Shareholders' right to oppose transfers of shares to third parties

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Authors

Bruna de Brito Santos

Marcella Campinho Vaz

Naomi Fiszon Zagarodny

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An assignment of shares can alter the chain of control of a limited liability company and the environment within the company itself, especially when the assignment is made to parties who are not shareholders. The Brazilian Civil Code ("BCC") contains an important mechanism to protect shareholders and prevent the entry of a new member from causing detrimental changes to the company's operations and internal dynamics.

Article 1057 BCC provides that *"where the articles of association are silent, a member may assign their interest in the company, in whole or in part, to another member, without need for the consent of the remaining members, or to a third party, if there is no opposition from members holding more than one quarter of the capital of the company."* In other words, if a company's articles of association do not provide for the assignment of shares, the members of the company may freely transfer their shares to another member, and may transfer them to third parties, as long as a member or members holding more than 25% of the company do not object to the transfer.

The Code's concern over the assignment of shares to third parties stems from the fact that limited liability companies (sociedades limitadas) can have some of the characteristics of a partnership. In such cases, the company's business and internal functioning depend on the relationship between the members – the affectio societatis, as it is called in Brazilian law.

Although the concern is a legitimate one, article 1057 BCC is not understood to be imperative in nature,[1] so the members of a limited liability company can establish their own rules to govern the transfer of shares in their company's articles of association, including conditions and restrictions on the transfers to other members and to third parties. For example, the members could establish a lower threshold for objections to third-party transfers, or even exclude the right to object altogether. Similarly, they could create a requirement for unanimous approval for all transfers.

The existence of greater restrictions on the transfer of shares in the limited liability company to third parties can be a relevant factor in determining whether the company tends toward a partnership; conversely, lesser restrictions may indicate that the company is more in the nature of a corporation, more centered around capital rather than persons. The solution found in article 1057 BCC, which interprets the silence of the articles of association as an option to restrict the transfer of shares to non-members, comes down in favor of the partnership aspect of limited liability companies, although the application of article 1057 can be excluded.

Interestingly, in one case (Appeal REsp no. 1.309.188/SP[2]), the company's articles of association did contain provisions on the transfer of shares to third parties, including a provision giving existing members a right of first refusal to acquire the shares. Despite acknowledging that the rule under article 1057 BCC is not imperative, the Superior Court of Justice (*"STJ" – Superior Tribunal de Justiça*, Brazil's highest court in non-constitutional matters), took the position that the provisions of the articles of association were too general, and did not expressly exclude the application of article 1057 BCC. In the STJ's view, the articles of association were silent on the question of transfers to third parties, because they did no more than mention the possibility of such a transfer if the existing members did not exercise their right of first refusal. In the absence of a specific provision on how the transfer to the third party would be implemented, the rule under article 1057 BCC applied.

Given the freedom that the parties have in drawing up their articles of association, if the members of a company wish to avoid the restriction on transfers of shares to third parties contained in article 1057 BCC, they should take care to set out, in detail, the procedure such transfers, to avoid disputes over whether the restriction has been effectively excluded.

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NOTES

1. See, for example, Alfredo de Assis Gonçalves Neto, "Quotas sociais" In: Alfredo de Assis Gonçalves Neto e Erasmo Valladão Azevedo e Novaes França (coord.). Empresa individual de responsabilidade limitada e sociedades de pessoas, v. 2, 3. ed. São Paulo: Thomsom Reuters, 2023, pp. 393-394; Arnoldo Wald. In: Sálvio de Figueiredo Teixeira (coord.). Comentários ao novo Código Civil: do direito de empresa (arts. 966 a 1.195), v. 14. Rio de Janeiro: Forense, 2005, p. 382.

2. STJ, 4th Panel, Appeal REsp 1309188/SP, Justice Luis Felipe Salomão reporting, judged April 24, 2014, majority decision, published DJ August 15, 2014.

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Bruna de Brito Santos

Marcella Campinho Vaz

Naomi Fiszon Zagarodny