



Department of Business & Management

Chair of Company & Business Law

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

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High life

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Index

Introduction.....	5
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Chapter I: The legal treatment of foreign capital

1.1 The Brazilian legal system.....	8
1.2 Foreign capital in Brazil, legal treatment.....	12
1.3 Investment in currency.....	17
1.4 Investment via conversion of foreign credit.....	18
1.5 Investment by import of goods without exchange cover.....	19
1.6 Investment on the capital market.....	21
1.7 Reallocation of foreign capital.....	23

Chapter II: Entering the Brazilian market, different legal tools for investing

2.1 How to invest in.....	27
2.2 Constitution of a branch.....	28
2.3 Create a new legal entity with a Brazilian partner.....	32
2.4 Brazilian corporation models.....	36
2.4.1 <i>Sociedade Simples</i>	36
2.4.1.1 Constitution.....	37

2.4.1.2 Contributions and partners liability.....	39
2.4.1.3 Administration and dissolution.....	41
2.4.2 <i>Sociedade Limitada</i>	45
2.4.2.1 Constitution and contributions.....	46
2.4.2.2 Quotas and quotaholders' rights and liabilities.....	48
2.4.2.3 Quotaholders resolutions.....	51
2.4.2.4 Company administration.....	54
2.4.2.5 Audit Committee and dissolution.....	56
2.4.2.6 EIRELI.....	60
2.4.3 <i>Sociedade Anônima</i>	63
2.4.3.1 General Features.....	64
2.4.3.2 Incorporation.....	67
2.4.3.3 Contributions and shares.....	71
2.4.3.4 Capital increases.....	75
2.4.3.5 Other securities.....	78
2.4.3.6 Shareholders' rights.....	82
2.4.3.7 The General Meeting.....	87
2.4.3.8 Shareholders' agreements.....	92
2.4.3.9 Company administration.....	93
2.4.3.10 Audit Committee.....	99
2.4.3.11 Dissolution.....	101
2.4.4 Other corporation models	102
2.4.5 Corporation without legal status	105
2.4.5.1 <i>Sociedade em conta de participação</i>	106
2.4.5.2 <i>Consortium</i>	108

2.5 Statistics.....	109
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Chapter III: Comparison between Brazilian and Italian corporation models

3.1 Historical evolution of Brazilian civil code: the Italian influence	
3.1.1 Brief History.....	111
3.1.2 From Teixeira de Freitas to the advent of the Republic.....	115
3.1.3 From the Civil Code of 1916 to the Constitution of 1988.....	119
3.1.4 The New Civil Code.....	124
3.2 Limited liability companies.....	130
3.3 Joint stock companies.....	134
3.4 Other company models.....	141
Conclusions.....	143
References.....	146

Introduction

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 led 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 year¹, 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

¹ Data taken from World Bank National accounts, <http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG/countries>.

potential in the long run, representing a very attractive target for foreign investments.

Indeed in the last ten years, the foreign direct investments² in Brazil have raised dramatically, reaching 80.842.996.681 US\$ in 2013³, 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

² Foreign direct investment are the net inflows of investment to acquire a lasting management interest (10% or more of voting stock) in an enterprise operating in an economy other than that of the investor. It is the sum of equity capital, reinvestment of earnings, other long-term capital, and short-term capital as shown in the balance of payments (International Monetary Fund definition).

³ Data taken from International Monetary Fund, Balance of Payments database, <http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?page=1>.

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.

In the second chapter it will be outlined all the legal tools available for setting up a business in Brazil, as a single player, opening a branch, or with a Brazilian partner, constituting a company. In particular are outlined all the corporation models provided by the Brazilian company law, focusing both on the less common corporation models such as *Sociedade Simples* and on the most spread and important regulations of the *Sociedade Limitada* and the *Sociedade Anônima*, dealing with all the main features such as constitution, partners liability and company management.

In the third chapter, after having analysed the principal Brazilian corporation model, 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, focusing again on *Sociedade Limitada* and *Sociedade Anônima* alongside their Italian forefathers *Società a Responsabilità Limitata* and *Società per Azioni*, in order to highlight the similarities and the differences observed.

CHAPTER I:

THE LEGAL TREATMENT OF FOREIGN CAPITAL

1.1 The Brazilian legal system

The indissoluble union of the States and Municipalities and of the Federal District forms the Federative Republic of Brazil⁴.

The Union's powers are distributed among its different branches, the executive to the *Presidente do Brasil*, the legislative to the *Congresso Nacional do Brasil*, composed by *Senado Federal* and by *Câmara dos Deputados* and the judiciary to the Federal and Justice Court.

Rules are issued mainly by the legislative and executive branches, and interpreted by the judiciary branch. Brazil adopts a civil law system, so it is based on laws on different hierarchic levels, on the top of which there is the *Constituição da República Federativa do Brasil de 1988*⁵.

⁴As the art.1° of the *Constituição da República Federativa do Brasil de 1988* states "A República Federativa do Brasil, formada pela união indissolúvel dos Estados e Municípios e do Distrito Federal, constitui-se em Estado Democrático de Direito e tem como fundamentos: I - a soberania; II - a cidadania; III - a dignidade da pessoa humana; IV - os valores sociais do trabalho e da livre iniciativa; V - o pluralismo político. Parágrafo único. Todo o poder emana do povo, que o exerce por meio de representantes eleitos ou diretamente, nos termos desta Constituição".

(http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm).

⁵http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm.

Promulgated by *Assembleia Constituinte de 1988*, it has a democratic focus, being drafted after a period of dictatorship and despite its young age it has already been amended 82 times, the last one in July 2014⁶.

The purpose was to guarantee individual rights and restrict the state's ability to limit freedom and to regulate individual life. The Constitution covers a wide range of topics and ensures rights and guarantees to individuals and corporations, apart from shaping the political and administrative framework.

The entire system is based on the provisions of the *Constituição*, and comprises also international treaties and conventions, which have to be approved by the *Congresso*, as well as laws and administrative tools, such as decree and administrative rules.

After the Constitution, the legislative power is enacted primarily by the federal legislative power, the *Congresso*, and also by the legislatures from the States and Municipalities.

The *Congresso*, as the Constitution states, must legislate on matters such as Agrarian, Civil, Commercial, Foreign Trade, Telecommunications, Criminal, Electoral, Monetary System, as well as on Energy, Insurance, Nuclear Activity, Water and National Transportation Policy⁷.

Each state has its proper constitution, which must comply with the Federal Constitution and with the federal laws. Moreover its legislative branch has the role to issue state laws, and even complementary law on particular

⁶ Emenda Constitucional No.82 of 2014,

http://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc82.htm.

⁷ Art.21-22-48-49 of the *Constituição da República Federativa do Brasil de 1988*,

http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm.

matters, like Environmental Liability, Natural Resources, Tax, Production, Consumption, Public Finance and Economic Law⁸.

On these topics there is a concomitant competence between the State and the Federal law.

Legislative branch of the Municipalities is enabled only to regulate on local issues.

The judiciary branch consists of the Federal, the State and the Specialized Court; indeed the Municipalities don't have judiciary power.

The judicial procedure is made of two ordinary judging levels, alongside with the extraordinary level performed by high court of each jurisdiction, the Superior Court of Justice, which deals with infra-constitutional cases, and the Federal Supreme Court, which instead deals only with constitutional cases⁹.

The judges base their decisions on the interpretation of the existing rules and, in case of a legislative gap, they may apply analogy, custom and general principles of law to the case. In recent years, however, the Federal Supreme Court moved one step further to issue binding precedents, which may be enforced as formal law. These recent enhancements to the judicial system intended to increase the effectiveness of court decisions and to reinforce the growing appreciation of judicial precedents in the Brazilian legal system, despite the fact that in Brazil the civil law system prevails (as

⁸ Art. 23-24 of the *Constituição da República Federativa do Brasil de 1988*, http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm.

⁹ From art. 92 to 105 of the *Constituição* idem.

opposed to the common law system, adopted in other countries)¹⁰.

Within duly established constitutional and legal limits, the executive branch has the competence to self-regulate, to apply rules to supplementary legal issues and to regulate economic activities through regulatory agencies¹¹.

¹⁰Cesa- Centro de Estudos nas Sociedade de Advogados, Secretaria de Desenvolvimento Econômico, Ciência e Tecnologia do Estado de São Paulo, Investe São Paulo- Agência Paulista de Promoção de Investimentos e Competitividade, Legal Guide for the Foreign Investor in Brazil, 2014, p.29.

¹¹Ministry of External Relations, Department of Trade and Investment Promotion, Investment Division, Cesa – Centro de Estudos das Sociedades de Advogados, Legal Guide for Foreign Investors in Brazil, 2012, p.15.

1.2 Foreign capital in Brazil, legal treatment

The foreign capital in Brazil is subjected to Law 4131¹² of 3 September 1962, and to Law 4390¹³ of 29 August 1964, which were put into effect thanks to Decree 55762¹⁴ of 17 February 1965 and subsequent amendments.

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 abroad¹⁵.

To foreign capital is reserved the same legal treatment of the national capital, all conditions being equal¹⁶.

The foreign capital, so defined, must be registered¹⁷ through the Central Bank Information System (*Sistema de Informações do Banco Central – SISBACEN*), by means of an Electronic Statement Registration¹⁸ (*Registro*

¹²http://www.planalto.gov.br/ccivil_03/leis/L4131.htm.

¹³http://www.planalto.gov.br/ccivil_03/leis/L4390.htm.

¹⁴http://www.planalto.gov.br/ccivil_03/decreto/Antigos/D55762.htm.

¹⁵As Art. 1 of Law 4131 states “Consideram-se capitais estrangeiros, para os efeitos desta lei, os bens, máquinas e equipamentos, entrados no Brasil sem dispêndio inicial de divisas, destinados à produção de bens ou serviços, bem como os recursos financeiros ou monetários, introduzidos no país, para aplicação em atividades econômicas desde que, em ambas as hipóteses, pertençam a pessoas físicas ou jurídicas residentes, domiciliadas ou com sede no exterior”.

¹⁶Art. 2 of Law No. 4131/62, http://www.planalto.gov.br/ccivil_03/leis/L4131.htm.

¹⁷Art. 3 of Law No.4131/62, http://www.planalto.gov.br/ccivil_03/leis/L4131.htm.

¹⁸Art. 3 of *Resolução BACEN* No. 3844/10, http://www.bcb.gov.br/pre/normativos/res/2010/pdf/res_3844_v1_o.pdf.

Declaratório Eletrônico – Investimento Externo Direito, RDE-IED)¹⁹, within 30 days from the date of admission²⁰.

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 Brazil²¹.

The investors must appoint one or more representative in Brazil, which have to present all the registration information to the Central Bank²² and it is responsible alongside with the investor for the registration effectuation²³. When the representative is an individual or a non-financial institution, the

¹⁹Art.1 and 3 of Circular BACEN No. 2997/2000,
http://www.bcb.gov.br/pre/normativos/circ/2000/pdf/circ_2997_v4_P.pdf.

²⁰Paragrafo unico of art. 3 of *Resolução BACEN* No. 3844/10,
http://www.bcb.gov.br/pre/normativos/res/2010/pdf/res_3844_v1_o.pdf.

²¹Art. 5 of *Regulamento anexo I à Resolução BACEN* No. 3844/10,
http://www.bcb.gov.br/pre/normativos/res/2010/pdf/res_3844_v1_o.pdf.

²²Art. 3 and 5 of *Resolução CMN* No. 2689/2000,
<https://www3.bcb.gov.br/normativo/detalharNormativo.do?method=detalharNormativo&N=100014927> for capital markets and art. 1 of *Regulamento anexo a Circular BACEN* No.2997/2010, http://www.bcb.gov.br/pre/normativos/circ/2000/pdf/circ_2997_v4_P.pdf for FDI.

²³Art. 2 Paragrafo 2 of Circular BACEN No. 2997/2000 revoked by Circular No. 3491/2010 and then flowed into *Regulamento do Mercados de Câmbio e Capitais Internacionais*, RMCCI, http://www.bcb.gov.br/pre/normativos/circ/2000/pdf/circ_2997_v4_P.pdf.

investor shall name an institution authorized to function by the Central Bank of Brazil that shall be jointly responsible for fulfilling the obligations²⁴. The foreign investment to be performed and registered is not subject to preliminary review and verification by the Central Bank, being thus declaratory, performed through a statement, which means that the Brazilian investee and/or the representative of the foreign investor are responsible, themselves, for registration of foreign investments²⁵.

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 stake²⁶.

The registration is essential for offshore remittances, registration of profit reinvestments and capital repatriation²⁷.

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

²⁴Art. 3 Paragrafo II of *Resolução CMN* No. 2689/2000, <https://www3.bcb.gov.br/normativo/detalharNormativo.do?method=detalharNormativo&N=100014927>.

²⁵ Cesa- Centro de Estudos nas Sociedade de Advogados, Secretaria de Desenvolvimento Econômico, Ciência e Tecnologia do Estado de São Paulo, Investe São Paulo- Agência Paulista de Promoção de Investimentos e Competitividade, *Legal Guide for the Foreign Investor in Brazil*, 2014, p. 42.

²⁶Art. 3 of Law No. 4131/62, http://www.planalto.gov.br/ccivil_03/leis/L4131.htm.

²⁷BVS Avvocati e Commercialisti, Guarnera Advogados, Brasile: breve guida agli investimenti.

small number of exceptions. Indeed foreign capital is prohibited to use in certain economic activities, such as Healthcare Services²⁸, activities involving Nuclear Energy, Mail and Telegraph services and Aerospace (the prohibition does not apply for manufacturing or trading satellite, aircraft and vehicles)²⁹.

Furthermore there are other areas of investments, which present restrictions:

- a) Acquisition of rural land by Brazilian companies under foreign control, by alien residents in the country or foreign entities authorized to operate in Brazil;
- b) Acquisition of properties located in border areas, considered unavailable to national security, (requires prior consent of the Secretary General of the Council of National Security);
- c) Participation of foreign capital in financial institutions;
- d) Operation of public air services transport, for the operation of regular transport (prior concession);
- e) The ownership and management of newspapers, magazines and other publications and networks of radio and television;

²⁸Sundfel C. A., Câmara J. A., Capitais estrangeiros na saúde: Qual a política da Constituição Brasileira?, Just et Societatis, 2010.

²⁹Ministry of External Relations; the Brazilian Trade and Investment Promotion Agency (Apex-Brasil); Brazilian Investment Information Network (RENAI) of the Ministry of Development, Industry and Foreign trade; Secretary of International Relations of the Ministry of Agriculture, Livestock and Food Supply (MAPA), Investment Guide to Brazil 2014, p.46.

f) Brazilian companies, albeit under foreign control, may request and obtain permission to operate in the mining sector³⁰.

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.

³⁰Agroinvest, Confederação da Agricultura e Pecuária do Brasil – CNA, Foreign Direct Investment.

1.3 Investments in currency

No preliminary authorization is required for investment in currency³¹. To subscribe capital or purchase stock in an existing Brazilian company, the investor must only transfer the funds by means of a banking institution authorized to operate with foreign exchange³². However, authorization of the exchange contract is conditional upon presentation of a RDE-IED registration number for the foreign investor and for the Brazilian company receiving the investment.

The investment has to be registered through the RDE-IED system within 30 days from closing of the contract, by the non-resident investor and/or its Brazilian representative³³.

Foreign currency investments can be registered in original currency, or, upon express request from the investor, in Brazilian currency or in a different currency, maintaining the exchange parity³⁴.

³¹Art. 7 of Resolução BACEN 3844/2010, <https://www3.bcb.gov.br/normativo/detalharNormativo.do?N=110024192&method=detalharNormativo>.

³²Art. 1 título 3, Capítulo 2, Seção 2, Subseção 2 of Regulamento do Mercado de Câmbio e Capitais Internacionais (RMCCI), <http://www.bcb.gov.br/rex/legce/ingl/ftp/rmcci-i.pdf>.

³³Art.1 Título 3 Capítulo 2 Seção 2 RMCCI, <http://www.bcb.gov.br/Rex/RMCCI/Ftp/RMCCI-3-02.pdf>.

³⁴Art. 1 § 2 of Resolução BACEN No.3844/2010, <https://www3.bcb.gov.br/normativo/detalharNormativo.do?N=110024192&method=detalharNormativo>.

1.4 Investments via conversions of foreign credit

Conversion into foreign direct investment is defined as the transaction whereby credits eligible for offshore transfer based on prevailing rules are used by non-resident creditors to acquire or pay in an ownership interest in the capital of a company in Brazil³⁵.

Conversion of foreign credit has to be registered first in the Register of Financial Transactions (ROF) Module of the RDE system, then converted through a foreign exchange contracts or by international transfers in the Brazilian national currency (*Transferências Internacionais em Moeda Nacional* or “TIMN”)³⁶ and finally registered in the RDE-IED system³⁷.

These stages don't require the prior authorization of the Central Bank, the conversion either³⁸.

Conversions aimed at reduction of accumulated losses do not change the registration value³⁹.

³⁵Art.2 Titulo 3 Capitulo 2 Seção 2 Subseção 2 RMCCI,
<http://www.bcb.gov.br/Rex/RMCCI/Ftp/RMCCI-3-02.pdf>.

³⁶Titulo 1 RMCCI.

³⁷Art. 2 Titulo 3 Capitulo 2 Seção 2 Subseção 2 of RMCCI.

³⁸Art.10 Titulo 3 Capitulo 2 Seção 1 of RMCCI.

³⁹Art. 3 Titulo 3 Capitulo 2 Seção 2 Subseção 2 of RMCCI.

1.5 Investment by import of goods without exchange cover

Investment made via import of goods without exchange cover, regarding tangible asset as contribution to corporate capital, do not require the preliminary approval of the Central Bank.

Registration of foreign direct investments, resulting from the import of intangible assets follows the same rules as the tangible⁴⁰.

The registration requires the value recorded on the Register of Financial Transactions (ROF) Module of the RDE System, linked to the Import Declaration (DI); and the currency stated on the corresponding ROF⁴¹.

Registration through RDE-IED Mode requires that both tangible and intangible assets be exclusively intended for paying-up of capital⁴².

Foreign direct investment by means of the conference of tangible assets is characterized by the capitalization of the corresponding value to the assets owned by non-residents, imported without obligation of payment⁴³.

The registration could be held in the currency of investor's country or, upon express request of the investor, in another currency, maintaining the

⁴⁰Art.4 Título 3 Capítulo 3 Seção 2 Subseção 5 of RMCCI.

⁴¹Art. 2-3 Título 3 Capítulo 2 Seção 2 Subseção 5 of RMCCI.

⁴²International Business Publications USA, Brazil Business Law Handbook: Strategic Information and Laws, 2012, International Business Publications, p.90.

⁴³Art. 6 of Regulamento Anexo I a Circular 3844/2010,

<https://www3.bcb.gov.br/normativo/detalharNormativo.do?N=110024192&method=detalharNormativo>.

exchange parity⁴⁴.

