

**BUSINESS LAW AND THE RELEVANCE OF PROVISION OF GOODWILL IN CONTRACT IN THE PARTIAL DISSOLUTION OF COMPANIE**

**O DIREITO EMPRESARIAL E A RELEVÂNCIA DE PREVER EM CONTRATO A APURAÇÃO DO *GOODWILL* NA DISSOLUÇÃO PARCIAL DE EMPRESA**

**DERECHO EMPRESARIAL Y RELEVANCIA DE LA DISPOSICIÓN DE BUENA VOLUNTAD EN CONTRATO EN LA DISOLUCIÓN PARCIAL DE EMPRESA**

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**Abstract**

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The partial dissolution of the company is the legal action that can take place under various forms of motivation, the calculation and calculation of intangible assets are part of this process, whether successful or unsuccessful. In this context, this article aims to investigate the relevance of the business contract and contemplate the determination of goodwill in the partial dissolution of the company. For this purpose, bibliographic research was used in the websites of events and journals on the CAPES portal, Scielo, Google Scholar, and other materials available in electronic media, dated from 2010 to 2020. The approach given to the information collected was qualitative. After analyzing the results, it was found that the dissatisfaction with the division of goodwill, resulting from the partial dissolution of the company, when it generates a lawsuit, burdens the amounts paid with the dismissal of the company, since the legal investigation of assets, contemplates not only the value added individually by the withdrawing partner, the calculation in question of goodwill considers the value of the business group as a whole, almost always calculated considering the Discounted Cash Flow (FCD) method, therefore, it is concluded that it is extremely important to show the percentage of each partner in determining the assets generated by goodwill, when drafting the business contract, as it is necessary to avoid the high legal costs that are generated with the dissolution of the company, for any reason.

**Keywords:** Intangible assets. Company Valuation. Business Contract. Business Law. Goodwill.

## Resumo

A dissolução parcial da empresa é a ação jurídica que pode acontecer sob diversas formas de motivação, o cálculo e a apuração dos ativos incorpóreos fazem parte desse processo, com situação de sucesso ou insucesso. Neste contexto, este artigo tem por objetivo investigar a relevância do contrato empresarial e contemplar a apuração do *goodwill* na dissolução parcial da empresa. Para tanto, utilizou-se a pesquisa bibliográfica nos sítios eletrônicos de eventos e periódicos do portal da CAPES, Scielo, Google Acadêmico, e demais materiais disponibilizados em meio eletrônico, datados de 2010 a 2020. A abordagem dada as informações coletadas foram qualitativas. Após análise dos resultados, foi possível constatar que a insatisfação com a divisão do *goodwill*, fruto da dissolução parcial da empresa, quando gera processo judicial, onera os valores pagos com o desligamento da sociedade, pois a apuração jurídica de haveres, contempla não só o valor agregado individualmente pelo sócio em retirada, o cálculo em questão do *goodwill* considera o valor do conjunto empresarial como um todo, quase sempre calculado considerando o método Fluxo de Caixa Descontado (FCD), sendo assim, conclui-se que é de suma relevância evidenciar o percentual de cada sócio na apuração dos haveres gerados pelo *goodwill*, quando da elaboração do contrato empresarial, pois há que se evitar os altos custos jurídicos que são gerados com a dissolução da sociedade, seja por qualquer motivação.

**Palavras-chave:** Ativo Intangível. Avaliação de Empresas. Contrato Empresarial. Direito Empresarial. *Goodwill*.

## Resumen

La disolución parcial de la empresa es una acción jurídica que puede ocurrir en diversas formas de motivación, así el cálculo y la verificación de activos hacen parte del proceso, con situaciones de éxito o no. En este contexto, este artículo tiene por objetivo investigar la relevancia del contrato empresarial y considerar la aplicación del goodwill en la disolución parcial de la empresa. Para eso, fue utilizada la investigación bibliográfica encontrada en los sitios electrónicos de eventos y periódicos del portal de CAPES, Scielo, Google Académico y los materiales disponibles en el sistema electrónico, fechados de 2010 a 2020. El abordaje dado a las informaciones fue cualitativo. Después del análisis de los resultados, fue posible constatar que la insatisfacción con la división del goodwill, producto de la disolución parcial de empresa, cuando genera proceso judicial, encarga los valores pagos con la disolución de la sociedad, ya que la averiguación legal de activos, contempla no solamente el valor agregado individualmente por el socio en retirada, el cálculo en relación al goodwill considera el valor del conjunto empresarial como un todo, casi siempre calculado considerando el método Flujo de Caja Descontado (FCD), siendo así, se concluye que es muy importante evidenciar el percentual de cada socio en la averiguación legal de los activos generados por el goodwill, cuando se hace la construcción del contrato empresarial, para que no se tenga altos costos jurídicos que son generados con la disolución de la sociedad, sea cual sea el motivo.

