

The International Bar Association Company Director Checklist – Brazil

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Item	Number	Check	Item	Number	Check
Before appointment					
Items to understand	1	<input type="checkbox"/>	Potential liability	16	<input type="checkbox"/>
People to meet with	2	<input type="checkbox"/>	Duration of duties	17	<input type="checkbox"/>
Documents to review	3	<input type="checkbox"/>	Special circumstances		
Ongoing duties					
Points for attention	4	<input type="checkbox"/>	Bankruptcy	18	<input type="checkbox"/>
Legal status of directors	5	<input type="checkbox"/>	Takeover bids	19	<input type="checkbox"/>
Parties to which duties are owed	6	<input type="checkbox"/>	Market abuse/insider dealing	20	<input type="checkbox"/>
Powers of directors	7	<input type="checkbox"/>	Defences		
Duty of loyalty	8	<input type="checkbox"/>	Good corporate governance	21	<input type="checkbox"/>
Duty of care	9	<input type="checkbox"/>	Minutes of board meetings	22	<input type="checkbox"/>
Duty to have and maintain skills	10	<input type="checkbox"/>	Discharge and indemnification	23	<input type="checkbox"/>
Additional duties (confidentiality, etc.)	11	<input type="checkbox"/>	Insurance	24	<input type="checkbox"/>
Delegation of powers/authority	12	<input type="checkbox"/>	Resignation	25	<input type="checkbox"/>
Conflicts of interest (inc. intragroup dealings)	13	<input type="checkbox"/>	Restructuring of assets	26	<input type="checkbox"/>
Compliance with statutory obligations	14	<input type="checkbox"/>	ESG and D&I policies, metrics	27	<input type="checkbox"/>
Disclosure obligations	15	<input type="checkbox"/>			

Introduction

This checklist is intended to serve as a practical guide to the main duties and obligations of the directors of:

- listed public companies in Brazil, listed on a regulated market, i.e. B3)
- arising from the Brazilian corporate laws, namely:
 - The Brazilian Civil Code (Law No. 10,406/02)
 - The Brazilian Corporations Law (Law No. 6,404/76)
 - For public companies, the regulations of the Brazilian *Comissão de Valores Mobiliários* (“CVM”)

If any specifics of listed public companies are relevant, see the third column of this checklist below.

Disclaimer

This checklist is informational in character only and is not intended to be comprehensive in all respects or to serve as a substitute for professional advice. In all cases, however, specific legal advice should be sought. This checklist was last updated on 23 March 2022.

DUTIES AND OBLIGATIONS OF THE DIRECTORS			
	Action/issue	Specifics of listed public companies (if relevant)	Comments/notes
Before appointment			
1. Items to understand	<ul style="list-style-type: none"> scope of the company's business activities set forth in the corporate documents and which are currently developed current corporate and management structures company's current financial and economic situations time commitment required company's corporate governance framework requirements and prerequisites for serving as a member of the Board of Directors 	<ul style="list-style-type: none"> CVM regulations B3 listing requirements B3 special listing segments rules, if applicable 	<ul style="list-style-type: none"> Prior to taking office, you will need to formally declare that you fulfill the statutory requirements. Is the industry sector/company's business activity one that you are familiar with? Are you expected to be an industry expert? Consider if joining the board would place you in a position of conflict (see section 13 herein). Consider if the proposed compensation package meets with your expectation in terms of what will be expected of you in terms of time, skills and expertise. Note that the global amount that may be employed as compensation for a company's management must be approved by its shareholders' meeting (usually yearly, during the annual shareholders' meeting). Listed companies are subject to additional disclosure obligations pursuant to CVM regulations.
2. People to meet with	<ul style="list-style-type: none"> officers other directors company's advisors (external and internal) members of the company's Fiscal Council (<i>Conselho Fiscal</i>), if applicable company's auditors (external and internal - audit committee), if applicable 	<ul style="list-style-type: none"> Investors relations team 	<ul style="list-style-type: none"> Ascertain if there has been change in company auditors in recent years and the circumstances in which the change was made. Ascertain if there have been any queries from regulatory authorities and the circumstances giving rise to such queries. Ascertain if your inclusion on the board will change significantly the composition and independence of the board.