After the tangible good have been cleared by customs, the company has 30 days to register through RDE-IED⁴⁵.

⁴⁴Art. 2 of Circular BACEN No.3844/2010, <https://www3.bcb.gov.br/normativo/detalharNormativo.do?N=110024192&method=detalharNormativo>.

⁴⁵Art. 6 Título 3 Capítulo 2 Seção Subseção 1 Regulamento do Mercado do Câmbio e Capitais Internacionais, <http://www.bcb.gov.br/Rex/RMCCI/Ftp/RMCCI-3-02.pdf>.

1.6 Investment on the capital market

According to *Resolução* BACEN No.2689/2000⁴⁶, non-resident investors, both individuals and corporate entities, are allowed to invest in the Brazilian financial markets in those instruments and operational modalities of the financial and capital markets available to the resident investor⁴⁷.

Investment Companies – Foreign capital, Investment Funds – Foreign Capital, Annex IV Portfolios and Fixed-Income Funds – Foreign Capital⁴⁸, were replaced by a single investment mechanism, where foreign funds, flowed to Brazil by non-resident investors, may be invested in the same fixed or variable income instruments offered, on the financial and capital markets, to resident investors⁴⁹.

The non-resident investor shall appoint one or more representatives in the country; fill out an application form attached at the resolution; and be registered with the Securities Commission, *Comissão de Valores Mobiliários* (CVM)⁵⁰.

Financial assets and securities traded, as well as other modalities of financial operations carried out by the non-resident investor must be registered, safe kept, or maintained in a deposit account in authorized

⁴⁶http://www.bcb.gov.br/pre/normativos/res/2000/pdf/res_2689_v3_P.pdf.

⁴⁷Art.1 Paragrafo 2 of *Resolução* BACEN No.2689/2000.

⁴⁸These ways of investment were created by Regulamento Anexo I, II of *Resolução* No. 1289/1987 and *Resolução* No. 1832/1991, and were revoked by *Resolução* BACEN No. 2689/2000.

⁴⁹Art. 11 of *Resolução* BACEN No.2689/2000.

⁵⁰Art. 3 of *Resolução* BACEN No. 2689/2000.

institutions or entities certified to offer these services by the Central Bank of Brazil or by the Securities Commission; or be duly registered in the Special Settlement and Custody System (*Sistema Especial de Liquidação e Custódia*, SELIC) or with a registration and financial settlement system supervised by the Central Agency for Custody and Financial Settlement of Securities, *Central de Custódia e de Liquidação Financeira de Títulos* CETIP⁵¹.

⁵¹Art. 6 of Resolução BACEN No. 2689/2000,
http://www.bcb.gov.br/pre/normativos/res/2000/pdf/res_2689_v3_P.pdf.

1.7 Reallocation of foreign capital

Thus far it has been outlined the legal treatment of the foreign capital inflows in its different forms, now it will be discussed how the investors may reallocate their foreign capital invested, through remittances of profits, reinvestments or transfers abroad.

Until 1996 profits made in Brazil and remitted abroad were subject to a 15% withholding taxation. From 1996 January 1 there are no restrictions on the remittances and distribution of profits abroad and profits are exempt from tax withholding⁵².

Profit remittances must be registered as such through the RDE-IED Module, essential for the remittance, considering the ownership interest held by the investor in the total shares or quotas that make up the paid-up corporate capital of the investee⁵³.

Capitalization of profits, dividends, interest on equity capital and profit reserves in the receiving company in which they were produced, has to be duly registered as reinvestment of profits through the RDE-IED Module⁵⁴. These reinvestments are treated equally as the foreign capital originally registered, and thereby increase bases for tax assessment on any future

⁵²Art. 10 of Law No. 9249/1995,

<http://www.receita.fazenda.gov.br/Legislacao/leis/Ant2001/lei924995.htm>.

⁵³Art. 2 Titulo 3 Capitulo 2 Seção 5 of RMCCI,

<http://www.bcb.gov.br/Rex/RMCCI/Ftp/RMCCI-3-02.pdf>.

⁵⁴Art. 1 Titulo 3 Capitulo 2 Seção 3 of RMCCI.

repatriation of capital.

Reinvestments are defined as “profits made by companies established in Brazil and allocated to persons or companies resident or domiciled abroad, which have been invested in the company that produced them or in another sector of the domestic economy”⁵⁵.

Reinvested earnings are registered in the currency of the country to which they could have been remitted or in Brazilian currency, with respect to the portion of the recorded investment in national currency⁵⁶.

The capitalization of capital reserves and revaluation does not change the value registered, reflecting only on the investor’s participation⁵⁷.

Foreign capital registered with the Central Bank of Brazil may be repatriated to its country of origin at any time without preliminary authorization.

Foreign currency amounts registered with the Central Bank as non-resident investments may be repatriated without income tax assessment. In this case, the foreign currency amounts, which proportionally exceed the original investment (capital gain), will be subject to 15% withholding income tax⁵⁸.

⁵⁵According to art.7 of Law 4131/62, http://www.planalto.gov.br/ccivil_03/leis/L4131.htm.

⁵⁶Art. 3 Titulo 3 Capitulo 2 Seção 3 of RMCCI.

⁵⁷Art. 2 Titulo 3 Capitulo 2 Seção 3 of RMCCI.

⁵⁸Art. 690, II, of Regulamento do Imposto de Renda de 1999 (RIR/1999), <http://www.receita.fazenda.gov.br/Legislacao/rir/Livro3.htm>.

Notwithstanding such provision, after enactment of Law No. 9249/95⁵⁹ and Normative Ruling No.73/98⁶⁰, have interrogated calculation of capital gains earned by a non-resident investor based on such non-resident's original investment in *reais* rather than on the foreign currency amount registered with the Central Bank⁶¹.

In the specific case of repatriation of capital, it should be noted that the central Bank of Brazil would normally examine the net worth of the company involved, as shown in its balance sheet. If the net worth is negative, the Central Bank of Brazil may decide that there was dilution of the investment, and may thus deny authorization for repatriation of a part of the investment in proportion to such negative result⁶².

Acquirers, whether they are individuals or legal entities residing or domiciled in Brazil, or their attorney-in-fact, in the case of acquirers residing or domiciled abroad, are responsible for withholding and paying income tax on capital gains earned by individuals or legal entities residing or domiciled abroad that transfer property located in Brazil⁶³.

The foreign purchaser will be entitled to register capital in the same amount as the registration previously held by the selling company, once

⁵⁹Law 9249/1995, http://www.planalto.gov.br/ccivil_03/leis/l9249.htm.

⁶⁰Instrução Normative SRF No. 73/98, <http://www.receita.fazenda.gov.br/Legislacao/ins/Ant2001/1998/in07398.htm>.

⁶¹International Business Publications USA, Brazil Business Law Handbook: Strategic Information and Laws, 2012, International Business Publications, p.92.

⁶²International Business Publications USA, Brazil Business Law Handbook: Strategic Information and Laws, 2012, International Business Publications, p.92.

⁶³Ministry of External Relations, Department of Trade and Investment Promotion, Investment Division, Cesa – Centro de Estudos das Sociedades de Advogados, Legal Guide for Foreign Investors in Brazil, 2012, p.31.

again regardless of the price paid for the investment abroad. In this case, the registration number in the RDE-IED Mode of the Central Bank of Brazil should be changed to reflect the name of the new foreign investor, which is essential to allow the new investor to remit/reinvest profits and to repatriate capital⁶⁴.

⁶⁴Ministry of External Relations; the Brazilian Trade and Investment Promotion Agency (Apex-Brasil); Brazilian Investment Information Network (RENAI) of the Ministry of Development, Industry and Foreign trade; Secretary of International Relations of the Ministry of Agriculture, Livestock and Food Supply (MAPA), Investment Guide to Brazil 2014, p. 45-46.

CHAPTER II

Entering the Brazilian market, different legal tools for investing

2.1 How to invest in

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. Now 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.

We will examine all these possibilities in this chapter.

2.2 Constitution of a branch

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 law⁶⁵⁶⁶.

The foreign company, which wants to obtain the authorization to operate in the country, must present an application to the *Departamento de Registros Empresarial e Integração - DREI*⁶⁷.

In order to obtain the authorization, the company have to present the above-mentioned application, composed of the following documents:

- Act of deliberation about installing subsidiary, branch, agency or establishment in Brazil;
- Full text of the contract or statute;
- List of partners or shareholders, with the names, occupations, households and number of shares or quotas, except when, as a result of applicable

⁶⁵Art. 64 of Decree Law of No. 2627/1940, http://www.planalto.gov.br/ccivil_03/decreto-lei/del2627.htm.

⁶⁶Also recalled by art. 1134 of Civil Code, http://www.planalto.gov.br/ccivil_03/leis/2002/110406.htm.

⁶⁷Art.1 of Normative Instruction DREI No.7/2013, <http://drei.smpe.gov.br/legislacao/instrucoes-normativas/titulo-menu/pasta-instrucoes-normativas-em-vigor-04/in-07-2013-alterada-pela-in-25-2014.pdf>.

legislation in the country of origin, is impossible to comply the requirement;

- Proof of being a company incorporated under the law of his country;
- Act of deliberation on the appointment of a representative in Brazil, accompanied by a proxy that empowers him to accept the conditions under which authorization is granted and full powers to address any issues and resolve them definitely, having the right to be sued for the company;
- Statement by the representative in Brazil that accepts the conditions in which it is given authorization for installation and operation by the Federal Government;
- Last balance sheet;
- Receipt of payment of the price of the service⁶⁸.

The foreign company must appoint a permanent representative, who must be resident in Brazil and which, as we said, have all the powers to address any issue and to be sued for the company activities⁶⁹.

Once the company has granted the authorization of instalment and functioning, the company has to deposit further documentation to the *Junta Comercial* (Commercial Registry) of the federal unit where will be

⁶⁸Art.2 of Normative Instruction DREI No.7/2013, <http://drei.smpe.gov.br/legislacao/instrucoes-normativas/titulo-menu/pasta-instrucoes-normativas-em-vigor-04/in-07-2013-alterada-pela-in-25-2014.pdf>.

⁶⁹Art. 1138 of Civil Code, http://www.planalto.gov.br/ccivil_03/leis/2002/110406.htm, and art.4 of Normative Instruction DREI No.7/2013, <http://drei.smpe.gov.br/legislacao/instrucoes-normativas/titulo-menu/pasta-instrucoes-normativas-em-vigor-04/in-07-2013-alterada-pela-in-25-2014.pdf>.

constituted the branch⁷⁰.

A foreign corporation authorized to operate will be subject to the laws and to the jurisdiction of Brazil⁷¹.

The mother company must proceed with the publication of the balance sheet, income statement and administration acts, which must be published according to the law of its country of origin, as well as in the *Diario Oficial* of the Federal Government and of the State where the branch will be installed⁷².

Once installed in the country, the foreign company must operate according to the conditions stated in the granted authorization. In case of any changes of any conditions, or in case of any changes in the bylaws of the mother company, another authorization has to be filled out in order to apply the changes⁷³.

It is possible for the foreign company to nationalize itself, transferring its legal residence in Brazil, through the authorization of the Federal Government, subjected to a documentation presentation⁷⁴.

⁷⁰Art. 5 of Normative Instruction DREI No.7/2013, <http://drei.smpe.gov.br/legislacao/instrucoes-normativas/titulo-menu/pasta-instrucoes-normativas-em-vigor-04/in-07-2013-alterada-pela-in-25-2014.pdf>.

⁷¹Art. 1137 of Civil Code.

⁷²Art. 6 of Normative Instruction DREI No.7/2013.

⁷³Art. 1139 of Civil Code and art.7 of Normative Instruction DREI No.7/2013.

⁷⁴Art. 9 of Normative Instruction DREI No.7/2013.

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, such as create a new legal entity with a Brazilian partner.

2.3 Create a new legal entity with a Brazilian partner

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 company⁷⁵. 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 BRL⁷⁶.

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),

⁷⁵Art. 99 of Law No.6815/1980, http://www.planalto.gov.br/ccivil_03/leis/l6815.htm.

⁷⁶Art.2 of Resolução Normativa No.84/2009.

Sociedade Limitada (limited liability company), *Sociedade Anônima* (joint-stock company) and *sociedade em comandita por ações* (partnership limited by shares)⁷⁷.

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

It is possible to operate a further distinction of the corporation models of *sociedades personificadas* in *sociedade empresaria* e *sociedade não empresaria*, based on the nature of the specific economic activities conducted.

Indeed it is considered, according to art. 982 of Civil Code, a *sociedade empresaria*, the corporation that has for its object the exercise of the activity of the *empresario*, defined in art. 966 of Civil Code as whom exercise professionally organized economic activity for the production or circulation of goods and services⁷⁸.

It is not considered *empresario* who exerts intellectual profession, scientific, literary or artistic, even with the help of assistants or employees, unless the profession constitute essential element of the company⁷⁹.

The only corporate model, which is considered *sociedade não empresaria*, is

⁷⁷According to Título II “Da Sociedade” of Civil Code, http://www.planalto.gov.br/ccivil_03/leis/2002/110406.htm.

⁷⁸According to Fábio Ulhoa Coelho, Manual de Direito Comercial,2006, p. 111: “A sociedade empresária pode ser conceituada como a pessoa jurídica de direito privado não-estatal, que explora empresarialmente seu objeto social ou a forma de sociedade por ações”.

⁷⁹Art. 966 Paragrafo Unico of Civil Code, http://www.planalto.gov.br/ccivil_03/leis/2002/110406.htm.

the *sociedade simples* (simple partnership).

However, apart from *sociedade anonima* and *sociedade em comandita por ações*⁸⁰, the framework of a corporation in the Brazilian corporate legal system depends, exclusively, in the way in which the company exploits its object, professionally organized or not⁸¹.

Another distinction can be realized, analysing the relationship among the associates. Indeed we have *sociedades de pessoas* (partnership), where there is a relationship of trust between the partners, and *sociedades de capital* (corporation), where the personal attributes of the shareholders are irrelevant.

In the formers the entry of a stranger partner depends on the approval or consent of the other partners⁸² while in the latter it is free the transfer of shares.

The *sociedades de pessoas* are *sociedade simples*, *sociedade em nome coletivo*, *sociedade em comandita simples* and *Sociedade Limitada*, if the transfer limitation is precisely expressed in the articles of association. These corporation models are based on partners' personal attributes, essential for reaching the corporate object.

On the other hand the *sociedades de capital* are *Sociedade Limitada*, *sociedade anonima* and *sociedade em comandita por ações*. Here partners' personal

⁸⁰Art. 982 Paragrafo Unico of Civil Code.

⁸¹Coelho, Fábio Ulhoa. Manual de Direito Comercial. 17. ed. São Paulo: Saraiva, 2007, p.111.

⁸²Art. 1002 of Civil Code.

attributes are not essential for the company's execution.

In the further pages we will examine all of these corporation models.

2.4 Brazilian corporation models

All the corporation models present in the Brazilian law are regulated by the new Civil Code, promulgated by law No.10406 of 2002⁸³, which substituted the old Civil Code of 1916, and by law No.6404 of 1976⁸⁴, the so called "*Lei da Sociedade Anônima*".

2.4.1 *Sociedade Simples*

This corporate model is suitable for the establishment of holding companies and service companies, like consulting, technical assistance, professional studies, transfer know-how.

Due to its particular organizational simplicity, is especially preferred by foreign investors who are interested in installing company for the provision of services consulting, engineering and others⁸⁵.

⁸³http://www.planalto.gov.br/ccivil_03/leis/2002/110406.htm#art1033.

⁸⁴http://www.planalto.gov.br/ccivil_03/leis/l6404consol.htm.

⁸⁵PMI Finance & Consulting, Guida agli Investimenti in Brasile, p. 47.

2.4.1.1 Constitution

The *sociedade simples* represents the most flexible corporate structure available in the Brazilian system and does not pursue commercial or industrial purposes.

Defined by the articles from 997 to 1038 of the Civil Code, the *sociedade simples* has to be constituted through a formal contract, the article of incorporation, between the partners, which must present:

- Name, nationality, profession and residence of the partners, whether individuals, and the firm's name, nationality and headquarters of the partner, whether legal entities;
- Name, object, office and term of the company;
- Capital of the company expressed in local currency, comprising any kind of property, susceptible of monetary value;
- The share of each partner in the capital, and how to realize it;
- The performances to which the partner, whose contribution consists of services, are committed;
- Persons entrusted with the management of the company, and their powers and duties;
- The share of each partner in profits and losses;

- The partners' subsidiary liability, concerning the social obligations⁸⁶.

These basic clauses define the main aspects that characterize the company, from the identification and qualification of members, which may be natural or legal persons. Characterize the company its name, its object, its headquarters and duration. In the *sociedade simples*, as it is a *sociedade não empresaria*, with no business nature, it is assumed that each partner contributes only with services or work⁸⁷.

However, if provided in the article of incorporation, it can opt for one of business company's types such as *sociedade em nome coletivo*, *sociedade em comandita simples*, and *Sociedade Limitada*. In these cases, the *sociedade simples* shall submit to all the related regulation, acquiring the status of *empresaria* (art. 983 CC).

The article of incorporation has to be registered to *Registro Civil das Pessoas Juridicas* (Civil Registry of Corporate Entities), within 30 days from the constitution⁸⁸. In case the partners opted for a different model in the constitution, the article has to be registered to the proper office provided for, depending on the different regulation.

⁸⁶Art. 997 of Civil Code, http://www.planalto.gov.br/ccivil_03/leis/2002/110406.htm.

⁸⁷Fiuza, Ricardo, Novo Código Civil Comentado. São Paulo, Saraiva, 2003.p.902

⁸⁸Art. 998 of Civil Code.

2.4.1.2 Contributions and partners liability

The last topic of the articles of incorporation is crucial, because it will determine the partners' liability against third parties.

If it is not differently stated in the articles, 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 obligation⁸⁹.

However, the liability of partners will depend on the type of company adopted, may be limited or unlimited, depending on what declare the corporate contract.

Hardly we would find a single company which partners assume unlimited liability, risking their personal assets in case of default of social obligations⁹⁰. However, in case of contractual omission, liability remains unlimited and subsidiary.

The rights and duties of the associates start with the stipulation of the social contract and end with the wind up of the company, extinguishing the social obligations⁹¹.

⁸⁹Art. 1023-1024 of Civil Code.

⁹⁰Gusmão, Mônica, *Lições de Direito Empresarial*, 7^a Ed. Rio de Janeiro: Lumen Juris , 2008.p.138.

⁹¹Art. 1001 of Civil Code.

Unless otherwise agreed, the partner participates in the profits and losses in proportion to their shares but the one whose contribution consists of services, only participates in the profits in proportion to the average value of the shares⁹².

