

CORPORATE *LiveWire*

OFFSHORE FOCUS 2016

EXPERT GUIDE

www.corporatelivewire.com



**Walter Stuber**

www.stuberlaw.com.br
+55 11 2609 8684

WALTER STUBER CONSULTORIA JURÍDICA

Arbitration to Solve Corporate Disputes in Brazil

By Walter Stuber

Brazilian law expressly allows the inclusion of an arbitration clause or arbitral convention (*convenção de arbitragem*) in the by-laws of a company (*sociedade anônima*) and to make such clause binding upon all shareholders, including those who voted against the inclusion of the arbitration clause, granting the dissenting shareholders the right to withdraw from the company. The matter is governed by Law No. 13,129, of 26 May 2015, which amends Law No. 9,307, of 23 November 1996 (the Arbitration Law) and Law No. 6,404, of 15 December 1976 (the Brazilian Corporation Law – BCL) and adds a new article 136-A to the BCL to admit such inclusion.

The *quorum* for this type of resolution, which approves the inclusion of an arbitration clause in the company's by-laws, is the one required by article 136 of the BCL, i.e. the approval of shareholders representing at least one-half of the voting shares. A larger *quorum* may be needed, if this possibility is contemplated in the by-laws, in the case of a company whose shares are not admitted for trading in the stock exchange or in the over-the-counter market.

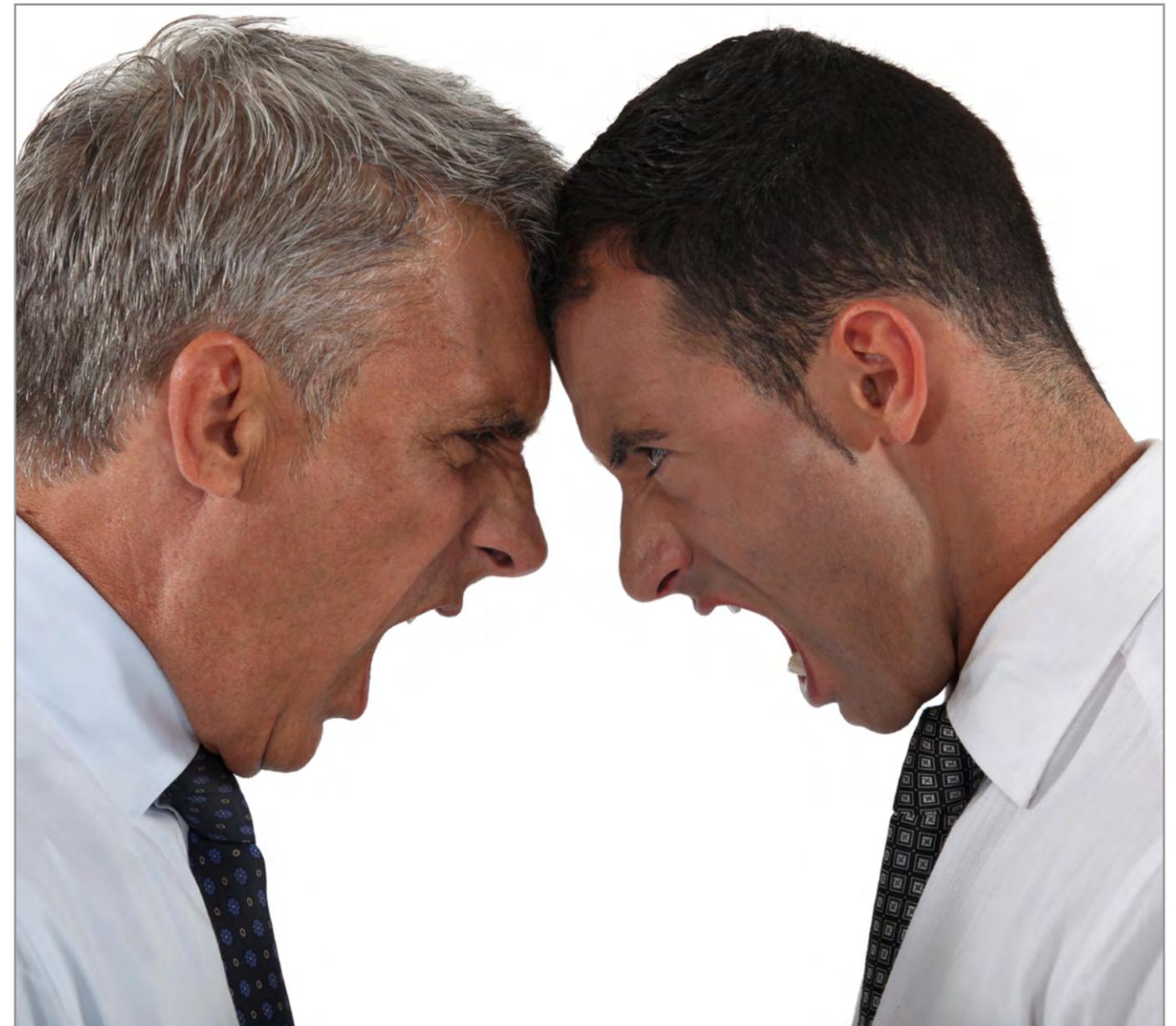
Pursuant to the provisions of paragraph 2 of article 136 of the BCL, the Brazilian Securi-

ties and Exchange Commission (*Comissão de Valores Mobiliários – CVM*) may authorise a reduction of this quorum in the case of a publicly-held corporation whose shares are widely held and whose last three general shareholders' meetings were attended by shareholders representing less than one-half of the voting shares. In such event, the CVM authorisation must be mentioned in the call notices and the reduced quorum resolution may only be passed on the third call.

