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Sumário

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Shareholder agreements in publicly traded companies: a comparison between the U.S. and Brazil*

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Abstract

We know remarkably little about the use of shareholder agreements in publicly held companies. This article builds upon empirical evidence to advance the theoretical understanding in comparative law of how and why shareholders agreements are used by publicly traded firms. It also contributes to the existing literature on comparative contract design. The evidence suggests great divergence in the incidence and content of shareholder agreements in both countries. Consistent with prior studies, we find that shareholder agreements are frequent in Brazilian corporate culture, where they are used to coordinate corporate decision-making and bind directors' votes, in such a way that the best corporate governance practices are being disregarded. But while conventional wisdom suggests that U.S. public corporations do not have shareholders agreements, such understanding is inaccurate. Nevertheless, the existing agreements differ from their Brazilian counterparts in that they are usually used in order to achieve a specific corporate transaction. Many findings of this study are surprising and challenge the current thinking in terms of contract design. For example, it finds no major stylistic differences between the agreements of the two countries, which contradicts the prevailing belief that U.S. contracts are necessarily longer than those of civil-law countries. Moreover, while arbitration appears as the preferred method of dispute resolution in Brazil, U.S. parties opt for judicial dispute resolution with greater frequency, mostly in Delaware and New York courts.

Keywords: Shareholder agreement. Empirical research. Contract design and business law.

Resumo

Sabe-se pouco sobre o uso de acordos de acionistas em companhias abertas. Este artigo utiliza evidências empíricas para progredir a compreensão teórica em direito comparado sobre a razão e a maneira pelas quais acordos de acionistas são utilizadas por companhias de capital aberto. O artigo também traz contribuições à literatura existente em direito contratual. As evidências sugerem que existe uma diferença relevante em relação à existência e ao conteúdo de acordos de acionistas no Brasil e nos Es-

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tados Unidos. Coerente com estudos anteriores, descobrimos que acordos de acionistas são frequentes na cultura corporativa brasileira, em que eles são utilizados para coordenar decisões corporativas e vincular os votos dos administradores, de modo que as melhores práticas de governança corporativa muitas vezes são desconsideradas. Embora a visão convencional indique que as companhias abertas norte-americanas não possuem acordos de acionistas, tal visão é imprecisa. Não obstante, os acordos existentes no cenário norte-americano diferem daqueles utilizados por companhias brasileiras, uma vez que aqueles são normalmente utilizados para concretizar determinada operação societária. Diversas descobertas desse estudo são surpreendentes e desafiam o entendimento atual em termos de estilo contratual. Por exemplo, verificam-se poucas diferenças estilísticas entre os acordos de acionistas dos dois países, o que contradiz o entendimento prevalecente de que os contratos norte-americanos são necessariamente mais longos do que aqueles proveniente de países de *civil law*. Além disso, enquanto a arbitragem parece ser o método preferido de resolução de disputas no Brasil, os norte-americanos optam por resolver disputas no âmbito judicial com maior frequência, sobretudo nas cortes de Delaware e Nova Iorque.

Palavras-Chave: Acordos de Acionistas. Pesquisa Empírica. Direito Societário e Contratual.

1. Introduction

We know remarkably little about the use of shareholder agreements in publicly held companies. The existing corporate law literature generally focuses on shareholder agreements entered into by shareholders of privately held corporations[1]. However, such agreements are far absent in the context of listed corporations. This article shows that shareholder agreements are present in publicly traded firms of both civil law and common law countries and contributes to the enrichment of the literature on this relevant corporate tool.

A shareholder agreement is a contract that governs the relationship among shareholders through specific rights and duties not included in the articles of incorporation or bylaws of the company. It typically regulates the manner in which shareholders vote and establish restrictions on the free transferability of shares. Since shareholders agreements are generally governed by the rules of contract law, they are endowed with greater flexibility vis-à-vis other organizational documents.

This study is based on a sample of hand-collected shareholder agreements entered into by Brazilian and U.S. publicly traded firms between 2010 and 2012. It analyzes all relevant clauses of a shareholder agreement, investigating the following issues: voting agreements, provisions concerning the election of directors, restrictions on director's corporate powers, limitations on the free transferability of shares, the identity of the shareholders of the company and method of dispute resolution.

The study focused on a period of three years for two main reasons: to collect a relevant sample of documents and to deal with technical issues regarding the collection and availability of date. EDGAR's electronic database does not have a specific field for shareholder agreements, so that the author had to use the "full-text search" field to find such documents. Such a time restriction helped to limit the number of documents collected. To illustrate, in the short period of three years the author had to analyze more than 8.000 documents to collect a sample of 69 shareholder agreements. Additionally, the period of 2010 to 2012 was specifically chosen to provide a current review on this corporate instrument and Brazilian studies conducted in previous years.

This provides the best comparative analysis of shareholder agreements of public companies in different countries. The author opted to compare the U.S. and Brazil to identify similarities and differences between contrasting corporate contexts. Brazil is a jurisdiction where, according to the existing literature[2], shareholder agrrements play a key role in corporate governance. In contrast, although the U.S. is the jurisdiction with the largest equity markets and the focus of corporate gover-

1 VENTORUZZO, Marco. Why Shareholders' Agreements are not used in U.S. Listed Corporations: a Conundrum in Search of an Explanation. *Penn State Law Research Paper*, n. 42, 2013; CARVALHOSA, Modesto. *Acordo de acionistas*: homenagem a Celso Barbi Filho. São Paulo: Saraiva, 2011. EIZIRIK, Nelson. *A lei das S/A comentada*. Cidade: Editora, 2011.

2 GORGA, Érica. Changing The Paradigm Of Stock Ownership From Concentrated Towards Dispersed Ownership? Evidence From Brazil And Consequences For Emerging Countries**.** *Northwestern Journal of International Law & Business*, v. 29, p. 439-462-463, 2009; ALDRIGHI, Dante Mendes; MAZZER NETO, Roberto. Estrutura de propriedade e de controle das empresas de capital aberto no Brasil. *Revista de Economia Política*, v. 25, p. 115-132, 2005.

nance literature, U.S. shareholder agreements are mostly employed in relation to corporate transactions, addressing specific issues. In this framework, the study aims to identify and explore possible effects of shareholder agreements on the best corporate governance practices.

The results of this study challenge the conventional wisdom that shareholder agreements are not used in U.S. public corporations. Although rare, this study finds that such agreements are employed in several contexts by these companies, though mostly in connection with specific corporate transactions, such as voting agreements signed in connection with the closing of a merger agreement. Moreover, the evidence shows that Brazilian public companies commonly use shareholder agreements to provide for central issues of corporate governance, in such a way that they are truly frequent in Brazilian corporate culture.

After examining their incidence in both countries, the author explores different hypotheses to explain why in Brazil shareholder agreements are vastly used by public companies while in the United States they are not. One possible explanation is that the tradition of concentrated control in Brazilian companies has encouraged non-controlling shareholders to enter into agreements to establish (or share) corporate control. On the contrary, shareholders of U.S. public companies do not recognize the same value in shareholder agreements. This may be explained by the relatively dispersed capital structure of U.S. companies. After all, to sign an agreement, a limited group of shareholders is necessary and each of them must have a significant number of shares, in such a way that they will be able to make relevant decisions together. For example, if a shareholder owns 15% of the corporation shares, but the next largest shareholders own less than 1%, it would be inefficient for the block holder to seek an agreement with the other shareholders. Accordingly, this study compares how shareholder agreements impact the companies' control in regimes with different capital structures.

Furthermore, the two legal systems differ in their legal treatment of shareholders agreements. The article indicates that, unlike the Brazilian legal framework, which promotes the use of shareholder agreements, U.S. law deters companies from using such agreements. It also discusses other potential explanations for the different incidence of shareholder agreements in both countries.

The best corporate governance practices reflect individual and collective interests of shareholders, as well as the interests of the stakeholders of the company (as employees, customers, suppliers, creditors etc.). According to the Brazilian Institute of Corporate Governance (IBGC), corporate governance is

> The system by which organizations are managed, monitored and encouraged, involving the relationship between owners, board of directors, executive officers and control bodies. The best corporate governance practices convert principles into objective recommendations, aligning interests in order to preserve and optimize the value of the organization, facilitating access to capital and contributing to its longevity[3].