The main obligation assumed by the partner entering in a given society is its contribution to the formation of social capital, which can be made via cash, goods or services⁹³. The *sociedade simples* is the only type of company that accepts the service partner, one whose contribution consists in providing its services. It is mandatory to express in the social contract, the type of service to be held, and not simply the reference to the existence of service associate⁹⁴.

In accordance with Article 1004 of the Civil Code associates are required, in the manner and term provided, to execute the provisions established in the social contract, and who fail to do so, in the following thirty days from the company's notification, will respond for damage arising from arrears.

Article 1003 of the Civil Code states that the total or partial transfer of share without the amendment of the social contract through and with the consent of the other partners, will not be effective regarding to these subjects and the society. Indeed being a *sociedade de pessoas*, *sociedade simples* rely on the trust between the associates.

⁹²Art. 1007 of Civil Code.

⁹³Gusmão, Mônica, Lições de Direito Empresarial, 7ª Ed. Rio de Janeiro: Lumen Juris , 2008.p.147.

⁹⁴Art. 997 Paragrafo V of Civil Code.

2.4.1.3 Administration and dissolution

In the *sociedade simples*, the figure of the director is very important to make the decision and to put into practice the social will, because the company acquires rights, assumes obligation and proceed judicially through directors.

However, whatever the form of the exercise, the role of the director is very personal, not admitting their replacement by others, indeed the administrator can not delegate its functions to third parties, which do not prevent the establishment of representatives for the benefit of society⁹⁵.

In the silence of the contract, directors can perform all acts relevant to the management of the company; if not provided in the social object, encumbrance or sale of real estate depends on the decision of the members' majority⁹⁶.

Not incurring the legal impediments, administrators, who may be partners or non-partners, must be indicated in the social contract, or by separate instrument, which must be recorded alongside the registration of the company, to ensure the general public's knowledge of who can perform activities on behalf of the society⁹⁷. Prior to registration, the administrator

⁹⁵Art. 1018 of Civil Code.

⁹⁶Art. 1015 of Civil Code.

⁹⁷Tomazette, Marlon, As sociedades simples no novo Código Civil . Jus Navigandi, Teresina, ano 7, No. 62, fev. 2003.

responds personally and jointly with the society for his acts⁹⁸.

The director of company should, in the exercise of its functions, use the care and diligence that all active and honest person employs in managing their own businesses⁹⁹.

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 vote¹⁰⁰.

When, by law or social contract, the partners have the responsibility to decide on the affairs of the society, decisions are always taken by majority vote, counted according to the single value of the shares. For the formation of the absolute majority is needed more than half of the social capital¹⁰¹.

The director is liable for damage to company, when he acts with guilt, and when he acts contrary to the will of the majority, which he knew it or he should have known it¹⁰². Furthermore, when the administrator uses company goods without the written consent of the other partners, for his advantage or for advantage of third parties, he will also respond for damages¹⁰³. Faulting in the performance of his duties, the director will be

⁹⁸Art. 1012 of Civil Code.

⁹⁹Art. 1011 of Civil Code.

¹⁰⁰Art. 1013 § 1 of Civil Code.

¹⁰¹Art. 1010 of Civil Code.

¹⁰²Art. 1013 of Civil Code.

¹⁰³Art. 1017 of Civil Code.

severally liable towards the company and third parties harmed¹⁰⁴.

Every year Directors must also present to shareholders the financial statements of the company¹⁰⁵.

Regarding the dissolution of the *sociedade simples*, we underline the fact that could be judicial or extrajudicial.

Article 1033 of the Civil Code covers extrajudicial cases, which are:

- The expiration of term, unless, if expired it without opposed partner and not entering the company into liquidation, in which case will be extended indefinitely;
- The unanimous consent of the partners;
- The resolution of the shareholders, by majority, for company without expiration term;
- The lack of partners' plurality, not reconstituted within one hundred eighty days;
- The extinction, under the law, of the authorization for work.

Judicially, the company may be dissolved at the request of any of the partners when: voided its constitution; depleted the social end, or verified its unenforceability¹⁰⁶.

¹⁰⁴Art. 1016 of Civil Code.

¹⁰⁵Art. 1020 of Civil Code.

¹⁰⁶Art. 1034 of Civil Code.

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 liquidation¹⁰⁷.

¹⁰⁷Art. 1036 of Civil Code.

2.4.2 *Sociedade Limitada*

The company model in question is 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*.

The *Sociedade Limitada* is specifically regulated by the articles 1052-1087 of Civil Code, set out by Law No. 10406/2002, and can be subsidiary regulated by Law No. 6404/76, so called *Lei das Sociedades Anônimas*.

This set of standards, however, is not sufficient to discipline the immense range of legal issues concerning *limitada*. Other legal provisions and legislation therefore also apply to this type of company.

In principle, on the omissions of the chapter regarding the *limitada* in the Civil Code, apply the *sociedade simples* rules¹⁰⁸. Nevertheless the social contract could provide as supplementary regency the *sociedade anonima* rules¹⁰⁹, found in the above-mentioned Law No. 6404/76.

The different treatment is a relevant issue for both foreign and Brazilian investor.

¹⁰⁸Art. 1053 of Civil Code.

¹⁰⁹Art. 1053 Paragrafo Unico of Civil Code.

2.4.2.1 Constitution and contributions

Two or more natural persons or legal entities, not necessarily resident in Brazil, through a written mutual agreement, constitute the *Sociedade Limitada*.

Partner residing abroad must appoint an attorney resident in Brazil, responsible towards all local authorities for their participation, with powers to receive quotes. Moreover the foreign partners are not allowed to manage the company¹¹⁰, although they can appoint a director resident in Brazil.

The article of association has to be redacted according to article 997 of Civil Code and must contain all the information required for *Sociedade Simples*¹¹¹ and the company organization structure, as basic governing provisions.

The article of association has to be registered at the *Registro Publico de Empresas Mercantis*, Commercial Registry, of the State where the company has its headquarters located, in order to obtain legal personality¹¹².

Any changes in the articles of association of the company can also be registered at the Commercial Registry, including transfer of quotas, election of new managers, and so on¹¹³.

¹¹⁰Art. 1.2.12 of Manual de Atos de Registro de Sociedade Limitada, attached to Instrução Normativa No. 98, <http://jcdf.smpe.gov.br/orientacoes/manual-de-atos-de-registro-mercantil-sociedade-limitada.pdf>.

¹¹¹Art. 1054 of Civil Code.

¹¹²Art. 45, 985, 1150 of Civil Code.

¹¹³Fazio, Brazilian Commercial Law, 2013, Wolters Kluwer, Law & Business, p. 11.

Differently from what is provided by other legislation, the Brazilian legislation does not require subscription or safekeeping of a minimum social capital for the company constitution.

The partners' contributions shall be made only via cash, goods or credits. In particular it is forbidden the contribution consisting of a service rendered by any of the quotaholder¹¹⁴. The company's capital will be subscribed for and paid in by the quotaholders.

Regarding the goods contribution, all partner are jointly liable for the accurate capital estimation, up to five years from the registration date of the company¹¹⁵.

The law does not establish a cap on paid in capital, but the quotaholders must clearly establish in the articles of association the term for such payment¹¹⁶.

¹¹⁴Art. 1055 § 2 of Civil Code.

¹¹⁵Art. 1055 § 1 of Civil Code.

¹¹⁶Fazio, *ibidem*, p.12.

2.4.2.2 Quotas and quotaholders' rights and liabilities

The capital is divided into quotas, which can be equal or unequal, assigned to the partners according to their capital contribution.

The partner may transfer his quota, wholly or partly, to who is a partner, regardless of the audition of others, or to anyone, if not opposed from who hold more than one quarter of the capital, if not provided differently in the articles of association¹¹⁷. Quota transfer requires an amendment of the articles of association, duly registered in the Commercial Registry.

The liability of partners in the *Sociedade Limitada* is limited to their quota ownership but exist a joint liability for paying up the social capital¹¹⁸. In any cases it is only the corporate capital that responds of all the corporate obligations.

Indeed if the company's assets are insufficient to pay the total debt amount that the company incurred, the creditors will only recoup on partners assets up to a certain amount. Achieved this, the lender bears the loss. The limit of partners' liability is the total capital subscribed and not already paid-up¹¹⁹.

Partners do not respond, therefore, of social debts, unless, pursuant to art.50 of Civil Code, in cases where it can be waived the legal personality or

¹¹⁷Art. 1057 of Civil Code.

¹¹⁸Art.1052 of Civil Code, http://www.planalto.gov.br/ccivil_03/leis/2002/110406.htm.

¹¹⁹ Coelho, Fábio Ulhoa. Manual de Direito Comercial. 17. ed. São Paulo: Saraiva, 2007, p.156.

when they adopt resolutions contrary to law or to the corporate contract, according to art.1050 of Civil Code. In these above-mentioned cases apply the unlimited subsidiary liability for the partners¹²⁰.

Analysed in depth the quotaholders' liabilities, now we will deal with the their rights. The law granted several rights to quotaholders, such as:

- right to participate in the company's profit, according to the proportion of quotas held by each partners, unless otherwise provided for in the articles of association;
- 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, of which we will deal with in the further pages;
- right to withdraw from the company, in the event of any amendments to the articles of association, even relatively minors, and amalgamation or merger of the company. In particular, the dissident quotaholder has the right to receive the liquidation of its quota¹²¹.

¹²⁰Art. 1080 of Civil Code.

¹²¹Fazio, Silva, Brazilian Commercial Law, 2013, Wolters Kluwer, Law & Business, p. 13-14.

Confirming the above, predominant legal writings hold that in *limitadas*, since the quotaholders have incorporated the company by mutual agreement, they are not obliged to indefinitely remain partners if they not wish to do so¹²².

¹²²Fazio, *ibidem*, p.14.

2.4.2.3 Quotaholders' resolutions

Under the Civil Code, 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 a corporate organization, which meets provisions as required by law or by the articles of association¹²³.

Quotaholders' resolutions must be taken during the General Meeting, mandatory for *limitadas* with more than ten partners¹²⁴.

According to art. 1071, from the quotaholders' resolutions depend the following issues:

I - the approval of management and financial statements;

II - the appointment of directors, when made in a separate document;

III - the removal of directors;

IV - the compensation method of directors, when it was not stated in the contract;

V – the amendments of the social contract;

¹²³ Ministry of External Relations, Department of Trade and Investment Promotion, Investment Division, Cesa – Centro de Estudos das Sociedades de Advogados, Legal Guide for Foreign Investors in Brazil, 2012, p. 44.

¹²⁴Art. 1072 of Civil Code.

VI - the incorporation, the merger and the dissolution of the company, or the termination of liquidation state;

VII - the appointment and dismissal of liquidators and the decision on the accounts;

VIII - the declaration of insolvency.

The law provide different quorum for quotaholders resolutions, depending on the subject treated. In particular for articles of association amendments, incorporation, merger and dissolution of the company are required votes which correspond to minimum three-fourths of the total social capital, while for appointment, compensation and dismissal of the directors are required votes corresponding to more than half of the total social capital¹²⁵.

The directors must call the General Meeting in the cases provided by law or by corporate contract, however at least once a year in order to deliberate on the financial statements, appointment of directors or every other issue on the agenda¹²⁶.

Furthermore the General Meeting could also be convened by the Audit Committee and by any partner, when the directors delay the convening of the meeting in cases specified by law or by social contract¹²⁷.

As we said earlier in this paragraph, company with less than ten partners are not compel to establish a General Meeting for quotaholders' resolutions.

¹²⁵Art. 1076 of Civil Code.

¹²⁶Art. 1078 of Civil Code.

¹²⁷Art. 1073 of Civil Code.

Indeed in this case the articles of association may provide the establishment of a different meeting, called the Partners Reunion, instead of the General Meeting¹²⁸.

The denomination is not the only difference between the two meetings. The articles of association is free to dispose on the frequency, convocation, conducting and recording of the Partners Reunion. On the omissions of articles of association, apply the rules of the General Meeting¹²⁹.

¹²⁸ Coelho, Fábio Ulhoa. Manual de Direito Comercial. 17. ed. São Paulo: Saraiva, 2007, p.160-161.

¹²⁹Art. 1072 § 6 of Civil Code.

2.4.2.4 Company Administration

One or more directors, whether or not quotaholders, resident in Brazil, duly designed in the articles of association, exert the ordinary administration of the *limitada*¹³⁰. Their powers are regulated and described specifically in the articles of association.

If provided by the articles of association it is possible to establish a Board of Directors, instead of single directors, having the same duties and rights of the directors themselves.

In order to appoint a non-quotaholder director is required the unanimity vote of the General Meeting while corporate capital is not yet fully paid up, or the 2/3 of the General Meeting after corporate capital is fully paid up¹³¹.

The appointment and the dismissal of the directors, through a quotaholders vote decision, have to be recorded in the *Registro Publico de Empresas Mercantis* to have legal effect, indeed represents an amendment to the articles of association¹³².

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

¹³⁰Art. 1060 of Civil Code.

¹³¹Art. 1061 of Civil Code.

¹³²Art. 1062-1063 of Civil Code.

inform the quotaholders¹³³, although it is not required the publication of the financial statements.

The directors are not personally liable for the company obligations but for acts made in fraud of the law or in violation of the rules contained in the corporate contract, and for all the acts charged with abuse of power, they respond to the company and to third parties, jointly and unlimitedly.

When the *Sociedade Limitada* is subject to *sociedade simples* supplementary regency, the directors will be personally liable for unrelated corporate object acts¹³⁴. Otherwise if subject to *sociedade anonima* regency, the *limitada* will be liable for all acts on its behalf, reserved the right to persecute the directors who exceeded their powers¹³⁵.

¹³³Art. 1065 of Civil Code.

¹³⁴Art. 1015 of Civil Code.

¹³⁵Coelho, Fábio Ulhoa. Manual de Direito Comercial. 17. ed. São Paulo: Saraiva, 2007, p.163.

2.4.2.5 Audit Committee and dissolution

The social contract could provide for the installation and operation of the Audit Committee, *Conselho Fiscal*, in the *limitada*.

This body is only justified in companies where there are significant numbers of partners far from everyday business life. In most of the *limitadas*, it should not be conveniently or economically justified its installation and operation¹³⁶.

The Audit Committee is composed of minimum three members and relative substitutes elected by the General Meeting¹³⁷.

The members have not to be necessarily quotaholders, but must be Brazilian resident. Directors, of the company itself or of a subsidiary, employees, directors' spouse or relatives within the third degree, are not allowed to be members of the Committee¹³⁸. Moreover it is necessary that the person be not subject to any legal restrictions: do not be involved in any crime that prevents the exercise of commercial activities; not be sentenced by a special law that prevent, even if temporarily, to fulfil public office; not be convicted of a crime or bankruptcy, or corruption, bribery, speculation; or offense against the national financial system, against the competition

¹³⁶ Coelho, Fábio Ulhoa. Manual de Direito Comercial. 17. ed. São Paulo: Saraiva, 2007, p.164.

¹³⁷Art. 1066 of Civil Code.

¹³⁸Art. 1066 § 1 of Civil Code.

law, against to consumer relations, against the public trust or property, if remain the effects of the sentence¹³⁹.

In the Audit Committee the law provide protection to minority partners through the mandatory appointment to those, which represents at least one fifth of the social capital, of one member and its substitute¹⁴⁰.

The powers and duties conferred by law to Audit Committee can not be transferred to any other company's body, and the liability of its members reflect the directors liability¹⁴¹.

In addition to other duties specified by law or by the articles of association, the members of the Audit Committee observe, individually or jointly, the following duties:

I - examine, at least quarterly, the tax books and records of the company, with administrators or liquidators providing them all the information requested;

II – annotate in the book of the Audit Committee, the results of the tests referred to in paragraph I of this article;

III - present to the annual meeting of the quotaholders auditing opinion on the business and corporate operations in the year passed, based on the balance sheet and the income statement;

¹³⁹Art. 1011 § 1 of Civil Code.

¹⁴⁰Art. 1066 § 2 of Civil Code.

¹⁴¹Art. 1070 of Civil Code.

IV - to report errors, frauds or crimes found, suggesting measures useful to company;

V - convene the quotaholders' meeting if the board delay for more than thirty days at its annual convocation, or whenever there are grave and urgent reasons;

VI - practice, during the period of liquidation, the acts referred to in this article, taking into account the special regulatory provisions of the liquidation¹⁴².

It is free the chance for the Audit Committee to choose a professional auditor in order to assist the body in the examination and in the auditing of the financial statement¹⁴³. Furthermore the law No. 11638/2007¹⁴⁴ set out the mandatory audit by an independent auditor, registered with the Brazilian Securities and Exchange Commisison (*Comissão de Valores Mobiliarios*), for *limitadas* that exceed quantitative limits, regarding assets and income¹⁴⁵.

Regarding the company dissolution it is important to observe that apply all the provisions of the *sociedade simples*¹⁴⁶. Indeed also for the *limitada* there will be judicial or extrajudicial cases.

Article 1033 of the Civil Code covers extrajudicial, or de jure, cases which

¹⁴²Art. 1069 of Civil Code.

¹⁴³Art. 1070 Paragrafo Unico of Civil Code.

¹⁴⁴http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2007/lei/l11638.htm.

¹⁴⁵Indeed are considered large limitadas, "the firm that have more than 240 BRL million in assets or annual income superior to 300 BRL millions" (art.3º Paragrafo Unico of Law No.11638/2007).

¹⁴⁶Art. 1087 of Civil Code.

are:

- The expiration of term, unless, if expired it without opposed partner and not entering the company into liquidation, in which case will be extended indefinitely;
- The unanimous consent of the partners;
- The resolution of the partners, by a majority, for company without expiration term;
- The lack of partners' plurality, not reconstituted within one hundred eighty days;
- The extinction, under the law, of the authorization for work.

Judicially, the company may be dissolved at the request of any of the partners when: voided its constitution; depleted the social end, or verified its unenforceability¹⁴⁷.

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. Started the liquidation process, the liquidators have the duty to repay with the corporate capital first all the creditors, and only after the partner can request the liquidation of its quota¹⁴⁸.

¹⁴⁷ Art. 1034 of Civil Code.

¹⁴⁸ Art. 1036 Paragrafo Unico of Civil Code.

2.4.2.6 EIRELI

Enacted by Law No.12411 of 2011, that amended the Civil Code, including the art.980-A, and officially putted in force at the beginning of 2012, the new corporation model of the *empresa individual de responsabilidade limitada*, EIRELI, consists in a sole limited-liability company, where just one partner holds all the corporate capital.

It is provided by law a quantitative requirement for the corporate capital, which has to be at minimum ten times the minimum wage¹⁴⁹ then prevailing in Brazil and must be fully paid up¹⁵⁰.

An express restriction of the EIRELI regards the fact that its quotaholder can be quotaholder only in one such type of company, and so have only one EIRELI registered in its name¹⁵¹. The EIRELI is recognised as a legal entity.

