-REVISTA DA FACULDADE DE DIREITO DA UERJ- RFD- v.1, n.25, 2014

# THE EXCLUSION OF PARTNERS FOR JUST CAUSE IN LIMITED COMPANIES – CONTROVERSIAL ISSUES

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## ABSTRACT

In this article it is discussed the matter of the exclusion for cause of a member in limited partnerships. Although this is an issue governed by the Brazilian Civil Code, the approach of the matter by this law was not detailed, allowing the development of different positions of the doctrine and case law on the proceeding for the exclusion. Thus, this paper studies the latest understandings about the controversial points on the subject, dealing, therefore, from the cases of just cause admitted for excluding a partner to the methods of calculating assets due to the excluded company member.

**KEYWORDS:** Partner Exclusion. Limited Companies. Just Cause. Company's Preservation. Determination of Assets.

# A EXCLUSÃO DE SÓCIO POR JUSTA CAUSA NAS SOCIEDADES LIMITADAS – PONTOS CONTROVERSOS

## RESUMO

**N**este artigo trata-se da exclusão de sócio por justa causa nas sociedades limitadas. Apesar deste ser um tema disciplinado pelo Código Civil, sua disciplina não foi detalhada, o que permitiu o surgimento de diferentes posições da doutrina e jurisprudência sobre o procedimento para exclusão. Desta forma, o artigo estuda os mais recentes entendimentos sobre os pontos controversos do tema, buscando indicar qual seria a conclusão mais acertada para cada um deles, tratando, desta forma, das hipóteses de justa causa admitidas para a exclusão até a forma de cálculo dos haveres devidos ao sócio excluído.

**PALAVRAS-CHAVE:** Exclusão de sócio. Sociedades limitadas. Justa causa. Preservação da empresa. Apuração de haveres.

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This article was translated by Thiago Guilherme Nolasco and authorized for publication by the author in 26/06/2014. Version in Portuguese received in 29/09/2013, accepted in 07/04/2014.

## 1. INTRODUCTION

The success of a company, in a market surrounded by competitors, is an arduous task that requires collaboration and dedication of all of its partners. The natural decision-making process of companies demands a reunion of different people, with distinct beliefs, to settle regarding the enterprise' fate, configuring a procedure that may result in misunderstandings and conflicts between business associates.

Nevertheless, when one of them ceases to contribute to the business' success, practicing harmful acts to its keeping or when a divergence of opinions with other members starts to jeopardize the company's permanence, the Brazilian Civil Code permits the exclusion of that partner who is endangering the entrepreneurship.

In other words, the possibility of partner exclusion permits a company to continue its development without the dissonant partner, avoiding, therefore, its failure or dissolution. Thus, in view of the social character related to an enterprise, society's preservation is, ultimately, the primary objective of excluding a business partner.

The Brazilian Civil Code, when disciplining the institute of partner exclusion, provided different occasions for its application, specifying the procedure to be observed in each one of them. Notwithstanding, the regulation of this subject was not exhaustive, which led to major doctrinal discussions regarding the interpretation of the legal text and the procedure to be adopted in situations of partner exclusion not envisioned by the legislator (*legal gaps*).

In this subject, the exclusion of partners on the grounds of just cause proves to be an extremely attractive matter. First, the regulation of the theme, in many aspects not detailed, allows different interpretations and, by consequence, greater reflection towards the institute. Secondly, the great importance of this issue in the legal practice makes necessary to examine different doctrinal and jurisprudential positions, built in recent years, to conclude about the most appropriate understanding of each controversial point.

## 2. COMPANY'S PRESERVATION PRINCIPLE

The company's preservation principle may be considered one of the most relevant aspects of modern commercial law. As exposed by José Waldecy Lucena, the social function

of the enterprise yielded a reflection towards the old romanist idea that the only way to force the removal of a partner would be by total dissolution of the entity (LUCENA, 2005, p. 707).

According to the former concept, the company that had a partner who was hampering its development would have only two possible fates: (i) its ventures would fail due to the damage caused by the deleterious partner; or (ii) would be obligated to be extinguished, giving up possible success achievement in the event of excluding the injurious member.

The presence of a company impacts far beyond its partners and members, reaching the community that surrounds it as well. Companies have a key role in the economic development of a country, in the extent that they are job creators, investors aggregators, commodity producers, service providers and enable generation of income not only for its members, but also for those to whom it relates.

For these reasons, the concept of a company's importance has evolved, expanding, from a vision focused only on the effects regarding its partners, to the significance of its social role. Thereby, disagreements among partners are problems that do not concern only themselves, since the exclusion of one of them may guarantee, ultimately, protection of interests of the community as whole.

