BMA ADVOGADOS

New legislation introduces super-voting shares and other important changes to brazilian companies Law

27.08.2021 7 min read

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The Business Environment Law, Law 14.195, came into force Friday, August 27, 2021. This newest law is part of Brazil's effort to make it easier to do business in the country: one of the federal government's goals is to improve Brazil's standing in the World Bank's *Doing Business* ranking from its current position of 124th. Earlier in the year, the Framework Legislation for Startups, Complementary Law 182, also made changes to the Brazilian Corporations Law, Law 6404/1976.

Law 14.195 results from the conversion into ordinary legislation of Provisional Measure 1040. The legislation contemplates various measures to facilitate doing business in Brazil by reducing the bureaucracy involved in starting a new business and in trading with other countries, and by unifying federal, state and municipal tax identification numbers in the federal register, the CNPJ, for example.

This newsletter, however, deals with the important changes made by Law 14.195 to the Brazilian Corporations Law, and particularly the introduction of multiple-voting shares.

The changes to the **Brazilian Corporations Law** can be divided into three main topics:

Multiple-voting Shares: Companies can now create a class of common shares that carry more than one vote per share. The new "super-voting" shares:

- may be adopted by public or private companies, with the exception of companies that were listed on the stock exchange on the date the Law was published;
- may carry up to 10 votes per share;
- have a term of up to seven years, although the seven-year term can be extended by decision of the shareholders in meeting;
- do not allow their holders to cast more than one vote on resolutions dealing with management compensation or transactions with related parties.

Shareholders' Meetings: The minimum notice for calling general

shareholders' meetings (known as "general assemblies") in public companies is increased from 15 to 21 days, and the approval of shareholders is now needed for transactions with related parties, and sale or contribution of material assets; and
Management: Non-residents may now be appointed as officers of Brazilian companies. Public companies are now required to have independent members on their boards, in accordance with regulations to be adopted by the CVM, Brazil's securities commission, and the same person may not hold the positions of CEO and Chair of the Board of Directors – a requirement that already existed on the Novo Mercado and Nível 2 segments of Brazil's stock exchange, B3.

Except for the prohibition against the same person being both CEO and Chair of the Board of Directors, which comes into effect 360 days from publication of the Law, all changes to the Brazilian Corporations Law have immediate effect.

Without entering into the merits of the changes, we are concerned that sweeping changes to the law governing Brazilian corporations have been made by a Provisional Measure – which should be used only for urgently-required changes to the law – without the necessary opportunity for debate and reflection on the implications of the new legislation.

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Multiple-voting shares

The new legislation allows corporations (*sociedades anônimas*) to issue shares carrying more than one vote, reversing the prohibition against multiple-voting shares established by Decree-Law 2627/40, the legislation that preceded the current Brazilian Corporations, Law 6404/1976. Multiple-voting shares allow their holders, who are generally the entrepreneur or group that started up the business, to maintain control of the business even with a reduced shareholding.

The legislation's objective is to give greater freedom to Brazilian companies in how they structure their capital, bringing Brazilian rules closer to the reality in the United States, where an ever-greater number of listed companies, principally in the technology sector, have adopted "super-voting shares" for their founders. In fact, a number of significant Brazilian companies have opted to list in the US because they could adopt a leveraged control structure, among other reasons. The introduction of multiple-voting shares is intended to contain this exodus and make the Brazilian stock exchange more attractive to entrepreneurs who do not want to lose control of their business after going public, or who wish to imprint their particular vision of how the business should develop.

With multiple-voting shares, a shareholder holding 10 votes per share can control the company with a shareholding representing a little more than 9% of the company's capital, if the company issues only common shares. In a scenario in which the company has issued an equal number of common and non-voting preferred shares, a shareholder holding shares carrying 10 votes can retain control with less than 5% of the company's capital stock.

