Doing Business in Brazil:

How Do the Responsibilities of Investors and Managers in Brazilian Companies Work?

grupo A2

INTRODUCTION

This material was prepared to support foreign investors and executives in the process of internationalizing their investments in Brazilian companies or assets, or for those considering expanding their businesses in Brazil, seeking implementation and development.

It aims to help expatriates or not to overcome and anticipate some challenges they will face upon arriving in a country where the native language, laws, culture, and local administration differ from their usual standards.

Brazil is a country that has historically attracted a massive range of foreign investors seeking to start their operations here. The reasons for this are numerous: open market policies, solid business practices, a massive amount of natural resources to be exploited, a macroeconomic environment with relative predictability and stability, among others.

According to the report by the Organization for Economic Cooperation and Development (OECD) released in the first half of 2024, data reveals that Brazil was the second main destination for Global Foreign Direct Investment (FDI) in 2023, bringing in USD 64 billion in the same year, a volume only lower than that received by the United States (USD 341 billion), despite the global trend of a decline with volumes below the pre-pandemic period.

We hope you enjoy your reading!

04 OVERVIEW OF BRAZILIAN LEGISLATION

Brazil's legal tradition is related to the "Civil Law" framework, meaning our Federal Constitution is considered the supreme law of our country, with all other laws and judicial decisions required to be compatible with it.

Brazil is organized politically and administratively as a Federation, composed of the Union, Federal District, States, and Municipalities, all possessing the competence to legislate on specific matters as provided in the Constitution. The Federal Government, for example, has exclusive jurisdiction to legislate on corporations, contract rules, trade, finance, labor relations, and intellectual property procedures, among others.

The main laws governing the regulation of foreign companies under Brazilian legislation are essentially:

- The Law of Introduction to the Rules of Brazilian Law (also known as the “Civil Code”)
- The Corporations Law
- The Judicial Recovery and Bankruptcy Law, which aim to establish the general rules for business and corporate operations in the country.

Specific regulations for each state and municipality may arise and be regulated by autonomous public bodies (e.g., autonomous agencies—entities that provide social services and perform activities with public prerogatives), provided they are never contrary to the Federal Constitution.

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CIVIL LIABILITY IN BRAZIL

In Brazil, the liability attributed to investors, managers, directors, and legal representatives of Brazilian companies is a significant aspect of risk management and, consequently, in the way risks are mitigated. Let us, therefore, analyze how our legal system regulates this issue in practice concerning legal liability. The Brazilian Civil Code (Law 10.406/02) generally establishes subjective liability in the context of damages to third parties. But what does this mean? 'Subjective liability' is the responsibility that arises from unlawful acts committed with 'fault' or 'intent' (elements of negligence, recklessness, or incompetence), which is the general rule. Thus, only through the assessment of the 'fault' or 'intent' of the agent will the liability be considered subjective, and therefore a necessary condition for compensable damage. Comparatively, objective liability occurs when someone can be held liable regardless of the culpable act. The comparative table below summarizes these differences:

	Subjective Liability	Objective liability
Application	Proof of intent or fault is required.	Regardless of intent or fault, only the causal link between the act and the damage is sufficient
Elements	Negligence, recklessness or incompetence.	Causality between damage and conduct

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According to the Corporations Law (Law No. 6,404/76), the liability of the administrators of a Brazilian company arises whenever they

Act with fault or intent in the exercise of their duties; and/or

Violate the law or the company's bylaws. The burden of proof, in this case, will be the main difference between them because, in the first scenario, it will be necessary to prove the administrator's intent or fault in the act, while in the second scenario, the wrongful act will always be presumed. Therefore, the administrator will bear the burden of proving the circumstances that remove their responsibility for the act(s) that caused the damage(s).

With regards to their management acts, these are understood as those actions performed and expected by administrators:

Within the company's corporate purpose;

That comply with the law and the rules of the company's bylaws/ articles of association; and

That fulfill the legal duties of diligence, confidentiali ty, loyalty, and information.

When we mention the company's corporate purpose, it is important to highlight that this means that management acts must have some relation to what the company performs as an activity, that is, anything intrinsic to the general purpose of the organization. Likewise, management acts must comply with what is defined in the company's Articles of Association, as it makes no sense to make decisions that contradict the constitutive document of the legal entity. Finally, management acts must conform to the principles that govern not only the company in question but also the applicable legislation and the company's bylaws/articles of incorporation. We can also briefly mention that the administrator has other legal duties within their scope of responsibility, which are: the duties of diligence, confidentiality, loyalty, and information.

The first, the duty of diligence, stipulates that the company's administrator must exercise care and diligence with the same effort and integrity that they apply in managing their own businesses. In essence, we can define it as a duty that values the careful and conscientious fulfillment of their responsibilities.

The duty of confidentiality pertains to the administrator's duty to keep confidential information about the company that has not been disclosed to the market, obtained by virtue of their position, and capable of influencing the company's securities.

Regarding the duty of loyalty, this encompasses the administrator serving the company with loyalty, always seeking to maintain discretion about its businesses, and being prohibited from using business opportunities for personal benefit, refraining from protecting the company's rights for personal gain, and acquiring assets needed by the company.

Finally, the duty of information conveys the idea that the administrator must promptly disclose any and all relevant facts related to the company's business and status, making relevant information about the company's health clear to all who may have access to it, especially in the case of companies listed on the stock exchange that are subject to the rules of the Securities and Exchange Commission (CVM).

It is also noteworthy that the legislation addresses the administrator's duty to consider potential conflicts of interest in their actions. A conflict of interest occurs when an administrator is prohibited from representing the interests of a company while representing or having an interest in a matter that could impact the health of the same company. This is not necessarily linked to extreme corporate matters but can also manifest in situations where the company in which the administrator serves cannot be correlated with another by law, obligation, or social interest.

It is noted that the administrator cannot guarantee necessarily positive outcomes from their management (also known as "obligation of result"), so there is a discretionary margin in which they can decide and act in favor of their role and responsibility, but always representing the social interests of the company.

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This autonomy is quite important so that administrators are not eventually held liable when strategic decisions result in potential losses for the company and allow them to act discretionarily in pursuit of achieving the organization's proposed objectives.

Regarding this topic, the decision on whether a management act by the administrator is considered lawful or not ends up being a relatively subjective task. To make it more objective, our doctrine adopted the Business Judgment Rule, which sets forth some criteria for a management act to be considered effectively lawful, which are: (a) an act performed in good faith; (b) without conflict of interest; and (c) duly reported to the company's shareholders. According to this doctrine, if the above criteria are adequately met, administrators should not be held liable for the company's debts, which is a relevant point when discussing the merits of lawsuits in Brazilian courts involving administrators.

