INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

The pursuit of a company's interest over the life of a company

Corporate Acquisition and Joint Ventures Commission

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Brazilian National Report

General Reporters:

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Introduction

The typical lifecycle of a company consists of various phases, as for example, startup, growth phase, maturity (mid- to large-size privately held company), IPO and listed phase, and finally the acquisition by another company.

The various stakeholders in a company – understood in a very broad sense including equity holders, debt holders, management, employees, advisors and public – have expectations in the company. According to the stakeholder-value-theory all these expectations of the stakeholders form the company's interest.

Undoubtedly, the expectations of the various stakeholders and, therefore, the company's interest change and develop over the life cycle of the company.

The general report and the working session focus on these changes and developments, how they are reflected resp. influenced by the rules of the various jurisdictions and what the consequences are for us, the legal advisors. For efficiency reasons, the general report is limited to the developments of certain stakeholders' expectations (see A to D in the below matrix)

The following matrix provides an overview of the stakeholders (A to D) and the phases (1 to 5) that are covered by this general report. At the same time it provides an overview of the structure of this questionnaire (chapters A to D, each having sub-chapters 1 to 5). Our goal is to shed light on one or several aspects of a specific stakeholder's interests in each phase so that, as a result, the entire questionnaire provides an overview of the development of the interests of the various stakeholders over the life cycle of the company and, thus, shows the development of the company's interest as such.

	1. Startup	2. Growth	3. Maturity	4. IPO / Listed	5. Acquisition
A. Equity holders	A.1	A.2	A.3	A.4	A.5
B. Debt holders	B.1	B.2	B.3	B.4	B.5
C. Management / Employees	C.1	C.2	C.3	C.4	C.5
D. Lawyers	D.1	D.2	D.3	D.4	D.5

The general report and the working session focus on these changes and developments, how they are reflected resp. influenced by the rules of the various jurisdictions and what the consequences are for us, the legal advisors.

A. Interest of equity holders

1. Start-up phase

In the start-up phase, an entrepreneur or third parties may wish to invest in a business idea as equity holders in a business association. In this context:

1.1 In your opinion, what is an entrepreneur's typical reasoning for setting up a specific business association? Attract investments by third parties? Avoidance of personal liability? Tax reasons? Protect IP rights and technology?

As a general rule, the typical reasoning is segregating entrepreneur's estate from the company's estate, with the purpose of avoiding personal liability. However, under Brazilian Law, there are certain situations, when the company's corporate veil is pierced, where entrepreneur may be held liable with his own estate for the company's debts.

1.2 What kind of business association structures does your jurisdiction offer to equity holders (e.g., partnerships, corporation, LLC, etc.)?

The most widely adopted forms of corporate organizations in Brazil are limited liability companies (*sociedade limitada* – Ltda.) and corporations (*sociedade anônima* - SA).

- ***What are the most crucial differences between these business association structures from an equity holder's perspective?***

The most crucial difference is related to partners'/shareholders' liability.

In a limited liability company, the capital is divided in quotas and the liability of each partner is limited to the quotas such partner has subscribed, but all partners are jointly and severally liable until the social capital is fully paid-up.

Corporations' capital is apportioned in shares and the liability of each shareholder is strictly limited to the total amount of the issue price of the shares he subscribes or purchases.

As a general rule, limited liability companies and corporations do not require a minimum capital. However, depending on the company's corporate purpose, a minimum capital may be required, such as if the company carries out import transactions.

With respect to corporations, it is important to mention that Brazilian Corporation law requires that shareholders pay up, at least, ten per cent (10%) of the share capital prior to the filing of the incorporation act (General Shareholders' Meeting of Incorporation together with the Bylaws) for registration with the competent Trade Board.

A – Limited Liability Companies

The costs implied in the setting up of a *limitada* are less significant, and expenses with publications of corporate documents and financial statements may be waived, thus enhancing confidentiality as to corporate affairs. Additionally, *limitadas* are more flexible types of company, since their articles of association can be drafted more freely and in line with the expectations of the partners.

Limited liability companies are governed by the Brazilian Civil Code (Law no. 10,406/2002) and may be supplementarily ruled by the Brazilian Corporate Law (Law no. 6,404/76) and further amendments thereto.

The law requires a minimum of two partners and, if any of them is a foreign individual or entity, such partner must be represented by a Brazilian resident.

The company's capital is divided in quotas, which may have equivalent or nonequivalent value, and may be paid-up in cash, property or credits, provided that it is foreseen in the articles of association.

The management of a limited liability company may be performed by one or more individuals, who may be partners or not, provided that such managers are resident in Brazil. The managers might be appointed in the articles of association or in a separate instrument.

A foreign individual may be appointed as a manager if an investment equal or superior to R$ 600.000,00 is made in the Brazilian company or if he/she directly invests R$ 150.000,00 in the Brazilian company, in which cases this foreign individual will be eligible to obtain the permanent visa.

B – Corporations

Corporations are ruled by the Brazilian Corporate Law and may be publicly-held or closely-held. As happens to limited liability companies, the law requires a minimum of two shareholders, provided that foreign shareholders maintain a representative in Brazil.

The management of a corporation may be performed by two bodies, the Executive Office and the Board of Directors.

The Executive Office is the body that has the attribution to run the company internally and represent it before third parties in any affairs and transactions required for its regular operation. Executive officers will not be held liable for any obligations assumed on behalf of the company with regards to routine acts necessary for the company's management.

The Board of Directors has the attributions of adopting decisions and establishing internal regulations, as economic, corporate and financial policies to be followed by the company, and to supervise on a permanent basis the Executive Office members.

Although the Executive Office must be comprised by either Brazilian nationals or foreigners resident in Brazil with a permanent visa, the members of the Board of Directors may be either Brazilian or foreign individuals, who are not required to be resident in Brazil, provided that they maintain a representative in Brazil.

It is important to mention that, in case of closely-held corporations with subscribed capital, the establishment of a Board of Directors is not mandatory.

- ***If statistics on the use of business association structures are available in your jurisdiction: which are the most commonly used business association structures for start-ups? Do you see a particular reason for the dominance of one specific structure?***

  Limited liability companies are the most commonly used, as the costs implied in the setting up of a *limitada* are less significant, and expenses with publications of corporate documents and financial statements may be waived (except for large scale *limitadas*), thus enhancing confidentiality as to corporate affairs. Additionally, *limitadas* are more flexible types of company, since their articles of association can be drafted more freely and in line with the expectations of the partners.

- ***In case of a corporation or LLC (in the following we simply refer to the "company"): are there any equity instruments other than common shares that are typically used for equity investments? Non-voting shares? Other forms of participation rights?***

  Yes, in a corporation there are.

  The non-voting shares or preferred shares may belong to one or more classes, and carry rights and/or privileges that may include the right to elect certain members for the company's administrative bodies, even if these preferred shares are granted no other voting rights.

  The non-voting preferred shares or preferred shares with restricted of voting rights may not exceed 50% of the company's total issued shares. Holders of preferred shares must be accorded the following privileges, on a cumulative or non-cumulative basis: (i) priority in the distribution of fixed or minimum dividends; or (ii) priority in capital repayment, at or without a premium. In order to be traded on the securities market, preferred shares without voting rights or with restricted voting rights must confer on their holders at least one of the following privileges: (i) payment of dividends corresponding to at least 25% of the average profits at year-end; or (ii) payment of dividends at least 10% higher than those paid to common shares; or (iii) the right to tag these shares along in a public offer for disposal of control, receiving dividends at least equal to those paid to common shares.

