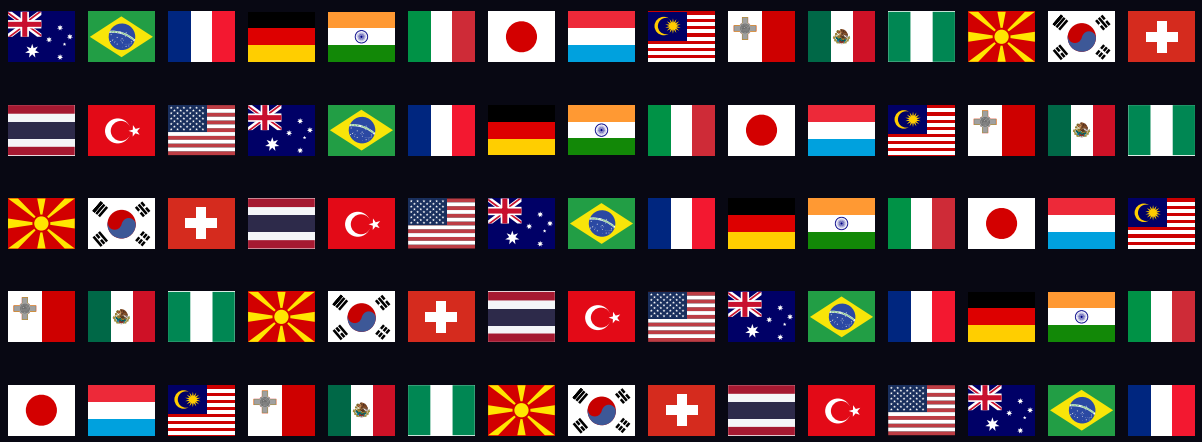
CORPORATE GOVERNANCE

Brazil



LEXOLOGY
Getting The Deal Through

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Corporate Governance

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Quick reference guide enabling side-by-side comparison of local insights into corporate governance issues worldwide, including sources of rules and practice; responsible agencies and notable opinion formers; shareholder powers, decisions, meetings, voting, duties and liabilities; employee role in governance; corporate control issues; board structure and composition, duties, leadership, committees, meetings and evaluation; director and senior management remuneration; director protections; disclosure and transparency; hot topics, such as shareholder engagement, and sustainability, pay ratio and gender gap reporting; and other recent trends.

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SOURCES OF CORPORATE GOVERNANCE RULES AND PRACTICES

Primary sources of law, regulation and practice

What are the primary sources of law, regulation and practice relating to corporate governance? Is it mandatory for listed companies to comply with listing rules or do they apply on a 'comply or explain' basis?

The primary sources of law are the Civil Code (Law No. 10,406/2002), the Corporations Law (Law No. 6,404/1976), the Securities Law (Law No. 6,385/1976) and the Capital Markets Law (Law No. 4,728/1965).

The Civil Code regulates a wide range of topics, such as those related to property, family and obligations. However, it also sets forth the basic corporate governance legal framework applicable to limited liability companies. Although limited liability companies are the most common type of company in Brazil, this type of company cannot go public or raise funds in the capital markets.

The Corporations Law regulates both closely held and publicly listed corporations. It regulates, in a comprehensive way, corporate governance matters that are important for corporations, including shareholder rights, board structures, duties and responsibilities of board members and officers, tag-along rights, public offerings, financial statements and shareholders agreements, among other things. The Corporations Law may also apply to limited liability companies on a subsidiary basis if the articles of association of the limited liability company so provide.

In addition, there are other regulations and best practices related to corporate governance that may be enforceable according to the specific characteristics of the corporation. For instance, the Securities and Exchange Commission of Brazil (CVM) is the securities market authority in Brazil, which regulates the capital markets and its participants and has the competence to issue rules, directions, opinions, decisions and releases. The CVM's rules are usually called 'instructions' and are mandatory for listed corporations.

One of the main rules enacted by the CVM in connection with corporate governance is Instruction No. 480/09, which applies to all listed corporations. The Instruction regulates a wide range of matters, such as mandatory filings, disclosure of information and financial statements. In 2017, Instruction No. 480/09 was amended to incorporate the Code of Corporate Governance – Listed Corporations, which provides for good practices related to shareholding structures, board composition and internal controls, among other things, thereby adopting the apply or explain approach.

The main stock exchange of Brazil, Brasil, Bolsa e Balcão SA (B3), is the most important institution that enables the country's capital markets to function, organising and allowing the activities of trading, post-trading and registration enforceable for listed companies. B3 is also responsible for issuing corporate governance guidelines applicable according to the companies' listing segment, such as Novo Mercado, Level 2, Level 1, Bovespa Mais and Bovespa Mais Level 2.

Lastly, the Brazilian Institute of Corporate Governance (IBGC) also plays an important role in the Brazilian corporate governance framework. Although the IBGC's rules are non-binding, they are widely adopted by the most important market players. Periodically, the IBGC reviews its Code of Best Practices for Corporate Governance, which has proved to be an important guide on corporate governance in Brazil.

Law stated - 08 April 2022

Responsible entities

What are the primary government agencies or other entities responsible for making such rules and enforcing them? Are there any well-known shareholder or business groups, or proxy advisory firms, whose views are often considered?

The National Monetary Council (CMN) is the supreme agency of the National Financial System of Brazil. The CMN is responsible for issuing the rules and guidelines for all financial institutions of the country. In addition, the CVM is an independent agency that regulates the capital markets and its listed companies, with powers to investigate, prosecute and impose sanctions.

