Corporate Governance In Brazil

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1. Setting The Scene – Sources And Overview

1.1 What are the main corporate entities to be discussed?

In Brazil, there are two main types of corporate entities: limited liability companies (sociedades limitadas); and corporations (sociedades anônimas). Limited liability companies have a simpler structure and are generally used in small and medium-sized ventures, family businesses and as subsidiaries. Corporations which have a more complex structure are subject to a more encompassing regulation and are geared towards medium and large-sized ventures. As a general rule, corporations are the only entities that can be listed and have securities admitted for public trading.

Although corporate governance is relevant to all types of companies, the answers below cover corporations, focusing on listed corporations.

1.2 What are the main legislative, regulatory and other sources regulating corporate governance practices?

The main sources of corporate governance requirements are corporate legislation, the corporation's organisational documents, securities legislation and stock exchange rules. Shareholder advocacy groups are also increasingly influential through the issuance of guidelines and best practices rules.

Corporate legislation

The primary source for corporate regulation and corporate governance is Federal Law 6,404/1976 ("Corporation Law"), which governs all corporations in Brazil, whether listed or not. In Brazil, only the Federal Congress has the authority to issue laws with regard to corporate matters and the securities market.

The Corporation Law regulates all matters concerning the incorporation, organisation, existence and winding up of corporations, including the issuance of shares and other securities, shareholder meetings, shareholders' rights, operation and management of the corporation, directors' and officers' duties and profit distribution.

In Brazil, important listed corporations are government-controlled. In view of an increase in conflicts between minority shareholders and the controlling shareholder (the government) of such corporations due to accusations of corruption and the use of such corporations as vehicles to implement governmental policies that undermine shareholder value, in the end of 2016 the Brazilian Congress enacted a law (Federal Law 13,303/2016) establishing rules and corporate governance standards that must be followed by government-controlled or owned companies. Except where expressly indicated otherwise, we do not cover in this article the corporate governance rules applicable to government-controlled or government-owned companies.

A Corporation's Organisational Documents

All corporations in Brazil are governed by bylaws (estatuto social), which, in addition to defining the corporation's name, its purpose, the location of its head office, the value of its capital stock and the number of issued shares, among other elements, may also establish rules on shareholder meetings, board composition and authority, officers' authority, organisation of other committees of the board, shareholders' rights and many other aspects of corporate governance, to the extent that such matters are not regulated or imposed by the Corporation Law. In the case of a conflict, the Corporation Law will generally prevail over the bylaws. The bylaws can be amended by the shareholder meeting.

Listed corporations are also required to issue a policy for disclosure and use of information. Such a policy will establish standards of disclosure of acts and facts involving the entity and procedures to maintain confidentiality of sensitive information not yet disclosed to the public. Listed corporations are also encouraged to issue a policy for trading of securities by related parties, setting forth standards to be upheld by the corporation, its controlling shareholders, directors, officers and members of the overseeing committees and other committees of the board when trading securities issued by the corporation.

Corporations, especially listed ones, may also adopt additional governing documents, such as codes of ethical business conduct, dividends policies and charters of the board of directors and other committees. Government-controlled corporations and certain listed companies are obliged to adopt a code of business conduct.

Securities Legislation

Listed corporations are also subject to Federal Law 6,385/1976, which regulates the securities market and the Comissão de Valores Mobiliários (the Brazilian securities and exchange commission, referred to as the "CVM"). They must adhere to the various rules, regulations and guidance opinions issued by the CVM, among which:

- Ordinance 358/2002, which addresses the disclosure requirements and use of relevant information of the corporation.

- Ordinance 361/2002, which regulates tender offers of Brazilian listed corporations, including delisting offers, hostile offers and sale of control offers.

- Ordinance 400/2003, which regulates the public offer for the distribution of securities, including the disclosure and control of inside information before the offer period.

- Ordinance 480/2009, which contains the requirements for a corporation to obtain registration with the CVM and thus be listed. It also establishes annual, quarterly and periodic financial reporting and other continuing obligations, and imposes additional obligations on directors, officers and controlling shareholders.

- Ordinance 481/2009, which regulates proxy solicitations and information that must be disclosed to shareholders on matters to be voted in shareholder meetings.