As will be observed in the next sections of this paper, the company's preservation principle is the main foundation of existence of the partner exclusion institute. It's important not to forget that the forcible removal of a company member is severe punishment. Therefore, the preservation principle justifies the prevalence of collective interests (maintenance of a company's activities) against individual interests (a specific partner).

## 3. HYPOTHESES OF PARTNER EXCLUSION IN LIMITED COMPANIES

Private limited companies are, with great advantage, the most common type of enterprises in Brazil and, coincidentally, the kind that presents the biggest number of partner exclusion hypotheses. Given this fact, nothing more natural than the present study to start with the parsing of possibilities of exclusion for *just cause* provided for this sort of partnership.

Initially, it is of note that the Brazilian Civil Code provides for six events of partner exclusion on limited companies, two of them referring to *just cause*. In this regard, Professor Haroldo Malheiros Duclec Verçosa listed the cases of exclusion referred to, namely: "(i)

negligent partner (art. 1.004 and its paragraph); (ii) partner responsible for misconduct in the performance of its obligations (art. 1.030, *caput*); (iii) partner who proved incapable after the company was incorporated (art. 1.030, *caput*); (iv) bankrupt partner (art. 1.030, sole paragraph); (v) partner whose share has been paid (art. 1.030, sole paragraph, combined with art. 1.026, sole paragraph); and (vi) partner that committed act of undeniable gravity, thus, jeopardizing the business (art. 1.085)" (VERÇOSA, 2005, p. 528).

The possibilities set out through items (i) to (vi) above are applicable towards both simple and limited companies, except for the last one (vi), related to acts of undeniable gravity performed by a partner, which is exclusive to limited enterprises.

Furthermore, it should be highlighted that the situations covered by art. 1.030 of the Civil Code, hypotheses (ii) to (v) previously listed, are cases of legal exclusion of partners. Thereby, the result will only be achieved when a sentence in this sense, aftermath of a suit filed by the company against one or more partners, becomes *res judicata* (Verçosa, 2005, p. 528). As for hypotheses (i) and (vi) of partners exclusion, these refer to extrajudicial procedures that at no time will depend on a legal authorization to be conducted, but which may, nevertheless, be subsequently revised and reformed by the Judiciary, if any flaw is detected.

As outlined earlier, the purpose of this study is to make a detailed analysis of the hypotheses of partner exclusion on the grounds of *just cause*. This is why only hypotheses (ii) and (vi) listed above – in other words, hypotheses of legal and extrajudicial exclusion of partners in limited companies – will be considered.

Thus, it is necessary to verify which actions or omissions of a partner can be considered as *just cause* for his or hers compulsory removal of a company.

## 4. JUST CAUSE DEFINITION

Identifying what reason could be considered as fair enough to exclude a partner from a business is the first controversial topic of this study. This occurs, naturally, because there is no exhaustive definition of acts and omissions that could lead to an eventual exclusion of a partner on the Civil Code.

The lawmaker preferred to inscribe generic provisions, indicating that partners could be forcibly secluded "for serious misconduct in the performance of their obligations" (art. 1.030,

concerning judicial exclusion) or when "one or more partners are putting at risk the continuity of the company, due to acts of undeniable gravity" (art. 1.085, on extrajudicial exclusion).

However, "*just cause's*" open definition gave rise to much doctrinal and jurisprudential discussion on the matter of which acts and omissions would enter on the list of possible reasons for partner exclusion. As remembered by Cunha Peixoto, "the forced removal of a partner must always happen, for the sake of the company, whenever there is just cause; and it's hard to establish, in advance, the cases with potential to disrupt the company's well-being" (CUNHA PEIXOTO, 1956, p. 269).

### 4.1 Problems in defining the concept of just cause

Initially, it is necessary to emphasize that the term "just cause", referred to in doctrine, jurisprudence and in this study, has no connection with the concept of just cause related to labor justice, as recalled by Armando Luiz Rovai (2006, p. 32), being only a reference to acts and omissions of a partner that may justifiably cause its exclusion from an entrepreneurial society.

According to some doctrinal notations, the following may be considered just causes for partner exclusion: constant absence on partner's meetings, inappropriate behavior towards employees (WALD, 2005, p. 565), misappropriation of company assets, deviation of company money and commission of acts that negatively affect the company's honor (RIZZARDO, 2007, p. 261). Yet, the major obstacle of defining just cause lies in the impossibility of establishing a definitive meaning, which could be used in all cases, excusing any examples and keeping subjectivity out of question.

Nevertheless, some elements have been constantly used by doctrine and jurisprudence to ascertain just cause. In this sense, it's possible to state that is not every fault that may be considered as grounds for expulsion of a partner from the company. The act or omission must have, provenly, brought loss to the entrepreneurial society to justify an exclusion.