In addition, the IBGC, founded in 1995, is referenced across the country and is one of the world's best corporate governance organisations. One of its purposes is to produce and spread knowledge about best practices in corporate governance by contributing to the sustainable development of organisations. The IBGC publishes the Best Practices Code and coordinates a group called the Interacting Working Group, which was responsible for creating the Code of Corporate Governance – Listed Corporations, now incorporated into the regulations enacted by the CVM. The Code presents the best practices of the market as a critical benefit of investment in Brazil and a source of attraction to the country for listed corporations.

The main stock exchange of Brazil (B3) has different listing segments for the trading of shares according to the corporate governance practices adopted by the companies. The Novo Mercado is a segment composed of companies that voluntarily adopt corporate governance practices in addition to those required by law.

Law stated - 08 April 2022

THE RIGHTS AND EQUITABLE TREATMENT OF SHAREHOLDERS AND EMPLOYEES

Shareholder powers

What powers do shareholders have to appoint or remove directors or require the board to pursue a particular course of action? What shareholder vote is required to elect or remove directors?

Shareholders can appoint and remove directors or officers by at least a majority vote, or a higher quorum, subject to the specific provisions set forth in the by-laws of the company.

If the corporation only has a board of executive officers (closely held companies are not required to have a board of directors), their members shall be elected and removed by the shareholders. However, if the corporation has both a board of directors and a board of executive officers (which is mandatory for public companies), directors shall be elected and removed by the shareholders, and the officers shall be elected and removed by the board of directors.

The purpose of appointing directors is to enable the separation between the ownership and management of the corporation. Listed corporations, mixed capital corporations and those corporations with authorised capital must have a board of directors to avoid conflicts of interest with the shareholders.

Law stated - 08 April 2022

Shareholder decisions

What decisions must be reserved to the shareholders? What matters are required to be subject to a non-binding shareholder vote?

According to the Corporations Law, the shareholders, whose votes are binding, shall make the following decisions in the shareholders' meeting:

- amending the by-laws;
- electing and removing directors or officers;
- approving annually the company's accounts and financial statements from the past year;
- issuing debentures;

- suspending shareholders' rights;
- approving the valuation of the shareholders' assets for the purpose of paying up the share capital;
- issuing participation certificates;
- approving the transformation, merger, spin-off, dissolution or liquidation of the company, and the appointment and destitution of liquidators and approving the company's accounts;
- approving the administrator to request bankruptcy or request financial reorganisation; and
- voting, in public companies, about contracting with related third parties, selling or asset contributing to another company if the value of the operation is over 50 per cent of the company's total assets as demonstrated in the last approved balance sheet.

In Brazil, non-binding shareholder votes do not apply.

Law stated - 08 April 2022

Disproportionate voting rights

To what extent are disproportionate voting rights or limits on the exercise of voting rights allowed?

As a general rule, each common share corresponds to one vote in the resolutions of the shareholders' general meeting. The shareholder principle of 'one share, one vote' has the purpose of promoting the alignment of interests among all shareholders by making the power represented by the right to vote proportional to the economic rights attributed to each share.

Nonetheless, closely held companies and publicly listed corporations that have not negotiated their shares in the stock exchange can issue ordinary shares with up to 10 voting rights each, subject to compliance with a range of legal requirements. The issuance of shares bearing disproportionate voting rights requires, among others, a majority shareholder vote approval; said approval may also determine a defined term, conditions for losing the disproportionate voting rights and the number of additional voting rights conferred to each share.

Under Brazilian law, corporations are also allowed to issue preferred stock, normally with no voting rights, that must be provided for in the by-laws of the company. However, preferred stock shall grant other benefits to their bearers, such as priority in the distribution of dividends, fixed dividends or minimum dividends.

Law stated - 08 April 2022

Shareholders' meetings and voting

Are there any special requirements for shareholders to participate in general meetings of shareholders or to vote? Can shareholders act by written consent without a meeting? Are virtual meetings of shareholders permitted?

There are no special requirements for shareholders duly invested in their capacity to participate in general meetings of shareholders or to vote. However, there is a procedure for calling that must be followed at the shareholders' meeting. The call must be made by a published notice in at least three different places containing, in addition to the place, date and time of the general meeting, the agenda and, in the case of an amendment to the by-laws, an indication of the subject matter.

A shareholder can nominate by proxy another shareholder, a director of the company or a lawyer to represent him or her in the general meeting. Moreover, in 2015, the Securities and Exchange Commission of Brazil (CVM) issued a ruling (the

instructions of the CVM, 570) regarding distance voting for corporations (regulating a provision brought by Law No. 12,431 of 2011).

Closely held corporations usually act by written consent when shareholders representing 100 per cent of the shares sign the relevant meeting minutes, even though acting by written consent without a meeting is not expressly authorised by the Corporations Law.

The CVM issued a new regulation in 2020 (Instruction No. 622/20) addressing virtual shareholders' general meetings. In light of the new regulation, public companies may choose between in-person meetings, virtual meetings and a hybrid of these options. Under the new regulation, virtual meetings are those in which the shareholders may only attend and vote through electronic systems, whereas hybrid meetings are those in which the shareholders may attend and vote either in person or through electronic systems.

In Brazil, as a result of the global coronavirus pandemic, initial measures were adopted through an executive order that allowed the CVM to quickly set the general rules for holding virtual meetings. What had been initially designed as a temporary measure was permanently incorporated into the country's legal framework through Law 14,030/20, which established the holding of virtual meetings as a permanent fixture of the Brazilian markets – not only for public companies but also for closely held corporations and other types of companies, such as limited liability companies.