In this sense, it is recommended that the administrator of a Brazilian entity ensure that the powers of their management are always previously and expressly defined in the company's Articles of Incorporation/Bylaws, having full knowledge and understanding of their responsibilities and what is expected from their fiduciary role in their respective business decisions in favor of the shareholders' interests.

MEANS OF PROTECTION FOR THE ADMINISTRATOR

In addition to resorting to legal means of dispute resolution, both outside or within judicial courts in Brazil (we will discuss this topic in a separate chapter below), the administrator of a Brazilian company can protect themselves from potential problems or disputes that may arise in the course of their duties.

Among the most used protection mechanisms in Brazil, we can highlight a guarantor figure present in international contracts and which aims to certify the protection of the physical assets of the director, also known as D&O ("Directors and Officers Insurance" or simply "Directors and Officers Liability Insurance"), which is often present in international contracts and aims to protect the administrator's physical assets.

It is well-known that directors and officers of companies can be held liable for their management actions worldwide, in line with corporate and business laws of each country. The D&O insurance seeks to protect the personal assets of the administrator, providing coverage in case of a legal dispute or imminent piercing of corporate veil that might affect them. In Brazil, the most common claims for this type of insurance arise from tax and labor lawsuits, as these often involve the piercing of corporate veil, leading to seizures in the name of company administrators.

D&O insurance can be seen as a risk management method, as it prevents the exposure of managers and financially supports potential losses that may occur in this process. Additionally, it becomes a significant reputational ally for the organization, as it demonstrates that the company cares about the financial health of its administration and seeks to mitigate any risks associated with its role.

Another contractual measure is the so-called Comfort Letter, an agreement signed between the parties (company and administrator) to ensure that the foreign parent company will act responsibly and indemnify its administrator/legal representative (we will discuss this important role in this material) in case of any interference with their reputation, name, or assets. This may involve assisting in legal demands or even taking responsibility for the payment of fines or debts, thus avoiding the exposure of the administrator's personal assets, provided that they have not acted with intent or fault in the performance of their management duties.

The exposure of the personal assets of the administrator is provided for in Article 50 of the Civil Code and in Paragraph 5 of Article 28 of the Consumer Protection Code, making it possible for the piercing of corporate veil to reach their private assets or even those of a shareholder holding a management position in the company. Therefore, any mechanism that aims to protect the administrator's assets is extremely common and well-regarded in negotiations, especially those involving the legal representation of foreign companies in Brazil.

PIERCING OF CORPORATE VEIL IN BRAZIL

Given the potential exposure of the administrator's personal assets, it is recommended to adopt some preventive measures to reduce the risk of liability for their respective ordinary management acts on behalf of the company.

As a general rule, from the perspective of civil liability for unlawful acts that result in potential debts to third parties, such debts should always fall primarily on the company, and if it remains in default, creditors have the legitimacy to request the seizure of the company's assets in an amount sufficient to settle their debts. Therefore, initially, partners and administrators (as individuals) are not liable/do not have to be liable for the debts of the legal entity.

According to our Economic Freedom Law (Law No. 13,874/19), established at the end of 2019, the autonomy of the company's assets was formally recognized, serving as a legal instrument aimed at promoting businesses and their positive consequences (job creation, economic growth, generation of tax revenue, etc.).

However, the sense of corporate autonomy began to be used (and sometimes misinterpreted) by investors and entrepreneurs to defraud creditors and enrich themselves illicitly, leaving companies without sufficient assets to honor their debts. This gave rise to the need for legal protection for creditors through an institution known in Brazilian law as 'piercing of corporate veil' or "disregard of corporate personality'.

Piercing of corporate veil is the name given to the judicial mechanism that "removes" this characteristic, allowing creditors of the company to directly reach the individuals involved and their respective assets, in this case, the shareholders, partners, and administrators, in cases expressly provided by law.

Generally, the piercing of corporate veil aims to target only the assets of shareholders, partners, and administrators who participated in the unlawful act or fraud/fraudulent act in question. If the conduct cannot be individualized for any of these, then the liability may fall on the assets of all administrators, regardless of their actual involvement in the cause.

The law permits the piercing of corporate veil in strictly exceptional cases. This concept was legally established in 1990 with the Consumer Protection Code (Law 8,078/90), and in 2002, the general rule for its application was introduced in the New Civil Code. The first approach is known as the 'Lesser Theory' of the piercing of corporate veil, and the second as the 'Greater Theory.' Let's look at the main differences between them:

Greater Theory: Proof of dysfunctional use of corporate personality is required. For this theory, it must be proven that the shareholders/partners or administrators committed an abuse of rights, engaged in purpose deviation, or caused patrimonial confusion (mixing the assets/rights of the individual with those of the legal entity) with the aim of diverting the company's assets to defraud creditors.

Abuse of Rights	Purpose Deviation	Patrimonial Confusion
Use of the company to perform illegal, fraudulent, or abusive acts and/or violate the Articles of Incorporation. In other words, exceeding the limits of good business faith.	Irregular use of the legal entity for purposes other than those for which the company was created, seeking to defraud creditors and commit unlawful acts.	The net assets and other obligations of shareholders and the company are connected in such a way that it becomes difficult or even impossible to distinguish between them.

It is important to note that the creditor is also required to prove that the company was used as a means and in a fraudulent manner through concrete and recognized evidence.

Lesser Theory: For this theory, insufficient assets are a simple sufficient reason for the piercing of corporate veil, making it a more severe measure and, therefore, applicable in more exceptional circumstances. The idea of this theory is that business risk cannot be assumed by but rather solely by shareholders/partners and administrators of the legal entity, even if there are no indications of negligent or bad faith conduct on their respective parts.

It is important for foreign investors to understand that the Lesser Theory is typically applied in cases where the autonomy of the company prevents compensation for damages caused by the legal entity. In this regard, the 'Lesser Theory' is commonly addressed in Brazilian legislation in the following cases:

Consumer Legislation: Article 28, §5 of the Consumer Protection Code states that "the legal entity may also be disregarded whenever its personality is, in any way, an obstacle to the compensation for damages caused to consumers." We will discuss the consumer relationship further below.

Environmental Legislation: Article 4 of Law 9,605/98 provides that "the legal entity may be disregarded whenever its personality is an obstacle to the compensation for damages caused to environmental quality."

