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# Corporate Law in Brazil – Problems with Justice

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**Abstract**

This paper will present the institutional arrangements that regulate the Brazilian corporations, focusing on the recent legislative changes which had the goal to increase the investors trust on the Brazilian market share. The approach is multidisciplinary, which means that, Law and Economics and Organizations Theory knowledge will be used on the investigation to criticize this regulation system, exposing its fragilities and potentialities in order to propose solutions. Also, this analyses the state inefficiencies and its difficulties when trying to resolve conflicts on this market. This work, descriptive and critical, when analyzing relations between corporation`s structure and its function, understand the corporations as an Posner's uptake method or as an organization from Coase's hierarchy method, with the function of reducing the transaction coast. Assuming this purpose and supposing the theoretical background to comprehend the object of study and the problems related to it, (corporation as an investment option, a form of business organization in Brazil), an analysis will be made on the legal formulas that regulates: 1) the rules and the process necessary to the corporation constitution; 2) the relations between the investors and the controllers; 3) The mechanism for dispute resolution between investors and controllers and between shareholders and society.

**Keywords:** Governance; Control; Judiciary

## 1. Introduction

A study of the public corporation (in the language used by Berle) is proposed here, specifically the issues involving its management (the corporate governance is used as an interdisciplinary theoretical tool, which justifies the adoption of Williamson's institutionalism (Williamson, 1985) as theoretical framework of this paper), related to the emergence forms of minority and management controls in the Brazilian scenario, which may influence the incentives for investments in this type of legal and economic structure.

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This paper is supported on an interdisciplinary investigation (the Institutionalism, part of Law and Economics) which understands that institutions (understood as rules, formal and informal, legal and nonlegal) affect social structures, including the market, and, from that, enables the analysis of the Brazilian institutional environment, and their impacts on the market - if the levels of certainty or uncertainty increases – and also the institutional innovations promoted and tensions resulting from the friction between organizations and these new rules.

From these considerations, it is understood that this rise of minority and management controls stems from institutional changes occurred in Brazil since 2001, and this fact brings a problem: instability (increased unpredictability/uncertainty) in Brazilian corporate system, reflecting in the local capital market (in the incentives for investment), caused by a mismatch between this new reality and the Brazilian regulation, that despite of occasional changes, is still structured around the majority control and permanent (control through almost complete ownership, including also control through a legal device).

This article will be developed as followed: a) the presentation of theoretical framework in order to establish the environment in which the problem-situation will be faced; b) the contrast between the Brazilian Corporate law tradition and the new institutional environment (the bet on the concentration of capital *vis a vis* and the bet on dispersed ownership as a means of encouraging Brazilian capital market); c) the current challenges of Brazilian corporate governance: the uncertainties caused by structural (institutional) inconsistencies and the function of Brazilian Judiciary regulating; d) Conclusion.

## 2. The Theoretical Approach

Williamson's institutionalism assumes as a model of human behavior called “the contractual man”, i.e., we assume human nature being described by The Transaction Cost Theory – the man rationally limited and opportunistic. This assumption is relevant to the investigations here proposed due to the following reasons: (1) it recognizes that human institutions inherit their main problems from the human condition itself; (2) the economic (and legal) institutions should study the man as he is (…) (Williamson, 1985). The assumption of this abstract model of human behavior justifies their presumptions of limited rationality and opportunism in the Transaction Costs Theory.

The cognitive limitation defended by this model is important for governance structures studies because: if mind is the scarce resource, then economizing on claims against it is plainly warranted (Williamson, 1985), in other words, the costs of planning, the adaptations and monitoring of transactions should be taken into consideration and, in this case, the governance structures which demand cognitive ability more intensely are considered less efficient. Opportunism implies that corporate transactions – which are more subject to a form of *ex post* opportunism – can benefit from it if appropriate safeguards can be conceived *ex ante*.

We can affirm, based on Williamson, Transaction Costs and Agency theories (Jensen&Meckling,1976) are not incompatible, but complementary. However, some distinctions are necessary for a methodological consistency of this paper – and here the concepts of positive theory of agency and governance branch of transaction-cost economics are made similar. The fundamental problem faced by Transaction Costs Theory is as follows: when should firms produce to satisfy their own needs and when should they seek the market? Coase argues that the differences between the transaction costs involved in the hierarchy and in the market influence the decision. Therefore, can be said that the Transaction Costs Theory is genetically linked to vertical integration and it has the transactions as basic unit of analysis. It understands the "firm" as a governance structure. Its focus is on the application of *ex post* solutions, such as dispute prevention and organizational structures building in order to solve disputes.