For all the other issues, the regulation of the *Sociedade Limitada* companies applies to EIRELI¹⁵².

This new corporation type has given rise to some controversy, regards the possibility of either an individual or a legal entity have to be entitled to hold equity in such kind of corporation and the possibility for a foreigner of being the sole quotaholder of the corporation.

¹⁴⁹At January 2012, when the law NO.12411 took effect was approximately 622,73 BRL.

¹⁵⁰Art.980-A of Civil Code.

¹⁵¹Art.980-A § 2 of Civil Code.

¹⁵²Art.980-A § 6 of Civil Code.

Regarding the first controversy, the major current understanding was to acknowledge the possibility of either an individual or a legal entity being the sole partner of the company, until the National Commercial Registry Department, *Departamento Nacional do Registro do Comercio* (DNRC), issued the *Instrução Normativa* No.117/2011¹⁵³, which stated the impossibility for legal entities to form an EIRELI.

After this issuance the controversy has not gone down, cause the DNRC was not designate to regulate on such issues. After a short period of uncertainty, the controversy finally closed when the *Departamento de Registro Empreserial e Integração* (DREI) issued the *Instrução Normativa* No.11 of 2013 that in *Anexo V* point 1.2.12¹⁵⁴ officially stated the impossibility for a legal entity to form an EIRELI, being entitled only to natural persons.

On the other hand the same *Instrução Normativa* officially stated the possibility for a foreigner, not residing in the country, to be entitled to form an EIRELI¹⁵⁵. As for all the other corporate models, the foreign individual has to nominate an attorney that will be liable for all the activities related to the corporation, with the power to receive judicial quotes, until the foreigner has not obtained a permanent visa.

¹⁵³http://www.jucepa.pa.gov.br/downloads/IN_117_2011.pdf.

¹⁵⁴<http://www.normaslegais.com.br/legislacao/Manual-Registro-EIRELI.pdf>.

¹⁵⁵Anexo V 1.2.10 of Instrução Normativa No.11/2013 of DREI.

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.

2.4.3 Sociedade Anônima

The *Sociedade Anônima* is similar to the American Corporation and to the Italian *Società per Azioni*.

It is the most suitable structure for medium and large companies, as a market strategy, or as an access to Equity and Stock Exchange, and the law No. 6404 of December 15, 1976 and further amendments govern its features. The Civil Code will apply only in the omissions of that law¹⁵⁶.

Compared to the limited company has greater structural and functional complexity, burdensome operating costs and public exposure.

¹⁵⁶Art. 1089 of Civil Code.

2.4.3.1 General Features

The *Sociedade Anônima* is a *sociedade de capital*. Indeed the personal attributes of the shareholders are irrelevant for achieving the social object. The securities representing the equity interest (share) are freely negotiable. No shareholder can prevent, therefore, the entry of anyone in the ownership structure. On the other hand, it will be always available the share garnishment in the execution promoted against the shareholder.

In case of death of a shareholder, their successors cannot be prevented from entering in the ownership. The heir or legatee of a share becomes, willy-nilly, a shareholder of the *Anônima*.

The capital of this type of company is split into units represented by shares. Their partners so are called shareholders, and they respond by social obligations to the limit of what is missing for the initial capital payment in proportion to the shares they hold.

The shares of the *Anônima* value differently according to the evaluation aims. Indeed we have:

- nominal value, or par value, the result of the mathematical operation of dividing the capital value by the shares number;
- book value, the value of the interest of the shareholder equity in the company; it is the value given to shareholders in case of liquidation;
- negotiation value, the price that shareholder obtain from the share's alienation;

- economic value, the amount that is rational to pay for a share, in view of the company profitability; it is calculated through specific techniques, such as discounted cash flow;
- issue price, the price paid by underwriters, fixed by the founders; it measures the shareholder contribution to social capital and the limit of its subsidiary liability.

The fixing of the issue price of shares issued under capital increase must meet certain criteria set by law¹⁵⁷, of which we emphasize the following one: it is prohibited to impose to former shareholders an unjustified dilution of the patrimonial value of their shares.

Indeed, when the new shares are subscribed for less than the book value of the existing price, there is the reduction (dilution). This reduction can be justified or not. I mean: if the company actually needs the resources from the issuance of new shares, existing shareholders should bear the dilution of the book value of its securities. If there is not such a need or the lacking resources could be obtained by other means, the dilution is not justified. This rule is effective for the corporation with or without nominal share value¹⁵⁸.

It is important to notice that the *sociedade anonima* is always considered

¹⁵⁷Art. 170 § 1 of Civil Code.

¹⁵⁸ Coelho, Fábio Ulhoa. Manual de Direito Comercial. 17. ed. São Paulo: Saraiva, 2007, p.184.

sociedade empresaria, whatever will be its social object¹⁵⁹.

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*. Indeed in order to be defined open, the *anônima* has to be admitted to stock market negotiations¹⁶⁰.

To obtain the admission to the stock market, the *anônima* have to be authorized by *Comissão de Valores Mobiliários*, CVM¹⁶¹. This authority jointly with Central Bank exerts the control and supervision of the capital market, according to the directives issued by *Conselho Monetário Nacional*, CMNO.

The federal government's interest in monitoring the open joint-stock companies, which justifies the particular control regime to which they are subjected, is related to investor protection in particular, and to the role that these organizations play in the economy in general.

¹⁵⁹Art. 2 § 1 of Civil Code.

¹⁶⁰Art. 4 of Law No. 6404/76.

¹⁶¹Instituted by art. 5 of Law No. 6385/76,
http://www.planalto.gov.br/ccivil_03/Leis/L6385original.htm.

2.4.3.2 Incorporation

We could fractionate the issue of incorporation in three different levels: preliminary requirement, constitution process and complementary measures.

Any company have to respect these preliminary requirements¹⁶²:

- Subscription of capital by at least two persons. No more are required, differently from the past, when were required at least seven subscribers for the constitution validity. Necessary, however, is that all shares of social capital are subscribed. The subscription is irrevocable.
- Deposit in cash of at least 10% of the issue price of the subscribed shares. Regarding financial institutions, the percentage rises to 50%, pursuant to art.27 of Law No. 4595, 1964.
- The cash deposit as provided above, at the Bank of Brazil or another bank authorized by the CVM.

The company incorporation could follow two different procedures: the public subscription, in which the founders seek resources for the establishment of the company with investors on the capital markets, and the private subscription, which it is circumscribed to the founders.

¹⁶²Art. 80 of Law No.6404/76, http://www.planalto.gov.br/ccivil_03/Leis/L6404consol.htm.

In the table below are outlined all the formalities related¹⁶³.

Procedures/Formalities	
Public subscription	Private subscription
1 Registration of the request for the establishment at the CVM: presentation of studies on economic and financial viability of the project; presentation of the project of the articles of association and the document that will be presented to investors (<i>Prospecto</i>), for the control of the formalities required by law.	Not required
2 Presence of financial institutions that make the brokerage operation.	Not required
3 Notification of the Inaugural Meeting, with the election of the first administrators after the full subscription of the share capital.	1 Resolution of the founders, gathered in the General Meeting, or through public deed, signed by all the subscribers.
4 Registration of the Meeting Minutes and of the articles of association at the <i>Junta Comercial</i> , and further publication on the <i>Diario Oficial</i> and on another newspaper of large diffusion.	2 Registration of the Meeting Minutes and of the articles of association at the <i>Junta Comercial</i> , and further publication on the <i>Diario Oficial</i> and on another newspaper of large diffusion.

¹⁶³The table is taken from Associazione Industriali della Provincia di Vicenza, Confindustria Vicenza, *Brasile la guida per le imprese italiane*, 2006, p. 25.

As mentioned in the table above, in case of public subscription the shareholders, upon subscription of the capital stock, may hold an Inaugural Meeting in order to:

- approve the company's bylaws, which will define the corporate purpose, capital amount, number of shares and classes, if applicable, management structure, shareholders' meeting procedures, profit distribution, among other provisions;
- approve the subscription of shares and payment of the capital;
- elect the members of the management bodies;
- approve the appraisal of any assets that are being used to pay in the capital by any shareholder; and
- confirm the capital of the company and the number of shares subscribed for, according to the subscription list, and like measure¹⁶⁴.

The law requires that at least one-half of the subscribers be present at the Inaugural meeting to approve the incorporation of the company. Should the quorum not be reached at the first meeting, a second meeting can be held with any number of shareholders¹⁶⁵.

On the other hand, in the event of incorporation of a privately-held *Sociedade Anônima*, the shareholders can also execute a public deed instead of a general shareholders' meeting.

The last step of the incorporation process described in the table above represents the complementary measures that are common to both

¹⁶⁴Fazio, *Brazilian Commercial Law*, 2013, Wolters Kluwer, Law & Business, p. 18-19.

¹⁶⁵Art. 87 of Law No.6404/76.

subscription forms; indeed the law fixed the need for registration and publication of the corporate acts. Either the general shareholders' meeting or the public deed approving the incorporation of the company, must be registered at the commercial registry and subsequently published in a newspaper located in the same city as the headquarters of the company, as well as in the Official Gazette¹⁶⁶.

Only after these steps, the company may initiate the operation of its business activities on a regular basis.

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, which must contain the expression "*Sociedade Anônima*", social object, the value of the social capital¹⁶⁷, 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.

¹⁶⁶Ibidem, p.19.

¹⁶⁷Art. 5 of Law No.6404/76.

2.4.3.3 Contributions and Shares

The social capital is divided into shares, with or without par value, and it is fixed in the bylaws, where it is expressed in national currency.

The payment of the subscribed shares may be effected by contributions in currency or assets, as long as capable of economic assessment, in accordance with what determined by the General Meeting in the course of which the subscription was made¹⁶⁸.

Indeed, for the payment of the corporate capital in assets is necessary to conduct the assessment of such property, which must be done in compliance with certain rules, laid down by law. Thus, three experts must be hired, or an expert appraisal company, to prepare a reasoned report indicating the criteria and elements of comparison used for the assets assessment. This report shall be subject to vote by the General Meeting of the company and be accepted by the subscriber¹⁶⁹.

It is free the possibility to contribute to corporate capital through credits, responding the correspondent subscriber for its existence and its solvency¹⁷⁰.

Shares are securities representing unity of the corporate capital of a limited company, which entitle holders to a complex of rights and duties.

¹⁶⁸Art. 7 of Law No. 6404/76.

¹⁶⁹Art. 8 of Law No. 6404/76.

¹⁷⁰Art. 10 Paragrafo Unico of Law No. 6404/76.

Shares are classified according to three different criteria: type, class and form.

According to the type, we have:

- a) Common shares, those that entitle their holders the rights that the law reserves to the common shareholder. Issuing of common share is mandatory. There is no *Sociedade Anônima* without shares of this kind. The bylaws shall not need to discipline this kind of shares, since it entails only the rights normally granted to a shareholder.
- b) Preferred shares, which entitle their holders a complex of different rights, for example, the priority in the distribution of dividends or in the reimbursement of capital, with or without premium etc. The preferred shares may or may not confer voting rights to their holders. To be traded on the capital market, the preferred shares must have at least one of the three advantages defined in the art.17 of Law No.6404/76, such as priority in the distribution of dividends or in the reimbursement of the capital, or accumulation of such advantages¹⁷¹.
- c) Fruition shares are those attributed to shareholders whose shares have been fully amortized. The holder will be subject to the same restrictions or enjoy the same advantages of common or preferred share amortized, unless the statutes or the General Meeting authorizing the amortization dictate in another sense.

¹⁷¹Art. 17 § 1 of Law No.6404/76.

The maximum number of preferred shares without voting rights or with restricted rights, tolerated by law, is 50% of the total number issued¹⁷².

The preferred shares are divided into classes according to the complex of rights or restrictions that, pursuant to bylaws, are conferred on their holders. The common shares, in theory, should not be divisible into classes, conferring the same set of rights to their holders. However, the law allows the bylaws of the closed company to provide common stock classes, based on its convertibility in preferred shares, on demand for Brazilian nationality of the shareholder or on the right to elect separately, members of the administration¹⁷³.

The common shares of public companies shall not be divided into classes¹⁷⁴.

Regarding the shares form, they could be nominal or dematerialized.

The criterion of differentiation between one form and another takes into account the legal act, which operates the transfer of the share ownership, i.e., the manner in which they are transmitted.

The nominal circulate through registration in the appropriate register of the issuing company. The dematerialized shares are already held, by approval or determination of the bylaws, in deposit accounts on behalf of its owner. These shares are devoid of certificate and its circulation operates by launching the operation in the depositary financial institution own records, to debit in the deposit account of the seller and to credit in the deposit

¹⁷²Art. 15 § 2 of Law No.6404/76.

¹⁷³Art. 16 of Law No.6404/76.

¹⁷⁴Art. 15 § 1 of Law No.6404/76.

account of the purchaser¹⁷⁵.

The bylaws of a closed *Sociedade Anônima* may establish limits on the free movement of its shares, if neither prevents its trading nor subjects the shareholder at the will of the management or the majority of shareholders¹⁷⁶.

The circulation of the shares of a public *Sociedade Anônima*, however, shall not suffer any restriction by the bylaws.

¹⁷⁵Coelho, Fábio Ulhoa. Manual de Direito Comercial. 17. ed. São Paulo: Saraiva, 2007, p.196.

¹⁷⁶Art. 36 of Law No.6404/76.

2.4.3.4 Capital increases

The corporation capital could, and in some cases must, be increased. In order to increase the corporation capital is mandatory to amend the bylaws.

However, a capital increase, not always is due to the entry of new resources in the company.

Indeed the capital of the *Sociedade Anônima* is increased in the following hypothesis:

- a) Issue of shares, in which case there is an actual inflow of new resources in the equity capital. The increase will be approved at the Extraordinary Shareholders General Meeting¹⁷⁷, with a majority of at least three quarters of the existing share capital¹⁷⁸.

It can also be done by resolution of the General Meeting or the Board of Directors, within the limits of the authorized capital specified in the bylaws¹⁷⁹.

- b) Marketable securities, the conversion of debentures or any other financial instrument convertible into shares, as the exercise of the rights conferred by bonus subscription or purchase option, count as a capital increase with issuance of new shares¹⁸⁰.

¹⁷⁷Art. 166 IV of Law No.6404/76.

¹⁷⁸Art. 170 of Law No.6404/76.

¹⁷⁹Art. 166 II of Law No.6404/76.

¹⁸⁰Art. 166 III of Law No.6404/76.

- c) Capitalisation of profits and reserves, the annual General Meeting may allocate a portion of net income or reserves for strengthening share capital, emitting, or not, new shares, but always without the entry of new resources¹⁸¹.

The company bylaws may authorize an increase in corporation capital, within certain limits, without needs to amend the bylaws. The measure aims to smooth the decision-making and the issue of new shares. This limit is called the capital "authorized". When fixing the authorized capital, the bylaws should define which body shall be competent to decide the issue of new shares, if the general meeting or the board of directors¹⁸².

A *Sociedade Anônima* may increase its capital stock, only after 75% of the subscribed capital stock is paid up.

Furthermore is important to notice that all shareholders have pre-emptive right to subscribe for additional shares in case of capital increases, proportionally to their stock in the corporate capital, as we will discuss later.

The capital of the company may also be reduced. Reduction can occur in the following events:

- if the capital is considered oversized comparing to the company's activities;

¹⁸¹Art. 169 of Law No.6404/76.

¹⁸²Art. 168 of Law No. 6404/76.

- to offset accrued losses¹⁸³;
- if the shares issued are not fully subscribed for;
- to reimburse shares to shareholders withdrawing from the company;
and
- in the event of redemption of shares¹⁸⁴.

There are two causes which the law considers to allow this reduction: the excess of capital, when it is verified the capital oversizing; and unreality of the capital, when there is an economic loss.

¹⁸³Art. 173 of Law No.6404/76.

¹⁸⁴Fazio, Brazilian Commercial Law, 2013, Wolters Kluwer, Law & Business, p.17.

2.4.3.5 Other securities

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.

Founder's shares are negotiable securities with no par value, and they do not represent the corporate capital of the company¹⁸⁵. These certificates grant their owners a future credit with the company, consisting in a participation in the total annual net profits of the company. The total participation consisting of all the founder's shares could not exceed the 10% of the total annual net profits¹⁸⁶. Only *sociedades anônimas* that are privately held may offer such kind of securities, for public companies it is forbidden¹⁸⁷.

These securities may be transferred or assigned. The assignment, in turn, could be costly, subjected to service provisions, or freely.

The founder's shares term will be established in the bylaws, never exceeding 10 years, unless issued to company or charitable foundation of the company's employees, in which case the bylaws may set the term freely¹⁸⁸.

¹⁸⁵Art.46 of Law No.6404/76.

¹⁸⁶Art.46 § 2 of Law No.6404/76.

¹⁸⁷Art.47 Paragrafo Unico of Law No.6404/76.

¹⁸⁸Art.48 § 1º of Law No.6404/76.

Notwithstanding, the bylaws may provide for conversion of these certificates into shares by capitalizing a specific reserve for this purpose. The purpose of this kind of security is to offer another form of remuneration to those who render services to the company or to raise funds for the company¹⁸⁹.

The debentures are defined as securities representing a loan agreement, where the company is the borrower and the debenture holder the lender¹⁹⁰. Indeed it grants its holders a credit with the company, and must be issued at par value. Their issuance is subjected to the approval of the shareholders met in a General Meeting.

In the specific case of debentures of a *Sociedade Anônima* that is publicly held, a trustee must represent their holders and will be liable for any losses resulting from failure to comply with its obligations¹⁹¹.

The debentures, according to the guarantee offered to their holders, may be of four kinds: a) with collateral, in which an asset belonging or not to the company, is encumbered (mortgage of a property, for example); b) with floating guarantee, which gives bondholders a general advantage on company's assets, by which will have precedence over unsecured creditors in the event of bankruptcy of the issuer; c) unsecured, the holder of which competes with the other unsecured creditors in the bankruptcy state; d) subordinated (or *subquirografia*), in which the holder has precedence only

¹⁸⁹ Fazio, Brazilian Commercial Law, 2013, Wolters Kluwer, Law & Business, p.17.

¹⁹⁰ Art.52 of Law No.6404/76.

¹⁹¹ Fazio, ibidem p.18.

on shareholders, in case of bankruptcy of the debtor company¹⁹². However the company may also grant the holder a participation in the company's profit and may be converted into shares, as provided for in the company's bylaws¹⁹³.

Redemption of the debentures may occur according to what is established in the deed of title, and may be subject to conditional occurrence of an event or a set date¹⁹⁴.

The subscription rights are securities issued by a *Sociedade Anônima* with authorized capital, which grants its holders the right to subscribe for shares of the issuing company in case of future capital increases.

