the Spanish *Sociedad de responsabilidad limitada* (SRL), the French *société à responsabilité limitée* (SARL), the United Kingdom's private company, and the American limited liability company (LLC). In respect to the definition of shares of PLLCs, Portuguese, Italian, and Spanish laws as well as legal scholarship have been greatly influenced by German law. Thus, I will use German law as a helpful analytical springboard. German law does not present a definition of share *Aktien* (*AG*) or *Geschäftsanteile* (*GmbH*). This concept has been especially developed by legal doctrine. Commentators in general have been defining share as a membership right (*Mitgliedschaftsrecht*) that comprises a bundle of rights and duties. However, the authors of the main comments to the *AktG* and to the *GmbHG* have not been too concerned about the definition in abstract.[26] Still, under German law, shares have been defined as complex rights (*Mitgliedschaftsrecht*). In this concept of share, property, administrative, and personal rights are included. This definition may be illustrated with the rights shareholders hold to share in the profits of the company, to participate and vote in the general meetings, to ask for corporate information, to be elected members of the governing bodies of the company and so on. Additionally, all these rights enable the emancipation of shareholders within the company. Not only rights, however, are part of this concept of "complex right," but also duties are attached to it. The *Mitgliedschaftsrecht* has very *sui generis* features since it cannot be straightforwardly explained by the dyadic relation between property rights and credit rights. That is to say, this concept surmounts the dichotomy between property rights (absolute, i.e., "good against the world")[27] and credit rights (relative, i.e., "good only against a handful of

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26. Leading treatises on § 15 of the *GmbHG* explain that, while referring to the provision of warranties on the purchase of a share, claim that the purchase of a share is the purchase of a right. Therefore, in principle, a warranty against defects of the thing is not provided. In contrast, it established a warranty against defects of the law. A different case is one in which the firm is acquired through the acquisition of all the shares of the company. In these situations, a warranty may be provided against the defects of the thing. Lorenz Fastrich, *in* ADOLF BAUMBACH & ALFRED HUECK, GMBH-GESETZ: GESETZ BETREFFEND GESELLSCHAFTEN DIE MIT BESCHRÄNKTER HAFTUNG (21st ed. 2017); Frank Ebbing, *in* MICHALSKI, GMBHG 3, § 15 Rn. 177, 180 (Auflage 2017).

27. For example, article 544 of the French Civil Code provides that "La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un

people"). Despite this concept of *Mitgliedschaftsrecht,* the trend in German legal doctrine is to define shares of a *GmbH* (*Mitgliedschaft*) as subjective rights (*subjektive Rechte)*.[28] Defining them as such does not add much to the understanding of their physiology and morphology. Attending to the broad definition of subjective rights, it is obvious they can be included in the concept.

In the case of Portuguese, the concept of subjective right was insufficient to define what share is. The problem has less to do with the concept of share than with the definition of subjective rights (it is a concept liable to include all sorts of entitlements). Consequently, other alternatives have been proposed. For instance, Raúl Ventura dogmatically circumscribed the share by using the regime of the assignment of rights established in articles 424 and following of the Portuguese Civil Code.

Pais de Vasconcelos adopted a different approach. He argued that the share can and should be perceived as a plural form. That is to say, the share represents a legal relationship but can also be understood as a subjective right or as the position members have in the company (*status socii*). In his opinion, all these qualifications can be accommodated.[29] This is trivial because it gives no hint as to the components, the function, and structure of a share in a Portuguese company.

In Italy, the concept of subjective right also was not bold enough to provide a clear definition of share, even though, as in the German case, part of legal doctrine still defines shares as a subjective right.[30] Shares have been referred to as "subjective legal positions" or as a "complex of

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usage prohibé par les lois ou par les règlements." ("Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations.") For a translation of the French Civil Code by David W. Gruning, Professor of Law, Loyola University, School of Law, New Orleans, see https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations (last visited Apr. 1, 2018). In the economics literature, see Oliver Hart, *An Economist Perspective on the Theory of the Firm*, 89 COLUM. L. REV. 1757, 1765 (1989) (affirming that "ownership of an asset goes together with the possession of residual rights of control over that asset; the owner has the right to use the asset in any way not inconsistent with a prior contract, custom or any law").

28. *See* HANS-GEORG KOPPENSTEINER & FRIEDRICH RÜFFLER, GMBH GESETZ KOMMENTAR 776 (3 Auflage 2007) ("Die Mitgliedschaft (der Geschftsanteil) ist freilich auch als subjektives Recht aufzufassen, das gegen den Willen des Inhabers nur im Rahmen des Gesetzes und der Satzung verändert werden kann und das deliktischen Schutz gegen Eingriffe durch Dritte genieβt . . . .") ("Membership is certainly regarded as a personal right, which can be changed against the will of the owner only according with the law and the statutes, and it enjoys the tort protection from interference by third parties . . . .").

29. *See* PEDRO PAIS DE VASCONCELOS, A PARTICIPAÇÃO SOCIAL NAS SOCIEDADES COMERCIAIS (2d ed. 2006).

30. *See* GIAN CARLO M. RIVOLTA, LA PARTECIPAZIONE SOCIALE (1965) (debating the concept of share and discussing the structure and incidents of shares).

subjective positions."[31] This is particularly true when the articles of association grant special rights to members of the company (*diritti particolari dei soci*)[32] and adopt elements of the partnership to enhance these companies' *intuitus personae* nature. Shares have also been considered by commentators as standing for a mere contractual position of the member summing up the rights and duties attributed to her by the articles of the company. The share as *partecipazione* is often seen as the measurement of the participation of the member in the company.[33] Some commentators, however, have tried to refine the concept, and have submitted that shareholders hold a *diritto corporativo*. The nature of this right is *sui generis* since, in the same vein as the *Mitgliedschaftsrecht,* it tries to surpass the twofold reality of property rights and credit rights. In other instances, in an attempt to objectify the concept, commentators and jurisprudence alike have defined shares as moveable property (*bene mobile*).[34]

In the United Kingdom, private limited companies as well as public limited companies consist of issued shares. They are classified by English law as intangibles (*choses in action*).[35] Ownership of the share is evidenced by a share certificate, which is different from the Portuguese, Italian, and Spanish cases where certificates of shares of PLLCs are not

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31. *See* ORESTE CAGNASSO, 5 TRATATTO DI DIRITTO COMMERCIALE: LA SOCIETÀ A RESPONSABILITÀ LIMITATA 138 (2007) (referring to the "complesso di posizioni soggettive che rappresentano il contenuto della partecipazione").

32. *See* CODICE CIVILE [C.C.] [CIVIL CODE] arts. 2468(3), (4) (It.).

33. *See* CAGNASSO, *supra* note 31, at 126.