Labor Legislation: Labor jurisprudence generally understands that the employee is economically disadvantaged compared to the company ("vulnerable party") and cannot bear the risks of their employer. When the company does not have sufficient assets to settle labor debts, shareholders, partners, and, in some cases, administrators are liable for the debt. We will discuss this phenomenon further when addressing labor liability.

Consumer Relationship Liability

The Consumer Protection Code (CDC) establishes the fundamental premise that the consumer is always the weaker link in the consumer relationship, deserving greater legal protection. An example of this is the flexibility in disregarding corporate personality in cases involving consumer relationships.

The law, as described above, emphatically states that the piercing of corporate veil can be applied if it is the factor preventing the consumer's compensation.

When it comes to investment by foreign shareholders/partners, it is natural that this provision ends up exposing the assets of legal representatives, for example, since they are the ones who deal directly with consumers due to their operations in Brazil. Good preventive governance and customer service practices that investigate and mitigate any problems related to consumers can minimize or even eliminate the risk of liability in consumer relations.

Environmental Responsibility

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Brazil is globally known for its geographic and natural attributes on a continental scale, with its territory covered by ecosystems and biomes of immeasurable magnitude.

Therefore, concern for the environment and the adoption of environmentally responsible practices deserve attention from both foreign investors and the Brazilian legal system itself.

The Federal Constitution provides for criminal and/or administrative sanctions for any individual or legal entity that causes any type of environmental damage in the country, holding them responsible for repairing the damage.

In Brazil, all federal entities have the authority to legislate on environmental law. Thus, investors seeking to start their activities in Brazil need to consider that environmental regulations may vary depending on the location where the activity will be carried out, and they should also be aware of all legislative nuances on the subject.

Civil liability for environmental damage in Brazil is considered objective, joint, and integral, regardless of the company's corporate structure. Whenever the environment is degraded in any way, the preferred form of compensation should be in-kind rather than financial compensation/fine, although this does not exempt the company from potentially being penalized with monetary sanctions. This is known as the "polluter pays principle," meaning that the "polluter" is responsible for "paying" the price.

Environmental liability primarily arises from the causal link between conduct and damage, with the following parties held jointly liable:

1 Those who effectively caused the damage;

2 Those who were inactive regarding the damage, i.e., who did not act to prevent it;

3 Those who did not care if others caused the damage;

4 Those who made payments to cause the damage; and

5 Those who benefited from the damage caused by others, in any capacity.

It is evident that the scope of environmental liability is quite extensive when observing the range of responsibilities. In environmental protection, everyone can be held liable, even if they did not directly contribute to the damage in question.

Finally, it should be noted that piercing of corporate veil is fully applicable if the legal entity does not have the assets to repair the environmental damage, regardless of the agent's fault or intent.

In addition to civil liability (stemming from the theories discussed above), there are also administrative sanctions, which may include:

1 Formal warning;

2 Single or simple fine;

3 Intermittent fine (daily);

4 Seizure of equipment used as a means of committing the legal infraction, as well as instruments, inputs, among other products;

5 Suspension of manufacturing operations and the sale of products/services;

6 Total or partial interruption of the activity;

7 Destruction (in the case of organizations operating with products).

Brazilian legislation also provides for criminal liability in Environmental Law for legal entities, with Brazil being one of the pioneers in this area. We will discuss this topic further in a relevant chapter.

Labor Responsibility

by Fernando A. Prado (BFAP Advogados)

Fernando A. Prado (BFAP Advogados)

The Consolidation of Labor Laws (CLT) is the regulatory legislation for labor rights in Brazil.

The incident of the piercing of corporate veil is provided for in Article 855-A of the CLT, meaning that labor liability can also reach the administrator/director in specific situations defined in the aforementioned article and the Code of Civil Procedure. However, jurisprudence has shown that judges, in practice, the piercing of corporate veil regardless of the legal requirements for doing so.

The majority understanding of labor courts is that shareholders, partners, and legal representatives are liable for the company's debts if it does not have sufficient assets, even if there is no specific evidence of fraud, abuse of rights, or negligence. The Judiciary's view is that the non-payment of labor debts is a fraud or abuse of rights in itself, regardless of intent.

Thus, the Judiciary predominantly understands that the employee cannot bear the risks of the business, and as a result, shareholders/ partners and even administrators and legal representatives are held jointly liable for the company's unpaid labor debts.

It is recommended, therefore, that the company operates in compliance with labor legislation and protects itself with protective mechanisms (such as contracting D&O insurance) for potential issues of this nature that may arise, thereby mitigating risks to the company's shareholders.

Tax Responsibility

The Brazilian Tax System is known for its complexity, given that tax legislation is diverse and contains several special rules. The National Tax Code (CTN), Law No. 5,172/1966, governs this system in conjunction with the Federal Constitution and state and municipal tax legislation. Considering this complexity, and recognizing that legislation is segmented at all levels of government—Federal, State, and Municipal—it is important that companies conduct good tax planning to create the best environment for operating in Brazil with compatible tax security.

Good tax planning helps the company minimize tax burdens—whether through the use of potential benefits and/or tax exemptions or by properly fulfilling ancillary obligations, and also avoiding undue or incorrect charges.

Tax liability is outlined in Article 134 of the CTN and lists the individuals who are jointly liable for tax payments. In this regard, the Greater Theory is applied, as it is a settled understanding in jurisprudence that the management or administration of the company does not make these individuals responsible for the company's tax debts, except in cases where these individuals exceed or violate their powers established by the company's Articles of Incorporation/Bylaws.

The Role and Responsibility

of the Legal Representative of a Foreign Partner/ Company, Director, and/or Foreign Counselor

Understanding the legal responsibilities of an investor and administrator within a Brazilian investment is as important as understanding the figure of the legal representative and their mandatory role in operations in Brazil.

Brazilian corporate legislation defines the role of the legal representative as the individual who is empowered to act in accordance with the interests of a partner/shareholder or even their foreign directors and/or counselors, with powers established by law or private instruments (contract/bylaws, power of attorney, or agreements).

For the purposes of our legislation, legal representatives can be individuals, whether Brazilian or foreign, as long as they are permanent residents in Brazil and have received the legal (or contractual) powers to perform business acts on behalf of shareholders/investors and/or foreign directors and counselors.