Law stated - 08 April 2022

Shareholders and the board

Are shareholders able to require meetings of shareholders to be convened, resolutions and director nominations to be put to a shareholder vote against the wishes of the board, or the board to circulate statements by dissident shareholders?

Under Brazilian law, there is a clear distinction between the powers of each body of the company (eg, shareholders' general meetings, board of directors and officers), and the powers of one specific body, as a general rule, cannot be delegated to another body. Consequently, resolutions adopted by the shareholders against the wishes of the board are not an issue. Nevertheless, the board of directors can make recommendations with respect to resolutions to be adopted by the shareholders, but the shareholders are free to resolve against the recommendations of the board. This same principle applies to the nomination and removal of members of the board as the power to do so resides with the shareholders.

The power to convene shareholders' meetings resides with the board (or, in the case of its absence, with the officers). However, shareholders can require meetings to be convened to approve certain matters when directors fail to do so in a timely manner under the terms required by the corporation's by-laws. However, shareholders requiring meetings to be convened is rare as the rule is that directors shall convene the meetings.

Lastly, the law is silent regarding provisions granting shareholders the right to require the board to circulate statements by dissident shareholders.

Law stated - 08 April 2022

Controlling shareholders' duties

Do controlling shareholders owe duties to the company or to non-controlling shareholders? If so, can an enforcement action be brought against controlling shareholders for breach of these duties?

Regarding controlling shareholders, Brazilian law expressly states that they are liable for the abuse of their power,

which is subject to enforcement action, and damage caused to the corporation. Examples of the abuse of power include: deviating from the company's scope; entering into business combinations that are detrimental to the company; and appointing board members who are not suitable for the role. A claim for damages against the controlling shareholder may be proposed by shareholders representing 5 per cent of the company's stock, or by any shareholder if a guarantee is provided in case the courts dismiss the claim.

Law stated - 08 April 2022

Shareholder responsibility

Can shareholders ever be held responsible for the acts or omissions of the company?

The shareholders' responsibility is limited to the issuance price of the subscribed shares held by each shareholder in the corporation. However, in special circumstances, legislation permits the piercing of the corporate veil. These circumstances are restricted to the diversion of the company's purpose through the wilful use of the legal entity with the purpose of harming the creditors and for practising illicit acts of any nature; and the lack of clear separation between the assets of the company and the assets of directors, officers and shareholders.

Notwithstanding the above, consumer protection and environmental law, as well as employment case law, adopt a less stringent approach to piercing the corporate veil. For those matters, and depending on the circumstances, the shareholders can be held liable if the company is unable to pay its obligation.

Law stated - 08 April 2022

Employees

What role do employees have in corporate governance?

Shareholders must use their power to enable the corporation to accomplish its purpose and perform its social role, and they shall have duties and responsibilities towards the other parties, the employees and the community in which it operates. The by-laws may provide for an employee to be a member of the board of directors or member of an advisory body of the corporation, such as the fiscal council or the audit committee. However, for state-controlled corporations in the sphere of the federal government, the board of directors must have at least one representative of the company's employees. To be admitted to the board, the representative of the employees must comply with all requirements of the law and the by-laws of the company.

Law stated - 08 April 2022

CORPORATE CONTROL

Anti-takeover devices

Are anti-takeover devices permitted?

In Brazil, hostile takeover bids are not yet as common as they are in more mature markets, such as the United States and the United Kingdom. Nonetheless, in the last decade, Brazil has experienced a boost in its capital markets, with a significant increase in the number of publicly held corporations with dispersed shareholdings. Owing to this fact, hostile takeovers (and, consequently, anti-takeover devices) have gained more attention.

Brazilian law does not prohibit anti-takeover devices, but they must be clearly stated in the by-laws of the corporation. In this context, currently it is not unusual to find in Brazilian corporations' by-laws provisions triggering mandatory tender offers with the payment of a premium once a shareholder increases its equity participation to a certain level

(usually between 10 per cent to 30 per cent).

Lastly, the Corporations Law provides for one specific mechanism that can be interpreted as an anti-takeover device. This mechanism provides that the purchaser, in a takeover bid to gain control of a listed corporation, is required to make a public offer to all other voting shareholders of the company for a purchase price of at least 80 per cent of the takeover bid's price.

Law stated - 08 April 2022

Issuance of new shares

May the board be permitted to issue new shares without shareholder approval? Do shareholders have pre-emptive rights to acquire newly issued shares?

Yes; for that purpose, the corporation's by-laws must provide for an authorised capital amount and grant the board powers to issue new shares without shareholder approval. If the by-laws do not have this provision, the board cannot issue new shares without shareholder approval.

In addition, shareholders have pre-emptive rights in the subscription of new shares proportionally to the number of shares they hold. The by-laws or a general meeting must establish which pre-emptive rights may be exercised at least 30 days before the issuance of new shares.

Law stated - 08 April 2022

Restrictions on the transfer of fully paid shares

Are restrictions on the transfer of fully paid shares permitted and, if so, what restrictions are commonly adopted?

Restrictions on the transfer of shares will mostly depend on the type of company. In publicly listed companies, except for some restrictions resulting from shareholders' agreements, shares must be freely traded to guarantee liquidity to the markets. On the other hand, closely held corporations may limit the transfer of shares through their by-laws, terms and conditions, but they may never entirely forbid the transfer.

Limited liability companies, which are governed by the Civil Code and are considered to be intuitu personae entities, may incorporate in their articles of association restrictions on the transfer of shares to third parties. However, if the articles are silent in this regard, shareholders may transfer their shares to third parties if this transfer is not opposed by more than 25 per cent of the company's share capital. The transfer of shares to another shareholder of the company is usually permitted in the absence of a specific rule provided in its articles of association.