Otherwise, the fundamental problem faced by Agency Theory concerns the separation of ownership and control and their implications on Organization Theory and on public policies formulation. The Agency Theory has its origin in the control structures and it has the agent's behavior as basic unit of analysis.

It understands the "firm" as a bundle of contracts. It focuses on the application of *ex ante* remedies, such as building institutional formulas (formal and informal rules) to encourage alignment of interests between the director and the agent. In conclusion to these theoretical concepts and the reflections of the application of those concepts in corporate dynamics (practical effects), this paper moves away from the super-efficient markets model (model defended by Neoclassical Theories)[3].

[3] It is denied, for example, the idea that stock markets would hold all available information and even unavailable ones, it follows that, companies with inefficient executives would be punished with a reduction in the price of shares and others securities.

It is denied, hence, that problems resulting from the rising forms of minority and management control in the Brazilian context can be solved by market mechanisms.

On the other hand, this new reality brings instability, which increases the level of uncertainty in the corporate world, demanding a new regulation to challenge the Brazilian corporate governance.

## 3. The Differences between the Traditional Corporate Brazilian Law and the New Institutional Environment (The Bet on the Concentration *Vis a Vis*the Bet on the Dispersion)

### 3.1. The Fundamentals and the Institutional Scheme That Influenced in the Tradition of Brazilian Corporate Law

The current federal laws (Law n. 6.385/76, capital market regulations and Law 6.404/76, that deals with Corporation Law, accounting legal framework), were enacted in the 1970's, under a theoretical conception that used to privileged the majority control because this form of control was seen as the best alternative to dissociate control from ownership identified by Berle & Means in their studies of the American stock market in the 1930's. Hence, the logic was, in a way, that someone who could invest sufficient resources, as a shareholder, in a given company, to ensure a power of majority and permanent control, would have incentives closer to the company's own in order to pursue success.

This economic logic found support on dogmatic law, specially the Institutionalist Theory, as it is called, which is, in legal dogmatic, opposed to Contratualist Theory, that should not be confused with the framework for this paper: it is a theory of legal doctrine, of German origin, which distinguishes the corporate interest from those of shareholders, putting the first one in a higher level compared to their partners. The Institutionalist Theory influenced the Brazilian Corporate Law in a different way than in American Law. While in Brazil there was a concentration of power around the figure of the controller, in the United States, it meant a strong director independence from the shareholders. This difference creates different incentives: while in the U.S. the tension is concentrated between managers and shareholders, in Brazil, historically, this tension is between the controller and the minority. It is from this tension that the Brazilian Corporate Law built its interest alignment mechanisms and conflict resolution.

And this orientation influenced the design of the regulation model and the format of social government itself. The Brazilian regulation logic, inserted into domestic Corporate Law, is evidenced by the legal definition of controller[4]. There are three attributes: to hold the majority of votes in corporate decisions; to remain in power or in the condition of the controlling shareholder, and finally effectively utilize the law to appoint the corporate directors. As we can realize, the first one and the second one for the Brazilian doctrine are a single attribute (Carvalhosa & Eizirick, 2002) aim to the stability of majority control. We assume that this control has the best incentives to decide according to social interests, but, when there is a major concentration of power, it needs to be regulated. About this logic, the Securities Commission administrative jurisprudence presents interesting arguments:

(…) "It is not enough to win an election or have preponderance in a decision. It is necessary that shareholder can legally prevail his will whenever he wants (excluding, obviously, special voting of non-voting shares or a given share class, or even common and preferred shares voting together for specific matters, when this is established in company statue). For this reason, in a company with shareholding dispersion or that presents a shareholder with more than 50(3) of shares, who does not take part in votes and guidelines, if any shareholder always prevail, he will not be subject to controlling shareholder's obligations and responsibilities, given that factual issues prevails in assemblies so that the requirement in point "a" of article 116 is not fulfilled, although the point "b" is fulfilled.