The withdrawal right or refund is regulated by article 45 and respective paragraphs of the BCL. These rules are outlined below.

The refund is an operation whereby, in the cases provided for by law, a company pays a shareholder the value of the shares, if the shareholder dissents from a decision of a general shareholders' meeting.

The by-laws may establish rules to determine the amount of a refund, which may be less than the net worth of the shares stated in the last balance sheet approved by the general shareholders' meeting, only if the refund value is calculated in accordance with the economic value of the company, which will be determined by



proceeding to its evaluation.

If the decision of the general shareholders' meeting is taken more than 60 days after the date of the last approved balance sheet, the dissenting shareholder may demand, together with the refund, that a special balance sheet be prepared as of a date within such 60-day period. In such a case, the company shall forthwith pay 80% of the refund amount calculated according to the last balance sheet and, after the special

balance sheet is ready, it shall pay the balance within 120 days from the date of the resolution of the general shareholders' meeting.

If the by-laws have established the evaluation criteria for the purpose of refund, the refund value shall be determined by three experts or an evaluation corporation. The experts or evaluation corporation (the valuers) will submit a report indicating the evaluation criteria and the basis of comparison used, and these will be

“
A refund may be paid from profits or reserves, except the legal reserve, in which case refunded shares will be held in the corporation treasury
 ”

supported by documentary evidence as to the property valued. The valuers must be present at the general shareholders' meeting at which the report is read to supply any information requested of them. They will be liable for any damage caused to the company, shareholders and third parties, by their negligence or fraud in valuing the property.

The valuers will be indicated in a list containing six or three names, respectively, produced by the Administrative Council or, in its absence, by the Board of Directors. They will be elected in a general shareholders' meeting, by the absolute majority of votes, not counting shareholders' abstentions. Each share will be entitled to one vote, regardless of its class or type.

A refund may be paid from profits or reserves, except the legal reserve, in which case refunded shares will be held in the corporation treasury.

If within 120 days from the publication of the minutes of the general shareholders' meeting, the shareholders whose shares were refunded from the capital have not been substituted, the capital shall be deemed to have been reduced by a corresponding amount and the administrative bodies must call a general shareholders' meeting within five days to inform the shareholders of the reduction.

If the company is declared bankrupt, a dissenting shareholder who is a creditor for the shares' refund will be classified in a separate list as an unsecured creditor. The apportionment made to the unsecured creditors will be used to pay the established claims prior to the date of publication of the minutes of the general shareholders' meeting. The sums so attributed to earlier claims will not be deducted from the claim of the former shareholder, which will continue in full force for payment from the assets of the bankrupt estate after satisfaction of the former claims.

If, in the event of bankruptcy, the former shareholders who have already been refunded from the capital have not yet been substituted and the bankrupt estate is not sufficient to pay the earlier claims, a revocatory action may be brought to demand restitution of the refund paid with the reduction of the capital, limited to the remainder of this portion of the liabilities. Restitution will be demanded in equal proportions from all the shareholders whose shares have been refunded.

The arbitration clause will only become effective after 30 days counted from the date of publication of the minutes of the general shareholders' meeting which approved such clause.

The refund is not applicable:

(i) in the event the inclusion of the arbitration clause is a condition to the issuance of securities of the company to be accepted for a trade in a list segment of the stock exchange or the organized over-the-counter market that requires minimum free-float of 25% of each type or class of shares; and

(ii) if the inclusion of the arbitration clause is made in the by-laws of a publicly-held corporation whose share have liquidity or dispersion in the market.

Liquidity is evidenced when the type or class of share, or the certificate that represents it, is part of a general index representing a portfolio of securities in Brazil or abroad, defined by CVM. Therefore, the shares are part of a stock exchange index.

Dispersion is evidenced when the majority shareholder, the controlling company or other companies under their control hold less than half of the issued shares of the applicable type or class. In other words, none of the shareholders have the majority of any type or class of share.

Since 2001, when the Market Arbitration Chamber was instituted by the Brazilian Ex-

change, the possibility to include an arbitration clause in the by-laws of a company was allowed. However, this issue was controversial and some Brazilian arbitration practitioners argued that an arbitration clause could not bind shareholders who did not expressly consent to arbitrate and that these shareholders would have the right to access the courts to settle any corporate disputes, regardless of the existence of an arbitration clause in the company's by-laws. New article 136-A of the BCL intends to put an end at this discussion.

Walter Stuber is a practicing lawyer, with law degree from the São Paulo University (1972), admitted in 1973 to the Brazilian Bar Association, and the founding partner of the law firm Walter Stuber Consultoria Jurídica, in São Paulo, Brazil. He specialises in corporate, M&A, joint ventures, banking and finance law, international financial transactions, capital markets, securities, project finance, foreign investments, privatisation, arbitration, contracts and international law. Author of several papers published on renowned legal journals and magazines and electronic bulletins, national and international, and also speaker at seminars, conferences and congresses in Brazil and abroad, on matters related to his practice.