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NEWSLETTER
nov 2020

_ Board of Trade of the State of São Paulo authorizes share capital payment with cryptocurrency

The Birigui Regional Office of the Board of Trade of the State of São Paulo ("JUCESP") issued on October 20th, 2020 a harmonization of understandings, by which it acknowledged that it would be possible to pay-in share capital with cryptocurrency, such as bitcoin.

Cryptocurrency are, in short, digital currencies that only exist in electronic format, with no link to any sovereign government-issuing state authority, without ballast in real assets of any kind. The most popular of these is the bitcoin, whose growing popularity has led entrepreneurs to question whether they could use it to pay in the share capital of companies.

Pursuant to Law No. 10.406/2002 ("Brazilian Civil Code") and Law No. 6.404/1976 ("Brazilian Corporation Law"), the share capital may be paid in with cash or assets which may evaluated in monetary terms. For purposes of capital payment of limited liability companies, the only requirement is the approval by partners of the assets' value. In the case of corporations, it is necessary to have the assets evaluated by a specialized company or three experts, followed by the approval of such valuation in a shareholders meeting.

Cryptocurrency is not currency in strict sense pursuant to the Brazilian legislation, therefore they should be considered as assets which may evaluated in monetary terms for purposes of capital payment. There is a peculiarity to be considered, which is that the volatility of the cryptocurrency market hinders its pricing and there is no official recommendation on the valuation method which shall be used for this purpose. Finally, as this is something new, it is not yet clear how this possibility will be applied by the regional offices of JUCESP.

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_ Brazilian Securities and Exchange Commission judges case on managers' failure to comply with fiduciary duties

On August 24th, 2020, the judgment of PAS CVM SEI 19957.010647/2019-97 (05/2016) was initiated, to determine the responsibility of a publicly held company's managers for failure to comply with their fiduciary duties in the development of a project, with possible infringement of arts. 153, 154, §2º, 'c' and 155 of the Brazilian Corporation Law, among other accusations.

According to the prosecution, the company used a specific methodology for implementing investment projects, which required (i) the presentation of technical and economic feasibility studies; and (ii) the verification of international project management standards. The application of this methodology was important to avoid excessive cost increases during projects to be implemented by the company, so eventual changes would still occur in the initial phase.

The company's officer approved an initial schedule for the project and, after approximately three (3) months, approved the implementation of an anticipation plan, which advanced the start of said project by approximately 1 (one) year and, consequently, the cost for its construction increased expressively. According to the prosecution, the anticipation of the project occurred without sufficient technical support, considering the uncertainties that still permeated the project's planning phase.

In addition, the prosecution pointed out that several aspects related to the approval of the anticipation plan indicated that the officers had not been diligent in examining the matter. The proposal prior to said resolution, would have already provided for very risky anticipations, contrary to the procedures recommended by the methodology usually adopted by the company. On the other hand, the executive board could disregard such procedures, if duly supported by suitable documentation, which did not happen, since the objective criteria of the aforementioned methodology were ignored.

In this sense, the Reporting Director, Mr. Henrique Machado, mentions in his vote that the DUTY OF DILIGENCE IMPOSES ON THE MANAGERS OF PUBLICLY-HELD COMPANIES THE CARE THAT EVERY ACTIVE AND REASONABLE MAN USUALLY EMPLOYS IN THE MANAGEMENT OF THEIR OWN BUSINESSES, THUS REQUIRING PROFESSIONAL CAPACITY WITH TECHNICAL CHARACTER. FOR THIS REASON, WHEN USING THE RESOURCES DELIVERED BY THE SHAREHOLDERS TO THE COMPANY, THE MANAGER SHALL USE THEM IN A RATIONAL AND JUSTIFIED MANNER, MAKING TECHNICAL DECISIONS BASED ON RELEVANT INFORMATION AVAILABLE.

Notwithstanding, it is worth mentioning the Brazilian Securities and Exchange Commission - CVM adopts the business judgment rule review standard to assess the pertinence of business decisions made by company managers. That is, in the absence of assumptions that demonstrate the manager's bad faith, fraud, interest or conflict, and in view of the procedural adequacy of the respective decision-making process, the decisions of a manager should, in principle, be considered regular. That is, such decisions are presumed to be made seeking the best social interest.

Regarding the anticipation of the project implementation, approved by the officers, the Reporting Director understood that there was no change in the scenario of when the schedule was approved that could minimally justify the

anticipation of the beginning of the project, which was even surrounded by circumstances which pointed against its implementation.

In addition, throughout the process, several documents that challenged the reliability of the project's viability were made available to the executive board, as well as recommendations for changes to be evaluated, so, according to the Reporting Director, it was the board's duty to seek additional clarification on these issues until they were sure they were handling the situation correctly. The duty of care imposes on managers a duty of care that should have given them greater scrutiny on the information submitted to them and the damage that was possibly being imposed on the company, so, they should take the necessary steps to avoid such risk.