Moreover, when discussing this subject, Marcelo Vieira von Adamek indicated two significant principles that should guide the just cause's identification: proportionality principle and equal treatment principle (ADAMEK, 2011, p. 191). The first principle determines that not all faults can be considered just cause for excluding a partner, depending on less intense

sanctions that may suppress a minor problem, for instance. According to the proportionality principle, exclusion must always be taken as *ultima ratio*, a last resort to solve an issue.

As for the equal treatment principle, it's an important keystone to dodge a discretionary and unfair exclusion of a partner. It's common to face practical examples of companies that want to forcibly expel a member due to personal problems between the company's shareholders. In these cases, to base such expulsion on supposedly righteous motivation, the excluding partners point out faults committed by the excluded one that, truly, are actually perpetrated by all of them.

In this manner, if the behavior of a partner is tolerated by the others, the same behavior performed by another member can't be used as justification for his or hers exclusion.

Therefore, even though just cause being an unclear legal concept, the implementation of the principles outlined above will allow a plain identification, in concrete cases, of acts or omissions of a partner that may lead to his or hers exclusion from the enterprise. The most important is that the company is protected against internal attacks that may compromise its survival in the market.

**4.2 Differences between gross misconduct and acts of undeniable severity**

As previously pointed out, the Civil Code provides for two distinct hypotheses, which will be analyzed with detail on the next lines, regarding exclusion of partners that are putting the company at risk: legal exclusion, provided by art. 1.030, and extrajudicial exclusion, regulated by art. 1.085.

Both propositions present different procedures and requirements from each other. However, it's relevant to accentuate that the reasons required for applying the compulsory removal institute are diverse in each hypothesis. In other words, the definite articulation of what is considered "just cause" is not the same on the articles exposed.

In this sense, art. 1.030, concerning legal exclusion, states that a member may be put away for "gross misconduct in the performance of its obligations". On the other hand, art. 1.085, providing for extrajudicial exclusion, refers to just cause as "acts of undeniable gravity" that "put the company's continuity at risk". When analyzing both articles, inevitably an issue arises: comparing the concepts of "acts of undeniable gravity" and "gross misconduct in the

performance of obligations", would there be a distinction between them? In other words, could we conclude that an act practiced by a partner will determine which excluding procedure should be adopted (legal or extrajudicial)?

The doctrine wasn't unanimous when trying to find an answer to these questions. Arnaldo Rizzardo teaches that: "It's necessary and correct the differentiation between mere grave misconduct and acts of undeniable gravity that may expose risk to the business continuity." (RIZZARDO, 2007, p. 261). According to the aforesaid author, the first offense (grave misconduct) would be a less serious one, which would harm the company economically, and the acts of undeniable gravity would be those related to more critical conducts, which effectively jeopardize the company's continuity.

Leonardo Guimarães agreed with this point of view, providing that "the question is: how to discern the dichotomy between grave misconduct and risk to society? And this is a question of utmost relevance, considering that if the partners have committed grave misconduct they may only be excluded from the entrepreneurial society legally; and if they their actions make a threat to the company's existence, then they are subject to extrajudicial exclusion" (GUIMARÃES, 2003, p. 117).

If the view outlined above were to be adopted, a partner that, by committing misconduct, exposed the company to financial losses, but didn't endanger its survival, could only be dismissed through a legal procedure, knowingly slower than the extrajudicial process of partner exclusion.

We don't agree, *data venia*, with this understanding. If the wording of each article is distinct, it is also certain that the lawmaker didn't appoint, at any moment, that there should be a gradation between the hypotheses. Rather, when distinguishing legal from extrajudicial exclusion, the law explicitly indicated different requirements and procedures to be followed in each case, as will be described ahead.

This position is defended by Marcelo Vieira von Adamek (2011, p. 187), Modesto Carvalhosa (2003, p. 323) and by professor Priscila Maria Pereira Corrêa da Fonseca who wrote: "As previously warned, the events previewed by the lawmaker in either arts. 1.030 and 1.085 may, with great probability, be intermingled. The so-called 'grave misconduct in the performance of obligations' or even the 'supervening incapacity' may represent 'risk to the business continuity' as well as 'acts of undeniable gravity'" (FONSECA, 2007, p. 46).

Hence, any act or omission, perpetrated by one or more partner, that brings an effective damage to the company will be considered as just cause to exclude the harmful partner, being also considered a grave misconduct and an act of undeniable gravity.

### 4.3 *"Affectio societatis"* as just cause for the exclusion of a partner

*Affectio societatis* is one of the basic principles for setting up a limited company. Because it's considered, historically, a partnership (a people's society), the *affectio societatis* principle has always been related to this type of company, being a statement of intent, willingly expressed by its members, to be gathered in the same company.