The main rules and limits on multiple-voting shares under the newly-amended Corporations Law are listed below:

- Multiple-voting shares are available **to private companies**, and to **public companies** that create the shares **before going public**;
- **One or more classes** of common shares can be multiple-voting;
- There is **a limit of 10 votes** per share;
- Multiple-voting rights can be subject to a term or a condition, but the initial term is **limited to seven years, which may be extended for any length of time** (including periods longer than seven years);
- The creation of multiple-voting shares and the extension of the original term of such shares must have the **approval by an absolute majority of all shareholders, voting and non-voting**, if a greater majority is not established in the company's bylaws. Holders of multiple-voting shares may not vote on the extension of the term of their multiple votes;
- Multiple votes **are not available for resolutions on management's compensation or transactions with related parties**;
- **Shareholders who dissent** from the resolution to create or extend multiple-voting shares **may exercise appraisal rights** and withdraw from the company, unless the bylaws already provided for their creation or extension;
- After the company goes public, the features of **multiple-voting shares may only be altered to reduce the rights attached to the shares**;
- **Mergers** between public companies without multiple-voting shares and companies with multiple-voting shares **are prohibited** if the multiple-voting shares survive the merger; likewise, a corporate split in a public company without multiple-voting rights may not result in a company with multiple-voting shares;
- **Multiple-voting shares may not be transferred or traded** and are automatically converted into ordinary common shares on (i) transfer to third parties (unless the transferor continues, indirectly, to be the sole holder of the shares, the transferee holds shares of the same class, or the transfer is fiduciary in nature, made to transfer custody to a central depositary institution) or (ii) the making of an agreement for joint exercise of the voting rights attached to shares with and without multiple votes;
- **State-owned companies** (including subsidiaries and mixed-economy companies) and limited partnerships with capital stock (*sociedades em comandita por ações*) **may not have multiple-voting shares**;
- To make multiple-voting shares effective, the quorums for doing business and majorities for approval of resolutions, along with the presumption of significant influence held by shareholders, which were formerly fixed in function of *voting capital*, are now determined on the basis of the *quantity of votes*.

Although the new legislation allows companies to adopt multiple-voting shares, and gives them some leeway to determine how to structure their capital stock and voting rights, it also imposes various limits to protect minority shareholders, adding safeguards to those already contained in the

Corporations Law.

Given the various possibilities and implications of multiple-voting shares, depending on the circumstances of each case, we recommend that entrepreneurs, companies and investors conduct a very careful analysis before adopting super-voting shares, or investing in companies that have issued them.

Shareholders' Meetings

The minimum **notice of general shareholders' meetings** (known as "general assemblies") **in public companies is increased from 15 to 21 days**, at first call. This change was needed to increase Brazil's score in the Doing Business ranking. The Provisional Measure on which the new legislation is based contemplated 30 days' notice, and in fact the legislation still provides that the CVM can adjourn meetings for up to 30 days if the information provided to the shareholders is insufficient. This provisions seems to be left over from the original text, since it does not have a logical relationship to the new period of 21 days. Notice of 30 days is still required for shareholders' meetings where shareholders can vote by proxy form – and proxy forms (or BVDs – *boletime de voto a distância*, as proxy forms are called in Brazil) are required for annual general meetings.

For **public companies, the matters that fall within the exclusive jurisdiction of the shareholders in general meeting, now include "transactions with related parties, disposal or contribution of material assets**, if the value of the transaction is greater than 50% of the company's total assets".

Management

The new legislation makes three notable changes that affect corporations' management:

- **Persons resident outside Brazil may be appointed as officers**, although they must appoint an attorney-in-fact to receive service of process in Brazil. Formerly, only members of the board of directors could be non-residents.
- In public companies (except "smaller" companies, within gross annual revenues of less than BRL 500 million, if exempted by the CVM), **the same person may not hold the positions of chief executive and chair of the board of directors**. In this, the new legislation reflects the listing rules for the segments of B3 that require higher levels of corporate governance, although B3's rules expressly allow the two positions to be held by one person exceptionally, for no more than one year.
- In public companies, **the board of directors must have independent members**, on terms to be defined by the CVM. Here again, the law was inspired by the listing rules for B3 segments requiring higher standards of corporate governance, but it remains to be seen to what extent the legal parameters will actually mirror B3's.