**Palabras-clave:** Activos intangibles. Evaluación de la empresa. Contrato comercial. Derecho comercial. Goodwill.

## 1 Introduction

Corporate Law contemplates that with the departure of one of the partners of the company without consensus, it is necessary to carry out the business assessment and the determination of the assets of the withdrawing partner, when the judicial process is initiated, since, according to the Federal Constitution, it determines in its art.5, item XX, no one is obliged to associate or remain associated with a company, in this sense regardless of the reason for leaving the company, it is also necessary to determine intangible assets, including goodwill.

There is goodwill, a kind of organizational model that contemplates the valorization of the workforce, customer relationship policies, product innovation capacity, different ways of transacting goods, effective advertising, respect for the environment, social responsibility, among others that enables the company to earn a profit, when this does not happen, there is a negative assessment, that is, the economic loss (AQUINO, 2015).

It is worth mentioning that the gains related to goodwill, a new business paradigm, are not recognized in the financial statements, since the accounting rules prohibit the registration of the economic benefits generated internally, except when the company, or part of it, is sold, a fact that it occurs with the action of partial dissolution of the company, which requires the verification of assets (SCHMITZ; BERTONCINI, 2016).

Based on this situation, of non-acceptance when distributing amounts associated with the calculation of the financial portion related to goodwill, the purpose of this article is to investigate the relevance of the social contract to contemplate the calculation of goodwill in the dissolution of companies. For that, it is necessary to discuss Business Law, business contract and how legally the determination of assets, generated with the partial dissolution of the company, must also characterize the goodwill method and discuss the accounting for intangible assets in the light of the Pronouncement Technical CPC 04, edited by the Accounting Pronouncements Committee - CPC (2010).

The research is justified by the notoriety of little publication in the area of Business Law, which associates the percentage of previous apportionment of gains as goodwill, among partners, when the elaboration of the clauses of the business contract. Goodwill has an intangible asset, difficult to measure in accounting, but due to the updating of the Civil Code in 2015, the partner who leaves the company extrajudicially, can judicially propose an assessment of his assets, as determined by this legal rule in his art. 600.

In this sense, the intention of this research is to give notoriety that goodwill when calculated through legal disputes, even if it does not appear in accounting, this intangible asset is part of the company's intangible assets and has its value measured in court, with the possibility of incurring interest on arrears and monetary correction, if not paid within the specified period.

Within this framework of ideals, the problem that guided the research investigation was: given the importance of the intangible asset, goodwill for the capitalization of resources and valuation of the organization, what is the relevance of foreseeing in the contract the determination of goodwill in the dissolution of companies?

## **2 Business Law and the Business Contract**

The nomenclature Business Law comes from the old Commercial Law that expanded its area of activity due to the modernities of commercial relations, it consists of the branch of Private Law whose focus is on the regulation, promotion and stabilization of business practices, such as bankruptcy / judicial or extrajudicial recovery of companies, as well as credit and other securities (DINIZ, 2005).

It is opportune to comment, as explained by Diniz (2005), that Business Law does not discipline only the rights of entrepreneurs, but rather all organized economic activity for the

production and circulation of goods or services, in this sense it also covers the rights of industries, banks, transport and insurance.

As determined by the Civil Code in force, art.1º “[...] every person is capable of rights and duties in the civil order”, that is, since the person is born he already has guaranteed rights and these are governed by Law Business. It is also observed that for the national legal system the person has personality, so since he is born he brings with him a generic ability to be a subject of rights, with the capacity, as stated in Rodrigues (2011) to acquire rights and exercise, by himself or by others, acts of civil life.

In a subjective perspective, the person or entrepreneur and the company are distinct institutes, both for Accounting and for Corporate Law, in this sense, as Furtado (2005) puts it, the person's patrimony is part of the universe that constitutes the establishment. About what is a company or establishment, art. 1,142 of the Civil Code, Brazil (2002), if it deals with any complex of goods organized for the exercise of the company, by a businessman, or by a company.

The establishment exists, but it is not part of the legal relationships, as these constitute the company, so for the company to put its activities into practice, it is necessary to get involved in a series of legal relationships, which are part of the entrepreneur's heritage (CORRÊA, 2015; OLIVEIRA, 2008).

