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FOREIGN INVESTMENTS IN BRAZIL: THE LEGAL SYSTEM AND A COMPARISON WITH ITALIAN CORPORATION MODELS

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Abstract

In the last twenty years Brazil has experienced remarkable economic and social progress that caused great changes in the country's legal system.
After the launch of a successful stabilization program, Plano Real, during the Cardoso government in 1994, the country succeeded in decreasing the high inflation rate that it historically suffered, through strict monetary policy and the open exchange of Brazilian currency, which leaded to a gradual depreciation against the Us dollar.
The steady economic growth, obtained through the decreasing inflation, has been followed by a consolidation of democratic institutions and by an improvement of social standards, starting to create a favourable investment environment, also through promotion of economic competitiveness.
During the period 2004-2008 Brazilian Gross Domestic Product has raised averagely 4.8% per year, and the economy reacted well at the crisis of 2009, observing a stop only in the abovementioned year with a -0.3% of GDP, continuing in the growth pattern undertaken.
While there is still room for improvement especially for infrastructure modernization and bureaucracy relaxation, considering its vast natural resources (Brazil reached the oil self-sufficiency in 2006), and its huge potential market, being Brazil the largest country of Latin America with more than 200 million population, the country have a great growth potential in the long run, representing a very attractive target for foreign investments.
Indeed in the last ten years, the foreign direct investments in Brazil have raised dramatically, reaching 80.842.996.681 US$ in 2013, observing an increase of 51.5% compared to 2010 and of more than 400% compared to 2005.

The achievement of newly industrialised economy was further sustained by the foundation of BRICS association in 2009, representing the interests of the five major emerging economies, Brazil, Russia, India, China and South Africa through annual summits.
Alongside with the economic development also the legal system improved in order to supply proper tools to sustain the new position as a major international player, relaxing the restrictions on foreign investments.
Throughout this work, it will be outlined the legal tools for investing in Brazil as a foreign player, starting from the legal treatment of foreign capital and arriving to the corporation models available for the investor and their specific regulation. Furthermore through the analysis of the corporation models will be showed the great influence of the Italian company law on the Brazilian regulation, firstly from an historical point of view and also comparing the different corporation models provided by the two legislations.
In particular in the first chapter it will be analysed the legal treatment of the foreign capital by the Brazilian law, with all the registration requirements needs, its restrictions on strategic sectors, the different forms in which can occur and its reallocation rules.
The foreign capital in Brazil is subjected to Law 4131 of 3 September 1962, and to Law 4390 of 29 August 1964. Foreign capital is considered to be any goods, machinery or equipment that enter Brazil with no initial disbursement of foreign exchange, and are intended for the production of goods and services, as well as any funds brought into the country to be used in economic activities, provided that they belong to individuals or corporate entities domiciled or incorporated abroad. To foreign capital is reserved the same legal treatment of

the national capital, all conditions being equal. The foreign capital, so defined, must be registered through the Central Bank Information System (*Sistema de Informações do Banco Central* – SISBACEN), by means of an Electronic Statement Registration (*Registro Declaratório Eletrônico – Investimento Externo Direito*, RDE-IED), within 30 days from the date of admission.

For the purposes of the Electronic Statement of Registration, foreign direct investment is defined as permanent holdings in Brazilian companies or, in accordance with common market practices, long-term ownership by non-resident investors; individuals or corporate entities residing, domiciled or incorporated abroad, through ownership of shares or stock in Brazilian companies, or investments in foreign companies authorized to operate in Brazil.

The investors must appoint one or more representative in Brazil, which have to present all the registration information to the Central Bank, being responsible alongside with the investor for the registration effectuation. When the representative is an individual or a non-financial institution, the investor shall name an institution authorized to function by the Central Bank of Brazil that shall be jointly responsible for fulfilling the obligations.

Registration includes the following: a) foreign capital that enters the country under the form of direct investment or loans, whether in regular currency, or assets; b) remittance made abroad as capital gain, profits, dividends, interests, as well as royalties for the payment of technical assistance, or of any other title that implies transfer of profits abroad; c) reinvestment of foreign capital profits; d) changes in capital of monetary gain of companies proceeding of agreement with the legislation at stake. The registration is also essential for

offshore remittances, registration of profit reinvestments and capital repatriation.

