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The management of Limited Liability Companies in Brazil

La administración de sociedades limitadas en Brasil

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Resumen: La previsibilidad y la seguridad jurídica de las actividades humanas son objetivos implícitos en cualquier Estado Democrático de Derecho. Estos valores son buscados aún más en la protección del Derecho Fundamental a la Libertad Económica, tutelado por la Constitución brasileña, principalmente en su artículo 170, título, y secundariamente, en numerosos actos normativos primarios y secundarios. Paralelamente a la regulación nacional, los asuntos comerciales a menudo se caracterizan por necesidades e intereses globalizados. Este ensayo comparte los fundamentos, deberes y estructuras del órgano de administración de las sociedades limitadas brasileñas mediante una metodología descriptiva basada en la doctrina y la jurisprudencia. El objetivo era dotar a los investigadores extranjeros de mejores condiciones de información para el desarrollo de estudios en Derecho Comparado.

Palabras clave: Derechos Fundamentales. Libertad de Iniciativa Económica. Administración. Sociedades limitadas brasileñas. Derecho Comparado.

Abstract:

Predictability and legal certainty of human activities are implicit objectives in any Democratic State of Law. These values are further sought when protecting the Fundamental Right to Economic Freedom, safeguarded by the Brazilian Constitution, primarily in its Article 170, heading, and secondarily, in numerous primary and

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secondary normative acts. In parallel with domestic regulation, business matters are often characterized by globalized needs and interests. This essay shares the fundamentals, duties and structures of the management body of Brazilian limited companies through a descriptive methodology based on doctrine and jurisprudence. The objective was to provide foreign researchers with better information conditions for the development of researchs in Comparative Law.

Keywords: Fundamental rights. Economic Freedom. Brazilian Limited Liability Companies. Management. Comparative Law.

1. Introduction

Predictability and legal certainty of human activities are implicit objectives in any Democratic State of Law. These values are further sought when protecting the Fundamental Right to Economic Freedom[2], safeguarded by the Brazilian Constitution, primarily in its Article 170, heading, and secondarily, in numerous primary and secondary normative acts.

In parallel with domestic regulation, business matters are often characterized by globalized needs and interests. Therefore, Comparative Law gains unparalleled relevance, and the issues inherent to the theme of this study – company or corporate governance - are clear examples of this. The *business judgment* rule, the duties and rules of conduct of the management body of business companies are regulated by countless legal systems, usually created and reformed based on transnational dialogues and investigations that allow influences, considerations and harmonization of relevant solutions in a field strictly cosmopolitan.

In this essay, I share the fundamentals, duties and structures of the management body of Brazilian limited liability companies, a model that accounts for an impressive 95% of the commercial market registries in activity [3] in the country that occupies the ninth position of the worldwide economy and the largest Latin American economy[4]. I hope that the information provided below will be useful for foreign researchers in order to be able to develop research in the field of Comparative Law.

2. Fundamentals of company management

The management is a necessary and permanent organ because, without it, the legal entity, as an abstract entity, does not act or can accomplish the purposes for which it was created. Its *internal* task is to manage and organize company and the enterprise attached to it; *externally*, it is up to it to exercise the power of presentation arising from the constitutive act or from social deliberation[5].

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[2] LEITE, M. L. "Descortinando um direito fundamental: notas sobre a livre iniciativa", *Revista Digital Constituição E Garantia De Direitos*, 6(02), 2014, Recuperado de https://periodicos.ufrn.br/constituicaoegarantiadedireitos/article/view/5795.

[3] PAINEL MAPA DE EMPRESAS. Available at: <https://www.gov.br/governodigital/pt-br/mapa-de-empresas/painel-mapa-de-empresas>. Updated on April 10, 2024. Accessed on April 10, 2024.

[4] By Gross Domestic Product – THE WORLD BANK DATA: GDP. Available at: https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?most_recent_value_desc=true. Accessed on 9-2-2024.

[5] Brazilian Civil Code (CC)

The *presentation* should not be confused with the *representation*. The representative is a person authorized to declare his own will on behalf of another person, with a different legal sphere, focusing on the latter the effects of that declaration[6]. The organ does not represent; it presents itself [7]- hence speaking of an *organic relationship* -, its existence being essential for company to manifest itself[8].

Although the legal entity may grant powers of representation - when, for example, it constitutes a lawyer -, the management has powers that result from its investiture. Its manifestation does not correspond to that of a third party speaking by someone else, as occurs in a relationship between principal and principal, but, rather, to the legal entity itself figuring and attaching itself in the exercise of its legal personality. Indeed, it is not the management that acts in behalf of the company, but the company that manifests itself by its managers[9].

3. Management acts and disposal acts

For the management to work, the presence of managers chosen by the contracting partners is required[10]. It is up to the manager to make decisions that do not represent social deliberations, that is, decisions that require, by law or contract, the call of the partners in a meeting or assembly. Naturally, the manager would not be able to perform his duties properly if he had to report to all partners before concluding any business deals, e.g., the purchase of a new computer. What is required, however, is attention to the need for social deliberation when the matter to be decided is logically incompatible with the management decision or when it can effectively change the legal and economic structure of company, as it will be seen below.

The actions and omissions of the manager's competence are called *management acts*, the internal and external contents of which have already been mentioned above[11]. In turn, those destined for social deliberation are considered *acts*

Article 47. The acts of the administrators are binding on the legal entity, exercised within the limits of its powers defined in the constitutive act.

In doctrine, *see* NAVARRINI, U., FAGGELLA, G. *Das sociedades e das associações comerciais*, v. 1, Rio de Janeiro, José Konfino Editor, 1950, p. 421; REQUIÃO, R. *Curso de Direito Comercial*, v. 1, 29, ed. São Paulo: Saraiva, 2010, p. 575; RIZZARDO, A. *Direito de empresa*, Rio de Janeiro, Forense, 2007, p. 215; OTAEGUI, J. C. *Administración societaria*, Buenos Aires, Ábaco, 1979, p. 162; MARTORELL, E. E. *Sociedades de responsabilidad limitada*, Buenos Aires, Depalma, 1989, p. 238-239, 245; HALPERÍN, I. *Curso de derecho comercial*, Atualizado por Guillermo Cabanellas, 5, ed. Buenos Aires, AbeledoPerrot, 2010, p. 313-314; KULMAN, D. A. "*A*ctos de administración y representación societaria: actos facultativos y obligatorios", In: *Revista de doctrina, jurisprudencia, legislación y práctica*, Buenos Aires, v. 46, p. 65-79, 2013-B, p. 65.

[6] FARINA, J. M. *Derecho de las sociedades comerciales*, v. 1, Buenos Aires, Astrea, 2011, p. 359-360; FURTADO, J. H. P. *Curso de direito das sociedades*, 5. ed, Coimbra, Almedina, 2004, p. 342-344.

