THE ROLE OF CORPORATE GOVERNANCE IN THE CHOICE OF ARBITRATION AS A DISPUTE RESOLUTION MECHANISM

ORIGINAL ARTICLE

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ABSTRACT

Conflicts of interest are a phenomenon inherent to human beings, and inevitably, within private, public, corporate, and business relationships, there will be disputes over the same object or claims resisted for various reasons. The hypercomplex society in which we are immersed has brought changes in human behavior, where individuals' objectives, success, and results are being pursued in an increasingly immediate manner. The reflections of these values directly impact companies because, in addition to being responsible for producing services and products that will be consumed by those seeking full satisfaction, they also aim for their organization's profitability to exceed annual targets. Market demands have made business relationships multidisciplinary, requiring partners, advisors, administrators, and directors to have the knowledge and caution to operate in areas that were never professionally explored before, as well as care in decision-making and their social repercussions, where consultation with legal, accounting, technological, administrative, and commercial experts is becoming increasingly common. The problematic question is defining the contours and elements that should precede the company's decision-making in choosing an appropriate method for conflict resolution. The general objective of this study is to analyze the values and characteristics that a conflict must possess to be brought to arbitration, without giving rise to new problems, relying on good corporate governance and ESG values. Using the deductive method and specialized doctrinal analysis of the topic, the conclusion is reached that when the conflicting parties cannot resolve the dispute themselves through negotiation or even through conciliation or mediation, this is when arbitration gains space, as the judiciary is not capable of efficiently resolving complex issues with the confidentiality and reasonable timeframe required by business organizations due to the increasingly competitive market. This

paper aims to study the advantages of arbitration and the role of corporate governance in participating in the decision-making process.

Keywords: Corporate Governance, ESG, Alternative Dispute Resolution, Arbitration.

1. INTRODUCTION

Entrepreneurship in Brazil is not a simple task today, as prospective entrepreneurs encounter a multitude of obstacles, requiring a high degree of study and planning before engaging in any economic activity. Understanding the business environment, our culture, the inherent unpredictabilities of the activities carried out, regulations, and the natural uncertainties of our country are fundamental steps in the pursuit of success (CAMARGO, 2018).

The institute of corporate governance is the path through which entrepreneurs can seek effective business management, reducing their risks, developing their activities sustainably, and deriving profit from them. However, there are other values associated with corporate governance, which, though having an extremely broad meaning, can be summarized in the acronym ESG (Environmental, Social, and Governance).

Environmental (E), Social (S), and Governance (G) themes constitute the foundational values in a new global organizational perspective, emphasizing long-term value creation to satisfy investors and all those who are somehow connected to the organization. While not new topics, the fact is that these issues were previously addressed by companies separately and individually. This new approach proposes a joint analysis and application, balancing and nurturing values (NASCIMENTO, 2021).

Therefore, within various forms of business entities, corporate governance pertains to making decisions, controlling their implementation, and distributing results fairly (preventing or inhibiting disparity) to the various involved parties, creating long-term value for the corporation while preserving the balance of these parties' interests (GUERRA, 2021).

Corporate governance refers to a set of mechanisms, practices, processes, and relationship norms based on common principles, such as transparency, accountability, equity, and corporate responsibility (SILVEIRA, 2020).

It can also be understood as a system through which companies present themselves in the market, highlighting their management style, decision-making process, and relationships among owners, shareholders, investors, directors, employees, and customers (NASCIMENTO, 2021).

Implementing good corporate governance practices is not synonymous with shielding against conflicts or crises. When there are structural flaws in a company's organization, with a lack of proper distribution of tasks, responsibilities, boundaries, and an unwise choice of its members, problems are likely to arise.

Considering the complexity of the society in which we live and the multidisciplinary nature of relationships entered into daily, the judiciary is losing ground to alternative dispute resolution solutions. Its structure and delays are not capable of providing an efficient, quality response within a reasonable timeframe, as demanded by the current financial and commercial market.

The Code of Best Corporate Governance Practices of IBGC (*Instituto Brasileiro de Governança Corporativa*) itself provides that the bylaws or articles of association, when possible, should include an arbitration clause or other forms of conflict resolution when direct negotiation proves incapable of resolving disputes.

