

Brazil

Mariana Cortez, Tania Liberman and
Vera Helena Cardoso de Almeida
KLA – Koury Lopes Advogados

www.practicallaw.com/2-502-1925

CORPORATE ENTITIES

There are two main types of company used in Brazil:

- **Limited liability company (*sociedade limitada*) (*limitada*).** A *limitada* is created by the filing of its articles of association (articles) with the Registry of Commerce. It must have at least two partners. The liability of each partner is limited to the value of its equity interest in the company, but all partners are jointly and severally liable for the corporate capital until it is fully paid in. The capital is divided into quotas with par value. Ownership of the quotas is shown by the registered articles, as quotas are not represented by certificates. All amendments to the articles must be approved by partners representing at least three-quarters of the capital.

The *limitada* is appropriate for investors seeking a simple and flexible corporate structure, reduced maintenance costs and the absence of certain legal formalities applicable to other types of company. *Limitadas* are usually used when establishing wholly-owned subsidiaries.
- **Corporation (*sociedade anônima*) (SA).** An SA is created by the filing of its bye-laws with the Registry of Commerce. It must have at least two shareholders. An SA's capital is divided into shares with or without par value, which may or may not be represented by certificates. SAs can be privately or publicly held. Publicly-held SAs must be registered with the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários*) (CVM). A publicly-held SA can be listed or unlisted, depending on whether its securities are admitted to trade on the stock exchange or over-the-counter markets.

LEGAL FRAMEWORK

1. What is the regulatory framework for corporate governance and directors' duties?

Corporate Governance is regulated by:

- Articles 1.052 to 1.087 of the Brazilian Civil Code (*Law #10.406/2000*).
- Brazilian Corporation Law (*Law #6.404/1976, as amended*) (Corporation Law).

Publicly-held SAs (whether listed or not) are also subject to CVM's rules and regulations, which cover, among other matters:

- Specific minority shareholders rights.
- Disclosure standards.
- Tag-along rights.
- Delisting.
- Non-voting shares.
- Election of board members by minority shareholders.
- Private arbitration.

Publicly-held SAs may also be subject to non-mandatory best practices codes.

In 2000 the São Paulo Stock Exchange (*Bolsa de Valores de São Paulo*) (BOVESPA), created the New Market, classifying the listed companies in accordance with their level of compliance with certain non-mandatory corporate governance rules that give a stricter corporate governance regime than the mandatory rules. According to BOVESPA, the value and liquidity of listed shares are positively influenced by participation in the New Market.

The Brazilian Institute of Corporate Governance (IBGC) has developed a code of ethics for the members of the board of directors of publicly held companies. Compliance with the code is not mandatory.

BOARD COMPOSITION AND REMUNERATION OF DIRECTORS

2. What is the management/board structure of a company? In particular:

- Is there a unitary or two-tiered board structure?
- Who manages a company and what name is given to these managers?
- Who sits on the board(s)?
- Do employees have a right to board representation?
- Is there a minimum or maximum number of directors or members of the managerial and supervisory bodies?

- **Structure.** A *limitada* does not have a formal board structure but instead is managed by one or more officers (who may or may not be partners).

An SA can be managed by a board of officers (*diretoria*) or by both a board of directors (*conselho de administração*) and a board of officers. Publicly-held SAs must have a board of directors and a board of officers (*diretoria*). The management structure of an SA may also include an audit committee (*conselho fiscal*) that is responsible for examining the accounting records and practices (see *Question 4*).

- **Management.** In a *limitada* the officers have full individual and joint powers to manage and represent the company, as established in the articles.

Under its bye-laws, the management of a SA is entrusted either to its board of directors and its board of officers, or only to its board of officers. The board of directors is a collegiate decision body, corporate representation being vested exclusively in the officers.

In the absence of a provision in the bye-laws or a resolution of the board of directors, each officer represents the corporation and takes such actions as are necessary for its normal operation.