[7] PONTES DE MIRANDA, F. C. *Tratado de Direito Privado*, Atualizado por Alfredo de Assis Gonçalves Neto, v. 49, São Paulo, Revista dos Tribunais, 2012, p. 166-170. In the same sense, Coutinho de Abreu speaks of "organic representation" - COUTINHO DE ABREU, J. M. "Vinculação das sociedades comerciais", In: *Estudos em honra do Professor Doutor José de Oliveira Ascensão*, v. 2, Coimbra, Almedina, 2008, p. 1.214.

[8] Unlike what happens with the representation, marked by the voluntary character - OTAEGUI, *Ob. Cit.*, p. 164.

[9] FARINA, *Ob. Cit.*, p. 355.

[10] BARBOSA FILHO, M. F. "Do direito de empresa", In: PELUSO, C. (org.), *Código civil comentado*, 2. ed, Barueri, Manole, 2008, p. 980.

[11] See what art. 259 of the Portuguese Commercial Companies Code (CSC):

of disposition[12], which include, among other matters indicated by law or in the social contract, the following[13]: (*i*) the approval of the management accounts; (*ii*) the assignment of the managers, when made in a separate act; (*iii*) the destitution of the managers; (*iv*) the setting of the remuneration of the partners and managers, when not established in the contract; (*v*) the amendment to the articles of association; (*vi*) the incorporation, merger and dissolution of the company, or the termination of the liquidation status; (*vii*) the appointment and destitution of liquidators and the judgment of their accounts; (*viii*) filing for bankruptcy or judicial reorganization; and (*ix*) the encumbrance or sale of real estate.

As it is possible to observe, acts of disposition do not necessarily imply the undoing or acquisition of patrimonial assets.

3.1 Content of management acts

3.1.1 Operative management

Managers are responsible for the operational management of the company, that is, to carry out the activities that constitute the company object. The object is the limiting factor of the management function, indicating where the social assets and the exercise of the company should be applied[14]. It does not extract individually measurable actions or acts, but rather a complex list of interconnected activities that enable its direct achievement - e.g., acquisition of raw materials, products in preparation or finished, resale goods, etc. - or indirect - e.g., expenses with commercialization, research and development, publicity and advertising, taxes and amortizations.

Compliance with operative management therefore implies the purchase and sale of exchange goods, which are generally consumed in the productive process or in the sale of goods or services[15].

When the managers go beyond the practice of the operational management acts that they are responsible for, they act with excess or misuse of power. The prohibition to act due to excess or misuse of power is not directly provided by the rules specific to the limited liability company. However, regardless of whether the supplementary regulation is that of the normative framework of simple or anonymous societies, it is certain that the parameters are similar. In other words, the Brazilian legal system prohibits[16] the company manager from practicing acts that go beyond or deviate from the powers that were constituted by the constitutive act, clearly *adopting the theory of ultra vires acts*.

3.1.2 Business management

The manager is also responsible for the organization, conservation and development of the company underlying the limited liability company[17]. To this end,

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Article 259 - Management competence
Managers must perform the acts that are necessary or convenient for the accomplishment of the corporate purpose, respecting the resolutions of the partners.

[12] OTAEGUI, *Ob. Cit.*, p. 60; VILLEGAS, C. G. *Sociedades comerciales*, t. 1, Buenos Aires, Rubinzal-Culzoni, 1997, p. 456-457.

[13] The content of arts. 1.015, *caput*, and 1.071 do CC.

[14] OTAEGUI, *Ob. Cit.*, p. 75; BRUNETTI, *Ob. Cit.*, p. 203.

[15] KULMAN, *Ob. Cit.¸* p. 68.

[16] CC, arts 47 and 1.015; Corporations Law (LSA), art. 154.

[17] KULMAN, *Ob. Cit.¸* p. 69; OTAEGUI, *Ob. Cit.*, p. 88.

Otaegui[18] identifies aspects that comprise the entrepreneurial management of company managers: (i) maintenance, renewal and increase of material and immaterial assets; (ii) hiring legally subordinate employees; (iii) contracting of service providers and suppliers; (iv) market concentrations; and (v) making investments.

Entrepreneurial management allows the manager to organize the company technically and economically[19]. His power of direction gives him the discipline of work per se. More than hiring and firing employees, it is management duty to regulate issues such as time and place of work, activities developed, use of uniforms, routines, quality control, safety and sanctions.

Aiming at a more efficient allocation of resources and the consequent reduction in transaction costs, it is up to the manager to decide to externalize productive aspects. In this sense, pacts are usually signed with third parties whose objects are key elements for the profitable exercise of the company, as occurs in the areas of transportation, storage, commercial representation and security.

In turn, the commercial concentrations that are inserted in the business management refer to the link with other businessmen or business companies for lawful purposes - such as the formation of consortia[20], joint ventures[21] and pools[22]. Through such associations, it is possible to obtain greater competitiveness in the market, whether collaborating for a specific enterprise, expanding a certain commercial sector, raising financing or integrating production processes[23].

The business management ordinarily contemplates the making of internal investments - consistent with the maintenance, renewal and increase of material and immaterial assets - and external. These refer to recipients who, although extra-social, are intended for the development of the company[24], as is the case with the acquisition of government bonds, debentures, bills of exchange, quotas in investment funds, among other means of capitalization.

[18] *Ob. Cit.*, p. 89. In this context, Coutinho de Abreu talks about the organization of productive means, the size and location of the company, strategic or fundamental decisions about long-term business objectives, business policies for production, distribution, personnel and financing, among other activities. Reputes it as the most relevant, that is, the company's management of the company - In: Corporate governance, *Ob. Cit.*, p. 40.
[19] OTAEGUI, *Ob. Cit.*, p. 95.
[20] LSA, art. 278.
[21] It is an associative contract by which resources or techniques are gathered in a venture of mutual interest, maintaining partners balanced or adjusted positions, through contribution in cash, goods or technology, or by the combination of material or immaterial assets - BITTAR, C. A. *Contratos comerciais,* 2. Ed, Rio de Janeiro, Forense Universitária, 1994, p. 214.
[22] It occurs when several companies decide to maintain a common activity or service that serves all of them, such as a raw material purchasing office, telemarketing, technical assistance, etc. - NUSDEO, F. *Curso de economia: introdução ao direito econômico*, São Paulo, Revista dos Tribunais, 1997, p. 317.
[23] BITTAR, *Ob. Cit.*, p. 210-214.
[24] OTAEGUI, *Ob. Cit.*, p. 119.

In short, here is the development of the management (or business) process, which includes planning - strategic[25] and tactical[26]; the organization - management[27], human resources[28], delegation[29] and (de) centralization[30]; and leadership - authority[31] and motivation.

3.1.3 Company management

Company management concerns the fulfillment of obligations and charges of company as a subject of law, as well as the legally correct functioning of the mercantile organization[32]. Examples of corporate management act as a subject of law are bookkeeping[33], registration[34] and presentation of company will as a whole, as, as seen, the actions and omissions of managers, as such, materialize in the conduct of the company itself.