When the *affectio societatis* is no longer perceived, then there is no more reason for these partners to continue in society. Furthermore, it can be noted that, as provided by the Constitution's section XX, "no person may be compelled to join or remain a member of an association". Based on these premises, a question arises: when all other partners have no intention of remaining associated with a particular partner, can the *affectio societatis* be presented as sole cause to justify a shareholder's exclusion?

This is an issue that has been much debated by doctrine and jurisprudence and that has no simple answer. As recalled by Silvio de Salvo Venosa, "not every act that undermines the *affectio societatis* justifies the exclusion procedure" (VENOSA, 2010, p. 150). Therefore, it is necessary to check when the *affectio societatis'* breaking can be considered a fair reason for the exclusion of a partner.

As a rule, *affetio societatis'* breach should never be considered as the cause of a partner's exclusion, but as "a result of any event that may legitimize the exclusion, provided that it figures as grave misconduct" (ADAMEK, 2011, p. 190). In the same line of thinking, other scholars, such as Modesto Carvalhosa (2003, p. 311), refer to the breaking of *affectio societatis* as the natural consequence brought by an act of undeniable gravity that may be considered as grounds for compulsory removal of a partner.

Howbeit, the mere breaking of *affectio societatis* is frequently cited in lawsuits as an excuse for the exclusion of a partner, since no one would be obliged to conjoin an unwanted

partner. Even though, jurisprudence has repeatedly repelled the allegation of rupture of the "will to remain associate" as a fair motivation to determine a partner's expulsion.[2]

As it is seen in some precedents[3], the breaking of *affectio societatis* can be considered sufficient argument for the voluntary withdrawal of a partner from a company. However, the same justification isn't enough to forcibly remove him, since the exclusion of a partner should be a severe sanction, one that can only be used as *ultima ratio*.

In contrast, part of the doctrine advocates that the just cause for partner exclusion doesn't need to be related to an act or omission of the shareholder who is intentionally endangering the company. As observed by Arnoldo Wald, in other words, "nothing prevents the judge responsible for analyzing the just cause shown by the majority of remanant partners from understanding that the breaking of *affectio societatis* may derail the continuity of the company's activities, turning the achievement of its goals impossible, and, thus, granting the exclusion. This is what happens when one of the partners is responsible for breaching the *affectio societatis* or when coexistence among the members becomes unviable" (WALD, 2005, p. 235).

Hence, a significant part of the jurists understands that yes, breaking the *affectio societatis* can give rise to partner exclusion. However, a profound and irreversible misunderstanding between the partners must be proven. In addition, it's required to prove that such disagreement is harming the business' continuity. Personal problems between partners cannot prevail as cause for exclusion of anyone of them.

For a better understanding of the procedure on partner's exclusion in limited companies, the next two sections of this study shall explore the two possibilities of compulsory expulsion for just cause provided on the Civil Code, namely: legal and extrajudicial exclusion of partners.

## 5. REQUIREMENTS FOR EXTRAJUDICIAL EXCLUSION

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[2] In this sense, TJSP, AI 0083667-64.2012.8.26.0000, 2012, "Moreover, the mere breaking of *affectio societatis*, by itself, does not authorize the administrative exclusion of the dissenting partner".

[3] REsp 1.129.222, 2009, "Thus, the company's partial dissolution, based on loss of *affetio societatis*, in the system of the Commercial Code, could occur through the exercise of the right of withdrawal or by the exclusion of one of the partners. Notice, nevertheless, that the second hypothesis, because it is an act of extreme gravity, requires not only a claim of breaking of *affectio societatis*, but also a demonstration of just cause (...)".

The procedure for extrajudicial exclusion of a partner, as can be imagined, allows a company to put away a harmful shareholder with much greater agility than the legal expulsion. On the other hand, for its implementation, art. 1.085 of the Civil Code demands compliance of some requirements, namely: (i) acknowledgment of an act of undeniable gravity; (ii) provision, on the bylaws, of exclusion for just cause; and (iii) approval of the exclusion by the majority of partners, representing more than half of the corporate capital.

If none of the three requirements listed above are verified, the company will be left with the option of excluding its partner through the legal courts. Seeing that requirement "(i)" has already been mentioned in a previous section, some comments regarding the need of a provision, on the bylaws, of exclusion due to just cause, will be seen ahead.

**5.1 Provision of exclusion, on the grounds of just cause, on the Bylaws**

At first, the final part of art. 1.085 leaves no room for doubt: extrajudicial exclusion of partners will be possible "by amending the bylaws, if it provides exclusion for just cause". Through this wording, the Civil Code expressly demanded, for the procedure of extrajudicial exclusion, previous inclusion, in the bylaws, of a permissive clause regarding this form of compulsory removal.