34. *See id.* ("Il legislatore, nell'articolata disciplina della partecipazione, pare accentuare la prospettiva, già delineate dalla dottrina ed accolta dalla giurisprudenza nel sistema anterior, volta ad oggettivarla, equiparandola ad un bene.") ("The legislator in the articulated rules about the share seems to accentuate the view already outlined by legal doctrine and upheld by jurisprudence in the former legal regime, objectifies it [the share] again and equates it with an asset."). In jurisprudence, see Cass. 12.12.1986, No. 7409 (the court held that the share of the società a responsabilità limitata is "un bene immateriale equiparato ex. Art. 812 c.c. a bene mobile materiale non iscritto in pubblico registro") ("an intangible asset comparable to movable tangible property not registered in the public registry"), and Cass. 26.05.2003, No. 6957 (the court considered that "la quota di partecipazione in una società a responsabilità limitata esprime una posizione contrattuale obiettiva che va considerate come bene immateriale equiparabile al bene mobile non iscritto in public registro ai sensi dell' art. 812 c.c. onde a essa possono applicarsi, a norma dell'art. 813 c.c., le disposizioni concernenti I beni mobile") ("the share in a *società a responsabilità limitata* expresses an objective contractual position which must be regarded as an intangible asset comparable to moveable property not registered in the public registry within the meaning of art. 812 c.c., and to which rules on moveable property may be applied pursuant to art. 813 c.c.").

35. *See* EVA MICHELER, PROPERTY IN SECURITIES: A COMPARATIVE STUDY 21 (2007) (saying that securities are intangibles under English law); *see also* ARIANNA PRETTO, BOUNDARIES OF PERSONAL PROPERTY LAW: SHARES AND SUB-SHARES 41 (2005).

issued.[36] Section 541 of the Companies Act 2006 defines shares or other interest of a member in the company as "personal property (or, in Scotland, moveable property) and are not in the nature of real estate (or heritage)." However, in the United Kingdom the share has been traditionally defined as:

> the interest of a shareholder in the company, measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se* in accordance with [the Companies Act]. The contract contained in the articles of association is one of the original incidents of the share.[37]

Paul Davies provides a critical analysis of this definition. In his words,

> this definition, though it lays considerable and perhaps disproportionate stress on the contractual nature of the shareholder's rights, also emphasises the fact that he has an interest *in* the company. The theory seems to be that the contract constituted by the articles of association defines the nature of the rights, which, however, are not purely personal rights but instead confer some sort of proprietary interest in the company though not in its property.[38]

Commentators such as Luxton have stressed that "the various contractual obligations incurred by a member, upon the acquisition and the disposal of his shares, are capable of creating rights of a proprietary nature."[39] Luxton submits the example of the pre-emption clause as a restriction upon the free transferability of shares. He argues that a shareholder who sells her share to a third party without first notifying the company's secretary breaches the contract in the articles. In these circumstances, specific performance to compel the vendor to execute the transfer of the share will not be ordered because that would necessarily imply the seller breach the articles of association. Luxton, however, thinks that the unavailability of specific performance does not prevent the purchaser from acquiring an equitable interest under a trust.[40] This is the case of

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36. *See* Companies Act 2006, § 768 (UK).

37. *See* Borland's Trustee v. Steel Brothers & Co. Ltd. [1901] 1 Ch 279, at 288 (UK).

38. *See* PAUL L. DAVIES, GOWER AND DAVIES' PRINCIPLES OF MODERN COMPANY LAW 817-18 (8th ed. 2008).

39. *See* Peter Luxton, *Share Transfer Restrictions and the Relative Nature of Property Rights*, 1990 J. BUS. L. 14.

40. As he puts it:

> During the period between contract and registration, the vendor holds the legal title to the shares in trust for the purchaser. This imposes a variety of duties upon the vendor, including the obligation to account to the purchaser for dividends received by him which were declared after the date of the contract.

un-consented transfers of shares in which the pre-emption clause was breached by the member transferring her shares. In this situation, the purchaser acquires equitable interests in the share.[41] This is so because no conveyance of the share is needed for equitable interests to pass to the purchaser considering the trusteeship binding her to the vendor. But, then, the issue becomes one of priority between equitable interests in the share of non-transferring members and the purchaser.[42] According to Luxton, "This is possible because of the nature of property in English law: it is the relationship between persons in regard to things." Yet, it appears that the real test would seem to be whether it has effects towards third parties. They not only include the other members of the company, but also creditors of the seller who may want to seize her assets. Property rights both in common law and in equity are relative, and the priority between equitable interests is determined pursuant to established principles. This, his argument goes, is consistent with developments in land law.[43] Consequently, in some circumstances, equitable interests may indeed pass to the purchaser upon breach of the articles.[44] Interestingly, Luxton's reference to *Tett v Phoenix Property & Assurance Co Ltd.*[45] illustrates the idea that restrictions on transfers such as pre-emption rights or rights of first refusal generate equitable interests (or property rights) upon the breach of the articles by one of the members. Evidence of such equitable interests is not provided by the register of members.[46] Apropos this issue, in the United Kingdom, the Small Business, Enterprise and Employment Act 2015 amended the Companies Act 2006 "to require

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41. *See* A. Borrowdale, *The Effect of Breach of Share Transfer Restrictions*, 1988 J. BUS. L. 307. Borrowdale advocates an opposite opinion. He construes the right of pre-emption as an option upon the sale of the share by the transferor to a third party in breach of the articles. He argues the following

> To construe a right of pre-emption as an option upon the right becoming exercisable resolves the anomaly of a right of pre-emption being entirely defeated or breached. The right assumes the character of an option, i.e. an irrevocable offer, because the grantor should in first instance have offered the property to him.

42. *See* DAVIES, *supra* note 38, at 947, 948 (dealing with priorities between competing transferees).

43. This is in opposition to the definition of property rights in Portuguese, Italian, Spanish, and French law. In these jurisdictions, the perception that property rights are absolute is yet enduring. This idea is linked to an extremely individualistic view of these rights in these jurisdictions.

44. *See* DAVIES, *supra* note 38, at 945-46 (referring to the transfer of beneficial interests in the shares notwithstanding registration of shares in the register of members has not occurred).

45. [1984] B.C.L.C. 599, [1986] B.C.L.C. 149 (C.A.).

46. *See* DAVIES, *supra* note 38, at 958 ("[A]lthough the register provides prima facie evidence of who its members are and what their shareholdings are, it provides no evidence at all, either to the company or anyone else, of who the beneficial owners of the shares are.").

companies to keep a register of people with significant control over the company" in addition to the register of directors and register of members.[47] This is a public register. Furthermore, the application of sanctions is foreseen if people with significant control also known as beneficial owners are not disclosed.[48] It may happen that it is not possible to track a person with significant control, particularly if there are agreements to vote or exercise other type of management rights in the company. The fact that evidence of equitable interests or beneficial ownership is not given by the register of members grants, as Luxton acknowledges, restrictions on transfers (pre-emption rights in this case) "a force they would otherwise lack."[49] Moreover, it calls attention to the

47. *See* Lécia Vicente, The Requirement of Consent for the Transfer of Shares and Freedoms of Movement: Toward the Liberalization of Private Limited Liability Companies: A Comparative Study of the Laws of Portugal, France, Italy, Spain, the United Kingdom and the United States and Its Interplay with EU Law (2014) (unpublished Ph.D. thesis, European University Institute), http://hdl.handle.net/1814/32211 (foreseeing the amendment to the United Kingdom's law).

