Strengthening the enforcement of shareholders' rights

Interim Report

October 2019

With the support of: Great Britain and North Ireland CVM OCDE SPE | Secretaria Especial de Fazenda | Ministério da Economia

Disclaimer

The views and opinions expressed in this report are those of the authors and do not necessarily reflect the official policy or position of the Ministry of Economy, the Brazilian Securities Commission (CVM) or any other organization. The Working Group (WG) gratefully acknowledges the fundamental support of the UK Prosperity Fund, and contributions from OECD Secretariat and Corporate Governance Committee.
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1. Introduction

The importance of private enforcement

Over the past few years, the Brazilian economy has been shaken by corporate misdeeds and business scandals, involving both the public and private sectors. These episodes affected the credibility and value of some major publicly-held companies and brought to light the issue of shareholder rights and how their enforcement in Brazil may be strengthened.

There is a widespread perception that the current legal regime does not provide adequate mechanisms for investors' protection. In fact, it is relatively uncommon to see Brazilian minority shareholders filing lawsuits or arbitral claims in order to seek redress from managers or controlling shareholders. Several factors may explain the scarcity of litigation, such as lack of information, costs, restrictions on legitimacy to file, and risk of extra losses (for example, due to the "loser pays" regime[1]), most of them arising from the Brazilian legal framework.

Access to effective private enforcement mechanisms is key to the development of a strong capital market. When minority shareholders are harmed by misconduct carried out by controlling shareholders or managers of a publicly-held company, the existence of effective mechanisms for enforcing their rights will not merely satisfy their individual interests[2], but it will also produce positive externalities. Redress can improve market compliance and build investor confidence in capital markets.

From an economic perspective, a stock market that protects minority shareholders tends to lead publicly-held companies to have easier access to capital through external financing[3]. As pointed out in several studies[4], "*variations in law [and regulatory framework] and its enforcement are central to understanding why firms raise more funds in some countries than in others. To a large extent, potential shareholders and creditors finance firms because their rights are protected by the law*"[5].

In this regard, G20/OECD Principle II.G brings the following recommendation: "*[m]inority shareholders should be protected from abusive actions by, or in the interest of, controlling shareholders acting either directly or indirectly, and should have effective means of redress...*". According to the G20/OECD, *"[i]nvestors' confidence that the capital they provide will be protected from misuse or misappropriation by corporate managers, board members or controlling shareholders is an important factor in the development and proper functioning of capital markets"*[6], and must be analysed through a balanced approach: allowing investors to seek remedies for infringement of ownership rights without stimulating excessive and frivolous litigation.

There is no question that Brazilian existing private enforcement mechanisms need improvements in order to enhance their effectiveness in the field of corporate law and capital markets – especially to address the issue of shareholders' redress. However, there is a lack of sufficient review, analysis and diagnosis of the strengths and weaknesses of the current framework to inform an eventual legal or regulatory reform. In particular, there is a lack of academic research comparing the pros and cons of corporate/capital market litigation through the traditional judiciary system and through alternative dispute resolution mechanisms – especially arbitration, which, according to Brazilian Corporate Law, may replace the use of judicial lawsuits to resolve disputes involving the company, minority and controlling shareholders in Brazil (as long as there is such a provision in the company's by-laws).

Private vs Public Enforcement

Currently, the Brazilian Securities Commission (CVM) plays an important role in shareholder disputes. CVM has jurisdiction over corporate law matters, and authority to start administrative proceedings and impose penalties against wrongdoers. However, CVM does not have authority to determine reimbursement for compensation for those affected. The only case

1 Pursuant to the Brazilian Civil Procedure Code (Law 13,105/2015), the losing party must pay the other's attorney fees, which are fixed at between 10 to 20 per cent of the value of the damages due plus the litigation costs.

2 See CFA Institute, Investor Redress (November/December, 2014), available at: https://www.cfapubs.org/doi/pdf/10.2469/cfm.v25.n6.16.

3 See Reese, William Jr. & Weisbach, Michael S., 2002. "Protection of minority shareholder interests, cross-listings in the United States, and subsequent equity offerings", Journal of Financial Economics, Elsevier, vol. 66(1), pages 65-104.

4 See La Porta et. al (1997, 1998, 199b, 2000), Rajan and Zingales (1999) and Grinblatt and Titman (1998).

5 LaPorta, Rafael, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny. 2000. "Investor Protection and Corporate Governance". Journal of Financial Economics 58 (1-2): 3-27.

6 See G20/OECD, Principles of Corporate Governance (September, 2015), pages 28 and 20, available at: https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf.

in which CVM can require investors' redress is when it enters into specific settlement agreements (*termos de compromisso*) with market participants[7].

Therefore, the main mechanisms available in Brazil for investors redress are beyond CVM's administrative jurisdiction, since, as a rule, the Commission does not participate in and sometimes is not even aware of lawsuits and arbitral proceedings involving publicly-held companies or other market participants[8].

According to the findings of OECD Corporate Governance Committee's survey on supervision and enforcement in corporate governance[9], though most jurisdictions rely more heavily on public enforcement, those that have both public and private enforcement found that they play important complementary roles. This complementarity is especially relevant when it comes to redress, since it usually requires a shareholder suit[10]. The OECD's supervision and enforcement peer review[11] found that, in Brazil, private enforcement is very weak in practice. There are flaws in the current system that does not encourage enough shareholders to seek redress by themselves, and which creates an imbalance that concentrates the enforcement burden on public authorities (CVM and public prosecutor service). In sum, claims by shareholders to the CVM have replaced private enforcement.

Considering, among other factors, the CVM limitations regarding investor redress, this report seeks to find mechanisms to equilibrate the balance between public and private enforcement by providing suggestions on how to improve private enforcement in Brazil.

A brief overview of the Brazilian equity market

As of December 31, 2018, there were 400 publicly-held companies in Brazil with shares admitted to trade at the São Paulo Stock Exchange – currently named B3, the only stock exchange operating in Brazil nowadays. Since 2000, B3 has different listing segments[12] for publicly-held companies. Adhesion to the special segments is voluntary, but each segment requires the adoption of corporate governance rules beyond those required in the law. The special listing segment rules has a direct and important impact on the private enforcement discussions, since the special listing segments with more stringent requirements – Novo Mercado, Nível 2, Bovespa Mais and Bovespa Mais Nível 2 – require the insertion of a mandatory arbitration agreement in the bylaws.

Table 1 presents how the 400 publicly-held companies with shares admitted to trade at B3 were divided amongst the different B3 listing segments on December 31, 2018:

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7 In the cases where the CVM prosecution identifies the existence of damages, redress is a condition for the settlement agreement (Article 11, Paragraph 5, II, Law No. 6,385/76).

8 As it will be further explained, the Law 7,913/89 empowers CVM and the public prosecutor's office (Ministério Público) to litigate in order to avoid losses or to seek compensation for damages to owners of securities and investors. Moreover, according to Law 6,385/76, CVM shall also be subpoenaed to, at its convenience, join lawsuits as amicus curiae or provide clarifications in cases involving subjects under its administrative jurisdiction. However, such judicial communication does not always happen. Therefore, if the company does not consider the filing of the proceeding a material information, the awareness of it by the CVM is compromised.

9 OECD, Supervision and Enforcement in Corporate Governance. OECD Publishing, 2013, available at: http://www.oecd.org/daf/ca/SupervisionandEnforcementinCorporateGovernance2013.pdf).

10 In this regard, although, a priori, the involvement of public enforcement authorities may facilitate and strengthen private actions, there are limitations to their participation due to lack of resources, legitimacy issues, among other factors.

11 OECD, Supervision and Enforcement in Corporate Governance. OECD Publishing, 2013, available at: http://www.oecd.org/daf/ca/SupervisionandEnforcementinCorporateGovernance2013.pdf).

12 According to B3, "[s]pecial listing segments of B3 – Bovespa Mais, Bovespa Mais Nível 2, Novo Mercado, Nível 2 and Nível 1 - were created when we realized that, in order to develop the Brazilian capital market, we would need to have segments suited to different company profiles. All these segments are bound by rules of corporate governance. These rules go beyond the obligations that companies have according to the Brazilian Corporate Law (Lei das S.As.) and are intended to improve the assessment of those companies who decide to join one of these segments voluntarily. Moreover, such rules attract investors. Ensuring shareholders rights and guarantees, as well as establishing the dissemination of more complete information for market players, the listing segments aim to mitigate risks related to informational asymmetries. B3 also has the Basic Segment that does not contain corporate governance rules." (Available at: http://www.bmfbovespa.com.br/en_us/listing/equities/listing-segments/about-listing-segments/)

Table 1. N. of publicly-held companies listed in each segment of B3 (as of 12/31/2018)

B3 STOCK EXCHANGE	N. of publicly-held companies Dec./18
Standard market (no additional governance rules)	194
Special Listing Segments	206
Novo Mercado	143
Nível 2 / Level 2	19
Nível 1 / Level 1	27
BOVESPA Mais	15
BOVESPA Mais Nível 2	2
Total	400

As of December 31, 2018, out of a total of 400 publicly-held companies listed in B3, 179 (44,75%) were listed in segments that require a mandatory arbitration provision in the bylaws, especially Novo Mercado. Furthermore, over the years there is a clear trend of migration to the more stringent segments – those that require mandatory arbitration bylaws. The following table summarizes the number of equity offerings completed in Brazil (at B3) between 2017 and 2019, divided between the different listing segments:

Table 2. N. of equity offerings completed by listing segment between 2007-2019

Year	Standard	BDR	Mais	Nível 1	Nível 2	Novo Mercado	Total
2007	1	6		9	8	52	76
2008		1	1	3	1	6	12
2009					4	20	24
2010	1				1	20	22
2011				1	2	19	22
2012				1	1	9	12
2013			1		4	12	17
2014				1		1	2
2015	1			1		3	5
2016	1			1	3	5	10
2017	3	1			4	18	26
2018				1		4	5

The Ministry of Economy and CVM Joint Working Group on strengthening the enforcement of shareholders' rights

In March, 2018, Brazil's Ministry of Economy (ME) and the CVM formed a working group (WG) and jointly launched a project aimed at improving investors' protection in the country's capital markets through the development of mechanisms related to the private enforcement of shareholders' rights and redress[13].

The development of the project counts on the financial support of the Great Britain's Prosperity Fund and technical support of OECD's Corporate Governance Committee, including support in benchmarking Brazil against other OECD members' approaches and practices, and to help ensure that Brazil's efforts to strengthen its framework and practices in this area are consistent with the G20/OECD Principles of Corporate Governance, its main reference. The CVM alongside with the OECD prepared a Project Spec-

13 The Minister of Economy and the President of the CVM signed the Ministerial Order on March, 21st, 2018, which was officially published on April, 11th, 2018 (PORTARIA CONJUNTA MF/CVM Nº 92).

ification in June, 2018, establishing an initial scope for the project, the expected deliverables and the tentative schedule dates.

This interim report is one of the main deliverables of the first phase of the project, as designed in the Project Specification, and represents the fulfilment of the main task of the WG, as agreed between the ME and the CVM back in March, 2018. The document was prepared by the WG, with the support of the OECD.

OECD/ UK Prosperity Fund

The support of the UK Prosperity Fund and the OECD has been essential to the development of the Project. In fact, the partnership that the Commission has been developing with the Prosperity Fund over the years has been very rewarding, in view of the alignment of the Prosperity Fund's agenda with the mandate of the CVM. Therefore, the CVM hopes that the Prosperity Fund continues to provide funding support for this project, as well as others that aim to have a positive impact in Brazil, promoting the country's economic growth. In particular, the Prosperity Fund agenda with the OECD has enabled the Commission to count on the technical support of the OECD for this project, participation that has been fundamental so far.

In this regard, it should be noted that this project is part of CVM's ongoing process of developing best practices of corporate governance in Brazil – based on review of international experience – and, in particular, our objective of being accepted as a full and formal OECD member – which would require compliance with the G20/OECD Principles on this specific subject as well. Thus, counting on the OECD, its Secretariat and its Corporate Governance Committee experts to debate the issues under discussion in the project, organize international events, and present to us its unique expertise about the international legal framework adds great value to the work of the Commission, fostering our goals.

Workshop

One of the first steps taken in the context of the project was the organization of a *"Workshop on Strengthening the Private Enforcement of Shareholder Rights"* which was held on November 8th and 9th, 2018 at Insper University[14], in São Paulo, Brazil, and attended by key Brazilian and international public officials, academic experts and private sector practitioners with relevant experience on the matter.

To support the workshop discussions, the WG prepared[15] an Issues Note gathering information from market participants on the perceived difficulties that hinder the effectiveness of private enforcement in Brazil, and from outside experts on the experience of other jurisdictions. The information in the Issues Note both on Brazil and on international experience of a range of different jurisdictions including Germany, Israel, Sweden, the UK and the US among others, has been fully taken into account in the further development of this Interim Report, providing important input to the WG's deliberations.