Arbitration is one of the forms of third-party dispute resolution, where capable parties, by mutual agreement, in the face of a dispute or through an agreement, establish that a third party or panel resolves the conflict without state intervention, and the decision carries the same efficacy as a final court judgment (CAHALI, 2020).

However, the significant controversy surrounding this alternative conflict resolution is whether arbitration is suitable for every business dispute, and what is the role of corporate governance in reaching such a conclusion.

In light of the above question that guides this study, it should be noted that not every conflict is arbitrable, but only those involving available property rights. This is precisely where most limitations arise, requiring a company to develop a strategy and value assessment for decision-making.

Within the company's organizational structure and its commercial and contractual relationships, there are numerous situations that can be brought to arbitration, and the primary role of governance is to analyze the nature of the conflict and, in consideration of the corporation's principles and values, determine whether arbitration is the best course of action.

2. CORPORATE GOVERNANCE AND ESG VALUES IN CONFLICT MANAGEMENT

All organizations possess a specific combination of governance characteristics, some more formal, dependent on the administration of certain positions and always seeking satisfactory economic outcomes regardless of the means used. Others are more informal, with a greater delegation of powers and responsibilities among their members, aiming for sustainability among people, the environment, and profit.

The good relationship between key leadership is crucial for good governance, as it encompasses areas such as business ethics, management, leadership, social psychology, encouraging executives and employees to voluntarily follow rules, act ethically, and make decisions in the organization's long-term best interests (SILVEIRA, 2021).

However, the mere existence of governance systems in a corporation does not automatically mean that it would be free of crises, conflicts, scandals, or losses. Despite ongoing evolution, governance instruments have not been able to prevent the worst corporate failures, always with serious direct and indirect social impacts (GUERRA, 2021).

That is why, in recent years, there has been talk of a new trend, ESG (Environmental, Social, and Governance), which solidified post-pandemic, as values should take precedence over the relentless pursuit of profit at any cost (NASCIMENTO, 2021).

ESG thinking in the realm of governance should focus on the brand, reputation, quality of governance, quality of management, a history of respecting labor rights, and consideration of ecosystems in the community where the company operates. Separating people, the planet, and profits is unwarranted (IBGC, 2007).

The objectives of good governance are to continuously enhance the decision-making process in the organization's best interest, reduce the likelihood of negative surprises resulting from intentional or unintentional actions by its members, provide transparency to internal and external audiences, and ensure equitable treatment and the effective exercise of the rights of all shareholders (SILVEIRA, 2021).

To achieve all these objectives, each conflict should be treated in a specific and appropriate manner, avoiding one-size-fits-all approaches used for any problem.

For example, direct negotiation between the parties is one of the most economical ways to resolve a potential conflict but depends primarily on good communication among those involved. Negotiation can be defined as the art of reaching an agreement between two or more interdependent individuals seeking to maximize their results, understanding that they will gain more by working together than by litigating (GALDOS, 2000).

This form of dispute resolution can be used in various situations, such as personal, professional, political, legal, family, business, labor, commercial conflicts, and more. The primary goal of negotiation is to achieve mutual satisfaction of the parties involved (SCAVONE JUNIOR, 2020).

However, in the absence of communication between the disputants and in cases where the degree of litigation appears to be above normal, negotiation gives way to other forms of conflict resolution, such as mediation, conciliation, or arbitration.

Mediation is suitable for situations involving a continued legal or personal relationship between the parties in conflict, requiring an examination of the personal and professional elements that led to the state of divergence.

Once these differences are identified, and considering that mediation can also be used before a conflict arises, the goal is to prevent or correct the sensitive points between the parties, resulting from human interaction. The mediator dedicates more time to the parties, creating an environment conducive to communication, easing emotions, grievances, and resentments, allowing the parties themselves to reach a settlement (CAHALI, 2020).

Corporate mediation and private caucus meetings (private meetings with each shareholder) have proven effective in family-run businesses, where family dialogue has been restored, and the agreement has been voluntarily fulfilled without the need for judicial approval, satisfying all parties after the mediator has learned about the "pain" of each involved in the conflict (SARAIVA, 2020).