Regardless of the corporate type chosen by the investor, a foreign company or partner wishing to operate its activities in Brazil will necessarily require at least one legal representative residing in Brazil with express powers to receive legal notifications and summonses, as explicitly required by the Corporations Law (Article 119) and the Brazilian Civil Code (Article 1138), in addition to acting on their behalf (e.g., attending, voting, and approving matters in assemblies).

Foreign investors who decide to appoint a legal representative in Brazil need to understand the extent of the risks and all the responsibilities involved, as the position of the legal representative can be sensitive for both parties, both for the company in Brazil (which will be represented by an agent who can make and approve the main decisions of the company) and for the individual representative who will represent it before all applicable Brazilian public authorities and who may be involved in administrative or judicial proceedings.

Legal representatives, due to their roles as proxies, bear significant legal responsibilities in their own name. It is highly recommended that foreign investors (i) appoint someone of utmost trust to act on their behalf (a local “country manager”); or (ii) hire a professional organization with a compatible structure, reputation, and impeccable compliance management to ensure precise monitoring of this interaction in the company's day-to-day business. Otherwise, this representative could become an obstacle in Brazilian operations.

Appoint someone of utmost trust to act on their behalf (a local “country manager”);

OR

Hire a professional organization with a compatible structure, reputation, and impeccable compliance management to ensure precise monitoring of this interaction in the company's day-to-day business. Otherwise, this representative could become an obstacle in Brazilian operations.

In practice, legal representatives are sometimes, unfortunately, involved in situations where their personal role is confused with the role of the legal entity, and they may end up being held liable, sometimes mistakenly, in situations for which they are not responsible/did not cause and in which they had no participation or interference, including with their personal assets.

Specifically, regarding point (hire a professional) above, there are organizations in Brazil that offer legal representation services (for both partners/investors and foreign directors and counselors), bringing greater confidence and professionalism to the role, mitigating the potential complications of a highly personal (and perhaps more costly) choice of appointing an executive and/or a local country manager. This market is mostly composed of outsourcing companies, paralegal support, accounting firms, and even law firms (usually smaller ones).

The scope of these companies’ activities includes, among other responsibilities, representing the company before local public authorities, signing documents on behalf of the company, and, in many cases, ensuring that the company’s ordinary and formal acts occur as expected and in accordance with Brazilian corporate legislation. Therefore, typically, these professionals do not engage in actual management acts (conducting the company’s business involving decision-making).

A good path for foreign investors could be to work with companies that provide paralegal advisory services as they are commonly familiar with the streamlining of business and corporate processes before Brazilian public authorities. This provides additional support to the investor in enabling the contracting of more specialized and excellent service for their operations in Brazil.

It is recommended that caution be exercised when deciding on hiring, and preference should be given to companies and professionals who adopt governance and compliance management in their processes and the best practices from the Brazilian Anti-Corruption Law (we will briefly discuss this at the end of this material).

One of the reasons for implementing protective measures in favor of the legal representative is that, among other reasons, the incident of piercing of corporate veil can also affect the individual affairs of the respective representatives, consequently impacting their personal assets. Not infrequently, Brazilian jurisprudence has decided in favor of creditors, often lacking a careful look at the role that the legal representative of the foreign investor should have in terms of their responsibility—and not automatically extending that they must respond for the debts of the foreign company, as they end up doing in practice. In most cases, these are labor debts, tax debts, and consumer claims that have nothing to do with the role of the legal representative per se, but due to a mere power of attorney or even contractual relationship, as explained below, they end up being affected and held liable.

In our view, it should be considered that the legal representative, especially when appointed through the hiring of a professional service, has a relative responsibility. That is, if they have not acted with intent, fault, or bad faith, they do not have responsibility beyond what was effectively contracted (within the scope of their service contract) nor beyond the limits that the power of attorney and/or the constitutive instruments of the Brazilian company allow. Unfortunately, Brazilian jurisprudence is still hasty in considering that, even though the representative is merely an 'instrument' for the company's operation in the country, they should bear any damages and contingencies that the company may face, which puts the legal security of this professional market segment in question.

A recent case on the above subject involved the arrest of a legal representative by a justice of our Supreme Federal Court in connection with a large and well-known social media network. In our view, the appointed legal representative was not even involved in the company's managerial decisions and was merely fulfilling the formal requirements mandated by corporate legislation, making her accountability nonsensical.

Furthermore, it is common to see public agents erroneously labeling the role of the legal representative as a "straw man"—a popular term used to describe someone who conducts fraudulent transactions using their name, banking information, etc., to protect someone or a company. Let's consider: the legal rationale stems from corporate legislation and the Civil Code, which establish the need for a legal representative; therefore, these concepts should not be confused.

We understand that the legitimacy of the legal representative exists precisely to ensure the opposite—that no operation of the company in Brazil is carried out fraudulently, as the representative exists to ensure compliance with the law in all processes, including those involving public authorities. Unlike a "straw man", the legal representative's role is granted official and fiduciary powers by the foreign company to operate on its behalf, with their powers fully limited by the scope of the contracted service and the power of attorney with express powers granted to them.

Given the above, it is recommended to carefully evaluate the criteria for selecting and appointing a legal representative, thus making the path and journey of foreign investor(s) smoother and more professional.

Finally, as stipulated by our Civil Code, the mandate of the legal representative is exercised when they receive powers to perform acts and manage the interests of others, with the power of attorney being the document that formalizes this relationship so that partners and investors maintain control and management over their decisions. This document is also known as a "PoA" ("Power of Attorney"), without prejudice to the powers and limits that should be adequately provided within the company's corporate documents, such as the contract/bylaws, internal regulations, shareholder agreements, or other applicable corporate documents.

As it is a foreign document, our legislation requires that, for this document to produce its regular effects in Brazil, it must be apostilled in the country of origin and translated by a certified translator in Brazil.

Next, we will discuss the role of the legal representative in three classes of governance, all equally provided for in our legislation:

1 for a foreign partner/shareholder;

2 for a foreign director; and

3 for a foreign counselor.

LEGAL REPRESENTATIVE OF A FOREIGN PARTNER/ SHAREHOLDER

The role of the legal representative, as mentioned above, is linked to an individual whose main role is to act on behalf of the foreign company, in the form of its shareholders/partners of the Brazilian company, to perform corporate acts (e.g., attend, vote, and approve resolutions on their behalf) and represent the company before public bodies and authorities.

The Corporations Law also mandates that foreign companies (i.e., shareholders of the company in Brazil) must appoint a legal representative to represent them in the national territory, granting them powers to receive summonses on their behalf.