Law stated - 08 April 2022

Compulsory repurchase rules

Are compulsory share repurchases allowed? Can they be made mandatory in certain circumstances?

The Corporations Law presents two kinds of share repurchases that can be compulsory if determined so by the by-laws or by the extraordinary general shareholders' meeting: redemption and amortisation.

Redemption share repurchases comprise paying the value of the share to withdraw it permanently from circulation, regardless of whether the share capital is reduced. If the share capital is not reduced, a new par value shall be

attributed to the remaining shares, as the case may be.

Amortisation share repurchases comprise the distribution to the shareholders of an advance payment, without reduction of the share capital, in the amount that they would be entitled to in the event of liquidation of the corporation. The amortisation may be in full or in part and may cover only one or all classes of shares of the corporation.

A redemption or an amortisation share repurchase that does not cover all shares of the same class shall be carried out by drawing lots.

Law stated - 08 April 2022

Dissenters' rights

Do shareholders have appraisal rights?

Yes, the shareholders have appraisal rights in limited situations, according to the Corporations Law. The approval, by at least half of the voting shares, of the following matters grants the dissenting shareholder the right to withdraw from the corporation by a refund of his or her shares:

- creating preferred shares or increasing an existing class of preferred shares without maintaining the existing ratio with the remaining class of preferred shares, unless this is already set forth in or authorised by the by-laws (this is only applicable to those shareholders that have been affected);
- altering a preference, a privilege or a condition of redemption or amortisation conferred upon one or more classes of preferred shares, or creating a new, more favoured, class (this is only applicable to those shareholders that have been affected);
- reducing the compulsory dividend;
- merging the corporation with another corporation or consolidating it;
- participating in a group of corporations;
- changing the corporate purpose;
- approving the spin-off of the corporation; and
- issuance of shares with disproportionate voting rights.

The corporation's by-laws may establish the terms and conditions under which the shares of the dissenting shareholder will be redeemed. The value of the redemption cannot be lower than the company's net worth, as determined pursuant to the latest balance sheet of the company approved by the general meeting, unless the appraisal takes into account the economic valuation of the company, as determined by experts.

If the by-laws require a valuation to be done, the valuation must be carried out by three experts or by a company specialising in valuation. The experts' appraisal must present the grounds on which the valuation was based and provide all the supporting documentation that underpinned their work.

Law stated - 08 April 2022

RESPONSIBILITIES OF THE BOARD (SUPERVISORY)

Board structure

Is the predominant board structure for listed companies best categorised as one-tier or two-tier?

Listed corporations shall have a two-tier structure: a board of directors and a board of executive officers. The board of executive officers is accountable to the board of directors and makes decisions related to the operational and tactical

direction of the company. Nonetheless, the board of directors makes decisions regarding the long-term strategic direction of the business. The corporation will be legally bound before third parties by officers only, considering that directors do not have powers to bind the company.

Law stated - 08 April 2022

Board's legal responsibilities

What are the board's primary legal responsibilities?

The board of directors is a deliberative body that assumes responsibility for the treatment of long-term strategic decisions related to the business management of the corporation.

The following are the board's primary legal responsibilities:

- establishing the general business strategy for the corporation;
- electing and discharging the corporation's officers and prescribing their duties in accordance with relevant provisions in the by-laws;
- supervising the performance of the officers, examining the books and records of the corporation at any time, requesting information on contracts signed or about to be signed, or any other act;
- calling a general meeting whenever it is deemed advisable;
- giving its opinion on the reports of the management and on the accounts of the board of officers;
- giving its opinion in advance on actions or contracts whenever required by the by-laws;
- deciding whether to issue shares or subscription bonuses, when so authorised by the by-laws;
- authorising the transfer of fixed assets, the creation of charges in rem and guarantees for liabilities of third parties; and
- selecting and discharging independent auditors.

Law stated - 08 April 2022

Board obligees

Whom does the board represent and to whom do directors owe legal duties?

The board of directors' responsibility is to act in the corporation's best interest; therefore, the directors owe legal duties to the shareholders and to the corporation. When acting in the best interest of the corporation, the directors have the following duties.

Duty of care

The director, in the exercise of his or her duties, must employ the care and diligence that a reasonable and honourable person customarily employs in the administration of his or her own business affairs. In addition, directors must exercise their powers within the limits provided in the laws and by-laws and must always act in the best interest of the company.

Duty of loyalty

Under Brazilian law, the duty of loyalty is understood as the obligation of the director to refrain from pursuing personal interests instead of the company's interests. In this regard, the Corporations Law establishes that it is forbidden for a

director to use business opportunities to benefit him or herself, not to act in the company's best interests to benefit him or herself and to purchase assets or rights of the company to benefit him or herself.

Duty of disclosure

A director of a publicly held corporation must declare the number of shares, subscription bonuses, options to purchase shares and convertible debentures issued by the corporation, by a controlled corporation or by a corporation belonging to the same group that he or she owns and must disclose to the markets any material information.

Conflict of interest

A director must not take part in any corporate transaction in which he or she has an interest that conflicts with an interest of the corporation nor in the decisions made by the other officers on the matter. He or she must disclose his or her conflict of interest to the other officers and must have the nature and extent of his or her interest be recorded in the minutes of the administrative council or the board of directors' meeting.

Law stated - 08 April 2022

Enforcement action against directors

Can an enforcement action against directors be brought by, or on behalf of, those to whom duties are owed? Is there a business judgment rule?