The best practices require respect for the following principles: transparency, accountability, equity and corporate responsibility[4]. The protection of minority shareholders is one of the basic conditions for an environment that fosters the best corporate governance practices, as it ensures fairness between shareholders and prevent the expropriation of rights by controlling shareholders.

In this vein, this study argues that shareholder agreements may operate in the same or in the opposite direction of the best corporate governance practices, depending on their purpose and use. Taking this into account, this study shows that U.S. agreements do not restrict rights and obligations of the shareholders and of the management as much as the Brazilian agreements. For instance, while many Brazilian companies seek to use shareholder agreements to bind the votes of corporate directors, U.S. agreements do not contain similar provisions. This is consistent with related work by Erica Gorga and Marina Gelman, which describes what they see as negative uses of shareholder agreement in Brazil. As an example, they state that shareholder agreements that create limitations to the board of directors are being used in such a way that the responsibility to act with independence and commitment in the full exercise of the Board is annulled[5]. In this sense, the study indicates

3 IBCG. *Governança Corporativa*. Available at: <http://www.ibgc.org.br/Secao.aspx?CodSecao=17>

4 IBCG. *Governança Corporativa*. Available at: <http://www.ibgc.org.br/Secao.aspx?CodSecao=17>.

5 GORGA, Érica; GELMAN, Marina. O esvaziamento crescente do conselho de administração como efeito da vinculação de seu voto a acordos de acionistas no Brasil. In: INSTITUTO BRASILEIRO GOVERNANÇA CORPORATIVA, 13, 2012, São Paulo. *Anais*... São Paulo, 2012.

that a shareholder agreement may run over corporate law and market rules obliging protection of minority shareholders and compliance with the best corporate governance practices, as equal treatment of shareholders and fulfillment of the duties of loyalty and care by the directors and officers.

Nevertheless, there is significant debate in the literature about the merits of shareholder agreements. For example, Morten Bennedsen and Daniel Wolfenzon suggest that a shareholder agreement may be beneficial for minority shareholders, when granting veto powers on certain matters that must be deliberated by the general meeting[6]. Furthermore, other studies suggest that it would be more difficult for a group of shareholders who entered into an agreement to extract private benefits of control, as opposed to one controlling shareholder[7]. In this sense, the agreement enables companies to maintain an intermediate level between a single controlling shareholder and an extremely diffuse control of capital. Consequently, it helps to reduce agency costs through management oversight by the signing shareholders and prevents the expropriation of minority shareholders' rights[8]. Thus, joint control through shareholder agreements has some promise as a mechanism to reduce private benefits of control[9].

Besides analyzing the typical rights and duties included in shareholder agreements of Brazilian and U.S. public firms and their incidence in both countries, this article will explore the contractual style of the agreements. There are theoretical discussions that claim that U.S. contracts are overly descriptive and detailed, as analyzed by Thomas Lundmark and John Langbein. The main finding of this study contradicts the current thinking on contractual style in the sense that U.S. contracts are inherently longer. It attests that there are no relevant differences between shareholder agreements of Brazil, a civil law country, and the U.S., a common law country, as they are similar in length.

The goal of this study is to document the use and content of shareholder agreements in Brazilian public companies and compare it to the U.S. context, taking into account best corporate governance practices. Based on this goal, it pursues a comparative analysis that takes into consideration quantitative and qualitative aspects of the data collected. As a result, hypotheses are proposed to explain its main findings, in such a way that the comparative literature on corporate law is not only contested, but also enriched.

This article proceeds as follows. Part II presents the empirical evidence on the use and content of shareholder agreements of public companies in the U.S. and Brazil, in light of existing corporate law scholarship and taking into account possible effects on the best corporate governance practices. Part III outlines the main features of the design of shareholder agreement in both countries. Part IV draws conclusions and calls for discussion on the use of shareholder agreements in comparative law.

2. The Use and Content of Shareholder Agreements in Brazil Compared to The U.S.

The empirical evidence collected by the author[10] demonstrates that, between 2010 and 2012, 54 publicly held Brazilian companies signed 64 shareholder agreements[11]. In the U.S., in this same period, approximately 69 shareholder agreements were signed by 65 U.S. public companies. Until December 2012, there were approximately 353 listed corporations in Brazil[12], while in

6 WOLFENZON, Daniel; BENNEDSEN, Morten. The Balance of Power in Closely Held Corporations. *Journal of Financial Economics*, v. 58, p. 113 – 139, 2000.

7 HANSMANN, Henry; PARGENDLER, Mariana; GILSON, Ronald J. Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the United States, and the European Union. *Stanford Law Review*, Stanford, v. 63, p. 475-498, 2011.

8 HANSMANN, Henry; PARGENDLER, Mariana; GILSON, Ronald J. Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the United States, and the European Union. *Stanford Law Review*, Stanford, v. 63, p. 475-498, 2011.

9 HANSMANN, Henry; PARGENDLER, Mariana; GILSON, Ronald J. Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the United States, and the European Union. *Stanford Law Review*, Stanford, v. 63, p. 475-498, 2011.

10 The study involves hand-collected data available from the shareholder agreements filed with CVM and with SEC. The author collected all Brazilian shareholder agreements signed between 2010 and 2012, considering that CVM's electronic database has a specific field indicating all existing shareholder agreements of Brazilian public companies. In relation to U.S. shareholder agreements, the author collected a sample of the agreements signed between 2010 and 2012, as EDGAR's electronic database does not have a specific field for shareholder agreements, in such a way that the author had to use the "full-text search" field to find such documents. See infra Table 1 and Table 2.

11 Of them, 39 companies were listed on a special segment of BM&FBOVESPA.

12 The World Bank, *World Development Indicators:* Stock markets,

the U.S. there were approximately 4,102 publicly held companies[13]. Illustratively, this means 1,58% of U.S. publicly companies entered into a shareholder agreement in the period analyzed, while in Brazil, in the same period, this number represents 15,29% of Brazilian public companies. Taking these numbers into account, it is possible to infer that Brazilian publicly held companies use shareholder agreements far more than the U.S listed corporations, in which such a corporate tool is not as typical.

The empirical study confirms that shareholder agreement are intensely employed in Brazil, by means of clauses that coordinate corporate decision-making, bind directors' votes and intensely limit the free transferability of shares. By contrast, in the U.S., shareholders sign an agreement in order mainly to achieve a corporate transaction, predominantly establishing rules to govern the election of directors and the transferability of shares.

Considering that shareholder agreements are commonly identified in the Brazilian context, a number of studies have analyzed the use of such instrument. Érica Gorga empirically demonstrated that since the 1990s the use of shareholder agreements has greatly increased in Brazil[14]. Similarly, a study conducted in 2001 by Dante Mendes Aldrighi and Roberto Mazzer Neto concluded that shareholder agreements are a widespread practice among Brazilian companies[15].

However, there is little American literature that addresses the theme of shareholder agreement in U.S. public companies, as noted by Marco Ventoruzzo[16]. This may be explained by the fact that, in the U.S., shareholder agreements are commonly used by closed corporations. Nevertheless, although rare, the present study proves that they are identified in publicly held companies, mainly in some specific transactions, as the entrance of an investment fund in the company.

There are different hypotheses to explain why listed companies in the U.S. employ shareholder agreements with comparatively little frequency. The first hypothesis relates to the historical predominance of dispersed ownership in U.S. public corporations. This is the classic thesis of Adolf Berle and Gardiner Means, who found that there is lack of a satisfactory number of holders with a substantial percentage of shares in U.S publicly held corporations that would be able to represent a block of control or, at least, a relevant block of common stock[17]. Most of the times, a shareholder agreement is only beneficial when there is a limited group of shareholders with a significant number of shares that will be able to take relevant decisions together. For example, if a shareholder owns 20% of the corporation shares, but the next largest shareholders own less than 1%, it would be futile or inefficient for the block holder to seek an agreement with the other shareholders[18].