Stock Exchange Rules

Corporations listed on the São Paulo Stock Exchange, now called B3 – Brasil, Bolsa, Balcão Stock Exchange ("B3") must comply with its listing rules and regulations. There are four listing segments in the B3 Stock Exchange's main market: the traditional segment; Level 1; Level 2; and Novo Mercado. The latter three segments subject corporations to additional corporate governance practices in comparison to those set forth by law; the Novo Mercado having the highest standards and Level 2 having the second highest standards. The great majority of recent IPOs have been made on the Novo Mercado. The following practices, among others, must be followed by corporations listed on the Novo Mercado segment: capital composed of a sole class of voting shares; tag-along to all shareholders in the sale of the corporation's control; additional disclosures of financial information; and a minimum number of independent members in the board of directors.

The B3 Stock Exchange also manages two over-the-counter markets – the Bovespa Mais and the Bovespa Mais Nível 2 – similar to the London Stock Exchange AIM, focusing on smaller companies and with more flexible listing rules.

Other Sources

Advocacy groups such as IBGC (the Brazilian Corporate Governance Association) have issued best practice guidelines and manuals. Although not mandatory, such guidelines and manuals have had a growing influence on corporate governance practices of Brazilian corporations.

1.3 What are the current topical issues, developments, trends and challenges in corporate governance?

Due to 'Operation Car Wash', the enactment in 2013 of an anti-corruption law (Federal Law 12,846/2013) and other factors, compliance has become a very important issue for Brazilian corporations. Brazilian corporations are taking active measures to adopt compliance programmes and institute compliance committees, at the same time in which there is an increase in public and investors' scrutiny of listed corporations.

Important advocacy groups in the Brazilian capital market, including ABRASCA (the Brazilian Listed Corporations Association), AMEC (the Brazilian Capital Market Investors Association) and IBGC jointly approved in the end of 2016 a new corporate governance code with recommended corporate governance practices. Although the code is not mandatory, according to new regulation issued by the CVM on July 2017, listed companies are required to inform if they adopt each of the recommended practices or to otherwise inform why they have chosen not to, under a "comply or explain" approach.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

The promotion of sustainable value over the long-term is gaining importance in Brazil. The corporate governance code referred to in question 1.3 above, which was approved at the end of 2016, concerned with short-termism, emphasises the need to promote value creation over the long-term. The code recommends management bodies to set forth the corporation's business strategies with a view to promote long-term growth. The code also underlines the need for the compensation package of the members of the management body to be aligned with long-term value creation.

2. Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

The operation and management of corporations is entrusted to the members of the management bodies (directors and officers). Shareholders will shape the corporation's operation and management by electing, removing or refusing to re-elect management body members. Shareholders may also choose to install an overseeing committee (conselho fiscal), which will be responsible for overseeing the actions taken by the members of the management bodies and the fulfilment of their duties.

Additionally, under the Corporation Law, the following matters require shareholders' approval: amendments to the bylaws (such as share capital increases and decreases, changes to the rights of share classes, modification of the composition of the board, corporate name change); the laying and receiving of accounts from the management bodies; approval of financial statements; issuance of debentures; suspension of shareholders' rights; evaluation of assets to be conveyed by a shareholder in exchange for shares of the corporation; issuance of participation notes (partes beneficiárias); transformation of the corporation into another type of entity; corporate reorganisation (merger, spin-off or amalgamation); dissolution, winding up and appointment of the liquidator; and filing for bankruptcy or court-ordered restructuring. The authority of the shareholder meeting, though, is not limited to those matters. The shareholder meeting is the supreme authority within the corporation and has the power to decide on any corporate matter, including those delegated by law to management bodies.

The bylaws can also establish that specific transactions, such as the sale of relevant assets or the execution of contracts with values exceeding certain thresholds, require shareholders' approval. This type of provision is more common in smaller unlisted corporations, notably those that do not have a board of directors.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

Corporate governance responsibilities are generally owed to the shareholders by those in command of the corporation. In Brazil, in spite of the emergence of some listed corporations with dispersed share ownership, most of them continue to have a concentrated capital structure, in which the controlling shareholder exercises a vast influence over the corporations' activities. The Corporation Law provides that the controlling shareholder must use its controlling authority to cause the corporation to fulfil its corporate purpose and social function. It also sets forth the controlling shareholders' fiduciary duties towards other shareholders, the corporation's employees and the communities affected by the business activities. The controlling shareholder will be liable for damages caused by the abusive use of its controlling authority.