- **Board members.** The bye-laws of an SA establish the composition of both boards. Officers may have different titles (for example, a chief executive officer or chief financial officer) and duties established in the bye-laws.
- **Employees' representation.** An SA's bye-laws may establish an employees' representative in the board of directors but, unless there is a specific provision in the bye-laws, employees do not have the right to management representation or consultation. A representative's election is organised jointly by the SA and the labour union.
- **Number of directors or members.** A *limitada* is managed by one or more persons.

The board of directors in an SA must have at least three members, who must be shareholders. The board of officers must have at least two members.

3. Are there any age or nationality restrictions on the identity of directors?

Age restrictions

An individual must be at least 18 years old to be a director or officer.

Nationality restrictions

The officers of a *limitada* and of an SA do not need to be Brazilian nationals but must be Brazilian residents.

Members of an SA's board of directors do not need to be Brazilian nationals or residents.

The directors and officers of certain regulated companies, such as financial institutions and communication companies, must be Brazilian nationals.

4. In relation to non-executive, supervisory or independent directors:

- **Are they recognised?**
- **Does a part of the board have to consist of them? If so, what proportion?**
- **Do non-executive or supervisory directors have to be independent of the company? If so, what is the test for independence or what makes a director not independent?**
- **What is the scope of their duties and potential liability to the company, shareholders and third parties?**

-
- **Recognition.** There is no requirement for companies to have independent officers or directors, except for members of the audit committee.
 - **Board composition.** All the members of the audit committee must be independent. The audit committee can be permanent or temporary.
 - **Independence.** Independent directors are those without a direct relation to the company's management and/or to its controlling shareholders. The audit committee cannot include individuals that are also:
 - members of the board of directors;
 - members of the board of officers;
 - employees of the company or its affiliates;
 - spouses or relatives of any of the persons mentioned above.
 - **Duties and liabilities.** The duties and liabilities of independent directors are the same as for other directors (see *Question 14*).

5. Are the roles of individual board members restricted? For example, can one person be the chairman and chief executive?

In SAs, a maximum of one-third of the members of the board of directors can be company officers (*Corporation Law*).

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

Appointment of directors

In a *limitada*, officers are appointed by the articles or in a partners' meeting.

In an SA with a board of directors and a board of officers:

- The shareholders elect the members of the board of directors in a shareholders meeting.
- The board of directors elect the officers in a board of directors meeting.

In an SA with only a board of officers, the shareholders elect the officers in a shareholders meeting.

The members of an audit committee are elected by the shareholders at the annual shareholders' meeting.

Removal of directors

In a *limitada* the officers can be removed at any time by the partners at a partners' meeting or by an amendment to the articles (where the officers are named in the articles).

In an SA, members of the board of directors or officers can be removed by the corporate body that elected them.

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

In a *limitada* there are no restrictions on an officer's term of appointment. Officers can be elected for an indeterminate or fixed term, as established in the articles.

The term of appointment of a director or an officer in an SA can vary from between one to three years and re-election is permitted.

Members of an audit committee must be appointed for one-year terms and re-election is permitted.

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

Directors employed by the company

Officers and directors do not have to be employees of the company but this is allowed. Members of the audit committee cannot be employees as they must be independent (*see Question 4*).

Shareholders' inspection

Neither the by-laws nor a general meeting can deprive a shareholder of the right to supervise the management of the corporate business.

At the request of shareholders representing 5% or more of the capital, an officer of a publicly-held corporation must disclose to the annual general meeting the conditions of the contracts of employment that the corporation entered into with its managers.

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

Officers and members of the audit committee can, but are not required to, own quotas or shares in the company.

Members of the board of directors must be shareholders of the company (owning at least one share each).

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

Determination of directors' remuneration

Officers' and directors' total remuneration, including benefits and

allowances, is established by the shareholders meeting, based on the individual's:

- Responsibilities.
- Time dedicated to their services.
- Competence.
- Professional reputation.
- Services' market value.

