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# Corporate governance and directors' duties in Brazil: overview

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## CORPORATE GOVERNANCE TRENDS

### 1. What are the main recent corporate governance trends and reform proposals in your jurisdiction?

In the past few years there has been a continuous trend of initiatives and proposals to promote and improve governance practices in the country.

Such initiatives have included the following:

- Proposals for the review and/or creation of corporate governance codes. This included the Corporate Governance Code issued by the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários*) (CVM) (*see Question 4*).
- The approval of new regulations and regulation amendments inspired by corporate governance principles.

The most recent corporate regulation focuses on the stimulation of the development of economic activities in the country, especially through the solidification of corporate governance practices and modernisation/simplification of corporate-related rules and proceedings. Such main regulation is further detailed below.

**Developments in corporate law**

- **Federal Law No. 13.818 of 24 April 2019 (Law 13.818/2019): new rules on disclosure of information and legal publications.** Law 13.818/2019 has introduced two alterations to the Corporations Act:
  - (effective as of 24 April 2019) closely-held companies with less than 20 shareholders and net equity of less than BRL10 million became exempt from publishing their corporate acts and financial statements with the official gazette and local newspaper (publications which were previously required by the Corporations Act). The exemption previously established in the Corporations Act was more restrictive and applied only to companies with less than 20 shareholders and net equity of less than BRL1 million.
  - Corporate publications in the official gazette and local newspaper can be done in summary if their complete versions are made available in the official gazette and local newspaper websites. (Effective from 1 January 2020.)
- The core goal of the initiatives above was to reduce companies' costs with legal obligations.
- The matter relating to legal publications has been under intense discussion. In such context, it was issued the Provisional Measure No. 892 of 5 August 2019 which established that all corporations, regardless of their number of shareholders and net equity) were no longer required to publish information and documents in the official gazette and local press printed editions, but only disclosed through the internet through specific websites. The Provisional Measure was not converted into law within the statutory deadline and, therefore, its rules are no longer effective.
- **Federal Law No. 13.874 of 20 September 2019 (Law 13.874/2019).** The so-called Law of Economic Freedom. Its main goal was to stimulate the development of economic activities in the country. One of the most notable amendments introduced by the Law of Economic Freedom is the possibility of incorporating and maintaining limited liability companies with one single shareholder. Before the enactment of this law, limited liability companies were required to have at least two shareholders.
- **Brazilian Securities and Exchange Commission (CVM).** The CVM has been continuously improving its regulations to meet best corporate governance standards and practices. Among the relevant regulation reforms recently approved are the following:
  - **CVM Instruction No. 586 of 8 June 2017 (ICVM568): adoption by the CVM of the Corporate Governance Code.** The main objective of ICVM568 is to incorporate certain provisions of the Corporate Governance Code into CVM Instruction No 480 of 7 December 2009, which is the general regulation dealing with publicly held companies' registration with CVM and related obligations. The rules introduced by ICVM568 apply to publicly held companies with shares listed and traded on the Brazilian Stock Exchange. Since July 2019, such listed companies are required to submit to CVM a Corporate Governance Code Report (*Informe sobre o Código Brasileiro de Govenança Corporativa*) in which they must inform what recommendations set out in the Code were adopted by them. As the Code is based on the "comply or explain" principle (*see Question 4*), if any of the recommended practices were not adopted, the companies must explain why;
  - **CVM Instruction No. 567 of 15 June 2015 (ICVM567): negotiation by publicly held companies of their own shares and derivatives.** This instruction has replaced the general regulation on the matter (*CVM Instruction No. 10 of 14 February 1980 (ICVM10)* and *CVM Instruction No. 390 of 8 July 2003 (ICVM390)*). Among the rules introduced by ICVM567 are certain additional disclosure obligations that the company's management must comply with when submitting transactions with the company's own shares or derivatives for shareholder approval;
  - **CVM Instruction No. 565 of 15 June 2015 (ICVM565): public M&A transactions.** ICVM565 has improved publicly held companies' disclosure obligations relating to merger, spin-off and amalgamation transactions. Additionally, ICVM565 introduced additional disclosure obligations (particularly for financial information and financial statements relating to the transactions) and established managers' fiduciary duties regarding the disclosed information; and

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- **CVM Instruction No. 561 of 7 April 2015 (ICVM561): remote voting.** The main objective of ICVM561 is to facilitate shareholders' participation in general meetings, by means of the regulation of the remote voting process using simplified mechanisms. The new rules established by ICVM561 relating to remote voting were incorporated in CVM Instruction No. 481 of 17 December 2009, which is the general regulation dealing with shareholders' meetings and proxy voting.

- **Trade Registration Department (DREI).** The DREI is the federal authority responsible for the regulation of commercial registries in Brazil. The DREI has recently issued DREI Normative Ruling No. 66 of 6 August 2019 (DREI NR No. 66/2019) establishing that the companies' corporate filings will be centralised in the Board of Trade of the State where their head office is based. Previously, companies with branches located in other States were also required to perform filings in each specific State. This amendment simplifies the process for corporate filings and also represents a cost reduction for companies.

### Clean Company Act

The enactment of the Clean Company Act (*Federal Law No. 12,846 of 2013*) was also a significant boost to corporate governance in the country.

The law applies to virtually every company (either foreign or Brazilian) headquartered in the country, or which has a local subsidiary or representative office, and it strictly forbids acts such as:

- Bribery.
- Fraud in public procurement.
- Bid rigging (and virtually any conduct that aims to restrict competition in public bids).
- Fraud in contracts signed with public bodies, impairing public officers' investigative activities.
- Influencing or financing others to engage in illegal acts against the government.
- Manipulating the economic-financial equilibrium of a public contract or gathering any type of advantage from amendments or extensions of public contracts.

Although it is focused on companies, the law emphasises that managers will also be liable to the extent that they have been found guilty of the illegal practices prohibited by the law.

