Bill of Law proposes to revise the quorums for corporate resolutions set forth in the Brazilian Civil Code

Bill of Law No. 1212/2022 ("Bill"), which changes the quorums for corporate resolutions in limited liability companies, was approved by the Constitution, Justice and Citizenship Committee and will be sent to the Senate for voting.

Currently, the Brazilian Civil Code determines the minimum quorum of three quarters of the capital stock for the approval of the following resolutions: 1) amendment to the articles of association; 2) incorporation, merger, or dissolution of the company; and 3) termination of liquidation. The Bill proposes that the quorum for these decisions changes to a simple majority one.

According to the Bill, the quorum for appointments and dismissals of directors would also be of simple majority. Today, the quorum required for these choices is of absolute majority. For the appointment of a non-partner director, the Civil Code determines quorums that vary according to the paid-up capital stock: if it has not yet been paid-up, the partners' unanimity is required to appoint a non-partner director; if it has already been fully paid-up, the quorum is reduced to 2/3 of the partners. The Bill suggests that the mentioned quorums should be replaced, respectively, by two-thirds of the partners and by simple majority.

The text of the Bill can be accessed in Portuguese through the link below:

https://legis.senado.leg.br/sdleg-getter/documento?dm=9156767&ts=1659641373140&disposition=inline

Courts establish jurisprudence on procedural succession of shareholders

Creditors of dissolved companies now have a new judicial way to recover amounts due. Recently, the São Paulo Court of Justice and the Superior Court of Justice in Brazil decided that partners of extinguished companies may be held liable for debts owed to creditors if assets were returned to them upon the company's dissolution, according to lawsuits No. 2008757-80.2022.8.26.0000, 2150408-37.2021.8.26.0000, 2145773-13.2021.8.26.0000, REsp 1652592 and REsp 1784032.

Called "procedural succession of the partner", this thesis arose by analogy to the succession of assets, provided for in article 110 of the Brazilian Code of Civil Procedure, combined with the rules of execution proceedings (article 779, II), and establishes that, just as the heirs are liable for the debts of the deceased up to the limit of the assets inherited, the partners of extinguished companies are liable for the company's debts up to the limit of the assets returned at the time of dissolution.

Creditors shall only have to prove the extinction of the company and capital stock composition. It should be noted, however, that if the debt exceeds the amounts received within the scope of the dissolution of the company, it is still necessary to prove misuse of purpose or confusion of assets in the procedure for piercing of the corporate veil in order to reach the personal assets of the partners and obtain the amounts due.

The lawsuits mentioned above can be accessed in Portuguese through the links below:

Processo n. 2008757-80.2022.8.26.0000

Processo n. 2150408-37.2021.8.26.0000

Processo n. 2145773-13.2021.8.26.0000

REsp 1652592

REsp 1784032

Brazilian Securities and Exchange Commission acquits listed company in case of abuse of controlling power

On July 12, 2022, the Brazilian Securities and Exchange Commission ("CVM") judged the Sanctioning Proceeding SEI 19957.011341/2018-77, started to determine the liability of a controlling shareholder for alleged abusive exercise of power, provided for in article 117 of Law 6.404/76 (Brazilian Corporate Law).

According to the prosecution, in order to approve the execution of a contract supposedly contrary to the interests of controlled company A (a listed company) in a meeting of the Board of Directors, the controlling shareholder used a control structure of contractual nature, i.e., a shareholders' agreement of subsidiary A and a quotaholders' agreement of an investment fund also controlled by the controlling shareholder, which was also a shareholder of subsidiary A, to bind the votes of the members of the Board of Directors elected by minority shareholders.

The prosecution alleged that the controlling shareholder interference in the Board of Directors of controlled company A by binding the votes of members of the Board of Directors appointed by minority shareholders to its orientation would characterize an abuse of the controlling power since it would prevent these directors from engaging in the company's management, subordinating the company's interests to the wishes of the controlling shareholder. It also raised the point that even if the controlling shareholder could determine how the members of the Board of Directors appointed by other shareholders should vote, the exercise of this power would be prohibited when dealing with a matter that (i) is contrary to the interests of the company or (ii) is of exclusive competence of the Board of Directors, by legal provision.

The central issue in this case, therefore, was the assessment of the limits of binding the members of the board of directors appointed under a shareholders' agreement, as authorized by article 118 of the Brazilian Corporate Law.

The defense claimed, mainly, that according to paragraphs 8 and 9 of art. 118 of the Brazilian Corporate Law, the shareholders' agreement's rules bind all the company's resolutions, including board meetings, and that, regardless of this, CVM has no jurisdiction to discipline shareholders' agreements.

For the reporting director, Marcelo Barbosa, the defense is right to point out that the managers are also bound by the shareholders' agreement guidelines, since the Brazilian Corporate Law itself admits the alignment between the orientation of the controlling block and the administration's performance for the exercise of the power-duty of control, also mentioning that a different interpretation would be to deny the effectiveness of the shareholders' agreement in the most relevant deliberations for the ordinary course of a company's business and make this instrument unviable as a mechanism for regulating the conduct of shareholders and managers, eliminating the predictability of the outcome of disagreements precisely in situations in which the parties sought to foresee the disagreement and agree on a solution. He then dismissed the hypothesis that CVM intended to evaluate the validity and effectiveness of the clauses of the shareholders' agreement, and emphasized that, in this case, it would limit itself to determine the existence of abuse of controlling power by the shareholder when using the shareholders' agreement.