48. People with significant control over the company are individuals who hold more than 25% of the shares or of the voting rights in the company. People who, pursuant to the articles of association, have the right to appoint or remove the majority of the board of directors of the company or hold the right to exercise or actually exercise significant influence or control over the company also fall into this category.

49. Herein lies the economic value of such restrictions. The author says: "Outside courts, it has been increasingly appreciated that corporate investment in unquoted companies can be positively encouraged by the imposition of reasonable restrictions upon the transferability of their shares . . . ." *See also In re* Fry, Chase National Executors & Trustees Corporation Ltd. v. Fry and Others [1946] Ch. 312, [1946] 2 All ER 105 (Eng.). It does not deal with a sales contract but with an incomplete gift. It is interesting because it shows the court rationale in respect to the transfer of equitable interests in the context of an incomplete gift. In this dispute, the transferor, who was residing in the United States, wanted to make a gift to his son of shares that he held in an English company. The transfer was executed and sent to the company for registration. However, pursuant to the Defence (Finance) Regulations, 1939, reg 3A (as amended), the transfer of any securities or any interest in securities in which a person resident outside the sterling area had, immediately before the transfer, any interest, was prohibited unless permission from the Treasury had been obtained; and registration of any such transfer was prohibited without permission from the Treasury. Consequently, the company replied to the transferor that certain forms would have to be filled out by the transferor and transferee and that a license from the Treasury would have to be obtained for the transfer. The necessary forms were filled out by the transferor and the son, but the transferor died before the license from the Treasury was obtained. Facing the question as to whether the son was entitled to require the transferor's personal representatives to obtain for him legal and beneficial possession of the shares, the court held that since the requisite of consent of the Treasury had not been obtained, and the company was for that reason prohibited from registering the transfer the son had not acquired the right to be vested with a legal title to the shares. There had not been a complete gift to the son of the equitable interest in the shares, because the transferor had not obtained the consent of the Treasury and, therefore, he had not done all that was necessary to divest himself of his equitable interest in favor of his son. Another relevant case is *In re Rose (deceased); Midland Bank Executor and Trustee Co Ltd v. Rose and Others [1949] Ch 78*, dealing with the transfer of shares in a private company, which was executed by the testator. However, since the company was a private company, the right to claim registration of shares was subject to the consent of directors. In this

fact that shares are perceived as "things" (*choses*) subject to property rights.[50] This idea is supported by Davies, who claims shares are in law and in fact "items of property."[51]

The Spanish legal doctrine has defined share as a membership right or a legal relationship that stands for the position of the member in the articles of the company.[52] Additionally, Spanish authors, for the most part influenced by German doctrine, have qualified the share as a complex legal relationship or a relationship of cooperation. Others qualify it as a patrimonial subjective right (i.e., ownership right) because, in their opinion, subjective rights are not more than legal relationships even if they are complex legal relationships or represent a bundle of rights and duties. Defining shares as patrimonial subjective rights implies that, in principle, individuals who own these shares are free to negotiate them in the market unless the law or the company's contract establish differently.

Shares or parts *sociales* in the French *société à responsabilité limitée* (SARL), as in the Portuguese, Spanish, and Italian cases, are not represented by certificates. They are not securities.[53] The SARL, however, may issue bonds.[54] Historically, the French Civil Code has classified shares of commercial companies as moveable property.[55] Legal

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case, it is discussed whether this is a specific or general gift, and whether there had been an ademption of the shares.

50. See *Property*, BLACK'S LAW DICTIONARY 1252-53 (8th ed. 2004) (including shares in the definition of property).

51. *See* DAVIES, *supra* note 38, at 818-19 ("One thing is clear: shares are recognised in law, as well as in fact, as objects of property which are bought, sold mortgaged and bequeathed. They are indeed the typical items of property of the modern commercial era and particularly suited to its demands because of their exceptional liquidity. To deny that they are 'owned' would be as unreal as to deny, on the basis of feudal theory, that land is owned—far more unreal because the owner's freedom to do what he likes with his shares in public companies is likely to be considerably less fettered. Nor, today, is the bundle of rights making up the share regarded as equitable only."); *see also* MICHELER, *supra* note 35, at 61.

52. *See* HUETOS, *supra* note 5, at 32-33.

53. *See* CODE DE COMMERCE (COMMERCIAL CODE) art. L223-12 (Fr.).

54. *See id.* art. L223-11.

55. Article 529 of the French Civil Code of 1803 foresees that "Sont meubles par la détermination de la loi, les obligations et actions qui ont pour objet des sommes exigibles ou des effets mobiliers, les actions ou intérêts dans les companies de finance, de commerce ou d'industrie, encore que des immeubles dépendants de ces entreprises appartiennent aux compagnies. Ces actions ou intérêts sont réputés meubles à l'égard de chaque associé seulement, tant que dure la société.—Sont aussi meubles par la détermination de la loi, les rentes perpétuelles ou viagères, soit sur l'État, soit sur des particuliers." ("Obligations and actions having as their object sums due or movable effects, shares or interests in financial, commercial or industrial concerns, even where immovables depending on these enterprises belong to the concerns, are movables by operation of law. Those shares or interests shall be deemed movables with regard to each shareholder only, as long as the concern lasts. Perpetual or life annuities, either from the State or private individuals, are also movables by operation of law.") For a translation of the French Civil Code by David W. Gruning, Professor of Law, Loyola University, School of Law,

doctrine has understood that this definition does not suffice, nor does it suffice to say that shares are mere credit rights that members hold against the company. Commentators submit the share is first and foremost representative of the quality of membership (*status socii*). Additionally, it is regarded as an ensemble of political rights (e.g., the right to information, the right to participate in the shareholders' general meetings and to vote therein) and ownership rights in the corporate assets (*l'actif social*).[56]

In the United States, LLC agreements generally define shares (units) as interests in the company as provided in the agreement and the respective LLC Act.[57] They entitle their holders to participate in the management. They give title and interests in the profits, losses, deductions, and credits of the company, and any and all other benefits to which a holder thereof may be entitled as a member, together with the obligations of such members to comply with all terms and provisions of the agreement. In sum, units represent an ownership interest in the company and rights and obligations as described in the LLC agreement and the law. Additionally, shares have been defined as membership interests. As to the nature of units or membership interests, they are conceptualized as personal property and this has been pacifically included in the LLC agreements. Most statutes establish through default rules that the transfer or assignment of ownership interests in a LLC only conveys economic rights. The transferee can additionally acquire management rights if the non-transferring shareholders have given their consent to it. It being a default rule, members can contract around it, as they frequently do.[58] As to the form, some agreements also provide that units of the company may be evidenced by certificates if this is approved by the board of directors, but there should be no requirements that the companies issue certificates to evidence the units.[59] The agreements clarify that if the board determines to issue any certificates they shall on the face thereof bear a legend reflecting the restrictions on those securities.