In order to mitigate exposures, companies are encouraged to invest in compliance and prevention, including by means of governance practices. Consequently, Brazilian companies have been applying considerable efforts in the adoption of anti-corruption policies and procedures, codes of conduct, as well as in the improvement of their internal controls of business risks, reporting and disclosure mechanisms, among others.

## CORPORATE ENTITIES

**2. What are the main forms of corporate entity used in your jurisdiction?**

Brazilian legislation provides for several company forms. Among them, the Brazilian individual limited liability companies, the Brazilian limited liability company (*sociedade empresária limitada*) and the Brazilian corporation (*sociedade anônima*) are the most commonly used.

Other company forms have not been accepted in practice, especially because most of them provide for unlimited shareholder liability.

### Individual limited liability companies

Brazilian legislation also provides for the so called individual limited liability company (*empresa individual de responsabilidade limitada*) (EIRELI) which allows the existence of a sole shareholder (which may be an individual or legal entity) in its corporate structure. The EIRELI was originally created as an alternative for the Brazilian limited liability company, which, until the enactment of the Law of Economic Freedom, required at least two shareholders to be incorporated and maintained.

Considering the requirements for incorporation of an EIRELI and lack of solidity its institutes (since the regulation is new and not fully tested), and the fact that limited liability companies can now have a single individual or legal entity as a shareholder, the EIRELI will likely become superseded by sole shareholder limited liability companies.

### Limited liability companies

Limited liability companies are governed by the Civil Code (*Federal Law 10,406 of 2002*). In case of omissions and depending on the language of the company's articles of association, the rules under the Civil Code relating to limited liability companies may be supplemented by the rules in the Civil Code relating to the *sociedade simples* (a corporate type also established by the Civil Code) or by the Corporations Act (*Federal Law 6,404 of 1976*).

The limited liability company structure is usually recommended for companies that envisage a simple governance structure. The legislation grants these types of companies more freedom to organise their internal structure and decision-making process, as well as a lower grade of transparency and disclosure obligations. That is why these corporate entities are mostly used in wholly owned companies.

### Corporations

Corporations are governed by the Corporations Act, which provides a more sophisticated legal regime for corporate activities, management and shareholders' relations, corporate governance structures, decision-making processes, transparency and disclosure obligations, and conflict resolution procedures. This corporate entity is more appropriate for a co-owned equity structure, such as joint ventures, as well as for the participation of various kinds of stakeholder, such as financing entities or holders of debt instruments.

A corporation can be held either publicly or privately. As a general rule, a publicly held corporation has its securities traded on the stock exchange and/or on the over-the-counter market.

## LEGAL FRAMEWORK

**3. Outline the main corporate governance legislation and authorities that enforce it. How influential are institutional investors and other shareholder groups in monitoring and enforcing good corporate governance? List any such groups with significant influence in this area.**

### Main corporate governance legislation and authorities that enforce it

Corporate governance is governed by the following:

- Civil Code, which provides a specific section dedicated to limited liability companies.
- Corporations Act, which applies to publicly and privately held corporations and limited liability companies that choose the Corporation Act's subsidiary application in their articles of association.
- Rules set out by the Brazilian Securities and Exchange Commission (CVM), which apply to publicly held corporations.

This includes the Corporate Governance Code for Publicly Held Companies (Corporate Governance Code) (*see Question 4*).

- Rules enacted by the Brazilian Stock Exchange (BM&F Bovespa). The BM&F Bovespa has created differentiated listing segments, with rules setting out corporate governance practices and transparency requirements in addition to those already established under Brazilian corporate legislation. The adherence to the listing segments better advertises the company's efforts to improve its relations with its investors and increases the potential for appreciation in asset value. This adhesion is voluntary and must be approved by the BM&F Bovespa.
- There are currently four special listing segments established by the BM&F Bovespa:
  - Bovespa Mais;
  - Bovespa Mais Level 2;
  - Level 1;
  - Level 2; and
  - Novo Mercado.
- The basic difference between such segments is the level of demand for differentiated governance practices by the companies that adhere to their respective regulations.
- The Novo Mercado has the highest level of corporate governance requirements. The following are some of the main requirements:
  - the company's corporate capital must be represented only by common shares (that is, voting shares);
  - the company must maintain a minimum "free float", which may vary between 15% and 25% of the company's share capital, depending on the average trading volume of the company's shares or public offerings. The term "free float" means shares issued by the company, except for those shares held by the controlling shareholders and related parties, the company's officers and directors, as well as those shares kept in treasury by the company;
  - in the event of sale of a company by the controlling shareholder(s), the remaining shareholder(s) must be granted tag along rights so that they can sell their interest on the same conditions as the controlling shareholder(s);
  - a company's board of directors (board) must comprise at least five members, with a unified term of office of two years. At least 20% of the total board members or two (whichever number is higher) must be independent;
  - a company must prepare an annual agenda of its corporate events (such as ordinary corporate meetings, disclosure of the results or public meetings with market analysts and investors);
  - in the event of a company's delisting or cancellation of registration as a publicly held company, the company or its controlling shareholder(s), as the case may be, must perform a tender offer for the acquisition of the company's remaining shares using the economic value criteria;
  - any dispute involving the company must be settled by arbitration under the Market Arbitration Panel Rules;
  - the positions of chairman of the board and chief executive officer (CEO) cannot be held by the same person;
  - a company must prepare a trading policy regarding its securities, which must be applicable, at least, to the company itself, the controlling shareholder(s), company's officers, members of the board, members of the fiscal council (if established) and members of any statutory bodies with technical or advisory functions.
  - mandatory establishment of a statutory or non-statutory audit committee; and
  - mandatory implementation of a statutory public offering in the case of an acquisition of relevant participation in the company. The definition of relevant participation must be established by each company within the range of 20% to 30% of the company's total shares.

The answers below relate to the regulation applicable to the Novo Mercado listing segment (*Novo Mercado Regulation*).