At the same time, measures to satisfy the legally correct functioning of the mercantile organization are also included in corporate management. Here, the nuclei of duties to *information, care and loyalty* are considered.

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[25] Designed for the long term and focused on the relationship between the company and its task environment, being subject to the uncertainty and unpredictability of environmental events. In an environment of uncertainty, it bases its decisions on judgment and discernment, and not on referential data or information, contemplating a high degree of subjectivity. It includes stages of objective determination, external environmental analysis, internal organizational analysis and formulation of alternatives (CHIAVENATO, I. *Administração: teoria, processo e prática*, 4. ed, Rio de Janeiro, Elsevier, 2007, p. 142-143).

[26] Permanent and continuous, it is always looking towards the future, concerned with the rationality of decision making. For this reason, it is always changeable due to corrections and adjustments, configuring itself as a cyclical resource allocation technique. It includes steps for defining and diagnosing problems, looking for more promising solutions, analyzing and comparing alternative solutions and selection and choosing the best alternative as an action plan (CHIAVENATO, *Ob. Cit.*, p. 167-170).

[27] It covers the activities of coordination of activities, interpersonal communication and decision making (OLIVEIRA, D. *Introdução à administração: teoria e prática*, São Paulo, Atlas, 2009, p. 213).

[28] Broader than mere people management, it encompasses the stages of employment - needs determination, selection and recruitment -, development - evaluation, performance, training, promotion and transfer -, utilization - measure of efficiency and effectiveness and termination -, compensation - a study of the position / salary ratio, payment of remuneration and other benefits - and maintenance - advice, guidance, safety and hygiene (KWASNICKA, E. L. *Introdução à administração*, 6. ed, São Paulo, Atlas, 2009, p. 186).

[29] Assignment to someone with formal authority to carry out specific activities. This process, which starts from superiors to inferiors, is essential for the business organization. When done right, it leads to better decisions - since subordinates closest to the front line usually have a clearer view of the facts - and faster - because valuable time is wasted when subordinates constantly need to check on superiors before making (STONER, J. A. F.; FREEMAN, R. E. *Administração*, 5. ed, Traduzida por Alves Calado, Rio de Janeiro, LTC, 1994, p. 260-261).

[30]The higher the level of delegation, the more decentralized the business organization is; the smaller, the more centralized (STONER and FREEMAN, *Ob. Cit.*, p. 267).

[31]Not from a formal perspective (leadership), but the ability to conduct actions or influence the behavior and mentality of other people. It is not always possible to find it in an administrator (MAXIMIANO, A. C. A. *Teoria geral da administração: da revolução urbana à revolução digital*, 7. ed, São Paulo, Atlas, 2012, p. 282-283).

[32] OTAEGUI, *Ob. Cit.*, p. 139; KULMAN, *Ob. Cit.*, p. 78-79; COUTINHO DE ABREU, *Governação das sociedades comerciais*, *Ob. Cit.*, p. 42, referring to the management *of the company itself.*

[33] CC, art. 1.179.

[34] CC, art. 1.150.

3.1.3.1 Duty of information

The duty of information - of the managers - is linked to the right to information - of the partners. These must be guaranteed the possibility of effective knowledge about the way in which social business is conducted and about the state of company[35]. For this reason, the exercise of management needs to be transparent, giving credibility and security about the fairness of the deals concluded and the practices adopted. In view of this need, in order to standardize and regulate the accountability of social management, reconciling it with the shareholders' right to information, the manager must prepare, at the end of each financial year, the inventory, the balance sheet and the balance sheet of the limited company's economic result[36], according to the command inscribed in art. 1,065 of the CC[37]. With these documents, there is a clearer economic-financial overview of company activities, facilitating consultation and allowing other shareholders to have a minimally based assessment of management decisions.

Even with the formal consistency of the accounting documents, it is possible to detect flaws in the rendering of accounts, such as the diversion of resources, the evasion of revenues and the simulation of expenses[38]. Addiction becomes even more transparent in the absence of accountability.

In addition to this active / spontaneous obligation, the company management must be attentive to the passive / tax duty to provide information to any partner, regardless of capital participation[39], when the latter so requires. The weight of this last obligation is such that Raul Ventura[40] goes so far as to say that this prerogative should be described as "the partner's right to have, at his request, information provided by managers", remembering that information can both mean the knowledge of a fact as well as access to the medium to get to know him.

The prerogative of the partners to demand the provision of information by the manager - and the corresponding duty of the latter to provide it in the company management - has at least three grounds. Firstly, the ownership of a shareholding in the company by the shareholder gives it the right to know how its capital is being managed. Second, the exercise of personal rights, such as voting and demonstration

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[35] LABAREDA, J. "Direito à informação", In: IDET (Org.), *Problemas do Direito das sociedades*, Coimbra, Almedina, 2003, p. 127.

[36] The inventory is an exhaustive and meticulous list of both goods for permanent use and those destined for processing or commercialization, making up a consolidated list with the evaluation of each of its items; the balance sheet contains, considering the date of the calculation, the complete equity situation of the legal entity, quantifying and discriminating, in accounting categories, assets and liabilities, including all existing credits and debts; finally, the balance of economic results corresponds to a statement of profits and losses earned during the year, an essential instrument so that it is possible to deliberate on the allocation of such amounts, which, respecting the provisions of the articles of association, should be addressed, forming or extinguishing reserves and distributing gains or losses (BARBOSA FILHO, *Ob. Cit.*, p. 952-985.). STJ, REsp n.º 332.754, published in 18-2-2002.

[37] BARBOSA FILHO, *Ob. Cit.*, p. 984;

[38] COELHO, *Curso de direito comercial*, *v. 2*, *Ob. Cit.*, p. 391-392.

[39] MARTINS, A. de S. "Direito à informação: arts. 214º e 215º", In: COUTINHO DE ABREU, J. M. (coord.), *Código das Sociedades Comerciais em comentário*, v. 3, Coimbra, Almedina, 2011, p. 295; TORRES, C. M. P. *O direito à informação nas sociedades comerciais*, Coimbra, Almedina, 1998, p. 126.

[40] VENTURA, R. *Comentário ao Código das Sociedades Comerciais: sociedade por quotas*, v. I, 2. Ed, Coimbra, Almedina, 1989, p. 280;284. Treating the right to information as subjective, of which the partner is a credito.

rights, requires knowledge about the actions of the management[41]. Finally, this right / duty is useful for the control of management, serving both to deter illicit acts and to stimulate their performance to their satisfaction[42].

In fact, the free and enlightened exercise of private autonomy - from which contracts in general derive - presupposes minimal freedom and discernment, which require information, especially at the company level[43]. Although the right to information is much broader than controlling purposes, Brazil recognizes the quota holders' right to inspect[44] the management of the company whose assets partially belong to it. Such permission, which dates back to the Commercial Code of 1850[45], can be seen today from articles 1,021 of the CC and 157 of the LSA.