On the other hand, in their defense, members of the board of directors and officers mentioned they discussed all the risks involved in said anticipation, even though the minutes of the meetings, which were drawn in summary form, state only the approval of the matters, without further details. As analyzed by Director Gustavo Gonzalez, the vast majority of Brazilian publicly-held companies choose to draw up minutes of meetings in summary form, pursuant to art. 130, Paragraph 1 of the Brazilian Corporation Law, with generic descriptions of the deliberated matters and, in this sense, he understands that **the absence of detailed records is not able to demonstrate neither the diligence nor the lack of diligence of a manager**. Therefore, the prosecution is responsible for demonstrating the failure to comply with the duty of diligence by the company's managers - thus, if it is understood that the failure to record the reasons of the manager in the minutes of the meetings, in itself, is proof of the lack of diligence, this leads, in practice, to an inversion of the burden of proof, which is inadmissible in the context of a sanctioning process.

Director Flávia Perlingeiro adds that the difficulty to be faced in terms of the probative burden is evident, as it is the mental process of knowledge and convincing applied by the managers themselves, to make a decision in which, in principle, by the circumstances of the case, are protected by the business judgment rule.

Finally, regarding the accusation of failure to comply with their duty of diligence when approving the anticipation of the project, the managers remained acquitted, due to the examination of the decision-making process under the procedural prism applicable when examining this case, since the prosecution was unable to invert the probative burden it was subject to in order to prove that the managers did not analyze carefully the information available to make a decision.

MORE INFORMATION REGARDING PAS CVM SEI 19957.010647 / 2019-97 (05/2016) CAN BE ACCESSED THROUGH THE LINK BELOW:

http://www.cvm.gov.br/noticias/arquivos/2020/20201103-5.html

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_ Abuse of power by minority shareholders

Every shareholder position gives its holder rights and powers, greater or lesser, which can be exercised in a correct or abusive manner. However, while abuses by the controlling shareholder are deeply studied in the academy and frequently discussed in Brazilian case law, the abuse from the minority does not drive the same attention. Regarding the Brazilian corporate law, while Law No. 6,404/1976 ("Brazilian Corporate Law") provides for in its article 117, §1º some hypotheses of abusive exercise of power by the controlling shareholder, there is no reference of the abuse of power by the minority.

In this sense, the only provision established in the Brazilian Corporate Law would be the vote against the company's interests, pursuant to article 115, such as the disapproval of management accounts without justification. This, in fact, is a typical example of potential minority abuse, but it is not its only possibility.

Thus, it is essential to understand the legal position of a minority shareholder and its particularities in order to really understand the abuse of power. More than that, it must be understood that "minority shareholder" is not a unitary concept, it may be someone who has one share among millions or even a shareholder who holds 49.99% of the company's corporate interest, depending on the situation. Subjectively, there are also various profiles of minority shareholders, ranging from investment funds and professional shareholders to individual shareholders, or even relatives in family businesses and, as diverse as their profiles, may their attitudes be.

Among the examples of potential abusive exercise of power by minority shareholders, commissive or omissive, we highlight the deliberations taken by the minority against the legally impeded majority, as in the case of the approval of the management accounts in a company in which the controlling shareholder is also a manager. The veto by the minority in matters that have a qualified quorum for collegiate deliberation can also be a tool for abuse of power, thus being extremely important that shareholders take this into account when setting different quorums in bylaws and shareholders' agreements. For example, the refusal of a minority shareholder to approve a necessary capital increase, in a compatible amount and at a justified price, can be considered an abuse of minority power, since the protection against its dilution of interest is not a justifiable reason to prevent the investment of another shareholder.

The abuse of minority power can also be observed in the hypothesis of proposing abusive judicial measures, such as an action to invalidate decisions taken at a general shareholders' meeting (article 286 of the Corporation Law), whose active legitimacy does not depend on the percentage of interest, or series of judicial measures against the company and its managers (strike suits), with the purpose to hinder the regular course of business and, consequently, forcing the company and the other shareholders to buy or sell its shares on more favorable terms.

In this sense, a minority shareholder who represents 5% or more of the share capital could even use a lawsuit to dissolve the company (article 206, I, b, of the Brazilian Corporate

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Law). Although such measures may not be successful, as it is known that the harmful effects of an unfounded action are independent of the outcome of the judgment.

Nevertheless, the abuse of power by the minority cannot be presumed, and it is necessary to prove it by those who seek to establish it. Although the controlling shareholder is often tempted to frame any refusal or exercise of rights by the minority as an abusive behavior, it is important to note that the minority rights provided for by law, in the bylaws and shareholders' agreements are valid and legitimate. In this sense, the framing of a certain action or exercise of rights by a minority shareholder as abusive depends on a careful analysis on a case-by-case basis.