The Code of Best Practices in Corporate Governance (IBGC Code) (*see Question 4*). The IBGC, a not-for-profit organisation, has played a very important role in the introduction and dissemination of the corporate governance concept in Brazil. IBGC introduced the IBGC Code, currently in its fifth edition.

### Institutional investors

Institutional investors are very influential in monitoring and enforcing good corporate governance. The most significant institutional investors are:

- Private equity investment funds, which are required by law to participate in invested companies' decision-making processes and effectively influence the determination of their business strategies and management.
- Brazilian Development Bank (BNDES), which establishes certain minimum governance practices which companies that the bank invests in must comply with.
- Pension funds. The National Monetary Council has established rules regarding pension funds' investment limits in companies, based on the BM&F Bovespa listing segments.

## 4. Has your jurisdiction adopted a corporate governance code?

### Code of Best Practices in Corporate Governance (IBGC Code)

The Code of Best Practices in Corporate Governance (IBGC Code) is considered the most established and comprehensive code relating to corporate governance in Brazil.

The IBGC Code is divided into the following five chapters:

- Shareholders.
- Board of directors.
- Board of officers.
- Fiscal and controlling bodies.
- Conduct and conflicts of interest.

The first four chapters contain a set of best practices and recommendations. The last chapter discusses conduct standards for an entity's agents, in addition to proposing policies and practices to avoid conflicts of interest and misuse of assets and information.

The compliance with the recommendations set out in the IBGC Code is not mandatory and the IBGC Code does not set out a special compliance procedure. Any type of corporate entity can choose to comply with the IBGC Code; the IBGC Code is not confined to a specific type of corporate entity.

Non-compliance with the IBGC Code does not trigger any penalties.

The regulations of the BM&F Bovespa listing segments and the Corporate Governance Code for Publicly-Held Companies (Brazilian Corporate Governance Code) are also considered as corporate

governance codes applicable to the companies concerned (*see Question 1* and *Question 3*). Non-compliance with the BM&F Bovespa listing segments regulations is punishable by penalties issued by the BM&F Bovespa. On the other hand, the Corporate Governance Code is based on the "comply or explain" principle (*see Question 4*).

### Corporate Governance Code for Publicly Held Companies (Corporate Governance Code)

The Corporate Governance Code was jointly drafted by a working group comprised of representatives of the IBGC and the main self-regulatory capital market entities in Brazil (that is, the Brazilian Stock Exchange (*BM&F Bovespa*) and the Brazilian Association of Publicly-Held Corporations (ABRASCA)).

The Corporate Governance Code aims to consolidate and standardise the recommendations of the main self-regulatory entities in Brazil for publicly held companies, including the recommendations contained in the IBCG Code. The Corporate Governance Code is based on the "comply or explain" principle (*see Question 4*).

## CORPORATE SOCIAL RESPONSIBILITY AND REPORTING

**5. Is it common for companies to report on social, environmental and ethical issues? Highlight, where relevant, any legal requirements or non-binding guidance/best practice on corporate social responsibility.**

Reporting on social, environmental and ethical issues is more common among publicly held companies. Such a report is usually included in the management report, which must be annually presented by every corporation and describes the company's business and main administrative facts that occurred in a given year.

The Brazilian Securities and Exchange Commission (CVM) has issued a practice bulletin regarding the preparation of management reports, also recommending some fundamental matters that should be addressed in it, for example:

- Comments on macroeconomics.
- Human resources.
- Research and development.
- Environmental protection.
- Perspectives for the subsequent fiscal year.

CVM also published a recommendation to include information relating to decisions taken under the instruction of controlling shareholders as a matter to be addressed in the management report.

## BOARD COMPOSITION AND RESTRICTIONS

**6. What is the management/board structure of a company?**

### Structure

**Limited liability companies.** The Civil Code does not establish a formal management structure for limited liability companies. Similarly, the existence of a board in a limited liability company, although possible (*see Question 1*), is not expressly provided for, since the board is only regulated by the Corporations Act (*see below, Structure*). Because of this, and considering that limited liability companies usually have a simplified structure, any further reference to board of directors in this chapter refers solely to corporations.

**Corporations.** Under the Corporations Act, the management powers are vested in the company's officers and the board, or only the officers. The existence of a board is mandatory only for publicly held companies, companies with authorised capital and mixed capital companies (that is, companies whose corporate capital is held both by private parties and the state, being the later, as a general rule, its majority shareholder).

In any case, the board is a deliberative body only; the company's representation rights rest solely with the company's officers. Brazilian legislation does not provide for a two-tiered board structure.

**Fiscal council.** Brazilian legislation establishes the fiscal council for both limited liability companies and corporations. The fiscal council is not part of the company's management, being essentially a supervisory/inspection body which reports directly to the shareholders. As a general rule, the fiscal council may be either permanent or temporary. A fiscal council is appointed by the shareholders.

### Management

**Limited liability companies.** The management is carried out by one or more officers (or managers) resident in Brazil, who can be, but do not have to be, shareholders. Their appointment is made by the shareholders, who may attribute a specific designation to them. The managers' functions and responsibilities are set out in the applicable legislation and the company's articles of association.

**Corporations.** The management is carried out by:

- The officers and elected by the shareholders meeting or the board.
- If applicable, the board (*see above, Structure*).

Officers and board members are jointly referred to as managers under the Corporations Act (accordingly, any reference to managers of corporations in this article includes both directors and officers). In general, management structure, composition, functions and responsibilities are determined by the Corporations Act and the company's bye-laws.

Since the board of directors is a deliberative body, its members do not have specific titles. However, the board must have a chairman, chosen among the board members (*Corporations Act*).

Although officers are not required to have a specific designation, it is common for companies to designate their officers in the bye-laws (for example, as chief executive officer (CEO) and chief financial officer (CFO)). An exception is made for publicly held companies that are required to have an investors' relations officer with specific functions.