In practice, it is quite common for the power of attorney to normally include other powers in addition to the power to receive summonses, such as: attending assemblies, meetings, or other corporate acts; subscribing, disposing of, acquiring, or transferring shares or quotas; and exercising other rights inherent to the status of a shareholder or partner of the Brazilian company.

Without prejudice to the above-mentioned attributions, many attorneys may also receive other powers as required by the foreign company, as certain bureaucratic procedures or day-to-day operations in Brazil may demand the presence of a legal representative for such purposes, powers not expressly provided by law but relevant to the exercise of business activities. Examples include opening bank accounts, representing and signing purchase and sale agreements, signing contracts on behalf of the company, among others.

LEGAL REPRESENTATIVE OF A FOREIGN DIRECTOR

Brazilian legislation requires that when a company is incorporated, the Contract/Bylaws must expressly indicate an administrator or director, who must necessarily be an individual, either national or foreign, to represent the company for all legal purposes.

Until 2021, corporate legislation required that the company's director must reside in Brazil. With the advent of the Economic Freedom Law, which came into effect to facilitate the opening of companies in Brazil, it became permissible for residents abroad to be appointed as directors of Brazilian companies, provided they have an attorney residing in Brazil. This attorney must have active representation powers for at least three (3) years, and the power of attorney granted must include the same powers of receiving summonses on behalf of the respective foreign director.

In practice, their function does not overlap with that of a foreign shareholder (who, in simple terms, from a governance perspective, is actually the "owner" of the company), but it often gets confused when the foreign shareholder, represented by a legal representative, coincides with the same person as their director (who, from a governance perspective, simply has the function of managing and executing decisions originating from the shareholder).

LEGAL REPRESENTATIVE OF A FOREIGN COUNSELOR

Paragraph 2 of Article 146 of the Corporations Law stipulates that a foreign counselor must also be represented by a representative residing in the country. According to our prevailing jurisprudence, foreign counselors of foreign companies have similar responsibilities to those of administrators of Brazilian companies. In cases of abuse of personality, foreign counselors are liable for the damages resulting from their actions.

Similarly, we understand that the legal representative does not have absolute powers but only those defined by legislation, the power of attorney, and/or the contract/bylaws. Assuming that the legal representative also does not act in their own name but always in the interest of the entity they represent, their responsibility is quite relative and should be balanced along the lines discussed above.

CORPORATE TYPES AND THEIR SPECIFIC RESPONSIBILITIES

Among the corporate forms allowed by Brazilian legislation, there are two that are most chosen by foreign investors to start their activities in the country: Limited Liability Companies (LTDAs) and Corporations (also called joint-stock companies or simply "S.A.s").

Among the corporate forms allowed by Brazilian legislation, there are two that are most chosen by foreign investors to start their activities in the country: Limited Liability Companies (LTDAs) and Corporations (also called joint-stock companies or simply "S.A.s"). Naturally, there are other corporate types that can be used depending on the activity and size intended by the investor, such as company consortia—currently widely used in distributed energy generation structures, as well as the possibility of opening a direct branch of a foreign company, a relatively uncommon structure in our practice.

As a general rule, the shareholders/partners of a company may have unlimited or limited liabilities, in addition to conferring more rigid or flexible rights to their governance structure depending on the corporate form chosen to operate in the country. Therefore, it is important to understand the limits and responsibilities of Brazilian companies and their management bodies, respectively, which are briefly discussed below.

Limited Liability Companies

The most common and widely used corporate form in Brazil is the Limited Liability Company ("Ltda."). This corporate type is governed by the Civil Code and, subsidiarily, by the Corporations Law. Typically, the preference for choosing a limited liability company is due to several aspects that bring more practicality and security, such as:

1. Greater rigidity in the assignment and transfer of social quotas (always formalized by all partners through the execution of a specific contract).

2. No obligation to publish financial statements at the end of each fiscal year.

3 No legal obligation to distribute profits

4 More flexible limitations on partner liabilities and confidentiality for business operations.

In 2019, an important advancement in our local legislation resulting from the Economic Freedom Law allowed all companies of this corporate type to be formed with only a single partner, contrary to the previous rule that required at least two.

It is noted that both individuals and legal entities can be partners in a limited liability company, whether they reside in Brazil or not. However, it is important to highlight that partners not residing in Brazil must be represented by a legal representative or a Brazilian attorney residing in the country, with specific powers to receive summonses on behalf of the foreign partner(s) and/or company. We will discuss this important role in a dedicated chapter below.

Within a limited liability company, the partners are jointly responsible for the full payment of the share capital, with each partner's responsibility being limited to the value of their equity stake in the company.

Limited liability companies can choose, broadly speaking, from three types of tax regimes: Simples Nacional, Presumed Profit, or Actual Profit. We will explain the difference between the three regimes shortly.

Corporations (or Joint-Stock Companies)

Corporations ("S.A.s") are governed by Law No. 6,404/1976 (the Corporations Law) and can be objectively defined as corporations aiming to generate profits to be distributed to shareholders in the form of dividends or interest on equity—another alternative mechanism used by companies to remunerate their shareholders with tax advantages for both the organizations and their investors.

In Brazil, there are basically two types of corporations: (a) publicly held companies, which make public offers and subscriptions of their respective shares on stock exchanges or over-the-counter markets to raise capital (regulated and supervised by the Securities and Exchange Commission – CVM); and (b) privately held companies, whose capital is raised by their private shareholders or investors, and do not trade their shares in public markets.

In corporations, the securities called shares form and determine the assets of the corporation. Briefly, there are three types of shares: preferred, common (also called 'ordinary'), and usufruct shares. Preferred shares confer special rights to the holder, including the right to suppress or restrict voting rights, while ordinary shares give only voting rights to the holders. Usufruct shares, on the other hand, result from the amortization of ordinary or preferred shares and consist of shares that confer the holder participation in dividends and the estate, voting rights, and/or preference for acquiring new shares. They do not represent a portion of the company's share capital as they result from the amortization process, meaning the shareholder has already received the amount they would receive in the event of the company's liquidation, while continuing to enjoy the advantages and rights of the shares (such as dividends and voting rights). This format has fallen out of use and is not widely utilized by corporations currently.

