

LAW

**HOW
TO** UNDERSTAND
**MANAGERS AND
INVESTORS LIABILITY
IN BRAZIL**



AMCHAM
Brasil

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**HOW DO BUSINESS
TO AND INVEST
IN BRAZIL**



The American Chamber of Commerce for Brazil, being the largest Amcham outside the United States is serving its members building bridges for Brazilian businesses worldwide. Our foreign investment attraction efforts are a key mission for Amcham. The “How To” guides published by Amcham Brasil are part of this initiative. With the support of some of our members and Brazilian States and cities, we are putting together strategic information on the most various aspects of doing business in Brazil and its opportunities. As part of BRICS (Brazil, Russia, India, China and South Africa) and representing the 9th largest economy of the world, and the 7th largest destination for foreign investment, Brazil has an intrinsic importance for the global market. More than ever it is a strategic time for businesses opportunities in Brazil. We welcome you and hope that the information you are about to read will contribute to your commercial and investment decisions linked to Brazil.

Deborah Vieitas - CEO, Amcham Brasil



Brazilian market is undeniably important in the global scenario, being of the essence to the foreign investor to carry out a detailed business planning before entering the country. Because of some peculiarities on the way of doing business here, it is recommended that investors rely on local advice during their entire entrepreneurial journey. Also, it is important to deepen the issue of the responsibility of foreign investors and managers in order to avoid shocks during the implementation of their project in Brazil, which can directly impact on the personal and other parties equity associated with their local business. In this guide, the most significant aspects related to existing risks and ways to mitigate them will be discussed.

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01.

THE LIABILITY CONCEPT IN BRAZIL

Before addressing the most significant aspects related to existing risks and ways to mitigate them regarding liability, it is necessary to briefly explain what the Brazilian legal system regulates in different texts of Law, as well the liabilities attributions for investors, local managers, directors and other legal representatives of the Brazilian company, delimiting the degree of exposure to the risk of contingencies that this business might have.

As a general rule, the Brazilian Civil Code (Law No. 10,406/2002) adopts the principle of subjective liability of managers and investors in case of damages to third parties. Therefore, in order to have liability attributed to the manager for harmful acts to third parties practiced in the management of the company, it is necessary that the fault or gross negligence of the agent be ascertained, that is, the manager must have had the intention of committing the wrongful act.

Considering that the company with foreign investment is legally incorporated in Brazil, with its Articles of Incorporation/Bylaws¹ duly registered in the competent board of trade, in theory, the manager would only be liable upon acting deliberately against the principles listed in the company's corporate rules and other regulations, or against the applicable law.

However, the practical application of the Brazilian Judiciary, in numerous opportunities, does not reflect these fundamental principles when the focus is the liability of the manager or foreign investor. Analyzing the most varied lawsuits, judges often pierce the corporate veil, imposing personal liability on otherwise immune corporate managers, directors, or shareholders for the company's wrongful acts.

The exercise of the management function of a company in Brazil, by itself, already causes the manager an undeniable personal and equity exposure, insofar as the latter can be called to account for various obligations and debts of the company, especially those of environmental, labor and consumer nature.

It should be noted that the Brazilian Corporation Law (Law No. 6,404/1976) establishes two criteria for the management liability: (i) "to act within its attributions with fraud or gross negligence", and (ii) "violation of the law or the company's corporate regulations". The main difference between the two situations is found in the so-called burden of proof. Contrary to the first, in which it is necessary to be proven the fraud or gross negligence of the manager, in the second hypothesis, the manager's wrongful acts are presumed. It is up to the manager, in this case, the burden of proving the occurrence of a motive that excludes the illegality of the fact and the exemption of liability.

¹Articles of Incorporation/Bylaws: a governing document that sets forth the basic terms of a corporation's existence, including the number and classes of shares and the purposes and duration of the company.

Understanding the legal obligations is, consequently, the only way to act in such way that distances or minimizes the liabilities that are inherent to the management position.



	SUBJECTIVE LIABILITY	OBJECTIVE LIABILITY
APPLICATION	It is imperative that the intent or fraud of the agent is ascertained. Therefore, the manager must have had the intention of committing the wrongful act.	It <u>does not depend</u> on the evidence of the intent or fraud of the agent causing the harm, only the causal relationship between conduct and the damage, even if the causative agent has not acted with intent or guilt.
ELEMENTS	Negligence, imprudence and malpractice	Causal relationship between conduct and result

Because of the great subjectivity in the characterization of a regular management act, the doctrine absorbed the concepts of Business Judgment Rule, which is covered by Article 158 of the Brazilian Corporation Law. It provides that the manager is not personally liable for the obligations that may incur on behalf of the company and by a regular management act made without conflict of interest, in good faith and being duly informed.

Management acts are those performed by the managers in the achievement of the corporate purpose, in accordance with the law, the company's corporate rules and their duties (diligence, loyalty, secrecy and reporting). The manager cannot guarantee a positive outcome of a management decision, having a margin of discretion within which chooses to take one or another decision. This issue is important so that it does not constitute executive accountability when a strategic decision taken results in loss to the company.



Given the high exposure of the manager's personal equity, it is recommended to adopt measures that offer protection and reduce the risk of liability for ordinary acts of management. In this sense, the manager must: **(i)** know the exact contractual and legal extension of its responsibilities, complying with and enforcing regulatory standards related to the business purpose of the company; **(ii)** ensure that the management powers granted are expressly defined in the company's Articles of Incorporation/Bylaws or internal rules; **(iii)** submit the management annual accounts to the shareholders and obtain from them the formal approval; **(iv)** enter into agreements with the shareholders of the company aiming at the indemnification or the fair compensation for losses incurred due to the regular management exercise; and **(v)** appear as beneficiary of special insurance policies against third-party risks, known in other countries as Directors and Officers.



BRAZILIAN LEGAL SYSTEM

Brazil is part of the countries influenced by the European legal tradition, with the civil law model as the structuring base of its legal system. Also, regarding the Federal Constitution, it is the supreme law of the country; all other laws and court rulings must follow it.

Brazil is a federation, formed by the Federal District, States and Municipalities, all with the authority to legislate and ensure compliance with the Laws. The federal government has exclusive jurisdiction to legislate on corporations, contractual rules, trade, financing, labor relations and intellectual property.

The regulation of companies in Brazilian law is composed of sparse laws in the legal system. Some of them deserve special attention, such as the Law of Introduction to the Civil Code, the Brazilian Civil Code and the Corporation Law, that establishes the general rules in the field of business (contracts, corporate types, civil liability, among other important issues).

In addition to the codified legislation, Brazil is a signatory to a series of international agreements in the business sphere, and because they have been approved by the legal system, in practice, they have the force of law.



DISPUTE RESOLUTION METHODS

The Judiciary, one of the three powers of the State, has been assuming a fundamental function in the effectiveness of the Democratic State based on the rule of law.

Conflict resolution in Brazil is still very much linked to the Judiciary. In dispute situations, the rule is to use the judicial apparatus to deal with the problem.

The best known non-judicial dispute resolution methods in Brazil are arbitration, mediation and negotiation. These mechanisms have been found in practice with several variants and under different titles. In addition to these, there are several new alternative dispute resolution methods that are not very widespread in Brazil, although they are highly efficient in preventing and resolving disputes if used correctly.

02.