Ownership dispersion is identified in the majority of U.S. public companies. In 1929, some companies already had a high level of dispersion of the capital stock, meaning that the sum of the shares of the twenty largest shareholders accounted for somewhere around 5% of the total capital stock of the company[19]. Nevertheless, there is an ongoing debate in the U.S. corporate literature that discusses the current trend toward ownership concentration in that context.

Clifford G. Holderness conducted a study that proves the existence of shareholders holding significant percentage of shares in U.S. public companies[20]. He believes that the level of ownership concentration in the U.S. is similar to that observed in other countries[21]. In a sample of 375 companies, 96% of them have block holders, that is, shareholders who have at least 5% of the company's shares[22]. Ronald J. Gilson and Jeffrey N.

2014. Available at: <http://wdi.worldbank.org/table/5.4>. (last updated June 15, 2014).

13 The World Bank**,** *World Development Indicators:* Stock markets*,* 2014. Available at: <http://wdi.worldbank.org/table/5.4>. (last updated June 15, 2014).

14 GORGA, Érica. *Direito societário atual*. Rio de Janeiro: Elsevier, 2013.

15 ALDRIGHI, Dante Mendes; MAZZER NETO, Roberto. Estrutura de propriedade e de controle das empresas de capital aberto no Brasil. *Revista de Economia Política*, v. 25, p. 115-132, 2005.

16 CLARK, Robert. *Corporate Law*. Litte, Brown, 1986.

17 BERLE Adolf A.; MEANS, Gardiner C. *The Modern Corporation and Private Property*. New Brunswick: Transaction, 1967. p. 47–65.

18 VENTORUZZO, Marco. Why Shareholders' Agreements are not used in U.S. Listed Corporations: a Conundrum in Search of an Explanation. *Penn State Law Research Paper*, n. 42, 2013.

19 BERLE, Adolf A.; MEANS, Gardiner C. *A moderna sociedade anônima e a propriedade privada*. Rio de Janeiro: Nova Cultural, 1988.

20 HOLDERNESS Clifford G. The Myth of Diffuse Ownership in the United States. *Review of Financial Studies*, v. 22, n. 4, p. 1378-1379, 2009.

21 HOLDERNESS Clifford G. The Myth of Diffuse Ownership in the United States. *Review of Financial Studies*, v. 22, n. 4, p. 1378-1379, 2009.

22 HOLDERNESS Clifford G. The Myth of Diffuse Ownership in the United States. *Review of Financial Studies*, v. 22, n. 4, p. 1378-

Gordon have also questioned the prevalence of dispersed ownership in the U.S. They state that is common to find institutional investors with a relevant number of shares in U.S. public companies[23]. They note that, in 2011, institutional investors had, approximately, 70% of the shares of the ten thousand largest public companies in the U.S.[24].

However, although a recent trend toward ownership concentration is emerging in the U.S, it is clear that this is still far from the ownership concentration identified in Brazilian companies. In most Brazilian companies, one or more shareholders share corporate control, meaning that they have, at least, 51% of the company's shares. According to Dante Mendes Aldrighi and Roberto Mazzer Neto, on average, shareholder agreements of Brazilian companies involve three members and result in a concentration of more than 80% of the voting rights[25]. This number clearly contrasts with the 5% threshold used in Holderness's study. In this sense, equity ownership of U.S. companies may, indeed, impact the use of shareholder agreements.

The second hypothesis for the low use of shareholder agreements in U.S. public companies is the fact that most minority shareholders with significant shares of the company are institutional investors. Such investors, usually, do not want to limit their freedom to sell their shares or to vote in general meetings[26]. After all, most institutional investors have fiduciary duties related to the exercise of their vote[27], in such a way that they cannot limit this right by means of a shareholder agreement.

Indeed, the evidence shows that clauses that restricted the vote of shareholders were mostly absent from the U.S. However, rules that establish the election of the directors and limit the free transferability of shares were identified. This may indicate that, for institutional investors, a shareholder agreement might work as an efficient tool to influence the governance of the company and to guarantee their investment through clauses that limit the free transferability of shares to other shareholders.

The third hypothesis is the lack of extensive cross-holdings among listed corporations[28]. Interlocking participations among major shareholders in different companies would be an incentive to use shareholder agreements, since these shareholders would enter into these agreements in such a way that one of them would have control on the voting shares of one company while the other would control the other company.

As forth hypothesis, in the U.S. there are legal rules that prevent publicly held companies from using shareholder agreements[29]. First, minority shareholders are highly protected by law, in such a way that a relevant holder of the company would face high costs to sign a shareholder agreement with a large number of small holders. Secondly, block holders are subjected to a number of rules, as the Williams Act[30]. According to this Act, the beneficial owners of 5% or more of common stock must disclose their participations, indicating also the purpose of further acquisitions of the company's shares[31]. Possibly, the members of a shareholder agreement may be considered a group for disclosure purposes. However, some investors might be unwilling to reveal their strategies of capital investing, creating a disincentive to sign of shareholder agreements.

Another example is identified in Delaware's Corporation Act, section 203, that provides that stockholders who acquire beneficial ownership of more than 15% of the stock of the company without prior approval of the board of directors turn into interested stockholders. In this sense, they cannot enter into business combinations, as mergers, with the corporation for a period of 3

1384, 2009.

23 GORDON, Jeffrey N.; GILSON, Ronald J. The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights. *Columbia Law Review*, v. 113, p. 863-866, 2013.

24 GORDON, Jeffrey N.; GILSON, Ronald J. The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights. *Columbia Law Review*, v. 113, p. 863-866, 2013.

25 ALDRIGHI, Dante Mendes; M. NETO, Roberto. Estrutura de propriedade e de controle das empresas de capital aberto no Brasil. *Revista de Economia Política*, v. 25, p. 115-132, 2005.

26 VENTORUZZO, Marco. Why Shareholders' Agreements are not used in U.S. Listed Corporations: a Conundrum in Search of an Explanation. *Penn State Law Research Paper*, n. 42, 2013.

27 GORDON, Jeffrey N.; GILSON, Ronald J. The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights. *Columbia Law Review*, v. 113, p. 863-879–881, 2013.

28 GORDON, Jeffrey N.; GILSON, Ronald J. The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights. *Columbia Law Review*, v. 113, p. 863-881, 2013.

29 VENTORUZZO, Marco. Why Shareholders' Agreements are not used in U.S. Listed Corporations: a Conundrum in Search of an Explanation. *Penn State Law Research Paper*, n. 42, 2013.

30 VENTORUZZO, Marco. Why Shareholders' Agreements are not used in U.S. Listed Corporations: a Conundrum in Search of an Explanation. *Penn State Law Research Paper*, n. 42, 2013.

31 Securities Exchange Act of 1934 (48 Stat. 881, 15 U.S.C. 78a-78kk).

years without supermajority approvals[32].

This forth hypothesis arises from Mark Roe's thesis. According to Roe, the dispersed ownership of U.S. companies is the result of political decisions motivated by the fear of concentrating economic power[33]. He believes that shareholder's activism is inhibited by legal norms[34], in such a way that if such rules did not exist, the ownership structure in the U.S. would be more concentrated and, as a result, property would not have been separated from control[35].

In this same vein, Black believes that the ownership structure in the U.S. can be explained by legal norms. He says that institutional investors are not active shareholders because they face information costs to decide which governance matters they will support, as well as to organize themselves in collective action to influence the directors of the company[36]. Black states that legal norms exacerbate this problem for hindering acquisition of a relevant number of shares, collective action of institutional investors and capability to choose directors to the Board[37]. Thus, shareholder agreements may be prevented in the context of U.S. public corporations for the reason that legal norms are not friendly to its usual purpose of collective action.

This legal landscape really differs from the one identified in Brazil, where the legal framework contributes to the signing of shareholder agreements by public companies. For example, when the Brazilian Corporation Law was changed in 2001, by Law 10.303/2001, norms related to shareholder agreement were modified to formally bind directors to such agreements[38].