In this sense, every business society is a legal entity, whose life cycle is similar to that of an individual, who has rights to be born and die, it is born when it is founded and ends its existence when it is legally extinguished. The existence of century-old societies stands out, which go through various succession processes and remain active for several generations (CORRÊA, 2015).

The Civil Code of 2002, conceptualizes businessman in its art. 966, as “[...] who professionally carries out organized economic activity for the production or circulation of goods or services” (BRASIL, 2002).

Art. 45 of the Civil Code, informs that the legal existence of legal entities starts from the registration of the constitutive act in the respective registry. With the registration, the company acquires legal personality and, therefore, it starts to have its own assets, separate from the assets of the individuals that make up its corporate structure. In the case of the individual entrepreneur there is no separation between the company's assets and his personal assets.

Every society is created to generate economic benefits for the owners and remain in business indefinitely. Corporate Law governs that the company makes use of contracts to carry out its activities. These contracts signed by entrepreneurs respect two principles, predominantly consensualism, in which one of the parties makes a proposal, which is accepted by the other, therefore, those involved must be of legal age and have the capacity to honor each one of them. Also part of the contract is respect for the principle of relativity, which dictates that the contract only has effect for the purposes of the parties involved, in this sense it does not create any right or duty for those who are not part of the contract. Behold, every contract is liable to be invalidated or even dissolved. For registration to take place, there is a mandatory business contract, so that society actually exists (RODRIGUES, 2011).

The requirements that make a business contract valid are:

- (a) capacity of the parties, as provided for in article 104, item I, of the Civil Code;
- (b) lawful, possible and determined or determinable object, as provided for in article 104, item II, of the Civil Code;
- (c) form prescribed or not defended by law, as provided for in article 104, item III, of the Civil Code - the three being in general; and
- (d) the need for reciprocal consent and / or agreement of the will of the contracting parties - the latter of a special nature (BRASIL, 2002).

In the understanding of Correa (2015) and Rodrigues (2011) it is in the business contract that entrepreneurs clarify how the direct and indirect activities necessary for the company's existence will be carried out, respecting the constitutional principles and solidarity for the center of the primordial values to be protected. It must be ensured that the business contract may or may not present a relative position of equality, since there is the use of the entrepreneur's power to exercise his direct and indirect activities in the exercise of the company. The new legal order governs, which businessmen need to value in the scope of their contracts the valuation of the human being and solidarity, causing the order where heritage and individuality were the focus of Private Law to be forgotten, today this vision is outdated.

Therefore, it is understood that in the preparation of the company's contract, it is necessary to highlight clauses focused on the determination of assets, showing the percentage to be agreed upon for each member of society, within the scope of their social contract. It is understood that this is a solution focused on seeking the involvement of everyone so that the company is not affected by the very large amount of capital withdrawal.

In this sense, it is opportune for the company to think from the beginning of its institution in the calculation of goodwill, considering what the New Civil Code governs.

### **2.1.1 Partial Dissolution of the Company and the Investigation of Assets**

The New Civil Procedure Code - NCPC (2015) governs, meant the concern of legislators for the preservation of the systematic of procedural rules, with the purpose of making conflict resolution more functional. There were many complaints from law enforcement officials and jurisdictions across the country associated with the lack of provisions more committed to the fulfillment of constitutional rights.

One of the points contemplated by the NCPC (2015) is the situation based on the partial dissolution action of a company, which until then had been based on existing jurisprudence, as the provisions made available by the Civil Code were insufficient, more complex and did not give more speed. just social needs.

With the advent of the New Civil Procedure Code (2015), the partial dissolution action started to be governed by more specific articles, a fact that previously applied the rules associated with the total extinction of the company. In this sense, the withdrawal of a partner from society came to be contemplated in three situations, with the advent of the death of a partner, as stated in art. 1,028, from the exercise of the right of withdrawal of a partner, according to art. 1.029 or as described in art.1.030 by exclusion of partner.

According to comments by Advocacia (2015), Lana (2015) and Silva and Santos (2012) the possibility or not of including the amount related to the payment in the amount of the assets owed to the partner, who chooses to leave the company, has the same validity generated when there is a free will to form and be part of a business society, in that sense the person has the same freedom to enter and leave the company.

It is, therefore, the Civil Code (2015) that governs the rights of the partner who intends to leave the company who only needs to communicate his intention in advance, without being charged any reason for the stated intention. There is no need to prove anything judicially, as regulated by art. 1.029 of the Civil Code (BRASIL, 2002). In this sense, there is only entry into court, when there is dissatisfaction in the apportionment of the company's earnings.