### Board members

See above, *Management*.

### Employees' representation

According to the Corporations Act, the company's bye-laws may provide for the participation of an employees' representative in the board. An employee's representative is chosen by employees' votes in a free election, organised by the company jointly with the labour unions representing the employees.

### Number of directors or members

**Limited liability companies.** A minimum or maximum number of officers (managers) is not fixed by law.

**Corporations.** A corporation must have at least two officers and if there is a board, three directors. Generally, up to one-third of the board members can also serve as officers.

## 7. Are there any general restrictions or requirements on the identity of directors?

### Age

Brazilian corporate law is silent on this matter. The general principles regarding civil capacity apply. Considering that, generally, an individual reaches civil majority at 18, it is commonly understood that this should be the minimum age for election as manager of a company.

### Nationality

**Limited liability companies**. Officers must be Brazilian residents. If the shareholders want to elect a non-resident person as an officer, that individual must first apply for a permanent visa to obtain the required resident status in Brazil.

**Corporations.** The position relating to officers is the same as for limited liability companies (*see above, Number of directors or members*). Directors do not have to be Brazilian residents. However, companies that perform certain regulated activities (such as communication and broadcasting) must have Brazilian nationals as managers.

### Gender

The Brazilian legislation does not provide for any gender quotas requirement.

## 8. Are non-executive, supervisory or independent directors recognised or required?

### Recognition

Non-executive and supervisory directors are not recognised in Brazil. Independent directors are recognised but are not mandatory. The existence of independent directors is considered good corporate governance practice, being provided for in the IBGC Code, Novo Mercado Regulation and in the Corporate Governance Code.

### Board composition

The companies listed in the *Novo Mercado* segment must be composed of a minimum of 20% independent board members. There is no such requirement for other companies.

The IBGC Code does not define a specific number or proportion of independent directors, but establishes that such a number or proportion should be "relevant" in respect of the total number of company directors. There is no specific definition for what is considered "relevant" for such a purpose.

The Corporate Governance Code sets out that one-third of the board members should be independent directors.

### Independence

Under the *Novo Mercado* Regulation, an independent director is defined as an individual who:

- Has no ties with the company except for owning the company's shares.
- Is not a controlling shareholder, the controlling shareholder's spouse or a relative to the second degree, and is not, or has not been in the last three years, linked to a company or entity with ties with the controlling shareholder.
- Has not been a manager of the company or employed by or worked for the company, the controlling shareholder or any other company controlled by the company.
- Is not a direct or indirect supplier or purchaser of the company's services or products or both, to a degree that results in loss of independence.
- Is not an employee or manager of a company or entity that buys from, or supplies services or products to, the company.
- Is not a spouse or a relative to the second degree of any manager of the company.
- Does not receive any compensation from the company except for that related to its activities as a member of the board.

The IBGC Code and the Corporate Governance Code also provides for a definition of independent director which is conceptually similar to the one above.

## 9. Are the roles of individual board members restricted?

Under the Corporations Act, up to one third of the members of the board can also serve as officers.

Under the Novo Mercado Regulation and the Code of Best Practices in Corporate Governance (IBGC Code), the roles of chairman and CEO (or main executive) of a company cannot be held by the same person.

## 10. How are directors appointed and removed? Is shareholder approval required?

### Appointment of directors

The members of the board are appointed by the general shareholders' meeting.

### Removal of directors

The members of the board can be removed, at any time, by the general shareholders' meeting. In this sense, it is not possible for Brazilian companies to have a staggered board.

## 11. Are there any restrictions on a director's term of appointment?

The Corporations Act sets out a maximum three year term in office for managers. Reappointment is permitted. No similar restrictions apply to officers of limited liability companies.

Directors of companies listed in the Novo Mercado segment must not have a term in office exceeding two years. The Code of Best Practices in Corporate Governance (IBGC Code) sets out the same recommendation. The Corporate Governance Code contains no provision in this regard.

# DIRECTORS' REMUNERATION

## 12. Do directors have to be employees of the company? Can shareholders inspect directors' service contracts?

### Directors employed by the company

Brazilian corporate legislation does not require directors to be employees of the company.

### Shareholders' inspection

The right to inspect the company is an essential right assured to all shareholders, who must exercise this right in accordance with the applicable legislation.

The conditions of the agreements executed by and between the publicly held company and its directors and senior employees can be disclosed to the annual shareholders' meeting, at the request of shareholders representing 5% or more of the company's share capital (*Corporations Act*).

### 13. Are directors allowed or required to own shares in the company?

Directors are not required to own shares in the company.

Directors owning shares in publicly held companies are subject to disclosure obligations set out by the corporate legislation and the Brazilian Securities and Exchange Commission (CVM).

### 14. How is directors' remuneration determined? Is its disclosure necessary? Is shareholder approval required?

#### Determination of directors' remuneration

The shareholders' meeting must determine the total or individual remuneration of the company's managers, including benefits and allowances, taking into account (*Corporations Act*):

- The managers' responsibilities.
- Time dedicated by the managers to their tasks.
- The managers' competence.
- The managers' professional reputation.
- Market practices.

#### Disclosure

The minutes of the publicly held company's shareholders' meeting, approving manager remuneration, must be registered before the board of trade and disclosed to the market.

The Brazilian Securities and Exchange Commission (CVM) sets out additional disclosure requirements related to the remuneration of publicly held companies' managers, which includes the disclosure of the highest and lowest remuneration levels.

The Corporate Governance Code also requires the disclosure of information regarding the existence of:

- Different remunerations within the board members.
- The existence of remuneration based in the attendance by the directors to meetings and/or short-terms results.

The IBGC Code recommends the disclosure of the individual remuneration of each manager. There are increasing numbers of publicly held companies that choose to disclose their managers' remuneration under such individual terms.

As a general rule, privately held companies must register the shareholders' meeting minutes approving manager remuneration before the board of trade.