The 1 and ½-day workshop was divided into five sessions besides the Introductory Panel and the Concluding Session, each conducted by a moderator and lead speakers in a roundtable format. Notably, the workshop promoted an intense and productive discussion amongst all its participants with regards to the themes brought in each session.

The panel speakers of the Introductory Panel were João Manoel Pinho de Mello, former Brazilian Secretary for Productivity and Competition Advocacy of the Ministry of Economy, Marcelo Barbosa, CVM Chairman, Daniel Blume, Senior Policy Analyst of OECD Secretariat, and Marcos Lisboa, Insper University's President.

The panellists introduced the project developed by the CVM and the Brazilian Ministry of Economy, with the support of the OECD and Prosperity Fund, highlighting the importance of the matter under discussion to improve investors' confidence in Brazil's capital markets and therefore to the development of the country's economy.

Session 1: "Enforcement of Shareholders' Rights in Brazil" was moderated by Marcelo Trindade, former CVM Chairman and lawyer, and had Professor Viviane Muller Prado from GV Law School and Pablo Renteria, CVM Commissioner at the time, as lead speakers. In this session, provided an overview was provided of the Brazilian current framework on public and private enforcement of shareholders' rights in order to introduce the main issues that would be discussed throughout the

14 Insper University provided the logistical support for the event.

15 With input from the OECD Secretariat and Corporate Governance Committee in October, 2018, and with data and statistical support from B3 – in particular, the Market Chamber of Arbitration – and the collaboration of Professors Viviane Muller Prado and Guilherme Setoguti Pereira.

Workshop. Notably, the speakers outlined the main legal tools shareholders can use in Brazil to seek compensation for losses caused by managers and controlling shareholders of publicly-held companies, including compensation granted under the settlement agreements entered into by them with the CVM in administrative proceedings. There were also underlined the main obstacles Brazilian investors face to use the current mechanisms set forth in Brazilian legislation in order to obtain redress for damages. Finally, the role played by the CVM in overseeing compliance with corporate law by managers and controlling shareholders was explained.

Session 2: "Alternative Models for Enforcement of Shareholders' Rights" was moderated by Gustavo Gonzalez, CVM Commissioner, and had Daniel Blume, Professor Rolf Skog, Executive Director of the Swedish Securities Council, and Offir Eyal, Senior Advisor to the Chair and Director of International Affairs of Israel Securities Authority, as lead speakers. In this panel, speakers were able to provide an overview of the alternative models conceived by Sweden and Israel to enforce shareholder rights.

Firstly, Daniel Blume referenced relevant recommendations of the G20/OECD Principles of Corporate Governance and gave highlights from relevant OECD corporate governance comparative reviews on Supervision and Enforcement in Corporate Governance[16] and Related Party Transactions and Minority Shareholder Rights[17]. He also cited relevant public and private enforcement experience from the UK. Subsequently, Professor Rolf Skog presented the structure of the Swedish Securities Council, a self-regulatory body, the actions it takes in order to facilitate more rapid resolution of shareholder disputes and the role it plays as a consultant of matters involving capital markets, when urged to do so. In turn, Offir Eyal presented the Israeli model on the protection of shareholders rights, which combines public and private enforcement, with the Israel Securities Authority (ISA) playing an active role in derivative suits and class actions, sometimes even financing the claimaints, as well as in settlements. To this end, Offir Eyal exposed the mechanisms developed by ISA for directly getting the compensation to the members of the class.

16 OECD (2013), Supervision and Enforcement in Corporate Governance, Corporate Governance, OECD Publishing.http://dx.doi.org/10.1787/9789264203334-en

17 http://www.oecd.org/corporate/supervisionandenforcementincorporategovernance.htmhttp://www.oecd.org/daf/ca/relatedpartytransactionsandminorityshareholderrights.htm

Subsequently, session 3: "Shareholders Litigation Mechanisms" was moderated by Professor Nelson Eizirik, former Chairman of the Brazilian Takeover Panel (CAF) and lawyer. Professor Martin Gelter of Fordham University and Professor Aluisio Mendes, Federal Chief Justice, served as lead speakers. Professor Martin Gelter provided an overview of different mechanisms employed internationally – comparing especially those adopted in the U.S. and in other countries in Continental Europe – to enable shareholders to seek redress for damages, including derivative and class actions. In turn, Professor Aluisio Mendes underlined the current instruments set forth in the Brazilian legal system for collective protection of investors, pointing out its main deficiencies. In this panel, the experts also discussed the advantages and disadvantages of adopting the models of opt-in and opt-out in collective suits, using the international experience to illustrate the discussion.

Session 4: "Company's liability to its shareholders" was moderated by Professor Francisco Satiro from São Paulo University, and had Professor Merritt Fox from Columbia University, Geoffrey Jarvis, Partner of Kessler Topaz Meltzer Check LLP, and Professor Sergio Lazzarini from Insper University as lead speakers. In this panel, speakers discussed the implications related to legal provisions establishing company liability for shareholders' losses, the conditions under which such liability should be applicable and the advantages and disadvantages of using the company's assets to recover such losses. To this end, Geoffrey Jarvis shared his experience as a U.S. attorney whose firm finances investors' class actions against publicly-held companies, while Professor Merritt Fox provided a broad perspective of all the problems and deficiencies related to the fraud-on-the-market theory.

Thereafter, session 5: "Class Arbitration in Brazilian Public Company" was moderated by José Emílio Nunes, lawyer and arbitrator. Professor Christian Borris, Partner of Borris Hennecke Kneisel, and Grasiela Cerbino, Secretary General of the Market Arbitration Chamber of B3, served as lead speakers. The importance of this matter was due to the fact that arbitration has become the main mechanism for dispute resolution involving shareholders of Brazilian publicly-held companies.

In this session, speakers discussed the use of arbitration for shareholder redress claims against managers and controlling shareholders. They pointed out the advantages of using arbitration as a litigation mechanism over judicial proceedings, such as

specialization of the tribunal and celerity. On the other hand, it was outlined that the confidentiality that normally protects arbitration may be a barrier to shareholders' engagement in proceedings in which they have a legal interest. At this point, the workshop participants discussed possible measures that could be taken by the CVM to mitigate such a problem.

Afterwards, the challenges and complexity involved in collective arbitration was discussed, for instance the time limit to join the proceeding, parallel related proceedings, treatment of *res judicata*[18], amongst others. Professor Christian Borris gave an overview of the use of arbitration for shareholder redress claims in Germany, including the requirements set forth by the German Supreme Court to deal with the problems associated with the use of arbitration for disputes with *erga omnes*[19] *effects.*

Finally, in the Concluding Session, the participants discussed possible next steps to deal with the main problems and deficiencies identified in Brazilian legislation and regulation regarding enforcement of shareholders rights.

In light of all of the above, this interim report aims to summarize the WG conclusions at this stage, which greatly benefited from the experts' inputs during the *Workshop on Strengthening the Private Enforcement of Shareholder Rights*, including recommendations for regulatory or legislative changes. After the first round of discussions, the WG decided not to continue with consideration of the company's liability to its shareholders, as there is a lack of consensus both internationally and in Brazil on what constitutes best practice, making discussions of this topic potentially contentious.

Plan of Work

This interim report is organized into three different sections. Following this introductory section, the report goes into depth first on shareholder litigation mechanisms, and secondly on arbitration. Besides presenting an overview of the current Brazilian legal and regulatory framework regarding investors' redress mechanisms, it aims to point out the main issues identified not only in the current legal regime but also in the existing institutions that should favour investors' access to justice – to then propose some potential changes in the legislation and regulation in order to face these problems.

In fact, the Brazilian legislation sets forth different litigation mechanisms enabling investors to seek redress for the damages suffered. The general rule is that anyone who violates rights and cause damages to someone else by a voluntary act or omission is obliged to compensate the corresponding damages (Article 927 of the Brazilian Civil Code). In addition, the Brazilian Corporate Law entitles companies to file lawsuits against their managers, and investors to file individual and derivative lawsuits against managers and controlling shareholders. Besides, Law 7,913/1989 and Law 7,347/1985 regulate collective lawsuits.

At a first glance, the existing enforcement mechanisms are similar to those available in other jurisdictions. However, it is widely perceived that the extensive menu offered in the Brazilian legislation does not provide an effective protection for investors. There is no single explanation for this problem. Some problems are related to the existing legislation, while others arise from the organization, powers, and limitations of the existing public and private institutions in Brazil.

To discuss the problems associated with the Brazilian legislation, Section 2 provides a critical overview of the existing mechanisms. Based on this diagnostic, it indicates potential changes in the legislation, topics that should be further investigated, as well as some regulatory initiatives that CVM could adopt.

Other important problems are associated with the Brazilian enforcement institutions.

The Brazilian courts have always been criticized for their slowness and lack of expertise about corporate law and capital market regulation[20]. It is estimated

18 I.e. a matter that has been adjudicated by a competent court and may not be pursued further by the same parties.

19 I.e. when the subject under discussion in the proceeding affects all shareholders of a publicly-held company and, therefore, its award will produce effects over all of them (e.g. the right of redress derived from corruption schemes and fraudulent conducts).

20 Cf. Bruno Salama and Viviane Muller Prado, "Legal protection of minority shareholders of listed corporations in Brazil: brief history, legal structure and empirical evidence". Journal of Civil Law Studies, v. 4, 2011, p. 178; Eduardo Secchi Munhoz, Aquisição de controle na sociedade anônima. São Paulo: Saraiva, 2013, p. 89; Erik Oioli and José Afonso Leirião Filho, "Os Empecilhos à Tutela Judicial dos Investidores do Mercado de Capitais e a Class Action no Brasil". In: Processo Societário II (coords. Flávio Luiz Yarshell and Guilherme Setoguti J. Pereira). Quartier Latin: São Paulo, 2015, p. 191; Paulo Cezar Aragão, "A CVM em juízo: limites e possibilidades". Revista de Direito Bancário e do Mercado de Capitais, n. 34, out./dez. 2006, p. 40-42; Mayara Gasparoto Tonin e Mayara Roth Isfer, "Apontamentos sobre a efetividade do sistema de aplicação da lei (enforcement) no mercado de valores mobiliários brasileiro". Revista de Direito Empresarial, v. 9, mai./jun. 2015, p. 280; Eugenio Cárdenas, "Globalization of securities enforcement: a shift toward enhanced regulatory intensity in Brazil's capital market?". Brooklyn Journal of International Law, v. 37. 2012, p. 838); and Bernard Black, "Strengthening Brazil's

that between 2013 and 2016 around 5,740 lawsuits related to business matters were filed in the (civil law) courts of São Paulo[21]. And it is also estimated that, in comparison to other kind of disputes, business litigation is considered more complex and, therefore, takes much longer to be analysed by the judges[22].

In order to address this scenario, over the years, the Brazilian judiciary started to implement an important measure aiming to achieve a greater specialization with regards to business matters: to create specialized courts to deal with corporate disputes. Nowadays, there are business courts in the States of Rio de Janeiro, Minas Gerais, Rio Grande do Sul and São Paulo. Other States have been discussing similar initiatives as well. In this regard, it is important to note that although the headquarters of the majority of publicly-held companies are situated in the State of São Paulo, it was only at the end of 2017[23] that business courts were implemented there[24], one specialized in conflicts related to arbitration[25]. This initiative appears to have been successful so far. Therefore, its adoption on a larger scale would be desirable.

Despite this progress related to the resolution of business disputes in general, the existing specialized courts have not been heavily tested in disputes involving publicly-held companies, since arbitration has become the dominant mechanism to solve these claims[26]. The Brazilian Corporate Law expressly authorizes companies, including those that are publicly-held, to incorporate in their bylaws provisions imposing arbitration to settle corporate disputes (Article 109, Paragraph 3) and, as described above, some special listing segments of B3 requires mandatory arbitration. Besides, data shows that a significant part of publicly-held companies not listed in the referred listing segments have voluntarily chosen arbitration to settle their disputes, revealing the positive impression of the market about this ADR mechanism[27].

Arbitration can be an effective solution for problems associated with the slowness and lack of expertise of some courts, since the claims are appraised by corporate experts within a period that usually is shorter than the time required for a decision in a regular court. However, the use of arbitration was not initially designed to deal with the types of multi-party and collective rights disputes that we have been seeing in recent years in Brazil. There are other important issues regarding arbitration, ranging from general discussions about the coverage of the mandatory-arbitration bylaws to specific questions regarding the disclosure of the proceedings involving publicly-held companies and the ability of the existing arbitration rules to deal with collective claims. The problems associated with arbitration are discussed in Section 3 of this report.

securities markets". Revista de Direito Mercantil, Econômico e Financeiro, 120, out./dez. 2000, p. 17.

21 For more information regarding the Business Courts of the State of São Paulo, see: https://tj-sp.jusbrasil.com.br/noticias/528411714/tjsp-instala-1a-e-2a-varas-empresariais-e-de-conflitos-relacionados-a-arbitragem-e-3a-vara-de-falencias-e-recuperacoes-judiciais-da-capital and https://www.conjur.com.br/dl/parecer-corregedoria-varas-empresariais.pdf.