In addition, there is nothing to prevent the articles of association from regulating the right to active and passive information of consortia, restricting matters or setting deadlines[46], binding company management regarding such compliance[47]. In any case, neither the restriction nor the exercise of this right can take place in an abusive manner[48], being certain that a balance must be found between the quota holders' right to access company information, the social interest in the confidentiality of certain issues and the development management exercise without exaggerated

[41] VENTURA, *Ob. Cit.*, p. 282-283; 300 [(...) the right to information belongs to the partner in order to be able to validly express his vote, for logical necessity before legal necessity and regardless of the express recognition of the legislator; a German lawyer (Zolner) claims that, without knowledge of facts relevant to a decision, the vote is theater or game of chance].

[42] LABAREDA, *Ob. Cit.*, p. 129.

[43] VASCONCELOS, P. P. de. *A participação social nas sociedades comerciais*, 2. ed, Coimbra, Almedina, 2006, p. 203-204; LABAREDA, *Ob. Cit.*, p. 128-129.

[44] What is treated here as a genus and species is perceived, in Italy, as distinct points: right to information, while obtaining news about the progress of corporate management; right to inspection, as direct control not mediated by the administrator - FERNANDEZ, G. "I diritti di controllo del socio nella s.r.l. e l'autonomia private", In: *Rivista di Diritto Societario*, Torino, p. 826-854, 2012, p. 830; BUTA, G. M. "I diritti di controlo del sócio di s.r.l.", In: ABBADESSA, P. e PORTALE, G. B. *Il nuovo diritto dele società*, v. 3, Torino, UTET Giuridica, 2007, p. 593-596; ANGELIS, L. "Amministrazione e controlo nelle società a responsabilità limitata", In: *La riforma del diritto societario svoltosi, Incontro di Studio per iniziativa del Consiglio Superiore della Magistratura*, Roma, fev-2003, p. 13; PARRELA, F. "Articolo 2476", In: SANDULLI, M. e SANTORO, V. *La riforma delle società*, t. 1, Torino, G. Giappichelli Editore, 2003, p. 124-126.

[45] *See* the revoked art. 290; FERREIRA, *Ob. Cit.*, p. 153.

[46] CORREIA, A. F.; XAVIER, V. L.; COELHO, M. A.; CAIERO, A. "Sociedades por quotas de responsabilidade limitada: anteprojecto de lei – 2ª redacção e exposição de motivos". In: *Revista de Direito e Economia*, Coimbra, ano III, n. 2, p. 349-423, jul-dez 1977, p. 421; TORRES, *Ob. Cit.*, p. 152.

[47] CUNHA, P. O. "O poder dos sócios". In: COELHO, F. U.; RIBEIRO, M. F. (coord.). *Questões de direito societário em Portugal e no Brasil*, Coimbra, Almedina, 2012, p. 212; VENTURA, *Ob. Cit.*, p. 285; MARTINS, *Ob. Cit.*, p. 297. Tratando dos limites dessa restrição contratual, *see* LABAREDA, *Ob. Cit.*, p. 133-134.

[48] Abuse is censored by Brazilian Law – CC, art. 187.

disruption[49]. In this sense, Oliveira Ascensão[50] recalls that the right to information cannot imply a general debauchery of company life, harming, for example, the success of ongoing negotiations. On the other hand, its content is broad to the point of focusing not only on acts already practiced, but also on those whose practice is expected a posteriori[51].

There is no form or term prescribed by law for the provision of passive information. Thus, although it can be done verbally[52], the degree of intra-company animosity may recommend caution to do so in writing. Likewise, company management may excuse the immediate provision of certain information when it is not possible to deliver it, either due to lack of knowledge or due to the lack of time to consult with momentarily inaccessible elements[53]. Questions about biases in this aspect of company management certainly lack a thorough analysis of the complexity of information required, the data available to the manager and his responsibility or not to have them.

It must also be said that the manager cannot hinder without just reason that the exercise of the right of inspection by the partners occurs through third parties - e.g., lawyers or agents in general -, nor that copies or annotations are made on documents of interest of the quota holder[54]. On the other hand, the consultation must be carried out at the management headquarters of the company, and the partner cannot demand that the original documents be transported by himself or others to a different place[55].

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[49] SILVA, E. R. M. N. *Um estudo sobre a possibilidade e os limites da conformação estatutária e parassocial do direito à informação nas sociedades anônimas de capital aberto* (Master's Dissertation), Coimbra, FDUC, 2014, p. 125; COX, J. D.; HAZEN, T. L. *On corporations: including unincorporated forms of doing businesss*, v. 2., 2. Ed, New York, Aspen Publishers, 2003, p. 720; VASCONCELOS, *Ob. Cit.*, p. 204-205;212-216; VENTURA, *Ob. Cit.*, p. 313-315; TORRES, *Ob. Cit.*, p. 152-154;220-223; MARTINS, *Ob. Cit.*, p. 306 (*There will be no reason to refuse to provide information if it is only to be feared that the partner will use the information for purposes outside the company but it is not to be feared that such use would cause harm to the company. And, on the other hand, refusal will not be lawful if it is only to be feared that the use of the information will cause harm to society and it is not to be feared that the information will be used for purposes outside the society*).
In any case, it seems opportune for the proposed consideration that the partner, whenever possible, justifies his request for information. As Raul Ventura teaches (*Ob. Cit.*, P. 291), although the justification is not necessary, it should be done for certain purposes.

[50] ASCENSÃO, J. O. *Direito comercial*, v. 4., Lisboa, S.E., 2000, p. 320.

[51] TORRES, *Ob. Cit.*, p. 154-155. In the United States, the Delaware Limited Liability Companies Act (LLCA) deals interestingly with the duty / right to information in the course of company management. By its § 18-305, although any partner is guaranteed the right to obtain from the company, in reasonable time, true and complete information about the state of the business, financial condition, tax and registration issues, among other points, the manager keeps confidential, for the period of time that he considers reasonable, any information that he believes is not of social interest to its disclosure, including in view of the shareholders themselves.

[52] VENTURA, *Ob. Cit.*, p. 294.

[53] VENTURA, *Ob. Cit.*, p. 305.

[54] COX and HAZEN, *Ob. Cit.*, p. 729-730.

[55] VENTURA, *Ob. Cit.*, p. 295.

3.1.3.2 Duty of care

Brazilian law[56] requires that the manager of the limited liability company, in the exercise of his duties, act with the care and diligence - duty of care - that every active and honest man usually employs in the management of his own business. For this reason, the legislator took preventive care to prohibit[57] company management by those convicted of bankruptcy, malfeasance, bribery or bribery, concussion, embezzlement; or against the popular economy, against the national financial system, against the rules of defense of competition, against consumer relations, public faith or property, while the effects of the condemnation endure.

