BRAZIL - FORMS OF ASSOCIATION

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FORMS OF ASSOCIATION

1. General Aspects

The Brazilian legal structure provides for forms of association whereby parties may form corporate entities and other forms of incorporation do not imply corporate structure. The latter group includes consortia and other forms of legal businesses whereby parties do not relinquish their status as individuals.

Incorporation of a company, on the other hand, entails a written agreement, either private or public, in which the contracting parties express their aims either individually or as a partnership ("sociedades personificadas" or "não personificadas"). The latter include "sociedades em comum" and "sociedades em conta de participação".

The law attributes corporate status to such companies upon registration with the competent pubic registry office, which thus become legal entities, with distinct liability to that of their partners.

Brazilian law also provides for associations, foundations and co-operatives. Such forms of association are not-for-profit, either due to their charitable nature or in the light of their particular characteristics and aims, and are thus different from commercial organizations, regardless of whether the generate revenues.

It should be stressed that all the types of company foreseen under Brazilian legislation, apart from joint stock companies ("sociedades anônimas"), may function either as 'simple' companies ("sociedades simples") or business corporations ("sociedades empresariais") however, this should be expressed in their articles of incorporation at the time of their founding. Companies ("Sociedades simples" must be registered the Civil Registry of Corporate Entities, whereas business corporations ("sociedades empresariais") must register with the board of trade.

1.1. "Sociedade Anônima" (S/A)

A joint stock company ("Sociedade Anônima" or "Companhia"), as described in article 1.088 of Brazilian Civil Code and Law 6,404 of 15 December, 1976, partiallyamended by Law 9.457 of 5 June, 1997, and by Law 10.303, of 31 October, 2001,is fundamentally a legally constituted business corporation, with capital stockrepresented shares. The principal purpose of companies it to generate profits for distribution among the shareholders.

A "Sociedade Anônima" is identified by a name, followed by the words "Sociedade Anônima", in full or abridged to "S/A"; or preceded by the word Companhia, or abridged to "Cia". The corporate name may consist of a name (e.g. of the founder or a distinguished forbearer). The corporate name may describe corporate aims or activity out, however, such a description is not mandatory.

There are two kinds of S/As: publicly traded companies which obtain funds through public offerings and subscriptions and are supervised by the Brazilian Securities Commission ("CVM"); and a closed capital companies which obtain the shareholders own capital or that of subscribers, in which case the accounting and administration is simpler.

Capital stock is represented by securities known as shares. Depending on the nature of the rights or advantages that these conferred upon their holders, shares may be common, preferred or fruition shares.

Aside from essential rights, common shares confer upon their bearers voting rights; whereas preferential shares, though they entitle their bearer to special rights, may grant or suppress voting rights. Fruition shares confer the bearer the right to continue participating in the corporate profits of ordinary or preferential shares, even upon their amortization, without reduction in capital.

By means of a Shareholder's Agreement, the shareholders may decide issues relating to purchase and sale of their shares, establish preferential acquisition rights, or exercise voting rights. All obligations set forth in Shareholders Agreement are binding, and must be respected by the Company.

A "S/A" may be managed by its Board of Directors and Administrative Council, or exclusively by a Board of Directors, as determined in Law or in its Bylaws. An Administrative Council is a collegiate decision-making body. Such councils are optional for closed-capital corporations, and mandatory open-capital or authorized-capital corporations. The Administrative Council must be comprised of at least three members, who must be individual shareholders, resident or nonresident in Brazil.

The Board of Directors is the executive body of a "S/A". It is responsible for representing the company and ensuring its regular operation. The Board is composed of no less than two directors, that may or may not be shareholders, who must be individuals residing in the Brazil, elected for a maximum term of three years.

The shareholders may supervise corporate management by means of the Fiscal Council. The principal purpose of the Fiscal Council is to oversee company's accounts and management. Such supervision may be permanent or periodic. Installation of a Fiscal Council reflects the desire of the shareholders to ensure more stringent control over corporate management. It should comprise no less than three and no more than five members, each with a substitute, who may or not be shareholders, elected by the General Meeting. In certain cases, members of a Fiscal Council represent specific categories of shareholders.

1.2. "Sociedade Limitada" (LTDA)

Articles 1.052 to 1.087 of the Civil Code provide for Limited Liability Companies ("Sociedade Limitada"). These may take the form of a simple company ("sociedade simples") or a business corporation ("sociedade empresária"), depending upon their corporate aims, and type of business.

A "LTDA". is organized through the Articles of Association and has limited liability partners. Since every partner has its responsibility limited to the value of their shares, all of them are jointly liable for the payment of the capital stock. Under the New Civil Code, the structure of companies must include the Meeting of Shareholders, the Management, and an Audit Committee as established by the partners in the articles of association. The meeting of shareholders is the main decision-making body of a corporate organization, which meets whenever the law or the articles so require. The management is carried out

by one or more individuals, who may or not be shareholders, nominated in the articles of association which also specifies their terms of office.