#### Shareholder approval

The shareholders determine the managers' remuneration (*see above, Determination of directors' remuneration*).

#### General issues and trends

Due to its complexity, the structuring of managers' remuneration is subject to debate. Apart from the general provisions mentioned above, which includes the final approval of the remuneration by the shareholders' meeting (*see above, Determination of directors' remuneration*), there is no specific legislation regulating the subject.

The IBGC Code and the Corporate Governance Code deal with the matter on a non-specific basis, setting out general principles and recommendations that should be observed by a company and the shareholders when defining managers' remuneration.

Among the relevant discussions on managers' remuneration structuring and terms, the following is highlighted:

- Payment of variable compensation to directors and the inclusion of short-term incentives. Regarding this, the IBGC Code recommends:
  - different compensation structures for directors and officers;
  - the avoidance of compensation linked to short-term results to directors.
- Structuring of officers' variable compensation. Regarding this, the IBGC Code recommends that:
  - the global remuneration of the officers is linked to results, with short and long-term incentives;
  - the compensation structuring becomes an effective mechanism to align the company's and its officers' objectives.

The investment manuals disclosed by institutional investors in Brazil also provide general recommendations regarding managers' compensation. These recommendations are usually aligned with the ones set out in the IBGC Code and in the Corporate Governance Code.

## MANAGEMENT RULES AND AUTHORITY

### 15. How is a company's internal management regulated? For example, what is the length of notice and quorum for board meetings, and the voting requirements to pass resolutions at them?

Apart from the applicable legislation, companies' internal management is regulated by the articles of association (limited liability companies) or bye-laws (corporations), as well as shareholders' agreements, if any.

The general quorum for board meetings is the majority of attending members (Corporations Act). This quorum can be increased by the company for certain matters. Other than in relation to the board meeting's quorum, the applicable legislation does not provide specific rules regarding the management meeting proceedings. This matter can be freely determined by the company and its shareholders in the company's bye-laws or articles of association. The IBGC Code and the Corporate Governance Code set out some recommendations relating to the management meeting proceedings.

### 16. Can directors exercise all the powers of the company or are some powers reserved to the supervisory board (if any) or a general meeting? Can the powers of directors be restricted and are such restrictions enforceable against third parties?

#### Directors' powers

The Corporations Act provides a non-exhaustive list of the powers of the board, which includes:

- Establishing the general strategy for the company's business.
- Supervising the performance of the officers, which includes examination of the company's books and records and the right to request information on contracts.
- Electing and dismissing officers and determining their duties.

- Convening the general shareholders' meeting.

The company's bye-laws may grant additional powers to the directors, subject to the exclusive attributions of the shareholders' meeting. However, the board is a deliberative body only, and the company's general representation rights remain with the officers.

The *Novo Mercado* Regulation contains a list of the board attributions in addition to the ones set out in the Corporations Act. The bye-laws of the companies that comply with this listing segment must take these powers into account. The IBGC Code and the Corporate Governance Code also contain an entire chapter on the board, which includes the board's expected powers.

Some powers of the company are reserved for the shareholders' meeting, for example (*Corporations Act*):

- Amending bye-laws.
- Approving financial statements (*see Question 23*).
- Establishing the fiscal council and appointing its members.
- Appointing board members.
- Determining management compensation.
- Approving the company's merger, consolidation, spin-off and dissolution.

These powers cannot be delegated to any other corporate body.

### Restrictions

Restrictions on directors' and officers' powers are enforceable against third parties provided they are set out in the company's bye-laws, which must be registered before the board of trade. The restrictions must comply with corporate legislation and other applicable regulation.

**17. Can the board delegate responsibility for specific issues to individual directors or a committee of directors? Is the board required to delegate some responsibilities, for example for audit, appointment or directors' remuneration?**

Powers conferred by law exclusively on the board cannot be delegated to any other corporate body.

This restriction does not prevent the company from creating board committees to assist or advise the board in relation to certain matters. Board committees may include, among others:

- Audit committees.
- Human resources/compensation committees.
- Governance committees.
- Finance and sustainability committees.

## DIRECTORS' DUTIES AND LIABILITIES

**18. What is the scope of a director's general duties and liability to the company, shareholders and third parties?**

### General duties

**Corporations.** Managers (that is, directors and officers) are subject to (*Corporations Act*):

- **A duty of care.** Managers must use the necessary care and diligence that any average and honest person would use in the management of his own business.
- **A duty of loyalty.** Managers must not benefit or must not cause third parties to benefit from their position. Managers must keep information regarding the company's business confidential.
- **A duty to avoid conflicts of interest.** A manager must not take part in any corporate operation or deliberation in which his personal interests conflict with those of the company.

In addition, managers of publicly held companies have a duty of disclosure and must comply with the information policies set out by the Corporations Act and by the CVM regulations.

Managers must not be personally liable for the obligations arising from agreements executed on behalf of the company and in connection with regular acts of management, except when the damages and losses have occurred due to either:

- Fault, negligence or wilful misconduct on the managers' part.
- Any breach of the law or the company's bye-laws.

Managers are jointly and severally liable for damages caused as a result of their non-compliance with the legal duties relating to the regular management of the corporation even if, based on the corporation's bye-laws, liability would not be applicable to all managers. An exception is made for publicly held companies that set out in their bye-laws specific responsibilities for their officers, for example, for the investor relations officer.

In principle, a manager must not be liable for unlawful acts of managers, except if that manager:

- Has consented to the illegal activity implemented by the other managers.
- Was negligent in not discovering such illegal activities.
- Having discovered the illegal activity, did not act to avoid or stop it.

To be exempt from the liability that arises from other managers' illegal activity or from measures taken by the corporation that may result in damages or losses, the manager must dissent and make his dissent attested in the minutes of the relevant meeting.