22 According to a study made by the Associação Brasileira de Jurimetria in 2016 over lawsuits filed between 2013 and 2015, they take twice the time. Available at: https://abj.org.br/cases/varas-empresariais/.

23 These courts were created by the São Paulo Tribunal Resolution No. 763/2016. They shall analyze all cases related to business conflicts, precisely, the ones involving corporate rights (Book II, Special Part of the Brazilian Civil Code), Brazilian Corporate Law, Industrial Property and Disloyal Competition (Law No. 9.279/1996), Franchising (Law No. 8,955/1994), and lawsuits derived from the Brazilian Arbitration Law (Law No. 9.307/96).

24 Since 2011, São Paulo has two Business Law Courts of Appeal (Resolutions No. 538 and 558/2011).

25 Since 2011, the business courts of Minas Gerais received specific jurisdiction to solve cases involving arbitration (Resolution No. 679/2011). According to the National Council of Justice (CNJ), the tribunals of Brazil's 26 States have established jurisdiction to certain courts to deal with disputes derived from the Brazilian Arbitration Law. Data available at: https://cnj.jusbrasil.com.br/noticias/228236456/corregedoria-divulga-lista-de-varas-especializadas-em-arbitragem.

26 See PRADO, Viviane Muller; DECCACHE, Antonio. Arbitragem coletiva e companhias abertas. Revista de Arbitragem e Mediação. São Paulo, RT, ano 14, vol. 52, jan./mar., 2017, p. 100

27 See data in PARGENDLER, Mariana; PRADO, Viviane Muller; BARBOSA JR, Alberto. Cláusulas arbitrais no Mercado de capitais brasileiro: alguns dados empíricos. Revista de Arbitragem e Mediação. Ano 11, n. 40. Jan.-mar. 2014, p. 105-111. This conclusion also comes from data collected by the CAM in September, 2018 (see Section 3 below).

2. Shareholders litigation mechanisms

2.1. Available lawsuits for corporate litigation in Brazil

2.1.1. Lawsuits against managers

2.1.1.1. Company Direct Lawsuit

Officers and board members are liable for any loss caused when they (a) act within scope of their authority with fault or wrongful intent or (b) breach the law or the company's bylaws provisions (Article 158 of the Brazilian Corporate Law).

However, managers are exempted from liability in cases where shareholders have approved the management's accounts and financial statements, except in cases of fraud, error, wrongful intent or simulation (Article 134, Paragraph 3). In a situation where the wrongdoing is discovered after the approval of the management's accounts, shareholders must first annul the general meeting resolution that exempted the manager from liability[28]. Only after the annulment, will they be able to vote on a shareholders' resolution on whether the company should file a lawsuit against any of the members of the management.

This rule creates obvious procedural barriers to obtaining redress from the managers. First, even before filing the civil lawsuit, shareholders have to deal with the intricate problem of annulling the approval of the management's accounts. Second, shareholders have to invest money[29] and time[30] to file the civil lawsuit against the manager with only the prospect to receive an indirect benefit, namely the restoration of the company's assets. Third, there's a difference in the statute of limitations of the lawsuit to annul the resolution that approved the managers' accounts and financial statements and that of the civil lawsuit to hold managers liable, which may be understood to decrease the statute of limitation applicable to the latter[31].

Apart from the procedural constraints, from a material standpoint, it is questionable whether shareholders should be required to vote on exempting management from its liability before any of its possible wrongdoings come to light, especially when in doing so shareholders are prevented from freely filing a civil lawsuit against the management in case they do find any irregularity in the future[32].

Based on the barriers mentioned above and on the positive examples of other civil law jurisdictions[33], it seems

28 There is some controversy regarding the requirements for the annulment of the resolution that exempted management from liability (by approving the management's accounts and financial statements). According to some scholars and to the latest jurisprudence of the Brazil's Superior Court of Justice (STJ), this annulment can only be achieved through a lawsuit that seeks the annulment of the general meeting resolution, in accordance to article 286 of the Brazilian Corporate Law. BULHÕES PEDREIRA, José Luiz; ROSMAN, Luiz Alberto Colonna. "Aprovação das Demonstrações Financeiras, Tomada de Contas dos Administradores e seus Efeitos. Necessidade de Prévia Anulação da Deliberação que Aprovou as Contas dos Administradores para a Propositura da Ação de Responsabilidade". In: CASTRO, Rodrigo Monteiro de; ARAGÃO, Leandro Santos de (coord.). Sociedade Anônima: 30 Anos da Lei 6.404/76. São Paulo: Quartier Latin, 2007. EIZIRIK, Nelson. A Lei das S/A Comentada. Volume II – Artigos 80 a 137. 2ª Edição, Revista e Ampliada. São Paulo: Quartier Latin, 2015, p. 466. EIZIRIK, Nelson. A Lei das S/A Comentada. Volume IV – Artigos 206 a 300. 2ª Edição, Revista e Ampliada. São Paulo: Quartier Latin, 2015, p. 508.

29 At the end of the civil lawsuit, the expenses shareholders incurred in relation to it are reimbursed, but all the remaining amounts are submitted to the company (article 159, paragraph 5). Thus there's little economic incentive for shareholders to even file the lawsuit, as its benefits will only be indirect and shared proportionally with all the rest of the shareholders.

30 The civil lawsuit can only be filed after a general meeting resolution regarding it. If it is approved, the company itself may file it. If it's approved, but the administration wouldn't file it, any shareholder or group of shareholders can file it by themselves in the name of the company. If it's denied, any shareholder or group of shareholders that have at least 5% of the capital stock may file it.

31 The lawsuit to annual the resolution approving the managers' accounts and financial statements must be filed within two years from the date the resolution was taken, while the civil lawsuit to hold managers liable must be filed within three years from the date of publication of the minutes of the shareholders general meeting that approved the balance sheet for the fiscal year in which the violation occurred. This inconsistency reduces the already short time shareholders have to initiate a civil suit on management liability.

32 ADAMEK, Marcelo Vieira Von. Responsabilidade Civil de Administradores de S.A. São Paulo: Saraiva, 2009, p. 356.

33 In Germany (paragraph 120 of the German Stock Corporation Act) and in France (article L225-253 of the French Commercial Code) the approval of the managers' accounts by the shareholders general meeting do not exempt the managers from liability. In Italy (article 2434 of the Italian Civil Code) and in Portugal (article 74º of the Portuguese Corporations Code) the approval of the management's accounts also does not exempt managers from liability. However, exemption may be granted by an express resolution of the shareholders general meeting. In these latter examples a qualified minority (of 20% of the capital stock in Italy and

that the existing rule stated in Article 134, Paragraph 3 of the Brazilian Corporate Law should be extinct or seriously rethought (for example, allowing the power of veto to a qualified minority, restricting the exemption from liability only for facts known by the shareholders by the time of the voting, or enabling shareholders that voted against the approval of the managements' accounts to file civil lawsuits against managers) in order to reduce difficulties in obtaining compensation for damages to the shareholders or to reduce the impunity of managements' wrongdoings and the inefficiency of shareholders' rights enforcement.

The decision to file the lawsuit shall be approved in a shareholders general meeting, which needs to approve such resolution by the majority of the attending shareholders. If the lawsuit is approved, the managers that will be sued are immediately disqualified and shall be replaced at the same general meeting.

There has been some controversy regarding the question of whether the shareholder who has a management position should be entitled to vote on the filing of a lawsuit against him/herself. In a recent case, CVM decided that in these situations the shareholder is prevented from voting since he/she has a conflict of interest in the matter (Brazilian Corporate Law, Article 115, Paragraph 1).

However, shareholders are not prevented from voting when the resolution is related to board members that were appointed by them. Most of the Brazilian companies have a shareholder or a group of shareholders holding a controlling stake of the voting capital. This group will appoint the whole board or the majority of its members and will have the power to, irrespective of the minority shareholders' views, decide on whether the company should sue the management.

Brazilian Corporate Law does not regulate the governance of the lawsuit filed by the company against former managers. Pursuant to Article 144 of the Brazilian Corporate Law, the company is represented by its officers, including in the litigation against former officers or directors. Therefore, it is possible that managers do not have incentives to bring a lawsuit for compensatory damages against former colleagues and, even if they do bring it, there is no guarantee that they will apply the required resources and efforts in such lawsuits[34]. In other jurisdictions, for example, claims initiated by minority shareholders were pursued by a court-appointed special representative. The WG understands that it would be advisable to pursue further studies on the matter, including by examining the existing governance rules in other jurisdictions in order to find a benchmark to be followed in Brazil.

2.1.1.2. Derivative Lawsuits

In addition, the Brazilian Corporate Law enables shareholders to initiate litigation on behalf of the company under certain circumstances. In these cases, the shareholder is not acting as the company representative, but as its procedural substitute.

The first situation where the company authorizes the derivative litigation is when the shareholders approve the filing of the lawsuit in a shareholders general meeting and the managers fail to take the proper measures. If the company does not file the lawsuit within three months of the approval at the shareholders general meeting, any shareholder is entitled to file it on its behalf (Article 159, Paragraph 3, of the Brazilian Corporate Law). In addition, if the shareholders general meeting does not approve the lawsuit, shareholders representing at least 5% of the capital stock are allowed to file it. It is controversial if managers are also disqualified when the lawsuit is not approved at the shareholders general meeting and the dissident shareholders decide to file a derivative lawsuit[35].

The 5% legislation requirement reveals a preoccupation with constraining the filing of frivolous suits. However, in certain situations this quorum may be extremely difficult to attain: either in cases in which the capital is too dispersed or in which it is too concentrated. Irrespective of the capital structure, for the largest companies a 5% stake may represent a very large investment. Pursuant to Article 291 of the Brazilian Corporate Law, CVM has authority to reduce the thresholds for larger companies, based on the capital stock[36] stated in the company's bylaws. However, to date CVM has not issued any regulation on this matter.

of 10% in Portugal) has the right of veto. In Switzerland the approval of the management's account only has an exception of liability effect regarding the facts expressly revealed to the shareholders general meeting, and even so shareholders who voted against still have the right to promote de derivate lawsuit to hold the managers liable (article 758 of the Swiss Code of Obligations). In Argentina the approval also has the exception of liability effect, except in the cases of breach of the law or the company's bylaws provisions or if a qualified minority of 5% of the capital stock didn't oppose the resolution (article 275 of the Argentinian Corporate Law).

34 "Boards of directors are typically not inclined to sue officers of the corporation, even if the officers are not members of the board." GELTER, Martin, Why do Shareholder Derivative Suits Remain Rare in Continental Europe? (February 7, 2012). Brooklyn Journal of International Law, vol. 37, no. 3, 2012; Fordham Law Legal Studies Research Paper No. 2000814; ECGI - Law Working Paper No. 190/2012. Available at SSRN: https://ssrn.com/abstract=2000814, p. 850.

35 See ADAMEK, Marcelo Von. Responsabilidade Civil de Administradores de S.A. São Paulo: Saraiva, 2009, p. 376.

36 Such criteria in this case can be questioned, since it is not necessarily true that companies with an extremely high percentage of capital stock have a more dispersed capital.

Reducing the threshold required to file the derivative lawsuit may help the smaller, but significant, groups of investors to litigate against management. Therefore, CVM will propose a new regulation establishing different thresholds for larger[37] companies.

Besides the hurdles regarding achieving the threshold and those that are common to other litigation mechanisms (such as the effects of the approval of the financial statements and to the statute of limitations), there is a lack of balance between the risks and returns that a shareholder faces when deciding to initiate a lawsuit on behalf of the company.

In fact, any damages recovered by a favourable ruling must be transferred to the company, not to the claimants – since the lawsuit is brought on behalf of the company. Therefore, the shareholders will only indirectly benefit due to an increase in the company's assets, in the same way that those who did not participate in the litigation.

Besides, the plaintiffs will be reimbursed for their costs (including attorney fees and court costs) incurred in relation to the proceedings only in case of favourable decision and up to the limit of the damages it has awarded. In other words, shareholders who file a derivative lawsuit have to bear all the risk of an adverse ruling to the company. In this case, plaintiffs will not only be prevented from being reimbursed for the costs to initiate and maintain the judicial proceedings, but will also have to pay the lost fees. It is striking that the law does not differentiate the cases where the lawsuit is approved by the general meeting but management fails to file it in a timely fashion (i.e. within three months of the approval at the shareholders general meeting).

From the potential plaintiffs' perspective, there is a clear imbalance between the costs and benefits of filing a derivative lawsuit. The current outcome is a clear disincentive for shareholders to bring the lawsuit. The Brazilian Corporate Law should, therefore, be amended to enhance the appropriate incentives and/or to reduce the costs of a derivative litigation.

In view of the above, the WG considers that the provisions of the Brazilian Corporate Law should be amended to:

create a premium for shareholders who file the derivative lawsuit in case of a favourable ruling;

provide that plaintiffs will be entitled to reimbursement of all the costs incurred when the lawsuit was approved by the shareholders general meeting and the managers fail to take the proper measures.

