



Conflict of Interests on Decisions of Brazilian Securities And Exchange Commission: Formal and Substantive Theory?

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ABSTRACT

This study aims to analyze, from the point of view of administrative decisions, the wording of the managing conflict of interests because it contains undefined legal concept not yet defined by law or by the Brazilian Securities and Exchange Commission – CVM -, and, by that, is subject to divergent decisions regarding its factual application, generating impacts in its legal effects, which will be analyzed further. Initially will be exposed the doctrinal theories that endorse the theme and whose application are ground in jurisprudence.

KEYWORDS : Conflict of interests. Formal theory. Substantive theory.

1. Introduction

Generally, the simple duplication of harmonics interests in the same subject, is not characterized as a conflict situation, in the legal sense. For an interest can be performed without damaging the other.

The conflict of interest occurs when a rights-holder has two non-harmonic interests, before a particular factual situation:

- A) the interest of society; and
- B) the external interest to the company or the partner (personal or otherwise to society).

It is this duplicity of interests inharmonious condition to a shareholder of a corporation that cannot hold an interest without sacrificing the other is the problem of this research.

The overall goal is to interpret the conflict of interest in the administrator role that hiring is or not considered fair. And the special objectives are: (i) to characterize the conflict of interest with an indeterminate legal concept; (ii) chronicle of legislative developments and analyze; and (iii) confirm the divergence in doctrine and on Brazilian Securities and Exchange Commission – CVM - decisions, regulatory body of the Brazilian capital market, which, depending on the composition of its collective body, has presented diametrically opposed understandings of similar cases, based on two theories (formal and substantive). The methodology is to obtain secondary data on the CVM website and the compare the theories.

2. Theory

It is possible to infer the intent of the legal device to prevent the administrator from using its administrative powers to decide in favor itself, to the detriment of the company's organization that manages. The purely grammatical interpretation of Brazilian law, one can infer that the administrator can not take part in the deliberations that have conflicting interests; occurring situation the administrator must assign the conflict and the nature and extent of his interest and abstain from deliberation; if the contract does not give under fair conditions, the legal transaction is voidable, being returned to benefit over time (LEÃES, 1989:187).

It should be noted the lack of definition of the central term "conflict of interest". From this, it identifies the doctrine twofold seeking legally viable interpretations to solve uproar.

Authors such as Carvalhosa, Carvalho de Mendonça and Miranda Valverde adopt formal perspectiva of conflict of interest, also called a priori, triggered by the mere conflicting position occupied by the administrator as a possible contractor, should be held prevented, however the business has to be entered relied on the due diligence practices and market clarity, in which case it would not be voidable (CARVALHOSA, 2006:314).

A contradiction arises, however, when it reverses this reasoning. If the administrator at the same time contractor, has not declared himself

prevented in the minutes of deliberation, disregarding thus the main section of article, but acted with sufficient diligence so that the deal was fair and reasonable in accordance with market practices. In this case, it would not voidable business, since Paragraph 2 refers only to the breach of fair market conditions, as §1. For this, the company does not buscurá the annulment of the transaction executed because it was economically fair, making the provision of innocuous caption, for noncompliance not generate factual consequences.

Another perspective adopted by the doctrine, endorsed by Rubens Requião, is of substantive conflict analysis, check on the objective conditions of the contract, which must be reasonable to market (REQUIÃO, 2003:213). This logical line in a hiring than normal market conditions, the administrator shall exclude from the negotiations, for having characterized the conflict of interest. Allocates to the significant "conflict of interest" to the imbalance in the contractual conditions with the market, making once again, the failure of innocuous caption, as in fair scenario, hiring will not be canceled, and the failure to the declaration requirement impediment empty (BULHÕES; LAMY FILHO, 2009:218).

It is evident, therefore, a problem with the legal effectiveness of the rule in question, which may be a causative factor of legal uncertainty, in which the judge or the taxpayer from the norm - in this case, the administrator - will have a greater margin of discretion (COMPARATO; SALOMÃO FILHO, 2005:189).

Despite being the Securities Commission competent for solving corporate uproar as on screen, it is intended to lay out objectively the conflict settings developed interest in Board decisions of the Securities Commission in the time frame of 12 years from the first judgment delivered on the subject in 2000 in search of rationalization of the undefined legal concept.

Still wishes to examine whether there are patterns on the placements of said Board, and, with, its impact according to the time frame in which they are, which must take into account periods of office of four years director of CVM, which can influence voting patterns.

3. Methodology

The research will be limited to fetch data related to 10 (ten) 200-2008 decisions dealing administrator of conflict of interest. Below, we present sinóptico table with the data collected.