Other securities that may be issued by a corporation are participation certificates, subscription warrants, and debentures.

Participation certificates are nonpar securities and confer on their holders the right to participate in up to 10% of annual profits. These securities carry none of the rights attributable to the shareholders, except for the right to oversee the acts of the company's senior managers.

A company with authorized capital may issue negotiable securities called subscription warrants. These securities entitle their holders to subscribe for shares when the capital is increased, subject to the conditions stated on the corresponding certificates.

Debentures are securities that give their holders credit rights against the issuing company, in accordance with the conditions contained in the deed and, if any, in the debenture certificates. The credit rights held by debenture holders against the company must be stated in the respective deed, as well as in the certificate, if any. This certificate must specify the respective face value, rights and guarantees attaching to debenture holders, as well as the maturity date. Debentures may be convertible into shares, and will be secured by the issuing company. The rules relating to the ownership and circulation of shares are also applicable to debentures.

- ***Can equity investors remain anonymous (for example by the use of bearer shares)? Anonymous towards the company, other investors, the public? In the event equity investors cannot remain anonymous when holding shares, is there any alternative scheme that can be implemented to participate on an anonymous basis (for example, silent partnership schemes)?***

Bearer shares are no longer applicable under Brazilian law.

Differently from a limited liability company, in Brazilian corporations the shareholders remain anonymous to the public, as the bylaws do not disclose such information. The number of shares and their respective shareholders are registered with the company's share register book, which is filed at the company's headquarters.

Moreover, the Brazilian Civil Code provides for the Special Partnership (*sociedade em conta de participação*), which is not very commonly used. It is a partnership established by two or more persons to carry out one or more specific business ventures and in which one, some or all the partners contribute their individual efforts to attain a common profit.

The partnership is not organized as a firm and thus has no legal identity of its own. The partners are of two kinds: the ostensible partner, who assumes the liability for the partnership relations with third parties, and the silent partner, who contributes capital without assuming liability towards third parties, but is liable toward the ostensible partner for the result of their business and for the liabilities of the partnership according to the partnership agreement. The silent partner may not engage in business with third parties, under penalty of being held jointly liable with the ostensible partner before said third parties.

The special partnership has no assets as the funds contributed by the silent partner are given to the ostensible partner on a fiduciary basis for use as he deems fit.

1.3 Once the entrepreneur has set up a company: what could be a typical focus of third party equity investors when they invest in a company in this phase?

If the third party investor is a strategic investor, the focus would be more related to expanding its market share. If it is a professional investor, such as a venture capital or private equity fund, profitability is crucial in order to generate targeted returns for its own investors.

- ***What could typically be the friends', family's and fools' ("FFF") focus? Helping the entrepreneur to get his / her business going?***

  The typical FFF's focus is usually helping the entrepreneur to set up his/her business, especially because the most adopted types of companies in Brazil require two partners.

- ***What could typically be the professional investor's focus?***

  As mentioned above, professional investors would be more focused on profitability.

  In the initial phase, venture capital funds are usually the first outside money into an emerging business. These investors tolerate losses while the business develops, betting on progress toward stable cash flow through growth and refinement of the company's operations. Typically, they take minority positions and leave business with the founders.

  Private equity funds usually invest at a later stage, after a stable cash flow has been achieve. These investors would be more interested in professionalizing the company, organizing its management in order to increase its profitability, so it would be able to sell it for third parties or to carry out an IPO in the future. In practice, private equity funds typically (but not always) take control positions in companies, so that they have the ability to dictate the outcome of the major business decisions. However, the degree of such control will vary depending upon the industry focus, management style, among others.

- ***If there is a difference in focus among the various equity investors, how is this typically reflected in the legal relationship (be it corporate or contract law)? Are there legal instruments that are only used by certain investors (e.g., only by professional investors)?***

  Regardless the difference in focus among the various equity investors, if the investment is in equity, in Brazil, it is reflected in the legal relationship as corporate, i.e. the equity investor will be reflected in the limited liability company's articles of association and subject to the Brazilian Civil Code rules, or registered with the corporation share registered book, and subject to the Brazilian Corporation law rules. Depending on specific situation, there might be a partners'/shareholders' agreement to which the new equity investor will adhere to or negotiate.

2. Growth phase

In the start-up phase a business idea comes into existence: the idea is put into a business plan, a company is set up, first steps relating to production, service, distribution, sales etc. are made. The growth phase allows potential new investors to better assess not only the viability of business idea, but also the commitment of the people involved. In this phase, the new investors are usually not FFF, but professional investors. As a result, the FFF who invested in the start-up phase are faced with more demanding and skilled potential new co-investors. Against this background:

2.1 In your opinion, does the focus of the equity holders (e.g., the FFF or professional investors) shift in the growth phase (as compared to the start-up phase)?

Each case has its own framework. However, in this phase, the equity holders are still engaged and focused on the company's growth. What is expected from a company in the period following the start-up phase is that its accomplishments are relevant enough to attract professional investors like private equity funds aiming at the next expected phase of most start-up companies: an IPO or M&A restructure. Therefore, yes, it is likely that the focus of the equity holders would shift accordingly to the growth ratio of the company, but the sole growth and the expectancy of future profits may not be sufficient to draw professional investors to the company, as external factors, like the economic and political scenarios, may also be influential.

- ***If so, what could be a particular focus for equity holders in the growth phase? Protection from dilution?***

  The particular focus for equity holders would actually be protection from dilution.

- ***In your experience, do the equity investors from the start-up phase participate in further capital rounds in the growth phase? Do they usually accept dilution? Do they usually cash out at this point in time?***

  It varies on a case-by-case basis. Typically, the founders are not able to participate in all capital increases and, for such reason, prefer that new investment comes as debt, so that they are not diluted.

2.2 In your jurisdiction, does the company law provide existing equity holders protection from being diluted in further financing rounds in the growth phase? If so, how are they protected? Is there a need for equity holders to seek protection on a contractual basis?

The Brazilian Civil Code and the Brazilian Corporation Law provide protection to equity holders through the right of first refusal related to capital increases. Shareholders of a corporation and partners of a limited liability company have a right of first refusal to the subscription of shares/quotas from an increase in capital, in proportion to the number of shares/quotas they already hold.

Any other protection of the existing equity holders from being diluted would have to be provided contractually, for instance, under the articles of association/bylaws or under a partners'/shareholders' agreement, which typically contemplates non dilution provisions.

2.3 When new potential investors offer to come on board during the growth phase, the existing equity holders may be reluctant to provide the information required to satisfy the potential new investor's need for valuation. The reason for the existing shareholders' reluctance may be, for example, that the required information contains (still) unprotected intellectual concepts, knowledge or ideas. In your experience, which legal instruments are used to find a balance between the potential new investor's need for information and the existing equity holders' wish to keep such information confidential? Do existing equity holders have legal means to prevent management from disclosing such information?

Usually, in the beginning of a potential acquisition, the parties enter into a letter of intent or a memorandum of understandings, where the potential investor undertakes to keep all information disclosed by investee confidential even after the expiration of the relevant document. It is also possible to have the new potential investors, its representatives, managers, etc., executing specific non-disclosure agreements.

Any potential new investor in order to actually become an equity holder will depend on the partners'/shareholders' approval. Therefore, any disclosure of confidential information will be made within the limits established by the company's partners'/shareholders' to fulfill the purpose of disclosing the necessary information to enable the potential investor to proceed with his/her valuation.

For reference and knowledge, the company's managers have certain duties towards the company that are expressly established under Brazilian law, such as duty of loyalty, duty to inform, duty of service, among others, which they must observe and comply with, under penalty of being held personally liable.

