

MINORITY SHAREHOLDERS RIGHTS IN THE PORTUGUESE COMPANIES CODE

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“ ANONIMA” COMPANIES

OUTLINING:

Minority shareholders in the Portuguese Companies Code are protected through the implementation of provisions that, in relation to “Anonima “ companies, the most adequate vehicle to carry out larger investments and projects, concern the following aspects of Corporate Governance:

ASPECTS OF CORPORATE GOVERNANCE

1. Appointment and removal of Directors
 - a) Right to appoint a director
 - b) Right to remove a director
 - c) Right to require a director to be present at board meetings
 - d) Right to veto over the appointment of additional directors
 - e) Class of shares giving rise to the right to appoint a director
2. Veto over certain management and policy matters
3. Power to call a general meeting and to file proceedings against directors who failed to protect the rights of the company
4. Right to have access to information
5. Dividends Policy
6. Prevention of dilution of the equity stake
7. Limitations to the transfer of shares/ pre-emption rights
8. Deadlock of the company
9. Conclusion

1. Appointment and removal of directors

a) Right to appoint director

Article 391 of the Companies Code contains general rules, protecting minority shareholders in a negative sense. According to the abovementioned provision, the articles of association may provide that directors can only be appointed by a specified majority. Further, article 392 of the Companies Code contains special rules of the election of directors. Under paragraph 1 of this article, shareholders may present a list of persons to be appointed as directors, the number of these varying according to the total number of directors within a company; i.e. the list may be presented by shareholders with not less than a 10% and not more than a 20% shareholding. It is also possible, where there is a right to vote for more than one director, to vote for each in isolation, rather than all together.

Equally, under paragraph 6 of the same article of the Companies Code, the articles may provide that the minority shareholders who voted against a list may appoint one director providing they hold at least 10% of the share capital.

b) Right to remove director

According to article 386 of the Code, directors are appointed and removed by the General Assembly of shareholders. The majority required is a simple majority of votes, one vote corresponding to each person present, and not according to the distribution of the capital share. But paragraph 5 of the same article states that the articles of association can specify that an absolute majority is required, and make it dependent on the share capital.

Restrictions on removal are set out in article 403, which states that the removal of a director without “just cause”, under the rules of article 392, is null and void as long as more than 20% of the share capital opposes it.

c) Right to require a director to be present at board meeting in order for there to be a quorum.

The law does not foresee the possibility of the articles of association stating that a certain director must be present. However, article 410, paragraph 7 foresees that board resolutions be passed by simple majority but, as this is not imperative, it further states that the articles of association can stipulate the necessity for decisions of the Board of Directors to be taken by an absolute majority.

d) Right to veto over the appointment of additional directors

This right is dealt with in the law, in the sense that it is obligatory to state in the articles how many directors will constitute the Board (it must be an odd number). Article 390 states that the number of directors composing the Board can only be increased or decreased through the alteration of the articles of association. Further, article 395 provides for the election of a president of the Board, where stipulated in the articles of association, with a right of veto. However, he will be in principle, elected by the General Assembly of shareholders. If this specific rule is not contained within the articles, the Board can still nominate a president, but any right of veto would have to be stipulated in the articles.

e) Class of shares giving rise to right to appoint a director

Article 391 paragraph 2 states that although it is possible to stipulate that holders of certain classes of shares must also approve the election of at least one third of the directors, it is not possible for holders of certain class of shares to designate a director. As explained above, the articles of association can determine that a certain majority of votes, or a certain proportion of the share capital must approve the election of the directors.

2. Veto over certain management and policy matters

A power of veto for a nominated director, as indicated above, can also be set out in the articles, which can specify that a certain number of directors, including the one representing the minority, have to approve certain resolutions, unless the matter is the exclusive jurisdiction of the General Assembly.

3. Power to call a general meeting and to file proceedings against directors who failed to protect the rights of the company

A shareholder with at least a 5% holding can call a General Meeting to discuss a particular agenda. Directors are responsible to the company for any acts or omissions where they have not respected the rights, needs and best interests of the company. Therefore, they have civil and criminal responsibility to the company, and to other shareholders. Shareholders, representing at least 5% of the share capital, can file court proceedings against directors who have failed to protect the rights of the company, and failed in the reasonable and profitable exercise of the business of the company.