THE DISREGARD OF THE LEGAL ENTITY IN BRAZIL

Companies in Brazil have their own legal personality completely different from that of their shareholders/quotaholders or investors, having autonomy regarding their equity and compulsory matters. They therefore have the capacity to hold rights, duties and contract obligations on their behalf. The legal existence of these collective entities is born with the proper registration of their corporate formation documents in valid public registries and ceases upon their liquidation.

The company's equity and assets are a guarantee to its creditors, in the same way that the personal equity of the shareholders/quotaholders and investors serves as a guarantee of their private creditors. With some exceptions², the company's equity is not mixed with the personal equity of each partner, investor or legal representative.

² An example is the general partnership where all partners bear jointly and with unlimited liabilities.



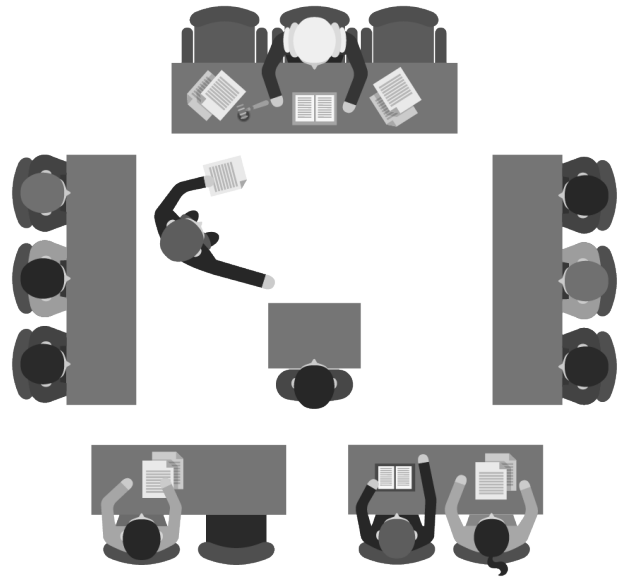
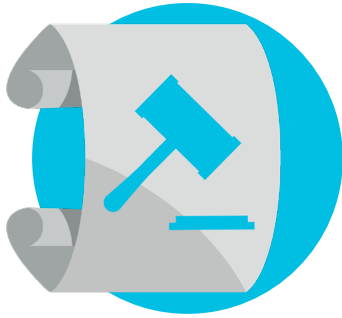
Thus, as a rule, obligations and debts existing due to the negotiation acts practiced by the company should always be directed to it. Only after verifying that the company no longer has the means to pay its debts or to fulfill its obligations, third parties can file a suit aiming at piercing the corporate veil and reaching the assets of partners, managers, directors and legal representatives, seeking for legal redress.

Disregard of the legal entity³ is the name given to the judicial act of imposing personal liability on otherwise immune corporate shareholders/quotaholders, managers, directors and other legal representatives. The law allows to consider the corporate structure ineffective in exceptional cases, when it is expressly foreseen or when certain special conditions are present. Because it is an exceptional measure, in order to be applied, certain legal requirements must be fulfilled.

³ Also known as “piercing the corporate veil”, veil-piercing, lifting the corporate veil.

In Brazil, the disregard of legal entity was legally introduced in 1990 with the enactment of the Consumer Protection Code (Law No. 8,078/90) that brought the application of the Minor Theory. The general rule (Major Theory) legally appeared with the promulgation of the new Brazilian Civil Code in 2002, in its Article 50, which established the universal rule for cases in which it is possible to disregard the legal autonomy of the company when it is used abusively.

As a rule, disregard reaches the equity of the shareholders/quotaholders or managers who practiced the irregular act, but if the conduct cannot be individualized, disregard may reach the equity of them all.



VEIL-PIERCING MAJOR THEORY

For the Veil-Piercing Major Theory, adopted by Article 50 of the Brazilian Civil Code, it is necessary to prove the dysfunctional use of the legal entity, with the intention of defrauding the law or harming third parties.

Thus, in the traditional conception of theory, it is fundamental to prove that the intentional, fraudulent or abusive use of the legal entity have occurred.

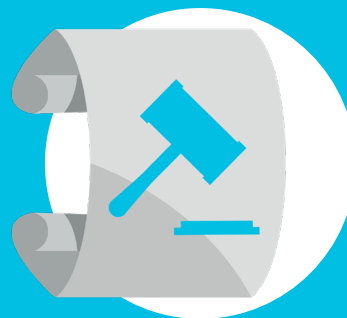
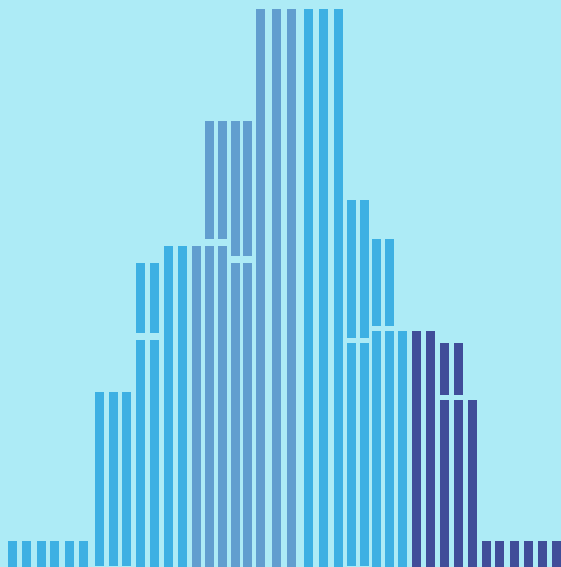
It is not enough that the company is insolvent and therefore financially unable to fulfill its obligations to its creditors for the veil-piercing to be applied. The Major Theory only recognizes the piercing of the corporate veil when it is established that the shareholders/quotaholders, managers, directors, legal representatives, acted with abuse of right, misused the company's purpose or when the commingling of assets between the assets of the individual and the assets of the legal entity has occurred, in order to embezzle or divert the company's equity to the detriment of its creditors.

ABUSE OF RIGHT	MISUSE OF COMPANY'S PURPOSE	COMMINGLING (CONFUSION OF ASSETS)
<p>Use of the company for the purpose of performing fraudulent, illegal, abusive acts or violating the Articles of Incorporation/Bylaws. Clearly exceeds the limits imposed by economic or social limits, good faith or good moral values.</p>	<p>Unlawful or irregular use of the corporate entity for a purpose different than the one for which it was created, resulting in damages for third parties.</p>	<p>Equity and other obligations of shareholders/quotaholders and company are so intertwined that it is difficult to distinguish between the two. It is demonstrated that the company pays debts of its partners, or the partners receive credits from that, or the reverse.</p>

For the application of the veil-piercing Major Theory, it is required to prove that the company was used in a fraudulent way, as a mere instrument to conceal the practice of injuring the rights of creditors or third parties, which must be demonstrated by concrete evidence and verified by a reasoned decision.

Some more modern doctrines understand that the thin capitalization of the company should also be framed as an unlawful act and a factor conducive to the piercing of the corporate veil in cases where it is proven that fraud or gross negligence have occurred.

It is understood that the company is considered to be thinly capitalized when it has a high proportion of debt capital in relation to its equity capital, that is, the equity capital is insufficient to meet its basic needs and/or bear the risks inherent to the activity performed by the company.



VEIL-PIERCING MINOR THEORY

The Minor Theory presents the understanding that the legal entity's equity insufficiency is enough to order the piercing of the corporate veil, which is an exception to the Major Theory.