The general rule is that, while in the exercise of his/her functions, the manager should employ the care and the diligence that an active and prudent individual would employ in the administration of his own affairs, and to act pursuant to law and the articles of association/bylaws to attain the purposes and the interests of the company, serving loyally and keeping the business of the company confidential, and not getting involved in operations that may conflict with those of the company.

For instance, the manager who executes an act aiming at his own benefit and to detriment of the company will be held in liable. The manager may also be held liable when he superimposes his own interests or interests that are alien to the company over the interests of the company itself, or when he performs acts that may later prejudice the company, or when he makes use of privileged information obtained as a result of his job function as a manager, to the prejudice of the company or aiming at his own advantage.

However, it is important to highlight that in order for the manager to be held liable for any damages caused by his acts, it is important to prove that: (i) the omission or commission happened as result of negligence or fraud; (ii) the damage actually occurred; and; (iii) there is a casual relation between the omission or commission and damage actually caused.

Brazilian doctrine adopts the business judgment rule as a way to exempt manager's liability, provided that he/she has acted in good faith, in accordance with the company's purpose and aiming the company's interests.

3. Maturity

During the various capital rounds in the growth phase, the circle of equity investors in a company typically becomes larger and the atmosphere may become less familiar. Also, in the maturity phase the management of the company may become more professional in the sense that there is a management in place which is not, or not significantly, invested in the company (i.e., intensification of the principal-agent-conflict). As a consequence, legal concepts that govern the relationship between equity holders (such as fiduciary duties of majority equity holders) as well as legal concepts that govern the relationship between management and equity holders (such as fiduciary duties of the board members / management, duty of loyalty, principle of equal treatment) may become more important.

In other words, corporate governance may become more important. Against this background:

3.1 In your opinion, how does the equity holder base change between the start-up phase, the growth phase and the maturity phase? How does the focus of the equity holders change? Focus on fair distributions of earnings?

Please refer to our comments to questions No. 1.3 and 2.1 above on the focus of the equity holders on the start-up and growth phases. In this maturity phase, the equity holders are either looking forward to expand their business by attracting professional investors like private equity funds aiming at the next expected phase of most start-up companies: an IPO or M&A restructure.

3.2 In your jurisdiction, does the law provide for stricter corporate governance rules for large (privately-held) companies as compared to small companies? If so, what exactly triggers the application of the stricter corporate governance rules? In which sense are the corporate governance rules different / stricter?

In Brazil, the law does not provide for stricter corporate governance rules of large companies as compared to small. Such concept is solely applicable to publicly-held corporations.

3.3 In your jurisdiction, do (certain) equity holders (e.g., majority shareholders) have obligations towards (certain) other shareholders or the company (e.g., duty of loyalty)? Please explain such obligations.

As a general rule, partners/shareholders must carry out the company's activities always envisaging the company's best interest through the complete fulfillment of its corporate purpose. In this regard, partners/shareholders must always act in accordance with the applicable law and incorporation documents, acting with good faith towards to company's resolutions without seeking any personal advantage that could in any way adversely affect the company or the minority partners/shareholders.

The Brazilian Corporation Law grants certain rights to minority shareholders representing at least 5 per cent of the total capital, as well as rights to shareholders representing 10 per cent to 20 per cent of the voting capital, including, among others: (i) to apply for a court order requiring a complete disclosure of corporate books, in case of determining acts practiced by the company's managers that contravene the law or the by-laws; (ii) to request in writing to be provided with copies of management reports, accounts and financial statements and opinions of independent auditors;(iii) to require the winding-up of the company by court action, provided it is proved that the company is not achieving its corporate objectives; (iv) to require information to the audit committee; (v) to file a suit against the officers of the company in order to claim losses caused to the company; (vi) to request the adoption of cumulative voting procedures in the election of the members of the Board of Directors, regardless of whether such procedure is or is not provided for in the by-laws; (vii) to indicate one of the Board members (shareholders representing at least 15 per cent of the voting capital of publicly-held companies, excluding the controlling shareholder); (viii) to request the operation of the audit committee when it is not permanent; and (ix) to elect one member of the audit committee and its alternate.

Notwithstanding the above, the shareholders of a corporation may enter into a shareholders' agreement in order to regulate voting rights, rights of first refusal, management of the company, control powers, among other corporate aspects. Any such shareholders' agreement shall be observed by the company/its management when filed in the company's headquarters. In addition, shareholders' agreements must be annotated in the company's registered shares register book, as well as in the shares certificates issued by the company (if any), in order to be valid against third parties.

3.4 Does the company have any means to control the circle of its equity holders (i.e., can the articles of incorporation prevent competitors from holding shares in the company?) or have such restrictions to be agreed among the other equity holders (e.g., shareholders' agreement)?

Although the articles of association/bylaws may expressly restrict the equity investment of competitors, such provision is typically regulated under the partners'/shareholders' agreement.

4. IPO / Listed phase

Following the IPO, a company enters into a new phase of being listed. The listing has potentially a great influence on the equity holder: the sale of their interest becomes easier. Against this background:

4.1 How does the focus of the shareholders change through the going public as compared to the maturity phase? Does the fact that a shareholder may at any time sell the residual value in its share (ideally) at a fair price in your opinion soften the focus on distribution of earnings? Does the focus shift from long term to short term?

In this IPO phase, the shareholders are focused on strengthen the corporate governance and growing the economics and financial standards of the company to build-up the value by which the shares of the company will be evaluated during the road show. Quite the opposite actually, because dividends are tax exempt in Brazil, which means that it is always better to clean the pot of accumulated profits before moving forward with any actual sale. Yes, the focus changes to short term.

4.2 *In your jurisdiction, are there publicly available records on the identity of (certain of) the shareholders in a listed company? If so, does this in your opinion influence the shareholders' focus?*

Yes, there is. It has some influences on deciding to go public.

4.3 *An efficient allocation of resources requires a most accurate pricing of the shares.*

- ***In this regard, are companies that are listed in your jurisdiction under an obligation to publish price-relevant information (ad hoc publicity)? If so, please provide a short overview of the respective rules including the exemptions from such obligation.***

Yes, the companies are obligated to publish "Material Facts" regarding: (i) any resolutions by the Executive Committee, the Board of Directors or the Shareholders; or (ii) any acts or facts concerning administrative-politic, technical, negotial or financial-economic natures related to the business of the company that might influence: (a) on the evaluation of the securities of the company; (b) on the decision of the investors to buy, sell or keep their securities; or (c) on the decision of the investors to exercise any rights as holders of securities of the company. Anything on the contrary is exempt from publishing. Please note that there is some room for interpretation here and the CVM (Brazilian SEC) will rule on the matter, thus, the companies use the precedents of CVM to guide them on being conservative or not on their decision to publish.

- ***It can be assumed that no jurisdiction requires listed companies to publish all price sensitive information. If this is correct in your jurisdiction, how does the law protect the market and its participants (including, the equity holders in the company) from market abuse? Are there insider trading and market manipulation prohibitions? If so, please provide a short overview and, if you can, provide certain peculiarities about them?***

- Yes, the protection is under the transparency obligations, as mentioned in the item right above "Material Facts", as well as the levels of corporate governance dictated by CVM. Yes, CVM rules and keeps a close eye on insider trading and market manipulation, it is a very regulated market with a lot of normative rules that are issued by CVM. The insider-trading rule, for instance, covers any person that had access to privileged information, not only people directly involved in the company (such as officers, directors, etc).