This rule is inspired by the Brazilian Commercial Code, whose already revoked art. 88-4 foresaw that the cheaters and managers of deposit warehouses would be obliged to keep in good care the goods they received, and to monitor and ensure that they did not deteriorate or leak being liquid, doing for that purpose, on account of whom belong, the same diligences and expenses that they would do if their own were. In Comparative Law, the duty of care is frankly disseminated, provided, among other provisions, by arts. 64 of the Portuguese Commercial Companies Code; 225, of the Spanish Capital Companies Act; 83, of the Uruguayan Corporate Law (LSUru); 59 of the Argentine Corporate Law (LSArg); 2392 of the Italian Civil Code; and § 8.30 of the American Model Business Corporation Act.

The negligence of the manager with the duty of care can generate the claim of his responsibility in favor of company or third parties, by express provision of art. 1,016 of the CC. In view of this, the abstraction of its content can generate severe disputes between partners and managers in times of economic crisis, when negative results do not necessarily result from the managers' negligence. This risk situation deserves due attention by the judge-state, avoiding that a manager unsuccessful due to bad circumstances will be unduly held responsible.

Thus, it seems to be a good idea that, in order to assess the (in) existence of the expected care and diligence, parameters such as the company object, the dimension of the enterprise, the time for decision-making, the nature of the act to be performed, manager's roles, experience and academic background are taken into account[58]. In fact, the assessment of the degree of due diligence can only be done concretely, which is why the current and foreign standards only deal with subjective / ideal referential criteria[59] - e.g., "active and honest", "good businessman", "Ordered businessman" and "judicious manager"[60].

Assuming these variables, the objective is the case-by-case assessment of the sub-duties that make up the duty of care, namely: (i) exercise to the satisfaction of the position; (ii) compliance with any company procedure or rule of conduct; and (iii) apparently reasonable decision-making. The metrics for such measurements can be

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[56] CC, art. 1,011; LSA, art. 153 (in this case, if this is the supplementary legislation chosen by the partners in the articles of association).
[57] CC, art. 1.011, single paragraph; LSA, art. 147, § 1º.
[58] COX and HAZEN, *Ob. Cit.*, p. 491-493; COUTINHO DE ABREU, J. M. *Responsabilidade civil dos administradores de sociedades*, 2. Ed, Coimbra, Almedina, 2010, p. 19.
[59] VENTURA and CORREIA, *Ob. Cit.*, p. 95;99; BAUMAN and STEVENSON JR., *Ob. Cit.*, p. 783.
[60] Clairvoyant that the management of a startup focused on medical-surgical software requires different responsibilities than those of a florist; a supermarket demands higher levels of diligence than a grocery store; decisions involving negotiations that require immediate responses are less likely to conform to company expectations compared to those made with weighted assessments; financial managers do not assume that care is identical to that of executive directors; and, finally, it is expected that managers with full academic and professional curricula will not make mistakes that are just for recent graduates.

defined in social deliberation or, still, derive from the uses and customs typical of the mercantile activity[61].

A) Exercise to the satisfaction of the position and the duty of oversight (*or* duty of attentiveness)

It has been well seen that company management demands different attributions of internal and external orders. A manager who, tasked with such tasks, does not take surveillance measures regarding the work of his subordinates, or fails to supply the essential inputs to achieve the company purpose, is potentially being careless or negligent. A relevant part of the exercise to the satisfaction of the company management function is in the duty of superintendence, a genre that encompasses not only the inspection of personnel, but also the supervision of business progress and the monitoring of legal compliance in company complexity.

In effect, managers need a minimally acceptable understanding of the company's business, familiarizing themselves with its fundamentals and keeping themselves informed about company activities[62]. Obviously, unless expressly assigned in this sense, this does not mean a detailed inspection of the daily activities of company, as the manager cannot be seen as a kind of omnipresent guardian angel, but it is up to him, however, to monitor the acts and facts in general company interests.

In any case, for the purposes of civil liability, no limited company or manager may be exempt from an act practiced by its employees alleging that they are difficult to monitor or supervise[63]. In this sense, the Brazilian consumer[64] and corporate[65] laws describe the joint and several liability of the legal entity and the manager.

At the same time, managers must be constantly aware of the company's financial situation[66]. It is an imperative caution for making economically sensible decisions based on a sufficient capital base to prevent company from being overthrown.

Unlike the risks inherent in positive decision making¸ failures in the exercise of duty of oversight will normally be linked to negative postures¸ consistent with abstention. Therefore, for example, a manager who fails to demand from his subordinates the fulfillment of a certain goal defined by the consortia violates the duty of superintendence; it does not do so, it omits itself in relation to what should have been done.

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[61] COUTINHO DE ABREU, *Responsabilidade civil dos administradores de sociedades*, *Ob. Cit.*, p. 19; LLEBOT, J. O. "Deberes y responsabilidad de los administradores", In: ROJO, A.; BELTRÁN, E. (org.). *La Responsabilidad de los administradores*, Valência, Tirant lo blanch, 2005, p. 27-29; BAUMAN and STEVENSON JR., *Ob. Cit.*, p. 782;796 (*The duty of care is a duty that directors owe to act in the corporation´s best interests and to exercise reasonable care in making decisions and in overseeing the corporation´s affairs*).

[62] BAUMAN and STEVENSON JR., *Ob. Cit.*, p. 795; O´KELLEY, C. R.T.; THOMPSON, R. B. *Corporations and other business associations*, New York, Wolters Kluwer, 2014, p. 88; LLEBOT, *Ob. Cit.*, p. 29.

[63] COX and HAZEN, *Ob. Cit.*, p. 502; 513.

[64] Consumer Protection Code, arts. 3º, 18 and 34.

[65] CC, art. 931 and 1.016.

[66] BAUMAN and STEVENSON JR., *Ob. Cit.*, p. 795.

B) Company conduct procedures or rules and corporate governance

Obedience to the internal rules of the enterprise[67] can also be relevant to the assumption of results technically or qualitatively desired by the limited company. Management malpractice would arise if such rules were not observed. For this reason, in addition to the duty of oversight, for which the manager acts as a supervisor of the activity of others, the duty registered here falls upon the manager himself.

This process of following the procedures and rules contained in the intra-company relationship is part of the corporate governance movement[68], especially in its most restricted sense, which emphasizes the relationship between the partners and the management under the so-called director's primacy approach. In the wake of Pedro Maia's lessons[69], for him, the core of corporate governance moves from the exercise of powers and control by and in favor of the partners towards the fulfillment of the duties of care and loyalty by managers and those focused on company.

In this sense, Arnoldo Wald[70] went on to state that corporate governance means the establishment of the rule of law in company headquarters, referring to the organization and dynamics of powers, the establishment of the proper definition of the governing bodies and the respective powers, rights and duties of the various shareholders and, in short, the regulation of its management structure.

Indeed, compliance with procedural rules (procedural duties) is inherent to duty of care. If the social contract, social deliberations or internal regulations of the limited company provide that the manager must render accounts more extensively than the one set out in the Civil Code, that command becomes mandatory and cannot be rejected by the latter. The duty of *compliance* was increased due to the autonomy of the will that sustains the freedom of initiative, its relentless fulfillment by the contractually instituted manager.