Finally, the last hypothesis is that U.S. shareholders have alternatives to shareholder agreement to strengthen their positions in the company. In the U.S., controlling shareholders increasingly use dual-classes shares structures, which may be taking the place of the shareholder agreement[39]. This reason seems to be only applicable to U.S. companies, since although Brazilian corporations can create preferred shares, shareholder agreements are still used.

A. The main objectives of signing shareholders

In Brazil, the study shows that most of the agreements were signed by shareholders that aimed to constitute a block of control. The reasons for the formation of a block of control are several; as establishment of shared control, enter of a strategic shareholder in the company, organization of the family power and creation of joint ventures. In the Brazilian context, a control block is formed through the contribution of, at least, 51% of the voting shares of the company, which are necessary to the achievement of the absolute majority of the votes in the general meetings.

It was identified that in 44 Brazilian agreements (68,75% of the total analyzed) the signing shareholders have more than 50% of the ordinary capital of the company. This data may indicate a change in the ownership structure of Brazilian companies, which is becoming more dispersed. Typical shareholder agreements used to be signed between the controlling shareholder and the minority shareholders, which desired to protect their economic interest in the company. However, such agreements are now being celebrated between minority shareholders who do not dispose of the power of control of the company individually, but, by means of a shareholder agreement, acquire this power[40]. Gorga corroborates this evidence of the article. She believes that the recent tendency of dispersed capital structure of Brazilian companies favored the creation of formal coalition between the shareholders, by means of shareholder agreements that are essential to the corporate governance of the company[41].

32 DEL. CODE ANN. tit. 8, § 203 (2001).

33 ROE, Mark J. *Strong managers, weak owners*: the political roots of american corporate finance. Cambrigde: Harward Law, 1994. p. 24.

34 ROE, Mark J. *Strong managers, weak owners*: the political roots of american corporate finance. Cambrigde: Harward Law, 1994. p. 13-15.

35 ROE, Mark J. *Strong managers, weak owners*: the political roots of american corporate finance. Cambrigde: Harward Law, 1994. p. 24.

36 BLACK, Bernard S. Shareholder Activism and Corporate Governance in the United States. *The New Palgrave Dictionary of Economics and the Law,* v. 3, p. 459-475, 1998.

37 BLACK, Bernard S. Shareholder Activism and Corporate Governance in the United States. *The New Palgrave Dictionary of Economics and the Law,* v. 3, p. 459-475, 1998.

38 See Brazilian Corporation Law (Law 6.404), art. 118.

39 VENTORUZZO, Marco. Why Shareholders' Agreements are not used in U.S. Listed Corporations: a Conundrum in Search of an Explanation. *Penn State Law Research Paper*, n. 42, 2013.

40 CARVALHOSA, Modesto. *Acordo de acionistas*: homenagem a Celso Barbi Filho. São Paulo: Saraiva, 2011.

41 GORGA, Érica. Corporate Control & Governance after a Decade from "Novo Mercado": Changes in Ownership Structures and Shareholder Power in Brazil. *Yale Law & Economics Research Paper*, n. 502, 2014.

It was not possible to identify the stake of the shareholders of U.S. companies. However, the study revealed that in American agreements the parties do not establish themselves as a control block. This contrasts to what has been identified in Brazil, where the shareholders clearly state that they must be jointly considered the controlling shareholder of the company. It seems that the shareholders of a U.S. company do not have this aim of creating a block of control. Contrariwise, they are mainly motivated to have some specifics rights guaranteed, as electing a director of the company, and not to jointly act as a block.

These evidences lead to the following hypothesis: Brazil is moving towards dispersed control in public companies, which may be explained by the role assumed by Novo Mercado, a special listing segment of BM&FBOVESPA, the main stock exchange in Brazil, in which common stock overlap preferred stock and rules that protect the minority shareholders are continuously preventing a single shareholder to command the company[42]. BM&FBOVESPA has three special listing segments: Level 1, Level 2 and Novo Mercado. These segments were launched to foster the best corporate governance practices in the capital markets, since a company listed in one of these segments must comply with stricter requirements regarding corporate governance[43]. The requirements include disclosure and transparency duties (all segments), maintenance of a certain degree of free-float (all segments), unified term of two years maximum to all directors (Level 2 and Novo Mercado), presence of independent directors (Novo Mercado), voting rights granted to non-voting shareholders in some matters (Level 2) or the rule one-share-one-vote (Novo Mercado), tag-along rights (Level 1, Level 2 and Novo Mercado), obligation to hold a tender offer in some events (Level 2 and Novo Mercado) and adherence to the Market Arbitration Panel (Level 2 and Novo Mercado)[44]. Novo Mercado is considered the most rigorous segment for being the only segment that requires the one-share-one-vote rule and tag-along for all minority shareholders at the same price paid for the shares of the controlling shareholder.

Canellas and Leal analyzed the structure of propriety and control of the Brazilian companies listed at BM&FBOVESPA between 2004 and 2006[45] and also concluded that dispersed ownership has increased in Brazil, especially at Novo Mercado[46].

In this context, shareholder agreements are seen as effective mechanisms to establish control power. In the study, it is noticed that these agreements are commonly used by shareholders holding small values of shares when comparing to the percentage held by a major shareholder, which is typically 51% or more of the total stock of the company. These shareholders enter into an agreement in order to form a control block representing the majority of shares or, at least, to create a relevant group of shareholders that will make decisions together.

A shareholder agreement may be positive when it allows Brazilian companies to maintain an intermediate level of capital distribution between a single controlling shareholder and an extremely diffused control. The agreement may ensure stability to a group of shareholders that jointly hold the control of the company, preventing the creation of new coalitions and the appearance of desertions that would destabilize the control group[47]. In this sense, such corporate tool facilitates the implementation of joint control and inhibits ownership concentration by a single majority shareholder that could easily expropriate minority shareholder rights[48]. Additionally, this tool can help reduce agency costs, since the shareholders that signed the agreement may be more efficient in supervising the management of the company when compared to the supervision of a single shareholder.

42 GORGA, Érica. Changing The Paradigm Of Stock Ownership From Concentrated Towards Dispersed Ownership? Evidence From Brazil And Consequences For Emerging Countries**.** *Northwestern Journal of International Law & Business*, v. 29, p. 439-462, 2009.

43 BOVESPA. O que são segmentos de listagem. Available at: <http://www.bmfbovespa.com.br/pt-br/servicos/solucoes-para-empresas/segmentos-de-listagem/o-que-sao-segmentos-de-listagem.aspx?Idioma=pt-br>.

44 BOVESPA. O que são segmentos de listagem. Available at: <http://www.bmfbovespa.com.br/pt-br/servicos/solucoes-para-empresas/segmentos-de-listagem/o-que-sao-segmentos-de-listagem.aspx?Idioma=pt-br>.

45 LEAL, Ricardo P. C.; CANELLAS, Thiago Costa. Evolução da Estrutura de Controle das Empresas Listadas na Bovespa entre 2004 e 2006, 387 Relatórios Coppead 01, 18-19 (2009).

46 LEAL, Ricardo P. C.; CANELLAS, Thiago Costa. Evolução da Estrutura de Controle das Empresas Listadas na Bovespa entre 2004 e 2006, 387 Relatórios Coppead 01, 18-19 (2009).

47 GOMES, Armando; NOVAES, Walter. Multiple Large Shareholders in Corporate Governance 26 (February 17, 1999) (unpublished manuscript) (on file with author).

48 HANSMANN, Henry; PARGENDLER, Mariana; GILSON, Ronald J. Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the United States, and the European Union. *Stanford Law Review*, Stanford, v. 63, p. 475-498, 2011.

However, a legal problem arises when a shareholder agreement establishing a block of control leads to violations of best corporate governance practices. This takes place when the agreement removes key corporate decisions from the minority shareholders and the managers of the company. Controlling shareholders feel uncomfortable to grant powers to minority shareholders, fearing that their intrusion in the course of business will cause mismanagement and loss of control, which could negatively impact the value of the company's shares. Accordingly, ownership concentration through a shareholder agreement may create an agency problem between the largest holders and the minority shareholders as the company´s control remains with a restricted group of shareholders that is not concerned with the interests of the minority.