2.1.1.3. Shareholder Direct Lawsuit

Finally, the third kind of lawsuit that can be filed against managers is the direct liability lawsuit (or shareholders individual lawsuit). Pursuant to Article 159, Paragraph 7 of Brazilian Corporate Law, shareholders may bring an action against managers in their own name in order to obtain redress for the damages directly suffered.

The direct lawsuit is not available to recover damages caused directly to the company even though they result in an indirect damage to shareholders.

2.1.2. Lawsuits against controlling shareholders

Considering the concentrated control of most Brazilian publicly-held companies, the provisions of Brazilian Corporate Law with regards to the specific duties and the liability regime applicable to controlling shareholders are especially relevant. In accordance with Article 117 of the law, controlling shareholders are liable for any damages caused by acts performed by the abuse of their controlling power.

Article 246 of the Brazilian Corporate Law describes the procedures that should be followed in order to allow the company to seek compensation for the damages suffered.[38] Recognizing that controlling shareholders could thwart the company ability to file a lawsuit against themselves, this article authorizes minority shareholders to file a lawsuit on behalf of the company against the controlling shareholder seeking redress without submitting the matter to a shareholders general meeting.[39]

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37 It is arguable whether the capital stock is the adequate measure to differentiate companies. Even though CVM does not have authority to use a different criterion in its regulation, in case of an amendment to the Brazilian Corporate Law this topic may be subject to a specific proposal, changing the criteria (for example, market capitalization) or granting CVM authority to select the criteria.

38 It is worth remarking that Article 246 only mentions "controlling entity", which can put into doubt if a lawsuit against a private individual would be possible. Regarding this matter, CHEDIAK and SETOGUTTI remark that the only possible interpretation of the law is that Article 246 is applicable both to controlling entities and to controlling private individuals. CHEDIAK, Julian Fonseca Peña. Reflexões sobre a efetividade do regime de responsabilização do acionista controlador. In: VENÂNCIO FILHO, Alberto; LOBO, Carlos Augusto da Silveira; ROSMAN, Luiz Alberto Colonna (coords.). Lei das S.A. em seus 40 anos. Rio de Janeiro: Forense, 2017, p. 221 and PEREIRA, Guilherme Setoguti J. Enforcement e Tutela Indenizatória no Direito Societário e no Mercado de Capitais. Quartier Latin: São Paulo, 2018, p. 75-77.

39 It is important to mention that there are some court decisions in Brazil that, when analyzing the matter incidentally, conditioned the approval in a shareholders general meeting as a prerequisite for filing the lawsuit. See Superior Court of Justice, REsp 798.264-SP, Justice Nancy Andrighi, ruled on February 6th, 2007 and Superior

As in the derivative lawsuits against managers, shareholders who decide to file the lawsuit will be required to bear all the costs associated with initiating and maintaining the proceeding, including attorney fees and court costs, and will only be entitled to a reimbursement in case of a favourable ruling – but according to Article 246, Paragraph 2, the reimbursement will cover only court fees. If the law is amended, Article 246 should incorporate the same reimbursement rule that exists for derivative claims against managers, including attorney fees.

Any shareholder may bring this lawsuit, provided he/she guarantees payment of the legal costs (including court costs, attorney fees and lost fees) in case of an adverse ruling. This guarantee is not required when the plaintiffs represent at least 5% of the capital. The case law is sparse and it is arguable whether this requirement is constitutional, since demanding a guarantee would represent a violation of the constitutional right of access to justice[40].

Pursuant to Article 291 of the Brazilian Corporate Law, CVM may enact regulation decreasing the ownership percentage required to file the lawsuit without offering the guarantee. The less favourable treatment between shareholders owning less than 5% and those representing higher stakes have a parallel with the abovementioned rule for derivative lawsuits against managers, even though the consequences are different in each case. In both cases, the rules reveal a concern in avoiding frivolous lawsuits but may create burdens for litigation due to difficulties in achieving the minimum ownership required. As with respect to derivative litigation against managers, the WG believes that reducing this threshold may facilitate investors to bring lawsuits against controlling shareholders and will, therefore, propose new regulation suggesting different thresholds for larger companies.

On the other hand, in case there is a favourable ruling to the company, Brazilian Corporate Law determines that besides being reimbursed for the legal expenses, the shareholder who brought the suit is entitled to a payment (a premium), to be made by the controlling shareholder, of 5% of the total amount of the rewarded compensation.

More impressively, Article 246 establishes that when the lawsuit is successful, the plaintiff's lawyer is entitled to fees corresponding to 20% of the total amount of the rewarded compensation, which should correspond at least to the amount of the damages suffered by the company.

Arguably, the Brazilian Corporate Law created a strong incentive for lawyers to support minority shareholders in lawsuits against controlling shareholders. Until today, however, this provision does not seem to comprise enough incentive to mitigate the burdens imposed to shareholders who are interested in filing a liability lawsuit, including the bond requirement, and, most of all, the length or uncertainty around corporate litigation.

2.1.3. Collective lawsuit provided for in Law 7,913/1989 and Law 7,347/1985

In Brazil, collective claims for losses in capital markets are governed by two different laws: Law 7,347/1985, which regulates all public-interest civil lawsuits, and Law 7,913/1989, which establishes a specific regulation for public-interest civil lawsuits for damages caused to investors in the capital markets[41].

As described in more details below, the Public Prosecutor's Office (*Ministério Público*), CVM and investors' associations have legitimacy to file collective lawsuits seeking redress for losses suffered by investors in the capital markets.

Collective claims have been used sporadically. According to one study[42], only nine collective lawsuits had been filed based on the Law 7,913 as of 2007, 18 years after its enactment. A more recent study issued in 2018 showed that only two public-interest civil lawsuits involving publicly-held companies failing to supply information had been filed by the public prosecutor's office alongside with the CVM acting as *amicus curiae*[43].

The problem, in fact, not only affects Brazil. According to John Coffee Jr., excluding the United States

Court of Justice REsp 1.214.497, Justice Raul Araújo ruled on September 23th, 2014. On the opposite side see Superior Court of Justice, REsp 16.410-SP, Justice Sálvio de Figueiredo.

40 See BUSCHINELLI, Gabriel Saad Kik; BRESCIANI, Rafael Helou. Aspectos Processuais da Ação de Responsabilidade do Controlador movida por acionista titular de menos de 5% do capital social (art. 246, § 1º, 'b', da Lei 6.404/76). In: YARSHELL, Flávio Luiz; PEREIRA, Guilherme Setoguti J. (coords.). Processo Societário II. Quartier Latin: São Paulo, 2015.

41 The law stipulates some examples of conducts which may give rise to damages, such as fraudulent transactions, unfair practices, price manipulation or creation of artificial conditions of demand, offer or price of securities, insider trading, non-disclosure of material facts when it is mandatory to do so, or the disclosure of incomplete, misleading or biased information.

42 ZACLIS, Lionel. Proteção coletiva dos investidores no mercado de capitais. São Paulo: RT, 2007, p. 178-183.

43 See PRADO, Viviane Muller. Os desafios para o ressarcimento de investidores. In: CARVALHOSA, Modesto; LEÃES, Luiz Gastão Paes de Barros; WALD, Arnoldo (coords.). A responsabilidade civil da empresa perante os investidores. São Paulo: Quartier Latin, 2018, pp. 386.

and a few other countries with a common law tradition, collective actions for the protection of the capital market are "*as rare as unicorns*" [44].

Several factors may help to explain why collective claims are not an effective enforcement tool for problems related to the Brazilian capital markets.

2.1.3.1. Standing to sue

Law 7,347/1985 grants authority to file a collective lawsuit to several public entities – including CVM – and to associations that fulfil some requirements (as described below).

Law 7,913/1989 grants to the Public Prosecutor's Office powers to, *ex officio* or by request of the CVM, litigate in order to avoid losses or to seek compensation for damages on behalf of securities holders and investors (Article 1 of Law 7,913/1989).

Even though Law 7,913/1989, which is the specific law for public claims related to capital markets matters, only refers to the Public Prosecutor's Office, scholars and case law acknowledge the legitimacy of CVM to file such collective lawsuits, since Article 3 of Law 7,913/1989 establishes that Law 7,347/1985 subsidiarialy governs public-interest civil lawsuits for damages caused to investors in the capital markets.

With respect to the associations, Law 7,347/1985 provides that their standing to sue depends on the following requirements: (a) the association must be established for at least one year and (b) its institutional purposes encompass the protection of investors. Law 7,347/1985 provides that the judge may waive the first requirement in case there is a significant social interest involved. Moreover, there is a debate amongst Brazilian experts on whether it is necessary for most of the associated investors to authorize the filing of the lawsuit through a meeting held by such investors.

2.1.3.2. Structural issues may (partially) explain why the Public Prosecutor's Office, CVM and investors' associations do not file more collective claims

Since they all have standing to sue, why don't the Public Prosecutor's Office, CVM and investors' associations file more collective claims?

With respect to the Public Prosecutor's Office, a possible explanation is that its jurisdiction is very broad. It encompasses the protection of all matters of public interest, including consumer rights, environmental interests, cultural heritage, etc. Consequently, it may lack incentive and expertise to handle complex corporate and securities cases by itself. In this sense, the joint authority provided to the Public Prosecutor's Office and CVM can be helpful, and therefore it would be recommended to further analyse if there is room for improvement.

However, as mentioned above, the CVM has also an independent standing to file collective lawsuits seeking redress for investors, but rarely does so. This behaviour is partially explained by CVM's shortage of resources and wide range of competences (Law 6.385/76, Articles 8 and 9), which requires the Commission to choose where to direct its human and financial resources and efforts. In this scenario, CVM has been focusing its efforts on inspecting, monitoring and regulating the capital markets, leaving the search for compensation to private enforcement.

As a result of the broad and vital functions assigned to CVM by law, it must exercise the legal prerogative to file a class action suit only in exceptional situations, where there is a relevant social function involved in the litigation. The performance of the Commission as responsible for the enforcement of capital market legislation must be supplemented by private action, and the search for reparation of damages must be attributed/made, in the first place, to/by the victims themselves. The primary focus of the regulator is not and should not be on the compensation of victims of wrongful acts[45].

Law 7,347/1985 relies on associations to develop private enforcement. However, associations proved not to be an effective protagonist for such claims. Moreover, the concurrent authority of the Public Prosecutor's Office to file suits in such cases may discourage the associations' initiative if they perceive that they may avoid bearing the costs by leaving it to the prosecutor's office to act.

2.1.3.3. Potential adjustments regarding legitimacy

Considering the above mentioned, the main problem with active legitimacy is, in fact, the lack of legitimacy of the individual to act as a procedural representative and spokesperson for its class. In this respect, too, the Brazilian system differs from the American system: in the US case, the shareholder is entitled to, as a representative of the whole class, commence proceedings.

Still in order to address legitimacy problems, it is worth mentioning the mechanism currently used in US – where the use of class actions is known as an

44 COFFEE JR., John C. Entrepreneurial litigation. Cambridge: Harvard Press. 2015, p. 198.

45 PEREIRA, Guilherme Setoguti J. Enforcement e Tutela Indenizatória no Direito Societário e no Mercado de Capitais. Quartier Latin: São Paulo, 2018, p. 77.

effective enforcement tool. In fact, probably the key element of the US class action that at least historically set it apart from other jurisdictions is that it is based on the opt-out principle.

The opt-out system provides that when a class action is filed by a member of the class, it becomes binding to all of them, unless a member of the class declares he/she wants to be set aside to the lawsuit.[46] This kind of system might incentivize the use of class actions – and sometimes the excess of litigation. On the other hand, the WG believes it should be further studied, since it seems to address not only the problems related to the standing to sue currently faced in Brazilian legal regime on collective lawsuits, but also the *res judicata* effects matter – since shareholders become aware of the commencement and further developments of the lawsuit, and also that they are bound to the effects of the award, unless deciding to be set aside.

2.1.3.4. Economic incentives

Another factor that may help to explain the scarcity of collective claims filed by associations is the lack of economic incentives. Law No. 7,347/1985 exempts associations from paying court costs, courts' experts' fees and any other expenses. Furthermore, Law 7,347/1985 states that in case of a negative result, the associations are exempted from paying the winning party's fees – which should serve as an incentive for this kind of suit.

However, the biggest expenses generally arising from a lawsuit are attorneys' and expert fees. That is why some scholars affirms that the law should determine that the associations should receive a bonus or part of the compensation[47].

As with respect to the derivative suits discussed above, there is a clear imbalance between costs and benefits in the collective claims filed by investors' associations. In case there is a favourable ruling, the effects of such decision will apply to all investors whose rights have been violated and not only to the associated ones (Article 95 of Consumer Code – applicable to this kind of lawsuit under article 21 of Law 7,347/1985). However, if there is an adverse ruling to the association, these effects will apply only to the represented members, i.e. those who decided to join the association.