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New Orleans, see https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations (last visited Apr. 1, 2018).

56. *See* MAURICE COZIAN ET AL., DROIT DE SOCIETES 474, 475 (22d ed. 2009); PHILIPPE MERLE & ANNE FAUCHON, DROIT COMMERCIAL: SOCIETE COMMERCIALES 474 (13th ed. 2009).

57. *See* Vicente, *supra* note 47.

58. *See* ROBERT A. RAGAZZO & DOUGLAS K. MOLL, CLOSELY HELD BUSINESS ORGANIZATIONS: CASES, MATERIALS, AND PROBLEMS 954, 955 (2006).

59. *See* Larry E. Ribstein, *Form and Substance in the Definition of a "Security": The Case of Limited Liability Companie*s, 51 WASH. & LEE L. REV. 807 (1994) (arguing that there is a presumption that LLC's units are not securities).

The preceding paragraphs describe different ideas of shares on a country-by-country basis. It appears that there is an effort to categorize, but the reason this effort is done is not always clear. The United Kingdom and the United States are exceptions. Shares or units have a dual structure. In the United Kingdom, shares are perceived as "things" in the sense of the French word *chose*, which are objects of property rights pursuant to common-law and equity. This shows how the articles of association of private companies in the United Kingdom are liable to create proprietary interests. The effort to categorize clarifies how corporate law, contract law, property law, and equity law are interconnected, especially if there is an un-consented transfer. In the United States, the implications of the clear distinction between economic rights and management rights is that if non-transferring members do not approve the transfer or assignment of membership interests, the transfer or assignment does not convey any governance or management rights, but, generally, all other rights and obligations of the member are transferred, including allocations of income, gain, loss, deductions and credits.[60] This distinction provides a straightforward look at what is included in a membership interest. Arguably, in the Portuguese, French, Italian, and Spanish cases these theories are, for the most part, inductively generated from the various elements of the share. The nuances in the theories are different because the rights and obligations such as, for example, duties of loyalty (*Nachschusspflicht*) differ between countries. It appears that in these countries, the concept of share has first been inductively derived and, then, further consequences have been deductively developed from it, where the law was not explicit.

Physiologically, rights in shares function like property rights even though in most cases, with the exception of the United Kingdom and the United States where they can be represented by certificates, shares are incorporeal.[61] Morphologically, however, their structure is different. Restrictions on shares combined with the specific regime of transfer of property rights cause empty property rights to be transferred out of an

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60. *See, e.g.*, Zokaites v. Pittsburgh Irish Pubs, LLC, 2008 PA Super 281; 962 A.2d 1220; 2008 Pa. Super. LEXIS 4287.

61. *See* Jane Ball, *The Boundaries of Property Rights in English Law*, 10.3 ELECTRONIC J. COMP. L., Dec. 2006, at 1, https://www.ejcl.org/103/art103-1.pdf (chiming in on whether incorporeal things can be the object of ownership or other property rights). In the Portuguese jurisprudence see, for example, Judgment of the Court of Appeal of Porto, Process No 0051450, March 28, 2001 (providing that a share in a Portuguese PLLC (*sociedades por quotas*) is susceptible of ownership or any other *right in rem*). Moreover, the transfer of shares may be undertaken through a sale and purchase agreement, which in Portuguese law is defined as a contract to transfer corporeal things.

un-consented transfer of shares. In other words, in the case where the SSPA is valid or has not been avoided, the transferee cannot exercise shareholder's rights in the company because she is not a shareholder. At most, she can exercise economic rights, or is entitled to equitable or beneficial interests under a trust (United Kingdom),[62] but that does not turn her into a member of the company. Hence, empty property rights transferred with the execution of the un-consented transfer are, in fact, credit rights. The transferee, if in good faith, holds a claim against the transferor. Good faith, however, has been interpreted narrowly in the United Kingdom and the United States.[63] In the United Kingdom, there has been an old tendency of courts not to compromise the certainty of the contract.[64] In the United States, the principle has been acknowledged through the Uniform Commercial Code[65] and the Restatement (Second) of Contracts.[66] Still, it is rather perceived as a minor requirement.[67]

I submit that the share in *Hohfeldian* terms is a legal configuration of a complex right. The *Hohfeldian* conception of "property" or "legal interest" is that of a complex aggregate of rights (or claims), privileges, powers, and immunities. In other words, property rights are a "complex aggregate of jural relations."[68] The aggregate can be composed of

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62. The United Kingdom is a special case because the dual foundation of property law, which is based in common law and equity law, is unique and cannot be traced in countries like Portugal, Spain, Italy, and France.

63. *See* Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 MODERN L.R. 11 (1998) (explaining the dissemination of the principle of good faith in the United Kingdom from a system theory's and social perspective); *see also* Maud Piers, *Good Faith in English Law: Could a Rule Become a Principle?*, 26 TUL. EUR. & CIV. L.F. 123 (2011) (explaining how good faith has never been a general principle of English law).

64. *See, e.g.*, CPC Group Limited v. Qatari Diar Real Estate Investment Company [2010] [2010] EWHC 1535 (Ch); [2010] All ER (D) 222 (Jun). This case applies the principle of good faith. However, such principle is read within the contractual obligations entered into and between the parties. The judge held that

> It seems to me, therefore, that the obligation to use "all reasonable endeavours" does not always require the obligor to sacrifice his commercial interests. In this case, the matter is, however, clearer, because the contract itself, as I have already said, contains other indications that . . . was not to be required to sacrifice its commercial interests.

65. *See* U.C.C. § 1-201(20) (AM. LAW INST. & UNIF. LAW COMM'N 2001) (providing that good faith "except as otherwise provided in Article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing"); *see also id.* §§ 2-103(1)(b), 1-304.

66. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST. 1981) (duty of good faith and fair dealing).

67. *See* Robert S. Summers, *The General Duty of Good Faith: Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 811 (1982) (arguing that "the general duty of good faith and fair dealing is no more than a minimal requirement (rather than a high ideal)").

68. There can be found in the literature different attempts to define property rights. *See* Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*,

multital or in rem "right-duty" relations, multital or in rem "privilege—no-right" relations, multital or in rem "power-liability" relations, and multital or in rem "immunity-disability" relations. Hohfeld calls attention to the fact that besides keeping in mind that all these elements are part of the aggregate, it is also important not to confuse the different classes of jural relations with one another. Making this distinction, he says, is of utmost practical and economic significance.[69] The conception of the share in *Hohfeldian* terms provides an image of the components and structure of the share. Additionally, it points in the direction of the number of possibilities in which these elements may be connected in different and unexpected ways. This calls for a re-conceptualization of property rights.