Art. 600. The action can be proposed:

I - For the estate of the deceased partner, when all the successors do not join the company;

II - By the successors, after the sharing of the deceased partner is completed;

III - For the company, if the surviving members do not admit the entry of the estate or the successors of the deceased in the company, when this right arises from the social contract;

- IV - By the partner who exercised the right of withdrawal or withdrawal, if the other partners have not provided for a consensual contractual amendment formalizing the termination, after 10 (ten) days of exercising the right;
- V - For society, in cases where the law does not authorize extrajudicial exclusion; or
- VI - By the excluded partner. (BRASIL, 2015, p.125)

The partial dissolution of a company is related to the withdrawal of a partner, for whatever reason the same decides. This resolution was designed with the intention of continuing the company and society, even with the departure of the partner. Additions by Schmitz and Bertoncini (2016), explain that the intention is to end the corporate bond that existed between the retiring partner and the other partners and society. With regard to the stock assessment action, this judicial action was designed by jurists with the purpose of forcing the company to pay what the partner who leaves the company really has, which demonstrates the effectiveness of this condemnatory action, because, what is obtained for example, as goodwill calculation, must be practiced by the company.

Well sum up Schmitz and Bertoncini (2016), that all conflict generated in the dissolution of society, comes from the calculation and payment of assets. Those who stay want to pay less and those who leave want to receive more. It is also of interest to the parties to know how the payment will take place and how the payment of the assets that will be determined will have to happen.

According to Picolo (2012), the partner even adding overvaluation to the company's assets, and goodwill, with the determination of its assets, when the dissolution of the company, this calculation is performed together, which generates a higher market value than the calculated in isolation.

The amendments resulting from Law 12.973 / 14, made it easier to understand and make better use of the goodwill or term fund adopted in the legal environment.

## **2.2 Goodwill**

Thinking about goodwill requires a brief discussion of the definitions of assets and their classifications, as well as the necessary requirements for its effective recognition from the perspective of accounting science.

In the view of Martins (1972), assets can be defined as the economic result that the agent expects to obtain in the future, as a result of the investments made by him in the past. Thus, it is evident that the benefits are concentrated on the gain acquired by the manager's

action, and not on those generated by himself. Lopes (2005) also understands this way, and adds that there are still assets that are also controlled as a result of past facts. In this way, the economic advantages to come overlap with the legal personality of the asset, as long as the company has control over it.

Iudícibus (2006) informs that assets are characterized by cash flows from resources managed by the organization, whether directly or indirectly. Martins (2010) calls attention reporting that the concept brought by Iudícibus (2006) is broad, including not only the patrimony that has physical substance, but also the immaterial ones.

It is worth mentioning that assets can be grouped into two classes: tangible and intangible. It appears that the said tangible assets are found in the company in material form, such as checks, promissory notes, inventories of goods, vehicles, machines, equipment, and so on. In this way, they incorporate value for their ability to be measured, due to their perceived actions (SANTOS, 2002).

According to Nunes (2003, p.17), tangible assets "[...] are the goods that will be consumed in the future and that will contribute to the realization of products and services". The fact that they are palpable, according to the same author, facilitates the estimation of useful life with reasonable security.

As for intangibles, Santos (2002) mentions that although they do not have a corporeal nature, they allow adding value through norms, manuals, doctrines, organizational culture, as a consequence of investments applied in brands, patents, customer relationship services, capacity for innovation, socio-environmental responsibility, etc.

Marion (1989) explains that the lack of constitutive elements does not imply proof of intangible assets, as they can add value to the company's equity. Sá (2000) adds that the effective functioning of material goods comes from the people who manage it, maximizing the firm's results. Hendriksen and Breda (1999) rightly state that the simple fact of not having a physical constitution will not cause intangibles to lose their asset quality. The author argues that the same rules valid for the recognition of assets are obeyed.

According to Technical Pronouncement CPC 04 (CPC, 2010), an intangible asset should only be recognized if the future economic benefits attributed to it favor the entity, and that this gain is probable. In addition, its costs must be measured reliably, eliminating any subjectivity in the evaluation method.

According to the same Pronouncement, during the process of quantifying the intangible, reasonable and verifiable assumptions must be adopted, indicating the best estimate given to economic conditions, aiming to employ a degree of certainty regarding the possible results.

In addition, Technical Pronouncement CPC 04 (CPC, 2010) defines criteria for an asset to be identifiable: it must be separable from the entity, allowing it to be sold, licensed, rented or exchanged. Another possibility is when it results from legal or contractual rights, regardless of being detached from the company's assets.

