CVM warns publicly held company's officer for irregularities **in the management of Stock Option Plan**

On October 14, 2021, the Brazilian Securities and Exchange Commission ("CVM") judged CVM Sanctioning Process SEI 19957.003480/2021-22 to examine the responsibility of an officer and members of the Board of Directors of a publicly held company for an alleged breach of fiduciary duties in the performance of their attributions, in violation of articles 153 and 154 of the Brazilian Corporation Law.

The accusation arose from a request to interrupt an Extraordinary Shareholders' Meeting by shareholders of the company, accompanied by several complaints, among them, the alleged irregularities in the management of the stock options plan ("Stock Options").

The officer was accused of failing to perform his attributions in accordance with the company's interests by means of: (i) failing to recognize the termination of Stock Options granted to officers upon their dismissals; and (ii) celebrating amendments to Stock Options agreements with employees under different conditions than those provided by the plan approved at the company's shareholder meeting, particularly regarding the extension of the term for exercising the options in the event of dismissal by the company.

Regarding the first accusation, the officer was unanimously absolved by CVM's board for lack of evidence. Regarding the second accusation, the reporting director of the case, Fernando Caio Galdi, understood that there was a violation of article 154 of the Brazilian Corporation Law, for the reasons summarized below:

- In the terms of article 168, 3rd paragraph, of the Brazilian Corporation Law, the granting of stock options to managers and employees of publicly held companies can only occur in accordance with a plan approved by shareholders in a shareholders' meeting, **therefore, the granting of stock options under conditions other than those foreseen in a plan approved by the company's shareholders' meeting is forbidden.**

- The reporting director stated that **it is perfectly legitimate for the shareholders' meeting to establish only general guidelines regarding the most relevant aspects that must be observed when granting stock options, giving certain discretion to management to execute the stock option agreements, within the approved general premises.** However, in the case in question, the plan provided a clear, objective and direct rule regarding the term for exercising the options in the event of dismissal by the company, consequently, said rule could not be relativized by the company's management.

- In cases of alleged violation of art. 154, caput, of the Brazilian Corporation Law, according to the reporting director, CVM's board must analyze the justifications brought by the manager to carry out certain transactions, evaluating if they are consistent with the social interest, avoiding excessively invasive approaches concerning the merits of the decisions which were taken.

- In the analyzed case, however, the reporting director declared that is up to who is judging the case to verify whether the conditions provided in the amendments were compatible or not with those approved by the company's shareholders. Being incompatible with the provisions of the Brazilian Corporation Law the recognition that an officer would be more legitimate than the shareholders to determine which decision would best align with the company's corporate interest.

- The conditions foreseen in the amendments regarding the term for exercising the stock options were different from those provided for in the approved plan, and by executing the plan approved by the shareholders' meeting under conditions different from the original terms, the shareholders' meeting's authority was disregarded, at least in part.

Therefore, CVM's board decided, by majority, to follow the vote of the reporting director and condemn the officer to a warning sentence.

The members of the board of directors were also accused of breach of the responsibility to exercise their duty of diligence, due to the lack of supervision of the officer's actions as detailed above, however, the reporting director understood that it would not be reasonable to expect the defendants to review all the individual stock option agreements, nor the requests for exercise said stock options, except if warning signs that the plan was not being executed within the approved premises were identified, nevertheless, this exception was not proven when analyzing the case.

Regarding the accusation against the members of the board of directors, CVM's board unanimously decided for their absolution.

More information regarding CVM Administrative Proceeding can be accessed in Portuguese through the link below:
https://www.gov.br/cvm/pt-br/assuntos/noticias/cvm-adverte-diretor-geral-da-bm-f-atual-b3-por-infringir-exigencia-determinada-na-lei-6-404-76-lei-das-s-a

Understanding Shareholders' Agreements **and binding managers' votes**

Following the series of articles on shareholders' agreements foreseen in article 118 of Law 6.404, of December 15, 1976 (Brazilian Corporation Law), we will address the political rights of shareholders specifically regarding the election of managers and the potentially binding their votes.

Election of managers

During the negotiation of shareholders' agreements, it is not unusual to encounter discussions about the number of seats on the board of directors that will be filled by each shareholder and even how the election of officers will take place. It is common for them to specify which shareholder will appoint the chief executive officer, the chief financial officer, or another officer relevant to the business. In addition, in certain structures it is possible to identify clauses that require board members to vote on certain matters in accordance with voting instructions determined by the shareholders in a prior meeting.