Besides recognizing the defendant's liability for the damages, a favourable final ruling to the investors shall determine compensation to the victims or their successors. Therefore, the law states that the total amount of the rewarded damages shall be deposited in an interest-bearing account until the investors, notified through a published notice, file a proof of claim.

Law 7,913/1989 provides that the awarded damages must be paid to the injured investors according to their respective losses – that is the reason why each investor will have to file such proof of claim. Hence, those filing a proof of claim should produce evidence of personal injury and indicate the causal relationship between the damage they have suffered and the general damage acknowledged by the ruling, in addition to determining the amount of losses. Accordingly, in the current framework, shareholders have a considerable burden of proof concerning the quantification of its losses.

In this regard, it shall be noted that the injured investors have a two-year period (statute of limitation) to file the proof of claim. In case no filing takes place, and as a result damages are paid in excess, the amount in excess shall be reverted to a specific Fund, managed by the Public Prosecutors' Office (Law 7,347/1985, as amended by Law 9,008/1995).

Finally, an overview of the judicial proceedings shows that despite having a few lawsuits filed by investors associations, there is no knowledge to date of any favourable judicial decision acknowledging investors' right of redress involving such cases[48]. This considerable burden of proof upon shareholders may be contributing to discourage associations from filing collective suits.

In conclusion, the WG understands that this incentives issue should be the subject of further consideration, considering the nature of the interests involved and the potential difficulties that shareholders may face to prove some of their rights. A possible solution would be granting legitimacy to individual investors to act as a procedural representative and spokesperson for its class directly, or to allow a group of shareholders, represented by the same attorney, to file the collective lawsuit analysed herein[49]. However, the WG understands that before any amendment to the Law is proposed, experts shall carry out specific research regarding the new incentives that these possibilities would create.

46 CONAC, Pierre-Henri; GELTER, Martin. Global Securities Litigation and Enforcement. Cambridge University Press, 2018.

47 GIDI, Antonio. Rumo a um Código de Processo Civil Coletivo – a codificação das ações coletivas no Brasil. Rio de Janeiro: GZ, 2008, p. 144-152.

48 See PRADO, Viviane Muller. Os desafios para o ressarcimento de investidores. In: CARVALHOSA, Modesto; LEÃES, Luiz Gastão Paes de Barros; WALD, Arnoldo (coords.). A responsabilidade civil da empresa perante os investidores. São Paulo: Quartier Latin, 2018, p. 395.

49 In this regard, it is important to note that according to Article 6 of Law 7.347/1985, every person can request the Public Prosecutor's Office action, providing information about the facts subject to Collective Lawsuits and indicating their grounds. However, nowadays, this request has to be made through a governmental official. The possibility of allowing such request to be made directly to the Public Prosecutor's Office shall also be subject to consideration.

2.2. Other procedural issues

There are some procedural issues that may help to explain why private enforcement is not widely used.

One of these factors is the "loser pays" regime. The result is that the shareholder bears the whole risk of the failure of a derivative suit, and, in the case of success, receives only, indirectly, a sum proportional to the percentage of their shares. The "loser pays" regime clearly discourages investors from bringing derivative suits.

The difficulties with the burden of proof are frequently identified as one of the causes for the ineffectiveness of the Brazilian legal framework.[50] Pursuant to the Brazilian Civil Procedure Code, the plaintiff has the burden to prove all the facts that give rise to its rights, while the defendant has the burden to prove the existence of facts that prevent, extinguish or modify the plaintiff's rights (article 373). The production of evidence by the plaintiff in disputes involving corporate or capital market offenses proves difficult in practice or, in some cases, even impossible, since the production of evidence usually depends on having access to documentation and information that are in the possession of the company, its managers or controlling shareholders[51]. Besides, the demonstration of causation and reliance and the quantification of damages caused by the most common illegal practices in the corporate field is highly complex[52].

Since 2015, the Code of Civil Procedure grants more power to courts to manage litigation procedure. The judge can decide, due to the peculiarities of the matter being discussed[53], on the allocation of the burden of proof, shifting the burden to the party that has the most ease in producing the evidence – the so-called dynamic distribution of the burden of proof (Article 373, Paragraph 1, of the Code of Civil Procedure). Although some scholars defend the dynamic distribution of the burden of proof in various situations involving corporate or capital market abusive practices, the rule is recent and has not been adequately tested yet.

Another procedural issue that deserves to be remarked is the role played by CVM as "amicus curiae" as set forth by Law 6,385/1976. According to Article 31 of the law, in all judicial proceedings involving matters related to CVM competence, it must be subpoenaed by the judge to, at its own discretion, present clarifications or its technical opinion on the matter. As "amicus curiae", CVM does not join the judicial proceedings as a party, but as a collaborator of the judge willing to give some technical support on the matters involved[54].

However, it is worth mentioning that despite the mandatory command of article 31 of the law, CVM is not always subpoenaed to present its opinion on judicial proceedings involving capital markets issues,[55] which may partially explain why it is not a procedural mechanism widely used in Brazil.

Having said that and taking into account all the functions assigned to CVM, it understands that it must exercise the legal prerogative to act as "amicus curiae" only in exceptional situations which, in addition to falling within its competence, involve matters with relevant repercussions to the capital markets or to a relevant part of its participants.

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50 PEREIRA, Guilherme Setoguti J. Enforcement e tutela indenizatória no direito societário e no mercado de capitais. São Paulo: Quartier Latin, 2018, p. 188; GORGA, Érica. "Is US law enforcement stronger than of a developing country? The case of securities fraud by Brazilian corporations and lessons for the private and public enforcement debate". Columbia Journal of Transnational Law, v. 54, n. 3, 2016, p. 657; and GORGA, Érica Gorga; HALBERSTAM. Michael Halberstam, "Litigation discovery & corporate governance: the missing story about 'the genius of American corporate law'". Emory Law Journal, v. 63, 2014, p. 1.486 e 1.487.

51 TRINDADE, Marcelo; ALMEIDA, Fabiana de. The securities litigation review - Chapter 3. London: Law Business Research, 2015, p. 43; and BUSCHINELLI, Gabriel; BRESCIANI, Rafael, Op. Cit., p. 256.

52 PRADO, Viviane Muller, "Não custa nada mentir: desafios para o ressarcimento de investidores", disponível em https://www.academia.edu/28762978/N%C3%83O_CUSTA_NADA_MENTIR_desafios_para_o_ressarcimento_de_investidores dados e reflexões sobre o não ressarcimento de investidores", 2016, p. 26-32; and SANTOS, Aline de Menezes, "Responsabilidade administrativa e civil do ofertante e do intermediário pelo conteúdo do prospecto". In: Temas de direito societário e empresarial contemporâneos (coord. Marcelo von Adamek). São Paulo: Malheiros, 2011, p. 249 e 250.

53 See MARINONI, Luiz Guilherme; ARENHART, Sérgio Cruz, Comentários ao Código de Processo Civil, v. VI. São Paulo: RT, 2016, p. 248; Bruna Braga da Silveira, "A distribuição dinâmica do ônus da prova no CPC-2015". In: Direito probatório (coords. Marcos Félix Jobim e William Santos Ferreira). Salvador: Jus Podivm, 2016, p. 214; MACÊDO, Lucas Buril de; PEIXOTO, Ravi. Ônus da prova e sua dinamização, 2ª ed. Salvador: Jus Podivm, 2016, n. 4.6.2, p. 170; Robson Godinho, Negócios processuais sobre o ônus da prova no novo Código de Processo Civil. São Paulo: RT, 2015, p. 205; TUCCI, José Rogério Cruz e. A causa petendi no processo civil, 3ª ed. São Paulo: RT, 2009, n. 4.10, p. 82.

54 JÚNIOR, Humberto Theodoro. Curso de Direito Processual Civil, Vol. 1. Rio de Janeiro: Forense, 2016. p. 412; and SERRA FILHO, Celso Luiz Rocha; WELLISCH, Julya Sotto Mayor. A CVM e o Poder Judiciário. Requisição de Informações. Amicus curiae. In: Direito do Mercado de Valores Mobiliários. 1ª ed. TOP, Comissão de Valores Mobiliários, Rio de Janeiro: 2017, p. 152.

55 However, scholars and case law acknowledge that the absence of a subpoena to CVM in this case does not result in the nullity of the proceedings. See TF - ARE: 795538 PE, Relator: Min. Gilmar Mendes, julgamento em 28/02/2014; STF - ARE: 720352 PE, Relator: Min. Luiz Fux, julgamento em 18/12/2014; STF - Ag: 1346320, Relator: Ministro Benedito GonçAlves, data de publicação: DJ 28/10/2010; and VIDAL NETO, Ademar. Comentários ao Artigo 31. In: CODORNIZ, Gabriela; PATELLA, Laura (coord.). Comentários à Lei do Mercado de Capitais-Lei n. 6.385/76. São Paulo: Quartier Latin, 2015, p. 671.

3. The use of arbitration in the Brazilian capital market

3.1. Legal Framework

Since 2001, the Brazilian Corporate Law authorizes company's bylaws to force disputes between shareholders and the company itself or between controlling and minority shareholders to be settled through arbitration (Article 109, Paragraph 3).

The 2001 amendment in the Brazilian Corporate Law allowing companies to adopt mandatory arbitration provisions was not challenged at the time it was enacted. In fact, arbitration was welcomed in Brazil, since courts have been criticized for their slowness and lack of expertise about corporate law and capital market regulation. Arbitration was then and now considered as an effective solution for these problems and the use of arbitration is widely recognized as a case of success by the specialized literature[56].

In fact, the Brazilian Corporate Law was amended in 2015 to reinforce the mandatory characteristic of arbitration provisions in publicly-held companies' bylaws. In order to put an end to a long discussion about subject arbitrability and, at the same time, to provide a protection to minority shareholders who held a stake in the company at the time its bylaws is amended to insert a mandatory arbitration provision, the Brazilian Corporate Law now expressly states that the insertion of a mandatory arbitration agreement binds all shareholders, but grants withdrawal rights to dissident shareholders[57].

3.2. Mandatory arbitration provisions in the special listing segments

Right before the 2001 reform, mandatory arbitration provisions started to be required by some special listing segments of the São Paulo Stock Exchange (B3), created in the end of 2000. Adhesion to the special segments is voluntary, but each segment requires the adoption of corporate governance rules beyond those required in the law. Novo Mercado is the segment with the highest standards of corporate governance practices.

The special listing segments with more stringent requirements – *Novo Mercado, Nível 2, Bovespa Mais and Bovespa Mais Nível 2* – require the insertion of a mandatory arbitration provisions in the bylaws. As mentioned in the introduction of this report, as of December 31, 2018, out of a total of 400 publicly-held companies listed in B3, 179 (44,75%) were listed in segments that require a mandatory arbitration provision in the bylaws[58].

The listing rules of *Nível 2, Bovespa Mais and Bovespa Mais Nível 2* have the same arbitration requirements, establishing in their items 13.1 and 13.2 that B3, the company, the controlling shareholder, the other shareholders, the managers, and the fiscal council members listed shall undertake to solve all and every dispute related with or derived from the listing rules and some related contracts, in particular, with regards to the application, validity, efficacy, interpretation, violations and effects of the arbitration agreement through arbitration before the B3's arbitration chamber – the *"Câmara de Arbitragem do Mercado"* (CAM), in the terms of its arbitration rules. Their rules also establish that the information about the existence of mandatory arbitration must be disclosed on the company's website.

In the case of the Novo Mercado, the rules are a bit more complete and specific, establishing that the *"bylaws must include an arbitration clause stating that the company, its shareholders and executive officers, as well as the members of its fiscal council and their alternates, if any, undertake to seek arbitration by the Market Arbitration Chamber and to abide by its rules in order to resolve any disputes that may arise relating to their status as issuer, shareholders, management and fiscal council members, especially in light of the provisions of Law 6.385/76, Law 6.404/76, the company's bylaws, the rules issued by the National Monetary Council (CMN), the Central Bank of Brazil (BCB) and CVM, as well as other rules applicable to the securities market in general, the rules herein, other rules and regulations established by B3, and the Novo Mercado participation agreement"*[59].

56 *Vide VIEIRA, Maíra de Melo; BENETTI, Giovanna Valentiniano; VERONESE, Lígia Espolaor; BOSCOLO, Ana Teresa de Abreu Coutinho. Arbitragem nos conflitos societários, no mercado de capitais e a reforma do Regulamento da Câmara de Arbitragem do Mercado (CAM) da BM&Fbovespa. RArb, v. 11, n. 40, p. 193-232, abr./jun. 2014. p. 195-196*

57 *Article 136-A. However, shareholders do not have appraisal rights when the company inserts the mandatory arbitration provision in preparation for listing in a special segment nor when there is a market out (i.e. when its shares have dispersion and liquidity).*

58 *See Table 1.*

59 *Article 39 of the Novo Mercado Listing Regulation, p. 23. Available at: http://www.bmfbovespa.com.br/pt_br/listagem/acoes/segmentos-de-listagem/novo-mercado/.*

According to the Market Arbitration Chamber, since the beginning of its activities in 2001, the chamber has conducted a total of 116 proceedings (51 in course, 65 concluded), with 79 of the disputes related to corporate law issues, such as annulment of shareholders meeting decisions, recovery of damages caused by contractual breaches or wrongdoings by the company management[60].