With this type of security, the holders request the exercise of their rights by paying the company the price for issuance of the shares. Basically, the subscription right grants the holder a priority right in subscribing for new shares of the company. The issuance must also be approved by the shareholders by means of a General Meeting or a Board of Directors' Meeting, as provided for in the company's bylaws¹⁹⁵.

Finally, the CVM disciplined by instruction No. 134, 1990, the issuance of promissory notes for public distribution. This is a security aimed for the raising of funds for short-term refund (30 days minimum and 180 maximum). Known as commercial paper, these securities may be traded

¹⁹²Coelho, Fábio Ulhoa. Manual de Direito Comercial. 17. ed. São Paulo: Saraiva, 2007, p.192-193.

¹⁹³Art.57 of Law No.6404/76.

¹⁹⁴Fazio, Brazilian Commercial Law, 2013, Wolters Kluwer, Law & Business, p.18.

¹⁹⁵Fazio, ibidem.

only by endorsement in blank with no warranty clause¹⁹⁶.

¹⁹⁶Coelho, Fábio Ulhoa. Manual de Direito Comercial. 17. ed. São Paulo: Saraiva, 2007, p.194.

2.4.3.6 Shareholders' rights

The shareholders are entitled of a complex of rights, due to their specific role. The article 109 of Law No.6404 define the essential rights of shareholders, which are the following:

- a) The right to participate in the profits of the company and right to receive assets of the company in the event of liquidation.

As established by law, the shareholder has the mandatory right to receive part of the profits distributed as dividends¹⁹⁷. This mandatory distribution will be set out in the company's bylaws.

Should the company's bylaws remain silent as regards the distribution of dividends, the law provides that the dividend will comprise 50% of the adjusted net profit. Exception can be made with regard to the mandatory distribution when the management bodies feel that the distribution could jeopardize the company's best interests¹⁹⁸.

Regarding the right to receive assets of the company in the event of liquidation, it could be applied only if it is present an outstanding balance upon liquidation of all outstanding obligations assumed.

It is important to underline that these particular rights may have different priorities, based on the share's classes, as for example for preferred shares. These priorities have to be established in the

¹⁹⁷Art.109 I of Law No.6404/76.

¹⁹⁸ Fazio, Brazilian Commercial Law, 2013, Wolters Kluwer, Law & Business, p.22.

company's bylaws.

b) The right to oversee the management body of the company.

As the number of the shareholders in *sociedades anônimas* is usually broader than in *limitadas*, the law provides some guarantees in order to protect the minority shareholders, such as the following ones:

- the right to call a General Meeting if the officers were to fail to comply with their obligations, provided that the minority shareholders represent at least 5% of the capital stock;
- the right to inspect the corporate books, as long as the minority shareholders represent at least 5% of the capital stock¹⁹⁹;
- the right to elect one member of the audit committee, as long as the minority shareholders represent at least 10% of the common shares or 5% of the preferred share capital with no voting rights²⁰⁰.

Additionally, the bylaws may provide for other rights/guarantees to be granted to minority shareholders. It is free the possibility for the shareholder to enter in a shareholders' agreement so as to assure and defend their rights against the controlling shareholders.

c) The pre-emptive right to subscribe for new shares.

This entitlement, apart from the shareholders owing common shares,

¹⁹⁹Art.105 of Law No.6404/76.

²⁰⁰Fazio, Brazilian Commercial Law, 2013, Wolters Kluwer, Law & Business, p.22.

is extended to the issuance of debentures and other securities that are convertible into shares, as well as to subscription bonus. The subscription will occur in proportion to their equity in the capital stock²⁰¹.

The *Sociedade Anônima* is not obligated to maintain the same proportion as to the different classes of shares issued. For this purpose, in order to grant the pre-emptive right to all shareholders so that their equity in the company is not modified, should the proportion of the classes of the new shares issued not be equal, the shareholders will be entitled to subscribe for shares in classes other than the ones held by them²⁰².

d) The right to withdraw from the company.

The right to withdraw may only be exercised in particular cases defined by law, depending on expressly enumerated shareholders' deliberations, which are the following:

- In case of issuance of new preferred shares or increase in a class of preferred shares already existing, when this modifies the proportion of the shares of the company, unless this is expressly provided for in the bylaws²⁰³.
- In case of changes in the benefits attached to preferred shares, change in the redemption conditions or issuance of a new

²⁰¹Art.171 of Law No.6404/76.

²⁰²Fazio, *ibidem* p.23.

²⁰³Art.136 I of Law No.6404/76.

class of shares with more advantages of the existing ones²⁰⁴.

- Reduction of the mandatory dividend²⁰⁵.
- Merger or assimilation with another company²⁰⁶.
- Acquisition of an equity interest in a block of companies²⁰⁷.
- Change in the company's corporate object²⁰⁸.
- Spin-off of the company²⁰⁹.
- Transformation of the company²¹⁰.

For all the cases provided by law, the shareholder has the burden to prove that he/she has in fact suffered a loss and has to show his/her dissent within 30 days from the publication of the minutes of the meeting that resolved on any of the above events.

Once proved the loss, the shareholders have the right to reimbursement of their share at a price that cannot be less than the net worth of the shares, all based on the latest balance sheet approved by the shareholders at the annual General Meeting, unless the company's bylaws establish some other form for calculation of the price²¹¹.

²⁰⁴Art.136 II of Law No.6404/76.

²⁰⁵Art.136 III, *ibidem*.

²⁰⁶Art 136 IV, *ibidem* and art.230, *ibidem*.

²⁰⁷Art.136 V, *ibidem* and art.252, *ibidem*.

²⁰⁸Art.136 VI, *ibidem*.

²⁰⁹Art.136 IX, *ibidem*.

²¹⁰Art.221 of Law No.6404/76.

²¹¹Fazio, *ibidem* p.23.

In closing, a particular case is constituted by the voting right. Indeed it is not an essential shareholders' right, cause it is free the possibility to have shares without voting rights attached.

2.4.3.7 The General Meeting

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. According to law the following issues are competence of General Meeting:

- (i) to amend the bylaws;
- (ii) to appoint or remove, at any time, directors;
- (iii) to review annually the accounts of directors and vote on the financial statements;
- (iv) to authorize the issue of debentures;
- (v) to suspend the exercise of shareholders' rights;
- (vi) to decide on the valuation of assets;
- (vii) to authorize the issue of party beneficiaries;
- (viii) to deliberate on the transformation, merger, incorporation, division, dissolution and liquidation of the company, elect and dismiss liquidators and judge their accounts;

(ix) to authorize the directors to confess the bankruptcy and insolvency reports²¹².

In general, Shareholders' General Meeting have to be called by the *Conselho de Administração*²¹³, although there are few exceptions authorizing other bodies to call the meeting, such as:

- in case the bylaws does not provide the Board of Directors, the *Diretoria* will call the meeting;
- in case of urgency, the *Conselho Fiscal* may call the meeting, should the *Conselho de Administração* and the *Diretoria* delay in making this call²¹⁴;
- any shareholder may call the meeting, should management bodies delay more than 60 days in calling the mandatory meeting according to law or to the bylaws;
- shareholders representing at least 5% of the corporate capital may make the call, should management bodies delay more than 8 days after being requested to call the meeting²¹⁵.

Brazilian law also establish certain formalities for call notice procedures. It is required that a call notice be published at least three times in the Official Gazette and in a newspaper widely circulated in the place where the company headquarters are located²¹⁶.

²¹²Art. 122 of Law No.6404/76.

²¹³Art. 123 of Law No.6404/76.

²¹⁴Art. 163 No. V of Law No.6404/76.

²¹⁵Art.123 Paragrafo Unico of Law No.6404/76.

²¹⁶Fazio, Brazilian Commercial Law, 2013, Wolters Kluwer, Law & Business, p. 24.

In privately held companies, publication is waived when all the shareholders company sign the minutes of the meeting, thereby proving their attendance at the meeting²¹⁷.

All resolutions of the company must be recorded in the minutes and the proper corporate books, then must be published and registered at the competent commercial registry²¹⁸.

The law provide three types of General Meeting, the inaugural, the ordinary and the extraordinary. Apart from the inaugural, which is held for incorporation of *Sociedade Anônima*, the distinction between the latters is based on the different issues subordinated to their deliberation.

The ordinary General Meeting is required by law and must be called annually, in the four months immediately following the end of the fiscal year, with the following agenda:

- (i) analysis of the officers' accounts, discussion and approval of annual financial statements;
- (ii) the resolution on the allocation of net income for the year and on the distribution of dividends;
- (iii) the election of directors and members of the Audit Committee, if necessary²¹⁹.

Any other issue may not be subject to approval of the ordinary general

²¹⁷Fazio, *ibidem*.

²¹⁸Fazio, *ibidem*.

²¹⁹Art. 132 of Law No.6404/76.

meeting, making indispensable to convene an Extraordinary General Meeting.

The law defines quorum for the Ordinary and Extraordinary Meeting. For the both is required an installation quorum of at least one quarter of the voting capital on the first call, and any shareholder number on the second call²²⁰. For the Extraordinary Meeting regarding bylaws amendments, the installation quorum required is of at least two third of the voting capital on the first call, and as for the ordinary any shareholder number on the second call²²¹.

Meanwhile the deliberation quorum for both meetings is defined as the majority of the voting shareholders present at the meeting, not counting blank votes²²².

There are, however, cases in which the law sets a higher quorum for the transaction. It is the case of the qualified quorum, stated in the art. 136, which requires, for the approval of the issues listed therein, the agreement of shareholders representing at least half of the total voting capital, not necessarily present at the meeting.

The deliberation quorum, simple or qualified, may be increased by the bylaws of the closed company.

Regarding the voting process, a shareholder may be represented in a meeting by a proxy holder, who must be another shareholder, an officer of

²²⁰Art. 125 of Law No.6404/76.

²²¹Art. 135 of Law No.6404/76.

²²²Art. 129 of Law No.6404/76.

the company, a director of the company or a lawyer²²³.

²²³Fazio, *ibidem* p. 25.

2.4.3.8 Shareholders' agreements

The shareholders are free to establish some basic procedures through a shareholders' agreement, which can provide for a variety of matters²²⁴.

According to art.118 the shareholders' agreement could provide for: trade of shares, option rights, voting exercise and controlling power.

Thus, if the agreement relies on these particular subjects, it has to be duly registered in the company's corporate books, as well as on the corporate certificates, in order to be effective towards third parties²²⁵. Pursuant to Brazilian legislation, should any of the parties not comply with its specifications, the other party may have the judicially execution of the obligation assumed by the defaulting party²²⁶.

In Brazil there are usually two kinds of shareholders agreements: blocking agreement and voting agreement. The former consists in a restriction of the sale and assignment of the company's shares to third parties, usually establishing provisions like put and call option or tag and drag along rights. The latter, instead, consists in an agreement whereby the shareholders set out how to vote at the shareholders' meeting²²⁷.

²²⁴Fazio, *ibidem*, p.10.

²²⁵Art.118 § 1 of Law No.6404/76.

²²⁶Coelho, Fábio Ulhoa. *Manual de Direito Comercial*. 17. ed. São Paulo: Saraiva, 2007, p.210.

²²⁷Fazio, *ibidem*, p.10.

2.4.3.9 Company administration

According to art. 138 of the Law No.6404/76, the company administration must compete to the *Diretoria* and, if disposed in the bylaws, to the *Conselho de Administração* (Board of Directors).

Analysing the above article along with the art. 145 of the same law, an important conclusion can be drawn: "administrator" is not only the director, member of *Conselho de Administração* (the law call it the *conselheiro*), but also any officer, member of the *Diretoria*, or any member of the *Conselho* that is charged with those roles. That is, the figure of the administrator can be part of both the *Conselho* and the *Diretoria*, which, consequently, are called organs of administration²²⁸.

Furthermore, from the simple reading of the art.138, we are led to the certainty that the *Conselho de Administração* is not a mandatory organ in the structure of the *anônima*, except in the cases provided for in its § 2, i.e., when the company is public or of authorized capital. However, with clairvoyance is shown the obligation of creation of the *Diretoria* in the structural context of the company.

Based on this, we can outline the two different administration system of the *Sociedade Anônima*, monistic and dualistic.

The monistic system is based on the General Meeting, which shall be the

²²⁸Machado Santos, Priscilla, Aspectos gerais da Sociedade Anônima, Viajus, 2007, p.6.

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*.

Thus, the exclusive authority to elect or dismiss members of the *Diretoria* will depend on the system that will follow the corporation, dualistic or monistic, respectively. In the monistic system the General Meeting shall be entitled to conduct this task while in the dualistic one the entitled body is the *Conselho de Administração*.

Analysing in depth the single organs, the *Conselho de Administração* is a facultative collegial deliberative organ²²⁹ and is composed of minimum three natural persons, elected and removed by the General Meeting²³⁰.

It must be provided in the bylaws the number of members, the minimum and the maximum permitted, the replacing system and the office term, not exceeding 3 years and the rules of procedures of the body, like call, installation, operation and deliberation²³¹.

The *Conselho* shall decide by majority vote if the bylaws does not provide

²²⁹Regarding the function of the *Conselho*, Coelho(2007) states “Trata-se de colegiado de caráter deliberativo, ao qual a lei atribui parcela da competência da assembleia geral, com vistas a agilizar a tomada de decisões de interesse da companhia”.

²³⁰Art. 140 of Law No.6404/76.

²³¹Art. 140 of Law No. 6404/76.

for a qualified quorum for one or more topics, and only Brazilian resident natural person is eligible for election as a director²³².

In general, the *Conselho* is competent, as the art. 142 of Law No.6404/76 states, on the subsequent topics: setting the general direction of the company's business; to elect and to remove officers of the company, members of the *Diretoria*, and determine their duties; supervise the management of officers, at any time examining the books and papers of the company and request information on agreements executed or to be executed and any other acts; to call a General Meeting, when it deems necessary; to express themselves on the management report and accounts of the *Diretoria*; to deliberate, when authorized by the bylaws, the issuance of shares or warrants; to authorize the disposal of fixed assets, the creation of encumbrances and the provision of guarantees on behalf of third parties, if the bylaws does not provide otherwise, and the appointment and dismissal of independent auditors, if due.

On the other hand we have the *Diretoria*, which is the mandatory management body of the *Sociedade Anônima*, and is composed of minimum two natural persons, whether shareholders or not, residents in Brazil²³³.

The *Diretoria* is the body that legally represents the company vis-à-vis public bodies and third parties and executes the resolutions of both, the General Meeting and the *Conselho de Administração*.

As we said above, the members of the *Diretoria*, called "*diretores*" in the

²³²Art. 146 of Law No.6404/76.

²³³Art.142 of Law No.6404/76.

Brazilian law, will be elected by means of a shareholders' General Meeting, or by the *Conselho de Administração*, if the company's bylaws provides one.

The bylaws must indicate, regarding the *Diretoria*: the number of the officers, with minimum and maximum allowed; the office's term, which cannot exceed three years; officers' substitution method; powers and assignments of each officer, indicating the officers responsible for the company's representation²³⁴.

Brazilian law does not define all obligations incumbent on the *Diretoria*; therefore, the officers may decide on any matters not restricted to other management bodies²³⁵, performing the necessary acts for the company's regular functioning. The *Diretoria* is basically responsible for everything relating to the company's activities, including its representation, as said above.

As we said at the beginning of the paragraph, should be in charge of management role, for the law administrators are both directors, any member of *Conselho de Administração*, and officers, any member of the *Diretoria*, and they must comply with both duties and liabilities established by law.

The law No.6404/76 in the articles 153 and subsequent provides that the administrators must comply with both the duty of diligence and the duty of loyalty. The administrators will be liable in cases when the principles were not complied with or should they not carry out their duties properly.

²³⁴Art.143 of Law No.6404/76.

²³⁵Fazio, Brazilian Commercial Law, 2013, Wolters Kluwer, Law & Business, p. 21.

The duty of diligence concerns the duty of managing the company based on the best practises of general management with a view to fulfilment of its guiding principles. The law specifically states that the administrator must behave with the diligence and the care that an active and honest man usually employs in managing his business ²³⁶ . Furthermore, the administrator shall exercise the power conferred by the law and by the company's bylaws, only to achieve the company's aims, always observing the requirements of the public good and the company's social function²³⁷.

The duty of loyalty, on the other hand, may be understood as the obligation assumed by the administrators to not use their position for their own benefit or for the advantage of third parties. The administrator cannot use the company's resources, such as assets and employees, for personal reasons. Additionally they cannot be involved in any business in conflict with the company's interests²³⁸.

In addition to the duty of diligence and the duty of loyalty, we should mention the non-disclosure duty expected of the administrators of public *sociedades anônimas*²³⁹. In the view of the above, the administrators must comply with the expectation of keeping all insider information

²³⁶The art.153 of Law No.6404/76 precisely states: "O administrador da companhia deve empregar, no exercício de suas funções, o cuidado e diligência que todo homem ativo e probo costuma empregar na administração dos seus próprios negócios".

²³⁷Santiago, Marcia, A responsabilidade do administrador na Sociedade Anônima, Revista da Faculdade de Direito da Universidade Federal do Paraná, p.106.

²³⁸Fazio, ibidem p.29.

²³⁹Art.157 § 5º of Law No.6404/76.

confidential²⁴⁰, so that all investors are equal. When realising information, release must be made to the open market, providing all investors with the same information at the same time²⁴¹.

The administrators, apart from the duty of non-disclosure, have also a duty to inform, which refers to the obligation of a full disclosure to the market of all the material facts regarding the company²⁴².

As said above, the administrators may not be personally liable for the obligation assumed in the company's name. However administrators' liability apply if they acted with negligence, or with fraudulent intent or violating the law or the company's bylaws, causing damages to any party, third parties or company itself²⁴³. Depending on the different cases, the administrators may be consequently suitable for administrative, civil and penal liability.

²⁴⁰In Brazil insider trading is punished by Law No.6385/76, which considers it a crime against the capital market. Penalties vary from one to five years of confinement and huge fines proportionated from the amount of the illegal advantage.

²⁴¹Fazio, *ibidem* p.30.

²⁴²Art.157 of Law No.6404/76.

²⁴³Martins, Arnoldi, *Administração e Diretoria das Sociedades Anônimas (Lei 6404/76)*, p.9.

2.4.3.10 Audit Committee

In the *Sociedade Anônima*, is mandatory the installation of an Audit Committee, *Conselho Fiscal*, although its operation can be restricted to certain circumstances, as provided for in the company's bylaws²⁴⁴.

The Audit Committee will be composed of minimum three members and maximum five members, with the corresponding alternates, elected by the General Meeting²⁴⁵. The members have to be resident in Brazil, without the need to be shareholders²⁴⁶. Apply to the Audit Committee members all the provisions provided for the administrators.

Should the Audit Committee not be a permanent body, it can operate at the request of the shareholders representing 10% of the voting shares or 5% of the non-voting shares²⁴⁷. From there on it will suspend its functioning until the next annual General Meeting.