Although in the majority of the cases the foreign capital entrance is not subject to any restrictions, not even on the amount of itself, we observe a small number of exceptions. Indeed foreign capital is prohibited to use in certain economic activities, such as Healthcare Services, activities involving Nuclear Energy, Mail and Telegraph services and Aerospace (the prohibition does not apply for manufacturing or trading satellite, aircraft and vehicles). Furthermore there are other areas of investments, which present restrictions: acquisition of rural land, acquisition of properties located in border areas, participation of foreign capital in financial institutions, public air services transport, mining sector, newspapers, magazines and other publications and networks of radio and television.

The different types of investments can occur in the form of: currency investments, investments by conversion of foreign credit, investments by import of goods without exchange cover, investments on intangible assets and investments on the capital market. Regarding the latter it is important to underline that the foreign funds, flowed to Brazil by non-resident investors, may be invested in the same fixed or variable income instruments available, on the financial and capital markets, for resident investors.

Regarding the way in which the investors may reallocate their foreign capital invested, the Brazilian law provides specific regulation for remittances of profits, reinvestments or transfers abroad. Regarding the first, from 1996 January 1 there is no restrictions on the remittances and distribution of profits abroad, which are exempted from tax withholding. The repatriation abroad

could be made at any time without preliminary authorization, should the capital being registered with the Central Bank of Brazil. In any case the registration is essential both for remittances of profits and reinvestments.

Thus far it has been outlined the legal treatment of the foreign capital entering Brazil, and the way in which it could be remitted, reinvested or transferred abroad. In the second chapter it will be revealed and analysed which are the tools available to the foreign direct investor for entering the Brazilian market.

To enter directly in the market the investor has different options, which differ by nature and by legal form. The first possibility is to enter alone in the market, opening a branch in the country. The second one, which is also the most followed, is to create a new legal entity with a Brazilian partner, which can be either a strong legal link, like a limited company or either a lighter legal form, like a joint venture.

The foreign companies, whatever their object may be, may not operate in the country by themselves, or by branches, agencies, or institutions that represent them without permission of the Executive power, but however may be a shareholder of a Brazilian corporation, except cases expressed in law.

Due to its formal and complex process and to its poor flexibility, the foreign companies rarely choose to enter in the market through this difficult way, preferring to enter through other easier ways.

The easiest way to enter in the Brazilian market is to create a new legal entity with a Brazilian partner. The Brazil legal system offers various legal solutions to the foreign corporations, which want to enter in.

First of all it is important to notice that the foreign investor can create a new legal entity with a Brazilian partner but cannot have powers to manage and

administer the company. The directors have to be Brazilian residents; indeed foreigners in possession of permanent visa are allowed to manage a company. In order to obtain a permanent visa, the foreign investor must employ in its business an amount of capital consisting in at least 150.000 BRL. Partners residing abroad must appoint an attorney resident in Brazil, responsible towards all local authorities for their participation, with powers to receive judicial quotes.

According to Civil Code, the different Brazilian corporation models are divided in *Sociedades Personificadas*, partnership forming a new legal entity and *Sociedades Não Personificadas*, partnership not forming a legal entity.

The former ones include the most used corporate models, such as *sociedade simples* (simple partnership), *sociedade em nome coletivo* (collective partnership), *sociedade em comandita simples* (limited co-partnership), *Sociedade Limitada* (limited liability company), *Sociedade Anônima* (joint-stock company) and *sociedade em comandita por ações* (partnership limited by shares).

The partnership not forming a legal entity comprises *sociedades em comum* (unregistered partnership), *sociedades em conta de partecipação* (joint venture partnership) and consortia.

Starting the analysis from the base corporate form, the *sociedade simples* represents the most flexible corporate structure available in the Brazilian system and does not pursue commercial or industrial purposes. It has to be constituted through a formal contract, the article of incorporation, between the partners, which must present all partners' generalities, capital, partners' share, partners' liability and contributions. It is important to underline that the *sociedade simples* is the only type of company that accepts the service partner,

one whose contribution consists in providing its services.

If it is not differently stated in the article, the partners will have unlimited subsidiary liability, meaning that if the company's assets is not sufficient to satisfy the creditors, the partners, subsidiary, will respond with their assets in proportion to the their participation in the capital until the total liquidation of the obligation.

The management of the company, anything providing the social contract, is responsibility of each partner separately. If the administration competes separately to multiple administrators, each one can challenge the proposed operation of the other, and the decision will be remitted to shareholders, through a majority vote. The directors, who may be partners and non-partners, shall perform all acts relevant to the management of the company.

Regarding the dissolution of the *sociedade simples*, it has been underline the fact that could be judicial or extrajudicial, in the cases provided by law. Once the dissolution occurred, it is a director's duty to arrange immediately the investiture of the liquidator and to restrict their activity to unavoidable business management, being prohibited new transactions. Dissolved the company by law, the shareholder can request its liquidation.