4The article 116 of Law 6404/76 understands as controlling shareholder the person, natural or juridical, or group of persons bound by a voting agreement, or under common control that a) is the right holder in a way that ensures, permanently, the majority of the votes on the resolutions of the general assembly and the power to elect a majority of the directors of the company; or b) uses its power to direct the activities and guide the functioning of company's structures. In the origin text:"Art. 116. Entende-se por acionista controlador a pessoa, natural ou jurídica, ou o grupo de pessoas vinculadas por acordo de voto, ou sob controle comum, que:a) é titular de direitos de sócio que lhe assegurem, **de modo permanente**, a maioria dos votos nas deliberações da assembléia-geral e o poder de eleger a maioria dos administradores da companhia; (...) (sem grifos no original)b) usa efetivamente seu poder para dirigir as atividades sociais e orientar o funcionamento dos órgãos da companhia."

This shareholder would be considered, in order to determine his responsibility, as an ordinary shareholder (subject, therefore, to the provisions of article 115)[5]" (Process: RJ 2005/4069, internet address: http://www.cvm.gov.br/port/descol/respdecis.asp?File=4788-0.HTM, access 28/02/2012) (translate freely).

The first argument is that the controlling power must be permanent, without characterizing any participation of general majority. The second argument is quite interesting and illustrates the scenario described in this topic. The logic of the governing system provided by the Brazilian tradition, aims the permanence of controlling power because it builds around controller an accountability mechanism that works as a type of compensation and also as a tool for alignment of interests. This responsibility system, in the corporate governance perspective, can be applied to resolve conflicts, as an *ex post* compensation formula, because it is an external instrument used by classical Corporate Law. But it is also an internal instrument of alignment of *ex ante* interests, because responsibility also functions as a disincentive (function cost), which, in a practical system as law, acquire pedagogical functions.

For the Brazilian corporate system, there is a the difference between shareholders' and controllers' responsibility. While controlling shareholders answer for guardianship of shareholders', employees' and stakeholders' interests[6],; non-controlling shareholders should act for the social interest, that can be defined as the pursuit of corporate purpose realization and lawful purposes for profitability (Carvalhosa, 2009)[7], under penalty of introducing a conflict of interests and the abuse of rights, which calls for the application of incurring penalties.

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5The original text states "(...) vencer uma eleição ou preponderar em uma decisão não é suficiente. É necessário que esse acionista possa, juridicamente, fazer prevalecer sua vontade sempre que desejar (excluídas, por óbvio, as votações especiais entre acionistas sem direito a voto ou de determinada classe ou espécie, ou mesmo a votação em conjunto de ações ordinárias e preferenciais, quando o estatuto estabelecer matérias específicas). Por esse motivo, em uma companhia com ampla dispersão ou que tenha um acionista, titular de mais de 50%(3) das ações, que seja omisso nas votações e orientações da companhia, eventual acionista que consiga preponderar sempre, não está sujeito aos deveres e responsabilidades do acionista controlador, uma vez que prepondera por questões fáticas das assembléias não preenchendo o requisito da alínea "a" do art. 116, embora preencha o da alínea "b". Esse acionista seria considerado, para determinação de sua responsabilidade, como um acionista normal (sujeito, portanto, ao regime do art. 115)"(Processo RJ 2005/4069, disponível em: http://www.cvm.gov.br/port/descol/respdecis.asp?File=4788-0.HTM, acesso em 28/02/2012).

6There is a greater influence of dogmatic German Institutionalism, but at this moment can reveal a worry with the protection of stakeholders interests.

7 In this case, there is a greater influence of Ascarelli's contractualism, which in actually can represent the shareholders interests.

We can observe that this Brazilian Corporate Law logic, which focuses on the controller, is perceived when the company's organizational structure is analyzed: even after absorption by the Brazilian corporate governance of more efficient mechanisms for interests internalization other than those belonging to the controller (alignment mechanisms, *ex ante*), which will be the subject of the following topic, the access and composition of the Board of Directors is coherent with a system that is based on the controller (majority and permanent control). See the rule under § 7 of art. 141 of Law n. 6.404/76, which states:

"Whenever, cumulatively, the election of the Board of Directors is conducted by multiple voting system and the holders of common or preferred shares exercise the prerogative to elect a member of council, the shareholder or group of shareholders, with voting rights, linked by a voting agreement holding more than 50% (fifty percent) of the shares will have the right to elect directors in a number equal to the number of those elected by the other shareholders, plus one, independently of the number of directors who, according to the statute, compose the organ. (Translate freely)[8]". It is noted that the same 2001 reform, that introduced the mechanism of voting separately as an instrument of internalization (*ex ante)* of non-controlling shareholders' interests, by the organizational structure of the company, took care to keep a proportion in the Board of Directors and majority control.