3.1The Brazilian Securities and Exchange Commission – CVM – database

Process number	Theory	Conflict of interest	Penalty	Infringement
Investigation CVM n.º 32/2000	Formal	Yes	Yes	No
Investigation CVM n.º 1.153/2002	Substantive	No	No	No

PAS CVM n.º 25/2003	Substantive	No	No	No
PAS CVM n.º 5.494/2004	Formal	Yes	Yes	No
PAS CVM n.º 0097/2005	*1	*1	*1	*1
PAS CVM n.º 1.143/2005	Formal	Yes	Yes	No
Investigation CVM n.º 17/2006	Substantive	Yes	Yes	Yes
PAS CVM n.º 03/2007	Substantive	No	Yes	No
PAS CVM n.º 3.453/2007	Formal	Yes	*2	*2
PAS CVM n.º 1.815/2008	Substantive	No	No	No

*1 - We were unable to ascertain the content of the dispute in the headquarters of the Board, due Commitment Agreement celebration;
*2 - The winner not vote attested to the violation of the device, but not away your chance.

Results and analysis

The application of Formal Theory

A) The administrator is given by prevented suits and other legal obligations and hiring is considered fair - No existent conflict of interests, being merely used here as a conceptual paradigm.

B) The administrator is given by stopped and meets other law obligations and hiring is not considered fair - It is voidable legal business and should return those received financial benefits to society. There is no similar case analyzed by the CVM Board, one can conjecture that, based on the formal theory, would not be considered a conflict of interest situation.

C) The administrator refused to be prevented and does not meet other legal obligations and hiring is considered fair - In this situation, there was a violation of the law, but there was no damage or the nullity of the business. In light of the formal theory, however, there was conflict of interest, capable of charging penalty by the CVM, as administrative decisions demonstrated.

D) The administrator refused to be prevented and does not meet other legal obligations and hiring is not considered fair - There is a conflict of interests' administrator to be counterpart of the company, subject to penalty by the CVM.

The application of Theory Substantive

A) The administrator is given by prevented suits and other legal obligations and hiring is considered fair - This situation would not trigger the conflict of interests' administrator.

B) The administrator is given by prevented suits and other legal obligations and hiring is not considered fair - this situation does not configure the main conflict of interest between administrator and society, but the administrator would be subject to the effects listed in the Brazilian legislation.

C) The administrator refused to be prevented and does not meet other legal obligations and hiring is considered fair - In contrast to the formal theory, would not set up the conflict of interest from the subsequent analysis because there would be no harm to society, so that the legal transaction between administrator and society would not be voidable away the consequences or legal charges. According to the decision handed down by the CVM Board in office of the Administrative Procedure Sanctioning CVM 03/2007, there was application fee despite no conflict of interest configuration.

D) The administrator refused to be prevented and does not meet other legal obligations and hiring is not considered fair - The conflict of interest in this case would be brought forth from analysis of the legal business conditions, having been strange by the conditions in market, culminating in the conflict, and the consequences which the applicable Brazilian law.

Conclusion

According to the sample from 2000 to 2008, we can determine which of the 10 questions they had in its scope administrator conflict interest, that:

- A) 40% of decisions in CVM Collegiate used the concept of the theory form, and
- B) 60% understood by the application of substantive theory, denoting no peacefulness, as already stated. Nor can attest that there is a recurrent application of one or another theory as to give rise to standards in this time.

Regarding the analysis of the legal effect, a hypothetical administrator conflict of interest situation depends on which theory will be applied to your resolution. For this, in sequence, hypotheses will be set out, both in the light of formal theory, as in the substantive theory, in which they will derive from an alleged administrator performance test scenarios, which enable the factual verification of the legal effectiveness of the chapeau of Article based on collected case law.

Recommendation

1. The CVM decided by the application of penalty for violation of Brazilian law that specifically deals with the occurrence of administrator conflict of interest, even when there is no proven conflict, but there is potential conflict.
2. When the CVM does not state prevented administrator to take part in the formation of the company's conviction on legal business that has potential conflict,
3. It is suggested that if we have raised the degree of diligence required of the administrator. Fitting the administrator to take action and exert efforts to prove that the conditions of the transaction are fair.
4. The administrator declares stopped in front of potential conflict situation, could have their untie your administrator role, acting merely as counterparty, thus reducing their degree of diligence to risk. Thus, if the deal was not a level playing field to market, would be voidable and the administrator would fit return the benefits perceived by him.

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REFERENCES

1. Leães, L. G. P. B. (1989) Estudos E Pareceres Sobre Sociedades Anônimas. São Paulo: Revista Dos Tribunais 2. Carvalhosa, M. S. B. (2006) Comentários A Lei Das Sociedades Anônimas. 3. Ed. São Paulo: Saraiva. 3. Requião, R. (2003) Curso De Direito Comercial, Vol. 2. 23. Ed. São Paulo: Saraiva. 4. Bulhões, J. L. P.; Lamy Filho, A. (2009) Direito Das Companhias. 1. Ed. Rio De Janeiro: Forense. 5. Comparato, F. K.; Salomão Filho, C. (2005) O Poder De Controle Na Sociedade Anônima. 4. Ed. Rio De Janeiro: Forense.