The *Sociedade Limitada* represents the form preferred by the foreign investors for its simplicity of structure, organization and function, resulting in lower costs and structural expenditure compared to the *Sociedade Anonima*.

Constituting the company, two or more natural persons or legal entities shall redact, through a written agreement, an article association which must contains all the information required for *Sociedade Simples* and the company organization structure, as basic governing provisions, and shall be registered

at the Commercial Registry in order to obtain legal status.

The capital is divided into quotas, which can be equal or unequal, assigned to the partners according to their capital contribution. The liability of partners in the *Sociedade Limitada* is limited to their quota ownership but exist a joint liability for paying up the social capital. In any cases only the corporate capital responds of all the corporate obligations.

The law grants several rights to quotaholders, such as: right to participate in the company's profit; right to supervise the management body of the *limitada,* inspecting all accounts related, as well as the financial statements; right to contribute to the company's resolutions, through the Quotaholders' General Meeting; right to withdraw from the company, in the event of any amendments to the articles of association, having the right to receive the liquidation of the quota.

Regarding the functioning, limited liability companies could have an organic structure made up of a General Meeting of Quotaholders, a Board of Directors and an Audit Committee established by the partners in the articles of association. The meeting of quotaholders is the main decision- making body of corporate organization, and it is mandatory for *limitadas* with more than ten partners. Competes to quotaholders' resolutions important subject such as appointing and removal of directors, approval of financial statements and amendments to article of association.

Differently competes to one or more directors, whether or not quotaholders, resident in Brazil, the ordinary administration of the *limitada*. Their powers are regulated and described specifically in the articles of association. At the end of every fiscal year the directors have the duty to proceed with the elaboration of

the Balance Sheet and Income Statement in order to inform the quotaholders, although it is not required the publication of the financial statements.

The social contract could provide for the installation and operation of the Audit Committee, *Conselho Fiscal*, in the *limitada*. The Audit Committee has the duty to supervise the management body and to audit the financial statements, a role which can be carried out by a professional auditor, registered with the CVM, and mandatory for *limitadas* that exceed certain quantitative limits. Regarding the company dissolution it is only important to observe that apply all the provisions of the *sociedade simples.*

Considering *limitada* regulation, particular evidence has to be given to the introduction in 2012 of the *empresa individual de responsabilidade limitada*, EIRELI, corporation consisting in a sole limited-liability company, where just one partner holds all the corporate capital. The law provides only to natural persons to be entitled to incorporation and admits the possibility for a foreigner, not residing in the country, to be entitled to form an EIRELI. The EIRELI represents a huge innovation for the Brazilian regulation and it is an investing tool susceptible of great improvements in the next years, especially for the foreign investor, due to its simplified regulation, as the *limitada*, and to the fact that it is not needed a Brazilian partner, as in all the others corporation models.

The *Sociedade Anônima* represents the most complex and costly corporation model, suitable for medium and large companies. The capital of this type of company is divided into units represented by shares, with or without par value, and the payment of the subscribed shares may be effected by contributions in currency or assets, as long as capable of economic assessment.

Their partners so are called shareholders, and they respond by social obligations only to the limit of what is missing for the initial capital payment in proportion to the shares they hold. The shares are classified according to the rights attached, and it is free the possibility to provide shares with increased patrimonial advantage and without voting rights, but with the limit of 50% of the total shares issued.

It is possible to identify two types of *Sociedade Anônima*, public or closed. The distinction regards only the access to the capital market of the issued shares, the *Bolsa de Valores*. The law requires that the capital must be subscripted by at least two persons and minimum its 10% must be deposited in cash.

The bylaws, which have to be registered along with the articles of association, must contain all the provisions for the company functioning such as: the social name, social object, the value of the social capital, shares number and their nominal value, description of the different shares classes and the different rights related, management structure, rules on Audit Committee and on the company dissolution.

Apart from shares, the *Sociedade Anônima* could issue other kinds of securities, in order to obtain the resources it needs, such as: founder's shares or participation certificates, debentures and subscription rights. The company may also grant the holder of such securities a participation in the company's profit and may be converted into shares, as provided for in the company's bylaws.

Regarding the complex of rights entitled to shareholders, they enjoy the same rights of the *limitada*'s quotaholders.

In the corporate structure of *Sociedade Anônima,* four are the provided

corporate bodies: the Shareholders' General Meeting, the *Conselho de Administração* (Board of directors), the *Diretoria* and the *Conselho Fiscal* (Audit Committee).