Whether a manager can be criminally liable depends on the characterisation of his conduct as illicit according to the provisions of the law. Criminal liability is based on misconduct by the manager. Criminal liability is similar in nature to civil liability, except that to be criminally liable, a manager's misconduct must be more severe, and also offensive to the public order, and therefore a crime.

In this respect, managers may be criminally liable for, among others:

- Crimes against the company's assets, for example, fraud and/or provision of false information about the company.
- Crimes under the economic law (*Law 7,492 of 1986 (Crimes Against the Financial System); Law No. 1,521 of 1951 (Crimes Against the Economy)*).
- Crimes in bankruptcy proceedings, for example, fraud against creditors.
- Crimes set out in the Consumer Code.
- Insider trading (applicable only to publicly held companies).

**Limited liability companies**. The section dedicated to limited liability companies in the Civil Code does not contain any specific provision relating to managers' duties and responsibilities. The general duties are applicable, *mutatis mutandis* (that is, with consideration to the respective differences), to managers of a limited liability company if the company is also governed by the Corporations Act. If not, the Civil Code provisions relating to the duties of managers of the *sociedades simples*, which are conceptually similar to the ones set out by the Corporations Act, apply. Criminal liability applies in any case, except for insider trading (*see above, General duties*).

### 19. Briefly outline the regulatory framework for theft, fraud, and bribery that can apply to directors.

Managers can be held liable for theft and fraud, as provided above (*see Question 18, General duties*).

Brazilian anti-corruption legislation provides for the possibility of managers' personal liability for corrupt acts, which are typified as crimes under Brazilian legislation (*see Question 18, General duties*). Such liability may also be applied whenever the company is used for an abuse of power, as a facilitator or shield for the practice of violations to anti-corruption legislation, or as a form of co-mingling assets.

### 20. Briefly outline the potential liability for directors under securities laws.

All publicly held companies, as well as their managers, are subject to the Brazilian Securities and Exchange Commission (CVM) supervision. Any violation of the Corporations Act and CVM regulations may subject managers to administrative penalties.

### 21. What is the scope of a director's duties and liability under insolvency laws?

Managers can be held liable for acts during bankruptcy and judicial recovery proceedings (*see Question 18, General duties*).

### 22. Briefly outline the potential liability for directors under environment and health and safety laws.

Managers may be held liable for environmental damages, if either:

- Their actions are due to negligence, imprudence, wilful misconduct or are against the company's bye-laws (civil liability).
- There is evidence that they were aware of the crime and did not take the necessary steps to avoid it (criminal liability).

Managers may also be held liable for violations of health and safety regulations.

### 23. Briefly outline the potential liability for directors under anti-trust laws.

The Anti-trust Law provides for the possibility of managers' personal liability for violations to the anti-trust legislation. Such liability is applied whenever the manager is considered as an agent of, or contributor to, the given violation.

### 24. Briefly outline any other liability that directors can incur under other specific laws.

Managers' liability may also include:

- Employment law liability.
- Tax liability resulting from acts performed with an abuse of power, or in breach of the law or the company's bye-laws.
- Liability for violating the consumer defence regulations.
- Data protection liability resulting from the company acting in breach of the Civil Rights Framework for the use of the internet in the country.

### 25. Can a director's liability be restricted or limited? Is it possible for the company to indemnify a director against liabilities?

Managers' liability for breach of duties described above (*see Question 18, General duties to Question 24*) cannot be limited. A company can contractually agree to indemnify its managers. Indemnity is usually provided through Directors' and Officers' insurance (D&O insurance).

### 26. Can a director obtain insurance against personal liability? If so, can the company pay the insurance premium?

Managers can have Directors' and Officers' insurance (D&O insurance), which may work to protect them against lawsuits brought by shareholders and/or third parties eventually affected by the management's actions.

The insurance premium is normally paid by the company.

### 27. Can a third party (such as a parent company or controlling shareholder) be liable as a de facto director (even though such person has not been formally appointed as a director)?

As a general rule, a third party can be held individually liable for acts done on behalf of the company, when that third party performed the act without proper authorisation.

## TRANSACTIONS WITH DIRECTORS AND CONFLICTS

### 28. Are there general rules relating to conflicts of interest between a director and the company?

The Corporations Act establishes a duty to avoid conflicts of interest (*see Question 18, General duties*). The IBGC Code and the Corporate Governance Code set out additional provisions relating to conflicts of interest.

### 29. Are there restrictions on particular transactions between a company and its directors?

A manager can only enter into transactions with the company under reasonable and fair conditions, identical to those prevailing in the market or under which the company would contract with third parties.

Any transactions that take place that do not observe these rules are subject to annulment and the manager involved will be obliged to transfer to the company the advantages that he or she may have obtained by virtue of this irregular contract.

### 30. Are there restrictions on the purchase or sale by a director of the shares and other securities of the company he is a director of?

As a general rule, the shareholders can freely transfer their shares and securities. Certain restrictions may be established contractually,

for example a lock-up period and right of first refusal, among others. In relation to limited liability companies, share transfers to third parties must be previously approved by shareholders representing at least 25% of the company's share capital.

Brazilian corporate legislation sets out additional rules for the trading of the publicly held companies' securities by their managers.

In general terms, managers are forbidden from trading with securities issued by a publicly held company, or backed by it, before either:

- The disclosure of any material fact regarding the company's business, as defined by the Brazilian Securities and Exchange Commission (CVM).
- The disclosure of the company's quarterly and annual results.

The Novo Mercado Regulation, IBGC Code and the Corporate Governance Code establish additional dispositions regarding the trading of shares, which includes the requirement of the implementation of a securities trading policy by the company.

## DISCLOSURE OF INFORMATION

### 31. Do directors have to disclose information about the company to shareholders, the public or regulatory bodies?

The Civil Code, the Corporations Act and the CVM regulation establish several disclosure obligations for managers in relation to the company's information.