For Santos (2002), the discussion about intangible assets arose from the increase in its non-accounting recognition, providing greater market capitalization for companies. The fact that the entity does not recognize intangible assets generated internally causes an understatement in the organization's assets.

However, given its subjective measurement, uncertainty arises as to the actual realization of probable gains. However, the complexity of quantifying an intact asset does not imply that it is impossible or unnecessary to evaluate it, it only makes it difficult to make comparisons between projects over time.

Santos (2002) mentions three elements in which intangible assets could be allocated on an organization's balance sheet, namely: human competence, which is related to the employees' ability to create assets; internal structure, corresponds to actions aimed at helping managers when making decisions, as well as including patents, brands, organizational culture, etc; and external structure, related to the relationship policy with customers and suppliers, the company's reputation, among others.

However, Technical Pronouncement CPC 04 (CPC, 2010) prohibits the accounting recognition of the goodwill derived by the expectation of future profitability generated internally, on the grounds that it is not an identifiable, controlled and reliably measured resource.

In addition, there are specific regulations on intangible assets, such as Law No. 11,638 / 2007 that inserts international accounting standards and Provisional Measure No. 449/2008, converted into Law No. 11,941 / 2009 (BARROS, 2014).

Hendriksen and Breda (1999) report that the lack of alternative use, the lack of separability and the uncertainty of realization make intangible assets endowed with a level of insecurity regarding future returns.

It is evident that according to Barros (2014) since 2007, with article 179 of Law No. 6,404 / 1986, the company needs to protect its distinctive signs, among them the corporate name, the brand, the patent, licenses and copyrights. Thus, these assets and rights are recorded at cost at the acquisition cost.

When citing Fernandes (et al., 2014, p. 89), the author exemplifies that when considering that the registration of a certain trademark with the INPI represents an expense of R \$ 6,000.00 (six thousand reais), “between services of creation of logo, attorney fees and costs of the industrial property protection body, their accounting recognition could follow the scheme below ”. Only as an illustration title, the value of “Other assets and rights” - R \$ 10,000.00 - will be replaced by Cash.

Ativo	Passivo
Caixa /Banco	
_____	
_____	
a) 10.000 1.200 (C)	Patrimônio líquido
b) 10.000 4.000 (d)	Capital Inicial
_____	10.000 (a)
14.800	10.000 (b)
Imobilizado	
Estações de trabalho	
_____	
c) 1.200	
Imobilizado	
_____	
Microcomputadores	
d) 4.000	
Intangível	
Marca	

Source: BARROS apud FERNANDES et. al., 2014, p. 89.

It is undeniable that the accounting guidelines are of paramount importance to the judicial administrator when evaluating the intangible assets of the bankrupt and / or in recovery company. And, “it will also be at this point in the process of isolated sale of goods, that the appraisers will be able to perform the impairment test”, which is the comparison of the fair value of the intangible asset with the value recorded in accounting (BARROS, 2014, p. 68).

Among the non-identifiable intangible assets that provide market value for companies is goodwill.

Glautier and Underdown (2001) define goodwill as the sum of immaterial qualities that contribute to the success of a business, such as the lasting relationship with creditors, employees' skill and expertise, good reputation, etc. Martins (2010) declares that the attributes of goodwill make the company have a propensity of increased profitability for the sector in which it operates, due to the synergy of multiple intangible assets that are not identifiable in isolation, as required by Technical Pronouncement CPC 04 (CPC, 2010).

It is worth mentioning that goodwill will only be accounted for in the financial statements when the business establishment is sold. At this time, the acquirer is responsible for recording the difference between the consideration transferred and the identifiable assets and liabilities at fair value, in compliance with Technical Pronouncement CPC 15 (CPC, 2011), which deals with business combinations.

For Martins (2010), it is from the sale transaction that intangible assets are evaluated objectively, as a consequence of the difference between market and book values. However, it does not imply that goodwill arises at the time of sale, but that it already existed internally, even though it could not be accounted for.

In Almeida's view (1997), goodwill can be classified into several categories, namely: financial, when the legal entity has a positive image that manages to attract investors; negative or badwill, book value higher than market capitalization; subjective, profitability above the opportunity cost is expected; purchased, occasion when a firm is acquired and the amount disbursed is reserved to the account of the purchasing company.

In addition, it has commercial goodwill, which relates to the location of the business, credit facility, effective advertising, well-trained team of employees, etc; industrial, related to the facility in obtaining credit to replace the raw material, compliance with financial obligations on time, etc; and, finally, political, due to the good relationship with the government.