3. Documents to review	<ul style="list-style-type: none"> • company’s articles of association or bylaws • recent board minutes and other board documents, including its internal rules • recent minutes from the company’s shareholders’ meeting • company’s annual and, if applicable, quarterly financial statements • company’s business plan and corporate strategy • company’s D&O, and indemnity agreements for officers and Directors, if any • press releases 	<ul style="list-style-type: none"> • Main CVM regulations • B3 listing requirements • B3 special listing segments rules, if applicable 	<ul style="list-style-type: none"> • Consider how often the board meets, how are the meetings held, ascertain the issues raised, and how decisions are taken • Consider also the proposals for reform (if any) or other potential changes in the company • Consider the company’s current financial position and its financial track record over the past three years • Ascertain whether there has been any change in accounting policies or practices • A director faces exposure to personal liability. It is therefore very important to review and assess the adequacy of the company’s directors’ and officers’ insurance arrangements that are in place
Ongoing duties			
4. Points for attention	<ul style="list-style-type: none"> • How are decisions made within the company? Which assisting committees exist? • Satisfy yourself as to the internal regulation of the company and the corporate governance framework 	<ul style="list-style-type: none"> • Has the company being recently notified by CVM due to alleged breach of legal or regulatory duties or obligations? If so, what were the steps taken to avoid similar future incidents? 	<ul style="list-style-type: none"> • Understand how the board works in practice and if independent judgement is truly encouraged • Consider if the company has a culture of candor, transparency and voluntary disclosure • Understand the company’s accounting policies and practices
5. Legal status of directors	<p>The basic duty imposed on you is to serve with the due care of a prudent manager and with necessary loyalty.</p> <p>In addition to having to comply with the duties imposed on the directors by law, you must comply with the company’s internal governance structure set forth in its bylaws, while also observing rules set forth on</p>		<p>The Board of Directors is tasked with overseeing the overall management of the company, with powers to request documents and information for this purpose.</p>

	shareholders' agreements regarding Board of Directors and shareholders' resolutions.		
6. Parties to which duties are owed	<p>Generally, the directors owe their duty to serve with the due care of a prudent manager to the company itself and its shareholders.</p> <p>In case of breach of fiduciary duties, the Director can be removed from office and will become liable for damages caused to the company.</p>	Directors of listed companies are subject to CVM regulations and may be subject to sanctions in case of breach of legal obligations (including fiduciary duties).	Directors are appointed by the shareholders' meeting.
7. Powers of the board of directors	<p>Generally, the board of directors are empowered to manage the course of company's business and oversee its management. Directors may not represent the company towards third parties (enter into agreements etc.), which can only be done by officers.</p> <p>The company's officers are appointed and removed by decision of its Board of Directors.</p> <p>In addition to competences set forth in law, the company's by-laws may grant the Board of Directors authority to decide on certain matters (e.g. disposal of assets with an amount exceeding a certain threshold, approving the company's management structure).</p>		In principle, directors' powers may not be delegated . They may rely on assisting bodies in their decision-making process.
8. Duty of loyalty	You are required to act in the best interest of the company and refrain from acting in situations involving a conflict of interest (see item 13 below).		
9. Duty of care	<p>You are required to:</p> <ul style="list-style-type: none"> • act responsibly, prudently and dutifully; • make informed and thoroughly considered decisions; 		The duty to act thoroughly (with duty of care) is closely associated with the duty to be informed.

	<ul style="list-style-type: none"> • recognize threatening damage and avoid engagement of the company in any unnecessary risks). 		
10. Duty to have and maintain skills	<p>There is no express legal duty for a director to have or maintain certain skills, although, in order to properly fulfill their fiduciary duties (in particular the duty of care), it is expected from a director to possess the necessary foundations to act diligently (including a minimum knowledge) and initiative to seek assistance from third parties for matters that are not within the director's abilities.</p>		
11. Additional duties (confidentiality, etc.)	<p>A director is obliged to maintain confidentiality of all the confidential information and facts, the disclosure of which to third parties could cause damage to the company (incl. the company's trade secrets and know how).</p> <p>Furthermore, you have to:</p> <ul style="list-style-type: none"> • comply with all the conflict-of-interest rules; • cooperate with and comply with your obligations vis-à-vis other competent corporate bodies/entities; • duly manage and conduct the internal corporate issues, including calling shareholders' meetings • fulfil the company's obligations vis-à-vis its shareholders. 	<p>The duty of confidentiality is particularly important in the case of public companies, since a breach of such duty involving a material information may impact the company's share price.</p>	