## IV. A NEW CONCEPTUALIZATION OF PROPERTY RIGHTS: TO WHAT EXTENT CAN THE SILVER FOX BE TAMED?

Property rights in shares are hybrid property rights.[70] This is so because they have a mixed origin or composition for the most part due to the different contractual structures of the operating agreements where shares are defined, and due to their doctrinal and legal conceptualization. They have a mixed composition because, on one hand, their holder owns a fundamental right or claim against persons in general (*right in rem*). However, on the other hand, especially when the transfer of shares is subject to restrictions, their holder seems to rather own a fundamental

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31 J. LEGAL STUD. 453, 454 (2002) (focusing, among other things, on what he names the "compositional dimension of property rights"); *see also* Armen Alchian, *Some Economics of Property Rights*, 30 IL POLITICO 816 (1965) (explaining that property rights are the rights of individuals to use resources). In corporate law literature: *see* HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE (1996) (analyzing different structures of ownership across firms and industries; in this case, property rights are subject to organizational law); *see also* Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. S373 (2002) (arguing that organizational law is functionally property law). In intellectual property rights law, the problems with intangible property echo the discussion about shares of companies. In this area, the problems of intangibility have largely been considered in light of digital copyrighted works. *See, e.g.*, L. BENTLY & B. SHERMAN, INTELLECTUAL PROPERTY LAW (2d ed. 2004).

69. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 *(*1913) (presenting a scheme of what he called "jural relations" by which he analyses these jural relations and provides eight individual jural conceptions) [hereinafter Hohfeld, 1913]; *see also* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) (discussing certain important classifications that are applicable to each of the eight individual jural conceptions; he mainly discusses in this article relations in personam ("paucital" relations) and relations in rem ("multital" relations)).

70. *See* MICHELER, *supra* note 35, at 35 (arguing that property rights in shares are hybrid, and questioning whether they can accurately be called property rights).

right or claim against a single or group of persons (*right in personam*).[71] This definition challenges the Roman law concept of ownership (*dominium*) because it appears that the share is not absolutely owned by the member if restrictions are foreseen in the company's operating agreement. Moreover, the requirement of consent *lato sensu* established in the default rules provided by legislatures demonstrates that restrictions on transfers of property rights are not at all subject to a *numerus clausus*.[72] The idea of hybrid property rights in shares bends the extraordinarily individualistic view of property rights particularly in the jurisdictions that are part of the French legal family. There is this view in comparative law that the civil law is inherently against "divided" or "mixed" property rights because of the antagonism toward feudalism embodied in the civil code following the French revolution. This is an experience common law did not go through.[73] In this respect, the legal solutions in United Kingdom and United States are different, and less

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71. *See* Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, *supra* note 69, at 718.

72. The Italian legislature adopted a principle of free transferability of shares. Section 603(a) of the New York Limited Liability Company Law and section 18-702 of the Delaware Limited Liability Company Act determine that, except as provided in the operating agreement, a membership interest is assignable in whole or in part. Nevertheless, management rights are not transferred, and their exercise by the transferee depends upon the consent of all the members of the limited liability company.

*See* Andrea Fusaro, *The Numerus Clausus of Property Rights*, *in* 1 MODERN STUDIES IN PROPERTY LAW 309 (Elizabeth Cooke ed., 2001) (arguing that a convergence of common and civil law systems toward the notion of *numerus clausus* is apparent; furthermore, the author claims that adopting a more flexible concept of ownership is better than creating new property rights); *see also* Hansmann & Kraakman, *supra* note 68, at S399-S400. The authors explain that the *numerus clausus* doctrine operates in common law at the category level. It appears the same is true of civil law countries. In their words, "The civil law's *numerus clausus*, after all, limits only the categories of property rights that can be created and not the content of specific rights within those categories." However, they point out that this doctrine is perceived in a less formalistic way in common law where the creation of other types of property rights is not prohibited. "Rather, property rights that fall outside the standard categories are simply governed by highly unaccommodating verification rules that place a heavy burden on the holder of the right to provide notice to third parties."

73. *See* Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: a Comparative Legal and Economic Analysis*, 5 N.Y.U. L. Rev. 434 (1998). The authors explain that

> During the French revolution, divided property rights came to be considered characteristic of feudalism. Consequently, it was thought that the number of restricted property rights had to be strictly controlled and limited. The *numerus clausus* theory was developed, stating that divided interests in property must be strictly confined to a small number of well-defined types, such as servitudes on real property, mortgages, and usufructs. Although this theory was largely the product of the folklore and ideology of the French revolution and lacked a well-articulated general rationale, it enjoyed tremendous success and continues to have a strong influence on the civil law.

This is not true of the Austrian civil code, for example. It used to have provisions for feudalist tenancy that were in use until 1848.

categorically corseted. The law of the United Kingdom either through equity, a dual system of courts, and the use of trusts, or the law of United States through the partition of property rights in shares into management rights and economic rights, are more likely to accommodate new forms of transacting property rights. Furthermore, defining property rights in shares as hybrid property rights fundamentally changes the conception of contract law as requiring an object (a corporeal "thing") so that the contract can be typified.

In Portugal, Pires de Lima and Antunes Varela have argued that the transfer of copyright and intellectual property rights raises problems like those involving the assignment of credits. They, however, do not go as far as making any reference to shares in their argument.[74] The comparison of shares of the Spanish SRL to credits is boldly made by Perdices Huetos. He says that the requirement of consent of the company (*clausula de autorizacion*) affects the capacity members have to dispose of their shares. He defines shares as a patrimonial subjective right which, by its nature, is liable to be transacted in the market. He understands, however, that restrictions such as the consent of the company change the configuration of property rights. In his view, there are two ways of doing this. It can be done either by considering that members, when they included restrictions into the company's articles, they entered into a *pactum de non cedendo* with *erga omnes* effects, or they established prohibitions to transfers of property rights. Perdices Huetos, additionally, defines share as a contractual position. For him, transfers of shares are transfers of contractual positions. The fact that this contractual position (in the company) represented by the share encapsulates rights and duties in the company turns it into a subjective right that can be transacted. This is how he reconciles the two definitions of share. Hence, the consent of the company, as it is construed by this author, is a technical expression of the consent of the party to the company's articles of association that are to be assigned. This consent is external to the sales contract, but it hinders the transfer. The consent

74. *See* PIRES DE LIMA & ANTUNES VARELA, I CÓDIGO CIVIL ANOTADO 603 (4th ed. 1987) (commenting article 588 of the Portuguese Civil Code, which regulates the application of the rules of assignment of credits to other institutes). There is a similar rule in German law, which for the most part has served as an inspiration to Portuguese legal doctrine. Section 413 of the BGB provides that "Die Vorschriften über die Übertragung von Forderungen finden auf die Übertragung anderer Rechte entsprechende Anwendung, soweit nicht das Gesetz ein anderes vorschreibt" ("The rules of assignment of claims shall apply to other transfer of rights, unless the law provides it differently"). The same can be said of the French law. Article1689 and following of the French Civil Code equate incorporeal rights with credit rights.