In another manner, this seemingly simple requirement generated three doctrinal trends: (i) those who understand that, even with such legal condition, the extrajudicial exclusion would be possible without the permissive clause in the company's bylaws; (ii) those who advocate the indispensability of such permissive clause, adding that it may only be inserted in the bylaws with the agreement of all partners; and (iii) those who believe that the clause is essential, but that it can be inserted in the bylaws at any moment, upon the agreement of partners representing 75% of the corporate capital.

Within the first trend defenders it is found Arnoldo Wald, Priscila Maria Pereira Corrêa da Fonseca and Egberto Lacerda Teixeira, among others. According to Wald, "before the entry into force of the order, the possibility of excluding a partner, regardless of an authorization from the bylaws, was already being peacefully accepted" (WALD, 2005, p. 235). Authors that advocate this position commonly refer to case law and jurisprudence from before of the 2002 Civil Code.

*Data venia*, we do not agree with the positioning above. Before the enactment of de 2002 Code, the law didn't require a permissive clause in the bylaws to allow an extrajudicial exclusion. For this reason, doctrine and jurisprudence far discussed the need of such clause.

However, as from 2002 this situation has changed. Under the Civil Code's current text, the permissive clause is expressly required by law and that cannot be ignored. A person who joins an entrepreneurial society that doesn't have this clause in its bylaws knows that can't be excluded outside a courtroom, unless the bylaws are altered, in an event that will depend on a significant *quorum* of partners.

Thus, recent case law has constantly emphasized the importance of this requirement, such as in the ruling of an appeal by the Court of Justice of Rio Grande do Sul: "In the present case, the possibility of compulsory exclusion of a partner wasn't expressly contemplated by the bylaws of the plaintiff company, as seen from the documents inserted on pages 217 upward, configuring a situation that puts away the provision of the Civil Code's art. 1.085".[4]

Furthermore, if there is a consolidated understanding that the presence of a permissive clause in the bylaws is indispensable for extrajudicial exclusion, another question can be raised: is it possible to include the permissive clause in the bylaws after the company's incorporation? If so, what is the *quorum* necessary for this?

Some believe that the bylaws' amendment to include the clause of extrajudicial exclusion would only be possible if approved by all of the company's partners, grasp advocated by a minor part of the doctrine. This is the perception of Romano Cristiano, former Chief-Prosecutor of the Commercial Registry of the state of São Paulo: "In the event of amendment, the document must be signed by all partners, including and specially the minority partners" (CRISTIANO, 2008, p. 377).

Marcelo Vieira von Adamek, when commenting Cristiano Romano's point of view, argues that "it would be odd to admit that partners representing a large majority, at the same time that hold the power to change the bylaws (to modify the form of distribution of profits or business purpose, for instance), approve mergers, incorporations and spin-offs and even the society's dissolution, could not, otherwise, insert in the bylaws, except with the consent of all of them, a simple clause that legitimates extrajudicial exclusion on the grounds of grave

4 TJRS, ACPF 70026618520/2008.

misconduct in the fulfilment of corporate obligations! It would have the power to do more, but not to do less?" (ADAMEK, 2011, p. 197).

It seems that Marcelo Vieira von Adamek's understanding is the most suitable. The Civil Code didn't preview any special *quorum* for the inclusion of a permissive clause in the bylaws. Because of this, the general *quorum* of bylaws amendment must prevail, demanding approval of the partners that represent at least 75% of the company's corporate capital. With this conviction, Haroldo Verçosa (2005, p. 531) and Modesto Carvalhosa (2005, p. 315) also agree.

The company's preservation principle must be remembered. So, if it is ascertained that a partner committed acts of undeniable gravity, putting the company at risk, a fast and effective remedy, such as the extrajudicial exclusion of the partner, shouldn't be denied to the enterprise.

Finally, it is primary to highlight that the bylaws doesn't need to provide an exhaustive list of hypotheses where the extrajudicial exclusion may apply. On the contrary, if a catalog of cases is provided in the bylaws, the partner that caused the damage may only be excluded from the entrepreneurial society athwart an extrajudicial procedure, if the act committed by him has been provided in the clause.

### 5.2 Extrajudicial exclusion *quorum*

Extrajudicial exclusion is a prerogative of the majority of the company's partners, being one of the most important requirements for this kind of exclusion procedure. This said, the lawmaker understood that, if the majority partner is the one causing damage to the company, it will be necessary to remove him through a legal procedure, since the exclusion of a majority partner would seriously undermine the enterprise, being, thus, necessary to occur with previous legal authorization.