The Corporation Law further provides that all shareholders must exercise their voting rights in the corporation's best interest. A shareholder's vote will be considered abusive when exercised to cause damage to the corporation or other shareholders or to obtain undue advantages. A shareholder will be liable for damages caused by its abusive vote, even if it is not the winning vote.

In addition, and as discussed in question 2.6 below, certain shareholders have disclosure obligations with regard to securities owned by them.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

Annual shareholder meetings are required by law and must be held within four months after the corporation's fiscal year-end. Annual meetings will resolve upon the following matters: the laying and receiving of accounts from the management bodies; approval of financial statements; profit allocation and dividend distribution; and appointment of directors (or officers) and members of the overseeing committee.

Special shareholder meetings can be called at any time to resolve upon any corporate matter, including amendments to the bylaws, corporate reorganisations (mergers, spin-offs and amalgamations) and removal of members of management bodies. As mentioned in question 2.1, shareholder meetings have the power to decide on any corporate matter, including those under the board's authority.

Shareholder meetings are generally convened by the board of directors or, if the entity is unlisted and does not have a board, by the officers. The call notice must contain an agenda of the meeting. Generally, only matters listed in the agenda may be voted. If the members of the management bodies fail to call a shareholder meeting required by law or the bylaws (for instance, the annual meeting), any shareholder may convene the meeting. In certain situations, meetings may also be called by the overseeing committee.

In addition, shareholders representing at least 5% of the corporation's capital stock may require the management bodies to call a shareholder meeting and indicate the specific resolutions to be voted upon. If the management bodies fail to do so, these shareholders may call the meeting themselves.

Shareholders holding at least 5% of the voting shares or 5% of the non-voting shares may also compel the management bodies to call a shareholder meeting for the installation of the overseeing committee. In listed corporations, these percentages will be reduced to up to 2% of the voting shares or 1% of the non-voting shares, depending on the value of the capital stock (the higher the value, the lower the required percentages). Again, if the management fails to comply, the meeting may be called directly by these shareholders.

Shareholders have the right to attend the meetings, speak, request clarifications from the management bodies and, if they have voting shares, vote.

Voting rights may be exercised by a proxy provided to another shareholder, a member of a management body or lawyer, and, in listed corporations, also by a financial institution. In listed corporations, both management and shareholders may make proxy solicitations. Shareholders representing at least 0.5% of the capital stock may require the inclusion of candidates for the position of director or member of the overseeing committee in the management body's proxy solicitation.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities? Are there any stewardship principles or laws regulating the conduct of shareholders with respect to the corporate entities in which they are invested?
As discussed in question 2.2 above, shareholders must exercise their voting rights in the corporation's best interest. Such duty, however, is only required if the shareholder chooses to vote.

Generally shareholders cannot be liable for acts or omissions of the corporate entity. The basic premise under Brazilian law is that the shareholders are only responsible for the payment of the shares subscribed by them. The corporation is an autonomous legal entity, distinct from the shareholders. The corporation's liabilities shall be paid with the corporation's own assets.

There are, however, some restricted circumstances in which a shareholder may be held liable for an act or omission of the corporation. Courts may apply the "piercing of the corporate veil" theory and hold a shareholder liable where the corporation is used for purposes other than those for which it was organised, where the corporation's assets are commingled with the shareholder's personal assets, where the corporation is employed to carry out a fraud or in other specific and exceptional cases (generally in smaller, unlisted companies). A shareholder that belongs to the same economic group of the corporation may also be held accountable for labour credits of the corporation's employees. Moreover, the controlling shareholder may be held liable for damages caused by the abusive use of the controlling power (for instance, where the controlling shareholder causes the corporation to benefit another company to the detriment of the minority shareholders or the corporate assets).

Other than the rules discussed above and in question 2.2, there are no specific mandatory stewardship principles or laws. The Brazilian advocacy group AMEC (association of investors in the capital markets) has launched a stewardship code, to which several institutional investors in Brasil have become signatories. As signatories, they are required to implement a stewardship program and disclose certain information regarding their stewardship responsibilities.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

Yes. Shareholders can seek enforcement action against the corporation for any violation of rights brought about by the corporation. Shareholders can also file lawsuits to annul resolutions approved in shareholders meetings that were irregularly convened or installed, that violated the law or that involved fraud or other problems.