The cases in which the Minor Theory is applied must be perceived by the foreign investor as the most troublesome aspect within the Brazilian legislation. In these cases the piercing is performed whenever the company's equity autonomy obstructs the compensation of damages caused by the legal entity.

This exceptionality is verified in our legal system under the understanding that "the core right" to be protected deserves special treatment, therefore, not being applied the general rule, brought by the Civil Code.

According to the Minor Theory, the inherent business risk, normal to economic activities, cannot be borne by the third party, but by the shareholders/quotaholders, managers, directors and legal representatives of the legal entity, even if they demonstrate good administrative behavior, that is, even if there is no evidence of culpable or malicious conduct on their part.

The following fields are affiliated to the Minor Theory in Brazil:



CONSUMER LAW, which provides that “the legal entity will also have the veil pierced whenever its legal autonomy is in any way an obstacle to the reimbursement of damages caused to consumers” (Article 28, paragraph 5, Law No. 8,078/1990).



ENVIRONMENTAL LAW, which provides that “the legal entity may have the veil pierced whenever its legal autonomy is an obstacle to compensation for damages caused to the quality of the environment” (Article 4, Law No. 9,605/1998).



LABOR LAW, which understands, through case-law, that the employee is economically disadvantaged and cannot bear the risks of the enterprise managed by his/her employer. Thus, since the company does not have sufficient equity to support the execution of labor debts, the shareholders/quotaholders and, eventually, managers, directors and legal representatives must be liable for the debts not paid by the company, and the payment will be performed by their private assets.

In these cases, it means, not without criticism, that it is possible to pierce the veil of legal entity for the individual to be held liable, simply because **the legal autonomy is in some way an obstacle to reimbursement of damages caused (to the consumer, the environment, and so on), even if no illegal act has been committed.**



APPLICATION OF THE DISREGARD OF THE LEGAL ENTITY UNDER THE NEW BRAZILIAN CODE OF CIVIL PROCEDURE

The New Brazilian Code of Civil Procedure (Law No. 13,105/2015), in Articles 133 to 137, has instituted the so-called disregard of the legal entity's incident, providing that the shareholders/quotaholders, managers, directors and legal representatives affected by a decision that "pierced a veil" of a certain company must be heard before, guaranteeing an adversarial proceeding.

In fact, it cannot be admitted that anyone within the framework of a democratic process model, except in cases of protection of urgency, is restricted in its assets and rights without due process of law, and the possibility of full adversarial proceeding and use of the resources inherent to the exercise of right to defense.

The new Code of Civil Procedure assured the parties the constitutional right of the adversarial proceeding and full defense, stated by the existence of constitutional guarantees that ensure the due process of law.



CONSUMER LIABILITY

Since it was adopted in Brazil, the Consumer Protection Code (*Código de Defesa do Consumidor* – CDC) has been trying to equalize the consumer relation composed by the Consumer (considered as the weakest part and for that reason deserving of greater care by the legal system) and the Supplier (being the agent that develops activity of production, assembly, construction, transformation, importation, exportation, distribution or commercialization of products or provision of services). Because of this alleged condition towards the consumer, CDC innovated in its provisions by bringing a different approach to the already mentioned institute of the disregard of the legal entity.

In the scope of the consumer relationship, unlike the general rule from the Civil Code that advocates the Major Theory for liability of managers and investors, it is observed the adoption of the Minor Theory of piercing of the corporate veil.

Whenever the conduct of the supplier is interpreted in any way as an obstacle to the compensation of damages caused to consumers, the lifting of the patrimonial protection veil is authorized, reaching the equity sphere of shareholders/quotaholders, managers, directors and legal representatives. In this regard, the spectrum that the legislator has opened is quite large.

The adoption of the Minor Theory, in order to protect the consumer in the daily relationship, results in a considerable increase in the degree of exposure to the risk of contingencies of the suppliers and its representatives in Brazil.

Here again, it is worth suggesting the company to adopt preventive policies for quality control, compliance and corporate governance.

In addition, it is strongly recommended to maintain a fast and efficient channel of contact with consumers so that their needs are remedied before being transformed into administrative or judicial litigation. Good service and speed in solving problems helps to mitigate risks to the company.



ENVIRONMENTAL LIABILITY

Brazil is a continental country. Of its total area, 516 million hectares are covered by forests, equivalent to 60.7% of the national territory. Faced with this fact, concerns about the environment deserve special attention in our legal system.

According to the Brazilian Federal Constitution, a person or entity that causes any type of damage to the environment is subject to criminal and/or administrative sanctions, and, in addition, will be responsible for repairing the damage caused.

The environmental theme in Brazil is especially complex because all federative entities have the power to legislate on the matter. Therefore, the investor who wishes to develop some activity that might cause environmental damage must be prepared to meet a series of requirements to start its business.

Civil liability for environmental damage, regardless of the legal qualification of the public or private debtor, is objective, joint and unlimited, and is governed by the polluter-payer principle, of the *in integrum* repair and the priority of *in nature* repair. As the legislation aims to protect the environment as a collective good, a series of techniques to facilitate access to justice are legitimized, including reversing the burden of proof always in favor of the environmental victim.

In practice, once the environmental damage is detected, the liability of the agent (company) is established with the presence of the causal relationship between conduct and the damage produced, being held liable: **(i)** those who do it, **(ii)** those who do not do when should do it, **(iii)** those who do not care if others do, **(iv)** those who pay others to do it, and **(v)** those who benefit when others do it.

In other words, the spectrum of accountability is enormous when dealing with environmental liability. In the interests of environmental protection, all the people that may have contributed to the environmental damage, even if not intended, are responsible for this result: the company, the managers (in case of personal responsibility), company shareholders/quotaholders and any third parties.



If the legal entity does not have sufficient equity to repair or compensate for the environmental damage caused, it may have its veil pierced, regardless of the evidence of fault, negligence or any wrongful act.

Another important subject on environmental liability is the administrative area, which consists in the sanctions imposed by the administrative authority due to violation of the environmental legislation. The administrative sanctions for violation of environmental legislation are the following:

1	Warning
2	Simple fine
3	Daily fine
4	Seizure of animals, products of fauna and flora, instruments, supplies, equipment of any kind used to infringe the Law
5	Suspension of the sale and manufacture of the product
6	Interruption of construction or activity
7	Destruction of the product

In the environmental sphere, liability can be criminal. Brazil was the pioneer in Latin America, creating the theory of criminal liability of the legal entity. Examining the Article 225, paragraph 3 of the Brazilian Federal Constitution, it is clear the application of penalties not only to individuals but also to legal entities.

It is undeniable that virtually all business activities have some impact on the environment. So, to minimize these impacts, the order of priority of measures to be taken should be firstly prevention, then mitigation, recovery and finally compensation. Therefore, finding ways to avoid impacts and prevent risks should be the first thing to be adhered to.





ANTITRUST LIABILITY

Free market competition is guaranteed by the Brazilian Federal Constitution, however there are sparse laws in the legal system that regulate the competitive relationship. Any practice adopted by an economic agent that may, even though potentially, damage free competition is characterized as anticompetitive conduct, even if the offender has not intended to harm the market.

Market power by itself is not considered illegal, but when a company or group of companies abuses that power by adopting a conduct that hurts free competition, in practice, it is abusing of economic power. Such abuse is not limited to a set of specific practices, since the analysis of the possibility of the harm caused to competition is complex and many factors are analyzed in order to characterize a practice as abuse.