As provided in the first part of Civil Code's art. 1.085, *caput*, extrajudicial exclusion may be possible if approved "by the partner's majority, representing more than half of the corporation capital". A quick reading of the transcribed text, most likely, would make us understand that the *quorum* for partner's extrajudicial exclusion is composed by the partners representing more than half of the company's corporate capital.

It can be noted that art. 1.085 has two requirements: (i) approval by "the partner's majority" (voting by head); and (ii) "representing more than half of the corporate capital". Thus, not only the approval must be issued by more than 50% of the corporate capital, it is also necessary that this portion of capital is held by the company's majority of shareholders.

Some authors do not concur with this dual requirement, sensing that the exclusion *quorum* would be the mere majority of corporate capital, among them Modesto Carvalhosa can be quoted: "Notice that exclusion is the company's act that excludes a partner that jeopardizes its continuity. It is not about an act of the other partners. This is why, following the corporate capital proportional vote principle adopted by limited companies as well, the *quorum* for determining a partner's exclusion must be of absolute majority (more than half of the corporate capital) (art. 1.076, II)" (CARVALHOSA, 2003, p. 313).

This does not seem to be, *data venia*, the most appropriate understanding. The lawmaker, when intended to demand an absolute majority of corporate capital *quorum*, did it expressly. Regarding art. 1.085, the corporate capital's majority is required along with the majority of partners as well. Therefore, one cannot understand that the lawmaker has used dead words when providing such an important requirement for extrajudicial exclusion. This position is advocated by great part of the doctrine, represented by names such as Arnaldo Rizzardo and Marcelo Vieira von Adamek (2011, p. 204).

On the other hand, accepting the complex *quorum* could make way for another interesting question: what about the limited companies set by only two partners? Legal exclusion is forbidden because of the impossibility of obtaining a head majority of partners? The answer to these questions demands to consider the exclusion institute's purpose.

Doctrine and jurisprudence have been putting away this possibility, as defended by Priscilla Maria P. C. da Fonseca: "In a society comprised of only two members, even if one of them is a majority partner, the possibility of exclusion of the other will definitely be brushed off. The majority partner, alone, can never henceforth exclude anyone without the support of enough members to compose, with these, a required majority" (FONSECA, 2007, p. 34).

Nonetheless, it must be remembered that, even though extrajudicial exclusion isn't allowed, the majority partner can always file a lawsuit with the intent of excluding the minority partner that is causing trouble, even if it's the only other partner in the company.

## 6. THE EXTRAJUDICIAL EXCLUSION PROCEDURE

### 6.1 Call for the meeting

According to the sole paragraph of art. 1.085 of the Civil Code, "the exclusion can only be determined in a meeting or an assembly specially convened for this purpose, being the accused advised in time, in order to permit his or hers attendance and the exercise of the right of defense". As it can be seen, the legal provision requires not only the meeting's call, but also that the partner to be excluded is made aware in a timely manner.

Convening the meeting or assembly through the normal procedure provided by the law or the bylaws isn't enough. It shall be necessary to send written communication, to the to be excluded partner, presenting the reasons for his exclusion, in time for his defense.

The summons delivered individually and specifically to the partner must detail which allegations may lead to his exclusion, enabling his defense in the meeting. Additionally, the documents that instruct the accusations must also be delivered or become available at the company's registered office for consultation and manufacture of copies.

### 6.2 Shareholder's expulsion on a meeting or assembly

Once the partners and shareholder to be excluded are duly called to the meeting or assembly, with sufficient time to the defense's prep, the conclave can be performed. The presence of the partner to be excluded in the meeting or assembly convoked to deliberate on his removal is not required. As it can be inferred from art. 1.085 of the Civil Code, the excluding shareholder has the possibility to attend and present his defense, but may be excluded, regardless of whether or not present (WALD, 2005, p. 574).

It's important that all accusations and the partner's defense appear in the meeting's minutes, because it will be based on this document that the Judiciary may later determine whether there was compliance with all legal requirements for the partner's expulsion in a possible lawsuit pursuing annulment of that decision.

It is worth recalling that the function of the Commercial Registries, when differing acts related to partner expulsion, is to verify whether the exclusion met all formal requirements

determined by law. The merit exam should not be held in any way, since the Registry cannot judge if the accusations against the shareholder configure just cause for his removal.

The minutes of the exclusion meeting or assembly must also include deliberations regarding the excluded shareholder's interest in the company. With the liquidation of shares previously held by the removed member, corporate capital shall suffer a correspondent reduction, unless the remaining partners compensate from their own resources or a new partner joins the society and make a contribution of the corresponding resources (VERÇOSA, 2005, p. 347).