The Shareholders' General Meeting is the body that represents and gathers the shareholders plurality, and competes to shareholders' resolutions important subject such as appointing and removal of directors, approval of financial statements and amendments to article of association.

In this particular model, the administration is shared between the *Diretoria* and the *Conselho de Administração*. Being the latter a facultative body, we can outline the two different administration system, monistic and dualistic. The former system is based on the General Meeting, which shall be the body competent to inspect and supervise the *Diretoria*, which is competent for the administration, missing in this case the *Conselho de Administração.* On the other hand, when provided by the bylaws the appointment of the *Conselho de Administração*, the administration system will be dualistic and so the inspection and supervisory power will be shared between the General Meeting and the above mentioned, *Conselho*.

In any case the regular administration of the company competes to *Diretoria,* which is also the body that legally represents the company vis-à-vis public bodies and third parties.

In the *Sociedade Anônima*, is mandatory the installation of an Audit Committee, *Conselho Fiscal*, body competent to supervise the management operations and to audit financial statements. Anyhow companies that are publicly held and large privately held are required to be audited by an independent auditor registered with CVM.

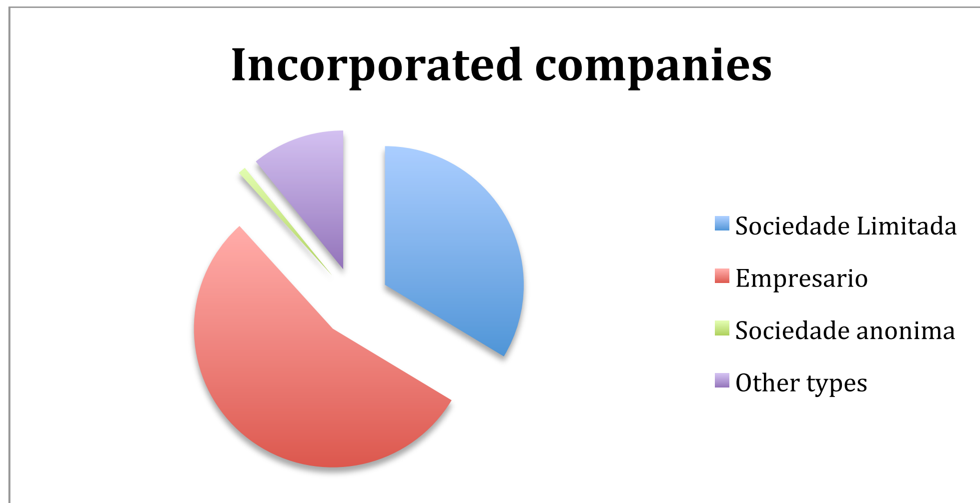
Moreover it is important to underline that all *sociedades anônimas* are required to publish their annual financial statements, whether they are publicly or privately held.

The law states that the *Sociedade Anônima* extinguishes itself in case of amalgamation, merger or spin-off, or at the end of the liquidation process, which follows the dissolution. The dissolution could occur de jure, by court order or by decision of the competent administrative authority.

Among the other minor corporation models, provided of legal personality, we found the *sociedade em nome coletivo*, in which the partners are unlimitedly liable, and *sociedade em comandita simples* and *em comandita por açoes*, in which there are two kinds of partners, limitedly and unlimitedly liable, depending on the administration burden.

The Brazilian legal system provides also three types of company, which does not have the nature of legal entity: the *sociedade em conta de partecipação* (participation account partnership), the *sociedade em comum* and the consortium. Apart from *the sociedade em comum*, these other models are not properly corporations, but partnerships between two or more legal entities, mostly limited in time, usually suitable for joint venture's establishment.

After having outlined the principal Brazilian corporation models, now we will see in practise the corporate model chosen by investors in the graph below.



Analysing the data of 2013 presented by I*nstituto Brasileiro de Planeamento e Tributação*, we observe that the great majority of the corporations incorporated in Brazil choose to incorporate as *sociedades limitadas*, apart from the individual entrepreneurs (*empresario*) which do not consists company.

In the third chapter, after the analysis of the principal corporation models, it will be revealed the Italian influence on the Brazilian law, starting from the historical evolution of the Brazilian civil code, deeply conditioned by the Italian experience, and arriving to a comparison between the respective corporation models.