The remuneration of the members of the audit committee, and the reimbursement of their expenses, are established by the annual shareholders meeting that elects them. The remuneration of each audit committee member must not be less than 10% of the average remuneration paid to each director or officer.

Disclosure

CVM has issued a regulation on publicly-held companies, requiring disclosure of the levels of remuneration paid to the management. The rule is currently being contested in court, and there is now a temporary restraining order in effect that makes the disclosure not mandatory.

Shareholder approval

As directors' remuneration must be established at a shareholders meeting, shareholders' approval is necessary.

MANAGEMENT RULES AND AUTHORITY

11. 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?

The bye-laws of an SA give the rules for calling and holding meetings of the board of officers and board of directors. Decisions at the meetings are taken by a majority of votes, unless otherwise established in the bye-laws.

Meetings are not necessary in *limitadas* with only one officer. If there is more than one officer, specific rules for meetings may be given by the articles.

12. 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 following actions require a resolution of the shareholders meeting (*Corporation Law*):

- Amendments to the bye-laws.
- Election or dismissal of the directors (and officers if there is no board of directors).
- Approving the financial statements and the distribution of dividends.

- Issuing shares, or debentures and or creation of any securities by the company.
- Suspension of the rights of a shareholder.
- Appraising assets contributed as capital by the shareholders.
- Issuing shares.
- Approving the transformation, merger, amalgamation, spin-off, dissolution and liquidation of the company.
- In insolvency, the election and removal of liquidators and the examination of the accounts.
- Filing for bankruptcy or requesting reorganisation.

The board of directors is responsible for:

- Establishing the general business strategy.
- Electing and dismissing officers and establishing their duties.
- Supervising the work of the officers.
- Calling shareholders meetings.
- Giving its opinion on management reports and accounts.
- Giving its opinion on specific actions or contracts, as and if required by the bye-laws.
- Deciding on the issuance of shares, when authorised by the bye-laws.
- Authorising the transfer of fixed assets and the granting of guarantees.
- Electing and dismissing the independent auditors, if any.

Officers are responsible for the representation of the company before third parties.

Restrictions

Restrictions on management powers in the bye-laws and articles are enforceable against third parties.

13. 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?

Except for the matters that are under the exclusive responsibility of the shareholders or of the board of directors (see *Question 12*), other specific issues can be delegated to officers.

DUTIES AND LIABILITIES OF DIRECTORS

14. What is the scope of a director's duties and personal liability to the company, shareholders and third parties? Please distinguish between civil and criminal liability under each of the following (if relevant):

- **General duties.**
- **Theft and fraud.**
- **Securities law.**
- **Insolvency law.**
- **Health and safety.**
- **Environment.**
- **Anti-trust.**
- **Other.**

-
- **General duties.** Officers and directors must serve the company with loyalty and trustfulness and cannot (*Corporation Law*):

- use any commercial opportunity arising from their position for their own benefit or that of a third party;
- fail to exercise or protect the company's rights or cause the company to fail to profit from a commercial opportunity by seeking to obtain advantages for themselves or for a third party; or
- acquire for resale at a profit assets or rights that if they know are necessary for the company or that the company intends to acquire.

Officers and directors have a duty to exercise care and diligence equal to that of an ordinary man managing his own business, and are personally responsible towards the company and third parties for negligence or mismanagement.

Mismanagement includes:

- having an undeclared conflict of interests;
 - misuse of the corporate name;
 - deviation from the purpose of the company;
 - gross negligence and wilful misconduct;
 - distribution of illegal or non-existent profits.
- **Theft and fraud.** A director or officer can be civilly and criminally liable for theft and fraud.
 - **Securities law.** Officers of publicly-held SAs must treat as confidential, and cannot use to obtain any personal advantage, any information (*Corporation Law*):
 - not yet disclosed to the public;
 - obtained due to their position; and
 - that may significantly affect the value of securities.