complements the transferor's right to dispose of her share.[75] Perdices Huetos justifies his argument with article 1526 of the Spanish Civil Code and article 120(1) of the *Ley de Sociedades de Capital,* which compares the transfer of credit rights to the transfer of shares and other intangible rights.[76] His doctrinal construction owes much to the influence of the Roman law tradition in Spanish contract and property laws. He also is clearly inspired by the separation principle (*Trennungsprinzip*), which Roman law also had (the distinction between *titulus* and *modus*),[77] and by the abstraction principle (*Abstraktionsprinzip*), which is widely accepted by German legal doctrine, but did not exist in Roman law. Still, he finds that when everything else has been taken into consideration it is irrelevant to label restrictions on transfers as *pacta de non cedendo* or prohibitions to transfer of property rights. This is so because both techniques "create a diaphragm between the right and its owner that prevents or grants to another person the faculty of disposition which otherwise would be his."[78]

Shares as object of hybrid property rights fit into a broad concept of *thing* as more than just the representation of a contractual position. The share is a legal configuration of a complex aggregate of rights (claims), which encompasses a bundle of management and economic rights involving the position their owner holds in the company according to the articles of association or operating agreement, and which includes a number of rights, privileges, powers, and immunities as well as their

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75. *See* HUETOS, *supra* note 5, at 50, 51 (saying about the consent clause that "dicha cláusula configura el supuesto de hecho transmisivo del derecho, y por tanto, toda transmisión negocial queda afectada por el defecto de capacidad de disposición que determina en el transmitente la falta de consentimiento del beneficiario de la cláusula de autorización") ("This clause constitutes the condition of the factual transmission of the right and, therefore, the entire sales contract is affected by the incapacity of the transferor to dispose as a result of the lack of consent of the beneficiary of the authorization clause"). Moreover, this construction provided by Perdices Huetos brings to mind some forms of factoring wherein credits are not conveyed.

76. Article 1526 of the Spanish Civil Code provides that "La cesión de un crédito, derecho o acción no surtirá efecto contra tercero sino desde que su fecha deba tenerse por cierta en conformidad a los artículos 1218 y 1227. Si se refiriere a un inmueble, desde la fecha de su inscripción en el Registro." ("The assignment of a credit, right or claim has no effect on a third party but from the moment it is publicized according to articles 1218 and 1227. If it [the assignment] refers to real estate, [it has an effect on third parties] from the date of its registration in the Registry.") Article 120(1) of the *Ley de Sociedades de Capital* establishes that "Mientras no se hayan impreso y entregado los títulos, la transmisión de acciones procederá de acuerdo con las normas sobre la cesión de créditos y demás derechos incorporales." ("Pending the print and delivery of the titles, the transfer of shares will proceed in accordance with the rules on the assignment of credits and other intangible rights.").

77. Savigny apparently claimed to have derived the abstraction principle from Roman law.

78. *See* HUETOS, *supra* note 5, at 41 ("un diafragma entre el derecho y su titular que impide o somete a outro la faculdad de disposición que de outro modo le correspondería").

correlative duties, no-rights, liabilities, and disabilities.[79] Unlike assets subject to "standard" property rights, which provide their owners with rights to take certain actions and prevent "the rest of the world" from taking actions involving those assets (*rights of exclusion*),[80] the share is subject to hybrid or "divided" property rights due to its complex nature.[81]

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79. *See* Hohfeld, 1913, *supra* note 69.

Normatively, I am treating contractual rights arising from the company's articles or operating agreements as property rights, especially if harm is done to non-transferring shareholders and to the company as a result of the execution of the un-consented transfer of shares. This echoes the discussion on the enforcement of contractual rights against third parties. *See* STEPHEN A. SMITH, ATIYAH'S INTRODUCTION TO THE LAW OF CONTRACT 369 (2006). The authors explain that

> an act that makes it impossible or more costly for a contracting party to perform a contract or which diminishes the benefit of a contract does not qualify as the tort of inducing a breach of contract, even if it done carelessly. This does not mean that the general tort of negligence could not in theory be extended to cover claims where the only loss suffered arises from some harm to the claimant's contract with a third party. Contractual rights could be treated, for the purpose of such claims, like ordinary property rights. But . . . claims for "pure economic loss" (of which this is a clear example) are not permitted under English law. As a general rule, the only way in which harm to contractual rights can form the basis for a claim in negligence for damages is where this harm has arisen from a loss or injury to the claimant's person or property.

80. *See* Hansmann & Kraakman, *supra* note 68, at S373-S420. The authors define property rights as claims on assets that can be enforceable against subsequent transferees of rights in the asset. For them, property rights run with the asset. They focus on voluntary transfers and, therefore, dissociate themselves from the 'good against all world' criteria. Unlike their take on property rights, this criterion focuses on tortuous interference. *See* Kenneth Campbell, *On the General Nature of Property Rights*, 3 K.C.L.J., 79, 97 (1992). The author presents a theory of the nature of ownership. Campbell rejects the "bundle theory" to explain the concept of ownership. He advances his own understanding of the concept. Campbell presents an account of ownership that says nothing about the content of the rights in question. In his words at 94, "Provided it is a property right and that it is not dominated by any greater right of the same content, it is a right of ownership." *See also Property,* BLACK'S LAW DICTIONARY 1252-53 (8th ed. 2004) ("The right to possess, use, and enjoy a determine thing (either a tract of land or a chattel); the right of ownership <the institution of private property is protected from undue governmental interference>. —Also termed *bundle of rights*").

81. An interesting example is provided by article 12 of the articles of association of the company Maximat Proprete Service, Sarl that I analyzed while creating a sample of French companies to support this study. I highlight the clause in the company's articles entitled "Droits et obligations attachés aux parts sociales" (Rights and Duties Attached to Shares). It said that

> Chaque part sociale confère a son proprietaire un droit égal dans les bénéfices de la Société, dans la propriété de l'actif social et dans le boni de liquidation. Elle donne également droit à une voix dans tous les votes et déliberations. Les associés ne sont tenus à l'égard des tiers qu'à concurrence du montant de leur apport. Toutefois ils sont solidairement responsables, à l'égard des tiers, pendant cinq ans, de la valeur attribuée aux apports en nature lors de la constituition de la Société, lorsqu'il n'y a pas eu de commissaire aux apports ou lorsque la valeur retenue est différente de celle propose par le commissaire aux apports . . . .
>
> (Each share entitles its owner to equal rights in the profits and assets of the company and the liquidation. It also attributes the right to one vote in all resolutions and deliberations. Shareholders are only liable toward third parties in respect to their