Regarding the legislation of S.A.s, it is necessary to highlight some important points, in addition to other rights provided for. These are:

1 Once the capital is fully paid in, the liability of the shareholders or partners will be limited to the price of their subscribed or acquired shares (Article 1 of Law 6,404 – Corporations Law);

2 Protection of minority shareholders in relation to decisions by majority shareholders (e.g., the possibility of electing board members through cumulative voting rights);

3 Greater access to external financing through the capital market, by issuing debt securities (e.g., debentures);

From a tax perspective, corporations can choose between the Actual Profit and Presumed Profit regimes, except in specific cases where the company must necessarily adopt the Actual Profit regime (e.g., financial institutions). We will explain these regimes and their particularities shortly.

Below is a brief table that shows the main differences between a limited liability company (Ltda) and corporations (S.A.s):

Characteristic Investor Name	Ltda Partner	S.A Shareholder
Minimum Number of Partners	1 or more	2 or more
Share Capital	Divided into quotas	Divided into shares
Partners' Liability	Limited to the value of their quotas	Limited to the issue price of the shares
Management	Generally simpler, formed by management that may also be a partner; can have a board of directors, but it's very uncommon.	Typically has a more robust governance structure (independent board of directors, structured board).
Investments	No minimum share capital requirement	No minimum capital requirement, but if formed in cash, at least 10% must be paid in at the time of incorporation.
Publicity	More flexible, as there is no requirement to publish annual financial statements.	More complex, as there is a requirement to publish annual financial statements in electronic newspapers, unless the company's gross revenue for that fiscal year is below R$78M.

CONSORTIUM

A business consortium is, in summary, a union of two or more companies in association for specific purposes, where these companies retain their legal and asset personality. The consortium is provided for in the Corporations Law and must be constituted by at least two legal entities that execute a consortium formation agreement. Consortia do not have joint liability, with each company being responsible for its own obligations, unless otherwise expressly stated by the consortium itself.

In Brazil, institutions like the ‘solar energy consortium’ are interesting examples of how the consortium structure works in practice, promoting the democratization of the energy market through distributed generation—a model that has been gaining more traction in our legal framework: Law 14,300/2022 established the figure of the consortium of electricity consumers.

Briefly, in the above case, there is the presence of a leading consortium member (outsourced or owner of a solar power plant) that manages the plant and is responsible for allocating energy credits.

Briefly, in the above case, there is the presence of a leading consortium member (outsourced or owner of a solar power plant) that manages the plant and is responsible for allocating energy credits. Companies interested in joining the consortium (the “consortium members”) sign an adhesion contract to participate in the Electric Energy Compensation System, with consortia of this type being able to present their own rules for member participation, including forms of remuneration, loyalty, payment terms, and termination, which are to be contractually defined and mutually agreed upon by all parties.

DIRECT BRANCH OF A FOREIGN COMPANY

Another type of structure possible in our legal system relates to the concept of a foreign branch, which is an extension of the main company (foreign headquarters) in Brazil. Some foreign companies have branches in Brazil, but these should not be confused with Brazilian companies with foreign partners due to their distinct legal personality.

The Brazilian Civil Code provides that this type of structure requires the approval of a Presidential Decree for the establishment of branches of foreign companies in Brazil. The number of multinational companies operating in Brazil in this format is quite low, as the bureaucratic requirements are relatively complex to implement.

MAIN TAX AND FISCAL ASPECT OF BRAZILIAN COMPANIES

Beyond the mere choice of corporate form, another relevant point in establishing a company in Brazil revolves around the tax/fiscal aspect of the organization. As mentioned above, each corporate structure has applicable tax regimes, and the choice of regime should be made with caution and in accordance with the enterprise's potential.

Without prejudice to the above, Brazil enacted a Tax Reform through its National Congress at the end of 2023, which, in 2024, underwent its respective regulation.

In summary, it proposed the unification of taxes currently levied in Brazil, bringing more transparency to tax rules, aiming to reduce the system's complexity regarding the consumption of goods and services, and boosting the Brazilian economy. The reform will still undergo years of implementation, and this material does not cover it in depth, so it is recommended that the investor is always guided by a specialized attorney in this regard.

Regarding the existing tax regimes in Brazil, we have: Simples Nacional, Actual Profit (Lucro Real), and Presumed Profit (Lucro Presumido). The choice between them is not merely preferential, as the regime depends on some important factors, such as the company's annual revenue, business size, and the type of activity performed, which also directly influences this decision.

Foreign investors also need to understand that the company may face issues with the Brazilian Tax Authority if an inappropriate tax regime is chosen, potentially resulting in fines and penalties. It is recommended to have a team of specialized tax attorneys and accounting consultants capable of assisting the foreign investor and outlining the best strategy for optimal tax planning adjusted to the specific reality of the investment. Below is a brief summary of each tax regime and the business formats to which they can be applied:

Simples Nacional

Simples Nacional is a tax regime originally created to serve microenterprises ("ME"), small businesses ("EPP"), and individual micro-entrepreneurs ("MEI"), with its main objective being to facilitate the tax process for these small entrepreneurs. As a result, taxes under this regime are collected once a month through the "DAS," short for Documento de Arrecadação do Simples Nacional—a guide that collects up to eight different taxes (depending on the company's activity), including the main ones: IRPJ, CSLL, PIS, Cofins, IPI, ICMS, ISS, and CPP.

Simples Nacional has a table of reduced tax rates with different bands applicable according to the company's revenue and activity.

To qualify for Simples Nacional, the company must meet certain essential requirements, such as an annual revenue limit of up to R$4.8 million; being an ME, EPP, or MEI; having only individuals as partners; not having partners abroad; not having outstanding debts or debts under negotiation with the government, among others. It is noted that only limited liability companies can adopt this tax regime, with corporations being prohibited from opting for this format.

This regime is not applicable to foreign investors, as the company cannot have partners residing abroad, regardless of having a Brazilian legal representative residing in the country.

Presumed Profit

The presumed profit regime uses a fixed profitability table as the basis for calculating the corporate income tax ('IRPJ') and the social contribution on net income ('CSLL').

The main feature of this tax regime is that the Federal Revenue only considers profit as a "slice" of revenue, i.e., a percentage called the "presumption percentage." This system is used to presume the legal entity's profit based on its gross revenue and other revenues subject to taxation, as provided in a table made available by the Brazilian Federal Revenue according to the respective activities. For example, for service providers, the presumption rate is 32% on the company's revenue (and 15% IRPJ and 9% CSLL are applied to the result of this percentage).

Presumed Profit can be chosen by any company that is not mandatorily required to adhere to the Actual Profit regime, and both limited liability companies and corporations can opt for this regime.

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Actual Profit

The Actual Profit regime is a tax regime in which the calculation of the Corporate Income Tax (IRPJ) and the Social Contribution on Net Income (CSLL) is based on the actual profit that the company obtained during the observed reporting period. Actual profit is calculated after the addition or deduction of deductible expenses.