5. Acquisition

In its life cycle, the company may itself become the object of an acquisition and integration into the acquirer's structure. At this point the life cycle of the company ends. For the purpose of the remainder of this questionnaire, we assume the acquirer proceeds via a public tender offer. Against this background:

5.1 In case a listed company (target) is approached by another company (bidder), the board of the target will have to decide whether it supports the offer (friendly offer) or not (unfriendly offer). What are the interests that the board of directors needs to take into consideration for this decision? Shareholders' interests only (e.g., offer price only)? The interests of other stakeholders (employees, community etc.)?

No, actually there are so many protections to the sale of a listed company in Brazil (such as poison pills, tag along, etc) that it is rare to have a successful offer in the public market. We cannot forget about Antitrust rules as well, which is something that always have to be taken into consideration.

5.2 In case of an acquisition of the listed company (target) by another company (bidder), the shareholders' are at a disadvantage as they cannot communicate efficiently or act in concert (for example, regarding the rejection of a low offer). A rational bidder should try to use this disadvantage of the shareholders to his benefit. In your jurisdiction, how does the law protect shareholders of the target in case of public tender offers? (for example, is there a specific process for public takeover offers which provides protection? Does the bidder need to treat target shareholders equally? Are there, for example, minimum price rules and/or best price rules?)

As mentioned in item 5.1 above, it is very rare to have a successful purchase because Brazil is a very regulated market and there are a lot of protections to hostile takeovers. In accordance with the Brazilian Corporations Law and the applicable regulations enacted by the CVM, a mandatory tender offer must be launched whenever there is a (direct or indirect) sale of control. Again, poison pills and tag along rights protects the company against this kind of bid.

5.3 As mentioned above, a listing provides (ideally) liquidity for the company's shares and ensures a high level of information for a potential new investor. In fact, equity investors may invest in listed companies exactly for these reasons. In your jurisdiction, how is an equity investor protected from a delisting? Does the delisting require (qualified) shareholder consent? What are the deadlines for the delisting? Do issuers need to provide for an off-exchange trading for a certain period following delisting?

Delisting in Brazil is made through an OPA (Public Offer of Shares), by which the Management or the Majority Stockholder purchases the shares of the minority stockholders. The OPA follows a set of rules issued by CVM and can only be made after a "Material Fact" is published and CVM approves the OPA. The OPA depends on the evaluation of the shares by an appraisal prepared by a company with credentials before CVM. The OPA must be approved by at least 2/3 of the of the shareholders that agreed with the procedure.

B. Interest of debt holders

1. Start-up phase

In the start-up phase, the entrepreneur may ask the so called "FFF" (friends, family and fools) for a loan. In other words the entrepreneur asks them to invest in a business idea as debt holders. In this context:

1.1 In your experience, what could be the typical focus of the FFF in this phase? Helping the entrepreneur to get his / her business going? How is this focus reflected in the legal relationship? For example, will such debt holders be likely to refrain from asking for security? Is the agreed interest rate likely to correctly reflect the risks for the debt investor?

As general rule, FFF's focus in this phase is helping entrepreneur getting his/her business going. Such debt holders will likely refrain from asking any security, or will ask personal guarantees (e.g. surety), which are not as strong as *in rem* guarantees, which provides the creditor with a direct right over the debtor's assets to secure a credit, if the debtor defaults. In the event the loan also bears interests, it will probably not correctly reflect the risks for the debt investor.

1.2 In your experience, is it common for professional investors to act as debt holders in this phase? If so, how is the different focus of professional investors typically reflected in the legal relationship? What are the legal instruments commonly used in your jurisdiction to protect their interests? For example, is it common for the professional investors to request a personal security by the entrepreneur in case the company does not yet have (a lot of) assets to secure a loan?

As a general rule, in this start-up phase, it is not common for professional investors to act as debt holders. However, if it occurs, such investor will enter into a loan agreement with the company (if already incorporated), contemplating an interest rate that properly reflects the debtor's risk and request that the entrepreneur grants a security, either personal or *in rem*. The debt investor may request a pledge, mortgage or fiduciary title over a company's, a partner's or a third partners' asset, which are of higher enforceability.

2. Growth phase

2.1 In your experience, who provides debt in this phase and what could typically be their focus (e.g., high return on investment)?

In this phase, commercial banks are more likely to provide debt envisaging receiving funds based on its high interest rates. Notwithstanding, depending on the company's financial situation, it could be able to obtain credit from professional investors.

- ***Are the debt holders and their focus in the growth phase typically different from the ones in the start-up phase? Is it now mostly professional investors (and no FFF)?***

  Yes. In the specific case of commercial banks, the focus would be restricted in obtaining funds deriving from its high interest rates.

  Nonetheless, if the company has a stable cash flow and good standing financial situation, it is more likely that it is able to obtain more professional investors, including by means of issuance of other types of securities, such as debentures. In the growth phase, depending on the company's field of activity and perspective of profitability, there could be more investors interested in providing credit with the possibility of conversion into investment in a later stage.

- ***If there is a difference, how could this be reflected in the contractual relationship? For example, do the interest rates or the security for the debt change?***

  Assuming that more professional investors would be willing to grant credit to the company, they will certainly establish higher interest rates in the respective agreement and request that the company and/or the partners/shareholders grant more consistent and easier to enforce types of security, such as mortgage or a pledge of any asset (including the company's shares, if interesting) or equipment. Moreover, the debt investor could also grant its credit by subscribing debentures issued by the relevant company. Such debentures could be convertible or not.

2.2 What kind of security is commonly request by debt holders in this phase? For example, rather collateral (pledge, etc.) or personal guarantees by the entrepreneur? What is the reason for the preference of a specific kind of security?

As mentioned above, collateral are preferable types of guarantees to be requested by debt holders in this phase, as they are more consistent and with privileged enforceability rights.

2.3 During the growth phase, the burn rate of the company may be quite high and the company may continuously be at the verge of over-indebtedness. Will investors usually be willing to subordinate their debt? Usually only the entrepreneur / FFF from the

start-up phase or also professional investors?

From a Brazilian law standpoint, it is not usual that debt investors would be willing to subordinate their debt at this stage, due to the significant risk of not being repaid. If the company is urging for new funds, it will probably come from the entrepreneur /FFF.

2.4 Investors providing debt in this phase may wish to keep the possibility to participate in the potential valuation upside. How could this wish be accommodated in your jurisdiction? For example, are profit-participating loans or convertible loans commonly used instruments?

Under Brazilian law, it is typical to have loans or debentures convertible into shares. Nonetheless, there are other securities, such as the participation certificates, that are profit participating, as mentioned in question No. 1.2 above, but are not convertible into shares.

3. Maturity

After having reached maturity, the structure of debt holders may change fundamentally. Against this background:

3.1 In your jurisdiction, who is usually the debt holder in the maturity phase (e.g., banks)?

Usually, the debt holders in this phase are banks.

- ***Are the debt holders and their focus in the maturity phase typically different from the ones in the start-up or growth phase?***

  In this phase, the debt holders are focused on profitability and depending on the company's field of activity; debt holders could be interested in granting convertible loans or subscribing convertible debentures.

- ***If there is a difference, how may this be reflected in the contractual relationship?***

  Please refer to our comments to the question above.

3.2 Before providing debt to a company, the potential debt holder may require information about the company's financial status to assess the default risk. What financial information is publicly available for potential new investors who wish to invest in a privately-held company? Are financial statements available from public registers? Excerpt from the debt enforcement register? Tax returns? Do companies have means to influence the amount of publicly available financial information?