Three implications derive from this statement. First, shares are objects subject to property rights because they can be owned. Second, restrictions on their transfers deviate from a principle of *numerus clausus* in property law because they imprint a new configuration of property rights in their physiognomy and morphology. This challenges the closed catalog of forms of property ownership, which includes interests in personal property like shares. (The whole idea of hybrid property rights, which is directly linked to the molecular structure of the share, is not subject to a principle of *numerus clausus*). Third, shares are morphologically positioned between property and credit rights, and this is evidenced by the effects of the un-consented transfer and the perception legislatures have on transfer of shares. Case law suggests that the Portuguese, Spanish, Italian, French, United Kingdom, and United States legislatures as well as courts perceive rules about transfer of shares—legal and conventional defaults—as some sort of property rules.[82] In other words, not only property rights in shares cannot be sold without the shareholder abiding by the restrictions established in the contract, but also, in principle, propriety rights of the shareholder in the share cannot be taken without his or her consent. In relation to the case-law, actions are mostly taken by the company, managers, and other members to invalidate the transfer or to prevent it. On the other hand, the transferor takes actions to be able to transfer. Damages and other sort of compensations may be asked for, but they are not the essence of the disputes. Shareholders' entitlements are not, therefore, especially protected by liability rules or inalienability rules. The legal perception of transfer of shares adopted by legislatures and courts in the jurisdictions referred to above does not make shares inalienable, as it would if parties to the company's contract had entered into a *pactum de non cedendo* by including a clause prohibiting the transfer *tout court*. The transfer of

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> contributions. Nonetheless, for five years they may be jointly and severally liable toward third parties for the value assigned to in-kind contributions upon the incorporation of the company provided that there was not an auditor or the value assigned to the shares is different from the one proposed by the auditor . . . .)

This is an example that shows how rights, benefits, and liabilities can comprise the structure of a share.

82. *See* Vicente, *supra* note 47. I refer to "some sort of property rules" in the text because entitlements allocated in the private limited liability company may be protected by property rules and by reverse property rules when pre-emption rights are given to non-transferring shareholders and the company. This would correspond to the mysterious rule 4 discussed by Calabresi and Melamed. Furthermore, this does not prevent property rules be combined with liability rules. *See* GUIDO CALABRESI & DOUGLAS A. MELAMED, 85 PROPERTY RULES, LIABILITY RULES, AND INALIENABILITY: ONE VIEW OF THE CATHEDRAL 1089, 1093 (1972) (presenting their entitlements model).

property rights in shares is restricted by contractual limitations included in the contract of the company, i.e., a *pactum de non alienando*. As a result of this contractual limitation, transferees are likely to acquire empty property rights because they are not entitled to exercise the rights the transferor can exercise in the company vis-a-vis the company itself, other members, and other corporate constituencies.

The effects of property rules adopted by legislatures to protect the entitlements of shareholders in the company combined with the hybridity of rights shareholders hold in the share (which stands for their own position and no one else's in that company), the consensual principle reigning in Portugal, France, and Italy, the rules of equity applicable to un-consented transfer in the United Kingdom, and the not-so-clear-cut definition of property rights in units of American LLCs and Spanish SRLs, demonstrate the complexity of the system of property rights and transfer of ownership in PLLCs. Besides, all the above-mentioned considerations suggest that further research is needed to understand whether property rules are the best form to protect shareholders' rights and how they can do so in the most efficient way. This means exploring the possibility of legislatures to continue choosing rules that establish the consent of certain corporate constituencies (not necessarily the shareholders) for the transfer.[83] In addition, the idea of introducing qualifying elements to these rules that are able to mitigate the problems arising from the un-consented transfer should be contemplated. These elements could be the introduction of a time limit for the validity of restrictions on transfers introduced in the company's articles. After that time limit, the decision to maintain those restrictions should be revisited by the shareholders. The merits of dissolution at will to overcome problems of combining action, asymmetries of information, and a prevailing status quo in the company can be explored.[84] This is a possible way of tipping balance in companies: indeed, as a way to champion a

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83. Liability rules allowing the transfer against compensation, or even inalienability rules may be also perceived as better choices on this regard. It will all depend on the policy choices made by legislatures.

84. *See* Frank H. Easterbrook & Daniel R. Fischel, *Close Corporations and Agency Costs*, 38 STAN. L. REV. 271, 288, 289 (1986). The authors say that "some commentators, sympathetic to the potential plight of minority shareholders, have advocated relaxing the standards for involuntary dissolution and allowing a minority shareholder to obtain dissolution whenever his 'reasonable expectations' have been frustrated." They, however, argue that this assumption as well as the creation of an automatic buy-out defended by some was inaccurate. For them there are other alternatives such as suits for the breach of fiduciary duties, the appointment of a custodian or provisional director, and in case the latter remedies did not work, there was still the possibility of bargaining for more protection.

new kind of collectivity.[85] A third possibility with somewhat broader policy implications is to investigate the benefits of promoting jurisdictional competition for the creation of a law market based on the offer and demand of new and better rules. These rules should be capable of protecting shareholders' property rights and of nudging shareholders and potential investors to invest in the company.[86]

Finally, the conceptualization of property rights I present here hints at the possibility of an alternative system of transfer of property rights in shares. For instance, the execution of such transfer by an abstract act can be sketched, following the consecration of a principle of separation of contracts in jurisdictions where the consensual principle prevails. Consent of the company would be as necessary for the effectiveness of the transfer as the performance with reference to (physical) delivery is in Spanish, Austrian, German, U.K. and U.S. laws. The comparative bottom line is the following. In consensualism countries (e.g., France) third parties can claim the lack of consent voids the contract as a whole, whilst in separation countries (e.g., Germany) the lack of consent would only void the transfer.[87] Defining the best solution will depend on which one causes a Pareto improvement. In other words, it will depend on the solution that constitutes the best response to any feasible contractual choices. In fact, the consensual principle is more residual than often pictured.[88] There still is space for new configurations of classic institutions of civil law in light of corporate law. This is how tamed the fox can be.[89]

## V. CONCLUSIONS

Operating agreements of LLCs, and more generally speaking articles of association of PLLCs, frequently entail problems of interpretation, of combining action, asymmetries of information,

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85. *See* MARCEL MAUSS, THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES (2002) (arguing that there are no gifts; gifts create a social bond that forces the receiver to reciprocate). By referring to a new kind of collectivity, I am thinking of a social environment in the company where corporate constituencies feel compelled to reciprocate.

86. *See* Larry E. Ribstein & Bruce H. Kobayashi, *Delaware for Small Fry: Jurisdictional Competition for Limited Liability Companies*, 2011 U. ILL. L. REV. 91 (2011); *see also* ERIN O' HARA A. & E. LARRY RIBSTEIN, THE LAW MARKET (2009).

87. *See* Reichert & Weller, *in* MÜNCHENER KOMMENTAR ZUM GMBHG § 15 Rz 362 (C.H. Beck ed., 3d ed. 2018).