## 3.2. Significant Institutional Changes Occurred After the Year 2001 - An Analysis Normative / Prescriptive

### 3.2.1. Change in State Rules

In 2001 Law 10.303/01 was enacted, inserting new rules in Brazilian Corporate system and changing the flow of information and of power within the company. The reform logic was to ensure greater transparency and protection of minority and preferred shares in order to encourage the participation of institutional investors in the Brazilian stock market.

8The original text of the paragrafh is: "Sempre que, cumulativamente, a eleição do conselho de administração se der pelo sistema do voto múltiplo e os titulares de ações ordinárias ou preferenciais exercerem a prerrogativa de eleger conselheiro, será assegurado a acionista ou grupo de acionistas vinculados por acordo de votos que detenham mais do que 50% (cinqüenta por cento) das ações com direito de voto o direito de eleger conselheiros em número igual ao dos eleitos pelos demais acionistas, mais um, independentemente do número de conselheiros que, segundo o estatuto, componha o órgão."

Among the major institutional innovations related to Brazilian governance model, we can mention the following: a) reducing the limit issuance of preferred shares b) the return of the tag long and fixing a guarantee of minimum payment to minorities in 80% of the amounts paid to the controller; c) the creation of new political instrument, giving to the preferred shares with restricted voting, the right to elect separate member of the Board of Directors; d) changes in the rules for the delisting of shares; e) the possibility of predicting in the company statute the election of workers' representative to the Board of Directors, and f) the extension of the CVM jurisdiction.

In 2007, Law 11.683/07 was enacted, changing the law n. 6.404/76 - Brazilian financial legal framework – introducing the International Financial Reporting Standards (IFRS) in Brazil, bringing Brazilian accounting practices closer to Financial Accounting Standards Board (FASB) pronouncements. This innovation in the institutions of the Brazilian corporate system aims to give more transparency especially to foreign investors.

In 2011, the Law 12.431/2011, among other innovations, introduced in the Brazilian Corporate Law the possibility of producing a shareholders' assembly at a distance (the attendance register can be done remotely) and it changed the conditions required for being elected a member of the Board of Directors, allowing this organ to be composed of non-shareholders, breaking with the traditional format in Brazilian law that used to demand only shareholders composing the Board of Directors.

In fact, this rupture had begun in 2001, but, by that time the change was very slight, taking into consideration that the solution there provided, as mentioned above, was contractual and legal.

The last three paragraphs listed some of the most significant legislative changes that resulted in governance mechanisms and aligning interests between the company and its participants. Now, some changes will be mentioned in the institutional environment implemented by private rules, issued by BM & F-Bovespa, a company responsible for the maintenance of the stock market in Brazil.

3.2.2. Change in Private Rules

In 2001, the BOVESPA, as it was called, actually BM&F-Bovespa, ceated new market segments: New Market, Level 1 and Level 2.

Its listing regulations (private rules) stipulate that listed companies in these segments *should use their best efforts to achieve shareholding dispersion when is made a public offer of shares*[9]..

For this purpose, some rules are implemented, such as prohibiting the issuance of preferred shares by companies listed on the New Market; the changing of value to be offered to the minority shareholders in the case of Tag Along; the extension to prefered shareholders of "outing together" warranty with minimum level of price; the demand for greater independence of directors; the guarantee of access to non-institutional investors, at least 10% of the total to be distributed in the offer, that ends up in changing the institutional environment, which, as will be demonstrated in the following item, has changed the present ownership structure in the Brazilian stock market.

### 3.3. The Present Brazilian Context: The Emergence of Minority and Managerial Controls - A Descriptive Analysis

If in the past the Brazilian strategy was the concentration of capital in the ownership structure of public corporation, as elucidated above, currently, the strategy is to disperse this capital in order to garantee more liquidity for the shares and to attract the individual investor. The idea seems to be to consolidate a strong stock market in Brazil, changing its structure that relied on a strong financial market, and a weak stock market.

This change in the Brazilian strategy of capturing the popular savings, stimulated by changes in the institutional environment, produced reflections in organizations, specially in its capital structure and corporate governance mechanisms. The first part of this statement, i.e. , the change in the ownership structure of public corporation, can be confirmed by analysis of the data for the free float issued by BM & F-Bovespa in the year 2012. The second part, relating to governance mechanisms, will be discussed in the next item. In 2012, 26% of companies listed on the market developed by BM & F-Bovespa remained more than 50% of its common shares in free circulation in the stock market, and 12% of these companies have 100% of its shares in free circulation in stock market values, indicating the possible presence of a significant number "pure market" companies.