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Nevertheless, regarding the binding nature regarding the members of the Board of Directors, he pointed out that managers are not prevented from acting autonomously and exercising their usual functions. In this case, the members of the board of directors stated their position and were not prevented from engaging in the administration. Thus, there is no characterization of abuse of controlling power.

The reporting director also expressed himself contrary to the prosecution's subsidiary thesis, stating that there is no legal limitation for binding the vote of managers on matters that are of exclusive responsibility of the board of directors, closing that such an understanding would result in the ineptitude of shareholders' agreements that have the purpose of establishing rules for the exercise of controlling power.

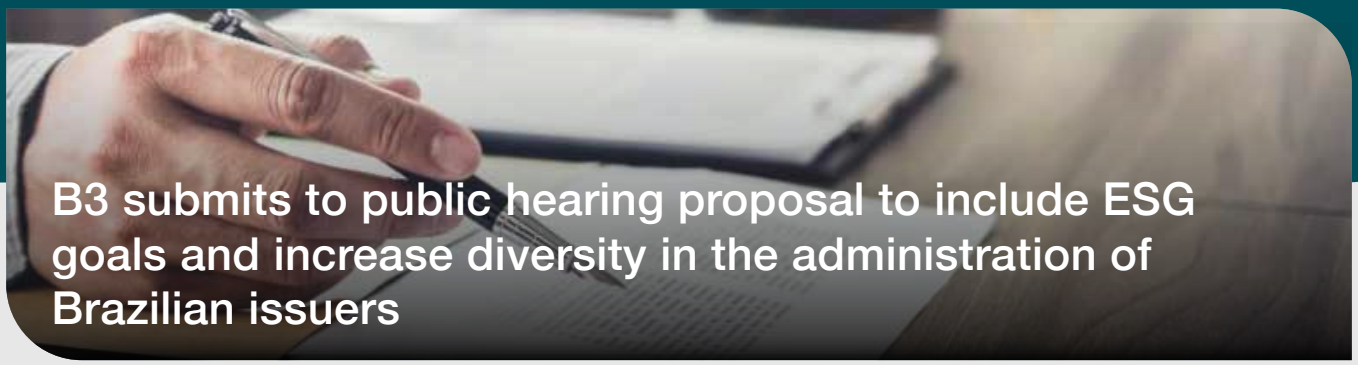
Therefore, the reporting director voted to acquit the controlling shareholder due to the lack of illegal exercise of its controlling power, and his vote was unanimously followed by CVM's board.

The report of the Sanctioning Proceeding is available in Portuguese through the following link:

https://www.gov.br/cvm/pt-br/assuntos/noticias/anexos/2022/20220712_PAS_CVM_19957_011341_2018_77_voto_presidente_marcelo_barbosa.pdf

The reporting director's vote is available in Portuguese through the following link:

https://www.gov.br/cvm/pt-br/assuntos/noticias/anexos/2022/20220712_PAS_CVM_19957_011341_2018_77_voto_presidente_marcelo_barbosa.pdf



B3 submits to public hearing proposal to include ESG goals and increase diversity in the administration of Brazilian issuers

On August 17, 2022, B3 submitted to public hearing a proposal to include Environmental, Social and Corporate Governance (ESG) measures to be adopted by listed companies in a "apply-or-explain" model in which issuers that do not adopt B3's recommendations must explain to the market and investors the reasons that prevented their development.

In summary, B3's proposals are the following:

(i). election of at least 1 (one) woman and 1 (one) member a minority community as effective members of the companies' board of directors or as officers;

(ii). inclusion, in its bylaws or in its appointment policy, of procedures for the nomination of members of the board of directors or board of officers, contemplating, at least, criteria of complementarity of experiences and diversity regarding gender, sexual orientation, color or race, age group and inclusion of people with disabilities

(iii). definition of performance indicators linked to ESG themes or goals in the variable compensation policies of the members of the board of directors or board of officers; and

(iv). preparation and disclosure of a document approved by the board of directors on ESG guidelines and practices, contemplating, at least, issues related to socio-environmental responsibility, fighting discrimination, respect for human rights and labor relations, defense against suffering and mistreatment of animals, environmental protection, treatment of solid waste and hazardous chemicals, and corporate governance and compliance mechanisms that indicate how such ESG guidelines and practices are being implemented by the company.

Upon the eventual implementation of the proposals submitted by B3, companies will be required to include discussions related to ESG issues in their daily operations and consequently experience diversity in the composition of their management structures.

B3 will receive comments on the proposals contained in the public notice until September 16, 2022, by e-mail to sre@b3.com.br.

The public notice can be found in Portuguese at the link below:

https://www.b3.com.br/data/files/77/67/BC/DB/8ABA2810F9BC5928AC094EA8/20220817_B3%20ASG_Edital%20de%20Audiencia%20Publica.pdf