Therefore, under the Actual Profit regime, tax amounts are directly linked to the company's profit. The higher the profitability, the higher the tax to be paid. Other taxes that must be collected under this regime include PIS, COFINS, ISSQN (Tax on Services), ICMS (for trading companies/companies that engage in the circulation of goods), and IPI (for industries).

The Actual Profit is a tax regime that can be chosen by any corporate form but is mandatory for companies whose revenue exceeded R$78 million in the previous calendar year.

Companies with profit originating from other countries (the case for many foreign companies) are also required to adopt the Actual Profit regime. This regime is also mandatory for companies in the financial sector (fintechs, banks, finance companies, payment intermediaries, among others), companies with tax benefits of any nature, and factoring companies. Similarly, both limited liability companies and corporations can adopt the Actual Profit regime.

THE BRAZILIAN ANTI-CORRUPTION LAW AND COMPLIANCE

In recent years, Brazil has made significant progress in the legal framework of corporate business, fortunately accompanied by the evolution of the Brazilian Anti-Corruption Law (Law 12,846/2013). This law established modern rules and instruments to combat corruption and marked its ten-year anniversary in October 2023, causing a true revolution in the private sector through the dissemination of concepts, mechanisms, and a compliance culture that were largely nonexistent in the national reality, aligning the country with the best anti-corruption practices in the world.

The law introduced important guidelines for organizations, creating the need to restructure their businesses and allowing corporate governance, compliance, internal controls, risk management, and crisis management to navigate this environment in Brazil as an issue of extreme relevance in decision-making by stakeholders.

More than that, the Brazilian Anti-Corruption Law became a tool for controlling good practices, making it possible to investigate and punish all agents involved in corruption cases. Companies that have always dealt, directly or indirectly, with the public sector began to revisit their processes and procedures, adopting measures to mitigate acts of corruption by their employees and collaborators towards public agents.

Our Anti-Corruption Law applies to all organizations (regardless of their corporate type and/or size) established in Brazil and is not limited to companies that deal solely with public agencies. Its direct target is usually the legal entity, but there are provisions in the law that govern the liability of administrators and investors in certain actions.

In this sense, the development and creation of effective compliance programs not only prevent irregularities but also make the corporate environment a place where good practices are prioritized.

It is worth noting that the existence of a compliance program within the organization is considered a mitigating factor by the Anti-Corruption Law in the event of administrative sanctions.

Corporate compliance should be created and structured according to the characteristics of the legal entity. A medical products company, for example, should have specific compliance practices and procedures different from those of a service provider or a steel company.

A strong culture of reporting irregularities is also a good indicator that the organization's compliance program is robust and well-defined, demonstrating that the organization takes care to ensure confidentiality and protection for those reporting irregularities.

Equally important are the constant conduct of periodic audits, risk management and analysis, and the implementation of good practices, which are elements that can keep the organization's compliance program organized, updated, and efficient.

CORPORATE CRIMINAL LIABILITY

by Rafael Canterji (Silveiro Advogados)

Initially, it is noted that the potential criminal liability of company administrators and investors is a highly complex issue that requires individualized analysis, which is why the following considerations are presented in a preliminary and informative manner. It is also emphasized that this discussion does not include potential defensive arguments regarding any charges brought against those with managerial powers, limiting itself to presenting the existing risks based on the positions held.

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The criminal liability of company administrators must be analyzed from the perspective of both the positions held and their actions and omissions. Administrators include all those who, regardless of their connection with the company, perform managerial functions or, even if not occupying such positions, act on behalf of the company. This includes partners, directors, board members, employees, and potentially third-party contractors or investors.

Based on the scope of this document, it is important to analyze both the doctrinal aspects and the criminal practice. From a doctrinal perspective, criminal liability has quite rigid limits. Unlike other branches of law, liability is subjective, requiring proof of conduct, whether by action or omission.

As a rule, for conduct to fit within criminal types, intent is required, understood as knowledge of the circumstances and the will to perform the action (direct intent). In some cases, there is less rigor, requiring only awareness of the risk and indifference to the outcome (indirect intent). Finally, referring to the subjective elements of criminal types, in some cases, provided there is explicit legal provision, there are negligent crimes where, for the agent to be held liable, the outcome must be at least foreseeable, and they must have acted with lack of skill, negligence, or recklessness.

From the perspective of criminal practice, there is increased criminal repression by control bodies based on the positions held rather than necessarily on concrete actions.

In other words, the responsibility of managers is often sought based on the position held, for what they should have done, and not necessarily for what they did. Actions are often presumed, and there is no requirement for detailed conduct in the indictments (initial charges in public-initiative criminal cases), unlike other crimes. In so-called crimes of collective authorship in the business context, there has been a relaxation in the detailed description of each agent's conduct, even at the level of the Higher Courts.

Beyond judicial understanding, it is noted that one form of criminal liability that company managers are subject to is improper omission. This form of liability occurs when the manager, being able and required to act to prevent the outcome of a crime, fails to do so, creating the risk of being criminally liable for a crime committed by a third party. Generally, the duty to act to prevent the commission of a harmful result applies to those who

1 have a legal/sub-legal obligation of care, protection, or surveillance;

2 have assumed responsibility to prevent the result, as in companies where the duty of guarantee is delegated through internal regulations or company policies, and

3 with their prior behavior, created the risk of the result occurring, a scenario that occurs when the agent creates an unpermitted risk, i.e., by failing to comply with institutional rules or the duty of diligence. Besides the scenario of omission, the administrator is also subject to criminal liability for their own conduct, as previously discussed.

In this regard, as noted, the current criminal-political environment is one of increasing accountability. Criminal liability due to the position held has been accepted, especially during the investigative phase and for the filing of charges and commencement of criminal action, without the unequivocal demonstration of conduct considered criminal.

Therefore, to minimize the risks of liability for alleged omissions, the existence of a solid and properly implemented compliance program gains importance, as well as reactions in situations of suspected misconduct, including through properly regulated internal investigations. The delineation of responsibilities by position and responses in the face of suspected wrongdoing mitigate the risk of charges and convictions based on generic arguments derived from positions held.