As a general rule, limited liability companies are not required to publish their financial statements, thus enhancing confidentiality as to corporate affairs. However, if the limited liability company is considered a large-scale company (companies that have total assets worth more than R$ 240 million or annual gross revenue of more than R$ 300 million), it will be obliged to present the financial statements for registration with the competent Trade Board, as well as to comply with all requirements related to publication and auditing of the publicly-held corporations.

On the other hand, privately-held corporations must file their financial statements with the competent Trade Board, as well as publish them in the Official Gazette an in a widely-circulated newspaper. Please note however that the Brazilian Corporation Law contemplates that publication of financing statements, administrative reports and audit reports may be waived in case of closely-held corporations with less than 20 (twenty) shareholders and a net worth lower than R$1,000,000 (one million reais), provided that a certified copy of such documents is duly filed with the Trade Board.

3.3 In your jurisdiction, is it common for privately-held companies to issue notes? Could you provide a short overview of the requirements and the procedure relating to the issuance of notes? Is the focus of note-holders any different from other debt holders?

Under Brazilian law, there are the promissory notes, which are typically used to fund a company, such as loans or debentures. The promissory note is a credit document that may be issued either by corporations or limited liability companies. Promissory notes are issued by the debtor usually to secure its debt and are transferrable by delivery to the creditor.

4. IPO / Listed

4.1 Once a company is listed, the debt holders have a considerably higher level of information regarding the company's financial situation. One could expect that this reduces the risk for the debt holder. Thus, in your jurisdiction, do listed companies usually have to pay lower interests?

More or less, they have more power to try to obtain better rates, but in Brazil the banks are very strong and pushy.

4.2 In your jurisdiction, is it possible to list notes? Could you provide a short overview of the requirements and the procedure relating to the listing of notes? In your opinion, is the focus of holders of listed notes any different from the focus of other debt holders?

We have some other securities with similar approach, like Promissory Notes, Debentures, Subscription Bonus, Credit Certificates, among others. The listing is quite similar to issuing shares and the requirements involve the participation of an Investment Bank to endorse the transaction.

5. Acquisition

5.1 In your jurisdiction, what is commonly the effect of a public tender offer on listed notes. Do they have to be redeemed? Can holders of listed notes interfere in the process of a public tender offer? If so, by which means?

N/A

5.2 In your jurisdiction, what is the typical influence of a public tender offer on existing credit facilities?

N/A

C. Interest of management / employees

1. Start-up phase

In the start-up phase, it is essential that the key management is committed towards the development of the business idea or project. In this context:

1.1 Which are the most commonly used means to ensure that the management / key employees will not leave the company until the company reaches the growth or maturity phase? Are warrants or similar incentives granted during this stage?

It is common to grant Stock Option Plans to key employees and management and other similar incentive plans with options related to other titles of the company, as well as the implementation of Profit Sharing Plans in order to ensure that employees and management do not leave the Company. Moreover, the Brazilian Corporation Law also allows that corporations, with fixed mandatory dividends equivalent or superior to 25% of the net profit, attributes to the management participation in the company's profit in its by-laws, being provided that (i) such participation may not be superior the manager's annual remuneration or to one tenth of the company's profits, whichever is inferior; and (ii) the management shall only receive such participation in case the mandatory dividends are paid with priory to the shareholders.

Structures based on earn out targets are also used in Brazil to retain management and key employees.

Other than that, it is also possible to negotiate with members of the management that are also shareholders' of the company non compete agreements. However, adding a non compete provision to an already existing employment contract may not be enforceable against the key employee due to its detrimental nature to an already existing labor relationship.

1.2 It is likely that at this stage, there are not sufficient funds for remuneration of management / key employees. Is it common to grant warrant or stock incentive schemes in your jurisdiction? Is there any other scheme to liaise with this issue?

The remuneration of management shall be fixed by a General Shareholders / Quotaholders Meeting, being provided for, under the Brazilian Corporation Law, a few criteria that shall be followed to reach the global remuneration of all management or the individual amount due to each member of the management as to avoid any abusive behavior by the majority shareholders in such decision. Such criteria is: (i) responsibility of the manager; (ii) amount of time dedicated to its activities; (iii) competence and skill of the manager; (iv) professional expertise and reputation; and (v) remuneration due in the market for his services. The remuneration of key employees is usually fixed by the management, with the approval of the shareholders / quotaholders. In addition to the amount of remuneration fixed by the General Shareholders / Quotaholders Meeting or management, as mentioned above, usually Stock Option Plans, bonus schemes and Plans for the Participation in Profits and Results are implemented by the companies to stimulate and award its management and key employees in accordance with the company’s growth.

2. Growth phase

The management plays a crucial part in order that a company achieves going from a start-up phase to a growth phase and tend to assumes considerable risks by devoting to such project. Therefore, it would seem reasonable to protect the management in further financing rounds during the growth phase.

2.1 In case new investors come on board in the growth phase and such investors request replacement of the current management: in such replacement, does the current management usually lose rights granted under an incentive plan? How broad are "bad leaver" provisions usually formulated?

Typically, depending on how the deal is structured and the link of the management with certain (for instance) earn out targets, a termination of the management without cause may accelerate the rights of the terminated manager or, if also a shareholder, may give such manager the right to exercise a put option to sell its participation to the company or the other shareholders.

2.2 Upon implementation of an incentive plan, the rights related to the shares that the management will be entitled to receive are usually subject to vesting. Is there any specific vesting period that is applied in your jurisdiction or is the vesting period

usually linked to a liquidation event (such as an IPO)?

The Brazilian law does not provide any specific vesting period or links such period to a liquidation event. The vesting period and its characteristics are usually established under the relevant incentive plan by the company, in accordance with its understandings and long and short term business plans.

2.3 In certain jurisdictions the management may fall out of labor relationship since it is developing executive duties for the company and/or may hold certain stock of the company (it might fall in a special labor relationship or corporate relationship). Is this the case in your jurisdiction? If so, is the loss of labor rights compensated by special laws or by contractual means?

Under the Brazilian jurisdiction, the management does not have a labor relationship with the company, due to be development of executive duties and powers to represent such company – without any subordination, in principle. Notwithstanding, the Brazilian Labor Courts recognize that if there is subordination in the relationship between the manager and the company, the employment relationship can be recognized even if formally the manager was not under an employment contract, being due the payment of mandatory labor rights and taxes to such manager-employee. This so considered “loss of labor rights” is not compensated by special laws; however, it can be compensated by contractual means, upon negotiation between the management and company. The concept applied by Brazilian labor courts is that what matter to determine whether the relationship is one of management or employment are the facts and Brazilian courts may totally disregard written agreements contrary to the facts.

3. Maturity

After having reached maturity, the business activity and the relationship between the shareholders and the management / key employees tend to become more complex (in particular, intensification of the principal-agent-conflict). The increasing complexity triggers certain hindrances or deterrents for the ongoing activity of the company. In this context:

3.1 In your jurisdiction, do the various corporate bodies (e.g., board of directors, directors, management) have

- ***an obligation to "act in the best interest of the company"? If so, how is the "interest of the company" defined? Is it the interest of all stakeholders (including the interests of all equity holders (e.g., holder of non-voting shares), debt holders, management, employees and public) or just the shareholders? Are only long term interests taken into account or also short term interests?***
- ***"fiduciary duties" or a duty to treat equity holders equally? How are these defined?***

Members appointed to the Board have fiduciary duties according to the Brazilian Corporation Law, such as: the duty of care, the duty of loyalty and the duty to act in the best interests of the company.