The capital stock is divided into shares. Each share represents an amount in money, credits, rights or assets which a shareholder contributes toward the formation of the company's capital. Shares must be registered and are not represented by securities. As the ownership and the number of shares are written in the Articles of Association, any transfer of such shares requires an amendment.

At the meetings of shareholders, changes resulting in modification to the articles of association or reorganization company's Bylaws require favorable votes representing at least three-fourths 3/4, of the capital stock.

Rules Common to Both "S/As" and "LTDAs".

Corporate operations involving transformation, mergers, consolidation or split up may be formalized either by "S/As" or by "LTDAs.", under the terms of Articles 1.113 to 1.122 of Law 10.406, of 10 January, 2002 (Civil Code), and articles 220 to 234 of Special Law 6.404, of 15 December, 1976 (the "S/A" Law).

Transformation is an operation whereby a given company, without dissolving, changes its corporate classification. In this process, the company must observe a form corresponding to the new classification.

Acquisition ("incorporação") is an operation whereby one or more companies are absorbed by another, which then assumes all in all their assets and liabilities. Merger ("fusão") is an operation whereby two or more companies amalgamate, with the aim of forming a new company which then assumes all in all their assets and liabilities of the now extinct former companies.

A split up ("cisão") is an operation whereby a company transfers parts all its net equity to one or more existing or specially formed companies, resulting in the extinction of the parent company in the event that it has transferred all its net equity, or reducing of its capital, if it transferred on only part of its net equity.

1.3. Other Types of Companies and Forms of Association

Owing to partial or unlimited liability, the other types of company are uncommon, but may become attractive under certain business circumstances. There follow brief outlines of some of these types of companies.

1.3.1. "Sociedade em Comandita Simples" or "Sociedade em Comandita por Ações"

A Limited Co-partnership ("Sociedade em Comandita Simples") or a limited partnership by shares ("Sociedade em Comandita por Ações") may have two classes of partners: those with unlimited liability, who are responsible for the corporate management and representation, known as full partners ("comanditados"); and those whose responsibility is limited to the value of their shares, known as silent partners ("comanditários").

In "sociedades em comandita simples", the participation of "comanditados" partners represented by corporate shares, however liability is governed by the rules of "sociedade em nome coletivo". Thus the liability of partners is unlimited and shared.

"Sociedade em comandita por ações" is governed by articles 1.090/1.092 of Brazilian Civil Code and by a special chapter of the Law of Companies by shares and has, for both types of partners, its corresponding interests represented by shares.

1.3.2. "Sociedade em Nome Coletivo" (General Partnership)

The relevant corporate feature of the General Partnership is the partners' unlimited liability vis-à-vis the company's debts. Thus, all partners are jointly liable with the company for its liabilities before third parties. However, the partners' assets cannot be executed until all the company's assets have been exhausted.

Responsibility for the management of the company falls on all of the partners, as long as the Articles of Association does not specifically determine which partner will have this responsibility.

The company's name may be the full name of one or more partners, adding the expression "& Cia." if other partners' names should be omitted.

1.3.3. "Sociedade em Conta de Participação" - SCP

A "Sociedade em Conta de Participação" (SCP) is a joint venture agreement entailing a partnership with one ostensible and one unidentified partner. Such partnerships are unincorporated, i.e., they have no corporate status even if registered.

Since such joint ventures are formed exclusively for the purpose of a specific undertaking, they exist for a determined period of time, specifically for execution of predetermined transactions.

Aside from the ostensible partner, there may be 'hidden' partners, which contribute capital or other inputs toward the undertaking. Their liability is exclusively toward the ostensible partner, pursuant to the corresponding articles of association, which also records their status as creditors. In the event of bankruptcy of the ostensible partner, the hidden partners have no priority or preference rights.

Establishment of an SCP is not subject to formalities other than registration of its articles of association, and is acceptable under Brazilian legislation. It thus constitutes a partnership existing among the parties, with no relation to third parties. Third parties deal exclusively with the ostensible partner, who bears full responsibility for all such dealings.

Management of an SPC is the exclusive responsibility of the ostensible partner, who assumes liability for the company's business and must, upon conclusion of the undertaking, present accounts to the other partners.

1.4. "Consórcio"

Strictly speaking, the word "consórcio" means union, combination, association or consortium. In the context of Brazilian corporate legislation, however, a "consórcio" is an association among two or more companies for the purpose of pursuing a specific project. The parties thus preserve their corporate identity, while pooling their efforts to achieve specific objectives.

Although based upon a contract, the resulting consortium does not have corporate standing, since the parties only bind themselves under the terms of the consortium agreement. Each party is liable for its specific obligations as established therein, without presumption of joint liability before third parties, except in regard to labor relations.