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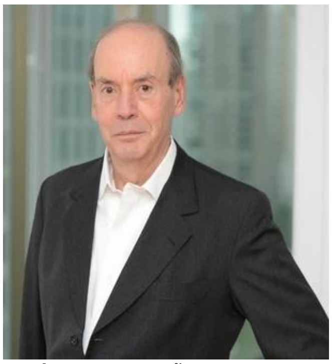
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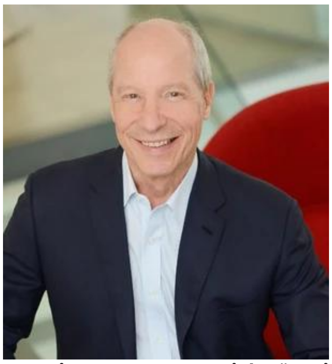
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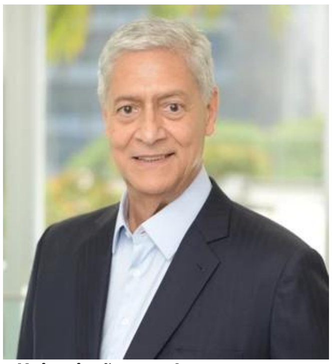
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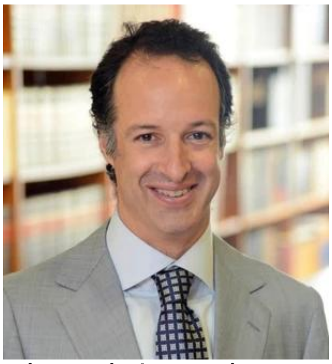
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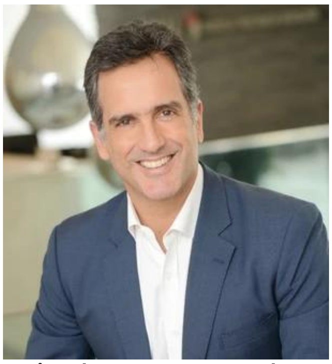
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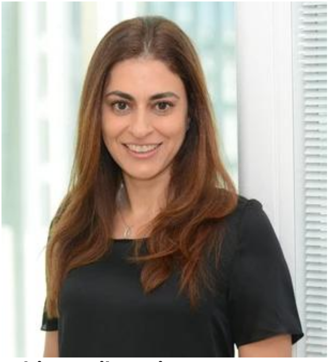
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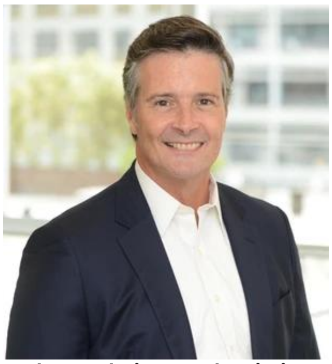
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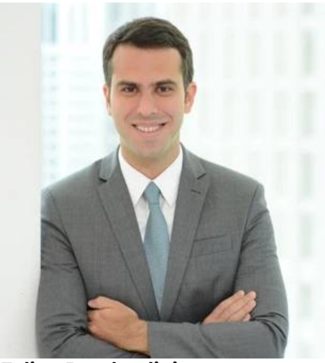
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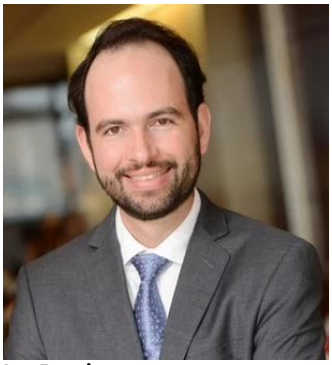

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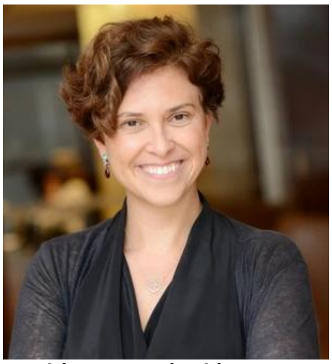

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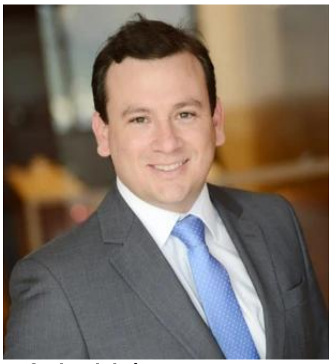

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