The state body responsible for overseeing and controlling Brazilian competition policy is the Administrative Council for Economic Defense (*Conselho Administrativo de Defesa Econômica* – CADE). Its action consists in investigating and repressing the conduct that can be characterized as harmful to the competition⁴.

Article 36 of Law No. 12,529/2011 lists some conduct that may characterize a breach of the economic order, insofar as it has as its object or may produce anticompetitive effects, distorting or in any way prejudicing free competition.

This provision sets out an exemplary and non-exhaustive list of pipelines that have the potential to cause harm to competition. Whether such conduct really will have this effect when adopted is a matter to be analyzed on a case-by-case basis. Among others, the exemplary conduct of article 36 mentions:

Cartel

Dumping

Territorial and customer base restrictions

Exclusive agreements

Abuse of dominant position

Fixing of resale prices

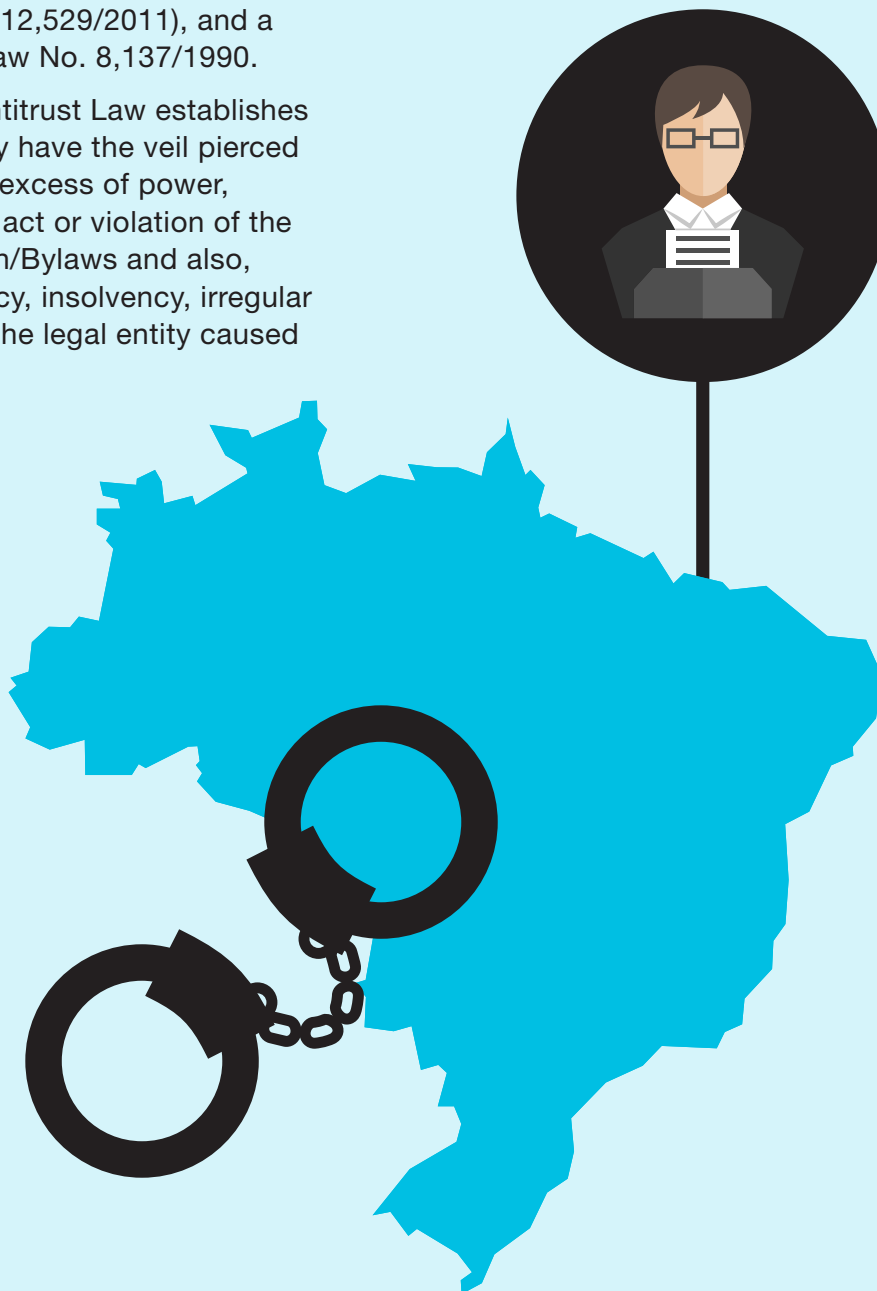
Refusal to hire

Creation of difficulties for the competitor

⁴ Unfair competition is the commercial disagreement between parties, with no impact on the competitive environment, and is therefore a private matter, disciplined by Law No. 9,279/1996, not constituting an infraction of the economic order and being treated in its own scope, that is, in the Judiciary. Unfair competition, described as “unpredictable behavior”, translating into acts “contrary to the practice of good moral values usually observed in the relations of the economic agents among themselves, as well as of these with the consumers”.

One of the most common behaviors in Brazil that hurt competitive policy is cartel practice. This constitutes an administrative offense punishable by CADE, under the terms of the Antitrust Law (Law No. 12,529/2011), and a crime, punishable by Law No. 8,137/1990.

The Article 34 of the Antitrust Law establishes that the legal entity may have the veil pierced due to abuse of rights, excess of power, infraction of law, illegal act or violation of the Articles of Incorporation/Bylaws and also, when there is bankruptcy, insolvency, irregular closure or inactivity of the legal entity caused by mismanagement.





LABOR LIABILITY

The Labor Court, in the absence of legal or contractual provisions, should decide, as the case may be, by case-law, by analogy, by equity and other general principles and norms of law, especially labor law, according to practice and good moral values and, comparable law. The Consolidation of Labor Laws (*Consolidação das Leis Trabalhistas* – CLT, Decree Law No. 5,452/1943) is the law that regulates the relations between employers and employees in Brazil.

In this sense, despite the clear legal determination regarding the labor liabilities brought by Brazilian legislation, it has been observed in many judgements that the application of disregard of the legal entity often surpasses the reasonable logic.

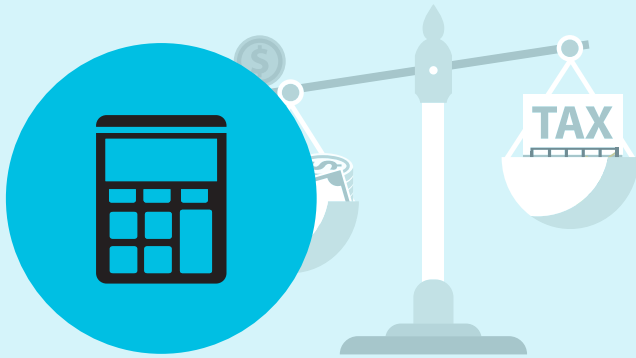
Theoretically, the veil-piercing Major Theory should be applied to labor cases. However, labor courts have been executing judicial convictions against all shareholders/quotaholders when the company does not have sufficient assets, regardless of whether there is fraud or gross negligence, abuse of company rights, and so on.