Shareholders can also seek enforcement against directors and officers through a derivative or direct claim. It is generally incumbent upon the corporation, previously authorised by the shareholder meeting, to bring an enforcement action against members of management bodies for losses caused by them to the corporations. If the shareholder meeting decides to pursue such action but the corporation fails to do so, any shareholder may bring a derivative claim against members of management bodies on the corporation's behalf. However, even if the shareholder meeting decides not to pursue such action, shareholders jointly holding 5% of the corporation's shares may initiate a derivative claim. Any proceeds of a successful derivative claim are awarded to the corporation, which must reimburse the shareholders that initiated the action for litigation expenses.

A shareholder may bring a direct claim against directors or officers when directly affected by their action or negligence (i.e. when the damage is not a result of the loss of value of the investment made in the corporation).

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

There is generally no limitation on the number of shares a shareholder can own. In some specific industry sectors (such as broadcast and newspaper media), there are laws prohibiting the acquisition by foreign shareholders of shares above a certain threshold. Although not common, unlisted corporations may issue a special class of shares that can only be held by Brazilians.

Bylaws can also limit the number of votes per shareholder. In corporations listed on the Novo Mercado or Level 2 segments, the number of votes of a shareholder or group of shareholders cannot be limited to a percentage lower than 5% of the capital stock. Plural votes cannot be attributed to any class of shares.

The controlling shareholder, the shareholder (or group of shareholders) that has elected a member of the board of directors and any shareholder (or group representing the same interest) holding at least 5% of the corporation's shares must inform the CVM and the stock exchange of the purpose of her/his equity interest, all of the securities of the corporation directly or indirectly owned by her or him and existing shareholders' agreements. This disclosure must be repeated each time there is a 5% increase or decrease in the shareholder's participation in the corporation. In addition, the controlling shareholders must submit a monthly report to the CVM and B3 informing the number of shares held by them.

The controlling shareholders and the corporation itself are prohibited from trading with securities of the corporation before the disclosure of any material fact or pending merger, acquisition or other corporate restructuring transactions. Controlling shareholders and the corporation must also refrain from purchasing or selling securities during a 15-day period before the publication of financial reports. This prohibition does not apply in corporations that adopt a fixed calendar for the issuance of those reports. If the controlling shareholder acquires more than one third of the corporation's outstanding shares not belonging to the controlling group by any means other than a tender offer, she or he is obligated to launch a tender offer to acquire all of the shares held by the minority shareholders.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?
Generally, it is incumbent upon the management bodies – and not the shareholders – to comment on the plans or proposals with respect to the corporate entity. In listed corporations, the CVM requires the management bodies to provide, previously to each shareholders meeting, their comments on each of the proposed resolutions to be considered at the meeting. When voting, shareholders are not required to justify their vote, but, as noted in question 2.2 above, the vote must be cast in the corporation's best interests. If a third party acquires the controlling interest of a listed corporation from its controlling shareholder, such third party must disclose the purpose of the acquisition and the expected results that the acquisition will have on the corporation's business.

2.8 What is the role of shareholder activism in this jurisdiction and is shareholder activism regulated?
Even though the level of shareholder activism in Brazil does not compare to that of countries such as the United States, shareholder activism has been constanty increasing in Brazil. Over the years, we have seen shareholders take on a more active role in their relationship with invested corporations. This includes the participation in shareholders meetings, the demand for further disclosure from management concerning the corporation, coordination with other shareholders to elect members of the board and the overseeing council, the filing of complaints with the CVM and the filing of lawsuits.

The Law of Corporation and the rules of the CVM contain various provisions that support shareholder activism. For instance, as discussed in question 3.2 below, the law contains mechanisms that incentivize minority shareholders to organize themselves to jointly appoint certain members of the board.

3. Management Body And Management

3.1 Who manages the corporate entity/entities and how?

Corporations are managed by executive managing officers (diretores) and, when established by the bylaws, also by a board of directors (conselho de administração). Listed corporations and government-controlled corporations (sociedades de economia mista) must have a board of directors.

The board of directors will supervise, direct and oversee the business and activities of the corporation. The board will establish the corporation's general policies and business strategies, appoint and remove officers (more details in question 3.2 below), oversee and evaluate the officers' performance, call shareholder meetings and approve certain material or sensitive transactions such as the sale of fixed assets and material loans. The bylaws may assign additional tasks and authority to the board.