If the parties to the consortium are "S/As", the consortium agreement must be approved by their general meeting. If they are not "S/As", the consortium agreement must be registered before the competent authorities. The consortium agreement must contain the following items:

- **name of the consortium, if any;**
- **objectives of the consortium;**
- **duration, address, and legal venue of the agreement;**
- **determination of the participating companies' obligations and commitments;**
- **rules for receipt and distribution of profits;**
- **management and accounting policies, shares of each of the participating companies, and administrative charges, if applicable;**
- **rules for deliberation, and voting rights of each participant; and**
- **dues of each participant towards expenses of the project, if applicable.**

The consortium agreement and any subsequent amendments must be filed before the Board of Trade in whose jurisdiction the head office is located. Upon filing of the consortium at the Board of Trade, a certificate must be published in the State or Federal Official Gazette ("DOU"), and in a newspaper with large circulation.

2. Registration Process

In Brazil there are two types of public registry for companies: (i) Commercial Registry, intended for the filing of activities of business companies (including registration of individual companies and the of subordinates of the individual partner and other agents), effected at the State Board of Trade; and (ii) Civil Registry, intended for the registration of the acts 'simple' companies ("sociedades simples"), effected at Civil Registry of Corporate Entities, which have jurisdiction within specific court districts.

2.1. Registration of Companies

Commercial Registry is effected by the Boards of Trade in each state, and is compulsory for self-the employed and for business corporations engaged in business activities that entail production or circulation of goods and services The law defines all "S/As" as business companies. Aside from these, any general partnership ("Sociedade em nome coletivo"), limited co-partnership ("Sociedade em Comandita Simples"), or LTDA ("Sociedade Limitada"), provided that its purpose is the pursuit of economic activities through production or circulation of goods or services, performed by means of a corporate structure, must register with the Board of Trade in the state where it operates or where it may open branches. The form chosen, along with a characterization of corporate aims must be clearly and accurately enunciated in the registration of the company with the Board of Trade or Civil Registry of Corporate Entities. The filing of the Articles of Association of a "S/A" must be accompanied by the following documents:

- **Articles of Incorporation or Minutes of the General Incorporation Meeting, listing the particulars of the subscribers and proof of payment of the entire capital stock;**
- **Bylaws signed by all subscribers;**
- **Report on the subscribed capital, signed by the founders or by the Secretariat of the General Meeting, containing full name, nationality, marital status, profession, residence and domicile of subscribers, in addition to the number of subscribed shares and the amount paid;**
- **Power-of-attorney of any foreign resident shareholder, signed before a Public Notary in the country of origin, stamped by the Brazilian Consulate, translated by a public sworn translator in Brazil and registered at the Public Notary Office.**
- **Documentary proof of partners resident abroad;**
- **Photocopies of Identity cards of elected directors and board members;**
- **Forms duly filled out with data on the company and its shareholders, accompanied by proof of payment of all charges due for filing.**

For all business companies, the filing of incorporation documents and any subsequent amendments must be effected at the Board of Trade in the jurisdiction of the company's head office, accompanied by a petition signed and dated by a partner, attorney, or other duly authorized person.

A request to file articles of incorporation of a business company with the Board of Trade must be accompanied by the following documents:

- **Three original copies of the Articles of Association signed by all the partners and two witnesses;**
- **Tenor or certificate, when the articles of association has been entered into by a public deed;**
- **Certified photocopy of each partner's identity card;**

- **Power-of-attorney from partners resident or incorporated abroad, signed before a public notary in the country of origin, stamped at the Brazilian Consulate, translated by a public sworn translator in Brazil and registered at a Brazilian Deeds and Documents Registry Office;**

- **Documentary proof of existence of any foreign partner resident abroad;**

- **Personal declaration signed by each partner or manager of the society that He is not prevented from engaging in commercial activities, which may be made in the articles of association themselves or in a separate document;**

- **forms with data on the company and its partners, duly filled out, accompanied by proof of payment of filing fees.**

2.2. The Civil Registry of Legal Entities

A 'simple' company ("sociedade simples") , one that has not adopted the structure of a S/A or other types that do does not engage in commercial activities, must register at the Civil Registry of Corporate Entities.

To register a 'simple' company a petition must be addressed to the Civil Registry, accompanied by the following documents:

- **articles of incorporation or corresponding amendments thereto, duly signed by its partners;**

- **certified photocopies of the identity documents of the partners;**

- **a proxy granted by foreign resident partners, signed before the Public Notary of his country of origin, stamped at the Brazilian Consulate, translated by a public translator in Brazil and registered at the Public Notary's Office in Brazil.**

The Articles of Association of a 'simple' company ("sociedade simples") may only be filed at the Civil Registry of Corporate Entities after having been duly certified by a lawyer.