As art.163 of Law No.6404/76 states, the *Conselho Fiscal* is competent to:

- oversee the executive officers' acts;
- issue its opinion on the annual officers' reports;
- issue its opinion on the proposals of the officers relating to changes in the capital stock, issue of debentures, distribution of dividends,

²⁴⁴Art.161 of Law No.6404/76.

²⁴⁵Art.161 § 1 of Law No.6404/76.

²⁴⁶Art.162 of Law No.6404/76.

²⁴⁷Art.161 § 2 of Law No.6404/76.

- merger, and/or amalgamation, among other possible alterations to the corporate structure;
- report to the officers any frauds identified in the company;
 - call for the annual General Meeting if the other management bodies fail to make it;
 - analyse, at least every three months, the company's balance sheet and financial statements;
 - issue its opinion on the annual financial statement;
 - exercise all prerogatives ascribed thereto during the liquidation proceeding²⁴⁸.

Regarding the financial statements audit, only *sociedades anônimas* that are publicly held are required to be audited by an independent auditor registered with CVM²⁴⁹. On the other hand, the law No.11638/2007, amending the art.176 and subsequent of law No.6404/76, provides that large²⁵⁰ privately held *Sociedade Anônima* are now committed to have their accounts audited by independent auditors as well.

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.

²⁴⁸Fazio, Brazilian Commercial Law, 2013, Wolters Kluwer, Law & Business, p. 21.

²⁴⁹Art.177 § 3 of Law No.6404/76.

²⁵⁰Law No.11638/2007 has defined large companies the ones that are privately held with assets in an amount superior to 240.000.000 BRL and/or with annual income superior to 300.000.000 BRL, http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2007/lei/l11638.htm.

2.4.3.11 Dissolution

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 dissolution²⁵¹.

The dissolution could occur de jure, by court order or by decision of the competent administrative authority²⁵². Determiners for the first dissolution mode are the ends of the company's term, the cases provided for in the bylaws, shareholder general meeting's resolution, occurred company sole proprietorship and ultimately the extinction of the authorization to operate²⁵³.

Regarding the judicial dissolution, causes are annulment of the company's constitution, proposed by any shareholder, the unobtainable company's social scope, proven in action proposed by shareholders representing 5% or more of the company's capital, and in case of bankruptcy.

The dissolved company retains legal personality, until the extinction, in order to carry out the liquidation process, in which all the company's assets are used in order to repay the company's debt and, only thereafter, to repay the capital paid by shareholders²⁵⁴.

²⁵¹Art.219 of Law No.6404/76.

²⁵²Art.206 of Law No.6404/76.

²⁵³Coelho, Fábio Ulhoa. Manual de Direito Comercial. 17. ed. São Paulo: Saraiva, 2007, p.220.

²⁵⁴Art.207 of Law No.6404/76.

2.4.4 Other minor corporation models

- *Sociedade em nome coletivo*

This type of corporation model, regulated by art.1039-1042 of Civil Code, is characterized by the unlimited jointly liability of the partners.

Apply subsidiary to the *sociedade em nome coletivo*, all of the rules provided in the regulation of the *sociedade simples*²⁵⁵.

It is important to notice that, apart from the unlimited liability of the partners, the principal characteristic is the jointly administration, which is at the expense of all the partners, unless it is provided differently in the bylaws²⁵⁶.

It is free the possibility for the partners to restrict the liability of each one, in the articles of incorporation or subsequently amending the bylaws²⁵⁷.

In the Brazilian economy, the *sociedade em nome coletivo* represents a corporate model that is rarely used or absolutely absent in the commercial practice, due to the unlimited liability of the partners.

²⁵⁵Art.1040 of Civil Code.

²⁵⁶Art.1042 of Civil Code.

²⁵⁷Art.1039 Paragrafo Unico of Civil Code.

- *Sociedade em comandita simples and em comandita por ações*

The following types of corporate model are characterized by the presence of two different partners' liability regime, provided by the law.

Indeed in both types we found general partners, defined "*comanditados*", which are unlimitedly liable for the corporate activities, and silent partners, defined "*comanditarios*", which conversely are limitedly liable for corporate activities, in proportion to their capital quota. Both partners' types have to be clearly defined in the bylaws²⁵⁸.

It is important to underline that only general partners may be appointed as officers and they have to be natural persons, not legal entities²⁵⁹.

The silent partners, who may be natural persons or legal entities, are subject to specific restriction provided by law: they cannot perform company's management acts, otherwise, acting on its behalf, they will be considered as officers and so the unlimited liability regime, which characterized the general partners, will apply also to them. However, they may receive special powers as attorney in performing well-defined businesses²⁶⁰.

Both general and silent partners have the right to participate in the company's profit, proportionally to their capital share, as well as taking part of the company's resolutions and supervising corporate

²⁵⁸Art.1045 of Civil Code.

²⁵⁹Coelho, Fábio Ulhoa. Manual de Direito Comercial. 17. ed. São Paulo: Saraiva, 2007, p.149.

²⁶⁰Coelho, *ibidem*.

management²⁶¹.

Thus far we described the common regulation for the two models, we now outline the main differences.

Indeed to *sociedade em comandita simples* is subsidiary applicable the *sociedade em nome coletivo* regulation, and its capital is composed by quotas²⁶². Conversely the *Sociedade Anônima* regulation applies to *sociedade em comandita por ações* and its capital is composed of stocks²⁶³.

Regarding the latter, it is important to underline that the officers are unlimitedly liable and due to this reason only shareholders can be appointed as administrators²⁶⁴, exactly as the general partners in the *comandita simples*.

²⁶¹Art.1047 of Civil Code.

²⁶²Art.1046 of Civil Code.

²⁶³Art.280 of Law No.6404/76.

²⁶⁴Art.1091 of Civil Code.

2.4.5 Corporation without legal status

The Brazilian legal system provides three types of company, which does not have the nature of legal entity: the *sociedade em conta de participação* (participation account partnership), the *sociedade em comum* and the consortium. Apart from *the sociedade em comum*, whom is not properly a company type but is prefigured as a regulation applicable to irregular company, 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. We will briefly analyse it in the next pages.

2.4.5.1 *Sociedade em conta de participação*

This type of corporation has special characteristics considering the Brazilian legal system scenario. Regulated by articles 991-996 of Civil Code, it is characterized as a special partnership, which means that is not able to assume obligations and liabilities in regard to third parties²⁶⁵, due to the lack of legal status.

In this partnership we distinguish between two types of partners: the ostensible partner and the unidentified partner. The former, either a legal entity or an individual, is the one that assumes all corporate obligations, such as signing agreements or responsibility for accounting procedures, on its personal behalf and he's entirely liable against third parties²⁶⁶. The latter, which will remain secret, is not involved in the partnership management, only being entitled to receive profits, and is liable towards the ostensible partner²⁶⁷, restricted to the capital invested.

The law does not provide any requirements for the constitution of the special partnership²⁶⁸, and the possible existent contract has no to be registered at the commercial registry. It can be established by any kind of agreement, even by an oral agreement, and is only valid between the parties.

²⁶⁵Fazio, Brazilian Commercial Law, 2013, Wolters Kluwer, Law & Business, p. 26.

²⁶⁶Art.991 of Civil Code.

²⁶⁷Art.991 Paragrafo Unico of Civil Code.

²⁶⁸Art.992 of Civil Code.

The only requirement, due to the absence of a joint corporate stock, is that the partnership account must be recorded to a specific account in the ostensible partner's financial statements²⁶⁹. Due to its nature the partnership cannot enter into bankruptcy.

The participation account partnerships are usually used for businesses with specific purpose within a determined term, configuring it as a flexible legal tool, as a joint venture.

Popular among construction companies for the incorporation of real estate undertakings, this kind of partnership can be easily adopted by any other corporate sector, offering the possibility to the ostensible partner of gaining investments from unidentified partners, which are interested only in receive profits and not in managing the company.

The secret partnership, since the previous regulation, is an important tool of fundraising and business viability, and was widely used until the tax legislation equated to the regular corporations, erasing the tax advantage, that still survive in a less extent, compared now to natural persons taxation²⁷⁰.

²⁶⁹Fazio, *Brazilian Commercial Law*, 2013, Wolters Kluwer, Law & Business, p. 26.

²⁷⁰Gomes, Alexandre Gir, *Sociedades não personificadas no Código Civil*, Doutrinas Essenciais de Direito Empresarial, vol. 1, 2010, Thomson Reuters, p.449.

2.4.5.2 Consortium

Similarly used to establish joint ventures but different in the form is the consortium. Regulated by art.278-279 of Law No.6404/76, consists in a written agreement between two corporations or legal entities in order to carry out a particular undertaking. Companies that intend to associate for participating in a public bid commonly use this tool in practice. The contract between the parties shall be duly registered and published in the *Junta Comercial*, to be valid against third parties.

All rights and partners' liabilities have to be clearly specified in the consortium's contract, as well as any other issue, like duration, profits distribution and management and accounting rules.

An important protection to the consortium's continuity is given by the provision that allows it to remain effective between all the companies, even if one of them goes into bankruptcy²⁷¹.

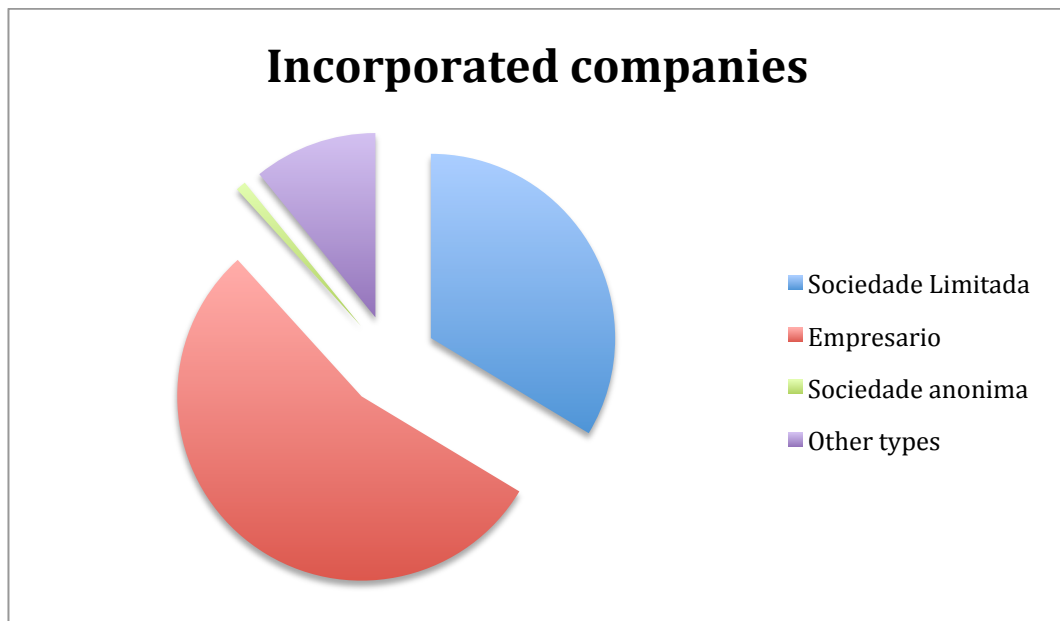
Notwithstanding the above, a consumer law was enacted to provide that in the event of losses or damages caused to consumers, the companies that are party to the consortium are to be held jointly liable²⁷².

²⁷¹Art.278 § 2 of Law No.6404/76.

²⁷²Fazio, *Brazilian Commercial Law*, 2013, Wolters Kluwer, Law & Business, p. 27.

2.5 Statistics

Thus far we have outlined the principal Brazilian corporation models, now we will see in practise the corporate model chosen by investors in the graph below²⁷³.



Analysing the data of 2013 presented by *Instituto Brasileiro de Planejamento e Tributação*, we observe that the great majority of the corporations incorporated in Brazil choose to incorporate as *sociedades limitadas*. Indeed, apart from the individual entrepreneurs (*empresario*)²⁷⁴, that not consists company, which account for more than 50% of the total commercial

²⁷³The graph is taken by data elaborated by Instituto Brasileiro de Planejamento e Tributação, IBPT, <http://www.empresometro.com.br/Site/Estatisticas>.

²⁷⁴The individual entrepreneurs (*empresario individual*) have unlimited liability regards its obligation towards third parties and do not have legal status. It is a form used for little Brazilian entrepreneurs.

activities, the *limitadas* amount to 5.838.603, representing more than 34% of the sample. The *Sociedade Anônima*, both open and closed, represent only less than 1% of the total, given an indication of the still poor Brazilian stock market. The other types category, which accounts for almost the 15%; comprises all companies and partnerships, such as *sociedades em comandita simples*, EIRELI, *consortium*, *sociedade simples limitada* and so on.

In any event it is useful to underline the huge presence, considering that it was entered in force only at the beginning of 2012, of the EIRELI corporate type, which amounts to 220.778 companies, representing the 1.27% of all the Brazilian companies incorporated. This corporation could represent a really interesting tool for investing, both for Brazilian and foreign investors.

CHAPTER III

A COMPARISON BETWEEN BRAZILIAN AND ITALIAN CORPORATION MODELS

3.1 Historical evolution of Brazilian Civil Code: the Italian influence

3.1.1 Brief history

Enacted by Law No. 10406 of 10 January of 2002, at the end of parliamentary works begun in 1975, the *Novo Código Civil*, entered in force the 10 January of 2003, stands out as the first code of the third millennium. Realising the idea that one of the most important Brazilian jurists, Augusto Teixeira de Freitas, expressed in 1867 and that was proposed again several times in Twentieth Century, the code unifies all private law. It substitutes both the civil code of 1916, which was one of the last of the seasons of the middleclass codifications opened by the Napoleonic Code of 1804, and the commercial code of 1850, conditioned, through Spanish and Portuguese

codifications, by the *code de commerce*, French commercial code, of 1807²⁷⁵.

The Brazilian legislator has, therefore, challenged the codifying complications in our time, age of decoding and uncertainty, caused by the continuous changes, due to economy's globalization, scientific improvements, communication systems' evolution, establishment of new personal rights and spreading of family models, deeply different from the traditional ones²⁷⁶.

Its effort demonstrates that, despite the overflowing of special laws, the code structure is still actual²⁷⁷, inasmuch, even if it has lost the constitutional value of middleclass' freedoms and free market's relations that assumed throughout all the 1800s, expressed in the form of civil-private rights, it has preserved its function of providing a systematic core of principles and peremptory categories which, in the conflict of interest selection, grant to the juridical argumentation the supremacy against the political evaluation's contingency²⁷⁸.

To better understand the dynamics that have brought to the issuing of the new civil code, it requires recalling all vicissitudes of the Brazilian commercial and private law history.

Declared September 7 of 1822 the independence from Portugal by the same ruler prince D. Pedro, afterwards Brazil's king with the title of D. Pedro I,

²⁷⁵Calderale, A., *Il nuovo codice civile brasiliano*, Giuffrè, 2003, p.XV.

²⁷⁶Calderale, A., *Diritto privato e codificazione in Brasile*, Giuffrè, 2005, p.2.

²⁷⁷Corapi, *L'unificazione del codice di commercio e del codice civile in Brasile*, in Calderale, *Il nuovo codice civile brasiliano*.

²⁷⁸Calderale, *ibidem*.

with law of October 23 1823 it was stated that all Portuguese sources of law, i.e. the ordinances, the laws and the decrees promulgated by the Portuguese kings until April 25 of 1821, remained in force in the country²⁷⁹.

That date marked the return of king D. João VI in Portugal, from where he ran away to escape from the Napoleonic invasion in 1808, and so represented a breaking point between the two systems, Portuguese and Brazilian. Indeed the law provided a temporary authority to the Portuguese sources of law, “until it was not organized another code or they were not expressly modified”²⁸⁰.

In 1824 it was issued the first Brazilian Constitution, sensibly inspired by English law model regarding the state’s organization, which reinforces the aim expressed in the law of 1823, disposing on the urgency of preparing of a new civil code, founded on *solidas bases da justiça e da equidade* (art.129, XVIII).

Until then, the civil law was regulated firstly by the bare provisions of the book IV of *Ordinações Filipinas* of 1603 regarding contracts and testaments, then by a huge number of laws and royal provisions, by conventions, and in the end, in order to fill up the still existent gaps, by the roman law interpreted at the light of Law of August 18 of 1769. According to this law, the Roman law has to be interpreted on the basis of *bõa razão*²⁸¹ (good reason), that is the *recta ratio* of the *jusnaturalist* school, resorting to *usus*

²⁷⁹Fausto, *Historia do Brasil*, 10 ed., São Paulo, 2002, 120 ss.

²⁸⁰Calderale, *Diritto privato e codificazione in Brasile*, Giuffrè, 2005, p.18.

²⁸¹*Boa razao* is constituted, using the law’s words, “nos primitivos princípios, que contém verdades essenciaes, intrínsecas, e inalteráveis, que a Ethica dos mesmos Romanos havia estabelecido, e que os Direitos Divino, e Natural, formalizarão para servirem de Regras Moraes, e Civis entre o Christianismo”

modernus Pandectarum, thanks to which important sectors of the Portuguese law were modified.

Fixed in the *Estatudos da Universidade* of Coimbra as a teaching method, the *usus modernus Pandectarum* represents the modern use made in Europe of the Latin law, and it was applied when there were doubts about the *bõa razão* compliance²⁸².

On the other hand the commercial law, before regulated by use and conventions, was formally regulated by the commercial code, enacted by Law No.556 of June 25 1850. The code provides detail about the creation of different types of companies and a meticulous part about maritime law, still in force.

Nevertheless it is important to underline that Brazilian law, in the status of secondary judicial system, was built under the influence of legal systems exporters, both for the Portuguese colonization, from 1500 to 1822, and through the resort to comparative law, with voluntary reception of laws²⁸³.

²⁸²Calderale, *ibidem*, p.27.

²⁸³Tavares, Ana Lucia, O direito comparado na historia do sistema juridico brasileiro, p.162, contained in *Revista Brasileira de Direito Comparado*, No.36, 2010, Instituto de Direito Comparado Luso-Brasileiro, Rio De Janeiro.

3.1.2 From Teixeira de Freitas to the advent of the Republic

Being the legislation “scattered, contradictory, confused and numerous”²⁸⁴, in February 15 of 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.

The Bahian jurist, soaked in the French and German juridical culture and passionate scholar of Roman law, concluded his work in 1857, issuing the *Consolidação das Leis Civis*, which included all civil law, apart from slavery law, deliberately omitted²⁸⁵.

Considered magnificent, wide and erudite, the consolidation was approved with royal decree by emperor D. Pedro II and although formally it had no force of law, it had a great persuasive authority, replacing the old *Ordinações Filipinas*²⁸⁶. The *Consolidação* set the basis for the systematic configuration of the future *Código 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”²⁸⁷.