**Limited liability companies.** Information that must be disclosed to shareholders includes, but is not limited, to:

- Management accounts and balance sheets.
- Corporate documents (such as articles of association and amendments, minutes of corporate resolutions). Certain corporate documents must also be published in the press (usually acts that could affect creditors' rights, such as the documents deliberating on merger, spin-off, consolidation, dissolution and excess capital reduction).

**Corporations**. Information that must be disclosed to shareholders includes, but is not limited, to:

- Annual management accounts and financial statements, which also must be published in the press.
- Corporate documents to be effective against third parties, minutes of a meeting must also be published in the press after being filed with the Board of Trade.
- Any documents related to shareholder meeting agendas.

**Publicly held corporations** Documents and information that publicly held companies must disclose both on an ordinary and extraordinary basis to the Brazilian Securities and Exchange Commission (CVM) and the market in general (including shareholders) are:

- Corporate documents (bye-laws, shareholders' agreements, minutes of corporate meetings, material fact notices and communications to the market).
- Financial statements, management reports and other financial information.
- A registration form (*Formulário Cadastral*) which summarises, among other things, the company's basic information, such as name, headquarters, business sector, website, investor relations officer, types and ownership of securities issued, stock exchanges in which such securities are traded and independent auditors. This form must be constantly updated by the company.
- A reference form (*Formulário de Referência*). This is a very similar to the 20-F form requested by the US Securities and Exchange Commission (SEC). The *Formulário de Referência* must be provided by the publicly held company annually and updated periodically. The form contains complex and substantial information regarding the company's business and operations

Companies that carry on regulated activities (for example, telecommunications, energy, oil and gas) must also comply with the disclosure obligations set out by the respective regulatory agencies.

## SHAREHOLDER RIGHTS

### *Company meetings*

### 32. Does a company have to hold an annual shareholders' meeting? If so, when? What issues must be discussed and approved?

Companies must hold an annual shareholders' meeting during the first four months after the end of each fiscal year to deliberate on the following matters:

- For limited liability companies:
  - management accounts and year-end balance sheet and economic results; and
  - election of managers, if applicable.
- For corporations:
  - management accounts and year-end financial statements;
  - allocation of the net profits for the fiscal year and distribution of dividends; and
  - election of managers and members of the fiscal council, if any, and establish their remuneration.

Special meetings can be held whenever the corporate interest so requires.

### 33. What are the notice, quorum and voting requirements for holding meetings and passing resolutions?

Apart from the Civil Code and the Corporations Act, shareholders' meetings are regulated by the articles of association (limited liability companies) or bye-laws (corporations), as well as shareholders' agreements, if any. The general rules regarding shareholders' meetings notices, quorums and voting requirements are below.

**Limited liability companies:**

- Meetings' call notices must be published in the official press. Call notice publication may be waived if all shareholders are attending the meeting.
- The general quorum for holding meetings in a first call is of three quarters of the corporate capital. Meetings are held with any number of shareholders in a second call.
- The general quorum for deliberation is of 50% plus one of all the shareholders present at the meeting.
- Meetings may be waived whenever the matters are decided in writing by all the shareholders. Teleconferencing and remote participation are allowed.
- The articles of association may establish higher quorums for holding meetings and passing deliberations.

**Corporations:**

- Meetings' call notices must be published in the official press. Call notice publication may be waived if all the shareholders are attending the meeting. Publicly held corporations must comply with additional disclosure requirements regarding meetings and meetings material.
- The general quorum for holding meetings in a first call is of one quarter of the voting shares. Meetings are held with any number of voting shares in a second call. Certain matters, such as bye-laws reform, require a higher quorum (66% of the voting shares).
- The general quorum for deliberation is 50% plus one of all voting shares represented at the general shareholders' meeting.
- Teleconferencing and remote participation are allowed, as provided for in law.
- The bye-laws of closely held corporations may establish higher quorums for holding meetings and passing deliberations.

### 34. Are specific voting majorities required by statute for certain corporate actions?

**Limited liability companies.** The Civil Code establishes certain matters which require a super majority vote, that is, 50%, 66% or 75% of all outstanding shares. Such matters include deliberations regarding amendments to the articles of association, merger, amalgamation and the company's dissolution.

**Corporations.** The Corporations Act establishes certain matters that require a supermajority vote, that is, at least 50% of all outstanding voting shares. Such matters include deliberations regarding the reduction of mandatory dividends, changes to the corporate purposes, mergers/spin-offs, and the winding-up, liquidation or dissolution of the corporation. In these specific cases, dissenting shareholders will be entitled to exercise dissenting rights, which will allow them to withdraw from the corporation by selling their shares to it.

### 35. Can shareholders call a meeting or propose a specific resolution for a meeting? If so, what level of shareholding is required to do this?

It is the managers' duty to call shareholders' meetings.

Such meetings can also be called by:

- Any shareholder, if there is a delay in calling the meeting for more than 60 days.
- Holders of more than 20% (limited liability companies) or 5% (corporations) of the company's corporate capital when the company's managers do not comply, within eight days, with the formal request to convene a meeting. Such a request must clearly demonstrate the proposed meeting agenda.

#### Minority shareholder action

### 36. What action, if any, can a minority shareholder take if it believes the company is being mismanaged and what level of shareholding is required to do this?

**Limited liability companies.** Similarly to corporations, shareholders can request a shareholders' meeting to discuss the managers' actions. If the limited liability company is also governed by the Corporations Act, a civil liability claim can be brought against the managers (*see below, Corporations*). If the company is not so governed, shareholders can seek compensation for damages based on the general civil liability rules set out in the Civil Code.

**Corporations.** All shareholders have the essential right to inspect the management of the company's business. The Corporations Act entitles minority shareholders to:

- Request documents and information to verify the company's direction, pursuant to applicable legislation.
- Request the calling of a shareholders' meeting and propose a specific agenda, which may include the consideration of managers' actions.
- Call a shareholders' meeting in case managers do not comply with the formal request (*see Question 33*).