Insider trading is a serious civil, administrative and criminal offence, subjecting violators to (*Article 155, Paragraph 4th of Law no. 6.404/76, Article 27-D of Law no. 6.385/76, and Article 13 of Instruction CVM no. 358/2002*):

- warnings;
- fines;
- temporary incapacity to hold positions in SAs;
- prohibitions from operating on the market.

Officers, directors, controlling shareholders and third parties are subject to the prohibition if they have insider information and trade on the market.

- **Insolvency law.** If an officer or director fails to file for bankruptcy when necessary, he can be personally liable for any resulting loss caused to the company.
- **Health and safety.** Officers and directors must comply with minimum occupational safety and health guidelines when hiring employees. Non-compliance with this obligation can result in a fine and in the director or officers' civil liability for damages caused to employees or third parties.
- **Environment.** Officers and directors that breach environmental laws may be subject to penalties including:
 - civil (damages);
 - criminal (imprisonment, fines, restrictions of rights and the imposition of community service); and
 - administrative (warnings, temporary suspension of activities, temporary and permanent interdictions).
- **Anti-trust.** The Antitrust Law (*Law no 8.884, 11 July 1994*) lists 24 violations, including price fixing, market division, combined bids, dumping, overpricing and abusive profits.

The Antitrust Law has adopted the concept of consent decree from US anti-trust law and also allows preliminary injunctions. Penalties include substantial fines, which can be applied to the company and to directors or officers that are directly or indirectly involved with the breach.
- **Other.** Not applicable.

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

In general, it is not possible to restrict or limit directors' liability for breaches of their duties. However, a company can indemnify a director or officer for acts on behalf of the company within the powers granted to him in the corporate documents, except if he acts fraudulently or his actions amount to wilful misconduct.

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

It is possible for a director to obtain directors' and officers' insurance and the premium can be paid by the company.

17. 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)?

A third party can be liable as a de facto director if it exercised management powers.

TRANSACTIONS WITH DIRECTORS AND CONFLICTS

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

Transactions between directors or officers and the company are subject to restrictions under their general duties (*see Question 14*).

In addition, directors or officers cannot participate in corporate transactions in which they have an interest that conflicts with the company's interest, or in the relevant management decisions (*Corporation Law*). Directors or officers must disclose the conflict to the board and ensure the conflict is recorded.

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

A director or officer can only contract with the company on an arm's length basis.

20. 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?

There are no restrictions on the purchase or sale by a director or officer of the shares or quotas and other securities of the company managed by him, provided that the purchase and sale is made under market conditions.

Rules on insider trading must be observed in publicly-held SAs and most such companies have internal policies dealing with the specific restrictions.

DISCLOSURE OF INFORMATION

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

Officers must disclose, at least one month before the annual shareholders' meeting copies of the:

- Management report of the last fiscal year.
- Financial statements.
- Opinion of the independent auditors, if any.
- Opinion of the audit committee, if any.
- Other relevant documents, if any.

The minutes of an SA's annual shareholders meeting must be registered at the Registry of Commerce and published in the press.

The officers and/or directors of a publicly-held SA must inform the stock exchange and publish in the press any minutes of shareholders' or management meetings, or any relevant facts that may affect the corporate business and influence the decision of investors to sell or buy securities issued by the company.

The officers of a publicly-held corporation must also maintain a permanently updated file called a Reference Form (*Formulário de Referência*), that consists of a pre-formatted chart containing relevant information on the publicly-held corporation, to which supplementary offer notes are added at each new public offer.

COMPANY MEETINGS

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

Limitadas and SAs must hold an annual meeting within four months of the end of the preceding fiscal year. The annual meeting:

- Discusses the financial statements.
- Decides on the distribution of dividends and on the destination of the net profits.
- Elects the directors or officers and the members of the audit committee, if any.
- Fixes the remuneration of the director or officers.

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

In a *limitada*, a meeting can be called by the officer(s) or by the partners.