The labor courts in Brazil, with very few exceptions, have the understanding that the employee is the economically disadvantaged party and cannot bear the risks of the enterprise managed by its employer. Consequently, when the company does not have sufficient equity to support the execution of labor debts, partners and, eventually, managers, directors and legal representatives are being held liable for the debts not paid by the company, **in a joint and unlimited manner**, being the payment of the debts performed by their private assets.

Happens, therefore, a subversion of the Major Theory by the Labor Court, since there is no legal provision that establishes liability to partners or managers for the payment of labor sums when the company does not have sufficient equity. Following this understanding, the veil-piercing theory is incorrectly applied when there is no unlawful act, fraud, abuse of rights or misuse of purpose.

Thus, it is recommended that shareholders/quotaholders and investors always maintain accurate control and effectively certify that all labor rules within their company are fulfilled in their entirety. Not only that, they should also always keep the employee records up to date, in order to prove regularity whenever necessary.





TAX LIABILITY

Taking into consideration the complexity of the tax system in Brazil, which is composed of numerous special rules and sparse legislation enacted at different levels of government (Federal, State and Municipal), it is essential to have a tax planning in order to opt for the best corporate structure to mitigate tax charges. The great number of rules that governs the current tax system can lead to the collection of taxes in an incorrect way, which can generate relevant losses for a company.

A good tax planning helps the company to define precisely, among others: **(i)** the possibility of using tax incentives or exemptions; **(ii)** the establishment of a schedule of taxes, defining the best dates for the collection of fees and taxes and the delivery of ancillary obligations; **(iii)** the tax liabilities that shareholders/quotaholders, managers, directors and others involved in the management of the company may have for the payment of taxes, fees, fines and penalties due to eventual legal entity veil-piercing.

The Brazilian National Tax Code (*Código Tributário Nacional* – CTN, Law No. 5,172/1966) regulates the tax liability theme in Article 134, establishing the legal burden for the individual or legal entity which, in certain cases, can hold secondarily, totally or partially, the responsibility for the fulfillment of the obligation in the event that the primary taxpayer cannot fulfill the principal obligation.

It is evident that the mere exercise of the management of the company by these individuals does not make them liable for the company's tax debts in case of non-compliance with the tax procedures. Here, it is fully applied the Major Theory rule as presented above.

However, individuals that act with excess of power, that violate the law or the Articles of Incorporation/Bylaws of the company, might be considered jointly responsible for the payment of the outstanding taxes and obligations. The Article 135 of the CTN regulates the joint liability of managers, directors and other legal representatives of the company when they perform acts with excessive powers⁵ or infraction of law or Articles of Incorporation/Bylaws.

Sections III and VII of Article 134 govern the liability of the managers of assets of third parties and of the shareholders/quotaholders of a certain company that goes into liquidation.

⁵ Considering that the Articles of Incorporation/Bylaws regulate the manager limits of power, it is right to say that the legal representative performs acts with excessive powers when the Company's Articles of Incorporation/Bylaws is violated.

03.

TYPES OF BUSINESS ORGANIZATIONS AND ITS SPECIFIC LIABILITIES



Brazilian law allows the formation of several types of corporate and business organization structures, being the limited liability companies (*Sociedade Limitada* – LTDA) and corporations (*Sociedade Anônima* – SA) the two most common structures chosen by foreign investors. There are also two other possibilities that eventually are used by foreign companies: (i) the opening of a branch of the foreign company in Brazil, which must be authorized by means of a Decree of the Presidency of the Republic, in accordance with Article 1134 of the Brazilian Civil Code and (ii) the formation of a consortium, so that foreign companies and investors can coordinate their specific interests towards a common end.

In Brazil, according to the corporate type adopted, the partners of a certain company may be limited or unlimited liable for its corporate obligations. Thus, it is essential to understand the limits and responsibilities of Brazilian companies within Corporation Law.

The general rule, due to the principle of the company's legal personality, is the non-liability of the partners, considering that the companies' assets shall not be mixed with the partners' assets. Likewise, the liability of the partners and managers of the company is subsidiary, which means that, until the company's assets are not exhausted, one cannot enforce on the personal assets of the partners and managers in order to satisfy the corporate obligations.

The liabilities attributed to the companies may be, in nature, civil, criminal or administrative.



LIMITED LIABILITY COMPANIES (*SOCIEDADE LIMITADA* – LTDA)

Most common and used corporate form in Brazil, being governed primarily by the Brazilian Civil Code and, in a secondary manner, by the Brazilian Corporation Law.

The preference for the use of limited liability company is especially due to five basic aspects that result in greater security and practicality for investors and entrepreneurs. They are: **(i)** simple and extremely flexible corporate structure; **(ii)** there is a clear limitation of the liability of the partners, **(iii)** there is no legal obligation to publish financial statements each fiscal year, **(iv)** it ensures a certain degree of confidentiality of the companies' affairs; and **(v)** there is no statute obligation to distribute profits.

The Brazilian Law provides that the *Sociedade Limitada* needs to be constituted by at least two quotaholders which, apart from a few exceptions, can be either individuals or legal entities and may or not reside in Brazil. Quotaholders not resident in Brazil must be formally represented by a Brazilian legal representative/attorney-in-fact residing in the country, with powers to receive service of process on behalf of the foreign quotaholder.

In limited liability companies, all partners are held jointly and severally liable for the complete payment of the corporate capital up to the full payment of the subscribed capital. Once the capital is fully paid up, the responsibility is restricted to the amount of each partner's ownership interest.



CORPORATIONS (*SOCIEDADE ANÔNIMA* – SA)

A joint-stock corporation, or *Sociedade Anônima*, is governed by the Corporation Law and it is a commercial corporation. It also could be described as a business corporation having as its purpose the earning of profits to be distributed to the shareholders as dividends or interest on their own capital.

There are two kinds of *Sociedades Anônimas* in Brazil: publicly held companies that raise capital through public offerings and subscriptions and are supervised by the Brazilian Securities Commission (*Comissão de Valores Mobiliários* – CVM) and closed capital companies that raise capital with its shareholders or subscribers, whose accounting and management are simpler.

Equity is represented by securities called shares. Depending on the rights or advantages conferred to their holders, the shares may be common, preferred or fruition shares. Common shares entitle its holder to the right to vote, whereas preferred shares, which grant special rights to its holder, may restrict or suppress the right to vote.

The main strengths of the Brazilian *Sociedade Anônima* are: **(i)** there is no joint liability among shareholders (when, for example, other shareholders fail to deposit their contributions to the corporate capital); **(ii)** protection of minority shareholders from arbitrary decisions of majority shareholders; **(iii)** availability of external finance through access to capital markets; and **(iv)** liability is limited to the issue price of shares subscribed for or acquired.