According to Ornellas (2000), goodwill can be grouped into two types: acquired and not acquired. The first refers to assets that cannot be identified, that is, goodwill. The second is generated internally and recorded as an expense incurred in the period, due to the accrual basis.

Accordingly, goodwill is related to the corporation's market value that exceeds the shareholders' equity recorded by accounting. Therefore, there is a causal link that involves company valuation and goodwill.

For Monobe (1986), the aforementioned link stems from the expectation of future profits attributable to non-identifiable and unrecorded intangible assets, causing an underestimation of corporate equity. Thus, the residual value given to the location of the firm, intellectual capital, effectiveness of advertisements, financial fluidity, although they are not accurately measured, the moment the company is sold, all amounts will be incorporated into goodwill.

It is worth mentioning, Carla Eugenia Caldas Barros (2014, p. 68), when quoting the author Fernandes, that the changes brought about in 2007 in the accounting procedure originated from the changes in the accounting system, in North American accounting standards, as well as in the treatment of intangible assets in the equity formation of business entities. Therefore, Goodwill can no longer be grouped in balance sheets as intangible assets, but rather classify them separately and divide them by classes, while it must “justify the estimated useful lives of these intangible assets”.

Thus, the importance of goodwill for investors, especially shareholders, is noteworthy, as it reveals the ability to provide future returns, which directly impacts the aggregation of market value for the entity, making it valuable information for the various users.

Neiva (1999) reports that goodwill belongs to the company as a whole, and does not exist as a segregated value from other assets. It is an inseparable part that cannot be traded in isolation, being the economic returns of property of the investors, who are interested in checking their quotation.

In this light, Padovani (2011) mentions that the valuation process of mercantile companies has been highlighted in the business environment, due to the need to know the value

of the business. This managerial information gives a global view of the enterprise's performance, assisting managers in the decision-making process.

## **2.2. Method of Calculating Goodwill Value: Discounted Cash Flow (FCD)**

There are several methods available to price an entity. However, in this work only the Discounted Cash Flow (FCD) was approached, which, according to Santos (2002) and Picolo (2012), is one of the most used to calculate the market value. Damodaram (2003) points out that the DCF is more suitable for organizations that present positive cash flows, which can be reliably forecast in the periods to come. It is, therefore, a methodological approach widely used by financial institutions, consulting companies and other interested parties when they want to analyze the viability of investments.

The FCD starts from the widely accepted proposition that what provides value to a company is its propensity to generate cash over time. Since these flows are positive, it becomes an effective indicator of the availability of resources for the entity and the shareholders. There are two ways to measure using the DCF method, namely: Free Cash Flow for Companies (FCLE) and Free Cash Flow for Partners. This research was limited to analyzing the first technique.

In the meantime, Padovani (2011) claims that the FCLE represents what is available to settle the obligations assumed with creditors and partners, disregarding the incidence of interest, amortization and disbursement with dividends. The starting point is the net income from taxes adjusted to depreciation of property, plant and equipment and amortization of intangible assets, with the deduction of supplementary investments in working capital and capital expenditures.

The free cash flow approach for companies is defined mathematically by the following expression:

$$VPL = \sum_{t=1}^{\infty} \frac{FCLE}{(1 + WACC)^t}$$

Where,

The NPV corresponds to the Net Present Value; FCLE is Free Cash Flow for the Company in period t; and, the WACC (Weighted Average Cost of Capital) represents the

discount rate in a mixed capital structure (third parties and own), considering the costs of equity and debt. In turn, the WACC is defined by the formula below:

$$WACC = k_1 * \frac{PO}{PL} + k_2 * \frac{PL}{PO}$$

K1 is the cost of debts (the ratio of interest to principal in the use of interest-bearing liabilities); PO imports into Interest Liabilities (loans, financing and debentures); the PL refers to the Shareholders' Equity; and, the term means the cost of equity.

According to Endler (2004), the cost of equity (k2) is the rate required by investors to make an equity investment in the entity. If the effective return is less than the required rate, the shareholder will exercise his option to invest in the financial market. Damodaram (2003) says that the most prescribed method to quantify the cost of equity is the model based on risk and return, the preferred one being the Capital Asset Pricing Model (CAPM), given by the subsequent equation:

$$E(R_i) = R_f + \beta_{im} * [E(R_m) - R_f]$$

Where, E (R<sub>i</sub>) corresponds to the expected return of a certain asset or portfolio; the R<sub>f</sub> is the risk-free interest rate; β<sub>im</sub> is the beta coefficient, which measures the sensitivity of the asset's returns in relation to the market, and is defined by: and, the E (R<sub>m</sub>) concerns the expected return of the market.