The duty of care means that the directors shall perform their responsibilities carefully, and be dedicated and committed to their administrative roles. In this sense, putting in concrete terms, the directors shall: (i) regularly and personally attend the Board meetings; (ii) be well informed about the company and the agenda of the Board meetings (they shall previously exam the merits of the information provided about the agenda); (iii) investigate and inquire the management, consultants, independent auditor or employees if there are motives to disbelieve information provided or facts that suggest the company may be facing problems or be acting illegally; (iv) share with the other directors relevant information regarding decision-making process; and (v) watch and supervise the role performed by the officers.

The duty of loyalty imposes on the directors the obligation to act on behalf of the Company, as well as to preserve the company’s interests. Directors should never seek their personal interests or the interests of the shareholder that appointed them. In addition, it obliges directors to not omit from protecting the company’s interests and not take opportunities that may be interesting for the company. As a consequence of the duty of loyalty, directors shall not intervene in any act, if they have a conflict of interest with the company.

The duty to act in the best interest of the company can be read as the pursuit of its corporate purposes, namely, the maximization of profits, taking into account the public interest and the social role of the company. In this regard, it is important to highlight that the Brazilian law expressly establishes that directors shall preserve the company’s interest, and not the interests of the shareholders who have elected them, whether controlling or minority shareholders. The directors shall pledge allegiance only to the company, whose interests may not be confused with the interests of controlling or minority shareholders.

3.2 In your jurisdiction, how are conflicts of interest addressed by the law? Are the rules on conflicts of interests for listed companies applied to non-listed companies? Have the rules on conflicts of interests become more rigid in recent years?

The Brazilian Corporation Law is applicable both to listed companies, that must necessarily adopt the corporations structure, but also to non-listed companies structured as closely held corporations and may be also applied to limited liability companies which apply the corporation regime residually. The Brazilian Corporations Law provides that Board members that (i) occupy positions in companies that may be considered as competition, and/or (ii) have conflicts of interests with the company, cannot be elected.

Moreover, the referred law also establishes that the management shall not take part in any corporate transaction in which they or a specific member have/ has an interest which conflicts with an interest of the corporation, nor in the decisions made by the other officers on the matter. The officer shall disclose his disqualification to the other officers and shall cause the nature and extent of his interest to be recorded in the minutes of the general meeting of the Board of Directors or Officers.

Notwithstanding the compliance with the provisions aforementioned, an officer may only contract with the corporation under reasonable and fair conditions, identical to those which prevail in the market or under which the corporation would contract with third parties - any business contracted otherwise than in accordance with the such provisions, is voidable and the officer concerned shall be obliged to transfer to the corporation all benefits which he may have obtained in such business.

The conflicts of interest concept also apply to shareholders. Shareholders with a conflict of interest should not vote to approve such matters in which there is a clear conflict. This concept is applied on a more strict on listed companies and not so much to non listed companies.

3.3 In your jurisdiction, is it common to put in place incentive plans for key management and employees or are they only entitled to receive a cash bonus (usually based on individual and overall performance)? Do incentive plans provide tax advantage for the company?

Brazilian law does not foresee special tax regime applicable to stock option plans as it happens in some foreign jurisdictions. Therefore, the tax aspects related to those plans should be analyzed, taking into account their particular characteristics, under the general terms of the individual income tax legislation. Nonetheless, for Profit Sharing Plans it is charged a differentiated percentage for purposes of calculating the individual income tax, in accordance with the rates provided under Brazilian Federal Law # 12,832/2013, which are established considering the amount received by the individual under the provisions of such plan.

Nevertheless, regarding specifically stock option plans and similar incentive plans for key management and employees, as well cash bonus, please note that the Brazilian labor law does not directly regulate such plans or bonuses granted by the employer and, therefore, there is no requirement of registering the plan or obtain its approval with the participation of employees, committees or labor union. This is also the reason why there is some controversy on whether such stock option plans and bonuses should be considered part of the employees' remuneration for the purpose of calculating labor rights and taxes, since cash payments made by the employer are regulated under the labor law. According to the Brazilian Labor Code, payments made to the employee on a regular/frequent basis as part of the employee's compensation will be deemed to have a salary nature and, therefore, should be considered for the purpose of calculating mandatory labor rights and taxes.

On the contrary, Profit Sharing Plans are subject to the labor unions scrutiny and shall follow the provisions of the Brazilian Federal Law # 10,101/2000 for its negotiation and draft. The Profit Sharing Plans can be implemented either through (i) a collective bargaining agreement entered into by and between the employer and the labor union representing its employees; or (ii) the election of an employees' commission with the specific purpose of representing the employees' interests in the negotiations with the Company of a profit-sharing plan. In the case of negotiation through an employee's commission, a member of the employees' labor union must participate in these negotiations from the very beginning. In both cases, the agreement instituting the Profit Sharing Plan must be filed before the union and, in a second step, before the Ministry of Labor. Further, the amounts paid to the employees as profit sharing are not treated as salary and, therefore, these payments are not taken into account for the purpose of calculating the mandatory employment benefits (FGTS contributions, vacation, Christmas bonus) or social security contributions.

4. IPO/ Listed phase

Reaching an IPO is often the pinnacle of private companies which have reached certain growth and have an attractive equity interest. Obviously, the management and employees play a significant role in the IPO / listing process. In this context:

4.1 It is our understanding that when a company goes from a private to a public setting it implies considerable changes for management and employees. In your experience and within this framework, what is the most significant change for management and employees? Does going public usually increase the total amount of the compensation and/or does it usually change the structure of the compensation (cash, shares, warrants, etc.)?

There is not precise data available in either direction. From our experience, the compensation does not necessarily increase as a result of the company becoming listed and going public, but it is common to structure stock option plans as part of the compensation of management in a listed company in Brazil.

4.2 Following the IPO the management is constantly assessed by the performance of the share price. Also the management's pay may to large extent depend on the share price performance. One could expect that management may abstain from taking any steps that are likely to weaken the share price – even if such steps are beneficial to the company in long term. In your jurisdiction, are there any measures that are commonly taken to address this conflict (i.e., incentives for long term strategies)? Is, for example, by law or by agreement a part of the pay paid in mid- to long term options?

As mentioned above, the Brazilian Corporation Law provides for the fiduciary duties of the management, being the officers / managers liable before the company, with functional and patrimonial duties and responsibilities to conduct the corporate business and the common interests of the shareholders.

In case of potential occurrence of losses by virtue of a breach of any of the manager's fiduciary duties before the company, the manager is subject to the applicable sanctions and to compensation of the damages caused. Please note also that managers may be held joint and severally liable for the losses caused due to nonperformance of the duties legally imposed to secure the regular operations of the company. In case of a publicly-held company, this joint and severally liability is restricted to the managers who, by statutory provision, have to perform such duties.

The breach of fiduciary duties subjects the managers to administrative liability, before Brazilian Securities and Exchange Commission (Comissão de Valores Mobiliários – CVM), as well as civil liability and other orders before the judicial courts.

Regarding the administrative liability, CVM has authority to supervise the domestic capital markets, with legitimacy to impose several types of penalties to different market agents who may potentially fail to comply with regulation applicable to them. The penalties always vary according to severity and frequency of "unlawful" conducts ascribed to the respective market agents.

4.3 Is the management and/or employees bound by a mandatory lock up period upon the IPO? In the event the lock up period is not mandatory, please explain the common standards in your jurisdiction towards implementing a lock up period.