4. Right to the access of information

Article 288 states that any shareholder, holding at least 1% of the share capital is able to consult any of the following documents and information: reports of the management, management accounts, accounting opinions or advice, reports of the auditors, calls for general meetings; minutes; lists of those present at meetings; amounts paid to the Board of Directors and the Supervisory Board; total amounts paid in the last three years to 10 (if the company has 200 or more employees) or 5 (if less than 200 employees) employees who have received pay rises; and share registrations. Such a shareholder may require that remuneration's be certified by an auditor. The documents can be inspected at the registered office of the company, either personally or by a representative, who is entitled to obtain copies of all the documents.

Article 289 also states that after the date of the calling of a General Assembly, all information concerning the Board of Directors and Supervisory Board, the proposed resolutions introduced by the administrative bodies, as well as the resolutions passed, the accounts and documents relating to any new members admitted in the corporate structure, will be at the disposal of the shareholders. All these documents must be delivered to all shareholders holding 1% of the share capital or more, 8 days or less after calling of a general Assembly.

At the General Assembly, the shareholder can, according to article 290, require all information relating to the details of resolutions to be passed. This duty of information also applies to any subsidiary. Any of this information can only be refused if it is alleged that it would cause serious damage to the company or violate the secrecy imposed by the law. The unjustified refusal to deliver this information is deemed as "just cause" to annul the meeting. Article 291 states that shareholders with at least 10% of the share capital can ask in writing to the Board for information about the business of the company. This request can only be refused in very limited circumstances, i.e. where it is suspected that it may be used for purposes that will damage the company, or any shareholder. A shareholder who is refused this information can file court proceedings.

5. Dividends Policy

Article 294 states that, the company has an obligation to distribute half of the profits. It can distribute less if there is a provision to this effect in the articles, or if a resolution to this effect is passed by at least a 75% majority of shareholders at a General Meeting.

6. Prevention of dilution of equity stake

To prevent dilution of equity stake, articles 85,87 and 456 of the Companies Code state that increases in the share capital, if not governed by the articles of association, equate to an alteration of the articles themselves. Therefore, an absolute majority of shareholders is necessary to authorise such an increase, which can be framed to include the votes of the minority shareholders. If the articles of association specify the steps necessary to effect an increase, they must stipulate the limit of the maximum increase,

the period, not exceeding 5 years, the means of increase (i.e. via incorporation of reserves, or issue of shares), the nominal value of each one of the new shares, the type of consideration, the premium, the period of time over which the consideration for the new share capital shall be delivered, and the identity of the participators.

7. Limitations to the transfer of shares/ pre-emption rights

Article 328 of the Companies Code states that the transfer of nominative shares can be limited in certain circumstances, but not excluded, via the articles of association. These limitations include the following possibilities: that the transfers are submitted to the authorisation of the company, that certain pre-emption rights are observed, or that other criteria, with respect to the commercial interests of the company are observed.

The company can refuse authorisation based on any motifs specified in the articles of association or, in their absence, on just cause of protection of the interests of the company. If this company refuses authorisation for the transfer of shares in question, either on the basis of certain criteria foreseen in the articles of association or on the basis that the interests of the company will not be served, it must then find another buyer, on the same terms.

8. Deadlock of the Company

Article 329 of the Companies Code stipulates that, unless otherwise stated in the articles of association, authorisation for transfer of nominative shares lies with the General Assembly, which can include the need for the support of the minority. It may be possible therefore to deadlock the company, and leave procedure for the parties to negotiate the terms of exit.

9. Conclusion

We have focussed on the points of the Portuguese *Anónima* Companies law, relating to the protection of minorities shareholders, as well as on the specific dispositions of the Companies law leave to the articles of association the option of disposing in order to require certain majorities to decide on sensitive issues, that may affect shareholders with minority stakes in the Companies share capital.