When the projection period ends, the entity, as a rule, does not go into liquidation. Therefore, it is crucial to estimate cash flows that go beyond the reliable projection, the so-called perpetuity or residual value. In this, premises are made about the growth of all future flows, which are transformed into just one, as if it were generated in the period after the end of the projection. To find perpetuity, use the following formula:

$$V_c = \frac{FCLE_p * (1 + g)}{WACC - g}$$

Where,  $V_c$  is the residual value or perpetuity;  $FCLE_p$ , the company's free cash flow from the last projection year; the WACC refers to the weighted average cost of capital;  $e$ ,  $g$  is the perpetuity growth rate.

For Damodaram (2003), the value of the entity is represented by the sum of the present value of cash flows with perpetuity. That is, both must be brought to their current value through the discount rate (WACC). Mathematically it is expressed:

$$VE = \sum_{n=1}^T \frac{FCLE_n}{(1 + WACC)^n} + \frac{FCLE_p * (1 + g)}{WACC - g}$$

Where,  $VE$  is the company's Value;  $n$ , the cash flow period;  $e$ ,  $t$  is the projection period number.

With these considerations in mind, the goodwill value represents the positive difference between  $VE$  and book equity. If this dissimilarity is negative, the company will have a badwill.

According to Aquino (2015), there is a lack of consensus between the parties when the company is dissolved, that is, the partner's departure for any reason whatsoever, which also determines goodwill, for this same author, unless it is contemplated in the contract, the amount determined as goodwill, as dictated by the express legal provision, must be paid as governed by the provisions of art. 1.031, paragraph 2, of the Civil Code (BRASIL, 2002).

Art. 1.031. In cases where the company resolves itself in relation to a partner, the value of its share, considered by the amount effectively realized, will be settled, unless otherwise provided for in the contract, based on the company's equity situation, at the date of resolution, verified in a specially raised balance sheet.

§2 The settled quota will be paid in cash, within ninety days, from the settlement, unless otherwise agreed, or contractual stipulation to the contrary (BRAZIL, 2002)

In the case of the dissolution of the company, the calculation of goodwill occurs when there is no understanding of the values taken when leaving the company. Legally speaking, as exposed by Lana (2015), Silva and Santos (2012) and Schmitz and Bertoncini (2016), when they affirm that it is necessary to try to avoid conflicts, trying to make as explicit as possible what is the responsibility of each partner, in the same way that make use of strategies based on

management practices, corporate governance and corporate structuring, encouraging the satisfaction of needs and favoring the existence of good relations.

### **3 Methodology**

The method applied in the realization of this article, consisted of bibliographic research in a virtual environment, considering as sources of research for the development of the main objective, which was to investigate the relevance of the social contract to contemplate the determination of goodwill in the dissolution of companies, content was searched from the CAPES database, Scielo, Google Scholar, and other materials made available in electronic media, dated from 2010 to 2020.

The research carried out in the CAPES database, obtained 1,583 contents associated only with “Business Law”, by applying filters considering the term “goodwill”, no results were related.

The same situation and repeated in the Scielo database, 29 titles related to “Business Law” and 17 were related with the addition of the terms “goodwill” and “Business Law”.

Google Scholar was more extensive with the search for the term “Business Law”, approximately 372,000 results were listed, with the application of filters for the period and the term “goodwill” the ratio reduced to approximately 1,910 contents.

Removing the repeated titles, and adding the term “contract”, the list reduced to 14 contents. By doing a complete reading of the titles and abstracts, it was found that none of the studies listed in any of the searches brings the purpose elaborated for the realization of this article.

The search carried out on specific sites for the publication of legal content, which are not periodicals, such as articles from the portal Jusbrasil and a digitized law book, the search related, 3 articles that, although working on the dissolution of society and investigation and characterization of goodwill, the authors Aquino (2015), Picolo (2012) and Lana (2015), refer to the importance of planning and contemplating when drafting the business contract to list clauses related to the dissolution of the company, and the calculation for determining goodwill , with the proposal to avoid future judicial conflicts.

Therefore, the final sample of the study included several studies, but only 04 contemplate the general objective. Studies prior to the aforementioned period are also considered to support the other objectives.

The approach given to the information collected was qualitative. Qualitative research is said to be the type of research that has a descriptive character, hence enabling the researcher to know in order to know better. In this type of research, we seek to interpret a phenomenon or object of study, where the key instrument is the researcher, the study site is the direct source of the data (MARCONI and LAKATOS, 2011).