Officers will be responsible for the day-to-day management and representation of the corporation. The bylaws can assign different activities and authorities to each officer. They will usually perform their tasks individually. However, the bylaws can provide that specific decisions and actions will be submitted to a board of officers (diretoria), which will decide by vote.

The board of directors will be composed of at least three members. If the corporation is listed on the Novo Mercado segment, at least two members of the board or 20% of the board members, whichever results in a higher number, must be independent. Directors can reside in Brazil or abroad.

Corporations must have at least two officers. All of them must reside in Brazil. A corporation will typically have at least a Chief Executive Officer and a Chief Financial Officer, larger corporations tending to have more officers.

Composition of the two management bodies can be partially overlapping: up to one-third of the directors may concomitantly be officers. However, under the Novo Mercado rules, the CEO cannot act as chairperson of the board of directors.

Corporations may also have an overseeing committee (conselho fiscal), even though strictly speaking it is not a management body. This committee's main purpose is to oversee the activities of the corporation, providing a written opinion on its financial statements. The overseeing committee is usually not a permanent body and will be established to operate for a specific fiscal year upon the request of shareholders. It will be composed of three to five members. All of them must reside in Brazil and have a university degree or at least three years of professional experience. Employees, officers and directors, as well as their relatives, cannot be members of the overseeing committee.

3.2 How are members of the management body appointed and removed?

The board of directors is elected by the shareholders, usually at the annual shareholder meeting and by majority vote. Board members are, in principle, elected all at the same time. They can be removed at any time by the shareholders, by a resolution of the shareholder meeting, with or without cause.

The Corporation Law provides two main mechanisms to facilitate the election of directors by minority shareholders: separate voting; and cumulative voting. Holders of at least 15% of the voting shares or non-voting shares (or restricted voting shares) amounting to 10% of the capital stock may require separate voting, which takes place in a sort of parallel meeting within the shareholder meeting. This parallel meeting is entitled to appoint and remove one director (and one alternate director) by a majority vote in which only minority shareholders can participate. Moreover, holders of at least 10% of the voting shares may require the adoption of cumulative voting for the appointment of board members (with the exception of the director elected through the separate vote, if any). In this case, each shareholder has as many votes as the number of shares respectively held, multiplied by the number of vacant positions on the board (for instance, if there are five vacant positions, the holder of 10 voting shares will have 50 votes). The votes can be freely distributed among all candidates of the board, allowing minority shareholders to concentrate all of their votes on few candidates (or even a single candidate) and ensure their election.

The adoption of both separate and cumulative voting mechanisms may prevent the controlling shareholder holding the majority of shares from appointing the majority of members of the board. If this occurs, such controlling shareholder will be entitled to appoint a sufficient number of additional directors to reach this majority, even if this means adding more members to the board.

In government-controlled corporations, minority shareholders are entitled to appoint one director even if they are unable to reach the shareholding thresholds for the separate and multiple voting mechanisms.

Officers are generally appointed by majority resolutions taken by the board of directors. Subject to the bylaws' provisions, the board of directors is also entitled to establish the specific role and authority of each officer. If the corporation does not have a board of directors, officers will be appointed by the shareholder meeting.

The maximum term in office for both directors and officers is three years. There are no limitations on the number of times an individual can be re-elected.

As previously mentioned, members of the overseeing committee are elected by the shareholder meeting. Holders of non-voting shares, on the one side, and minority shareholders with at least 10% of voting shares, on the other side, are each entitled to appoint one member by means of separate votes. If both such groups have exercised their right to elect members of the overseeing committee, the controlling shareholder will be entitled to appoint a total of three members, securing the majority of seats.

3.3 What are the main legislative, regulatory and other sources impacting on compensation and remuneration of members of the management body?

While the Corporation Law sets forth the general methods for approval of management compensation and the main limits and restrictions on bonuses and stock options, the CVM regulations focus on disclosure of information on remuneration – even though the scope of its rules has been limited by court decisions.

Under the Corporation Law, the annual shareholder meeting must approve the compensation payable to officers and directors. The meeting usually approves only the general maximum threshold of remuneration, without specifying the amounts payable to each management body or member. In this case, the board of directors will decide the individual remuneration of each management body member.

Management profit-sharing schemes can be adopted by corporations whose bylaws establish a minimum mandatory profit distribution corresponding to at least 25% of accrued net profits. Total profits shared with members of management bodies cannot exceed the lesser of 10% of accrued profits or the aggregate annual compensation of the management bodies approved by the shareholder meeting. Members of management bodies will only be entitled to profit-sharing in fiscal years in which mandatory minimum dividends have been distributed to shareholders.