As for the moment of effectiveness of the partner's removal, Sérgio Campinho (2004, p. 235) argues that it happens with the recording of documents at the Commercial Registry, while Arnoldo Wald (2005, p. 575) considers that the decision would be effective immediately upon the meeting or assembly. Despite the document's registration being a crucial event for the decision to produce effects on third parties, we agree with the last author since there is no doubt that internal effects operate along with the board's decision about the partner's expulsion.

Nevertheless, some authors and judges understand that, even having no more political rights, the partner would still have financial rights on the company, until the assets to which he is entitled are paid. More than that, prior to the 2002 Civil Code, Brazilian jurisprudence understood that whilst an excluded member isn't paid, his right to inspect the entrepreneurial society will abide.[5]

These insights don't seem reasonable enough. A partner who caused damage to the company cannot stay, even if only with supervision powers. Besides, if the shareholder isn't paid within the appointed time, Judiciary can always be triggered to protect the excluded partner's rights.

Moreover, as highlighted by Sérgio Campinho (2004, p. 224), similarly as the partner who voluntarily withdraws from the company, the excluded partner isn't exempt from the corporate obligations prior to the exclusion, which are extended up to two years after their registration at the competent Commercial Registry.

### 6.3 Determination of assets and payment to the shareholder

[5] TJSP, AI nº 70.728-2, 14th Chamber. **Revista dos Tribunais**. São Paulo, n. 601, p. 107.

As established by the Civil Code's art. 1.086, once the amendment on the bylaws is made, about the partner's exclusion, the procedure provided by articles 1.031 and 1.032 of the Civil Code, also applicable to the legal exclusion proceedings, must be observed. Article 1.031 regulates the payment of assets due to the shareholder compulsorily withdrawn from the company.

### 6.3.1 Deadline of payment to the shareholder

The second paragraph of article 1.031 establishes the manner and time of payment of the assets as follows: "The liquidated *quota* shall be paid in cash, within 90 (ninety) days, from the liquidation, unless there's an agreement or contractual provision stating the contrary". Thus, both the 90 (ninety) day period and payment in cash can be negotiated to be left behind.

As long as agreed between the company and the excluded partner or provided in the bylaws, there is no time limit for the payment. Nonetheless, unfair contract terms, which determine an excessively long timeframe for payment, can be canceled in court.

Professor Verçosa (2005, p. 539) believes that, if the payment isn't made within the specified period, the exclusion must be considered ineffective, returning the partner to its original condition, since it's still pending a condition linked to the payment of assets. In such case, *data venia*, we do not believe that the partner should be readmitted into the company.

In our view, a payment delay does not configure a defect on the exclusion procedure, since it's something subsequent to the moment of removal, as can be inferred from art. 1.086 of the Civil Code. Besides, it wouldn't be reasonable to admit into society, once again, a partner that was jeopardizing the company, because of a simple payment delay.

### 6.3.2 Calculation of due assets

About the form of calculation of due assets, the text of art. 1.031, *caput*, reproduced hereafter, is much criticized by Brazilian jurisprudence and doctrine: "In cases where the company resolves in relation to a partner, his *quota*, duly integrated, shall be liquidated, unless provided otherwise, based on the financial situation of the company at the time of the resolution, as verified in the balance sheet".

Based on interpretation of the *caput* above, it would be possible to conclude that if the bylaws didn't provide anything about the excluded partner's assets evaluation, the calculus would be made based on the company's equity accounting values. Nevertheless, doctrine and jurisprudence strongly depart this interpretation.

It is argued, including by the Supreme Court[6], that the valuation of assets due to the excluded partner must approximate the amount that would be due in case of total dissolution of the entrepreneurial society. For this reason, the mere verification of equity accounting, as established by art. 1.031, isn't enough, being necessary an identification of real market value of the company's equity, including stock in trade, brands, and any tangible and intangible assets that integrate the company's patrimony. Doctrine and jurisprudence[7] are revealing reinforced stance in the same direction.

What about the possibility of contractual provisions regarding the form of verification of assets, provided by art. 1.031? If the bylaws expressly provides that only the accounting value of the company's equity should be checked, waiving all other forms of assessment, then a real evaluation must be dismissed? The doctrine has been answering these questions with a negative response.

According to Modesto Carvalhosa (2003, pp. 239-240) and Sérgio Campinho (2004, pp. 128-129), the bylaws could only establish a valid alternative form of calculation of assets, due to the excluded partner, if this other method proved to be better to the removed shareholder than a real evaluation of the company's value. On the contrary, scholars understand that such clause must be considered abusive and, therefore, should be annulled by the Judiciary, considering that it would allow illicit enrichment of the society at the expense of the excluded partner.