Yes, enforcement action against directors is possible for damage caused to the corporation. Therefore, the corporation is the legitimate plaintiff in the action, and for filing this action, the approval of the majority of shareholders with voting rights is required. However, if the action is not approved, any shareholder holding at least 5 per cent of the capital stock shall have the right to file the action directly.

Although the business judgment rule in Brazil has no well-settled understanding, in recent years it has been frequently applied by the Securities and Exchange Commission of Brazil (CVM) when judging sanction proceedings against directors of listed corporations. However, most scholars understand that a judge can exempt the directors and officers from responsibility when convinced that they acted in good faith and in the interest of the corporation. The business judgment rule shields directors or officers of a corporation from liability only if, in reaching a business decision, the directors or officers acted on an informed and reflected basis, availing themselves of all material information reasonably available, and acted without conflicts of interest. The main purpose of the rule is the protection of the discretionary power of the company's managers, and it guarantees the existence of a presumption that they make decisions always in good faith.

Law stated - 08 April 2022

Care and prudence

Do the duties of directors include a care or prudence element?

Yes. According to the Corporations Law, directors have a duty of care, which requires that they always exercise competence, honesty and care in conducting the business of the corporation. 'Care' requires that the director must exercise the care that a reasonable person would in similar circumstances. In addition, directors must exercise their powers within the limits provided in the laws and by-laws and must always act in the best interest of the company.

Law stated - 08 April 2022

Board member duties

To what extent do the duties of individual members of the board differ?

Under Brazilian law, all the directors are subject to the duties of diligence and care, loyalty and disclosure, and the duty to avoid conflicts of interest. There is no differentiation between directors based on experience or certain skills.

Law stated - 08 April 2022

Delegation of board responsibilities

To what extent can the board delegate responsibilities to management, a board committee or board members, or other persons?

The responsibilities defined by law for the board of directors cannot be delegated. The attributions and powers conferred by law to the management bodies cannot be granted to another body created by law or by the by-laws. However, at the officers' level, it is possible to appoint proxies to act on behalf of the officers.

As they are responsible for day-to-day business management, the officers play a central role in the functioning of the corporate governance system, being responsible, among other things, for implementing the strategy defined by the board of directors, as well as the mechanisms, processes, programmes, controls and systems aimed at ensuring compliance with risk limits and guidelines previously approved by the board.

Law stated - 08 April 2022

Non-executive and independent directors

Is there a minimum number of 'non-executive' or 'independent' directors required by law, regulation or listing requirement? If so, what is the definition of 'non-executive' and 'independent' directors and how do their responsibilities differ from executive directors?

Yes; Law No. 14,195/2021 sets forth the mandatory inclusion of independent directors on the boards of directors of publicly held companies, in accordance with terms and deadlines defined by the CVM. Also, pursuant to the Novo Mercado segment of the listing rules of the main stock exchange of Brazil, Brasil, Bolsa e Balcão SA (B3), which provides for the highest standards in terms of corporate governance for publicly held companies, at least two members, or 20 per cent of the board, should be independent directors – whichever is higher.

The IBGC recommends that the board of directors has the relevant participation of independent members in relation to the total number of members.

The board of directors must evaluate and disclose annually who the independent directors are and must indicate and justify any circumstances that could compromise the directors' independence.

Situations that may compromise the independence of a member of the board of directors, among others, are:

- if he or she is a direct or indirect controlling shareholder of the company;
- if his or her votes in the board of directors' meetings are bound by a shareholders' agreement of which the object is matters related to the company;
- if he or she is a spouse, partner or relative, lineal or collateral, to a certain degree, of the controlling shareholder,

administrator of the company or administrator of the controlling shareholder; and
- if he or she was, in the past three years, an employee or director of the company or of its controlling shareholder.

Law stated - 08 April 2022

Board size and composition

How is the size of the board determined? Are there minimum and maximum numbers of seats on the board? Who is authorised to make appointments to fill vacancies on the board or newly created directorships? Are there criteria that individual directors or the board as a whole must fulfil? Are there any disclosure requirements relating to board composition?

According to the law, the board must be composed of at least three members, elected and removed by a shareholders' general meeting, at any time. The size of the board may vary depending on the company's sector and size and the stage of the company's lifecycle, among other things. The by-laws shall provide the number of board members and the appointment process. According to Brazilian law, there is no maximum number of seats on the board, even though best practice recommends no more than 11 members for large corporations.

The board members should appoint a substitute to occupy an opening position in the case of a vacancy until the following shareholders' meeting. If vacancies comprise a majority of the board of directors, a shareholders' meeting shall be called for the election of the board.

Both Brazilian residents and foreign individuals can be appointed as directors of corporations. Foreign individuals shall be represented by an attorney resident in Brazil with powers to receive summons, subpoenas, citation and notices on behalf of the grantor.

An individual is disqualified from being elected to the position of director if he or she:

- is disqualified by special law, or has been sentenced for a bankruptcy offence, fraud, bribery or corruption, misappropriation of public funds or embezzlement, crimes against the national economy, decency or public property, or to any criminal sanction that precludes, even temporarily, access to public office;
- has been declared by the CVM to be incapacitated;
- holds a position in a competing company, especially in the management board or on the advisory or finance committees, unless an applicable waiver is granted by the general meeting; or
- has conflicting interests with the company unless an applicable waiver is granted by the general meeting.