A corporation can also grant stock options to directors and officers within the limits of its authorised capital.

The shareholder meeting will also establish the remuneration of the members of the overseeing committee. The compensation paid to each member cannot be lower than 10% of the average annual remuneration paid to officers.

The CVM regulations provide for mandatory disclosure on compensation policies. Listed corporations are required to disclose several details on the remuneration of directors and officers, as well of members of other committees. However, court orders have so far exempted some corporations from disclosing the maximum and minimum compensation payable within each management body on the grounds of individual privacy and lack of authority of the CVM to regulate this issue.

3.4 What are the limitations on, and what disclosure is required in relation to, interests in securities held by members of the management body in the corporate entity/entities?
As a general principle derived from the duty of loyalty, management body members of listed corporations are not allowed to seek personal advantages based on privileged information. This includes any form of trading with shares or securities of the corporation based on confidential data.

All management body members are required, upon request of a group of shareholders holding more than 5% of the total number of shares, to disclose to the annual shareholder meeting details on any equity interest she or he may have in the corporation and affiliated companies, including stock options. Members of the management bodies are also required to inform the corporation about any equity interest held by themselves or their spouses in the entity itself and affiliated listed companies. The corporation must subsequently transmit such information to the stock exchange and the CVM.

The CVM regulations set forth certain restrictions on the trading of shares. Similar to the prohibition applicable to controlling shareholders, officers, directors and members of the overseeing committee are not allowed to trade with securities of the corporation before the disclosure of any material fact or pending merger, acquisition or other corporate restructuring transactions. Unless the corporation has adopted a fixed calendar for the disclosure of its interim financial statements and periodic information, officers, directors and members of the overseeing committee must also refrain from purchasing or selling securities during a 15-day period before the publication of the relevant reports. Listed corporations may establish a policy for trading of securities by related parties.

Additionally, officers and directors of corporations listed on Novo Mercado are not allowed to sell their shares within six months from the initial public offering.

3.5 What is the process for meetings of members of the management body?

Officers will only meet in a formally structured manner, organising themselves as a board, if and to the extent that their activities are subject to collective resolutions. Otherwise, officers will carry out their duties individually, reporting back to the board of directors. As a result, the process for meetings of board of officers may vary significantly from corporation to corporation.

There is also great flexibility with respect to the process for board of directors' meetings. However, in contrast to officers, directors must always take resolutions collectively, by means of majority votes, and it is mandatory to establish in the bylaws the rules for the appointment of its chairperson and calling of its meetings. Bylaws can establish that the chairperson of the board will be appointed by the directors themselves or by the shareholder meeting.

The chairperson of a directors' or officers' meeting has a relevant role in Brazilian corporations. This significance, to a great extent, results from the effectiveness of shareholders' agreements under Brazilian law: agreements duly filed with the corporation are expressly binding on management. The chairperson of a meeting will be required to disregard any votes cast in breach of a shareholders' agreement. She or he may also allow a party (or its representatives) damaged by the absence or abstention of other members of the board to vote on their behalf, if the approval or rejection of a given resolution is backed by the shareholders' agreement.

Boards can have decision-making criteria based on qualified majorities or unanimous approval. The criteria must be indicated in the bylaws and apply to specific matters.

Several corporations have adopted rules for holding board meetings through telephone or video conference.

3.6 What are the principal general legal duties and liabilities of members of the management body?

Under the Corporation Law, the main general duties of members of management bodies are:

- to act with diligence and care;
- to act within their powers, observing the purposes of the entity;
- to be loyal towards the corporation;
- to avoid conflicts of interest; and
- to inform.

The duty of diligence and care requires officers and directors to exercise the same diligence, care and skills that a sound businessperson would exercise in dealing with her or his own personal assets in comparable circumstances.

To fulfil the duty to act within their powers and purposes of the corporation, officers and directors must consider the interests of the corporation and of shareholders as a whole in their actions and decisions, without privileging the shareholders responsible for their appointment, and while observing the corporation's social function.

The duty of loyalty translates mainly into the obligation to preserve confidentiality and not to use privileged or sensitive information relating to the corporation for personal benefit or the benefit of third parties.