La Porta, Lopes-de-Silanes and Shleifer believe that the structure of propriety and control of public companies is the result of the legal protection granted to minority shareholders[49]. In such countries where minorities are legally protected and where the enforcement is effective, corporate ownership tends to be less concentrated[50].

Although the Brazilian capital market is advancing in the protection of minority rights and moving towards dispersed ownership, which can be mainly explained by the creation of special listing segments at BM&FBOVESPA, ownership in Brazil is still concentrated. Gorga has demonstrated that concentrated ownership rises in those listing segments where the rule one-share-one-vote does not exist[51]. In other words, dispersed ownership is only relevant at the Novo Mercado segment. In this sense, moving away from the Novo Mercado, the law is still insufficient in the protection of minority shareholders[52]. Such inadequate legal protection is mainly identified in the move away of the rule one-share-one-vote, which is enabled by the use of some mechanisms, as preferred shares[53].

The research leads to the conclusion that companies listed in Novo Mercado do not necessarily comply with rules concerning the protection of minority shareholders, since shareholder agreements may violate the proportionality between political power and economic rights. Although the study shows that 46% of the analyzed Brazilian companies are listed in Novo Mercado, 60% of them represent a block of control that owns more than 50% of the company's capital and 80% of them establish voting obligations that relocate the voting power between shareholders, as the previous meeting mechanism, deliberations in the general meetings that depend on the previous manifestation of specific shareholders and obligation to vote jointly in general meetings. In this sense, shareholder agreements are overriding stricter listing segment rules.

The study further analyzed who were the parties to the shareholder agreement in both countries. The shareholder that was most identified in Brazil was Brazilian legal entities (41 agreements, equivalent to 59,42%), while private individuals were identified in 37 contracts (57,81%). In the U.S., legal entities were identified in 59 agreements (85,5%) and private individuals in 36 (52,17%). Though the study brings only a sample of the shareholder agreements of public companies in both countries, the state presence in Brazilian agreements is evident. In 11 Brazilian agreements (17,18%) state presence is identified, by means of pension funds (as FUNCEF), state actors and BNDES. This may indicate the relevance of public financial support to Brazilian companies and this finding may collaborate with further studies on this matter.

B. Tight control of directors and corporate matters

The election of directors is intensely ruled by shareholder agreements in both countries, in the sense that such tool becomes relevant in the establishment of conditions to the corporate governance of the company. The study shows that 44 Brazilian agreements (68,75%) create conditions to the election of the members of the board of directors by the shareholders. In the U.S., 57 agreements (82,60%) have such clause.

Both Brazilian and American corporate law provide that shareholders must elect the directors of the com-

49 LA PORTA, Rafael; LOPES-DE-SILANES, Florencio; SHLEIFER, Andrei. Corporate Ownership Around the World. *Journal of Finance*, Cambridge, v.2, 1999.

50 ALDRIGHI, Dante Mendes; M. NETO, Roberto. Estrutura de propriedade e de controle das empresas de capital aberto no Brasil. *Revista de Economia Política*, v. 25, p. 115-132, 2005.

51 GORGA, Érica. Changing The Paradigm Of Stock Ownership From Concentrated Towards Dispersed Ownership? Evidence From Brazil And Consequences For Emerging Countries**.** *Northwestern Journal of International Law & Business*, v. 29, p. 439-463, 2009.

52 ALDRIGHI, Dante Mendes; MAZZER NETO, Roberto. Estrutura de propriedade e de controle das empresas de capital aberto no Brasil. *Revista de Economia Política*, v. 25, p. 115-132, 2005.

53 ALDRIGHI, Dante Mendes; MAZZER NETO, Roberto. Estrutura de propriedade e de controle das empresas de capital aberto no Brasil. *Revista de Economia Política*, v. 25, p. 115-132, 2005.

pany in general meetings. Thus, a shareholder agreement that seeks to regulate the director's election must have a clause that obliges the signatory shareholders to jointly exercise their vote in such general meetings. Therefore, agreements that regulate the election of directors consist in a voting agreement.

Besides establishing the election of directors, the agreements analyzed settled mandatory provisions to the board of directors. These provisions were more identified in Brazil than in the U.S. as 25 Brazilian agreements (39%) have such provisions. Particularly, 15 of them imposed the election of the executive officers of the company by the shareholders, although according to the article 142 of the Brazilian Corporate Law the officers' election is an exclusive competency of the board of directors[54]. Curiously, 13 of such 15 agreements are listed in a special segment of BM&FBOVESPA (Level 1, Level 2 and Novo Mercado). In this sense, not only corporate law is being infringed, but also market rules that demand the independence of directors.

Gorga and Gelman studied the rise of Brazilian shareholder agreements that restrict directors' vote through the so called "umbrella clauses". Such clauses allow the previous control of directors' decisions by the shareholders party to the agreement[55]. The article corroborates such discovery as it shows that the "previous meeting" mechanism was verified in 42 Brazilian companies (65,62%) signed between 2010 an 2012. In 25 of such agreements (39%), the previous meeting extends to the deliberations of the board of directors. This means that previously of any directors' meeting the shareholders have the power to decide how the directors elected by them will vote.

In 2007, the umbrella clauses were used by approximately 38% of the Brazilian shareholder agreements that bounded directors[56]. In 2012 this number increased, as clauses were identified in approximately 67% of the agreements[57]. This means a rise of 76% of umbrella clauses in the Brazilian context[58].

In such framework, Brazilian shareholder agreements seem to be indeed operating in the opposite direction of the best corporate governance practices. Shareholder agreements that establish limitations to the board of directors have been used as a mechanism of annulment of the duties of independence and commitment in the full exercise of the Board. This absence of independence may be even illegal when matters that must be exclusively deliberated by the directors are not an exception to umbrella clauses, as provided by art. 142 of the Brazilian Corporate Law[59]. After all, the interests of the controlling shareholders cannot be presumed to be in accordance with the corporate interest of the company itself. This situation, therefore, contrasts with the expected development of the Brazilian securities market and with the promotion of the best practices of corporate governance, as it requires independence to the board of directors.

In the U.S. agreements, such mandatory provisions towards directors were mostly not identified. Only 7 agreements (10,14%) limited Director's power, but in a less restrictive way than the one identified in Brazilian agreements. This context may be explained by two reasons. First, in the U.S., fiduciary duties of directors cannot be easily expropriated by a shareholder agreement, since they are not bounded to restrictions on their vote imposed by shareholders[60], which contrasts with paragraphs 7 and 8 of the article 118 of the Brazilian Corporate Law, which binds directors' votes to shareholder agreements[61]. Secondly, the company itself is part of American shareholder agreements, what means that obligations created towards the company end up obligating its managers. Thus, it would not be necessary to create direct obligations to the managers of the company.

In relation to corporate decisions, Brazilian voting agreements are intensely used to influence the deliberations of the general meetings and of the board of directors. The previous meeting stands out as a mechanism that restrict such decision-making bodies. As have been demonstrated above, it was used in 42 Brazilian agree-

54 Brazilian Corporation Law (Law 6.404), art. 142.

55 GORGA, Érica. *Direito societário atual.* Rio de Janeiro: Elsevier, 2013. p. 197-198.

56 GORGA, Érica. *Direito societário atual.* Rio de Janeiro: Elsevier, 2013. p. 197-198.

57 GORGA, Érica. *Direito societário atual.* Rio de Janeiro: Elsevier, 2013. p. 197-198.

58 GORGA, Érica. *Direito societário atual.* Rio de Janeiro: Elsevier, 2013. p. 197-198.

59 GORGA, Érica. *Direito societário atual.* Rio de Janeiro: Elsevier, 2013. p. 197-198.

60 Corporation Law Committee of the Association of the Bar of the City of New York, *The Enforceability and Effectiveness of Typical Shareholders Agreement Provisions,* 65 The Business Lawyer 1153, 1163 (2010).

61 Brazilian Corporation Law (Law 6.404), art. 118.

ments (65,62%) analyzed in the study. In this sense, shareholder agreements assume a central position in the corporate governance of Brazilian publicly held companies, which goes beyond the election of directors.