Although the *corporate governance* movement was conceived, structured and developed to serve public limited companies, there is nothing to prevent some of its facets from being transposed to limited companies, especially medium and large ones - which, although minority, exist. Therefore, instruments such as Manuals or Codes of Ethics can be adopted as guidelines for market management, and it is up to the members, in terms of internal control, to prevent them from becoming mere well-intentioned statements without practical effects[71].

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[67] It is in this sense that the topic of this topic is raised, differently from Coutinho de Abreu, when it refers to the duty of correct procedural action for decision making (Civil liability of company administrators, *Ob. Cit.*, P. 19-21). The duty in the form presented by the aforementioned Professor is framed in the exercise to the satisfaction of the charge.

[68] The Brazilian Institute of Corporate Governance (IBGC) defines it as the system by which organizations are directed, monitored and encouraged, involving the relationships between owners, the Board of Directors, the Executive Board and control bodies. In the Cadburry Report (1992), *corporate governance is the system by which companies are directed and controlled* – MAIA, P. *Voto e corporate governance: um novo paradigma para a sociedade anónima*, v. 1, (Doctoral thesis), Coimbra, FDUC, 2009, p. 710-711.

[69] *Ob. Cit.*, p. 711-713.

[70] WALD, A. "O governo das empresas", In: *Revista de Direito Bancário e do Mercado de Capitais*, São Paulo, v. 15, p. 53-78, Jan-Mar 2002, p. 54-55.

[71] BERGAMINI JUNIOR, S. "Controles internos como um instrumento de governança corporativa", In: *Revista do BNDES*, Rio de Janeiro, v. 12, p. 149-188, dez 2005, p. 163.

C) Reasonable decision making and a business judgment rule

As for the reasonableness of the negotiation decision, caution must be exercised in the judicial control of management decision-making. The measure of this just precaution is the so-called business judgment rule, a rule born in the United States of America (USA) as a way of ensuring that conduct taken by managers in good faith, in the interest of the economic agent, is protected. It excludes the responsibility of managers and the syndicability of management choices that may prove to be erroneous or cause loss[72].

A relevant factor in assessing the harmonious application of the disclaimer rule is the existence of information regarding the decision. As long as possible, the manager must take the necessary steps to gather the knowledge necessary to understand the fact under decision and its effects. The business judgment rule exists to protect the informed manager, given that uninformed decisions are equivalent to negligence[73], failing with a portion of the duty of care.

As it is known, magistrates are not subjected to management, economic or even business training. The Dantesque majority of judges who deal with business issues in Brazil are based in general civil courts[74]. In addition, market decisions are commonly complex and carried out under conditions of uncertainty[75] or risk[76].

In this context, measuring the adequacy of managerial, logistical, marketing, quantitative and financial choices made by managers can be a tricky exercise. After a harmful event, already knowing the negative consequences of a certain management option - assumed in the contours of business risk -, it seems clearer that a decision opposed to the failure should have been manifested, making the

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[72] MCMILLAN, L. "The business judgment rule as an immunity doctrine", In: *William & Mary Law School Business Law Review*, v. 4, n. 521, Williamsburg, 2013, p. 526; RIBEIRO, J. C. L. "A transposição da business judgment rule para o regime da responsabilidade civil de administradores em Portugal e no Brasil", In: *Revista dos Tribunais*, São Paulo, v. 937, p. 391-432, nov 2013, p. 409-411; O´KELLEY and THOMPSON, *Ob. Cit.*, p. 93.

[73] BLOK, M. *Business judgment rule: a responsabilidade dos administradores das sociedades anônimas*. In: Revista de direito bancário e do mercado de capitais, São Paulo, v. 46, p. 129-162, out-dez 2009, p. 135-137; MORAES, L. R. *Business judgment rule e sua aplicação no direito brasileiro e na apuração de responsabilidade dos administradores de companhias abertas em processos administrativos sancionadores*. In: Revista de Direito Bancário e do Mercado de Capitais, São Paulo, v. 60, p. 127-149, abr-jun 2013, p. 140-144; ALMEIDA, A. P. *A business judgment rule*. In: I Congresso - Direito das Sociedades em Revista, Coimbra, p. 359-372, mai 2011, p. 361.

[74] As ERIC POSNER says, "*courts have trouble understanding the simplest of business relationships. This is not surprising. Judges must be generalists, but they usually have narrow backgrounds in a particular field of the law. Moreover, they often owe their positions to political connections, not to merit. Their frequent failure to understand transactions is well-documented. One survey of cases involving consumer credit, for example, showed that the judges did not even understand the concept of present value*". (In: "A theory of contract law under conditions of radical judicial error", In: *University of Chicago Law School, John M. Olin Law & Economics Working Paper*, n. 80, Chicago, 1999, p. 13).

[75] They occur when there is little or no knowledge or information to use as a basis for assigning probability to each state of nature or each future event. In extreme cases, it is impossible to estimate the degree of probability with which the event will occur - CHIAVENATO, *Ob. Cit.*, p. 171-172.

[76] They occur when there is enough information to predict the difference consequences, however, the quality of this information and its interpretation by the administrators can vary widely, so that each manager can assign different probabilities according to their belief or intuition - CHIAVENATO, *Ob. Cit.*, p. 172.

manager unwise. However, reaching such a conclusion would imply demanding from the manager a judgment of divination unrelated to the commercial reality.

Now, if the manager has to worry, day in and day out, about the responsibility of his unrelated decisions[77] and the possibility of his dismissal, there would be a system of complete aversion to risk and innovation. If there is a natural correlation between risk and return, there would be an inevitable decline in the limited company's profit prospects, which would generate a cyclical damage to the social and extra-social interests surrounding the economic agent. Furthermore, as António Almeida[78] points out, one of the fundamentals of the *business judgment rule* is the partners' own interest in the fact that managers do not refrain from making risky decisions that may lead to profitable operations.

Thus, limited rationality and asymmetric conditions recommend that the courts refrain from scrutinizing the merit of the management acts taken by the manager (abstention doctrine)[79]. In this sense, art. 1,023 of the Bill that intends to institute a New Commercial Code in Brazil. According to him, the simple divergence regarding the conduct of business based, among other reasons, on a drop in revenues, complaints from consumers or customers or loss of business opportunities, does not in itself authorize judicial intervention.

However, it is appropriate to admit the existence, at the extremes, of areas of negative or positive certainty, in which it is feasible to have a conviction regarding the framework of the management choice in the field of reasonableness. Outside of that, the merit of the penumbra zone is unquestionable, and the pretension of holding the manager accountable in case of doubt, as far as the business judgment rule is concerned, is forbidden.

This attenuation is decisive. If, on one hand, the indistinct liability of the manager regarding the company would reduce business efficiency, on the other hand, his indistinct irresponsibility could imply excessive risks for the practice of opportunistic or negligent actions. For this reason, Bauman and Stevenson Jr[80] agree that the *business judgment rule* does not exonerate managers from liability when there is gross negligence.

