

## \_ São Paulo Court of Justice guarantees the exercises its right of first refusal by a minority quotaholder

On August 1st, 2018, the First Chamber of Corporate Law of São Paulo Court of Justice rejected the Appeal No. 2047801-48.2018.26.0000 (“Appeal”) filed by a majority quotaholder which intended to reverse an injunction that granted, on a preliminary basis, the exercise of the right of first refusal by a minority quotaholder in the acquisition of quotas issued by a limited liability company (“Company”).

In the Appeal, the majority quotaholder argued that: (i) it was going through a judicial rehabilitation in 2017 and, as a consequence, a portion of its assets was sold to a third party, including the equity interest held in the Company (“Transaction”); (ii) it had offered the minority quotaholder its right of first refusal in the acquisition of the equity interest, pursuant to the Company’s Articles of Association, as soon as the potential buyers placed the proposal for the Transaction; and (iii) the minority quotaholder had only exercised its right of first refusal after the deadline established in the Company’s Articles of Association expired.

However, in the judgment of the Appeal, the reporting judge sustained the injunction granted in favor of the minority quotaholder, arguing that:

(i) **the right of first refusal was offered untimely**, since the Transaction had already been closed when the minority quotaholder was notified about the proposal;

(ii) there was a violation of the Company’s Articles of Association terms which entitled the quotaholders with the right of first refusal in the purchase of the quotas issued by the Company;

(iii) **the minority quotaholder effectively exercised its right of first refusal** by sending a conclusive counter-notice to the majority quotaholder immediately after it was notified about the Transaction; and

(iv) the content of the notices sent by the majority quotaholder made it clear that **the third-party was favored in the Transaction to the detriment of the minority quotaholder’s interests**.

**AS A RESULT, DUE TO THE FAILURE TO OBSERVE THE RIGHT OF FIRST REFUSAL PROVIDED FOR IN THE COMPANY’S ARTICLES OF ASSOCIATION, THE INJUNCTION GRANTED IN FAVOR OF THE MINORITY QUOTAHOLDER WAS SUSTAINED AND, CONSEQUENTLY, THE MAJORITY QUOTAHOLDER WAS READMITTED TO THE PARTNERSHIP, BY MEANS OF WHICH THE TRANSACTION WAS REVERSED.**

MORE INFORMATION ON THE APPEAL CAN BE ACCESSES IN PORTUGUESE AT::

[https://esaj.tjsp.jus.br/cjsg/getArquivo.do?conversationId=&cdAcordao=11669385&cdForo=0&uuidCapcha=sajcaptcha\\_3a8eaf85662c4598b2cc151e60330170&vICaptcha=EJuEN&novoVICaptcha=](https://esaj.tjsp.jus.br/cjsg/getArquivo.do?conversationId=&cdAcordao=11669385&cdForo=0&uuidCapcha=sajcaptcha_3a8eaf85662c4598b2cc151e60330170&vICaptcha=EJuEN&novoVICaptcha=)

## \_ Brazilian Securities and Exchange Commission issues Guidance Report on indemnity agreements

On August 29th, 2018, the board of the Brazilian Securities and Exchange Commission approved the Guidance Report No. 38, which refers to the fiduciary duties of managers under indemnity agreements executed by and between publicly-held companies and its management members (“Report”).

In the Report, the Brazilian Securities and Exchange Commission presented to publicly-held companies its recommendations on the adoption of certain rules and procedures that minimize the risk of conflict of interest related to indemnity agreements, among which we highlight the following:

(i) **the description of the expenses which will be subject to indemnification**, which shall not include: (a) acts performed out of the of managers’ competences; (b) acts performed with bad faith, willful misconduct, gross negligence or fraud; and (c) acts performed in the managers or third parties’ interest against the company’s social interests. It is important to note that, in the negotiation of the terms and conditions of indemnity agreements, **it must be avoided that these legitimate instruments for attracting and retaining executives are used as a protection for “conducts that are incompatible with diligence expected from the management members”**; and

(ii) **the resolutions granting indemnities must be taken impartially and always in the best interest of the company**, reason why it is recommended that the indemnity agreement indicates: (a) the company’s deliberative body competent to assess whether an act performed by a manager is indemnifiable; and (b) the procedures adopted to prevent the manager whose expenses can be indemnified

from participating in the meetings of the deliberative body.

**THE REPORT ALSO RECOMMENDS THAT COMPANIES WHICH HAVE EXECUTED INDEMNITY AGREEMENTS WITH THEIR MANAGERS DISCLOSE SOME ESSENTIAL DETAILS OF SUCH AGREEMENTS, AMONG WHICH WE HIGHLIGHT:**

(I) **IF THE AGREEMENT PROVIDES A CAP FOR THE INDEMNITY OFFERED AND, IF IT DOES, WHAT IS THAT AMOUNT;**

(II) **THE MANAGERS WHO ARE ELIGIBLE TO EXECUTE AN INDEMNITY AGREEMENT WITH THE COMPANY;**

(III) **THE HYPOTHESIS UPON WHICH THE INDEMNITY RIGHT IS EXCLUDED;**

(IV) **THE TYPES OF EXPENSES THAT CAN BE PAID, ADVANCED OR REIMBURSED UNDER THE INDEMNITY AGREEMENT; AND**

(V) **THE PROCEDURES RELATED TO THE RESOLUTIONS GRANTING PAYMENT, REIMBURSEMENT OR ADVANCE OF EXPENSES IN THE SCOPE OF INDEMNITY AGREEMENTS.**

At last, the Brazilian Securities and Exchange Commission recommends that all documents related to the company’s indemnity rules be sent to the Brazilian Securities and Exchange Commission electronic system within seven (7) business days counted from the date on which they were executed.

MORE INFORMATION ON THE REPORT CAN BE ACCESSED IN PORTUGUESE AT:

<http://www.cvm.gov.br/legislacao/pareceres-orientacao/pare038.html>

Carneiro de Oliveira Advogados law firm and its partners Gyedre Carneiro de Oliveira and Érika Aguiar Carvalho Fleck are highlights in the law yearbook

The law firm **Carneiro de Oliveira Advogados** and their partners **Gyedre Palma Carneiro de Oliveira** and **Érika Aguiar Carvalho Fleck** were named by the magazine *Análise Advocacia 500* among the most admired law firms and lawyers of 2018.

The yearbook *Análise Advocacia 500* presents the most admired Brazilian law firms and lawyers in different fields of Law, according to the opinion of the heads of the Legal Departments of the biggest Brazilian companies.