Regarding the election of the members of the board of directors, the Brazilian Corporation Law provides as a general rule the election by majority vote of all members, with the possibility of multiple vote and separate vote for the election of members by minority shareholders. Nevertheless, it is possible that the shareholders undertake, by means of a shareholders' agreement, to elect the members of the board of directors in a different manner, guaranteeing, for example, the right for minority shareholders to elect directors without the need for a multiple or separate vote system. This is a common request in shareholders' agreements of family-owned companies as well as companies with investment funds as shareholders.

Binding of board member's votes by shareholders

Regarding the voting orientation of directors by shareholders, including within the scope of the election of officers, the Brazilian Corporation Law expressly provides, since 2001, the possibility of binding the votes of members of the management, it states that the president of the shareholders' meeting or of the collegiate deliberating body of the company shall not compute the vote cast in breach of a duly filed shareholders' agreement in the company's headquarters.

However, said legal provision has been subject of controversy since it was introduced in the law. It is argued that, by binding the managers' vote to what has been agreed upon in a shareholders' agreement, their freedom to vote and their independence would be put in jeopardy, in addition to their obligation to look after the company's interests.

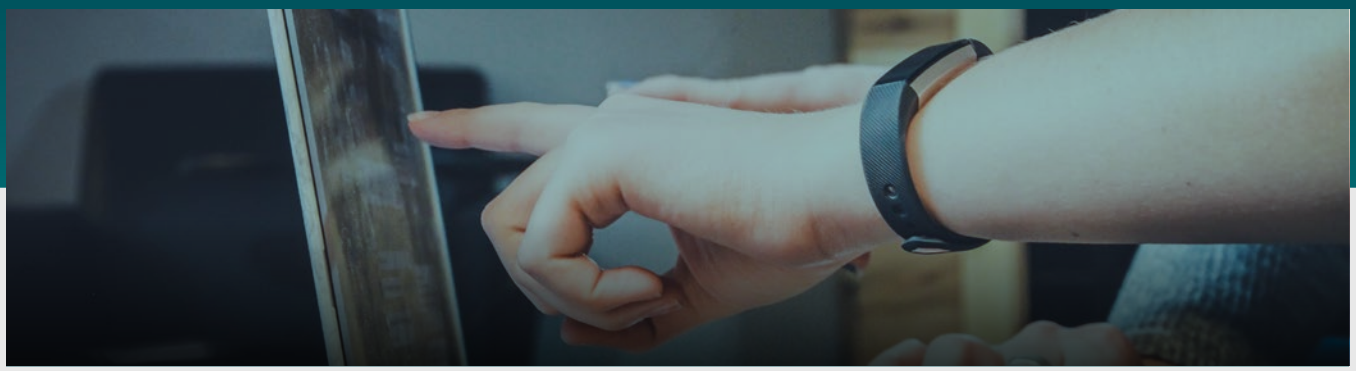
Faced with said controversy, there are three doctrinal conceptions on the matter:

- favorable to binding votes: the main argument is that the shareholders' agreement itself is representative of the corporate interest, in line with the 2nd paragraph of article 118 of the Brazilian Corporation Law, which provides that it is not possible to invoke said agreement to exempt shareholders from liability when exercising voting rights or controlling power.

- favorable to binding votes: except for certain situations (that is, opposing to binding votes indiscriminately), among which we highlight illegality and violation of social interest.

- against binding of managers' votes, on the grounds that this would be incompatible with the best corporate governance practices.

Thus, although there are solid positions and arguments in the three aforementioned conceptions, the one which is favorable to binding votes with limits is the predominant one, presenting



variations as to the extension and definition of such limits. Therefore, considering that managers are subject to the duties imposed by the Brazilian Corporation Law, notably the duties of diligence and loyalty, we understand that when they are faced with a binding voting guideline that may harm the company's best interests, they should deliver their vote in a manner contrary to the voting guideline, subject to the manager's being liable.

The text above was published in legislation and market session of Capital Aberto on October 27, 2021, and can be accessed in Portuguese through the link below: *https://legislacaoemercados.capitalaberto.com.br/entendendo-o-acordo-de-acionistas-e-a-vinculacao-de-voto-por-que-administradores-devem-se-voltar-sempre-para-o-interesse-da-companhia/?utm_campaign=lm_-_271021&utm_medium=email&utm_source=RD+Station*