As for the disclosure requirements, the composition of the board of directors and of the board of officers are made public once they are registered at the relevant Registry of Commerce. In addition, for listed corporations, the composition of the board of directors, as well as all the board's dismissals and resignations must be disclosed to the CVM as the information is classified as relevant facts of change in the management of the corporation.

Law stated - 08 April 2022

Board leadership

Is there any law, regulation, listing requirement or practice that requires the separation of the functions of board chair and CEO? If flexibility on board leadership is allowed, what is generally recognised as best practice and what is the common practice?

As of Law No. 14,195/2021, the combination of positions of a company's chief executive officer or main executive officer with the chairperson of the board of directors for publicly held companies is prohibited. Note that for corporations listed in the Novo Mercado and Level 1 and Level 2 segments of B3, the separation is mandatory, except for a transitional vacated period of these positions.

In addition, the IBGC recommends that the chief executive not be a member of the board of directors; nevertheless, he or she should participate in the meetings when required.

Law stated - 08 April 2022

Board committees

What board committees are mandatory? What board committees are allowed? Are there mandatory requirements for committee composition?

The Corporations Law does not have a list of mandatory board committees. However, it is usual for large corporations to implement committees for corporate governance purposes in areas such as auditing, human resources or compensation, governance, finance and risks, among others.

Committees have board advisory functions and no power to make decisions; therefore, their recommendations are not binding. According to IBGC best practices, it is recommended that the committees shall: be formed by board members; have at least three members; have at least one member who is an expert in the applicable area; have an exclusive chair; and not contain the corporations' executives, although they may be invited to some meetings.

Notwithstanding the above, for listed companies in the Novo Mercado segment of B3, it is mandatory to have an audit committee, until the date of the shareholders' general meeting, responsible for evaluating and monitoring internal audit activities and compliance. In addition, audit committees are also mandatory for financial institutions and insurance companies.

Law stated - 08 April 2022

Board meetings

Is a minimum or set number of board meetings per year required by law, regulation or listing requirement?

There is no minimum number of board meetings per year required by law. If there is a need for the board to evaluate specific topics requiring an immediate decision, a meeting shall be called at any time. In addition, if the corporation has a committee already established, the board shall meet with the committee according to its regulation. For instance, the audit committee, which is a mandatory committee for corporations listed in the Novo Mercado segment, requires meetings of the board of directors every three months.

Law stated - 08 April 2022

Board practices

Is disclosure of board practices required by law, regulation or listing requirement?

Yes, disclosure is required. Most of the practices of the board are outlined in the by-laws of the corporations, which are registered in the relevant Registry of Commerce and are, therefore, made public, (eg, the number of members, term of office, appointment of the chair, procedures in the case of a vacancy and meeting procedures).

In addition, the summary of the resolution taken in some of the board meetings shall be published in local newspapers in accordance with Corporations Law. Nonetheless, privately held corporations with an annual turnover of up to 78 million Brazilian Reais, can publish their corporate acts at the Balance Sheet Platform of the Digital Bookkeeping Public System (SPED), free of charge, and on their website.

For listed corporations, the minutes, prospectuses and statements of additional information are also required to be disclosed.

Law stated - 08 April 2022

Board and director evaluations

Is there any law, regulation, listing requirement or practice that requires evaluation of the board, its committees or individual directors? How regularly are such evaluations conducted and by whom? What do companies disclose in relation to such evaluations?

According to the Corporations Law, there is no mandatory evaluation. However, according to the Code of Corporate Governance – Listed Companies, it is recommended that corporations carry out formal performance evaluations of the board of directors on an annual basis to identify the main deficiencies that must be improved by the board, including the implementation of corrective measures. The scope of the evaluation shall include a process for assessing the performance of the board of directors, the committees, the chair and the directors individually considered, with the purpose of giving the shareholders a proper understanding of its evaluation results.

For listed companies in the Novo Mercado segment, the board must perform the evaluation at least once during its mandate.

Law stated - 08 April 2022

REMUNERATION

Remuneration of directors

How is remuneration of directors determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of directors, the length of directors' service contracts, loans to directors or other transactions or compensatory arrangements between the company and any director?

The shareholders' general meeting shall determine the amount of the remuneration of all of the individual directors, considering their responsibilities, the time dedicated to their functions, their competence, their professional reputation and the value of their services. The remuneration of the members of the board of directors must be aligned to the company's strategic objectives with a focus on its longevity and the creation of long-term value.

The term of a member of the board cannot exceed three years, although re-election is permitted. Listed corporations must disclose more detailed information on the director's remuneration in the prospectus and the statement of additional information annually filed to the Brazilian Securities Commission, and their directors are subject to a stricter two-year term of office, although re-election is admitted.

According to Brazilian law, directors are not allowed to contract loans or any other type of financial arrangement with the corporation without the prior approval of the shareholders.

Law stated - 08 April 2022

Remuneration of senior management

How is the remuneration of the most senior management determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of senior managers, loans to senior managers or other transactions or compensatory arrangements between the company and senior managers?

The remuneration of the officers is established by the shareholders in the general meeting, which must be aligned with the company's strategic objectives, with a focus on its longevity and the creation of long-term value. The officers are normally responsible for establishing the remuneration of the senior management in line with the company's remuneration policies and also in compliance with the power limitations set forth in the company's by-laws, if any.

Although there is nothing expressly prohibiting the company from granting loans to its officers, according to the Code of Corporate Governance – Listed Companies, this practice is not recommended. The Code suggests that companies implement policies concerning related parties that prohibit granting loans to their officers.

For granting loans or other compensatory arrangements to senior managers, the law is silent. However, the performance of any financial transaction with senior management must comply with the internal codes and policies of the company (eg, the code of conduct and risk and compliance), always preserving the position of the company.