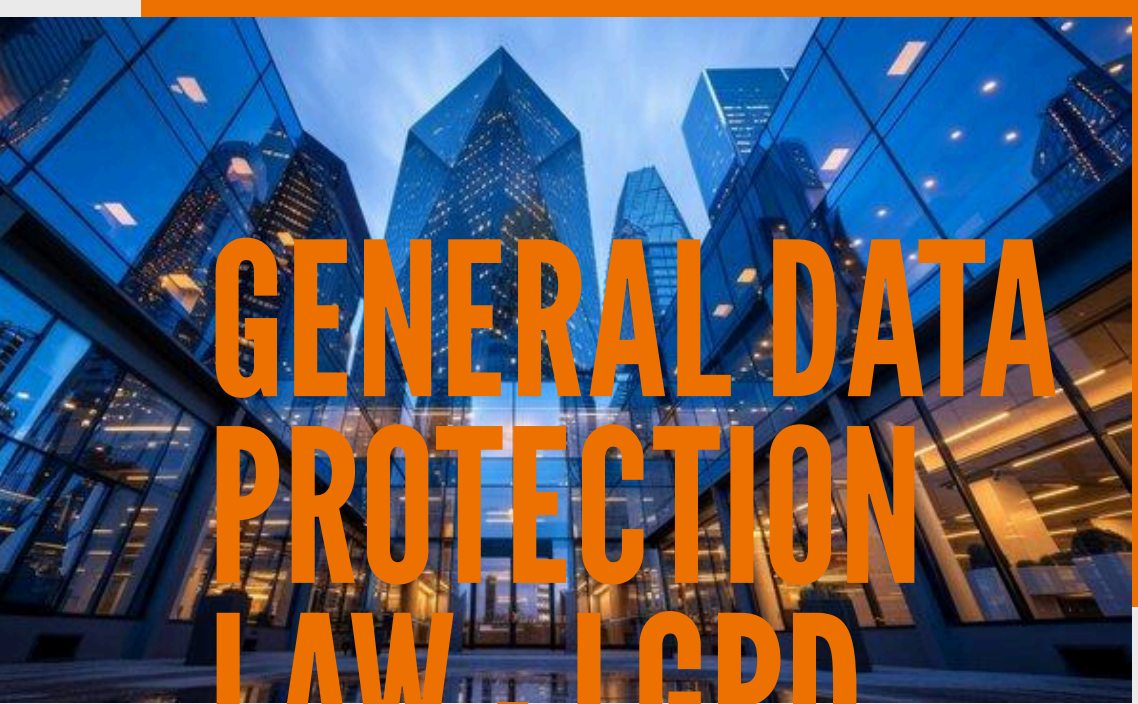
In the context of Brazilian criminal law, offenses commonly attributed to company managers are not limited to those provided for in the Penal Code. Non-exhaustively, there are legal provisions for crimes in various other special laws that typify certain conduct, such as the:

- Bankruptcy and Business Recovery Law (Law No. 11,101/05)
- Law defining Crimes Against Tax, Economic, and Consumer Order (Law No. 8.137/90)
- Law on Crimes against the National Financial System (Law No. 7.492/86)

- Law defining crimes against Industrial Property (Law No. 9.279/96)
- Consumer Protection Code (Law No. 8.078/90)
- Law on Crimes of "Money Laundering" or concealment of assets, rights, and values (Law No. 9.613/98)
- Environmental Crimes Law (Law No. 9.605/98)

The Environmental Crimes Law (Law No. 9,605/98) is notably mentioned as the only Brazilian legislation that provides for the criminal liability of legal entities, which can be attributed individually or jointly with individuals.

As noted earlier, this analysis is generic and should be further detailed and individualized in specific situations of potential criminal liability risks.



GENERAL DATA PROTECTION LAW - LGPD

In September 2020, Brazil enacted the General Data Protection Law, popularly known as LGPD (Law 13,709/2018). This law is extremely important for foreign investors, as it regulates all data processing activities carried out in Brazil, providing greater legal certainty. The Brazilian law closely resembles the CCPA—California Consumer Privacy Act, a law from the state of California (USA), and was also inspired by the European GDPR (General Data Protection Regulation).

The Brazilian LGPD regulates the processing of personal data to ensure the presence of fundamental rights and the protection of sensitive information. The regulation aimed to bring guidelines that balance individual rights and the operation of the free market, including, among others, free enterprise and competition, but also respect for privacy and the inviolability of intimacy and honor.

Article 3 of the LGPD states that it applies to all data processing operations conducted by individuals or legal entities (public or private), regardless of the means—whether the location of the data is online or offline, the country of establishment, or the country where the data is online or offline, the country of establishment, or the country where the data is located, as long as the processing is conducted within national territory, aims to provide goods and services located in the national territory, and involves personal data collected within national territory.

Regarding data processing, Article 7 of the Law lists the situations in which it can be objectively carried out, including: with the consent of the data subject, for compliance with a legal obligation, by public administration, for the protection of the life of the data subject or a third party, for health care, among others.

The LGPD also provides that data subjects be granted free access to information relating to the processing of their data, which must be corrected immediately if incorrect or outdated in any way. The data subject also has the right to anonymity, deletion, and blocking of any data they consider unnecessary, excessive, or even unlawful, as well as the right to revoke consent to data access.

In some cases, such as sending files to the cloud, the transfer of personal data to foreign companies is necessary and important. In this context, the LGPD has outlined certain requirements to allow for the international transfer of these data, including: ensuring that the other country offers the same level of personal data protection; the data controller guarantees compliance with the principles of the LGPD and is aware of the data subject's rights; if the transfer is, in any way, relevant or necessary for international cooperation, especially among public bodies for intelligence, prosecution, and investigation, or with the specific consent of the data subject, provided that it is mentioned that the operation will result in the international transfer of their personal data.

Data processing agents must take precautions to protect personal data from unauthorized access and against accidents or illegal situations of destruction, modification, loss, or any form of inadequate or illegal processing.

Failure to comply with these requirements is subject to penalties, which can range from a minor warning to a fine of 2% of the company's gross revenue (limited to fifty million reais) per infraction.

ACKNOWLEDGEMENT NOTE

The content covered in this material is extremely relevant for all entrepreneurs and investors seeking to better understand the Brazilian business environment, especially concerning the legal representation of foreign investors. All the nuances presented here significantly contribute to clarifying the particularities and challenges imposed by the market, offering a detailed and comprehensive view of the subject. This material was developed with the support of two prominent and reputable partnerships in the market, which helped us understand these particularities from the perspective of their respective expertise.

BFAP

silveiro advogados

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This material will certainly be of great value to our ongoing efforts to promote a safe and effective business environment for foreign investors in Brazil.

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