In Brazil, the business judgment rule is provided for in arts. 158 and 159, paragraph 6, of the LSA, applicable to companies limited by supplementary or analogical incidence, depending on the case. In spite of this, very few judicial

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[77] After all, decisions protected by the business judgment rule are those of a business nature. The violation of acts or precepts binding on the manager by law or contract is not covered by the criterion, under penalty of legal irresponsibility - VASCONCELOS, P. P. de. "Business judgment rule, deveres de cuidado e de lealdade, ilicitude e culpa e o artigo 64.º do Código das Sociedades Comerciais", In: *Direito das Sociedades em Revista*, Coimbra, a. 1, v. 2, p. 41-79, 2009, p. 65.

[78] *Ob. Cit.*, p. 363.

[79] BAINBRIDGE, S. M. "The business judgment rule as abstention doctrine", In: *University of California, Law & Economics Research Paper Series*, n. 3-18, Los Angeles, 2003, p. 39; TOKARS, *Ob. Cit.*, p. 293; BLOK, *Ob. Cit.*, p. 135-137. In the jurisprudence, the Judge Fernando Vidal de Oliveira voted, in a process before the TJPR: "(...) the manager cannot be held responsible, simply because he is unsuccessful (sic) in his administration. If he did not exceed, nor deviate from his managerial (sic) and presentation powers, there will be no basis for imputing any responsibility to him. The bad luck, the alhea (sic), the tyranny of the circumstances (as Galbraith called them) surround business. And in countries like ours, with an unstable economy, there is still the 'fact of the prince' (in eight years, eight economic plans), suddenly transforming good deals into the right path even for the bankruptcy (...) - AC No. 155.378-0, judged on 1-6-2004.

[80] BAUMAN and STEVENSON JR., *Ob. Cit.*, p. 784; COX and HAZEN, *On corporations: including unincorporated forms of doing business*, *v. 1*, *Ob. Cit.*, p. 505.

decisions have dealt with the phenomenon, having found only one judgment of the TJSP[81] that removed its incidence due to the bad faith of the manager who tried to cover himself up in the rule as a way of removing his responsibility. On the other hand, the Brazilian Securities and Exchange Commission (CVM) described what it called principles to be followed by the merchant manager to avoid judicial discussion of the merits of its decisions, *in verbis*[82]:

> *(i) Informed decision:* The informed decision is one on which the managers based themselves on the information reasonably necessary to make it. In such cases, managers may use information, analyzes and memos from directors and other employees, as well as from contracted third parties, as information. It is not necessary to hire an investment bank to evaluate an operation;
> *(ii) Reflected decision:* The reflected decision is the one taken after analyzing the different alternatives or possible consequences or, still, in comparison with the documentation that underlies the business. Even if it fails to analyze a business, the business decision that led to it can be considered reflected, if, informed, the manager has decided not to analyze that business; and
> *(iii) Disinterested decision:* The disinterested decision is one that does not result in a pecuniary benefit to the manager. This concept has been expanded to include benefits that are not direct to the manager or to institutions and companies connected to him. When the manager is interested in the decision, the standards of duty of loyalty apply[83].

3.1.3.3 Duty of loyalty

The management of a limited liability company must be exercised by those who can provide services in a probable manner, after all, the company presentation is given to this person. The quota holders, being inserted in a trust relationship, omit to take precautions and act by investing in an asset to be managed by others[84].

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[81] AC n.º 5431944900, published in 22-12-2008.
[82] PAS n.º 2005/1443/RJ, published in 10-5-2005 – PRADO, R. N.; OLIVEIRA, F. V. "Investimento na acepção econômica e o dever legal de diligência dos administradores nas tomadas de decisão empresarial de investimento", In: LIMA, M. L. M. P. (coord.)*, Agenda contemporânea: direito e economia, 30 anos de Brasil*, São Paulo, Saraiva, 2012, p. 201-202. In the same sense, TC No. 004,920 / 2015-5, judged on 4-11-2015.
[83] It is clear here that there is a very close point of contact between the duties of care and loyalty, making it difficult for a manager to benefit from the business judgment rule when he lacks parameters of good faith and loyalty - COX and HAZEN, *On corporations: including unincorporated forms of doing business*, v. 1, *Ob. Cit.*, p. 516-517.
[84] CORDEIRO, A. M. "A lealdade no direito das sociedades", In: *Revista da Ordem dos Advogados de Portugal*, a. 66, v. 3, dez 2006, p. 10-11; PARENTE, N. J. "O dever de lealdade do administrador e a oportunidade comercial", In: *Revista de Direito Bancário e do Mercado de Capitais*, São Paulo, v. 54, p. 185-196, Out-Dez 2011, p. 188-189.

The same fiduciary bond is replicated for the relationship between company - to whom social interests are imputed - and its manager. Thus, the fiduciary position obliges you to put them ahead of your private interest, determining an impartial performance. This perspective is the basis for a series of expectations that must be met by the company manager. Among them are the preservation of social assets, deliberate abstention on a case-by-case basis, the prohibition of unfair commercial practices, the duty of confidentiality and the caution in the formation of contracts between him and company.

Correctly, Coutinho de Abreu[85] defines the duty of loyalty as the obligation for managers to keep the interests of company in mind and seek to satisfy them, refraining from promoting their own benefit or the interests of others. In this sense, the Brazilian legal system prohibits the manager, without written consent from the consortia, to apply credits or social assets for their own benefit, that of other companies or third parties[86]. Likewise, it requires an abstention on the part of the manager who has a particular interest that conflicts with the social interest[87]. In Comparative Law, the duty of loyalty is provided for in the CSC[88], LSArg[89] and LSUru[90], among other normative diplomas.

The duty of loyalty also prohibits the manager from using or not using, for his own benefit or that of third parties, the commercial opportunities that he is aware of due to the exercise of his position[91]. For such a legal command, two distinct prohibitions stand out: (*i*) the prohibition of unfair competition and (*ii*) the unfair handling of commercial opportunities suitable for the realization of the company purpose.

The trustee, as a fiduciary, holds privileged information regarding inputs, logistics, financing, the labor market, clientele and demand for the products or services sold by the company. The acquisition of this *know-how* comes from experience in the exercise of its function. To use such information to, across the board, collaborate with an economic agent operating in the same relevant market[92], as a partner or employee, is to betray the trust placed in your charge, incurring *unfair competition.*

The dishonesty of competition carried out by the company manager himself may go beyond the mere transfer of knowledge, e.g., with the use, enjoyment or enjoyment of the tangible property of the company[93].