Law stated - 08 April 2022

Say-on-pay

Do shareholders have an advisory or other vote regarding remuneration of directors and senior management? How frequently may they vote?

Shareholders shall have the right to vote on the directors' remuneration through the annual general shareholders' meeting, whereas the remuneration of the senior management is typically defined by the officers of the company in line with the company's remuneration policies.

Law stated - 08 April 2022

DIRECTOR PROTECTIONS

D&O liability insurance

Is directors' and officers' liability insurance permitted or common practice? Can the company pay the premiums?

Directors' and officers' liability insurance is permitted and is a common practice as part of the benefits package in large corporations. Normally, corporations are responsible for paying the insurance premiums to directors and officers.

Law stated - 08 April 2022

Indemnification of directors and officers

Are there any constraints on the company indemnifying directors and officers in respect of liabilities incurred in their professional capacity? If not, are such indemnities common?

As a general rule, there are no constraints. The director's responsibility shall be excluded as long as he or she acted in the ordinary course of business. While acting in the ordinary course of business and in due compliance with the law and the by-laws, the corporation shall be responsible for the acts of its directors and officers and will, generally, assume responsibility for payments in claims against them.

However, in 2018, the Securities and Exchange Commission of Brazil (CVM) enacted a new (non-binding) guideline (No. 38, dated 25 September 2018) applicable to indemnity agreements executed between publicly listed companies and their directors with the aim of avoiding conflicts of interest, thereby creating new duties to the directors of public companies.

Under indemnity agreements, public companies undertake to compensate directors for damages or losses arising out of arbitration proceedings, court claims or administrative proceedings in general that involve acts, facts or omissions by the directors in the exercise of their duties or powers. Although, in general, the parties are free to negotiate the terms and conditions of the agreement, pursuant to the CVM's interpretation, the compensation is not due if the director breached his or her duty of care and his or her duty of loyalty. As such, the CVM recommends expressly providing the hypothesis of exclusion of liability in the indemnity agreement. In addition, the CVM recommends that before making any disbursements, the company must ensure whether the compensation to the director is due or if it falls into a hypothesis of exclusion of liability.

The CVM's guidelines provide that the directors must implement governance rules to prevent conflicts of interest in the execution of indemnity agreements. To be discharged of this duty, the directors must ensure that the indemnity agreements provide which body of the company will be responsible for assessing whether an exclusion of liability applies, as well as the applicable rules to avoid conflicts of interest. In specific circumstances, such as ones that could result in a material loss for the company, the CVM understands that additional governance rules must be adopted, without specifying them. Lastly, the directors are required to disclose the terms and conditions of the indemnity agreements to allow the shareholders to properly assess the liabilities that the company may be exposed to.

Law stated - 08 April 2022

Advancement of expenses to directors and officers

To what extent may companies advance expenses to directors and officers in connection with litigation or other proceedings against them or in which they will be a witness?

There is no legal provision regarding this subject in Brazil. Therefore, it shall depend on the litigation or other proceedings and the contractual relationship between the directors or officers and the corporation in negotiating the extent of the advancement of expenses.

Law stated - 08 April 2022

Exculpation of directors and officers

To what extent may companies or shareholders preclude or limit the liability of directors and officers?

In accordance with Brazilian law, a director or officer is not personally liable for the actions that he or she takes on behalf of a corporation in the ordinary course of business. However, the director or officer shall be liable for losses caused to the corporation if he or she acted with negligence or wilful misconduct or in violation of the law or the by-laws. In this case, indemnity or other hold harmless or comfort letters that limit the liability of directors and officers are normally not applicable.

A director or officer shall not be liable for unlawful acts of the other directors or officers, except when acting in collusion with them, when the director or officer neglects to investigate these acts or even when, despite having knowledge of the facts, the director or officer fails to act to prevent the act.

In addition, a director or officer shall be exempted from any liability when he or she expressly registers his or her disagreement in the minutes of the board of directors' or the management board's meeting in relation to a specific decision taken that caused the liability.

Law stated - 08 April 2022

DISCLOSURE AND TRANSPARENCY

Corporate charter and by-laws

Are the corporate charter and by-laws of companies publicly available? If so, where?

Yes; for the terms and conditions of the corporation's by-laws and minutes of shareholders' meetings to be enforceable against third parties, they must be registered at the relevant Registry of Commerce, thereby becoming publicly available.

Law stated - 08 April 2022

Company information

What information must companies publicly disclose? How often must disclosure be made?

In addition to the by-laws and the minutes of shareholders' meetings that are required to be registered at the Registry of Commerce, public corporations must also disclose, among other things:

- the audited financial statements, which must be disclosed in the first months of the following year;
- the quarterly accounting information, which must be submitted within 45 days as of the end of each quarter;
- the prospectus and statement of additional information to be filed in the case of changes (eg, a change in the administration and in the policies of the company, among other things) within five months as of the end of the fiscal year; and
- board meetings and corporate acts that may be relevant to third parties.

In addition, publicly listed corporations must disclose to the market any information that is deemed to be material information. Pursuant to the Securities and Exchange Commission of Brazil (CVM) regulations, material information is any decision of the shareholders or board of directors of publicly listed companies, or any other relevant technical, economic or financial facts or transactions related to the company's business and activities, that may influence the price of any shares or securities issued by the company, the decisions of the investors to buy or sell shares and securities of the company or the decisions of the investors regarding the exercise of any of their rights as shareholders. The CVM regulations also provide examples of what would be material information; the acquisition of control of a company and the execution of shareholders' agreements involving the corporations' securities, mergers, demergers and absorptions are among the material information that must also be disclosed. The list of examples provided by the CVM is not exhaustive, so any information that may fall within the definition of material information will be subject to the disclosure requirements.