As for conciliation, this method involves active participation in communication (bringing individuals closer), collaborating to identify interests, and helping to think of creative solutions and encouraging the parties to be flexible. If necessary, the conciliator can present suggestions for conflict resolution.

When properly established, and not imposed, conciliation can achieve the goal of achieving justice with peace. Otherwise, illegitimate transactions or situations where one party is not satisfied can lead to further conflicts and future disputes (TARTUCE, 2021).

Although conciliation is closely linked to the judiciary, with hearings scheduled for this purpose, the extrajudicial use of conciliation by trained and qualified professionals is becoming increasingly common. The conciliator intervenes with the goal of presenting the benefits of that method, explaining the pitfalls of a potential judicial dispute, creating an environment conducive to overcoming animosities in the pursuit of a settlement (CAHALI, 2020).

The study of extrajudicial conflict resolution methods by companies has become a constant concern for the preservation of the entire organization and its interests and goals since state intervention no longer satisfies market demands.

According to the National Council of Justice's "Justice in Numbers" report, evaluating the Common Justice Courts, the average time for a judgment in the knowledge process is 1 year and 7 months, without considering the time for judgment in higher courts and the execution phase until potential satisfaction (National Council of Justice, 2022).

One of the concerns of corporate governance is the efficiency, speed, and satisfaction in the resolution of internal and external business conflicts, as the judiciary is no longer the only viable means and not even an effective method.

In this context, arbitration gains ground because when the parties fail to resolve their differences and resisted claims, a third party must be called in to replace the litigants and put an end to the dispute within a reasonable duration and with all the guarantees of due process, provided that the conflict is arbitrable and its cost fits the characteristics of the dispute.

3. ARBITRATION AND ITS ORGANIC CHARACTERISTICS

Arbitration can be defined as a dispute resolution method through the intervention of an arbitrator chosen by the parties based on a private agreement, making decisions based on it without state intervention, with the decision having the same legal effect as a court judgment, available to capable individuals to resolve disputes concerning available property rights (CARMONA, 2009).

Its contracting is done through an arbitration agreement, which can be defined as a legal transaction that provides for arbitration as a mechanism used by the parties to resolve potential disputes, branching into an arbitration clause and an arbitration commitment.

The arbitration clause is a bilateral legal transaction included in a contract, prior to the dispute, with the aim of establishing arbitration as a method for resolving any conflicts.

In contrast, the arbitration commitment, unlike the arbitration clause, is formalized after the emergence of a particular dispute, regulating the present and aiming to establish an Arbitral Tribunal to resolve the dispute (FERREIRA, 2021).

However, the crux of arbitration lies in the subject matter brought to arbitration. Article 1 of Law 9,307/1996 defines that the subject matter of the dispute must relate to available property rights.

The Civil Code itself, in Article 852, states: "A commitment to settle matters of state, personal family law, and others that do not have a strictly property character is prohibited." In this regard, the legislator not only established the need for property availability but also legal availability (FIGUEIRA JUNIOR, 2019).

Although there are various studies on the possibility of arbitration within family law, tax law, labor relations, consumer relations, and environmental law, great care is required when entering into an arbitration clause or arbitration commitment. In these areas, due to potential vulnerability, the imbalance of power, or public interest in certain contractual relationships, there is a considerable likelihood that the dispute will be rejected by the arbitrator appointed by the parties or that a nullification action may be successful.

Each dispute must have its arbitrability assessed, i.e., whether the issue can be taken to arbitration or not. To make this assessment, it is necessary to determine whether the individuals involved are capable of contracting and whether the subject of the dispute involves available property rights, understood as those that encompass assets within the parties' property sphere and can be alienated or transferred to third parties (GUERRERO, 2021).

In addition to arbitrability, it is worth noting that although arbitration is considered a private jurisdiction, it still depends on the judiciary if the losing party does not comply voluntarily with the arbitrator's decision, as well as in cases of precautionary and urgent measures in case of non-compliance with the formalities of the arbitration procedure.