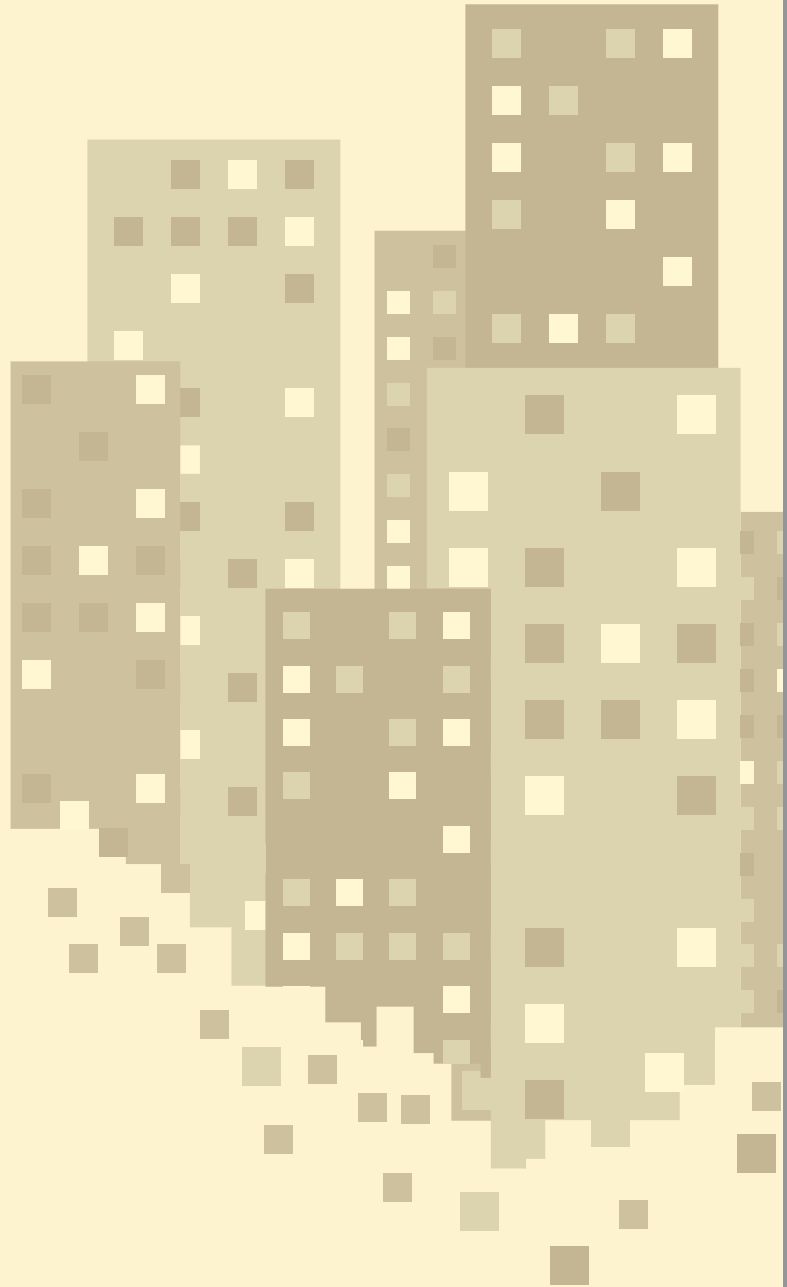


BRANCH OF A FOREIGN COMPANY

A branch can be described as an extension of the main company, a mere decentralization that does not confer any kind of autonomy in relation to the main company and shall not be confused with the incorporation of a Brazilian company whose partners are foreign companies (the latter having its own legal personality distinct from its shareholders).

According to the Articles No. 1,134 to 1,141, of the Brazilian Civil Code, a prior Presidential Decree is required for setting up a branch of a foreign company in Brazil. Only a very limited number of multinationals operate in Brazil under this structure, due to the extremely bureaucratic requirements associated with the creation and maintenance of a branch in Brazil.

According to Article 1,138 of the Civil Code, the foreign company authorized to operate in the country is obliged to have, permanently, a representative in Brazil, with powers to solve any issue and to receive judicial summons on its behalf. Then, these representatives can be held directly liable for the company before third parties.





CONSORTIUM

In accordance with Article 278 of the Corporation Law, the consortium of companies consists of the association of companies under the same control or not, which will keep their legal entity, in order to perform a certain endeavor, generally one of high cost, and which demands for its execution specialized technical knowledge and high standard technical instruments.

LIABILITIES OF PARTNERS

LIMITED-LIABILITY COMPANIES	<p>Restricted to the amount of interest held by each quotaholder in the subscribed corporate capital. However, all quotaholders are jointly and severally responsible if the corporate capital is not fully paid.</p>
CORPORATIONS (publicly held or closed capital)	<p>Liability is limited to the total value of the issue price of the shares subscribed or acquired by each quotaholder.</p>
BRANCH OF A FOREIGN COMPANY	<p>It is considered an extension of the head office of the foreign company and, therefore, its liability before third parties in Brazil may reach not only its own corporate capital but that of the head office of the foreign company as well.</p>
CONSORTIUM	<p>The companies which take part in a consortium have no joint liability, being each one liable for the obligations incurred by them, except if otherwise expressly determined by the consortium. Based on this legal provision, creditors can seek to receive their credit directly from the consortium members, who are responsible for the obligations assumed on behalf of the consortium.</p>

04.

BRAZIL'S ANTI-CORRUPTION LAW AND COMPLIANCE

Brazil is entering a new era of maturity in its business environment. With the entry into force of Law No. 12,846/2013, also known as the “Anti-Corruption Law”, the country complies with the most rigorous and advanced anti-corruption legislation in the world. This scenario presents a challenge for the organizations that operate in Brazil, in terms of creating a structure of corporate governance, compliance, risk management and internal controls. Those are profound changes that directly involve the corporate culture as a whole.

The meticulousness and structure of the Anti-Corruption Act are comparable to similar Laws in the United States (the Foreign Corrupt Practices Act, or FCPA) and the United Kingdom (the Bribery Act). The legislation was approved in August 2013 and put into effect in January 2014.

The Law has become a tool to reinforce business ethics, since it can be used to investigate and punish those involved in cases of corruption. This requires changes in how companies relate to the public sector, by taking measures that inhibit acts of corruption by their employees, contributors or suppliers.



The Anti-Corruption Law is not restricted to organizations that participate in bids and enter into or maintain contracts with public bodies, it also applies to any company (regardless of its form of organization), foundation, association or foreign company, which has an establishment or representation in Brazil.

In this context, the existence of a properly structured and effective integrity program may not only prevent the irregularities, but also be considered as one of the criteria for the application of administrative charges under the Anti-Corruption Law in the event of any harmful act. Thus, despite not eliminating the application of the penalty, a compliance/integrity program may imply its reduction.

The compliance program should be structured according to the characteristics and risks of the activity of each legal entity, and should include several effectiveness mechanisms, such as periodic audits, the opening of whistleblowing channels and the encouragement of complaints of irregularities and the protection of the complainant, as well as the recurrent analysis of risks in order to keep the program always adequate to the activities of the organization.

The direct target of the Anti-Corruption Law is indeed the legal entities; however, it is important to note that there are direct provisions of liability of managers and investors in the body of the Law.