The wild range of deliberations subjected to the previous meeting excels. As an example, 59,5% of the previous meetings identified in Brazilian agreements occur previously of any meeting of the general meeting of shareholders and of the board of directors. By means of such clause, the shareholders party to the agreement will meet and decide not only how themselves will vote on general meetings, but also how the directors elected by them will vote on the board of directors. In this sense, not only the independence of directors is harmed, but also the corporate rule one-share-one--vote, since the previous meeting relocates the voting power between shareholders[62]. Once again we identify the legal problem associated with Brazilian shareholder agreements: they are overriding the best corporate governance practices, as the rule one-share-one-vote, the principle of equal treatment for all shareholders and the independence of directors.

Voting agreements not related to the election of directors were almost not identified in the American context. Particularly, the previous meeting mechanism was not identified. Such assessment leads to the conclusion that although voting agreements are allowed by American corporate law, they are not as explored as in Brazil.

This situation may be explained by the legal competency granted to the general meeting in U.S. companies. As an example, in the Delaware Corporation Law the right to vote of the shareholders is essentially limited to the election of directors and to the approval of amendments to the bylaws, mergers and acquisitions, sell of all assets of the company and spontaneous dissolution of the company[63]. However, only the election of directors and amendments to the bylaws do not require the prior approval of the board of directors[64]. In contrast, art. 122 of the Brazilian Corporate Law provides an extensive number of matters that must be exclusively deliberated by the shareholders of the company[65]. Also, in art. 121 of such Brazilian law it is established that the general meeting has the power to decide on all business related to the "corporate purpose" of the company[66]. Thus, the competences of the general meeting in both countries seem to be a reasonable explanation on why voting agreements are differently explored in Brazil and in the U.S.

C. Mandatory limitations to the free transferability of shares

Clauses that limit the free transferability of shares stands out in both countries, although in Brazil they are more often used. Particularly, three types of clauses excelled, which were: tag-along, right of first refusal and lock up. Such clauses are usually employed to guarantee the investment of the shareholders in the company or to prevent the sudden withdrawn of any shareholder of the company and the consequent entrance of a new shareholder that could mislead business.

The tag-along clause was used by 30 Brazilian agreements (46,87%) and by 19 U.S. agreements (27,53%). On its turn, the right of first refusal was identified in 42 agreements from Brazil (65,6%) and in 15 from the U.S. (21,73%). Finally, the lock up clause was employed by 18 Brazilian contracts (28,12%) and by 12 U.S. contracts (17,39%). Other clauses were identified in both contexts, as call, put and drag-along. However, they do not represent a relevant number in the analyzed agreements.

The use of clauses limiting the free transfer of shares indicates a concern of shareholders to maintain and stabilize their interest in the company. This finding raises the question if such clauses would be legitimate in an environment of public traded shares, mostly in the special listing segments of BM&FBOVESPA in which free-float levels are mandatory. For example, in Level 1, Level 2 and Novo Mercado companies must comply with the requirement of 25% of the its shares in free float. However, the study indicates that 33% of the analyzed companies listed in these segments have shareholder agreements signed between shareholders representing more than 75% of the company's capital, in such a may that limiting the free transferability of shares ends up preventing the fulfillment of free-float mandatory rules.

62 GORGA, Érica. Corporate Control & Governance after a Decade from "Novo Mercado": Changes in Ownership Structures and Shareholder Power in Brazil. *Yale Law & Economics Research Paper,* n. 502, 2014.

63 DEL. CODE ANN. tit. 8, §§ 109 211 (2001).

64 DEL. CODE ANN. tit. 8, §§ 109 211 (2001).

65 Brazilian Corporation Law (Law 6.404), art. 122.

66 Brazilian Corporation Law (Law 6.404), art. 121.

Moreover, in Brazil, clauses limiting the free transfer of shares may result in unpredictable conflicts. On the one hand, the lock up clause may benefit the current shareholders of the company, since it prevents sudden fluctuations in the share price. On the other hand, it ends up restricting the liquidity of shares of "locked up" shareholders, in such a way that the restriction may impact the price of the company's shares proportionally to the number of shares of the "locked up" stockholders, as illiquidity usually affect stock prices.

It can also be noticed that U.S. agreements use standstill provisions. Standstill clauses intend to discourage any hostile acquisition of the company. It usually provides for previous approval of any relevant acquisition offer by the company and prevents submission and approval of offers by the shareholders. This clause was identified in 23% of the U.S. shareholder agreements. The standstill clause was only identified in U.S. shareholder agreements, which may be explained by the fact that the U.S. corporate context is more dispersed than the Brazilian context; meaning that American companies are more subjected to hostile acquisitions than Brazilian corporations, since the last usually have a controlling shareholder or block of control.

D. Contrasting views on Dispute Resolution

In Brazil, the dispute resolution method most used was arbitration. The arbitration was established in 50 agreements (78,12%), while the judiciary was identified in 14 agreements (21,88%). Such data indicates that Brazilian companies do not trust the judiciary to resolve any corporate disputes, mainly for its slowness and lack of technical expertise. In this context, arbitration appears to be a good solution, since it rapidly set a qualified body to deal with any corporate dispute. Moreover, this can be explained by that fact that many of the companies analyzed were listed in Level 2 and Novo Mercado of BM&FBOVESPA, where adherence to the Market Arbitration Panel is mandatory.

In its turn, in the U.S., the judiciary prevails. In 49 U.S. agreements (71%) the judiciary was chosen to resolve any issue that arises from the agreement. The arbitration only appeared in 5 agreements (7,25%). Thus, American shareholders seem to trust their judiciary. However, only the courts of two states were mainly selected by such shareholders, which were the courts of New York and the courts of Delaware, what may be explained by the judgments of such courts in matters of corporate law and by its technical team.

Concerning the applicable law to the contract, in Brazil, to govern obligations, the law of the country where they are constituted shall be applicable[67]. No Brazilian shareholder agreement has indicated the applicable law to the contract, because Brazilian law is automatically applied to national agreements. Particularly, in relation to shareholder's agreements, the Brazilian Corporation Law, a federal law, is the main regulatory norm and cannot be derogated by any state's law[68]. On the contrary, in the U.S., the shareholders may choose which law will be applicable to their agreement. The laws most chosen were Delaware's corporate law (55,07%) and New York's corporate law (26,08%).

The preference for the little state of Delaware may be explained by its reformist regime, which is sought by shareholders or managers who desire to guarantee a high value for the shares of their company, since the law of such state sets a higher protection to minority shareholders and contributes to global efficiency[69].

3. The Style of Shareholder Agreements

Besides analyzing the use and content of shareholder agreement, the article contributes to the examination of the design of shareholder agreements in different countries. In general, American and Brazilian agreements have the same extension. It can be even observed that they have clauses that are really similar to each other, as the definitions clause. Hence, the study proved that stylistically the agreements from both countries are not as different as usually believed.

This finding contrasts with the literature on agreements' design in comparative law. Authors believe that, in Brazil, as in most European civil law countries, contracts are less long than U.S. agreements[70]. This could be

67 Law of Introduction to the Civil Code (Decree-Law No. 4657), art. 9.

68 Brazilian Corporation Law (Law 6.404).

69 HANSMANN, Henry; PARGENDLER, Mariana; GILSON, Ronald J. Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the United States, and the European Union. *Stanford Law Review*, Stanford, v. 63, p. 475-498, 2011.

70 LUNDMARK, Thomas. Verbose Contracts. *American Journal of Comparative Law*, Michigan, v. 49, p. 121, 2001; LANGBEIM, John

explained by the predictability of civil law, which provides general rules for the signing of agreements, has a gap-filling role and guarantees specific enforcement in any dispute[71]. Taking into account these variances between civil law and common law, there are theoretical discussions that claim that U.S. contracts are overly descriptive and detailed.

Thomas Lundmark, for example, points to the following factors as responsible for the redundancy of U.S. contracts[72]: (i) limited solutions for the granting of compensatory damages in the case of breach of contract, (ii) the informal and oral tradition of common law, (iii) the jurisdictional diversity following federalism, and (iv) the preference for private arrangement of business.

