



Understanding the Shareholders' Agreement: Strategies for Preventing Deadlocks

As a rule, shareholders' agreements contain clauses for the resolution of deadlocks in order to define means for the resolution of conflicts among the shareholders of a company, mitigating possible risks and losses in the development of its activities. Considering that there are several ways to solve impasses, the provision of a resolution clause depends on the analysis of the context in which the company is inserted and the peculiarity of each case.

Among the commonly adopted methods of resolving impasses, we find more lenient and agile mechanisms such as negotiation, mediation and conciliation, in which conflict decisions are made by the parties themselves. On the other hand, there are more rigorous alternatives such as arbitration and judicial clauses, which depend on a third party to solve the deadlock and usually extend over a longer period of time and are considerably more expensive.

There are also other practices, known in North American law as "deadlock provisions", which may be applied in Brazilian law, although there is no specific provision regulating such means of solutions in our legislation. In this context, we have the "buy or sell" or "shotgun" clauses, which consist in call and put option clauses. They are used in certain deadlock situations and their purpose is to put an end to the partnership by means of the withdrawal of one of the shareholders according to a pre-agreed mechanism. These clauses can have different mechanisms depending on the interests and characteristics of the parties involved and their partnership.

The most common "shot-gun" mechanism is known as "Russian Roulette", in which any shareholder ("offeror") has the right to make a bid to sell his shares to another shareholder ("offeree") or to buy the offeree's shares at a certain price and the offeree must choose between buying the offeror's shares or selling his shares to him under the terms of the bid.

Shotgun mechanisms do not always work for all situations and need to be carefully thought out and adapted to each specific situation in order to ensure their effectiveness. For instance, when there is a difference in assets between the parties, this may result in a negotiating disadvantage for the less favored party in triggering a shotgun clause. In these situations, it is common to adjust standard clauses to provide for mechanisms that can minimize this disadvantage, as it is the case with the so-called "Fairest Sealed Bid", whereby, instead of the traditional pricing structure of a clause such as the Russian Roulette, each party puts its respective price proposal per share in an envelope and an independent third party will evaluate which proposal is closest to the market value of the share for purposes of applying the shotgun clause.

In Brazil, due to a cultural issue and to our property tradition in relation to the ownership of company's shares, there is still some resistance in adopting "shotgun" mechanisms in shareholders' agreements involving family companies. In fact, it is not uncommon to face situations where, due to the characteristics and interests of the parties, the clauses to solve impasses in relation to family companies end up being clauses that foresee phased negotiation structures and, in the absence of an agreement, the maintenance of the status quo.

Nevertheless, the scenario and characteristics of each company and its shareholders must always be analyzed to define the best conflict resolution mechanism to be used in each case.

The text above was published in legislation and market session of Capital Aberto on December 09, 2021, and can be accessed in Portuguese through the link below:

<https://legislacaoemercados.capitalaberto.com.br/entendendo-o-acordo-de-acionistas-estrategias-para-prevencao-de-impasses/>

2021 was marked by progress in reducing bureaucracy in business activity and simplifying its procedures

This year, the sanction of Law 14.195/2021, resulting from the Provisional Measure (MP) 1.040/2021, stands out as a major step towards reducing bureaucracy in business activity in Brazil. This Law has as its main objective the reduction and simplification of procedures required for starting a business in the country. It has a goal of fostering economic growth, reducing complexity and time needed to open new businesses, in addition to enabling a greater attraction of foreign investment throughout of the coming years.

An important change related to this simplification is the waiver of notarization in corporate acts to be registered with the boards of trade, including powers of attorney.

Also, among other measures, we highlight:

- **Corporate name.** (i) possibility for the businesspersons or legal entity to choose to use the National Registry of Legal Entities (CNPJ) number as a corporate name; (ii) end of the protection of the corporate name of a company without movement for ten years.
- **Simplifying the setting up business.** Reform of the existing system of the National Network for Simplification of Registration and Legalization of Companies and Businesses ("REDESIM"), which, through its website, provide users, free of charge, research on the registration steps, change and termination of business individuals and legal entities.
- **Virtual Address.** Possibility of registering entrepreneurs and legal entities without a physical establishment.
- **Risk assessment of the company's activities.** For companies that carry out an activity classified as medium risk, the business license and licenses will be issued automatically, without human analysis – as already happen in the case of low-risk companies.
- **Electronic Books.** Closed companies are entitled to replace certain physical corporate books for electronic registers.
- **Archiving of Original Corporate Documents.** The boards of trade will be able to eliminate any scanned and digitally archived corporate acts and documents. Before deletion, the company, through its partner, director, attorney or other interested parties, has a period of 30 days to remove the original document at no additional cost.
- **Integrated Asset Recovery System.** Institution of the Integrated Asset Recovery System (Sira), comprising a set of instruments, mechanisms and initiatives designed to facilitate the identification and location of assets and debtors, as well as the restriction and sale of assets. The system aims to improve the effectiveness and efficiency of asset recovery actions.