The São Paulo Stock Exchange (Bolsa de Valores de São Paulo - the "Bovespa"), in order to increase the transparency of the Brazilian capital markets and protect minority shareholders' rights, implemented, among others, two new initiatives: (i) classification system referred to as "Differentiated Levels of Corporate Governance" applicable to the companies already listed on the Bovespa, and (ii) a new separate listing segment for qualifying issuers referred to as the "New Market." The regulation established by Bovespa for all these different listing segments establishes a lock up period of six months after the IPO – during such period, the controlling shareholder and management cannot sell and/or offer to sell any of the company's shares and derivatives that they owned immediately after the IPO. After this initial lock period, the controlling shareholders and management cannot, for an additional period of six months, sell or offer to sell more than forty per cent of the shares and derivatives of the company that they owned immediately after the IPO. Nonetheless, the company, shareholders and management may also execute lock-up agreements between themselves and/or relevant investors with conditions that are more restrictive than those established by Bovespa. In addition to the above, trading of securities by the management and employees may be restricted by the company due to potential existence of sensitive and privileged information, such as an ongoing renegotiation of the debt of the company or an adverse material fact.

5. Acquisition

In the scenario of the acquisition, it is frequent that the management is essential towards the subsequent development of the company. In this context:

5.1 The focus of the board of directors of a listed company may be set to a large extent on the share price performance. Usually, this should be in line with the corporate interest. However, in case a listed company is being approached by a potential bidder, the board of directors and the management of the potential target may face a conflict of interest: an acquisition that may be beneficial to the shareholders of the potential target, may at the same time require replacement or adjustment of the target's board of directors and management. In your jurisdiction, how is this conflict of interest addressed? For example, are there limits to the defense measures that the board of directors of the target may take?

In Brazil there are no specific provisions regulating expressly the protective measures to prevent takeovers. In foreign jurisdictions, there are innumerous types of measures, nonetheless not all measures can be applied to the Brazilian jurisdiction – it is necessary to previously verify if such protective measure is in accordance with the Brazilian Civil Code and Corporation Law, as well as the laws and regulations applicable to publicly-held companies. Notwithstanding, in the Brazilian jurisdiction the acceptance or rejection of the public offer shall be made through a decision of the shareholders and not the management, which does not have an active role as it happens in other jurisdictions. Therefore, the conflict of interests between management and shareholders, usually identified in North-American corporations, for example, is not so apparent in Brazil.

5.2 Which are the common alternatives in order to keep management / key employees focused and keen to continue in the company?

Long term incentive plans with divided vesting and exercise terms.

5.3 In parallel, is it common to reinforce non-competition and confidentiality undertakings of the management / key employees upon acquisition? Is it common to regulate a non-solicitation by the Seller and that it is enforceable (for which period)?

It is common to reinforce non-competition and confidentiality undertakings of the management and key employees upon acquisition, being, usually, executed Non-Disclosure Agreements with the management and key employees prior to the due diligence for acquisition of the target or during the negotiation and discussions, and Non-Competition Agreements upon the completion of the deal.

However, as mentioned above, due to the fact that a non compete agreement would be a detrimental change to the existing employment contract of a key employee, it may be difficult to enforce the non compete provision in that scenario.

The same does not apply to non compete agreements in relation to the founding shareholders of the company.

The typical non compete period varies, but if the non compete language is written in a reasonable way, it may indeed be enforceable.

It is common to also request non solicitation periods when acquiring a company. More recently, we have also seen non solicitation arrangements included in the pre-due diligence NDA.

D. Interest of advisors / lawyers

1. Startup

During the startup phase, it is one of the most difficult stages to advice companies and/or projects since the company does not have the resources (funds) to implement an appropriate legal scheme and the management/equity holders tend to think in the short term rather than the long term.

1.1 Which are the common difficulties you liaise with during this stage? How do you tend to structure your fees (for example, do you go below your standard rates and agree to have this difference compensated at a later stage when the company has become more successful)?

Typically, we set hour fees based on a fixed fee scheme based on some assumptions and deliverables of the firm to the client.

1.2 In case you accept warrants / rights to shares as compensation for professional services rendered: how do you set the amount or the value of such warrants and rights? Do you rely on valuations of the company? If so, whose valuations? Is it common for an advisor in this situation to request that the company has previously successfully completed a minimum viable product ("MVP") stage which reduces the risk of failure (i.e., as part of the lean startup methodology it is advisable to diminish uncertainty for the project by means of developing an MVP to validate the project)?

In Brazil it is not usual to accept warrants / rights to share as compensation for professional services rendered.

2. Growth

Commonly, it is important to provide appropriate legal advice when the company intends to achieve going from the start-up phase to a growth phase. The role of lawyers and advisors would likely enhance the possibilities to effectively reach a solid growth phase. In this context:

2.1 How do you tend to structure your fees during this stage (in particular, is there a difference in the fee structure as compared to the start-up phase)?

We would typically charge the client on a time spent basis, unless if there is a clear scope for our work.

2.2 Is it common for advisors (in particular, lawyers) to take board positions during this phase? If so, how is such board member compensated? In cash? Or with exclusivity for providing legal services to the company?

Due to a somewhat open concept of succession of liabilities applied by the courts in relation to labor and tax cases, it is not common for lawyers or other advisors to become board members of their clients.

2.3 As the lawyer you may be asked by the entrepreneur to render advice on the division of equity (in particular to FFF)? What is the basis for your advice regarding the division of equity?

2.4 In certain jurisdictions corporate law is rigid and does not allow to regulate certain rights of the shareholders in the by-laws of the company (such as, preferential preemptive rights, drag along or tag along rights). Please explain (succinctly) which is corporate legal scheme that applies in your jurisdiction. Is the shareholders agreement enforceable against third parties in your jurisdiction or is only binding between the relevant shareholders?

The Brazilian Corporation Law establishes that the by-laws of the General Meeting of Shareholders cannot deprive the shareholders of following rights: (i) participate in the company's profit; (ii) participate in the division of the company's assets in case of liquidation; (iii) inspect, as provided for under the applicable law, the management of the company's affairs; (iv) preference rights for the subscription of shares, participation certificates convertible into shares, debentures convertible into shares and subscription bonuses; (v) to withdraw from the company, as provided for under the applicable law. The by-laws and General Meeting of Shareholders cannot, also, establish different rights to the owners of shares of the same class, and elide the means and proceedings or actions that the law provides the shareholders to ensure its rights.

The Shareholders Agreements shall only be observed by the Company when filed in its headquarters, being the obligations and duties arising from the Shareholders Agreement are only enforceable against third parties after its annotation in the corporate books and in the shares' certificates, if issued.

3. Maturity

After having reached maturity, the business activity is much more complex and the interests of the company become more intricate. In this context:

3.1 How do you tend to structure your fees during this stage (in particular, is there a difference in the fee structure as compared to the start-up or growth phase)?

Not really. We would typically charge on a time spent basis, unless if there is a request from the client for a fixed fee arrangement, in which case we will also establish some assumptions and a clear scope of work.

3.2 Are you able to become member of the board of directors of the companies? Do you tend to render more unique advice to companies (while the corporate counsel provides the typical ongoing corporate advice)?

Please refer to item 2.2.

3.3 From a lawyers' perspective, how is the conflict of interest of the management liaised with (are there any mandatory provisions that apply in your jurisdiction)?

Please refer to items 3.1 and 4.2 above.