With respect to the duty to avoid conflicts of interest, members of management bodies may not take part in transactions or resolutions in which they have a personal conflicting interest. They must also inform the other officers or directors about the nature and relevance of their personal interest.

The duty to inform requires officers and directors of listed corporations to disclose details about equity interests held in the corporation and affiliates, and remuneration and fringe benefits to which they are entitled. They must also disclose material acts or events related to the entity.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

Officers will carry out the actions required in the ordinary course of business and represent the corporation before third parties, signing documents on its behalf. In listed corporations, they are responsible for disclosing material facts and publishing financial reports.

The main responsibility of the board of directors is to supervise, direct and oversee the business and activities of the corporation. While overseeing the officers' performance, they should assess if the applicable corporate governance practices are being observed by the corporation. The board will approve the corporation's code of conduct, disclosure policy and policy for trading of securities. Further functions of the board of directors are mentioned in other questions in this chapter. A key challenge for directors is properly documenting individual measures that could exclude or mitigate their personal liability in relation to corporate wrongdoing, such as requests for additional information from officers, abstaining from voting due to conflicts of interest and casting dissenting votes.

The overseeing committee has an important role in overseeing the activities of officers and directors and assessing the compliance by them of applicable duties under the law and bylaws. The committee is required to review the corporation's financial statements and express its opinion on them. It will also give an opinion on proposals to be submitted by officers or directors to the shareholder meeting on certain corporate restructuring transactions and investments. The overseeing committee must also inform officers and directors of any detected fraud or error in the activities of the corporation. If officers and directors do not react properly and in a timely fashion, the overseeing committee is required to inform the fraud or error to the shareholder meeting. The committee will also call the annual shareholder meeting if the management bodies fail to do so for more than a month or, in cases of urgency, call special shareholder meetings.

An important current challenge for members of all management bodies in Brazil is the adjustment of corporate practice and culture to the Brazilian Federal Anti-Corruption Law of late 2013. This law sets forth, among other provisions, the strict liability of corporations for corrupt acts carried out on their behalf, or to their benefit, and is prompting many corporations to adopt or review anti-corruption compliance policies. For listed corporations on the Novo Mercado, a recent challenge is to adapt the corporation's bylaws and practices to the new regulation set forth by B3.

3.8 Are indemnities, or insurance, permitted in relation to members of the management body and others?

Yes, indemnities and professional liability insurance are generally permitted in relation to members of the management bodies, but not for losses arising from wilful misconduct, tort or fraud. D&O coverage has been growing steadily in Brazil.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

Under the Corporation Law, the board of directors has the authority to establish – and also change – the corporation's general policies and business strategies. Such policies and strategies must be aligned with the corporate purpose of the corporation and other limitations set forth in its bylaws and also with the resolutions taken by the shareholders. Officers are responsible for carrying out the actions to implement the corporation's strategies set forth by the board. Note that only the shareholders, by a resolution taken in a shareholders' meeting, can change the corporation's corporate purpose and other clauses of the bylaws.

4. Other Stakeholders

4.1 What, if any, is the role of employees in corporate governance?

In general, employees have a very limited role in the corporate governance of Brazilian corporations. Even though the Corporation Law permits that a position in the board of directors be allocated to a representative of the employees, this allocation is not mandatory and is not exercised by the vast majority of corporations.

Federal government-owned or controlled companies with more than 200 employees are required to have at least one representative of the employees on the board of directors. Such a representative – who is not authorised to take part in discussions on labour matters, due to potential conflicts of interest – will be appointed by a majority vote in a direct election held among all employees. The election must be organised by the corporation jointly with the relevant union representatives.

4.2 What, if any, is the role of other stakeholders in corporate governance?

Other stakeholders also have a limited role in the corporate governance of Brazilian corporations. The Corporation Law grants to creditors certain rights, which may impact the corporation's governance. According to this law, creditors may oppose the reduction of the corporation's capital stock and may judicially request the annulment of mergers that negatively affect her/his credit. Mergers and spin-offs of the corporation will also require the prior approval of debenture holders, unless they are authorised to redeem their debentures within a six-month period. If the corporation has debentures convertible into shares, the following actions will also require the prior approval of the debenture holders: (i) change of the corporation's corporate purpose; and (ii) creation of preferred shares or the modification of the rights of existing preferred shares that may negatively impact the shares into which the debentures may be converted. In addition to the rights set forth by law, it is not unusual for certain creditors, especially in more significant financings, to require the inclusion of covenants in the financing agreements establishing that certain actions to be taken by the corporation (for instance, sale of relevant assets) will require the creditor's prior approval. Finally, although the Corporation Law does not grant any specific approval or similar right to other stakeholders, it sets forth as a general principle that the controlling shareholder has duties and responsibilities towards the employees of the corporation and the community in which the corporation operates, and must respect the rights and interests of such stakeholders.