This represented a great novelty for the Luso-Brazilian law environment,

²⁸⁴Corvalho Moreira, *Da revisão geral e codificação das leis civis e do processo no Brasil*, 1846, Rio de Janeiro, which was one of the firsts authors to claim for the codificatioNo.

²⁸⁵In the Introduction of the *Consolidação* Teixeira defined the slavery law as *disposições vergonhosas* (shameful dispositions).

²⁸⁶Calderale, A., *Il nuovo codice civile brasiliano*, Giuffrè, 2003, p.XVIII.

²⁸⁷Teixeira de Freitas, *Consolidação das leis civis*, ed.1915.

strongly influenced by the tri-partition of persons-things-actions of the pandectists German authors²⁸⁸.

On the success of the *Consolidação*, in 1859 the government stipulated another agreement with Teixeira de Freitas, charging him to elaborate a civil code within the end of 1861, term later extended at June 1864.

The result of Teixeira's efforts was the *Esboço*, published between 1860 and 1865. Even though it was composed of 4908 articles, it was an uncompleted work and the government terminated the contract in 1872, due to conflicts regarding the nature and the extension to give to the code²⁸⁹. Even if it was considered "a building.....of extraordinary solidity, sculpted in the alive rock of the good principles, through the vigorous hand of a superior artist"²⁹⁰, it failed to establish itself as a code essentially for the only weakness of being too rambling and drown out, due the excessive concern regarding the theory²⁹¹.

Nevertheless the *Esboço* occupies a relevant place not even in the Brazilian history law but also in the all Latin America law. Indeed it was used as a solid basis for the Argentinian and Uruguayan codification process at the end of the Nineteenth century.

It is important to notice that the *Esboço* had a relevant influence on the civil code of 1916, mostly regarding the systematic organization of the regulation. From this point of view stands out the introduction of a general

²⁸⁸Calderale, *ibidem*, p.XIX

²⁸⁹Josè Carlos de Matos Peixoto, *A codificação*, cit., 8 ss.

²⁹⁰Bevilaqua, *Em defeza do projecto do codigo civil brasileiro*, Rio de Janeiro, 1916,23.

²⁹¹Calderale, *Diritto privato e codificazione in Brasile*, Giuffrè, 2005, p.41.

part, which separates the *Esboço* from the Napoleonic code and recalls the Germanic models that will form successively the BGB²⁹².

In 1867 Teixeira formulated an even more ambitious plan than codification. Before that in Europe arose the private law unification movement, which will bring to civil code of 1942 in Italy, the Brazilian jurist expressed the consideration that the contemporary presence of the commercial code and the civil code, could have led to dangerous civil law duplication. From this perspective he proposed the redaction of two codes: a general one, comprising all institutions definitions and guidelines for application and interpretation of laws, and civil one, regulating all civil and commercial law, as a unique private law code²⁹³.

The government, not persuaded by the nature of the project, rejected this ambitious plan and the contract with Teixeira was terminated in 1872.

It is relevant to underline that the vocation of unifying all the private law was an expression of Teixeira's diffidence against the risen middleclass. According to the Bahian jurist it was only for continuing the colonialist speculation that the commercial code contained special provisions regarding the middleclass, for the affirmation of the *destruição creadora* of capitalism, penalizing the agriculture development, the most crucial issue from his point of view²⁹⁴.

It is interesting to underline that the perspective, that was at the basis of

²⁹²Calderale, *ibidem*, p.42.

²⁹³Calderale, *ibidem*, p.49.

²⁹⁴Teixeira, *Consolidação*.

Teixeira's code unification project, was totally different compared to the one that in Italy supported the code unification issue, based on the prevalence of the industrial and commercial industry²⁹⁵.

Terminated the contract with Teixeira de Freitas, between the end of the monarchy and the beginning of the Republic there were three codification attempts, strongly influenced by Teixeira project structure.

In 1889 a bloodless coup d'état guided by marshal Deodoro de Fonseca made an end of the monarchy, weakened by the lose of the aristocracy support due to the abolishment of the slavery in 1850, by contrasts with the Church and by uncertainties regarding the succession to the throne²⁹⁶. Soon after in November 1889 in Rio de Janeiro it was declared the Republic.

²⁹⁵Calderale, *ibidem*, p.51.

²⁹⁶Calderale, *ibidem*, p.65-66.

3.1.3 From the civil code of 1916 to the Constitution of 1988

In 1891 had light a new Constitution, strongly influenced by the *laissez-faire* principle, centred on individual and economic initiative freedom, penalising the population's social rights, in the wake of the American law.

After a stalemate consequent the advent of the Republic, at the beginning of 1899 the justice minister, Epitacio Pessoa, charged Clovis Bevilaqua with elaborating a new civil code. In the October of the same year Bevilaqua dispatched his work. After being discussed and modified by the *Câmara* and the *Senato* for more than 15 years, in the end it was approved and promulgated by the two chambers gathered with Decree No.3071 of January 1916.

The civil code of 1916 represented a conservative code with a liberal spirit that reflected the relations of a society at the dawn of industrial revolution, and where the slavery was abolished short time before²⁹⁷.

Bevilaqua's work constituted the outcome of a long tradition of comparative law studies. Indeed after the independence, the lack of a national literature constrained the jurists, belonging to the country's elite, to become comparative law researcher perforce, dedicated to the study of the law and the foreign authors, mostly Frenchs, Germans and Italians. Consequently, due to the jurisprudence's devaluation, the institutions' reconstruction is presented as resultant from the continuous dialogue

²⁹⁷Calderale, *ibidem*, p.80.

between the jurists and the national legislator, occupied in accepting or refusing the legislative solution mostly derived by foreign law. This characteristic is tangible even nowadays, when references to foreign law is still used to motivate judgements²⁹⁸.

Composed of 1807 articles, the civil code of 1916 was divided in two big parts, a general one and a special one, as the German BGB.

Despite of being the result of a comparative work, a small part of all the articles was inspired by European legislation, in particular by Portuguese, French, German, Italian, Swiss and Spanish law²⁹⁹. The main part took root essentially in the Roman law.

In particular the Italian contribution consisted in marginal parts taken from the Italian civil code of 1865, mostly regarding family and succession law. Considering that few dispositions adopted constituted rewritings of articles of the French *code civil*, the Italian contribution resulted even inferior³⁰⁰.

In the code elaboration Bevilacqua abandoned the Teixeira's project of private law unification, convinced of the prematurity of the normative fusion, due to middleclass needs of favourable dispositions for richness diffusion in the country³⁰¹. Indeed the civil code suited perfectly with the cultural spirit of the *Primeira Republica* 1889-1930, where in the economic

²⁹⁸Calderale, *ibidem*, p.83-85.

²⁹⁹Pontes da Miranda, *Fontes e Evolução do Direito Civil Brasileiro*, Rio de Janeiro, 1928.

³⁰⁰Calderale, *La circolazione del modello italiano nelle codificazioni brasiliane*, p.205 contained in *Atti del II Congresso nazionale della SIRD, Il modello giuridico scientifico e legislative italiano fuori dell'europa*, 2012.

³⁰¹Calderale, *La circolazione del modello italiano nelle codificazioni brasiliane*, p.203 contained in *Atti del II Congresso nazionale della SIRD, Il modello giuridico scientifico e legislative italiano fuori dell'europa*, 2012.

field prevailed the exportation of coffee and sugar, managed by great nesters, the only holders of the politic power.

After the taking of power by Getulio Vargas in 1930 through military coup d'état instituting the dictatorship, the civil code seemed to be not suitable anymore with the economic and political structure of the country. Supported by the industrial middleclass and by the working class, Vargas bore an import substitution policy, in order to boost the weak national industry³⁰².

In the edification of the *Estado Novo*, Vargas was inspired by the state organization of the fascism and by the corporative law elaborated in Italy two decades before. Comparing the Brazilian Constitutions issued in 1934 and in 1937³⁰³ with the *Carta del lavoro* of 1927, the corporative inspiration of the new Brazilian state results clear. The labour was defined, as in the *Carta* of 1927, a social duty and it was instituted the *Conselho de Economia Nacional*, with powers of representing the interests of the different trade associations in front of the *Congresso*, which recalled the *Consiglio dei Fasci e delle Corporazioni* of the Italy's fascist era³⁰⁴. The laissez-fair principle gave way to a great state intervention.

Nevertheless, when in 1939 the government appointed a commission for the elaboration of a new civil code, the result was not far from Bevilacqua's version. The commission preserved the old code general structure, in order

³⁰²Calderale, La circolazione del modello italiano nelle codificazioni brasiliane, p.203.

³⁰³Tavares, Ana Lucia, O direito comparado na historia do sistema juridico brasileiro, p.170-171, contained in Revista Brasileira de Direito Comparado, No.36, 2010, Instituto de Direito Comparado Luso-Brasileiro, Rio De Janeiro.

³⁰⁴Calderale, La circolazione, ibidem, p.209.

to give continuity to Bevilacqua's work, without care about originality and innovation required by the changing times³⁰⁵.

Enacted in 1942 the civil code was not a success but it is important to underline that its principal benchmark was the Italian civil code of 1942, from that moment on very influential for those jurists who would have worked at a new civil code redaction³⁰⁶.

After the deposition of Vargas, the so-called Second Republic period was characterized by great political instability and no relevant improvements were made in order to modernize the legal system, apart from the constitution of 1946, which mostly reflected the Constitution of 1934³⁰⁷.

In 1964 there was another *coupe d'état* lead by armed forces against the democratic government of Goulart, establishing the military dictatorship, lasted twenty years.

Afterwards all the attempts for the codification were unsuccessful during the dictatorship, failing in giving proper tools for the ruling of a mature industrial society and causing the aggravation of the country inequalities. In this overbearing period two constitutions were enacted, only addressed to limit the fundamentals rights and to reinforce the Federal executive

³⁰⁵Calderale, La circolazione, *ibidem*, p.210.

³⁰⁶Calderale, La circolazione, *ibidem*, p.211.

³⁰⁷Tavares, Ana Lucia, O direito comparado na historia do sistema juridico brasileiro, p.172, contained in *Revista Brasileira de Direito Comparado*, No.36, 2010, Instituto de Direito Comparado Luso-Brasileiro, Rio De Janeiro.

power³⁰⁸.

When the dictatorship peacefully ended in 1985, soon after begun the works for a new constitution, issued in 1988, and a new civil code, which required a longer gestation and came out only in 2002.

The Constitution of 1988, the seventh of the Brazilian history, 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. Building a free, right and supportive society; granting the national development; promoting the wellness of the community, without any discrimination; reducing poverty and marginalization, are statements contained in the art.3 which recalls in the substance the logic of the second provision of the art.3 of the Italian Constitution, which is committed to remove all the barriers that limit the citizens' freedom and equality³⁰⁹.

³⁰⁸Tavares, Ana Lucia, O direito comparado na historia do sistema juridico brasileiro, p.172, contained in Revista Brasileira de Direito Comparado, No.36, 2010, Instituto de Direito Comparado Luso-Brasileiro, Rio De Janeiro.

³⁰⁹Calderale, La circolazione, ibidem, p.211.

3.1.4 The New Civil Code

The promulgation of the Constitution of 1988 has putted the human being at the centre of the Brazilian system, and has constricted the Brazilian legislator to revise the private law, founded by the civil code of 1916, based essentially on the property's institution and on the auto-determination power of the singles.

After works lasted wearily for more than 25 years, in 2002 it was promulgated with Law No.10406 the new civil code, entered in force in January 2003. Finally the idea of Teixeira de Freitas came true, the private law and the commercial law were unified, as in the Italian civil code of 1942. Even if Miguel Reale, the president of the commission charged with the code redaction, aspired, more humbly, "to represent the basic law, not the global, preserving the obligation law, both civil and commercial, in its range"³¹⁰, the unification target was reached through the art.2045, that declared abrogated, beyond the old civil code, even the first part of commercial code of 1850, remaining in force only the dispositions regarding maritime law and bankruptcy law.

Since its promulgation the new code has raised controversies in the Brazilian jurisprudence; its detractors defined it "born old" respect to the Brazilian society needs and its supporters acclaimed it as a radical innovation compared to the code of 1916. Indeed while not reflecting the

³¹⁰Miguel Reale, *O projeto de código civil. Situação atual e seu problemas fundamentais*, São Paulo, 1986, p.71 ss.

technological evolution, it is founded on an open system of flexible law, inspired by the values of *socialidade*, which states the predominance of the collective values against the individual, without losing focus on the crucial value of the individual; of *eticidade*, regarding the equity principle; of *operabilidade*, namely the law effectiveness, which brought to a clearer formulation of numerous dispositions respect to the civil code of 1916³¹¹.

Confirming the loyalty to the old model, close to the German setting, the new civil code is organized in a general and in a special part. The first part comprises three books about persons, goods and juristic acts; while in the special one are present five books, regarding debentures law, company law, property interest law, family law and succession law.

Even in the architecture choice is unveiled the relevant importance assumed by the economic private law, situated at the turn from the general to the special part, and the centrality of the human being, whose regulation was placed at the two extremes of the code³¹², confirming the relevance of the choices of the Constitution of 1988.

In this scenario, the influence of the Italian civil code of 1942 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

³¹¹Judith Martins-Costa; Gerson Luiz Carlos Branco, *Diretrizes teóricas do novo código civil*, São Paulo, 2002, 130 ss.

³¹²Jannarelli, *Il Penhor rural nel nuovo codice civile brasiliano*, in Calderale, *Il nuovo codice civile brasiliano*, 2003, p.266.

presents an altered function comparing to the original one³¹³.

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.

In the first book of the general part, the one regarding the natural persons, the art.2 states that the legal personality begins with the birth, a rule essentially equal to the art.1 of the Italian civil code, differently from other Latin American regulation where the personality begins with the conception as the Argentinian one³¹⁴.

The company law is disciplined in the second book of the special part and constitutes the major result of the unification of commercial and private law. Divided in four titles, deal with entrepreneur, companies, firm and complementary institutions, such as company's accounting. In the Italian civil code this book corresponds with the fifth book, entitled "of the labour", even though the latter covers a wider subject, comprising, besides company law, also labour regulation, in the collective-union dimension and in the one of the individual relationships³¹⁵.

From the articles 2082, 2195 and 2555 of the Italian civil code, the *codigo civil* has taken the fundamental notions of entrepreneur, of company as an organized professional activity, and of business as a complex of assets

³¹³Calderale, La circolazione del modello italiano nelle codificazioni brasiliane, p.215 contained in Atti del II Congresso nazionale della SIRD, Il modello giuridico scientifico e legislative italiano fuori dell'europa, 2012.

³¹⁴Calderale, Diritto privato e codificazione in Brasile, Giuffrè, 2005, p.293.

³¹⁵Calderale, La circolazione del modello italiano nelle codificazioni brasiliane, p.223.

functional to the company, formally adopted in the art.966³¹⁶ and art.1142³¹⁷. The entrepreneur's notion consists in a novelty in the Brazilian commercial law, considering that previously the Brazilian legislator resorted the notion of commercial act of the *code de commerce* of 1807, to define the law application range³¹⁸.

Differently from the Italian civil code, where the entrepreneur notion comprises the notion of rural³¹⁹ and small entrepreneur³²⁰, characterized by the activity undertaken and by company size, the Brazilian civil code has not distinguished between commercial entrepreneur and civil entrepreneur, only affirming that will be the law to provide a different and simplified regulation to rural and small entrepreneur³²¹.

This particular choice was widely appreciated by the Italian scholarly opinion³²², compared to the Italian legislator choice of increasing the entrepreneurs' types, considered unsuitable in the light of the economic reality, characterized by huge modernization process which, especially in agriculture, has softened the difference between the commercial and the agricultural business³²³.

³¹⁶ The art.966 of Brazilian civil code states: "Considera-se empresário quem exerce profissionalmente atividade econômica organizada para a produção ou a circulação de bens ou de serviços".

³¹⁷ The art.1142 states: " Considera-se estabelecimento todo complexo de bens organizado, para exercício da empresa, por empresário, ou por sociedade empresária".

³¹⁸ Moema Augusta Soares de Castro, A Teoria da empresa no novo código civil de 2002, in Revista de Direito da UFMG, 2003, p.165 ss.

³¹⁹ Art.2135 of Italian Civil Code.

³²⁰ Art.2083 of Italian Civil Code.

³²¹ Art.970 of Brazilian Civil Code.

³²² Serra, Considerazioni preliminari, cit., p.87 ss.

³²³ Cottino, Diritto commerciale, Vol. I, Padova, 1993, p.80 ss.

The company law is opened by the art.981, which defines the *contrato de sociedade* (company agreement), similarly of what disposed by the art.2247 of Italian civil code. Moreover it is present also the unilateral act as a constituting tool for sole proprietorship limited company, a model recently introduced by the Brazilian legislation³²⁴ and already adopted in Italy³²⁵ and in other civil law systems.

The art.983 fulfils a central role in the company law, codifying the mandatories models of company, which states that all the commercial companies may constitute only adopting the models provided in art.1039-1092, a cornerstone principle affirmed in the Italian code by art.2249.

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*.

The principal insight is that the Brazilian regulation uses models inspired by Italian regulation, considering that the Brazilian corporation models are almost specular to the one provided by the Italian civil code, but which presents also remarkable differences.

The *sociedade simples* and the *empresarias* companies, which are the companies that exert the entrepreneur's proper activities, are provided of legal status and have the requirement of the registration in the commercial

³²⁴Introduced by Law No. 12441 of 2011, http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/112441.htm.

³²⁵Receiving the Directive 89/667/EEC of 1989, it is regulated by Legislative Decree No.88 of 1993.

registry, except for the *sociedade simples* which has to be registered in the Juridical Persons Registry. This registration differs from Italian regulation where only stock company (*società di capitali*) are subjected to commercial registry³²⁶.

³²⁶Calderale, Diritto privato e codificazione in Brasile, Giuffrè, 2005, p.388.

3.2 Limited liability company

Small and medium enterprises system assume a central role in the Brazilian economy as in the Italian one, giving relevance at the regulation of the *Sociedade Limitada*³²⁷, the equivalent of the Italian *società a responsabilità limitata* (s.r.l.)³²⁸, retained the most suitable model for small and medium businesses.

By and large both regulation systems gather up typical features of partnership and of joint-stock company in the limited liability company regulation. Indeed the partners benefit from limited liability, as the shareholders in the joint stock company, since only the corporate capital is liable for corporate obligations, stated by art.2462 of Italian code and by art.1052 of Brazilian code, while the management disposition, recalling the partnership's provisions with different intensities in the two systems, outline a company essentially based on a small number of partners and on a fiduciary commitment³²⁹.

Strengthen the link with partnership models, the art.1053 of *Codigo Civil* states that the *sociedade simples* regulation applies subsidiary, in the omissions of law, to the *limitada* regulation, unless if it is provided in the bylaws the supplementary reGENCY of joint stock regulation, and regarding Italian regulation it is important to underline that after the reform of 2003,

³²⁷Regulated by art.1052-1087 of *Codigo Civil*.