Firstly regulated by *Ordinacoes Filipinas* and by laws and royal decrees of the Portuguese experience, in 1855 the government of Brazil stipulated an agreement with Augusto Teixeira de Freitas, acclaimed jurist and lawyer, with the purpose of consolidation of all the national laws, having in view the future codification. This leaded to the issue of the *Consolidação das leis civis*, which set the basis for the systematic configuration of the future *Codigo Civil* and organised all the legislation according to the dichotomy persons-things and

consequently personal rights and real rights, “key of all the civil relations”.

The *Consolidação* was also the basis of the Civil Code of 1916, which constituted the outcome of a long tradition of comparative law studies. Thereafter the contributions of the Italian law became crucially important for Brazilian regulation process, as in the Vargas era where the state organization was almost derived by Italian fascist experience, revealed by the Brazilian Constitutions of 1934 and 1937, strongly influenced by fascist *Carta del Lavoro* of 1927.

After numerous unsuccessful attempts and a military dictatorship lasted 20 years, in 1988 it was issued a new Constitution, the seventh, which has created a highly advanced system of individual and social rights, suitable to support the project of a more fair and supportive society. From numerous articles of the Constitution it is possible to understand the influence of the Italian Constitution of 1948, elevated as renowned model for outline the traits of a more acceptable society.

In the wake of the Constitution, after works lasted wearily for more than 25 years, in 2002 it was promulgated the new *Codigo Civil*, where the private law and the commercial law were unified, as in the Italian civil code of 1942. In this scenario, the influence of the Italian code is a tricky phenomenon, not identifiable with the simple and pure relocation of Italian norms in the new civil code. Indeed is not unusual to encounter Italian institutions melted with Brazilian rules derived from tradition, which presents an altered function comparing to the original one. In outline the Italian influence was really relevant in the building of the company law and in the contributions given in structuring specific institutions, mostly regarding contracts.

Regarding the company law, the contribution of the Italian civil code regards both theoretical aspects, such as for the entrepreneur definition, and structural aspects, such as for the corporation models. Indeed through the comparison of the different company models, it was highlighted the almost full model correspondence between the respective law systems.

A remarkable difference consists only in the classification, indeed in Brazilian law the models are classified according to juridical personality ownership, differently from the Italian code in which are classified according to the partners liability, besides the legal status, in *società di persone* and *società di capitali.*

Furthermore also the main features, such as incorporation, rights and shareholders liabilities, dissolution and administration (only in limited company), presents the same characteristics, only differing in detailed aspects or in procedural requirements. Nevertheless the company administration of joint stock corporations represents an exception, revealing the main differences. The Brazilian administration proves to be influenced more by the German experience rather than the Italian one, providing, a two-tier administration system derived from the German BGB, a model also recalled by the Italian dualistic administration model, in turn also derived by the BGB.

In summary, through the analysis it has been underlined the long modernization process undertaken by the Brazilian company law, still engaged in giving proper tools to investors in order to boost the market competitiveness, in the light of the growing attention gained in the international markets.

Even if at the beginning of 2014 the foreign direct investment in Brazil were

declined to around 70 US$ billions, consequently to the declining in the GDP after 2010, which was averagely around +1.1% in the period 2011-2014 and took its minimum in the second half of 2014 with a decrease of 0.9%, medium and long-term prospects remain favourable, supported by strong domestic demand, a growing middle class, global demand for commodity exports, development of offshore oil reserves and expected investment in infrastructure.

A legal key, which could contribute to the further country development attracting foreign capitals, may be represented by the opening of strategic sectors as aviation, insurance and media to foreign competition, relaxing the actual restrictions that allow only foreign minority ownership.

Indeed the law is going towards the liberalization as confirmed by the recent relaxation on TV and cable sector. Apart from the possible further relaxation of the strategic sector's restrictions, actually the law is providing new flexible tools for the investors, both locals and foreigners.

The introduction of EIRELI, *empresa individual de responsabilidade limitada*, in 2012 represents an example of this commitment, constituting an innovative investment vehicle for constituting a company. Indeed the possibility to enjoy the benefits of the limited liability together with the sole proprietorship consists a novelty in the Brazilian regulation, allowing also the foreigner, in possession of permanent visa, to incorporate such kind of company.

The data confirms the success of this corporation model, currently accounting to 1.27% of all the Brazilian companies incorporated up to all 2013, corresponding to 220.778 new companies in almost two years.

EIRELI represents an important step forward for the country regulation,

constituting a modern tool able to catch the current market challenges of a fast changing environment such the one that is characterizing the Brazilian economy in this historical period. Moreover EIRELI is only the last corporate model imported by the European law experience, always having been the Brazilian principal benchmark as it was cleared by the historical evolution of Brazilian *Codigo Civil.*

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