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6 RE n. 91.044/RS, STF's 2nd Class, RTJ n. 91/357: "Calculation of assets of the dissenting partner must approach the result that he would possibly obtain with total dissolution, with full verification, physical and accounting, of the assets value, and updated in their monetary value until the date of payment".

7 STJ, Special Appeal n. 1.112.858/MG (2009/0059236-2), Rapporteur Minister Luis Felipe Salomão: "In this context, it's important to note that the modern tendency is to seek the company's real value. The assets must be the closest possible to the company's equity value. (…) Thus, judicial determination of the portion belonging to the retreatant partner is strictly necessary for the payment of a fair price, under the penalty of illicit enrichment by the opposing party. To this end, a judicial review of the company's background is appropriate, including assets, goodwill, brand exploit rights, customers, etc."; TJRJ, Ap. n. 2006.001.09725, 5th Civil Chamber, Rapporteur Judge Antonio Saldanha Palheiro, j. 06.06.2006: "In the absence of a specific contractual provision, partial dissolution entails a reassessment of the company's patrimony, always considering its real value and leaving its accounting value aside (RTJ 89/1070, JC 55/85 and 38/243), which must be done by preparing a special balance sheet, even when the *quota* liquidation comes from the death of a minority partner".

## 7. JUDICIAL EXCLUSION OF SHAREHOLDERS

After finishing these notes about the procedure for extrajudicial exclusion, an analysis on the procedure of a partner's legal exclusion remains pending. To this end, it is important to point out that much of what has been said regarding extrajudicial exclusion can be applied to a legal proceeding, leaving only to be explored the checking of requirements of this procedure.

First, it is necessary to underline that art. 1.030 of the Civil Code, being a provision on simple entrepreneurial societies, can be applied to all types of companies that are secondarily governed by the rules of simple enterprises. Thereby, limited companies can exclude their partners, as a general rule, either by legal or extrajudicial procedure. In turn, simple companies are restricted only to legal expulsion of its partners.

The *quorum* of approval required to file a partner exclusion lawsuit is "the majority of the remaining partners". It isn't necessary to achieve the complex *quorum* of "majority of members, representing more than half of the corporate capital", mandatory for extrajudicial exclusion. Furthermore, it is also not necessary to have a provision in the bylaws enabling legal exclusion for it to be done. These are the reasons why, whenever it isn't possible the extrajudicial exclusion of a partner from a limited company, the latter may undertake it through a legal procedure.

Interesting to note that the *quorum* required by law allows even a majority partner to be excluded by decision of the minority members, since the partner to be excluded can't express any valid opinion. As remembered by Arnaldo Rizzardo (2007, p. 154), prior to filing the lawsuit, it will be essential that there is an approval, by the majority of the remaining partners, duly reunited in a meeting or general assembly. This is important for a proper confirmation of an agreement issued by the majority of the remaining partners, since the lawsuit will be filed not by them, but by the company itself.

Insomuch, the "initiative" to exclude a partner will be from the other members, yet the legitimacy to file the lawsuit will exclusively pertain to the entrepreneurial society (CARVALHOSA, 2003, p. 323). Still, should the company's legal representative remain silent regarding the lawsuit's filing (in many case the company's agent is, himself, the to-be-excluded partner), legal action may be taken by any partner that can represent the company in this particular case.

Some authors, such as Arnoldo Wald (2005, p. 237), argue that the legal appreciation of a partner's exclusion can be replaced, if allowed by the bylaws, by an arbitral decision. There is no obstacle for such argument, as long as the bylaws expressly provide that disagreements between partners should be decided by an arbitral court.

In cases of legal exclusion of partners, not only the matter's merit will be examined in court, but also the assets' calculation. Given that the partner will only be removed when the verdict becomes *res judicata*, the calculation of assets should take into account the company's financial situation at that time (*res judicata*) and not when the lawsuit was filed, since that the business conditions may be very different in these two occasions.

## 8. CONCLUSION

Given the exposed in this study, it is possible to see that the Civil Code's provisions on the topic of partner exclusion for *just cause* don't approach several aspects of this institute. Because of this, a discussion has come forth in both doctrine and jurisprudence.

On the other hand, the provision of two different procedures of partner exclusion, each with its own requirements, was very positive inasmuch as it enabled a company to protect its development from harmful partners in distinct situations, even when the majority shareholder is the partner that endangers the company's continuation.

Disagreements between partners, whenever possible, must be resolved without excluding either one from the company. However, the proper regulation of proceedings regarding compulsory removal of a partner is essential to fix a problem that, by its own nature, is very sensitive.

The lawmaker's silence on many points does not justify the adoption, by partners, of procedures that are harmful to the companies. Despite several opinions within the doctrine and jurisprudence, the most appropriate solution to the business should always be aspired, aiming the activity's continuation and profit.

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