9Text taken from official circular 40/2012, issued by the Stock Exchange.

We can observe that, in these companies there is a movement to increase the free float of its shares and to reduce the number of preferred shares, comparing with the previous format, which was the tendency to issue preferred shares in number near to the maximum legally allowed and to maintain a lower percentage of shares in free float[10]. This new scenario indicates the current Brazilian tendency: the emergence of minority control or management control.

An example that illustrates this new Brazilian reality – known as "ownerless companies" - is Brazil Foods S / A - BRF, the company that owns the brands Sadia and Perdigão, among others.

The main shareholder of that company is Previ (pension fund), which holds 12.3% of the common shares. After, appears Petros (pension fund), with 10.1% of the common shares, Tarpon, with 8% of the common shares, BlackRock, with just over 5%, Valia (foundation) with 1 , 3% and Sistel (foundation) with 1.4% of the common shares. His control was regulated, in 2011, by a shareholders' agreement (control by legal instruments), which was not renewed. In 2013, the company protects itself from a hostile takeover of its control through contractual arrangements, poison pills[11], and the company prepares itself, according to information released by the specialist media, to face the uncertainties in the succession of his presidency due to the resignation of its current CEO, Nilmar Secches.

## 4. The Current Challenges of the Brazilian Governance: The Uncertainties Caused by the Structural Inconsistencies and the Regulation by the Courts

We start this topic citing Coutinho de Abreu (2006), in its Corporate Governance:

(…) “the corporate governance theme involves issues relating to the distribution ofpowers between internal deliberative body and the Board of Directors; related to the organization, the composition and functioning of the administrative-representative body, methods of appointment and removal of directors, their remuneration, duties and responsibilities; and also related to the means of internal and external control of the companies.But theses issues are classic corporate law themes .

10Data collected on the website of BM & F-Bovespa: http://www.bmfbovespa.com.br/cias-listadas/empresas-listadas/AcaoCirculacaoMercado.aspx?idioma=pt-br; access: 04/03/2013.
11Source: *Valor Econômico* - http://www.valor.com.br/empresas/2993926/brf-companhia-sem-dono-comeca-nova-fase. Access 04/02/2013.

Then...” (translate freely)[12]

These are classic themes in Corporate Law. Thus, the approach to Corporate Governance provides from this study of Corporate Law classic themes an innovation in form, in the interdisciplinary method. Using such a theoretical tool, we extend the discussion of legal doctrine to a descriptive analysis and normative corporate structure more adjustable to the reality, political, social and economic tensions. About the subjective is interesting the Peer Zumbansen's perspective in *Rethinking the Nature of the Firm: The Corporation as a Governance Object.*

From this approach, this study aims to demonstrate that Brazilian corporate governance mechanisms need to be rethought in order to bring more predictability, with regard to fixing the rights in the Brazilian Public Corporation's structure. This statement takes into account that this article considere more predictable structures, more efficient (according to the Transaction Costs Theory). It is also based on the assumption that the construction of aligning interests mechanisms requires the accurate identification of those who are granted (agents) with the power to decide for the interest of other (main).

Regarding ex ante governance mechanisms (external, therefore), it is clear that the traditional division between shareholders', controller's and administrators' responsibilities (working at the normative level, with different standards of responsibility), are jeopardized: if there is no permanence in control, in principle, the responsibility rule applied is that one focused on shareholder (non-controlling) and not that one applied to the controller. One should bear in mind that behavior patterns are differently prescribed. As already mentioned, the responsibility of the non-controlling shareholder and directors is parameterized around the shareholders' interests , while the controller's responsibility refers to protect the stakeholders' interests.

12Original text: “a temática da governação das sociedades compreende problemas relativos à repartição de competências entre órgão deliberativo-interno e órgão de administração; à organização, composição e funcionamento do órgão administrativo-representativo, modos de designação e de destituição dos administradores, remuneração, deveres e responsabilidades deles; aos meios de controlo interno e externo das sociedades.Mas, dir-se-á, isto são temas clássicos do direito das sociedades. Então...”(Coutinho de Abreu, 2006)

On the other hand, as reflected in *ex post* governance mechanisms (internalization mechanisms, therefore), the present situation is much more complex than the context related to non-controllers' internalizing interests mechanisms structured by Brazilian corporate law. We can observe that multiple vote and separated vote for minority and preferred without voting rights are mechanisms structured to serve a share ownership structure much more concentrated than that one emerging in Brazil.