In an SA, meetings can be called by the board of directors, and, if any, by the board of officers and the audit committee. A meeting can be called by the shareholders if:

- The directors or officers delay calling the annual meeting for more than 60 days.
- The shareholders represent at least 5% of the capital and the officers and/or directors do not comply with a request to call a meeting within eight days, where the request is either:
 - reasonable; or
 - to appoint an audit committee.

MINORITY SHAREHOLDER ACTION

24. 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?

Minority shareholders can, in a shareholders meeting, request the company to file an indemnification claim against directors or of-

ficers for mismanagement. If the shareholders' meeting does not approve the claim, any shareholder with at least 5% of the capital stock can file the claim directly.

INTERNAL CONTROLS, ACCOUNTS AND AUDIT

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

There are no formal requirements on the internal control of business risks. However, most listed companies adopt a best practice code.

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

Until the accounts are approved by the shareholders at the annual shareholders meeting, directors or officers are personally liable under civil law for any accounting irregularities. In addition, they can be criminally liable for relevant breaches such as false accounting and giving misleading information.

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

The financial statements of publicly-held SAs and the consolidated accounts of a group of companies that includes a publicly-held SA must be audited by independent auditors that are registered with the CVM.

Limitadas with more than BRL240 million (about US\$128 million) of assets or BRL300 million (about US\$160 million) of gross revenue in the previous fiscal year must prepare annual financial statements in accordance with the provisions applicable to SAs (including auditing requirements) (*Corporation Law*).

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

An SA's auditors can be appointed and removed by the shareholders or by the board of directors.

Publicly-held SAs must replace their independent auditors every five years.

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

An independent auditor must be approved and registered by CVM.

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

The auditor must be independent and cannot render services other than auditing services (for example, legal or accounting services).

31. 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 are liable for any damages resulting from any failure to comply with their duties, negligence, misconduct or violation of the law. Their liability can be contractually limited but not excluded.

CORPORATE SOCIAL RESPONSIBILITY

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

Social, environmental, ethical and sustainable development reporting is still relatively rare. Except for certain specific environmental legislation in the State of São Paulo, reporting is not mandatory. Many large companies (especially US subsidiaries) adopt their own policies on reporting.

ROLE OF COMPANY SECRETARY

33. What is the role of the company secretary in corporate governance?

There is no requirement for companies to have a company secretary.

ROLE OF INSTITUTIONAL INVESTORS AND SHAREHOLDER GROUPS

34. How influential are institutional investors and other shareholder groups in monitoring and enforcing good corporate governance? Please list any such groups with significant influence in this area.

Institutional investors and other shareholders groups are reasonably influential in monitoring and enforcing good corporate governance for listed companies.

WHISTLEBLOWING

35. Is there statutory protection for whistleblowers (persons who disclose criminal activity or other serious malpractice within a company)?

There is no specific law protecting whistleblowers. However, directors and officers are not liable for illegal acts performed by other director or officers, provided that they were not negligent or attempted to prevent the illegal act (*Corporation Law*).

REFORM

36. Please summarise any impending developments or proposals for reform.

There are several bills in Congress relating to amendments to the Corporation Law, however, none of these is expected to be approved in the near future.

CONTRIBUTOR DETAILS

Mariana Cortez, Tania Liberman and Vera Helena Cardoso de Almeida

KLA – Koury Lopes Advogados

T +55 11 3799 8118

+55 11 3799 8114

+55 11 3799 8146

F +55 11 3799 8100

E mcortez@klalaw.com.br

tliberman@klalaw.com.br

vhcardoso@klalaw.com.br

W www.klalaw.com.br

PLC Law Department

PRACTICAL LAW COMPANY



“We expect all our commercial and transaction lawyers to use PLC Law Department. Frankly, I would be surprised if our external law firms and other blue chip in-house departments did not take the same view.”

Clive Grant, Legal Counsel, Shell International Limited.

PLC Law Department is the essential know-how service for in-house lawyers. Never miss an important development and confidently advise your business on law and its practical implications. www.practicallaw.com/about/lawdepartment