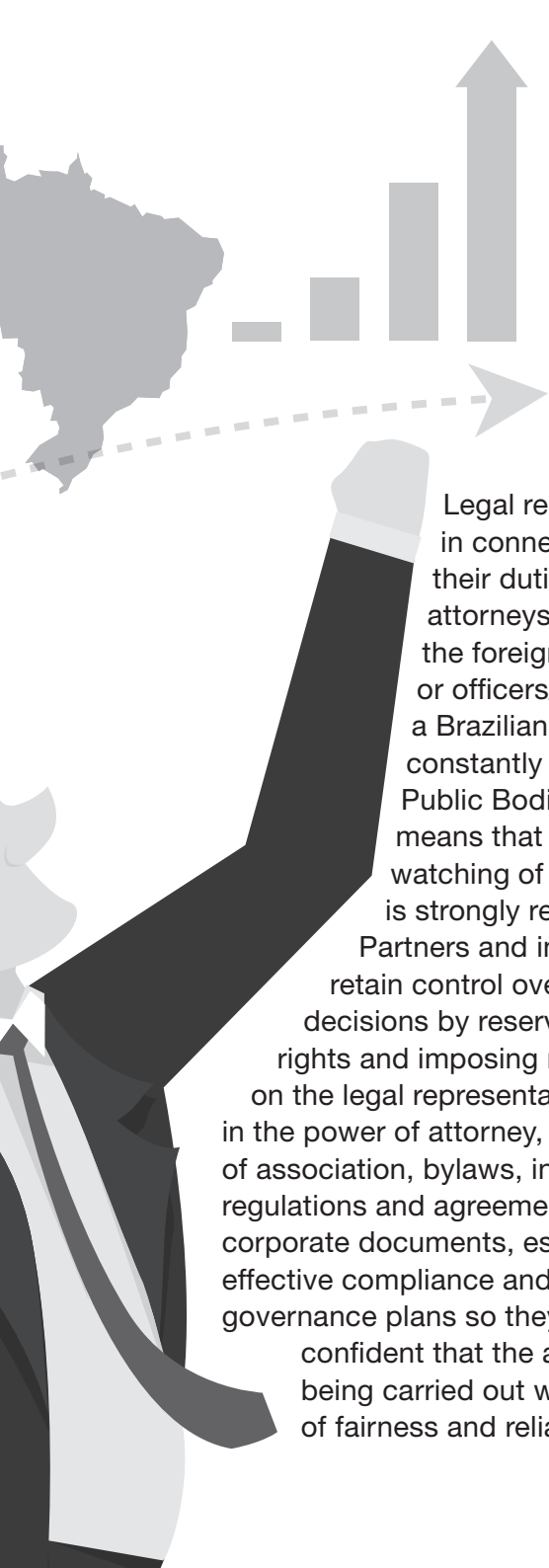
05.

LEGAL REPRESENTATION IN BRAZIL – RELEVANT INFORMATION

The Brazilian law recognizes as legal representatives all those who are given, through legislation or contract, powers to practice acts or management interests on behalf of another person (articles 115 and 653 of the Brazilian Civil Code). For the purposes of this guide, will be considered Legal Representative individuals who effectively exercise management and business management acts on behalf of foreign investors and shareholders, such as: officers, directors, managers and attorneys-in-fact⁶.

The investors who decide to nominate a legal representative in Brazil need to understand the extension of the risks and liabilities involved, due to the fact that this is an extremely delicate position to be occupied and certainly may affect the company in Brazilian soil and even have impacts abroad, as a result of the application of FCPA and UK Bribery Act provisions.

⁶ Attorneys-in-fact who hold powers to receive summons on behalf of foreign companies and foreign investors in Brazil.



Legal representatives, in connection with their duties as attorneys-in-fact of the foreign investors or officers/directors of a Brazilian company, constantly act before Public Bodies, which means that a close watching of this interaction is strongly recommended.

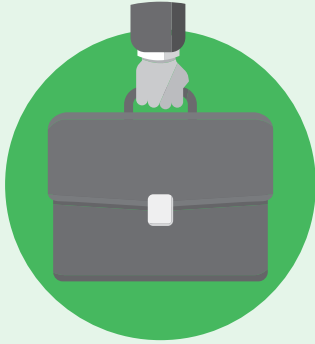
Partners and investors must retain control over specific decisions by reserving certain rights and imposing restrictions on the legal representatives acts in the power of attorney, articles of association, bylaws, internal regulations and agreements or others corporate documents, establishing an effective compliance and corporate governance plans so they can be confident that the activities are being carried out with a high level of fairness and reliability.

Likewise, a risk assessment is a mandatory step to be taken and must consider the legal representatives past activities and eventual other companies that they might be linked with. It is quite common in Brazil that the relationship of a legal representative in a problematic company will entail risks for another company that also counts on its simultaneous services (situation called “crossed risk”). Given that, directors, officers/managers and attorneys-in-fact shall pass through constant risk analysis in order to evaluate the potential of exposure that a company could be subjected to.

Nowadays, there is no doubt that foreign companies that conduct business in Brazil are considered directly liable and must be fully aware of the activities performed by its employees, suppliers and its legal representatives, in order to identify, combat and mitigate acts of corruption.

Besides that, with the increase in the number of cases in which a legal entity status may be disregarded, especially in environmental, consumer and labor cases, it has been verified that, besides partners, managers and shareholders/quotaholders (positions traditionally affected by the disregard of the legal entity), the attorneys-in-fact of the foreign companies have also started to appear as defendants in lawsuits filed against such foreign companies, and some of their personal assets have even been seized.

In Brazil, there is a severe liability issue regarding companies’ officers and attorneys-in-fact, considering that precedent judicial cases tend to increasingly favor the disregard of the legal entity, so that debts and accountabilities (tax, labor, environmental, consumer, corporate, among others) may be demanded directly from specific individuals (partners, officers, directors and attorneys-in-fact, for instance).



ATTORNEY-IN-FACT

The attorney-in-fact is the indispensable person who will perform, in the name of the foreign company, the acts inherent to his/her status as shareholder/quotaholder in the Brazilian company, and may perform numerous corporate acts before federal, state and municipal agencies and public authorities. As determined by the Brazilian Civil Code, the mandate is exercised when someone receives from another person the powers to, on his/her behalf, perform acts or manage interests. The power of attorney is the instrument that operationalizes the mandate.

Articles 119 and 126, paragraph 1 of the Corporation Law, provide for the obligation of the foreign company (shareholder or quotaholder of a company in Brazil) to establish in the country an attorney-in-fact to represent them permanently in the national territory including powers to receive summons on suits brought against it.

The foreign company that intends to open, incorporate or be a partner of a company in Brazil will need to appoint an individual residing in Brazil to exercise the corporate acts inherent to its legal status, such as: (i) attend meetings, assemblies or other acts of deliberation; (ii) subscribe, acquire, dispose of, assign or transfer shares or quotas, and (iii) exercise all other rights inherent to the status of shareholder or quotaholder of said Brazilian company of which it holds interest.

It is important to emphasize that a foreign individual may act as an Attorney-in-fact of foreign companies in Brazil, provided that he or she has residence in Brazil.





OFFICER OR DIRECTOR OF THE BRAZILIAN ENTITY

As previously explained, foreign companies traditionally run its Brazilian entities by occupying the position of quotaholder or shareholder. In this sense, many foreign companies usually choose to open a brand-new company in Brazil in which they will act as partners (often by using holdings).

As a result of enrolling this new company in Brazil, there is a legal obligation to appoint an officer or director who will be required to legally represent the new business entity initiated. The management may be performed by one or more individuals and shall be governed and registered at the articles of incorporation or a separate corporate act.

In addition to being responsible for the full legal representation of the company, the officer or director appointed by the foreign partners may be held civilly, administratively or criminally liable if they fail to comply with the rules defined by contract or by law, including the obligation to repair any losses and damages borne by foreign partners.

The exercise of the position ends by the dismissal, at any time, of the manager or director, or by the expiration of the term of office established in the company's Articles of Incorporation.