Therefore, before choosing arbitration to resolve a dispute, a company must be aware of the natural disadvantages of this choice, such as excessive confidentiality that may limit access for some partners, once arbitration has begun, the parties generally cannot seek judicial protection, and in case of non-voluntary compliance with the arbitral award, it will be necessary to enter the judiciary to initiate enforcement proceedings. Additionally, the high costs of arbitration chambers and the remuneration of arbitrators should also be taken into account (CAMARGO, 2018).

However, the apparent disadvantages do not eliminate arbitration as an option for business disputes because its confidentiality may be necessary when the dispute involves the company's revenues and contractual values. The parties can choose how the process and arbitration procedure will be conducted, including the production of evidence, ensuring due process to the maximum extent. The arbitrator exclusively dedicates themselves to the dispute for which they were chosen, being an expert in the subject matter debated, justifying the high costs and fees, making it a perfect alternative for complex and high-value contracts.

It is from this complexity of characteristics that corporate governance must have the necessary knowledge and experience to take its disputes to arbitration or keep them in some other form of extrajudicial conflict resolution. If all other methods fail or the nature of the dispute does not allow an alternative solution, the last resort is to use the judiciary.

4. CONCLUSION

Corporate governance is an increasingly present institution in companies, and when well-structured, it is a source of growth and value addition for the adopting corporation.

Conflicts of interest, being inherent to human nature, are inevitable, and it is the responsibility of the conflict management department or qualified manager to minimize or resolve them in a way that best preserves the values of the entity involved.

Given the current legislative evolution, the legal framework for all extrajudicial dispute resolution methods is extensive. However, the parties' attention should be focused on the effectiveness of each of them compared to the nature of the conflict.

The initiative for crisis resolution should consider not only the shortest and least costly path but also all the values of the environment in which business activities are conducted, its social impacts, and the role of corporate governance in preserving these principles.

Rigid stances of non-negotiation or absence of conciliation in judicial or extrajudicial fields no longer have a place in the contemporary world. What values would a company be cultivating if it adopts an extremely litigious, non-conciliatory stance with its employees and consumers, thereby enforcing the "law of the jungle"?

In this light, arbitration proves to be effective and suitable for conflicts where the parties are on an equal economic and legal footing, thus minimizing potential claims and situations of vulnerability or lack of self-sufficiency at the time of contracting.

In addition to the quality of the parties, the subject matter of the dispute must be carefully studied, ensuring that the dispute involves available property rights, avoiding causes that involve diffuse or collective rights, which could theoretically invalidate arbitration because they are non-disposable or not essentially patrimonial.

Although negotiation, conciliation, and mediation are less traumatic and less costly procedures than imposing a decision by an impartial third party, when the case involves complex matters of high economic value and requires a resolution in a short timeframe, arbitration seems to be the ideal choice.

This does not mean that other methods of dispute resolution should be discarded; on the contrary, they should be encouraged at all times, as not all disputes can be taken to arbitration.

The role of corporate governance is to look beyond the contractual lines, foresee possible conflict areas, and establish the best remedy in light of the hypothetical

situation analyzed. In conjunction, knowing that any dispute will require unparalleled attention from the decision-maker, and the parties will remain in contact for a long time due to their interdependence, the terrain will be favorable to arbitration.

In the event of a conflict situation, when communication between the parties fails, time is scarce, confidentiality is essential, and the matter is complex and involves a high economic value, the judiciary should be the last resort to be chosen.

All other methods of extrajudicial dispute resolution can be attempted before arbitration, especially negotiation, which can resolve the dispute in a short time and with significant cost savings.

However, for this to occur, it is the responsibility of corporate governance to develop and contract an excellent arbitration agreement specific and tailored to each contract. Moreover, these negotiation and conciliation values should already be instilled within the corporation and its employees.

There is no formula or pre-fabricated guidelines for the contracting of any arbitration clause or commitment, and if the company itself is not accustomed to resolving its internal disputes by appropriate methods, it will not be able to efficiently resolve its external conflicts.

Therefore, the role of corporate governance in choosing arbitration should be one of caution and keen insight, considering the costs and procedural limitations, as well as the quality of the parties involved, the litigiousness, and the level of communication between them, and lastly, the nature of the dispute at hand. Only after considering all these factors should the decision be made to contract a possible arbitration agreement or submit the dispute to the judiciary.

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