Among the 79 proceedings discussing corporate law issues, (i) 20 proceedings involve companies listed in special segments in which the use of arbitration is mandatory – and the bylaw's arbitration was used as the basis for starting the proceeding; (ii) 6 involve publicly-held companies not listed in the referred listing segments, but which also had included in their bylaws arbitration agreements; and (iii) the 53 remaining proceedings involve parties that voluntarily decided to submit the issue to arbitration at the Chamber. Eleven of the 79 proceedings (13.94%) were initiated by minority shareholders demanding redress from controlling shareholders or from the company itself, all of which remain pending. Four of the 11 were based on Article 246 of the Brazilian Corporate Law providing for minority shareholders to seek damages from controlling shareholders without submitting the matter to a general shareholder meeting.

Although B3's self-regulation through the special listing segments is widely considered a case of success in the specialized literature, with a significant impact in the development of the Brazilian capital markets, this conclusion is based on the improvement of the Brazilian publicly-held companies corporate governance practices as a whole, and does not specifically consider or address the pros and cons of the use of arbitration over state courts' jurisdiction. Until this moment, the effects of the use of arbitration by publicly-held companies have not been fully analyzed in Brazil.

3.3. Challenges related to the use of arbitration in publicly-held companies

3.3.1. The absence of benchmarks

The issue of mandatory arbitration provisions in the bylaws is a highly controversial topic, and the Brazilian position of allowing arbitration to solve disputes involving capital market players (including publicly-held companies) does not find support in other jurisdictions usually seen as reliable benchmarks, such as Germany, Italy[61], Israel, and Sweden[62]. In such countries, in general, arbitration is considered inappropriate for publicly-held companies, and the discussion about the use of arbitration to settle corporate disputes involves other corporate types[63]. In a *prima facie* analysis, in fact, no jurisdiction with a legal system similar to Brazil's (Civil Law) has regulated the use of arbitration in disputes involving or related to publicly-held companies.

This debate also exists in Common Law countries. In the United States, for instance, the inclusion of mandatory arbitration agreements in North-American publicly-held companies' bylaws, until this moment, has not been expressly authorized by the SEC[64-65].

60 *Data collected in September, 2018.*

61 *According to the Italian professor Diego Corapi, both Italy (see Article 34, Decree No. 5/2003) and Germany, jurisdictions that served as a model for Brazilian Law in many subjects, have severe restrictions to corporate (when publicly-held companies are involved) and capital market arbitration. See CORAPI, Diego, 2018. "La "Província" Dell'arbitrato Societario nel Diritto Comparato", Revista de Arbitragem e Mediação, Revista dos Tribunais, vol. 57, pages 177-180.*

62 *As mentioned in Section 1, the experiences of Israel and Germany were analyzed in the workshop.*

63 *E.g. limited liability companies in Germany, therefore, in principle not involving capital market matters.*

64 *"The SEC has long protected investors from companies' efforts to force them into mandatory arbitration instead of litigation in federal courts. For instance, in 1988, Franklin First Financial Corporation declared its intention to include a mandatory arbitration provision in its charter and bylaws in advance of its planned IPO. Similarly, in 2012, The Carlyle Group LP filed a draft registration statement with the SEC that would have required investors to arbitrate disputes. In both cases, the SEC refused to accelerate the effective date of the companies' registration statements, thereby effectively blocking the companies' ability to proceed with their planned IPOs. The result: Both companies abandoned their plan to prohibit shareholders from filing class-action lawsuits. The SEC has also prevented public companies from modifying their existing bylaws to provide for mandatory shareholder arbitration. For example, when a proposal was made to amend the bylaws of Gannett Co., Inc. to require investor disputes to be submitted to arbitration, the SEC encouraged Gannett to omit the proposal from its proxy materials (by stating that it would "not recommend enforcement action to the Commission" if it was indeed omitted) as there was support for the view that "implementation of the proposal would cause the company to violate the federal securities laws." The SEC has also supported other companies' (Alaska Air Group, Inc. and Pfizer Inc., for example) decisions to exclude similar pro-arbitration proposals." (Keeping Investors out of Court—The Looming Threat of Mandatory Arbitration. Posted by Salvatore Graziano and Robert Trisotto, Bernstein Litowitz Berger & Grossmann LLP, on Monday, February 18, 2019. Available at: https://corpgov.law.harvard.edu/2019/02/18/keeping-investors-out-of-court-the-looming-threat-of-mandatory-arbitration/)*

65 *In this sense, see the following assertions of the SEC Chairman Jay Clayton in a public letter dated April 24, 2018: "I have not formed a definitive view on whether or not mandatory arbitration for shareholder disputes is appropriate in the context of an IPO for a U.S. company"; "State laws generally provide the parameters for companies to establish their corporate governance through their organizational documents, such as their charter or bylaws. The Commission does not have rules permitting or prohibiting*

However, it should be noted that recent declarations of SEC Commissioners[66] suggest that this issue is controversial even among the Commissions' Board of Commissioners, and that the current position of the SEC may be revisited[67]. Some of them still think that mandatory arbitration would strip away the right of shareholders to bring a class action lawsuit, a vital mechanism in helping to protect investors, deterring wrongdoing, and policing corporate misconduct (given the SEC's limited resources).

But some of them believe that companies should have the option to require investors to resolve shareholder disputes through arbitration[68]. Actually, this possibility was encouraged by the U.S. Department of the Treasury, which issued a report in October 2017 suggesting that mandatory arbitration should be used as a tool to reduce the costs of shareholder litigation. It recommended that *"the SEC continue to investigate the various means to reduce costs of securities litigation for issuers in a way that protects investors' rights and interests, including allowing companies and shareholders to settle disputes through arbitration."*

These facts sparked a vigorous discussion about the practical effects that mandatory arbitration agreements would have on shareholders' ability to adequately vindicate their rights under the U.S. securities laws, possibly depriving them of important federal rights to litigate securities fraud violations in court. According to a recent article published on the Harvard Law School Forum on Corporate Governance and Financial Regulation, *"many scholars and advocates have concluded that the potential harm to investors of being forced to arbitrate securities violations significantly outweighs such benefits"*[69].

In a recent decision (Sciabacucci v. Salzberg, December 19, 2018[70]), the Chancery Court de Delaware ruled that Delaware corporate bylaws may only govern matters of corporate internal affairs, including litigation related to internal affairs; they may not be used to govern external matters like securities litigation though. Limiting the scope of mandatory arbitration agreements, as suggested in this decision, may be able to address some of the existing concerns of the regulator, preserving the shareholders' rights to file class actions in state courts.

The absence of benchmarks, especially in Civil Law jurisdictions, made the WG question the effectiveness of the Brazilian model compared to others, and to consider the need for changes to it. Though the mandatory adoption of arbitration over state courts, in principle, was supposed to contribute to strengthen the enforcement of corporate and capital market's rules, some of the characteristics of such private proceedings may in fact be creating barriers to the effective protection of shareholders rights, such as the right to seek redress.

In sum, the main challenges stemming from this corporate reality are related to the confidentiality of the arbitral proceedings, and its dual-party design. As it will be seen hereinafter, B3 arbitration works quite well to solve corporate contractual disputes among a small number of parties (usually, a claimant and a respondent). However, it was not designed to deal with collective rights, such as compensation rights involving publicly-held company (innumerous) minority shareholders, and the multi-parties characteristics of these cases[71].

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companies from using arbitration provisions." Available at: https://maloney.house.gov/sites/maloney.house.gov/files/MALONEY%20ET%20AL%20-%20FORCED%20ARBITRATION%20-%20ES156546%20Response.pdf

66 The SEC Commissioner Robert J. Jackson Jr., for instance, argued that the resolution of private disputes in public courts creates positive externalities, since a "public hearing gives judges a chance to tell corporate insiders what the law expects of them" and "tells the public that we take corporate fraud seriously", sending "a signal to insiders, the bar, and investors, that being unfaithful to investors doesn't pay". In this sense, confidential arbitral proceedings would prevent these positive externalities and deprive investors and managers from the knowledge of what the courts expect from them. About his declaration, see: Keeping Shareholders on the Beat: A Call for a Considered Conversation About Mandatory Arbitration. Available at: https://www.sec.gov/news/speech/jackson-shareholders-conversation-about-mandatory-arbitration-022618.

67 As SEC's Commissioner Robert J. Jackson Jr. has observed on February 26, 2018, "[s]hareholder suits also help us at the SEC identify and address corporate wrongdoing", adding that "in 2016, roughly sixty cents of every dollar returned to investors in corporate-fraud cases came through private rather than SEC settlements". Available at: Keeping Shareholders on the Beat: A Call for a Considered Conversation About Mandatory Arbitration. Available at: https://www.sec.gov/news/speech/jackson-shareholders-conversation-about-mandatory-arbitration-022618. In this regard, see also the content of the letter written by SEC Chairman Jay Clayton on April 24, 2018. Available at:https://maloney.house.gov/sites/maloney.house.gov/files/MALONEY%20ET%20AL%20-%20FORCED%20ARBITRATION%20-%20ES156546%20Response.pdf.

68 In this direction, the former SEC's Commissioner Michael Piwowar stated that "[f]or shareholder lawsuits, companies can come to us to ask for relief to put in mandatory arbitration into their charters". In this regard, see Sarah N. Lynch, U.S. SEC's Piwowar Urges Companies to Pursue Mandatory Arbitration Clauses, Reuters Business News (July 17, 2017). In this regard, see: https://www.reuters.com/article/us-usa-sec-arbitration-idUSKBN1A221Y

69 Keeping Investors out of Court—The Looming Threat of Mandatory Arbitration. Posted by Salvatore Graziano and Robert Trisotto, Bernstein Litowitz Berger & Grossmann LLP, on Monday, February 18, 2019. Available at: https://corpgov.law.harvard.edu/2019/02/18/keeping-investors-out-of-court-the-looming-threat-of-mandatory-arbitration/

70 Available at: https://courts.delaware.gov/Opinions/Download.aspx?id=282830

71 See PARGENDLER; PRADO. Ibid., p. 101.

3.3.2. The cost of arbitration

There is also a problem related to the costs of all types of institutional arbitrations[72]. The relationship between the costs and incentives to litigate is widely studied in the literature[73]. As in the legal proceedings in the courts, arbitration also involves costs. For instance, while there are procedure costs related to lawsuits, in arbitrations the parties have to pay administrative fees to the chamber. But arbitral proceedings also involve an extra cost[74] if compared to state courts: the arbitrators' fees, a cost that comes from one of the most important and attractive characteristics of arbitration, the autonomy of the parties to choose the "judges" considered the most suitable for the job, whether because of their area of expertise, reputation or experience.

Therefore, although this ADR method, from an objective viewpoint, is more costly, currently cost-benefit analysis can turn arbitration into an attractive litigation mechanism. This evaluation, however, may include other factors, including in relation to the amount individually claimed by the investor. After all, arbitration is unlikely to be used if the amount claimed does not justify the costs of the arbitration. If this is the case, the mandatory use of arbitration to settle a corporate dispute may represent an obstacle for shareholders to seek redress individually[75].

Considering the above mentioned, further studies should be carried out in order to understand what are the better ways to facilitate the access to redress of individual/retail investors in cases where the amount of the redress pursued does not compensate the cost of arbitration.

Nowadays, a possibility not much explored by shareholders is pursuing different individual compensation rights in the same arbitration. According to the CAM rules, the general rule is to divide the costs of arbitration between the "parties". Although this rule seems to be more suitable to ordinary disputes involving one claimant and one respondent, it is possible to claim that the terminology parties alludes to the "sides" of the disputes. Therefore, in a case involving four claimants and two respondents, the costs of the arbitration would still be divided in two and then the individuals in the same side would have the autonomy to decide how to split their half of the costs.

Regardless of this discussion, the CAM rules also prescribe that the parties can contractually agree on how to share the proceeding costs; the division of costs could be decided by mutual agreement among the parties and established in the Terms of Reference[76]. Moreover, when represented by the same law firm, multiple parties' claims are only required to pay the amount of B3's Market Arbitration Chamber's administrative fees as one party (1st Appendix of the Chamber Rulebook).

Therefore, in principle, the problem of costs could be minimized by the distribution of costs among parties on the same side of the dispute[77]. But this option, as will be further analyzed in the Subsection 3.3.4 below, has a secondary problem: the confidentiality of the proceedings, which appears to be the main obstacle to their reunion.

