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Conflicts of Interests at Debenture Holders' Meetings

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Debentures are widely used by both public and private companies of various sizes to raise funds in the capital market. For context, in 2022, 459 series of debentures were issued in Brazil, raising a total of BRL 270.5 billion, with an average of BRL 589.4 million per issuance. The smallest issuance was BRL 2 million, and the largest was BRL 5.4 billion[1].

One characteristic of debentures is that an unlimited number of investors may invest in the same series or issuance, and those investors may not always have converging interests. Conflicting interests among debenture holders tend to come to the surface when the issuing company seeks to restructure its debts, and is subject to the quorums and majorities established by law and in the debenture agreement.

Unless the law specifically provides otherwise (as in the case of court-supervised restructurings), decisions made at debenture holders' meetings are absolute, binding all debenture holders, even those who did not attend the meeting or voted contrary to the majority. Moreover, debenture holders who voted contrary to majority position do not have appraisal rights, so they are doubly bound by the majority's decision.

In such circumstances, decisions made at debenture holders' meetings, just as in the case of shareholders' meetings, must be protected against conflicts of interest, which can result in debenture holders casting their votes with a view to obtaining an advantage they are not entitled to[2].

Brazil's Corporations Law, Law 6.404/76, does not expressly state that the provisions governing conflicts of interest and abuse of voting rights by shareholders apply also to debenture holders: while article 71§2 does provide that the provisions of the Law apply to debenture holders' meetings, to the extent compatible, it does not make specific reference to any particular provision.

Renowned corporate law scholars such as Nelson Eizirik argue that the rules on abuse of voting rights and conflicts of interest under article 115 of Law 6.404/76 should also apply to resolutions made at debenture holders' meetings[3]. As for Brazil's securities commission, the CVM (Comissão de Valores Mobiliários), while it has dealt with many cases of conflict of interest at shareholders' meetings, references to conflicts of interest in debenture holders are rare.

In 2008, Commissioner Sergio Weguelin issued an opinion in favor of applying article 115 of Law 6.404/76 to debenture holders' meetings[4]. However, this issue was not addressed by the other Commissioners, as it was not central to the case under consideration at the time. Precedents in the courts are rare too, although in one case[5], the court excluded the vote cast by a debenture holder it was an investment fund holding that was part of the corporate group of the issuer's controlling shareholder.

The few precedents and scholarly commentary on the subject suggest that the rules on conflict of shareholder interests under the Brazilian Corporations Law also apply to meetings of debenture holders. As for how the conflict of interest rules apply, since 2022,6 the prevailing position in the CVM is that the conflicts contemplated by the Law are material, not formal, and that the existence of a conflict is assessed after the vote, based on the merits of the decision and the evidence produced.

Thus, in cases where the debenture holder is not expressly excluded from the definition of "outstanding debentures" under the debenture agreement (since only holders of outstanding debentures are entitled to vote), neither the debenture trustee nor the other debenture holders would have the power to bar a debenture holder from attending and voting at a debenture holders' meeting. As in the case of shareholders' votes, if a conflict of interest is later found to exist, then the conflicted votes can be invalidated, and the conflicted debenture holder may be exposed to administrative sanctions and liability, although the debenture holder's right to due process and a full defense are assured.

And even if debenture holders recognize that they are disqualified from voting by reason of conflict of interest, they still have the right to attend the meeting, while abstaining from voting.

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NOTES

[1] Segundo dados do Boletim de Mercado de Capitais da Associação Brasileira de Mercado de Capitais – ANBIMA.

[2] Art. 115, Law 6.404/76.

[3] EIZIRIK, Nelson. A Lei das S/A Comentada, Volume I – 2ª Edição Revisada e Ampliada – Artigos 1º aa 79. São Paulo: Quartier Latin, 2015

[4] CVM Proceeding 2005/4505

[5] TJ-DF 07313162520178070001 DF 0731316-25.2017.8.07.0001 (Apelação Cível. Relator Alvaro Ciarlini, 21.11.2018, 3ª Turma Cível, DJE: 28.11.2018) (link: https://www.jusbrasil.com.br/jurisprudencia/tj-df/652356072/inteiro-teor-652356102)

[6] VM Enforcement Proceeding 19957.003175/2020-50

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