Thus, remains the question: if the governance mechanisms have no effectiveness in alignment of controllers' and non-controllers' interests, will the market accomplish this task?

It seems that the answer to the question is negative for two reasons. The first is theoretical justification. In other words, reproducing the knowledge resulting from economic Institutionalism, the markets are not super-efficient structures, they need a external regulator to correct its faults. The second is practical. The majority of Brazilian companies that presents a share dispersion, able to emerge a minority or managerial controls minority, adopts a legal instrument imported from U.S. law: the stabilization of administrators by statutory clauses (the poison pills). This legal formula has the immediate effect of nullifying the market mechanism used to stimulate and to hold accountableadministration misaligned with the interests of shareholders - the takeover of control. And the effect mediate the delivery of conflicts arising from corporate structure to the judiciary, which will examine the validity of these mechanisms and liability arising therefrom, choosing, including the standard of liability to be applied, since there is inconsistency in the regulatory system in this respect.

Thus, if the institutional innovation movements pursued until now a logic of transaction and agency costs reduction, we must ask: the Brazilian Judiciary is an efficient mechanism to assume the regulatory role in corporate relations?

Data from the Brazilian judiciary tend to respond negatively to this question:

**Table 1: First Instance and Special Courts procedural motion in 2010**[13]

| State Court | New Cases | Pending cases | Total of finished cases | Sentences |
|---|---|---|---|---|
| First Instance | 11.550.034 | 41.919.265 | 11.821.627 | 9.630.254 |
| Special Courts | 3.936.951 | 4.421.974 | 4.620.308 | 4.077.731 |
| Total number of cases at First Instance | 15.486.985 | 46.341.239 | 16.441.935 | 13.707.985 |

| Total number of judges at first Instance and Special Courts | Average processes x judges |
|---|---|
| 10.264 | 4.515 |

This is the average number of cases per judge: 4,515. In Brazil, there is no specialized judges in corporate area, making this context - the little time available for each case – becomes worse by the lack of specific training (theoretical knowledge) and the small interaction with corporate issues (practical experience).

On the other hand, the private alternative - arbitration – does not seems to be the path taken by Brazilian companies. The number of Brazilian open capital companies adopting arbitration as a resolution conflict mechanism is as follows: 4 companies listed on the Bovespa Mais; 165 companies listed on the New Market; 21 companies listed on the market Level 2, and 7 companies Level 1 listed on the market.

As can be seen, the only significant position is that held by companies listed on the New Market, but this is not due to a rational choice, but due to a prescription (norm) for admission in this segment. At level 1, where there are optional rules for arbitration, the number of companies opting for arbitration is insignificant: only 7.

And as a sign of lack of credit in the private conflict solution, in the same period highlighted by the CNJ, we find little use of the Brazilian Arbitration Chambers:

13Source: *CNJ – Relatório Justiça em Números 2010*.

**(Table 2)**

| Arbitration Chambers | AMCHAM | CAMARB | CCBC | FGV | CIESP |
|---|---|---|---|---|---|
| Arbitration awards | 3 | 8 | 10 | 9 | 19 |
| Values under discussion | R$45 millions | R$76,1 millions | R$1,6 billions | R$225 millions | - |
| Average time until sentence | 13 months | 14 months | 14,4 months | 12 and 16 months | 12 and 15 months |

These numbers indicate that if the Judiciary, facing the current mechanisms of corporate governance and the low use of arbitration, is in charge of regulating the corporate environment, but it will not make it with the required efficiency. This conclusion is exacerbated by the Brazilian Judiciary tradition, which is not to establish rights in a uniform and transparent. This mechanism, as opposed to the desired, retrospectively, acts asymmetrically and without much transparent.

Moreover, the arbitral solution does not seem to appeal to companies. There is reluctance to voluntarily include arbitration clause in social status for conflicts resolution and, therefore, the low demand Arbitration Chambers for the settlement of disputes.

## 5. Conclusion

In conclusion, it can be said that new corporate governance mechanisms are not designed and developed for the Brazilian reality, the most recent strategy for the development of a strong stock market in Brazil, by stimulating shareholder dispersion base, may have an adverse effect: transaction costs and agency higher and less incentive for private investment.

The changes must be thought according to the behavior of firms and investors in Brazil. A ready solution, designed or copied from ideas prevailing in other countries will certainly not be the best solution for the harmonization and strengthening of the Brazilian stock market.

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