Although not studied in detail for this report, another possibility that can allow compensation would be the involvement of third parties, either (i) to finance the litigation (scholars have been studying the feasibility of third-party funding in arbitral proceedings); or (ii) to replace the shareholders in the litigation through the transference of "litigation rights" (e.g. compensation rights sought in arbitrations) to third-parties interested in seeking their rights[78] (see Article 109 of the Brazilian Civil Procedure Code). Both ideas were mentioned during the Workshop by panelists and, at a first glance, appear to be possible means to address the problems of costs and redress.

3.3.3. Mismatch between parties involved in the dispute and erga omnes/res iudicata effects of awards

The Brazilian Arbitration Law (Law 9,307/1996) establishes that any matter related to rights that can be monetized, that its holder can abdicate of and transfer to third-parties ("direitos patrimoniais disponíveis") may be solved through arbitration (objec-

72 E.g. this problem is also cited in international commercial arbitrations.

73 PEREIRA, Guilherme Setoguti J. Enforcement e Tutela Indenizatória no Direito Societário e no Mercado de Capitais. Quartier Latin: São Paulo, 2018, pp. 149-151.

74 See PARGENDLER; PRADO. Ibid., p. 119-120.

75 See PARGENDLER; PRADO. Ibid., p. 101.

76 See article 4.1 'ix' of the Rules of the Market Arbitration Chamber: "4.1 Terms of Reference. Once final appointment of the arbitrators has been agreed, the Arbitration Tribunal, working jointly with the parties, shall draw up the Terms of Reference, which shall cover the following points: (...) ix) Responsibility for payment of experts', arbitrators' and attorneys' fees, and for other administrative costs;"

77 In these two situations, if a group of minority shareholders initiate together an arbitral proceeding against the managers/controlling shareholders of a publicly-held company seeking redress, they would be able to share the costs involved in the proceeding.

78 For instance, an institutional investor could be interested in buying the rights that some shareholders were going to claim/were claiming in arbitration at a discounted price. Though the shareholders would not receive the full amount sought in the proceeding, they would not have to pay the costs associated with the proceeding or to bear the risk of a adverse ruling.

tive arbitrability)[79]. From that standpoint, it is possible to conclude that internal affairs of the company that can be validly decided by its management bodies, but do not affect the rights of third-parties not covered by the mandatory arbitration agreement, can be subject to arbitration[80].

Despite this general rule, there are no provisions in the Brazilian Corporate Law regarding the use of arbitration to settle corporate/capital markets disputes differentiating the different kinds of disputes that may arise in these contexts. This seems to be the root of some of the most problematic challenges that the use of arbitration for corporate/securities disputes currently faces in Brazil.

It is arguable whether arbitration is a proper instrument to deal with disputes when there is a potential mismatch between the parties involved in the dispute and the (legally mandatory) *res iudicata/erga omnes* effects of the award on third parties/other shareholders[81].

The WG believes that the current Brazilian arbitration framework is not prepared to handle these matters in a proper manner. Two solutions may be explored in order to establish appropriate mechanisms to legitimize extending the res iudicata/erga omnes effect of an arbitral award to third parties: guaranteeing that all the affected parties become aware of (i) the beginning of a proceeding (i.e. making possible their active participation in the formation of the tribunal and discussion of rights) or (ii) the decision held (i.e. making it possible for affected parties to claim their rights as already delimited in the ruling).

The existing legal, regulatory and contractual provisions governing arbitration in the Brazilian legal framework only address item 'i' above, but through means that carry certain limitations. In sum, the CAM rules include provisions related to third-party joinder[82], but only before the appointment of the first arbitrator, and the consolidation of proceedings, and only under certain circumstances[83]. Moreover, in cases with more than one claimant or respondent, Article 3.6 of the CAM Rules establishes that *"they shall appoint an arbitrator jointly based on their common interests and in accordance with the provisions of these Rules. If the parties fail to reach a consensus, the President of the Arbitration Chamber shall appoint all the arbitrators"*.

However, these rules do not seem to be sufficient to deal with the complexities of corporate and securities disputes that may lead to an award with *erga omnes* effects[84], still limiting the participation of all

79 See LEÃES, Luiz Gastão Paes de Barros. A responsabilidade da sociedade por desinformação do acionista e a arbitragem. Revista de Arbitragem e Mediação, São Paulo, RT, ano 13, vol. 50, jul./set., 2016, p. 308; EIZIRIK, Nelson. Arbitrabilidade objetiva nas sociedades anônimas e instituições financeiras. Direito societário. Desafios atuais. São Paulo: Quartier Latin, 2009, p. 34; MARTINS, Pedro A. Batista. Arbitragem no direito societário. São Paulo: Quartier Latin, 2012. p. 177.

80 See LEÃES, Ibid., p. 308. In this regard, see also the rationale used in the Delaware decision cited in Subsection 3.3.1., which appears to exclude securities litigation from the definition of internal affairs.

81 This is the case, for example, of the decisions on the validity of shareholder resolutions, as well as redress and dividend claims.

82 "6.1 Joinder of parties. Before any arbitrators have been appointed, the parties may request the inclusion of one or more additional parties in the arbitration proceedings by filing a Motion for Joinder of Parties ("Motion for Joinder"). Third parties with a legitimate claim to join or intervene in the proceedings may request permission to do so by filing a Motion for Joinder. 6.1.1. Motions for Joinder shall be submitted to the Arbitration Tribunal's Secretariat. They shall contain a justification for requiring the inclusion of additional parties and be accompanied by copies of the Request for Arbitration and the Answer or Answers thereto. 6.1.2 Answers to Motions for Joinder must be filed within fifteen (15) days and shall comply with the provisions of 2.1.3 above. 6.1.3 The parties shall be directed to respond to the Answers to Motions for Joinder within ten (10) days. 6.1.4 The President of the Arbitration Chamber shall decide whether to accept a Motion for Joinder. If he accepts it, the joined party shall enter the arbitration proceedings at that point, signing an undertaking to comply with these Rules and to be bound by the arbitral award. Should any party object and if the President of the Arbitration Chamber overrides such objection, enforcing the Motion for Joinder, the Arbitration Tribunal shall review the matter and issue a final decision regarding the joinder."

83 "6.2 Consolidation of proceedings. When Requests for Arbitration involve issues of fact or law in common with arbitration proceedings that are already under way and are governed by these Rules, the President of the Arbitration Chamber may direct that the proceedings be consolidated after hearing the parties and taking into consideration the circumstances and progress already achieved in the proceedings in question. 6.2.1 Consolidation of proceedings is possible only in evidence production stage of the arbitration proceeding. 6.2.2. If Arbitration Tribunals have not been set up in any of the proceedings to be consolidated, and if the parties fail to reach a consensus on the composition of the Arbitration Tribunal for the consolidated proceedings, all arbitrators shall be appointed by the President of the Arbitration Chamber. 6.2.3 If an Arbitration Tribunal has been set up in any of the proceedings to be consolidated, it shall be competent to judge all the consolidated proceedings. Because the parties to other arbitration proceedings relinquish the right to appoint arbitrators if they recognize the consolidation, the Secretary-General shall send them copies of the Terms of Reference signed by the arbitrators in the Arbitration Tribunal that has been set up. Consolidation shall be possible only if the parties to more recent proceedings agree to the composition of this Arbitration Tribunal. 6.2.4 Should the parties fail to challenge the arbitrators within five (5) days of being invited to do so, the evidence shall be heard and an award issued by the existing Arbitration Tribunal. 6.2.5 The challenges to which 6.2.4 above refers shall be judged as provided for in 3.12 above. If the challenges are denied, the cases shall be allocated to the Arbitration Tribunal that has already been constituted. If the challenges are accepted, the proceedings shall not be consolidated and the cases shall be heard separately in accordance with these Rules."

84 If the CAM receives a request for arbitration discussing issues of fact or law in common with ongoing arbitrations, depending on the stage of them, and if certain conditions related to the parties' consent and the formation of the tribunal are satisfied, the chamber may consolidate the proceedings. Although the consolidation has the potential to solve the erga omnes problem, and the gathering

interested parties. The experience of other jurisdictions indicates some possible solutions for them.

During the workshop, Prof. Dr Christian Borris presented the German experience on the matter – discussed in a context of limited liability companies. In 2009, the German Federal Supreme Court ruled in the case known as "Arbitrability II" that arbitration agreements shall incorporate some features in order to legitimize the *erga omnes*/*res iudicata* effects on all shareholders: (i) all shareholders must be bound by the arbitration agreement; (ii) all shareholders have the right and must be given an opportunity to participate in the selection of arbitrators[85]; (iii) all shareholders must be given the opportunity to participate in the arbitration; (iv) parallel arbitrations relating to the same shareholder resolution must be precluded. In order to fulfill the requirements outlined by the German Federal Supreme Court, the German Arbitration Institute enacted the DIS Supplementary Rules for Corporate Disputes, designed to ensure compliance with the requirements established under Arbitrability II.

In the opinion of the WG, the German solution – focused on giving the opportunity to all interested parties to participate in arbitral proceeding involving *erga omnes* effects (i.e. to all shareholders of a company) and on preventing parallel proceedings of this kind to occur – may be an interesting reference for further discussions on an eventual reform of the existing arbitration rules.

However, this analysis must be deepened before any definitive conclusion can be reached. It is recommended to further investigate in a specific study not only the German case, but other experiences as well. In this sense, the compatibility of arbitration itself (as currently prescribed in the Brazilian Corporate Law) with individual disputes that may lead to a decision with *erga omnes* effect on third parties/other shareholders, as well as the possible use of the mechanisms available in lawsuits to deal with co-parts (*litisconsortes*) prescribed in the Brazilian Procedural Code (see Articles 113 and 117) should also be analyzed in such a study[86].

Regardless of the mechanisms that will be considered as the most suitable to the Brazilian reality, it is clear to the WG that any participation mechanism will only work properly if there is an adequate disclosure of the proceedings. According to some scholars, while confidentiality can be accepted for certain cases that only affect the parties of the proceeding, it is inadmissible when there are other interested parties that do not or cannot participate in the proceeding. After all, if existing rights common to all or at least a group of shareholders are at stake, the non-disclosure of a case/decision will prevent them from the possibility of co-claiming their rights. Therefore, only the most informed and well-assisted shareholders, that filed the arbitration, will have had full access to justice, making clear the social costs associated to this situation[87].

3.3.4. The issue of confidentiality

One of the most controversial issues regarding publicly-held companies' arbitration is the confidentiality of the proceedings and awards. B3's Market Arbitration Chamber rules provide that the arbitral proceeding is confidential, and that the parties, the arbitrators and the chamber representatives cannot disclose any information about it, unless required by mandatory rules (legal or regulatory provisions)[88].

Due to this general rule, neither the market nor the regulators are usually informed about arbitral proceedings involving publicly-held companies. This is a relevant issue, since adequate disclosure is essential not only to stock price formation, but also to allow investors' to make informed investment decisions, and to exercise their rights[89].

The WG identified that the existent legal framework for

of shareholders to some extent, it is not a mandatory procedure, involvinging the coexistence of parallel proceedings with the same scope possible at CAM. The third-party joinder, as it is designed nowadays, has similar problems, not being able to guarantee the rights of shareholders to participate together in the same arbitration (or to adequately participate in a proceeding they do not start) either.

85 In Italy, the selection of arbitrators for multi-parties proceedings shall be delegated to a third-party. Article 32, 2nd of the Legislative Decree 5/03: "2. La clausola deve prevedere il numero e le modalità di nomina degli arbitri, conferendo in ogni caso, a pena di nullità, il potere di nomina di tutti gli arbitri a soggetto estraneo alla società. Ove il soggetto designato non provveda, la nomina è richiesta el presidente del tribunale del luogo in cui la società ha la sede legale."

86 See LEÃES, Op. Cit., p. 308-309

87 SALOMÃO FILHO, Calixto. Breves notas sobre transparência e publicidade na arbitragem societária. Revista de Arbitragem e Mediação, São Paulo, RT, ano 14, vol. 52, jan./mar., 2017, p. 65-66.

88 "9.1 Confidentiality. Arbitration proceedings are confidential and all parties, arbitrators and members of the Arbitration Chamber shall refrain from disclosing any information relating to such proceedings except in compliance with the instructions or rules of regulatory bodies and with the applicable legislation. 9.1.1 Third parties who participate in proceedings as witnesses, experts or technical assistants shall also be bound by the duty to maintain confidentiality and shall participate only to the extent required by their specific function in the proceedings. 9.1.2 Disclosure in according with the provisions of 7.10 above shall not be deemed an infringement of the confidentiality of arbitration proceedings." (Available at: http://www.bmfbovespa.com.br/en_us/services/market-arbitration-chamber-cam/regulation/)

89 The same problem could also happen in a court dispute if the claimant requests to the judge the confidentiality of the proceeding. However, this problem is mitigated, since the judge may refuse the request if he/she considers that the case is not compatible with confidentiality. The CAM rules do not give this discretionary power to arbitrators or to itself.

arbitration disclosure has deficiencies, which undermine shareholders' right to seek redress. And, following the understanding of a 2010 decision of the CVM Board of Commissioners[90], shareholders rights to information cannot be undermined by the characteristic of confidentiality of the majority of arbitral proceedings, which shall respect the disclosure obligations existent in the applicable legal and contractual frameworks.