4.3 What, if any, is the law, regulation and practice concerning corporate social responsibility?
Brazil has extensive and complex legislation on issues such as environmental protection, labour safety, consumer rights and gender equality, which must be observed by corporations. As discussed in question 2.2, the Corporation Law also sets forth the principle that the controlling shareholder must exercise the controlling powers within the corporation taking into account the interests not only of minority shareholders, but also of employees and the community.

Although not mandatory, some corporations issue social responsibility reports, describing their social responsibility practices and actions throughout the year. Certain advocacy groups, such as Institute Ethos and IBRACON, have enacted non-binding rules and standards for Brazilian corporations to prepare and publish corporate social responsibility reports.

5. Transparency And Reporting

5.1 Who is responsible for disclosure and transparency?
All members of management bodies are responsible for disclosure of information regarding events falling under their scopes of activity or authority or their respective personal relations with the corporation and affiliated entities.

In addition, listed corporations are required to appoint an investor relations officer (diretor de relações com investidores), who will be responsible for liaising with shareholders and market authorities and disclosing material facts. The investor relations officer can be entrusted concomitantly with other functions or activities within the corporation. Her or his appointment does not exclude personal liability of other officers and directors for any failure to comply with disclosure requirements.

5.2 What corporate governance-related disclosures are required and are there some disclosures that should be published on websites?
Unlisted corporations are essentially required to publish their yearly management reports and financial statements, notices and minutes of shareholder meetings, and minutes of management meetings affecting third parties. They are also required to respond to specific information requests from shareholders, either made in writing or during annual meetings. The minutes of meetings held by management bodies must be registered with the Commercial Registry – and thus be subject to public scrutiny – if they are expected to affect third parties.

Listed corporations, on the other hand, are required to disclose all of the information above plus significant additional data, which are typically divided into periodic standardised information and event-based disclosures. The main applicable periodic reports are: yearly financial statements (including statements in the standard form required by the CVM); quarterly financial statements;

and the yearly Reference Form. The Reference Form will include, among other information, a report on the business activities, a description of the risks that could affect the corporation, a summary of existing lawsuits and a description of the economic group to which the corporation belongs. The Reference Form should also inform the mechanisms for evaluating the performance of the management body members and present information on each of them, including her or his professional experience and relationship with the controlling shareholder. The most important form of non-periodic information is the disclosure of material facts which refer to any event that could have a significant impact on the market value of the securities issued by the corporation.

In addition, listed corporations are required to upload the following information to the CVM's website, among other things: notices of shareholder and debenture holder meetings; requirements to attend those meetings and vote; summaries of decisions taken in those meetings; minutes of shareholder meetings and of certain board of directors' and overseeing committee's meetings; opinions, reports and assessments on the financial status of the corporation, its value and specific corporate transactions (e.g. mergers and spin-offs); shareholders' agreements; communications on material facts; disclosure policy; reinstated bylaws; any materials used in roadshows and presentations; rating agencies' reports and assessments; instruments of securitisation and debenture issuance deeds; and debt restructuring plans and bankruptcy requests including related court decisions, internal policies and compliance with the corporate governance code. In addition, listed corporations authorised to trade shares (rather than just other securities) must publish all such information on their own website.

Unlisted corporations are not required to maintain a website or provide information on the CVM's website.

5.3 What is the role of audit and auditors in such disclosures?

Listed corporations, as well as other entities with aggregate assets exceeding R$240 million or annual turnover exceeding R$300 million, must have their yearly financial statements audited by independent external auditors (including both individual professionals or auditing firms) duly registered with the CVM.

External auditors will assess the compliance of the corporation's financial statements with applicable accounting standards and indicate the effects and impact of any possible discrepancies. They will provide detailed reports to internal auditors, officers and directors, highlighting alleged deficiencies in accounting practices.

Note that the CVM regulations impose mandatory rotation of external auditors after each period of five years. To limit possible conflicts of interest, there are also restrictions on the provision of consultancy services by auditing firms to the audited corporation.