carneiro
de oliveira

Gyedre Carneiro de Oliveira
Érika Aguiar Carvalho

NEWSLETTER
nov 2017

_ Brazilian Supreme Court of Justice decision stipulates that the fair market value will be the criteria used for calculating the payment of the withdrawal rights

In a recent decision, the Brazilian Supreme Court of Justice (STJ) of the 3rd Region unanimously upheld the request filed by the minority shareholders of a private company ("Company") to adopt the fair market value criterion for purposes of calculating the redemption value of its shares, due to the exercise of withdrawal rights as a result of the merger of the Company by its parent company.

In this case, an extraordinary general meeting of the Company was held to deliberate on its merger by its parent company. In order to implement the merger, five valuation reports were prepared based on three different criteria: (i) the fair market value; (ii) the net worth at market value; and (iii) the net equity.

Among the evaluations carried out, the most advantageous criterion was adopted for purposes of replacing shares of the acquire company by the controlling shareholder, ie, the fair market value.

Nevertheless, for the calculation of the reimbursement value for the minority shareholders that exercised their withdrawal rights, it was used the net worth value criterion, as set forth in article 45 of Law 6,404 / 76. It turns out that, in this case, this evaluation criterion was evidently the most unfavorable one, since it did not reflect the real value of the shares if compared to the fair market value criterion, which was about three times higher.

In reviewing the case, the reporting justice explained that, in the absence of any provision in the company's bylaws, the legislator defined the net worth value as the minimum value for the reimbursement amount. However, if this criterion proves to be inadequate for the purposes of measuring the value of company's shares - not representing their real value - another more advantageous valuation criterion must be adopted in order to preserve the rights of minority shareholders.

THEREFORE, STJ RULED THAT, WHENEVER POSSIBLE, THE REIMBURSEMENT VALUE TO BE PAID TO THE SHAREHOLDERS WHO EXERCISED THEIR WITHDRAWAL RIGHTS SHALL CORRESPOND TO THE REAL VALUE OF THE SHAREHOLDERS' EQUITY, IN ORDER TO SAFEGUARD THE MINORITY`S RIGHTS SET FORTH IN THE APPLICABLE LAW. FOR THAT REASON, IT WAS RECOGNIZED THAT THE MINORITY SHAREHOLDERS ARE ENTITLED TO RECEIVE THE DIFFERENCE BETWEEN THE AMOUNT PAID TO THEM UPON THE EXERCISE OF THE WITHDRAWAL RIGHT (CALCULATED BASED ON THE NET EQUITY) AND THE VALUE EFFECTLY DUE (FAIR VALUE PRICE).

STJ DECISION CAN BE ACCESSED IN PORTUGUESE IN THE LINK BELOW:

https://ww2.stj.jus.br/processo/revista/inteiroteor/?num_registro=201502359885&dt_publicacao=20/09/2017

rua dr. renato paes de barros 750 12º andar itaim bibi
são paulo sp brasil cep 04530-001 tel 5511 5171 8900
www.cdoadv.com.br

carneiro
de oliveira

_ B3 releases the new version of Novo Mercado's Listing Regulation

Following approval of the new version of the Novo Mercado Listing Rules ("New Regulation") by the Securities and Exchange Commission of Brazil ("CVM"), on September 5, 2017, B3 S.A. - Brasil, Bolsa, Balcão (Brazilian Stock Exchange) approved and published, on October 3, 2017, Circular Letter 618/2017-DRE, which includes the final version of the New Regulation, as well as the general guidelines on the deadlines and measures for adaptation to the new rules by the companies listed in the Novo Mercado.

The New Regulation will come into force on January 2, 2018. Thus, companies that are already listed at Novo Mercado or that file the request for listing at this special trading segment until December 28, 2017 have different deadlines for adaptation to the new rules.

From that date onwards, companies willing to join Novo Mercado will be required to fully comply with the provisions of the New Regulation without any adjustment period.

Circular Letter 618/2017 – DRE and the new Novo Mercado Listing Regulation can be accessed in the link below:
http://www.bmfbovespa.com.br/en_us/listing/equities/listing-segments/novo-mercado/

_ Brazilian Supreme Court of Justice allows exclusion of majority shareholder by

In a recent decision, the Brazilian Supreme Court of Justice (STJ) of the 3rd Region unanimously upheld the decision to exclude a majority shareholder from a family owned limited liability company in the real estate sector ("Company") which, pursuant to the files, engaged on unfair competition against the Company.

In this decision, STJ analyzed the request for exclusion of the majority shareholder and manager of the Company filled by the two nephews - minority shareholders – who, after their father's death, became the owners of 48.26% of the Company, arguing that the majority partner had no intention on being a part of the Company and was engaging in unfair competition through another real estate company founded by him even before the death of their father.

Regarding the latter argument, the nephews claimed that there were evidence that the Company's employees were instructed to recommend the services provided by their uncle's real estate company to the Company's customers.

On the other hand, the uncle argued in his defense that the two real estate companies had different corporate purposes, one being focused on real estate leasing and the other focused on buying and selling real estate, and that, therefore, the partners had agreed on the existence of the two companies.

The Court of Justice of Minas Gerais (TJMG) upheld the nephews' request and held the exclusion of the majority partner from the Company's corporate structure, with the consequent reduction of the share capital corresponding to the shares of the excluded partner.

In disagreement with the decision, the majority shareholder filed a special appeal, whereby he claimed that the exclusion of a partner for serious misconduct (art.1.080 of the Civil Code) must be resolved by a majority of more than half of the total share capital, pursuant to article 1.085 of the Brazilian Civil Code.

WHEN ANALYZING THE CLAIM, THE REPORTING JUSTICE STATED THAT THE APPLICABLE LEGISLATION ALLOWS THE EXCLUSION OF THE MAJORITY SHAREHOLDER WHO COMMITTED SERIOUS MISCONDUCT AGAINST THE COMPANY, THROUGH THE INITIATIVE OF THE MINORITY SHAREHOLDERS, BY A JUDICIAL PROCEEDING, PROVIDED THAT SAID MISCONDUCT IS DULY PROVEN.

With this regard, the Reporting Justice stated that "(...) article 1,085 of the Civil Code of 2002 does not apply to the exclusion, by means of a judicial procedure, of a partner due to the practice of serious misconduct and it is only applicable in the event of an extrajudicial exclusion of a shareholder, which requires the approval by more than half of the voting shares, by means of an amendment to the articles of association ".

Therefore, STJ ruled for the exclusion of the majority and managing partner based on the lack of afecttio societatis and the practice of unfair competition.

STJ DECISION CAN BE ACCESSED IN PORTUGUESE IN THE LINK BELOW:

http://www.stj.jus.br/sites/STJ/default/pt_BR/Comunica%C3%A7%C3%A3o/noticias/Not%C3%ADcias/Qu%C3%B3rum-para-excluir-s%C3%B3cio-majorit%C3%A1rio-por-falta-grave-dispensa-maioria-de-capital-social

rua dr. renato paes de barros 750 12º andar itaim bibi
são paulo sp brasil cep 04530-001 tel 5511 5171 8900
www.cdoadv.com.br