3.4 Does the anti-money laundering provisions in your jurisdiction have changed the form your render advice?

Brazilian Money Laundering Law was recently amended by the Federal Law # 12.683/2012 aiming to inhibit corruption actions that are commonly practiced. The amendment delegates to individuals the duties of supervising and informing any suspected money laundering conducts, with a mechanism that obligates key economic actors to maintain strict control policies over their operations and clients and to immediately inform the regulatory agencies of any kind of suspicious action. We have informed our clients of such amendments and we are abstaining from directly performing register of foreign investments in the Central Bank of Brazil, indicating brokers that we usually work with to perform such registers in accordance with the client's guidelines.

4. IPO/ Listed phase

Reaching an IPO is often the pinnacle of private companies which have reached certain growth and have an attractive equity interest. It is unlikely that the process of becoming a listed company will be successful without the proper advice. In this context:

4.1 How do you structure your fees for an IPO?

We will typically set a fixed fee or a cap based on assumptions negotiated with the client. The fixed fee or the cap may be split in accordance with agreed phases of the process.

4.2 From a lawyers' perspective, which are the main regulatory aspects of offering equity to the public? Is it common that companies reach this stage (in certain jurisdictions becoming a listed company is less rigid)?

From a lawyers' perspective, offering equity to the public subjects the company to the inspection and disclosure proceedings established by the Brazilian Securities and Exchanges Commission, being necessary to register before such entity with the referred body before any public offers and negotiation with the public. In Brazil, only major players of key markets that need constant investments are organized as publicly-held companies, listed at stock exchange and with publicly negotiated titles – foreign investors generally adopt the limitada (limited liability company) type, since it is less bureaucratic and not subject to the Brazilian Securities and Exchange Commission scrutiny.

4.3 Is there any specific secondary market in your jurisdiction that allows early startup companies to become listed with the aim of obtaining more equity (given the complexity of becoming a public company in certain jurisdictions a startup company can become listed in a specific market which is less rigid and allow it to obtain other sources of financing, among others)?

There is a specific market called Bovespa Mais which is less rigid, but it has not had a lot of success and only few companies have been listed at the Bovespa Mais. Nevertheless, please note that recently, on September 2014, the Brazilian Securities and Exchanges Commission issued the Normative Instruction # No. 55/2014 to encourage companies to perform IPOs – such norm allows the performance of IPOs with restricted efforts to qualified investors, being necessary the broad disclosure of the offer, not being required the prior register of such offer before the Brazilian Securities and Exchanges Commission.

4.4 Does the fact of becoming a listed company imply that the lawyers and/or advisors adjust rates their rates accordingly?

No, we do not think so.

5. Acquisition

In the scenario of the acquisition, it is frequent that lawyers and advisors are highly involved. In this context:

5.1 Which is most frequent scheme of implementing an acquisition (asset deal vs share purchase deal)?

From a corporate standpoint, there are some structures that may be adopted for the acquisition / transfer of a business in Brazil. The decision depends essentially on the analysis of the relevant tax, labor and regulatory aspects. For instance, if there are specific non-transferrable licenses or tax benefits linked to the business.

The acquisition as an asset deal can also be divided into sale of assets individually and a sale of a business enterprise or of a commercial establishment, being the later subject to a specific regulation under Brazilian law (i.e. publish the agreement for the purchase and sale of a commercial establishment in the Official Gazette, as well as filling with the respective Commercial Registry; the seller shall give the purchaser an express approval for him to carry out the activities related to the business previously conducted by the seller; the sellers are liable for debts that have not been duly accounted for in its books and records and, jointly with the purchaser, for the payment of debts during one year counted, for due debts, after the publishing in the Official Gazette of the sale of the commercial establishment, and for other debts from their maturity date).

From a tax perspective, the share deal preserves tax attributes, especially because target tax losses can be carried forward indefinitely as long as there is no change in business after sale. Such NOLs are thus an asset and may even be considered for purposes of attributing a price to the business. On the purchaser's side, a share deal could also allow for premium paid on acquisition to possibly be deductible if the target is merged with the purchaser (either up or downstream). From the perspective of non-resident sellers, the great advantage is that if there are capital gains, such gain is taxed at only 15%, which is a lower rate than that applicable to asset sales made by domestic entities (34%). Additionally, a share deal has the advantage of being easily implemented and there is no interruption of the existing business activities whatsoever. It also avoids any issues with respect to indirect/VAT taxation (such as the State VAT – ICMS and the Taxes on Gross Revenues – PIS/COFINS).Finally, in what concerns succession for past tax liabilities, the purchaser inherit all tax liabilities, materialized or contingent.

On the other hand, in both cases of sale of assets, the deductibility of the price paid by purchaser would generally arise through depreciation (for permanent assets) or cost (for inventory). The sale of each individual asset is usually subject to ICMS, but if the purchase is of an entire establishment such taxation can be avoided. The establishment sale also has the advantage that purchaser inherits the tax books of seller and there is no need to invoice the sale. PIS and COFINS (taxes on gross revenues) would be levied only on the sale of inventory and not of permanent assets, in both cases (sale of establishment and sale of individual assets).

As for succession, in case of both the establishment sale or the individual asset sale, in accordance with the applicable law, any legal entity which acquires, through any legal transaction, the stock in trade or a commercial, industrial or professional establishment, and continues to explore the business, is liable for any taxes due by the seller. The acquirer is jointly responsible if the seller does not continue to explore the business.

5.2 From a lawyers' perspective, which are the main differences within the process of acquiring a stake in listed companies versus private companies?

Acquiring a stake in private companies generally involves directly approaching the quotaholders or shareholders of a closely-held corporation or limitada in order to negotiate and assess the interest of such quotaholders or shareholders in selling their stake in the company. This process comprises due diligence work as to verify the company's regularity and possible contingences and liabilities that will be transferred to purchasers, as well as draft and negotiation of the relevant agreement. On the other hand, to acquire stake in publicly-held companies, in addition to the negotiations and due diligence and draft of agreements previously mentioned, the provisions of the Brazilian Corporation

Law will be applicable, which establishes that the direct or indirect transfer of control of a publicly-held corporation can only be effected under the condition that the purchaser agrees to conduct a public offer to acquire the voting shares owned by the remaining shareholders. The offer price for such shares shall be at least eighty per cent of the amount paid for the voting shares comprising the controlling block. Please note that, according to tha applicable law, the transfer of control shall be understood as the transfer, whether direct or indirect, of shares comprising the controlling block, of shares bound by shareholders' agreements and of securities convertible into voting shares, assignment of share subscription rights and other rights related to securities convertible into shares which may result in the transfer of corporate control, being necessary that such transfer of control is approved by the Brazilian Securities Commission upon the verification of the compliance of the public offer with the applicable legal requirements.

Typically, the process for the acquisition of stake in listed companies would involve phases and different data room schemes with more information on the target as the potential buyer advances in the process, until a binding offer is issued.

5.3 From a lawyers' perspective, which are the main steps in your jurisdiction in order that a public entity becomes a private entity as a consequence of an acquisition?

For a public entity to become a private entity, briefly, it is necessary to cancel the registration of such publicly-held corporation before the Brazilian Securities and Exchange Commisions. The referred registration may only be canceled if the corporation that issued the shares, the majority shareholder or the controlling corporation directly or indirectly makes a public offering to acquire the entirety of outstanding shares for a fair price, at least equal to the appraised worth of the corporation, calculated based on one or more of the following criteria: net assets appraised at market value, discounted cash flow, comparison by multiples, share quotation in the securities market, or another criteria adopted by the Brazilian Securitiesand Exhanges Commission.

5.4 How do you tend to structure your fees during this stage (in particular, is there a difference in the fee structure as compared to other phases)?

Typically, we will charge our fees on a time spent basis and will provide a fee estimate to the client based on some assumptions.