In Addition, the Corporations Act provides two kinds of legal actions that can be brought against managers:

- A civil liability claim brought by the company itself aiming at compensation for damages to its corporate assets. This claim is subject to the prior approval of the shareholders.
- A civil liability claim brought by any shareholder or by a third party that suffered damages due to managers' actions.

## INTERNAL CONTROLS, ACCOUNTS AND AUDIT

### 37. Are there any formal requirements or guidelines relating to the internal control of business risks?

The corporate legislation does not provide any formal requirements or guidelines regarding the internal control of business risks. Such matters are dealt with by the IBGC Code and the Corporate Governance Code.

### 38. What are the responsibilities and potential liabilities of directors in relation to the company's accounts?

The company's accounts must be prepared by the management in strict compliance with the applicable corporate and accounting legislation.

The approval of the company's accounts by the shareholders, with no exceptions or restrictions, excludes the managers' liability. An exception is made in cases of manager error, wilful misconduct, fraud or forgery.

### 39. Do a company's accounts have to be audited?

The following companies must have their accounts audited by an independent auditor registered with Brazilian Securities and Exchange Commission (CVM):

- Publicly held companies.
- Large entities (either corporations or limited liability companies), that is, a company or group of companies under the same corporate control which had, in the previous fiscal year, either:
  - assets totalling an amount higher than BRL240 million; or
  - an annual gross revenue higher than BRL300 million.

Companies that do not meet the specifications above may voluntarily choose to have their accounts audited.

### 40. How are the company's auditors appointed? Is there a limit on the length of their appointment?

The board or the shareholders' meeting appoints and dismisses the company's independent auditors.

Independent auditors of publicly held corporations' have a maximum five year term in office, and must not be re-appointed by the same company for three years following the end of their term in office.

### 41. Are there restrictions on who can be the company's auditors?

To be an independent auditor, the accountant (either individual or legal entity) must be registered with the Brazilian Securities and Exchange Commission (CVM) and the Accounting Regional Council (CRC).

### 42. Are there restrictions on non-audit work that auditors can do for the company that they audit accounts for?

Independent auditors of publicly held companies cannot provide any consultancy services that may cause the loss of objectivity and independence to:

- The company they audit accounts for, its subsidiaries or parent companies.
- Companies in the same economic group.

Also, according to the rules issued by the Accounting Regional Council (CRC), before an independent auditor agrees to provide a service to the company not related to the company's audit, it must previously have determined that providing this service would not somehow put its independence at risk.

### 43. What is the potential liability of auditors to the company, its shareholders and third parties if the audited accounts are inaccurate? Can their liability be limited or excluded?

Independent auditors can be held liable for any damages caused to third parties due to negligence or wilful misconduct in performing their duties.

The managers' responsibility for the information in the company's financial statements does not prevent the independent auditors' responsibility for their audit report.

### 44. What is the role of the company secretary (or equivalent) in corporate governance?

Under Brazilian corporate law, a company secretary is not mandatory. However, the appointment of a company secretary is considered good corporate governance practice, being provided for in the IBGC Code and in the Corporate Governance Code.

According to the IBGC Code, a company secretary must be a non-director appointed by the board. A company secretary's main responsibilities include:

- Assisting the chairman in setting the agenda for board meetings and sending it out to other directors.
- Interacting with officers and senior management to satisfy requests for clarification and information made by the directors.
- Providing support to the directors and members of the board committees in the performance of their activities.
- Drafting, filing and registering the minutes of the board meetings.

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**Publications**

- *Distributed generation in Brazil: The bright future of Brazilian renewable energy - Energy, Infrastructure and Projects Global Insight, DLA Piper, August 2019.*
- *Electricity Projects & Regulation 2019 – Brazilian Chapter, Latin Laywer, August 2019.*
- *Electricity Projects & Regulation 2018 – Brazilian Chapter, Latin Laywer, August 2018.*
- *Winds of change to the Brazilian Energy Industry offshore 2019 - NordicLight Magazine, Edition May - July 2019.*
- *Electricity Projects & Regulation 2017 – Brazilian Chapter, Latin Laywer, August 2017.*
- *Corporate Governance and Directors' Duties Global Guide 2015/2016 – Brazilian Chapter, Practical Law Company, March 2016.*
- *Electricity Regulation in Brazil: overview, Global Guide 2015/2016, Practical Law Company, April 2015.*
- *Global Legal Insights Mergers & Acquisitions – Fourth Edition, Global Legal Group, 2015.*
- *Global Legal Insights Mergers & Acquisitions – Third Edition, Global Legal Group, 2014.*
- *Global Legal Insights Mergers & Acquisitions – Second Edition, Global Legal Group, 2013.*
- *Private Mergers and Acquisitions Multi-jurisdictional Guide – Brazilian Chapter, Practical Law Company, August 2013.*
- *Public Mergers and Acquisitions Multi-jurisdictional Guide – Brazilian Chapter, Practical Law Company, April 2012.*
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- *Corporate Governance and Directors' Duties Global Guide 2015/2016 – Brazilian Chapter, Practical Law Company, March 2016.*
- *Global Legal Insights Mergers & Acquisitions – Fourth Edition, Global Legal Group, 2015.*
- *Global Legal Insights Mergers & Acquisitions – Third Edition, Global Legal Group, 2014.*
- *Global Legal Insights Mergers & Acquisitions – Second Edition, Global Legal Group, 2013.*
- *Private Mergers and Acquisitions Multi-jurisdictional Guide – Brazilian Chapter, Practical Law Company, August 2013.*
- *Public Mergers and Acquisitions Multi-jurisdictional Guide – Brazilian Chapter, Practical Law Company, April 2012.*
- *Corporate Governance and Directors Duties Handbook – Brazilian Chapter, Practical Law Company, July 2011.*
- *Public Mergers and Acquisitions Multi-jurisdictional Guide – Brazilian Chapter, Practical Law Company, May 2011.*

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