#### **4 Results and Discussions Regarding the Relevance of Predicting the Goodwill Allocation in Contract**

Through the application of bibliographic research in a virtual environment, in the period of May, June and July of the year 2020, using the terms "Business Law, goodwill and business contract", 03 contents were considered and the fact that the Civil Code (2002) in its article art.1.031, §2, it is verified that when the company contract also contains clauses that stipulate the amount to be paid when calculating goodwill, in the case of partial dissolution of the company, it becomes effective what is stipulated in it.

The reading in the studies found that, in general, the opening of the judicial process and the action to determine assets, is the main consequence when there is no agreement on the amounts paid associated with goodwill. As can be seen in this study and in the teachings of Aquino (2015), the lack of consensus between the parties when the dissolution of the company is cited, that is, the partner's departure for any reason whatsoever, which generates the judicial process, which takes the legal determination of goodwill.

For this same author, unless it is contemplated in a contract, the amount determined as goodwill, as dictated by the express legal provision, must be paid as governed by the provisions of art. 1.031, §2, of the Civil Code.

Art. 1.031. In cases where the company resolves itself in relation to a partner, the value of its share, considered by the amount effectively realized, will be settled, unless otherwise provided for in the contract, based on the company's equity situation, at the date of resolution, verified in a specially raised balance sheet.

§2 The settled quota will be paid in cash, within ninety days, from the settlement, unless otherwise agreed, or contractual stipulation to the contrary (BRASIL, 2002).

Considering that the dynamics of societies constantly undergoes changes, Aquino (2015), in his study attentive to the importance of a well-studied and written social contract,

which reduces the margin for insecurity, anticipating and planning the evaluation criteria and the actions of verification of assets, in the case of a corporate dissolution, whatever the reason.

Piccolo (2012) justifies this concern, pointing out that the current dynamics of mercantile societies are increasingly intense, with changes in market paradigms, the arrival of new businesses, the end of societies arising from old friendship relationships that through competition fierce markets have become deadly enemies, ill-intentioned partners focused on giving blows and deviations to companies, mental illness and death of partners and the cases of entrepreneurs who abandon their businesses and seek new directions for their existence, which favor the disconnection of the society with legal disputes.

In Piccolo's (2012) understanding that planning the social contract, considering not only the succession planning and the prenuptial pacts of family law, so prominent in the legal reality of the companies, it is also necessary to envision contingencies to deal with the hypotheses of the unsuccess of the family. Business, departure of partners or even disputes between the other partners. The proposal is to carry out an in-depth study, contemplating all these possibilities that generate insecurity for the company, and during this planning, contemplate, predict and plan evaluation criteria and actions in the case of a corporate dissolution, whatever its motive without coming to there is also an action to determine assets.

Lana (2015) in his study is much more effective with regard to the determination of goodwill, when the partner is removed from society and considers it opportune, to investigate whether or not the partner is entitled to a plus value in his assets, due to the its performance in carrying out activities in the company, measure whether or not there was excellent and exemplary performance, favoring the company's success in the market.

In this sense, the study by Lana (2015) recommends trying to clarify, via Economic Analysis of Law and legal foundations, the possibility of monetarily valuing the commitment to the success of society. The study talks about divergences created with the end of the society, in the opposite opinions emanated by other partners in the question of whether or not there is real emphasis on more dedication and more results on the part of the departing partner. In this sense, he comments that it is important to plan a legal analysis, to investigate the real gain of the partner's goodwill, without there being a lawsuit, which considers all the company's intangible assets, not only that generated by the partner's participation.

## **5 Final considerations**

This article aimed to investigate the relevance of the business contract to contemplate the determination of goodwill in the partial dissolution of the company, it was obtained with the development of the study that the main relevance is presented in the possibility that the company is given to anticipate, when preparing of the social contract and contemplate the specific rules of apportionment when calculating goodwill in situations that constitute the dissolution of companies.

It is inferred that, in the absence of legal disagreements with the termination of the partner of the company, the company avoids the withdrawal of large sums by opening motivating lawsuits to determine assets, which also include goodwill, considering the calculation using the most appropriate method. Adopted by the jurisprudence which is the calculation based on the discounted cash flow (FCD). This type of evaluation leads the company to pay more to the partner who withdraws from the company. In this sense, it is salutary that in the company's social contract clauses that deal with the departure of the partners are already prescribed, determining how much each partner will have in the calculation of goodwill.

Given the above, the dialogue between civil law and accounting is perceived. Undoubtedly, this interdisciplinarity in the contemporary world, in which the search for the right to justice and the pacification of conflicts is essential, makes it possible for these areas to complement each other, serve as support and provide legal security in economic and business areas.

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