Law stated - 08 April 2022

HOT TOPICS

Shareholder-nominated directors

Do shareholders have the ability to nominate directors and have them included in shareholder meeting materials that are prepared and distributed at the company's expense?

Yes; shareholders have the ability to nominate directors by proxy and have them included in the shareholder meeting materials.

Law stated - 08 April 2022

Shareholder engagement

Do companies engage with shareholders? If so, who typically participates in the company's engagement efforts and when does engagement typically occur?

Yes, according to Brazilian law, the engagement of companies with shareholders is possible at arm's length. The company is represented by an officer with the power to act on its behalf. However, the Corporations Law restricts engagement in situations of abuse of the voting or controlling power or conflict of interest of the shareholder.

Law stated - 08 April 2022

Sustainability disclosure

Are companies required to provide disclosure with respect to corporate social responsibility matters?

Yes, listed corporations must comply with the rules established by the Securities and Exchange Commission of Brazil (CVM) that require listed companies to disclose and report on their corporate social responsibility policies, according to the Code of Corporate Governance – Listed Corporations.

The Code establishes the duty of listed corporations to demonstrate which corporate governance practices have been adopted, making it clear to their current or future investors the degree of adherence that they have with the corporate governance mechanisms. Therefore, the prospectus and statement of additional information of listed corporations must disclose matters related to the environment, human rights, diversity, human capital matters and political spending, as they are set forth in the Code of Corporate Governance – Listed Corporations.

Listed companies are also required to submit a document (Reference Form) that brings together a range of information about the company, such as its main activities, risk factors and capital structure, among other details. Recently, CVM issued Resolution 59 amending the rules for disclosure of information by listed companies on the Reference Form. Such resolution added to the Reference Form information requirements on environmental, social and governance practices.

Law stated - 08 April 2022

CEO pay ratio disclosure

Are companies required to disclose the 'pay ratio' between the CEO's annual total compensation and the annual total compensation of other workers?

Although, under the CVM rules, listed companies are required to disclose policies, aggregate amounts, bonuses and other information related to the remuneration of officers and directors, there are no specific requirements to disclose the pay ratio between the CEO's annual total compensation and the annual total compensation of other workers.

Law stated - 08 April 2022

Gender pay gap disclosure

Are companies required to disclose 'gender pay gap' information? If so, how is the gender pay gap measured?

This disclosure is not required according to Brazilian legislation.

Law stated - 08 April 2022

UPDATE AND TRENDS

Recent developments

Identify any new developments in corporate governance over the past year. Identify any significant trends in the issues that have been the focus of shareholder interest or activism over the past year.

Provisional Measure (MP) No. 1,040/2021 was converted and passed into Law No. 14,195/2021 with the purpose of, among other things, reducing administrative formalities, increasing the competitiveness and modernisation of business in Brazil, and establishing new procedures to simplify the incorporation of companies. Among other items, one of its purposes was to protect shareholders of publicly held companies, especially minority shareholders.

Law No. 14,195/2021 provided an overhaul of certain provisions of Law No. 6,404/76 (Corporations Law), as listed below:

- closely held companies may prepare and maintain general corporate bookkeeping in an entire electronic record;
- addition of disproportionate voting rights to ordinary shares and allowing dissident shareholders to exercise their redemption rights if they so desire if disproportionate voting rights are approved;
- expansion of the attributions of the shareholders' meetings of the companies to resolve on the sale or contribution of assets bearing a value exceeding 50 per cent of the company's total assets, and for the approval of transactions to be entered into among related parties (according to guidelines defined by the CVM);
- vesting, in case of an emergency, the company's officers (with consent from the controlling shareholder) to file for bankruptcy or judicial recovery in place of the shareholders' meeting;
- the prior notice period for the first call of a shareholders' meeting in public companies is decreased from 30 to 15 days;
- the postponement of the shareholders' meeting within 30 days, if relevant documents and information from the shareholders' meeting are not made available to shareholders;
- a constraint on one person taking the position as a company's chief executive officer or chief executive officer and chairman of the board of directors (with an exception for this rule applying for companies with gross annual income of 500 million Brazilian Reais or less);
- the mandatory inclusion of independent directors in boards of directors, in accordance with terms and deadlines defined by the CVM; and
- allowing non-resident persons to be elected as company officers by fulfilling certain legal requirements (ie, appointing legal representatives).

Lastly, Complementary Law No. 182/2021 also provided a set of regulatory changes aiming to improve and encourage startup investments in Brazil, while also providing changes to the Corporations Law, as follows:

- reducing the minimum number of board of officers elected by the board of directors from 2 to 1;
- allowing closely held corporations with a gross annual income up to 78 million Brazilian reais to provide their disclosure forms and keep their books completely in electronic form; unless otherwise stated in the by-laws and in accordance with the rights of shareholders of preferred shares, to determine by way of a shareholders' meeting the distribution of profits as it deems fit without following article 202 of the Corporations Law; and establish officers' salaries without having to defer to article 152 of the Corporations Law; and
- allowing corporations with a gross annual income of 500 million Brazilian Reais or less to follow specific CVM regulations simplifying their entry into the Brazilian capital market and providing easier maintenance of their respective boards, and overall imposing fewer bureaucratic requirements for disclosure, issuance of securities, etc.

Law stated - 08 April 2022

Jurisdictions

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