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[85] COUTINHO DE ABREU, J. M. "Deveres de cuidado e de lealdade dos administradores e interesse social", In: *Reformas do Código das Sociedades*, Almedina, Coimbra, 2007, p. 22.
[86] LSA, art. 154, *Ob. Cit.*, and art. 1.017, *caput*, of CC.
[87] CC, art. Art. 1.017, Sole Paragraph; LSA, art. 156.
[88] Article 64, 1, "b"
[89] Art. 59, *Ob. Cit.*
[90] Art. 83, *Ob. Cit.*
[91] Similar application of art. 155, I, of the LSA; COUTINHO DE ABREU, *Deveres de cuidado e de lealdade dos administradores e interesse social*, *Ob. Cit.*, p. 26-27; PARENTE, *Ob. Cit.*, p. 188-189.
[92] Relevant market, as treated by American doctrine. It is the place where the economic establishment operates and the stage where competitive relations can be fought. For the study of the geographic and material parameters that define the relevant market, see BAGNOLI, V. *Introdução ao Direito da concorrência,* São Paulo, Singular, 2005; FORGIONI, P. A. *Os fundamentos do antitruste,* 3. ed., São Paulo, Revista dos Tribunais, 2008.
[93] NAVARRINI and FAGGELLA, *Ob. Cit.*, p. 500. In this sense, see the following judgment of the TJRS:
INSTRUMENT SUBMISSION. INOMINATE PRECAUTIONARY PREPARATION FOR THE DISSOLUTION OF SOCIETY AND INDEMNITY ACTION. UNFAIR COMPETITION OF MANAGEMENT PARTNER. 1. In summary cognition, based on article 804 of the CPC, it is

Likewise, the duty of loyalty does not allow the manager to purposely omit to take advantage of commercial deals that are of interest to company. This occurs when the possible business (i) is directly part of the company purpose; (ii) it is, in some way, interesting to company (e.g., advance the purchase of inputs to take advantage of extremely favorable price conditions); (iii) has already had an interest expressed by the company (e.g., the definition, at the meeting, for the acquisition of a certain number of shares when the value breaches the chosen barrier); (iv) has already been the subject of a formal proposal; or (v) is in the negotiation phase prior to the conclusion of the contract[94].

Such assumptions are not a failure in the duties of care and diligence, as such defects occur due to the manager's fault, characterized by negligence, recklessness or malpractice. Here, there is unmistakable willful conduct, aiming at own advantage or for the benefit of third parties, by action or omission. This is what happens, for example, when the manager acquires, to resell at a profit, patent rights that he knows - because he exercises a trustworthy function - to be essential to the company's business plan.

The fiduciary position of the managers hinders the use of confidential company information for private purposes, despite the omission of the Civil Code and the LSA[95]

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possible to conclude by the verisimilitude of the plaintiff's allegations. Imminence of the plaintiff's company suffering irreparable or difficult to repair damages if the defendant partner is maintained as Consult's administrator. 2. Evidence context that demonstrates the reckless act of aggravated, when directing clients of the Consult company to Provenza, as well as using machinery and raw material of that one in the elaboration of its products. 3. Considering the documentary and testimonial evidence attached to the case file, the temporary removal of the defendant's administration powers is prudent, and a judicial expert must be appointed at the expense of the aggravating factors, in order to inspect the Consult company's management acts and accounts. (...). Interlocutory Appeal No. 70045755808, judged on 10/25/2011.

[94] COUTINHO DE ABREU, *Responsabilidade civil dos administradores de sociedades*, *Ob. Cit.*, p. 31; LLEBOT, *Ob. Cit.*, p. 38-39; PARENTE, *Ob. Cit.*, p. 192-193 [(...) *The North American law is not indifferent to the issue and, in order to fill the gap that is necessary in the distinction between opportunities belonging to the company and any other opportunities, the American courts have been producing certain criteria of differentiation - the so-called traditional tests. The first one is Interest or Expectancy, for which the company considers the opportunity that, a priori, it is worth saying, at the moment it is identified, the company has an interest, expectation or need to achieve its social purpose. The criterion stems from the idea that the manager cannot harm, compete or gain personal advantage to the detriment of the company he manages. Another criterion used is the Line of Business, which translates the concept of commercial opportunity into any opportunity that relates to the company's current or future corporate purpose. The Fairness Test measures the present injustice in the specific case in which the manager takes an opportunity when the company's interests must be protected. The factors to be observed, according to the Fairness Test: a) If the opportunity was received by the administrator individually or as an administrator of the company, to whom he will relay the opportunity at a later time; b) Whether the company's resources were used to carry out the business; c) Whether the business is indispensable to the company's finances; d) Whether the parties involved in the business were reasonably expected to know that this was a business opportunity; and e) If the company was able to take advantage of the commercial opportunity, which includes the analysis of factors such as: refusal by the offeror to negotiate with the company or lack of resources on the part of the company to conclude the deal, among other possible impediments. Subsequently, the Line of Business was combined with the Fairness Test. Based on this criterion, it is verified, at first, if the business is related to the company's corporate purpose and, then, if its individual use by the administrator was done fairly.* (...)].

[95] The LSA only provides for the duty of secrecy with regard to information that may have an impact on the stock market (art. 155, § 1). *See*, and also, COUTINHO DE ABREU, *Deveres de cuidado e de lealdade dos administradores e interesse social*, *Ob. Cit.*, p. 28; CLARKSON *et al*, *op. it.*, p. 661.

on this aspect. For this reason, precaution recommends that the duty of secrecy be included in the articles of association or, alternatively, be included in the minutes of the meeting or meeting, safeguarding company as to any practices that might undermine the secrecy of the business.

Although unfair competition always contains a violation of the duty of confidentiality, the opposite is not true, and there may be a violation of business secrecy in several circumstances that do not represent the exercise of competition by the manager against the company. Such fact can be represented by numerous hypotheses, such as disclosure on social networks, posting on blogs, granting interviews, giving lectures, selling inside information, exchanging favors, revenge, among others.

Finally, mention is made of the relationship between duty of loyalty and the possibility for managers to enter into private contracts with the company or, even, contracts in which there are conflicts of interest[96]. It is feasible[97], only if restraining personal interests that are not disclosed to the partners, forging a legal business in view of a purely individual and hidden claim from the manager, different from that intended by the limited company[98]. This is what would happen, for example, if a certain manager induced the quota holders to approve, as payment for their services from another mercantile activity, a remuneration absurdly higher than that practiced by the market, classifying it as usual to benefit from company trust.

4. Closing Remarks

This essay sought to present an overview of the typical legal responsibilities and obligations of a board of directors of limited liability companies within the Brazilian context.

By exploring the distinction between acts of disposition and acts of administration, the essay meticulously delineated the content of the latter, elucidating the underlying complexities of operational, managerial, and corporate governance management. This examination included a detailed analysis of fiduciary duties, such as the duty of disclosure, loyalty, care, oversight, and corporate governance, as well as the application of the business judgment rule.

It is hoped that the methodology adopted, grounded in the review of doctrine and analysis of relevant jurisprudence, will provide a solid foundation for a deeper understanding and further investigation by scholars of Comparative Law.

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[96] Model Business Corporation Act, § 8.60; CLARKSON *et al*, *op. it.*, p. 662-663.
[97] According to art. 156, § 1.º, da LSA.
[98] TOKARS, *Ob. Cit.*, p. 294.

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