The first factor pointed out by Lundmark rises from the fact that common law countries do not grant specific performance to the parties of an agreement, what obliges them to entirely rely on a legal proceeding[73]. Moreover, the second factor prevents the parties of U.S. contracts from trusting documentary evidence, since witnesses have a larger role in common law countries. On the contrary, in civil law countries, a controversy arising from an agreement would be mainly solved by documentary evidence[74]. The third factor of Lundmark refers to the federalist system of the U.S. He states that the main issue of this factor is not on the state's substantial law, but rather in the state's procedural law, which is verbose and does not even guarantee specific performance[75]. At last, the forth factor relates to the fact that American businessman do not trust the State to solve their disputes. Therefore, they prefer to over detail the agreement and guarantee dispute resolution in the private sphere[76].

John H. Langbein also states that U.S. contracts are more complex[77]. He justifies this statement by the third factor of Lundmark. Langbein says that, in the U.S., civil procedure is inefficient, because it is expensive, unpredictable and do not discourage lawsuits, unlike the European civil law systems, which are more efficient and predictable[78].

The present article questions the continued relevance of these authors' assumptions, at least in the context of shareholder agreements. The study did not find any relevant stylistic difference between shareholder agreements of Brazil and the U.S. In length, they are really similar. Also, some clauses are identically used. As an example, the definitions clause, which is a customary practice of American corporate law, is being intensely used in Brazil. The data collected indicates that 40 Brazilian agreements (62,5%) and 36 U.S. agreements (52,17%) present such clause and have more than 30 definitions. This may be explained by the increasing flow of deals between American and Brazilian companies, as well as by the globalization of Brazil's companies, which are increasingly opening offices in other countries or being listed in American stock exchanges.

4. Conclusion

This empirical and comparative study intended to investigate the use and content of shareholder agreements of Brazilian and U.S. publicly held companies in order to analyze how the Brazilian experience diverges from a different corporate context.

Initially, the article proved that public traded companies, including U.S. corporations, use shareholder agreements. Secondly, it showed that while in Brazil such corporate instrument provides for central issues of corporate governance, in the U.S. they are mostly employed in relation to corporate transactions, mainly establishing conditions to the election of directors and restrictions to the free transferability of shares. Particularly, in Brazil, the previous meeting mechanism is widely used to bind the vote of the signing shareholders and also of the directors of the company. On the contrary, in U.S. agreements, this voting restriction was not iden-

H. Comparative Civil Procedure and the Style of Complex Contracts. *American Journal of Comparative Law*, v. 35, p. 381, 1987.

71 LUNDMARK, Thomas. Verbose Contracts. *American Journal of Comparative Law*, Michigan, v. 49, p. 121-124, 2001.

72 LUNDMARK, Thomas. Verbose Contracts. *American Journal of Comparative Law*, Michigan, v. 49, p. 121-123, 2001.

73 LUNDMARK, Thomas. Verbose Contracts. *American Journal of Comparative Law*, Michigan, v. 49, p. 121-124, 2001.

74 LUNDMARK, Thomas. Verbose Contracts. *American Journal of Comparative Law*, Michigan, v. 49, p. 121-126, 2001.

75 LUNDMARK, Thomas. Verbose Contracts. *American Journal of Comparative Law*, Michigan, v. 49, p. 121-130, 2001.

76 LUNDMARK, Thomas. Verbose Contracts. *American Journal of Comparative Law*, Michigan, v. 49, p. 121-131, 2001.

77 LANGBEIM, John H. Comparative Civil Procedure and the Style of Complex Contracts. *American Journal of Comparative Law*, v. 35, p. 381-392, 1987.

78 LANGBEIM, John H. Comparative Civil Procedure and the Style of Complex Contracts. *American Journal of Comparative Law*, v. 35, p. 381-392, 1987.

tified. American voting agreements almost do not limit shareholder voting or restrict directors' duties, being essentially used to elect directors. Thirdly, the study demonstrated that Brazilian shareholders establish a block of control by means of a shareholder agreement. This may indicate a rise of dispersed ownership in Brazil's capital market. In the Brazilian context, the article leads to the conclusion that shareholder agreements are overriding the best corporate governance practices, in such a way that corporate laws are infringed, as the protection of minority shareholders and the duties of care and loyalty of directors and officers, and market rules are disrespected.

Fourthly, it evidences the preference of Brazilian shareholders for arbitration as dispute resolution method, while U.S. shareholders trust the judiciary, predominantly Delaware and New York courts.

Lastly, the article revealed that the design of shareholder agreements in both countries is really similar, since there are no relevant stylistic differences between them. This finding demystifies the belief that U.S. contracts are necessarily longer than those from civil law countries.

Beyond questioning dominant assumptions about the role of shareholder agreements in public corporations, the conclusions of this article open a space for discussing shareholder agreements in comparative law.

Appendices

Table 1: Main Aspects of Brazilian Shareholder Agreements

Company	Date of Signature	Listing Segment
ALLIS PARTICIPAÇÕES S.A.	07/02/2011	OTC Mkt.
AMIL PARTICIPACOES S.A.	26/10/2012	OTC Mkt.
AREZZO INDÚSTRIA E COMÉRCIO S.A.	06/01/2011	Novo Mercado
AREZZO INDÚSTRIA E COMÉRCIO S.A.	06/01/2011	Novo Mercado
BCO BTG PACTUAL S.A.	29/02/2012	Standard
BCO DAYCOVAL S.A.	21/11/2011	Level 2
BCO INDUSVAL S.A.	30/03/2011	Level 2
BCO INDUSVAL S.A.	07/11/2011	Level 2
BCO MERCANTIL DO BRASIL S.A.	22/10/2010	Standard
BCO PANAMERICANO S.A.	26/07/2010	Level 1
BCO PANAMERICANO S.A.	31/01/2011	Level 1
BCO PINE S.A.	09/09/2011	Level 2
BRASIL INSURANCE PARTICIPAÇÕES E ADMINISTRAÇÃO S.A	27/03/2010	Novo Mercado
BRASIL TRAVEL TURISMO E PARTICIPAÇÕES S.A.	30/04/2012	Novo Mercado
BRASKEM S.A.	08/02/2010	Level 1
CIA CELG DE PARTICIPACOES – CELGPAR	01/08/2011	Standard
CIA ENERGETICA DE MINAS GERAIS – CEMIG	01/08/2011	Level 1
COMPANHIA DE LOCAÇÃO DAS AMÉRICAS	27/02/2012	Novo Mercado
CONCESSIONARIA RIO-TERESOPOLIS S.A.	25/04/2011	OTC Mkt.
COPERSUCAR S.A.	20/06/2011	Novo Mercado
DESENVIX ENERGIAS RENOVÁVEIS S.A.	08/03/2012	Bovespa Mais
DIMED S.A.	12/01/2012	Standard
ECORODOVIAS INFRAESTRUTURA E LOGÍSTICA S.A.	22/01/2010	Novo Mercado
ECORODOVIAS INFRAESTRUTURA E LOGÍSTICA S.A.	27/12/2012	Novo Mercado
EVEN CONSTRUTORA E INCORPORADORA S.A.	06/08/2012	Novo Mercado
FRIGOL FOODS PARTICIPAÇÕES S.A.	08/03/2012	Standard
HIDROVIAS DO BRASIL S.A.	27/03/2012	Standard
HYPERMARCAS S.A.	23/06/2010	Novo Mercado
INDUSTRIAS ROMI S.A.	05/11/2012	Novo Mercado
JBS S.A.	26/01/2010	Novo Mercado
JSL S.A.	19/03/2010	Novo Mercado
KROTON EDUCACIONAL S.A.	28/09/2012	Novo Mercado

Table 1: (continued)