88. For a comparative analysis, see Vicente, *supra* note 47.

89. For the analogy between the unintended consequences of legal solutions and the effects of the taming process of the silver fox, see Vicente, *supra* note 4.

strategic behavior and bargaining failures in those companies.[90] This is another situation that can be aligned with others stressed in the literature in which the mere assumption of zero transaction costs of the recurrently labeled Coase Theorem does not apply. This premise, or "parable" as some have called it,[91] holds that if there are no transaction costs, parties are able to bargain in order to satisfactorily accommodate their interests. In these circumstances, legal entitlements end up being, in fact, irrelevant to the achievement of efficient solutions.[92] Reality, however, has been recounting a different story. There are transaction costs that impede Coasean bargaining. Because of these transaction costs, parties are unable to reach efficiency-improving solutions that help them maximize their benefits with the least costs. My case shows that shareholders' property rights in these companies are often weak in the sense that they are frequently put in doubt as a result of the transfer system.[93] Moreover, it is apparent that there is an imbalance between the allocation of property rights in shares and the way that they are protected. Several cases show that restrictions on transfer of shares were not conceived to be part of the SSPA.[94] However, the un-consented transfer determines that rights that are assigned, if the sales contract is not invalid, are empty property rights. (They will continue to be empty as long as consent *stricto sensu* is not obtained or the transferee does not hold priority rights against the members of the company, in whose benefit the requirement to obtain consent *lato* and *stricto sensu* was established).

Given the above, I submit that, in general, restrictions on transfers, when introduced in the operating agreements, assume the nature of

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90. I reckon this statement is somewhat tautological because there would be no bargaining failures if there was no case law. I am trying to stress, however, that this phenomenon is rather curious considering the freedom parties enjoy to get the best contractual outcome for themselves.

91. *See* Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 625 (1986).

92. *See* R.H. Coase, *The Problem of Social Cost,* 3 J.L. & ECON. 1 (1960); Michael J. Whincop, *Painting the Corporate Cathedral: The Protection of Entitlements in Corporate Law*, 19 OXF. J. LEG. STUD. 21 (1999); Ellickson, *supra* note 91.

93. *See* Antonio Nicita & Matteo Rizzolli, *Hold-Up and Externality: The Firm as a Nexus of Incomplete Rights?*, 59 INT. REV. L. & ECON. 157 (2012). The authors note that the reference to incomplete property rights is missing in the Coasean theorem. In their words, when costs of defining ex-ante a system of complete property rights are prohibitive, then externalities do emerge as reciprocal claims over rival uses. When property rights are well defined, but ex-post transaction costs over the exchange of those rights are prohibitive, then the externality is depicted as the social waste of having a sub-optimal Paretian allocation. In this respect, they say, the notion of externality would coincide with that of an inefficient market configuration.

94. This will obviously depend on the purpose legislators and shareholders wanted to accomplish when they established those restrictions. It will also depend on the structure of the articles of association and any other side agreements shareholders might have entered into.

contractual limitations on the transfer of property rights (*pacta de non alienando*). This type of agreement does not have an *erga omnes* effect as commentators attribute it to a *pactum de non cedendo*.[95] A different understanding has been conveyed in respect to the restrictions on transfer of shares of the Spanish SRL. Commentators have described the clause providing for such restriction as a *pactum de non cedendo*. The transferability of shares is one of the most important features of the company.[96] Thus, I do not construe transfer restrictions as total bans or prohibitions on transfer of property rights in shares. Sometimes, however, operating agreements are drafted to include "prohibitions" on transfers.[97] Even when they are not drafted in that manner, the terms in which the transfer clause is supposed to operate renders any attempt to transfer shares extremely cumbersome and almost equivalent to a prohibition. Still, by including a transfer clause in the operating agreements providing restrictions on transfers, shareholders agree not to transfer their property rights in the shares. This agreement, however, is frequently ineffective not only because it does not deter shareholders from selling, but also because it does not prevent property rights or beneficial interests in the share from being transferred to a third party.[98]

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95. *See* Fritz Raber, *The Contractual Prohibition of Assignment in Austrian Law*, 64 NOTRE DAME L. REV. 171 (1989). The author refers to the pactum de non alienando as a "contractual prohibition of sale and emcumbrance," or a "contractual prohibition of alienation." I think this is the case because he compares pactum de non cedendo to a pactum de non alienando. Furthermore, he considers that both types of agreements may be read in light of article 364c of the General Civil Code of Austria. This provision establishes a contractual or testamentary prohibition to sell or encumber a thing or a real right, which has effects toward third parties only if it is recorded in a public register. The idea I offered in the text about the *erga omnes* effects of the *pactum de non cedendo* makes sense in Austria given that there is this understanding that property law is supposed to provide some type of signaling for third parties. Furthermore, following the *Zessionsrechtsänderungs-Gesetz* of 2005, in Austria a *pactum de non cedendo* only has relative effects.

96. Henry Hansmann & Reinier Kraakman, *What Is Corporate Law?*, *in* KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 1, 19, in particular 10, 11 (2004) (considering transferable shares together with legal personality, limited liability, delegated management under a board structure, and investor ownership basic legal characteristics of the business corporation).

97. *See, e.g.*, Holt and Others v. Inland Revenue Commissioners, [1953] 2 All ER 1499, [1953] 1 WLR 1488, [1953] 2 Lloyd's Rep 506, 32 ATC 402, [1953] TR 373, 46 R&IT 801 (the court referring to the restrictions established by the articles of the company explained that according to those articles unfettered transfer to non-members was prohibited as long as a member or a person approved by the directors was willing to purchase the shares at the fair value to be certified).

98. *See* DAVIES, *supra* note 38, at 945-46 (arguing that "[n]otwithstanding that the transfer is not lodged for registration or registration is refused, the beneficial interest in the shares will, it seems, pass from the seller to the buyer"). The seller then becomes a trustee for the buyer and must account to him for any dividends he receives and vote in accordance with his instructions (or appoint him as his proxy).

If and when this happens, the share is not transferred in full. In the United States, the transferee is assigned economic rights that are basically the right to receive dividends and the liquidation value. In the United Kingdom, the transferee is entitled to beneficial ownership. In the other selected jurisdictions shares are not designed to have a dual structure. However, freedom of contract allows parties to draft contracts by which the transferee may be granted the economic rights that the transferor is entitled to because she still is a member of the company. The contract associating the purchaser with the company's shares (*convention de croupier* or *Unterbeteiligung*) is a case in point.[99]

The complex nature of the share and the hybridity of the property rights in it call for a reformulation of the consensual principle. On the one hand, the taming process of property rights through restrictions on transfers challenges the classical understanding of principles of property law such as the principle of *numerus clausus*, since elements of contract law, corporate law, and civil law in general are connected in surprising ways. On the other hand, it also calls for new theoretical constructions, which, all things considered, are likely to break with any manifestations of doctrinal path-dependence in respect to the potential (re)configuration of property rights and their function.

99. *See* Lécia Vicente, *Un-Consented Transfers of Shares: A Comparative Perspective*, 9 EUR. COMPANY L. 300 (2012).