

Free exercise of appraisal rights for partners of limited liability companies

18.06.2021 3 min read

Authors

Gustavo Kulesza

Thaís Vieira

The Superior Court of Justice decides that partners have the right to withdraw at will from limited liability companies, even if the Corporations Law has secondary application.

Related areas

Dispute Resolution

Topics

Dispute Resolution BMA Review

STJ Anonymous Society Law

Decisions Laws

Brazil's courts are quite happy to allow partners of limited liability companies (*sociedades limitadas*) withdraw from the company, at their own discretion, without need for judicial authorization of any kind. Their right flows from article 1029 of the Civil Code, which governs limited liability companies, and provides that “any partner may withdraw from the company; on notice to the other partners, if the company has an undefined term.”

Some courts, however, have questioned whether partners may freely withdraw when the Brazilian Corporations Law (Law 6404/1976) has secondary application to the company. In fact, it is not uncommon for the articles of association (*contrato social*) of limited liability companies to provide that the rules under the Corporations Law will apply where the Civil Code is silent.

There are important differences between limited liability companies and corporations that prevent automatic application of some of the Corporations Law's applications to limited liability companies. These incompatibilities raise the following question: when a limited liability company's articles of association provide for secondary application of the Corporations Act – which does not allow shareholders to exercise appraisal rights at their own discretion – can a partner withdraw from the company on simple notice, without bringing judicial proceedings?

This question was recently answered by Brazil's highest court on non-constitutional matters, the Superior Court of Justice (STJ – *Superior Tribunal de Justiça*)¹. In a unanimous decision, the STJ's 3rd Panel found that the Corporations Law “does not have the power to set aside the discretionary right to withdraw from limited liability companies that have an undefined term.” The reporting justice, who wrote the court's opinion, gave two main reasons for this conclusion.

The first is that the Federal Constitution expressly guarantees the right to associate, and not to associate. Thus, partners have a constitutionally guaranteed freedom to associate, and also not to remain in association. Even in corporations, the STJ has taken the position that partial dissolution, with the exercise of appraisal rights by dissenting shareholders, is possible in closely-held corporations here the shareholders are bound by ties that are predominantly personal and familial.²

The second reason is that the rules under the Corporations Law can have secondary application only to the extent they are compatible with limited

liability companies. Justice Sanseverino stressed that there are significant differences between corporations (*sociedades anônimas*) and limited liability companies, and these differences must be kept in mind when applying the Corporations Law. Corporations are a type of “association of capital”, in which shareholders are important because of their wealth. As a rule, if shareholders wish to leave the corporation in which they invested, all they need to do is sell their shares, which the other shareholders cannot prevent. Limited liability companies, in contrast, are “associations of persons”, in which the personal identity of the partners has more importance in the company.

In limited liability companies, partners’ quotas are not freely negotiable securities, even if they may be sold to third parties. Given these differences between the two forms of organization, the STJ concluded that the simple absence of a provision under the Corporations Law allowing shareholders to withdraw at will “cannot automatically be interpreted as a prohibition against discretionary withdrawal by partners in limited liability companies to which the Corporations Law has secondary application.” Thus, even if a limited liability company’s articles of association provide for secondary application of the Corporations Law, the partners may freely withdraw from the company.

Although the STJ’s decision does not put an end to debate over this question, it is an important step toward consolidating the court’s position on the right of partners of limited liability companies to withdraw from their companies at will.

NOTES

¹STJ, Appeal REsp no. 1.839.078/SP, Justice Paulo de Tarso Sanseverino reporting, 3rd Panel, judged on 9 March 2021.

². See, for example, the decisions by the STJ in Appeal REsp no. 1.400.264/RS, Justice Nancy Andrichi reporting, 3rd Panel, judged 24 October 2017; Petition for Review in Appeal EREsp no. 1.079.763/SP, Justice Sidnei Beneti reporting, 2nd Section, judged on 25 April 2012; and Petition for Review in Appeal EREsp no. 111.294/PR, Justice Castro Filho reporting, 2nd Section, judged 38 June 2006.

****This article is part of No. 72 of BMA Review. Click here to access the list of all articles.***

› PROFESSIONALS

Professionals who combine legal insight and market perspective



Gustavo Kulesza



Thaís Vieira