BOARD OF DIRECTOR MEMBER

From the analysis of the Brazilian legislation, it is understood that the shareholders, in electing the members of the company's board (also known as the board of directors – BofD), are delegating to the nominated members the obligation to watch over the interests of all shareholders regarding the operation of the company.

Therefore, BofD members should exercise their powers that the law, statute or shareholders' agreement confers to them, always according to the interests of the company, and complying with the requirements of its social function, as well as the duties of diligence, loyalty and reporting.



BofD members are not personally liable for any obligations they may incur on behalf of the company and by virtue of a regular management act, but may, however, be civilly liable for any damages they cause if they act with (i) fraud or gross negligence (ii) or by violation of the law or the company's Articles of Incorporation.

The paragraph 2, article 146 of the Corporation Law establishes that the nomination of the BofD member resident or domiciled abroad is conditioned to the constitution of a resident legal representative in Brazil, with powers to receive service of process on lawsuits brought against him/her, by a power of attorney with validity period that shall extend for at least 3 (three) years after the end of member's term of office in the Board of Directors.



06.

FRAUD AND CORPORATE CRIMINAL LIABILITY



Under the responsibility of managers and investors in Brazil, fraud is an institute that deserves attention once it is characterized in the practice of business routine by agents invested in bad faith. Fraud is nothing more than the use of deceitful or tricky means in order to circumvent the law or an agreement, whether existing or future. It is worth mentioning that there is a need for harmful intent external to the relationship of the fraudulent parties so that there is a fraudulent action.

Some types of fraud in Brazilian Law are: (i) fraud on creditors; (ii) execution fraud and (iii) fraud in law.

In addition to the aforementioned civil liability, which is the general rule, the manager can be criminally liable for his/her illegal conduct.

It is worth noting that in order to be regarded as criminal liability of the agent, the conduct in question must be predicted as a crime and may include those who have participated in it, through action (practicing criminal conduct) or omission (failing to make decisions or actions that could prevent the occurrence of the crime, when they had the duty and the possibility of avoiding it).

Some regulations that provide criminal liability for managers or even foreign investors (in the person of his/her attorney-in-fact) are:

Brazilian Criminal Code

Anti-Corruption/Money Laundering Law

Environment Law

Tax Code
(Tax, Economic and Financial System)

Consumer Relationship

Illegal Enrichment/Misappropriation

Law of Court-Supervised
Reorganization and Bankruptcy

Labor Legislation
(Discriminatory Practices at Work)

CVM/Capital Market - Insider Trading - Art. 27-D
of Law 6,385/76, included by Law 10,303/01



Under the Brazilian criminal law perspective, managers and directors cannot be criminally liable for unlawful acts committed by the company. These agents only have incurred criminal responsibility for acts practiced in person in the performance of their duties. Managers and even the foreign investor's attorneys will be held liable for acts of the company if they are aware that the company is not complying with all legal requirements and do not take any action to avoid this noncompliance.

Despite fraud having such harmful effects on corporate practice, there are ways to curb this type of attitude. In addition to the legislative protection already mentioned, it is suggested that a corporate planning be performed at the time of the incorporation of this company, considering protection barriers in the Articles of Incorporation/Bylaws to avoid such conduct, as an example, **(i)** the delimitation of amounts for financial transactions and signatures of contracts; **(ii)** adoption of an effective Board of Directors/Supervisory Board structure; and **(iii)** implementation of Compliance and Corporate Governance rules, in line with Anti-Corruption and Anti-Money Laundering Laws.



07.

ABOUT OUR SPONSOR

Based on the experience acquired by its partners during several decades of work in the Brazilian and international legal and corporate scenarios, MOURÃO CAMPOS has been developing a unique format in the service provided to its clients from all over the world who enter Brazil to undertake in the most varied markets.

Aware of all the responsibilities arising from this activity, MOURÃO CAMPOS develops legal representation work for its foreign clients within the most sophisticated criteria for corporate governance and compliance.

The mission assumed by MOURÃO CAMPOS before its clients brings with it a picture of extreme trust for both sides: clients trust in the MOURÃO CAMPOS' values, in the same way as MOURÃO CAMPOS holds great certainty about the performance of its clients.

For these reasons, even when it is a risk-sensitive activity, MOURÃO CAMPOS enjoys high credibility in its market, which allows the high-level work performance and a very high level of control and safety for its members and clients.

Completed in 2018, the milestone of 10 years of exclusive activity in the legal representation of foreign companies and their subsidiaries in Brazil, MOURÃO CAMPOS regards the values of transparency, agility and integrity in dealing with its clients' business, always with constant attention to the control and systematization process for corporate governance and compliance.

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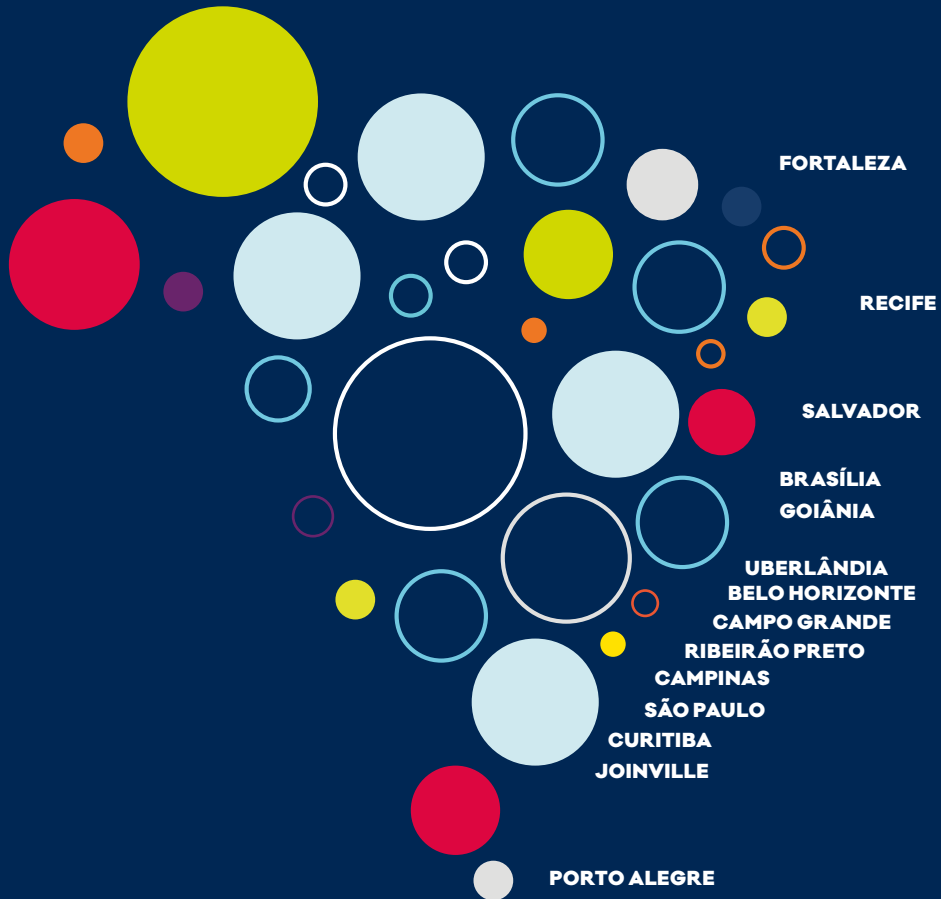
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