³²⁸Regulated by art.2462-2483 of *Codice Civile*.

³²⁹Santoro, La riforma della società a responsabilità limitata in Italia e la *Sociedade Limitada* nel nuovo *codigo civil brasileiro*, in Calderale, *Il nuovo codice civile*, p.321 ss.

the traditional oppressive link between s.r.l. and joint stock company was sharply untied³³⁰.

In the two legislations the capital is similarly divided in quotas and the partner' liability is limited to the correspondent quota's value.

Differently from the Brazilian legislation, in the Italian regulation it is provided a minimum capital requirement for the constitution of €10 000³³¹, even if it is possible to constitute an s.r.l. simplified with the symbolic minimum capital requirement of €1³³².

Regarding the partners contributions, the § 2 of art.1055 of *Codigo Civil* states that is prohibited the service contribution, a disposition out dated by the Italian legislator. Appraising the personal element of the company, the art.2464 of *Codice Civile* allows the capital contribution by any element susceptible of economic valuation, even if, in case of contribution of working and management skills, it is needed a bank guarantee or an insurance policy, as a guarantee towards third parties.

The Brazilian legislation provides that the company's management has to be exerted by one or more partner necessarily resident in the country, or even non-partners, only if unanimously elected, according to art.1061 of *Codigo Civil*, underling the personal character of the *Sociedade Limitada*. Same dispositions are contained in the art.2475 of *Codice Civile*, where the presence of non-partners in the management is also tolerated, even without

³³⁰Masarà, La s.r.l. come società di capitali e i suoi caratteri distintivi dalla s.p.a., in *Studium iuris*, 2004, p.301 ss.

³³¹Art.2463 of *Codice Civile*.

³³²Art.2463-bis of *Codice Civile*.

providing any different election quorum, and the residence requirement is not present. The installation of a board of directors is not mandatory, but preferable in case should be more than one director.

In both regulation systems³³³ the quotaholders, not necessarily gathered in a formal meeting, deliberate about the principal issues regarding the company's execution, such as appointment of directors and of statutory auditor, amendment to articles of association and merger, amalgamation or any other issues that implies a change in the corporate scope³³⁴.

Identifying the partners community as the sovereign body³³⁵, the Italian and Brazilian regulation were aimed at the reduction of the partners transaction costs related to management decisions, acknowledging the inefficiency of the old complex mechanisms cut out from joint stock company³³⁶.

In both regulation it is discretionary the installation of an audit committee, or of an auditor for inspection of the financial statements and supervision of directors' conduct³³⁷.

Regarding the transfer of quotas, the Brazilian legislation finds a solution in the middle between a personal and a capitalistic vision of the

³³³In Brazil it is mandatory the institution of the quotaholders meeting if the partners are more than 10 as stated by art.1072 of *Codigo Civil*.

³³⁴Calderale, *Diritto privato e codificazione in Brasile*, Giuffrè, 2005, p.393.

³³⁵Zanarone, *Introduzione alla nuova società a responsabilità limitata*, in *Riv. Dir. Soc.*, 2003, p.58 ss.

³³⁶Calderale, *Diritto private*, *ibidem*.

³³⁷Art.1066 ss of *Codigo Civil* and art.2477 of *Codice Civile*.

company³³⁸. Indeed the Brazilian civil code provides no limitation for transfers between quotaholders but provides, for partners corresponding to 25% of the corporate capital, an opposition right for a transfer towards third parties. In a different way the Italian civil code states the circulation freedom of the quotas, not providing any limitations, although the article of association could contain transferability limitations. In both systems it is always acknowledged the right of withdrawal to the dissent partner, should the article of association being amended³³⁹.

In the end is important to underline the recent promulgation of Law No.12411 of 2011³⁴⁰ in Brazil, which, amending the civil code, allows the constitution with unilateral act of sole limited-liability company, EIRELI, a model already provided in the Italian legislation by Legislative Decree No.88 of 1993. This model represents a huge innovation in Brazilian system, constituting a flexible tool for setting up a business.

³³⁸Santoro, La riforma della società a responsabilità limitata in Italia e la Sociedade Limitada nel nuovo código civil brasileiro, in Calderale, Il nuovo codice civile, p.327-328.

³³⁹Santoro, *ibidem*.

³⁴⁰ http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12441.htm.

3.3 Joint stock company

While in the Book V Title V of the Italian civil code is located a really detailed regulation about joint stock companies, "*società per azioni*", the Brazilian civil code in Book 2 provides only two articles regarding "*Sociedade Anônima*", 1088-1089, which cross-refer to the special law, in particular the Law No.6404 of 1976, and further amendments. This particular choice was widely criticised by jurists who support the partial or even apparent unification of private law made by the new Brazilian civil code³⁴¹.

The shareholders enjoy a limited liability regime, responding only the corporate capital towards corporate obligations. The capital is divided into shares, divided into different classes, with different right and obligations attached. Regarding the capital amount needed for constitution, the Italian regulation differs from the Brazilian one, imposing a minimum capital requirement of € 50 000³⁴², instead of no provisions. The shares are freely transferable, even if circulation limit provided in the bylaws are admitted, in Italy never exceeding 5 years³⁴³.

Capital stock may be paid in cash, credit assignment or assets³⁴⁴ and in both

³⁴¹Calderale, Diritto privato e codificazione in Brasile, Giuffrè, 2005, p.390.

³⁴²Art.2327 of Codice Civile, as recently amended by Law No.116 of August 2014. Before the requirement was settled at € 120 000.

³⁴³Art.2355-bis of Codice Civile.

³⁴⁴In both regulation systems the assets must be evaluated by an expert selected by the shareholders, in the Brazilian regulation as art.8 of Law No.6404/76 states, or selected judicially by court, as art.2343 of Codice Civile states.

legislation is prohibited the service contribution ³⁴⁵ . Regarding contributions, the Italian regulation tends to be stricter than the Brazilian one, requiring the deposit in cash of minimum 25% of the capital subscribed at the incorporation³⁴⁶, higher than the 10% provided by the Brazilian law³⁴⁷.

An important difference consists in the way in which the joint stock company is incorporated. Even if both systems provided the shareholders public or private subscription, depending on the nature of the company, opened or not to the capital markets, the Italian regulation provide also the incorporation by unilateral act³⁴⁸ by a single individual shareholder, either a juridical or natural person.

Only after the registration in the Commercial Registry the company officially acquires its legal status, a principle affirmed in both systems³⁴⁹.

Regarding the shareholders, the two jurisdictions entitle them the same complex of rights. First of all the shareholder are entitled to participate in the profits of the company, according to their share class, and to receive assets of the company in case of liquidation³⁵⁰, upon liquidation of all outstanding obligations assumed by the company. It is granted the right to oversee the management body, through different guarantees to minority

³⁴⁵As stated in Art.7 of Law No.6404/76 and in art.2342 of Codice Civile.

³⁴⁶Art.2342 § 2 of Codice Civile.

³⁴⁷Art.80 II of Law No.6404 of 1976.

³⁴⁸Art.2328 of Codice Civile as modified by Legislative Decree No.8 of 2003.

³⁴⁹As provided for in art.2331 of Codice Civile and in art.94 of law No.6404/76.

³⁵⁰Art.2350 of Codice Civile and art.109 of Law No.6404/76.

shareholders³⁵¹, especially in case of public joint stock company. Moreover the shareholders enjoy the pre-emptive right to subscribe for new shares³⁵² in case of capital increasing and the right to withdraw from the company, in case of important amendments to bylaws³⁵³, such as amalgamation, merger or change in the corporate scope. From the particular protection granted to the shareholders it is clear the great influence that the Italian legislator had on the Brazilian one, providing useful tool for protecting minorities.

The company administration represents a topic treated differently by the two legislations. The Brazilian law allows the shareholders to share the company management between two bodies, the *Conselho de Administração* e the *Diretoria*.

Differently from the *Diretoria* that is always mandatory, the *Conselho* represents a facultative body, mandatory only in public companies³⁵⁴. The compulsory nature of the *Diretoria* reveals its centrality in corporate governance. Composed by two or more officers elected by *Conselho de*

³⁵¹For example in Italy the art.147-ter of Tuf (Testo unico delle disposizioni in materia di intermediazione finanziaria), enacted by Legislative Decree No.58 of 1998, provides that in public companies at least one member of the Consiglio di Amministrazione has to be elected by minority shareholders representing at least one fortieth of the corporate capital. Similarly in Brazil the art.161 provides for minority shareholders representing at least 10% of common shares or 5% of preferred shares with no voting rights the right to elect one member of the Conselho Fiscal, being the company either public or closed.

³⁵²Art.2441 of Codice Civile and art.109 IV of Law No.6404/76.

³⁵³The art.137 of Law No.6404/76 states that the dissident shareholder has the right to withdraw in case any topic subjected to Extraordinary Meeting voting has been approved. These topics are listed in art.136 and consist in modification of rights attached to preferred shares, amalgamation, merger, spin-off etc. Similarly the art.2437 of Codice Civile lists the cases in which the dissident shareholder has the right to withdraw, consisting almost in the same topic deliberations.

³⁵⁴As provided by art.138 of Law No.6404/76.

Administração, or by General Meeting in case of lack of *Conselho*³⁵⁵, the *Diretoria* has the principal function of exerting the ordinary corporate management and of representing the company towards third parties³⁵⁶. The *Conselho*, instead, elected by the General Meeting³⁵⁷, has the principal task of setting the general address of the company's business and of supervising the management of officers³⁵⁸. This structure provides two administration systems, a monistic and dualistic model, depending on the presence of the *Conselho*.

On the other hand, the Italian legislation designated the *Consiglio di Amministrazione* as the exclusive management body, responsible to carry out all the needed operations for the reaching of corporate scope³⁵⁹. Indeed the directors have the exclusive competence in managing and in representing the company³⁶⁰.

Relevant is also the administration systems provided by the *Codice Civile*, as amended by 2003 reform³⁶¹, which could be traditional, dualistic or monistic. The traditional system provides the instalment of *Consiglio di Amministrazione* and *Collegio Sindacale*, invested with supervisory power, both elected by the General Meeting. The dualistic provides the instalment of *Consiglio di Sorveglianza*, elected by General Meeting, which in turn will provide to elect the *Consiglio di Gestione*, designated to exert the company

³⁵⁵Art.143 of Law No.6404/76.

³⁵⁶Art.144 of Law No.6404/76.

³⁵⁷Art.140 of Law No.6404/76.

³⁵⁸For the specific tasks of Conselho de Administração, art.142 of Law No.6404/76.

³⁵⁹Campobasso, *Diritto commerciale*, 2. *Diritto delle società*, UTET Giuridica, 2007, p.354.

³⁶⁰Art.2380-bis and art.2384 of Codice Civile.

³⁶¹The Codice Civile was amended by Legislative Decree No.6 of 2003.

management. In the end the monistic system designates the *Consiglio di Amministrazione* as the management body, and the *Comitato per il Controllo*, elected within the *Consiglio*, as the supervisory body³⁶².

Therefore, despite the assonance between the two denominations, the Italian *Consiglio di Amministrazione* has different tasks respect to the Brazilian *Conselho de Administração*. Thus, in recognising a corporate body equivalent to the *Consiglio di Amministrazione* in Brazilian regulation, this could be identified by the *Diretoria*³⁶³.

Nevertheless, even the *Conselho* could find a correspondence in the Italian governance, but within the dualistic administration system and not in the traditional one, as the *Consiglio di Sorveglianza*³⁶⁴. Indeed in the dualistic model, the General Meeting appoints and revokes the members of *Consiglio di Sorveglianza*³⁶⁵, which in turn appoints the members of the *Consiglio di Gestione*³⁶⁶, as in the Brazilian dualistic administration model with *Conselho* and *Diretoria*.

Regarding the competencies, the *Consiglio di Gestione* is designated as the management body³⁶⁷, as the *Diretoria* in the Brazilian regulation, while, to

³⁶²Campobasso, *Diritto commerciale*, 2. *Diritto delle società*, UTET Giuridica, 2007, p.353.

³⁶³Busani-Molinari, *Condizione di reciprocità nomina di cittadino straniero nel Consiglio di Amministrazione di s.p.a.*, in *Società*, 2011, 2. "Appare abbastanza evidente dunque che, ove si voglia paragonare il componente del Consiglio di Amministrazione di una s.p.a. italiana amministrata con il sistema tradizionale con il componente dell'organo gestorio di una società brasiliana, sembra doversi operare questo paragone più con la *Diretoria* che con il *Conselho de Administração* della *Sociedade Anônima* brasiliana".

³⁶⁴Meacci, *La condizione di reciprocità: passato, presente e futuro nella nomina di un cittadino straniero nel Consiglio di Amministrazione*, in *Giurisprudenza commerciale* Vol.39 Fol.6, Giuffrè, 2012, p.1294.

³⁶⁵Art.2409-duodecies of Codice Civile.

³⁶⁶Art.2409-terdecies of Codice Civile.

³⁶⁷Art.2409-novies of Codice Civile.

the *Consiglio di Sorveglianza*, competes the address of company's business and the supervisory power over the abovementioned body³⁶⁸, exactly as the competences addressed to the Brazilian *Conselho de Administração*.

Regarding the requirements for directors and officers, applies the reciprocity principle³⁶⁹. In Brazil in order to be a member of *Conselho* or *Diretoria*, the law provides the requirement of the Brazilian residency for foreign citizens³⁷⁰, obtainable with the issue of permanent visa. So in order to be elected as a director in the *Consiglio di Amministrazione* in Italy, a Brazilian person has to be resident in Italy, satisfying the reciprocity principle, being the *Consiglio* the sovereign management body as the *Diretoria* in Brazilian legislation³⁷¹.

Both regulations provide a mandatory supervisory body, the *Conselho Fiscal* in the Brazilian law and the *Collegio Sindacale* in the Italian law.

The competencies attributed to this body by the two legislations are similar, such as monitoring the company's management, with powers to inspect corporate books, and auditing of the financial statements³⁷². Now this peculiarity remains only as an exception in the Italian law; indeed it is now required for joint stock company, either public or closed, the auditing of

³⁶⁸Art.2409-terdecies of Codice Civile.

³⁶⁹The art.16 of Preliminary dispositions of Codice Civile, which affirms the reciprocity principle, states:"Lo straniero è ammesso a godere dei diritti civili attribuiti al cittadino a condizione di reciprocità e salve le disposizioni contenute in leggi speciali. Questa disposizione vale anche per le persone giuridiche straniere".

³⁷⁰Art.146 of Law No.6404/76.

³⁷¹Meacci, La condizione di reciprocità: passato , presente e futuro nella nomina di un cittadino straniero nel Consiglio di Amministrazione, in *Giurisprudenza commerciale* Vol.39 Fol.6, Giuffrè, 2012, p.1295.

³⁷²Art.2403 of Codice Civile and art.163 of Law No.6404/76 sets out the body's competencies.

financial statements by an independent auditor or by an auditing business³⁷³. In Brazil this provision only applies to public companies³⁷⁴, large privately held *Sociedade Anônima*³⁷⁵ and other specific institutions such as financial institutions, insurance companies and investment funds³⁷⁶.

The elaboration and subsequently publication, at the end of the financial year, of the financial statements are mandatory in both regulations³⁷⁷.

³⁷³Art.2409-bis of Codice Civile.

³⁷⁴Art.177 § 3 of Law No.6404/76.

³⁷⁵Law No.11638/2007 has defined large companies the ones that are privately held with assets in an amount superior to 240.000.000 BRL and/or with annual income superior to 300.000.000 BRL, http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2007/lei/11638.htm.

³⁷⁶Fazio, Brazilian Commercial Law, 2013, Wolters Kluwer, Law & Business, p. 20.

³⁷⁷Art.176 § 1 of Law No.6404/76 and art.2345 of Codice Civile.

3.4 Other corporation models

Considering the other corporation models, it is clear the correspondence between Italian and Brazilian regulations.

The regulation relating to the simple company, *sociedade simples*, is similar, regarding the principal characteristics, to the Italian *società semplice*, with a remarkable difference. Valuing the attribution of the juridical personality, the art.1023 of *Codigo Civil* states that, if the company assets are not sufficient for repaying the outstanding corporate debt, the partners are liable proportionally to their losses participation, unless provided differently in the article of association. Moreover it important to underline that the *sociedade simples* could be a commercial company³⁷⁸, *sociedade empresaria* in the Brazilian law, while for *società semplice* is prohibited to undertake commercial activities³⁷⁹.

Also the model of the *sociedade em nome coletivo* and the *sociedade em comandita simples* are specular to their Italian forefathers, the *società in nome collettivo* and the *società in accomandita semplice*, regarding partners liability and principal features³⁸⁰.

Nonetheless exist some differences. Indeed the art.1039 of *Codigo Civil* states that only natural persons can form a *sociedade em nome coletivo* and the art.1045 states that only natural persons may be general partners,

³⁷⁸Art.983 of *Codigo Civil*.

³⁷⁹Art.2249 of *Codice Civile*.

³⁸⁰Calderale, *Diritto privato e codificazione in Brasile*, Giuffrè, 2005, p.389.

“comanditados”, unlimited liable for corporate obligations, of the *sociedade em comandita simples*.

In the Italian regulation the second clause of art.2361 has passed this limit, allowing also juridical entities to take part in this kinds of corporation, but constraining the company to adopt accounting rules typical of joint stock companies³⁸¹.

In the end the regulation of the *sociedade em comandita por ações* reflects the regulation of the Italian *società in comandita per azioni*. As for *comandita simples*, the partners are divided in general and silent, without the limitation provided in art.1045 of Brazilian Code, but shares represent partners' participations and in both regulations it is provided the supplementary regency of the joint stock company law, except for company's administration and other particular issues³⁸².

³⁸¹Corapi, Gli statuti delle società per azioni, cit., 95, note 4.

³⁸²Art.2454 of Codice Civile and art.280 of Law No.6404/76.

Conclusions

Throughout this work it were outlined the legal tools available for the foreign investor in Brazil, evidencing the relevant influence of the Italian law on the Brazilian regulation.

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%³⁸³, 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.

³⁸³Data taken from Instituto Brasileiro de Geografia e Estatísticas, IBGE.

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 engaged in a modernization process finalized to adapting to the fast market changes 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.

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*.

In particular in the analysis it was shown the great contribution of the

Italian company law, both on the theoretical aspect, such as for the entrepreneur definition, and on the structural aspect, 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 two law systems. Moreover 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 reveals 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 derived by the BGB.

In the end, it is possible to observe that, even if almost all legal institutions are derived from the European experience, the Brazilian legal dispositions adapted to the particular country environment, melting with rules derived from traditions, uses and culture. Indeed it may not be uncommon to encounter legal tools, which presents an altered function comparing to its forefathers, preserving only its original name.

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