KROTON EDUCACIONAL S.A.	28/11/2012	Novo Mercado
MANABI S.A.	31/05/2011	Standard
MANABI S.A.	22/08/2012	Standard
MARCOPOLO S.A.	31/03/2012	Level 2
MARFRIG ALIMENTOS S.A.	05/08/2010	Novo Mercado
MARISA LOJAS S.A.	31/03/2010	Novo Mercado
MILLS ESTRUTURAS E SERVIÇOS DE ENGENHARIA S.A.	11/02/2011	Novo Mercado
MONTICIANO PARTICIPACOES S.A.	08/07/2010	OTC Mkt.
NADIR FIGUEIREDO IND E COM S.A.	31/10/2011	Standard
NET SERVICOS DE COMUNICACAO S.A.	21/12/2012	Level 2
NET SERVICOS DE COMUNICACAO S.A.	21/12/2012	Level 2
PARANA BCO S.A.	25/05/2011	Level 1
PORTOBELLO S.A.	15/04/2011	Novo Mercado
QGEP PARTICIPAÇÕES S.A.	17/01/2011	Novo Mercado

Table 1: (continued)

Company	Date of Signature	Listing Segment
QUALICORP S.A.	01/09/2010	Novo Mercado
RAIA DROGASIL S.A.	10/11/2011	Novo Mercado
RENOVA ENERGIA S.A.	19/08/2011	Level 2
RENOVA ENERGIA S.A.	06/11/2012	Level 2
SAO CARLOS EMPREEND E PARTICIPACOES S.A.	31/10/2011	Novo Mercado
SARAIVA S.A.	27/09/2011	Level 2
SPRINGER S.A.	31/07/2012	Standard
SUL 116 PARTICIPACOES S.A.	12/08/2010	OTC Mkt.
SUZANO PAPEL E CELULOSE S.A.	30/05/2011	Level1
TECHNOS S.A.	31/05/2011	Novo Mercado
ULTRAPAR PARTICIPACOES S.A.	01/04/2011	Novo Mercado
UNICASA INDÚSTRIA DE MÓVEIS S.A.	14/03/2012	Novo Mercado
UNIVERSO ONLINE S.A.	27/01/2011	Level 2
UNIVERSO ONLINE S.A.	27/01/2011	Level 2
USINAS SID DE MINAS GERAIS S.A.- USIMINAS	16/01/2012	Level 1
USINAS SID DE MINAS GERAIS S.A.- USIMINAS	18/02/2011	Level 1
VIA VAREJO S.A. (GLOBEX UTILIDADES S.A.)	01/07/2010	Standard
VIGOR ALIMENTOS S.A.	19/06/2012	Novo Mercado

Source: Own Elaboration based on electronic survey.

Table 2: Main Aspects of U.S. Shareholder Agreements

Company	Date of Signature	Listing
SCHIFF NUTRITION INTERNATIONAL, INC.	14/10/2010	NYSE
PARKWAY PROPERTIES, INC.	5/6/2012	NYSE
GREENMAN TECHNOLOGIES, INC.	30/04/2012	OTC Mkt.
KENNEDY-WILSON HOLDINGS, INC.	13/08/2010	NYSE
CHINA BCT PHARMACY GROUP, INC.	2011	OTC Mkt.
BUCYRUS INTERNATIONAL, INC.	19/02/2010	NASDAQ
ASCENT SOLAR TECHNOLOGIES, INC.	12/08/2011	NASDAQ
HCP, INC.	13/12/2010	NYSE
CTC MEDIA,INC.	20/05/2011	NASDAQ
WATSCO, INC.	27/04/2012	NYSE
TTM TECHNOLOGIES, INC.	09/04/2010	NASDAQ
CHINDEX INTERNATIONAL, INC.	14/06/2010	NASDAQ
THOMAS PROPERTIES GROUP, INC.	29/05/2012	NYSE
PEOPLE'S LIBERATION, INC.	22/02/2012	OTC Mkt.
HALCÓN RESOURCES CORPORATION	06/12/2012	NYSE
BONDS.COM GROUP, INC.	11/01/2010	OTC Mkt.
BONDS.COM GROUP, INC.	19/10/2010	OTC Mkt.
BONDS.COM GROUP, INC.	05/12/2011	OTC Mkt.
BONDS.COM GROUP, INC.	02/02/2011	OTC Mkt.
SILGAN HOLDINGS INC.	12/04/2011	NASDAQ

AMN HEALTHCARE SERVICES, INC.	28/07/2010	NYSE
INTERLINE BRANDS, INC.	07/09/2012	NYSE
DEERFIELD CAPITAL CORP	2011	NASDAQ
TEGAL CORPORATION	12/07/2012	NASDAQ
CARPENTER TECHNOLOGY CORPORATION	29/02/2012	NYSE
EXPRESS, INC.	23/04/2011	NYSE
REAL GOODS SOLAR, INC.	19/12/2011	NASDAQ
TRIUMPH GROUP, INC.	23/03/2010	NYSE

Table 2: (continued)

Company	Date of Signature	Listing
ACADIA HEALTHCARE COMPANY INC.	01/11/2011	NASDAQ
MEDIA GENERAL, INC.	24/05/2012	NYSE
RECOVERY ENERGY, INC.	23/06/2010	NASDAQ
URANIUM RESOURCES, INC.	01/03/2012	NASDAQ
TRIDENT MICROSYSTEMS, INC.	28/04/2011	OTC Mkt.
QUIKSILVER, INC.	09/08/2010	NYSE
BIOFUEL ENERGY CORP	24/09/2010	NASDAQ
APPLIED NATURAL GAS FUELS, INC.	24/03/2010	OTC Mkt.
TEXAS RARE EARTH RESOURCES CORP	21/01/2011	OTC Mkt.
GRAHAM PACKAGING COMPANY INC.	10/02/2010	NYSE
SPIRIT AIRLINES,INC.	01/06/2011	NASDAQ
WALKER& DUNLOP,INC.	20/12/2010	NYSE
WESCO AIRCRAFT HOLDINGS,INC.	27/07/2011	NYSE
BOOZ ALLEN HAMILTON HOLDING CORPORATION	08/11/2010	NYSE
ALLISON TRANSMISSION HOLDINGS, INC.	12/03/2012	NYSE
REGIONAL MANAGEMENT CORP	27/03/2012	NYSE
MIDSTATES PETROLEUM COMPANY, INC.	24/04/2012	NYSE
GSE HOLDING,INC.	15/02/2012	NYSE
MEDQUIST HOLDINGS INC.	04/02/2011	NASDAQ
SOLAR ENERTECH CORP	07/01/2010	OTC Mkt.
SMTC CORPORATION	05/01/2012	NASDAQ
HYSTER-YALE MATERIALS HANDLING, INC.	28/09/2012	NYSE
EXPEDIA, INC.	20/12/2011	NASDAQ
NACCO INDUSTRIES INC.	28/09/2012	NYSE
MANNING AND NAPIER INC.	23/12/2011	NYSE
IRONCLAD PERFORMANCE WEAR CORP	14/12/2012	OTC Mkt.
TAL INTERNATIONAL GROUP,INC.	23/03/2012	NYSE
ZIX CORPORATION	28/12/2012	NASDAQ

Table 2: (continued)

Company	Date of Signature	Listing
EXPEDIA, INC.	20/12/2011	NASDAQ
OPTIONS MEDIA GROUP HOLDINGS, INC.	16/04/2010	OTC Mkt.
BLACKROCK, INC.	15/11/2010	NYSE
TURKPOWER CORP (NOW: ZINCO DO BRASIL, INC.)	28/06/2011	OTC Mkt.
TRIPADVISOR, INC.	20/12/2011	NASDAQ
RSC HOLDINGS INC.	06/10/2011	NYSE
HIGH PLAINS GAS, INC.	18/11/2011	OTC Mkt.
WONDER AUTO TECHNOLOGY, INC.	05/10/2011	OTC Mkt.
LPL INVESTMENT HOLDINGS, INC.	23/11/2010	NASDAQ
BRAZIL FAST FOOD CORP	22/12/2010	OTC Mkt.
LUMOS NETWORKS CORP.	31/10/2011	NASDAQ
WUHAN GENERAL GROUP (CHINA), INC.	13/12/2010	OTC Mkt.
TALON INTERNATIONAL, INC.	30/07/2010	OTC Mkt.

Source: Own Elaboration based on electronic survey.

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