As a rule, parties should have the right to keep the arbitration confidential, as it is a private method of dispute resolution that relies on *direitos patrimoniais disponíveis*[91] only, and carries very sensitive information of the parties (which also justifies confidentiality in state courts lawsuits). However, there are situations in which, in the WG view, the transparency or publicity of the proceedings is needed. This is the case of capital market disputes involving collective rights of minority shareholders with a public interest element (e.g. a case that affects the credibility of the market itself) or *erga omnes* effects. As already mentioned, this could be seen either as a matter of arbitrability or, at least, as capable to justify a special treatment to the arbitration by the arbitration chamber, the parties of the arbitration, and the publicly-held company involved.

3.3.4.1. The publicly-held companies disclosure about arbitration

The confidentiality prescribed in the CAM rules has been justifying non-disclosure of information regarding such proceedings by the publicly-held companies, resulting in an interpretation regarding their duties to disclose (prescribed in law and in the CVM Rules) that the WG considers questionable.

Under the existing regulation, publicly-held companies may be required to disclose information about arbitrations in two ways: in the company's annual report form (*formulário de referência*) or in a specific notice of material information (*comunicado de fato relevante*).

CVM's Rule 480/09 encompasses provisions regarding the registry of public issuers, determining which information must be periodically provided by publicly-held companies. Among other information that must be disclosed in the *formulário de referência*, is information related to litigation (Items 4.3 to 4.6) involving (i) the company itself or its controlled companies; and (ii) such parties versus managers, former managers, controlling shareholders, former controlling shareholders, or investors (Item 4.4), not only in state and administrative courts, but also arbitration.

According to CVM's Rule 480/09, if the proceeding is not confidential, the company must disclose information regarding the subject under litigation, the parties involved, the cost of the dispute to the company, the probability of losing, the amounts and rights under dispute, and the status of the proceeding. However, if the proceeding is confidential, the company only has to disclose in the *formulário de referência* the impact that eventual loss would have to the company, and the amounts involved. Considering that, according to the CAM rules, the arbitral proceeding is confidential, the existing rules on periodic disclosure facilitate a limited disclosure of information.

Contrary to what happens in other jurisdictions, CVM does not require the company to release specific steps of the proceeding, such as the filing of a request of arbitration, the execution of the terms of reference, or the issuance of an arbitral award. In Italy, for instance, the public disclosure of the commencement of the arbitral proceedings is mandatory since the document must be filed in the local Commercial Registry[92]. Such benchmark, at a *prima facie* analysis, appears to create positive incentives. Moreover, this approach seems compatible to our regulatory system.

In addition to the disclosure at the *formulário de referência*, the Brazilian Corporate Law and CVM's Rule 358/02 establish that material information shall be immediately disclosed. According to CVM's Rule 358/02, information is material not only if it is price-sensitive, but also if it is likely to affect the decision of the shareholders regarding the exercise of any of their rights.

The investors have a legitimate expectation to receive information about litigation involving publicly-held companies[93]. After all, such information allows them to assess whether they have a direct interest in the litigation – for example, when it discusses the improvement of the price paid in a mandatory tender offer, the annulment of a previous shareholders meeting, a dividend distribution, or the existence of a fraud scheme that affected the stock price.

Notwithstanding the existing rule, the WG has the perception that, when deciding whether or not to disclose information regarding an arbitration proceeding, companies usually focus on the analysis of the potential impact of the dispute on the share price, and

90 CVM Proceeding N. RJ 2018/0713, decision held on April 27, 2010.

91 See item 126 above.

92 See Article 35, Decree 5/2003.

93 According to Calixto Salomão, controlling-shareholders or a group of shareholders cannot hold information regarding companies' lawsuits or arbitrations. In this sense, such scholar understands that the decisions held in such proceedings must be known by everyone who might be affected by them. If this is not the case, a high social cost emerges from arbitration. See SALOMÃO FILHO, Calixto. Op. Cit., p. 64-65.

do not make an appropriate assessment on whether the information may affect the decision of other shareholders to take some action related to the arbitration. Therefore, the WG understands that this situation needs specific clarification by the CVM.The existing filings at CVM's website indicate that only a few publicly-held companies disclose the existence of arbitral proceedings involving corporate disputes; and when they do, such disclosure occurs in several different ways. In some cases, the arbitration is disclosed in a specific notice of material information (*fatos relevantes*). In other cases, the information is presented in the company's annual report form (*formulário de referência*), its financial statements, or other types of data disclosure available. In view of the above, the WG concludes that some orientation is also recommended in order to create a disclosure pattern.

In conclusion, the actual disclosure regime for arbitration is not capable of adequately informing the market regarding price formation and the exercise of shareholder rights.

While it is possible to find significant data regarding courts or international arbitration proceedings related to individual interests, contractual disputes, and even administrative disputes about regulatory issues, information about corporate disputes involving the company, and its shareholders or managers are rarely found.

In this scenario, a specific amendment of CVM rules in order to require some minimum disclosure about arbitrations involving shareholder rights with *erga omnes* effects to the market, and the disclosure of specifics steps or documents of the proceeding would appear to be possible solutions to minimize the current problems associated with confidentiality. As mentioned, although the disclosure of material information is mandatory, each assessment is made considering a number of subject elements. Therefore, the WG suggests that CVM enact a new disclosure rule requiring publicly-held companies to promptly inform CVM about the filing of any arbitration involving shareholders' rights/the company, regardless of the company's materiality assessment on the matter. Then, the Commission could demand its disclosure to the market eventually when it deemed necessary.

Furthermore, taking into account the different ways that publicly-held companies have been disclosing information about their arbitrations, in form and essence, the issuance of a CVM opinion about arbitration disclosure, as well as the inclusion in CVM's Risk Assessment Based Enforcement Plan of a verification of disclosure regarding arbitration, would be important measures to standardize and enhance the disclosure system.

3.3.4.2. The difficulties to file a collective arbitration

Besides preventing individual shareholders from exercising their rights, confidentiality also brings a problem to the exercise of shareholders rights collectively. Although in some cases, due to the fact that the authorization to enter into a lawsuit/arbitration proceeding depends on the shareholders' meeting approval – in this regard, see Section 2 about the lawsuits prescribed in the Brazilian Corporate Law – the intention to arbitrate is disclosed even before the beginning of the proceeding; in other cases the lack of disclosure creates a practical barrier to the inclusion of affected shareholders at the beginning of a proceeding.

For instance, a single shareholder may not have sufficient funds or the shareholding stake required in the law to start a specific dispute on its own behalf, on behalf of a group of shareholders or even on behalf of the company itself. As mentioned above, a way to overcome this problem would be to gather with other shareholders with the same rights and interests, sharing the proceedings costs (chamber, attorneys, and arbitrators fees) and eventual awards. In other words, turning individual claims into a collective claim may encourage shareholders to act.

Another possibility would be bringing the collective lawsuits prescribed in Laws 7,913/1989 and 7,347/1985 to arbitration, as has been advocated by some scholars and practitioners in Brazil. This change of course, however, would certainly raise other challenges, since the referred laws have specific features (See Subsection 2.1.3 above), which would have to be reconciled with the arbitration chamber rules. Moreover, it is questionable whether the collective rights found in Law 7,913/1989 can be subject to arbitration, a proceeding that the Brazilian Arbitration Law reserves to *direitos patrimoniais disponíveis* only[94].

Considering the terms of the Brazilian Corporate Law, a declaration of intention to start an arbitral proceeding should be sufficient to authorize the receipt of the shareholders' list under its Article 100, Paragraph 1[95]. With that, a shareholder could easily reach others, inform about its intention to arbitrate and ask if they would be interested to be claimants

94 They are frequently referred to as "class arbitrations", suggesting a link with U.S. class action concepts. In this regard, see PARGENDLER; PRADO. Op. Cit., p. 102 and the following pages.

95 "Paragraph 1 To any person, if it has the purpose of defence of rights and clarifications of personal interest situations or shareholders interest or capital market interest, shall be given certified copies of the company books referred to in items I to III of this Article, for which the company may charge the costs of the service, and in case the solicitation is denied by the company, such decision is subject to appeal before the Securities and Exchange Commission." (free translation)

as well. The necessity to disclose an "opt-in or opt-out" moment could also be an undeniable motivation for its deferral. This possibility could also be clarified by the CVM in an eventual orientation note. A regulation demanding a publication by the companies about shareholders' intentions to arbitrate, if certain conditions of relevance are satisfied, could also help.

As mentioned in Section 3.1, it is also possible that isolated shareholder(s) present a request for arbitration, with claims common to all shareholders, but due to the confidentiality of the proceedings, the other shareholders will not be aware of the existence of the beginning of this proceeding, and therefore, will not be able to request its joinder to a pre-existent proceeding or the consolidation of the proceedings. And, according to the CAM rules, there is a time limit to new parties be able to join a proceeding under way. Thus, it is possible that even if a shareholder becomes aware of the proceeding, depending on the timing of the notice, it will not be able to join it.

3.3.4.3 How to deal with confidentiality in arbitrations with erga omnes effects

There are at least two possible approaches to deal with the confidentiality problem, when the arbitration will result in an award with *erga omnes* effect.

A first approach may follow from the terms of item 'iii' of Article 2 of the CVM Rule 358/02, and, therefore, the publicly-held companies involved would have the duty to disclose information about a request for arbitration filed or received. As a matter of fact, according to CVM Rule 358/02, such disclosure duties would also encompass all executive officers, directors, and controlling shareholders. In this case, the CVM could amend its rules to expressly demand that a request for arbitration in this sense would have to be immediately disclosed.

Second, based on a systematic interpretation of the Brazilian legal framework, the WG understands that the beginning of all capital market arbitrations – including the ones involving collective shareholder rights – should be automatically disclosed to the CVM, which then would have the power to demand full disclosure of the arbitral proceeding. Two legal provisions corroborate this rationale.

According to Law 6.385/76, the CVM must be notified about court proceedings involving subjects under its administrative jurisdiction. That way, if it considers appropriate, it can participate as *amicus curiae* or, at least, provide some clarifications. Taking into account that arbitral proceedings replace the jurisdiction of state courts, it is reasonable to consider that this prevision should be extended to arbitration.[96] Notwithstanding, a legislative amendment in order to expressly prescribe the applicability of this Article to arbitration is desirable.

Moreover, Law 9,307/1996 (the Brazilian Arbitration Law) authorizes the participation of the Public Administration (e.g. the CVM) in arbitral proceedings, demanding that the cases involving them shall respect the principle of publicity[97] and cannot be held confidential due to considerations of public interest. Therefore, the WG understands that arbitrations in which the CVM decides to participate would have to be subject of full disclosure to the market[98].

In conclusion, it is clear to the WG that maintaining confidentiality with respect to the course and outcome of arbitral proceedings about corporate and capital markets issues and involving publicly-held companies is not recommended. It is also evident that the current legal framework (national laws and CVM rules), as well as the CAM arbitration rules, are not suitable to the collective nature of some corporate and capital market conflicts. Legislative and regulatory changes must be implemented in order to solve the deficiencies identified along this report. However, considering the complexity of the subject, the WG recommends additional study about arbitration focusing on defining the most adequate solutions to improve the information framework of arbitral proceedings, as well as the procedures available to the parties in an arbitration, analyzing factors related to market impact, before any changes are formally proposed.

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96 It is worth mentioning that the Brazilian Arbitration Law was enacted twenty years after Law 6,385/1976, reason why the wording of Article 31 does not expressly encompass the feasibility of CVM's participation as amicus curiae in arbitrations. Such historical analysis seems to reinforce the admissibility of CVM's participation in arbitral proceedings. In this regard, "Since the Brazilian Arbitration Law (Law 9,307) was only enacted on September 23th, 1996, the legislator could not have entitled the CVM, in Article 31 of Law 6.385/76, to also intervene in arbitral proceedings. Despite arbitrators' significant expertise, CVM's participation as amicus curiae is perfectly admissible, since it is interesting to extend the debate whenever possible and, consequently, deepen the discussion, allowing the arbitrators to rely on technical information provided by the CVM to render their decisions. It is worth emphasizing: the more intense the discussion, the better". Free translation from VIDAL NETO, Ademar. In: CODORNIZ, Gabriela; PATELLA, Laura (coords). Comentários à Lei do Mercado de Capitais, São Paulo: Quartier Latin, 2015, p. 675.

97 See Article 2, Paragraph 3, included by Law 13.129/15 and Article 37 of the Brazilian Federal Constitution.

98 In this sense, all the ones interested in having access to the content of the proceeding could request a copy of its documents (Request of Arbitration, Terms of Reference and so on). However, it is important to note that the information protected by specific legislation (e.g. personal data, banking records, etc.) would not be disclosed. In this regard, see Law 105/2001 and Law 12.527/2011.

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