12. Delegation of powers/authority	Directors are not allowed to delegate to third parties powers attributed to them under law or the company's bylaws. Directors may rely on third party opinions in their decision-making process, although such reliance will not relieve the directors from their fiduciary duties.		
13. Conflicts of interest (inc. intragroup dealings)	If a director understands that their interests may conflict with the company's, such director must: <ul style="list-style-type: none"> • refrain from participating and voting in the relevant matter; and • formalize in the minutes of the relevant meeting of the Board of Directors the nature and extent of the conflict. 		Breach of the rules governing conflict of interest will cause the relevant director to be liable for any losses caused to the company.
14. Compliance with statutory obligations	A director must act with the due care of a prudent manager and, hence, is generally responsible for the company's compliance with all applicable legal obligations.		
15. Disclosure obligations of listed companies	Although not primarily responsible for ensuring that material information is properly and timely disclosed to the market, a director is responsible for generally overseeing the management of the company and compliance with applicable legal rules (including disclosure requirements).	Listed companies are subject to broader and more specific disclosure obligations, which are enforced also by CVM and B3.	
16. Potential liability	In the case of a breach of the duty to act with the due care of a prudent manager or other obligations related to the directors' service, a director can be held liable for losses caused to the company.		Unintended consequences arising from a decision usually only give rise to a director's liability in case the decision-making process was conducted without consideration to the applicable fiduciary duties.

<p>17. Duration of duties</p>	<p>A director is deemed to be a member of the company's body with duty of loyalty for the entire period from the appointment to the office until the discharge/resignation from office.</p> <p>The company may seek indemnification from directors within 3 years following the shareholders' meeting in which the accounts of such directors are reviewed by shareholders.</p>		<p>Shareholders' approval of the management accounts generally releases managers (including directors) from their liability. However, such approval may be annulled, and, in this case, indemnification may be sought.</p>
Special circumstances			
<p>18. Bankruptcy</p>	<p>Directors must act accordingly to their fiduciary duties in case of bankruptcy and cooperate with other management bodies.</p>		
<p>19. Takeover bids</p>	<p>Directors must ensure that the company's interest are sought in case of a takeover bid, negotiating the terms of the relevant tender offer, if necessary.</p>	<p>Takeovers are regulated by CVM. Its precedents also provide important standards and interpretations applicable to such situations.</p> <p>The rules of B3's special listing segments set forth that the Board of Directors must provide an opinion on the relevant tender offer, with a minimum set of points that must be addressed.</p>	
<p>20. Market abuse/insider dealing</p>	<p>Market abuse and insider trading may subject the relevant director to both civil and criminal liability.</p> <p><u>Civil</u> In addition to the general prohibition to use undisclosed material information when trading securities, directors (as primary insiders) are also subject to a set of specific rules governing trading securities.</p> <p><u>Criminal</u></p>		

	In case of willful misconduct, market abuse and insider trading may also constitute a crime.		
Defences			
21. Good corporate governance	The directors are in charge of the general overseeing of a company's business management. Therefore, they are expected to play an active role in setting up and monitoring the company's governance structure.	The information and publication duties are much broader in case of listed companies. B3 listing rules also provide additional governance requirements.	
22. Minutes of board meetings and publication requirements	<p>All board meetings must be recorded in minutes. The procedures for conducting the meetings and drawing up the relevant minutes are usually set forth in the internal rules of the Board of Directors.</p> <p>All minutes are kept in the company's corporate books. Minutes containing resolutions which effects must be enforceable against third parties (e.g. appointment of officers) must be published and registered with the Board of Trade.</p>	In addition to being published and registered with the Board of Trade, minutes containing resolutions which effects must be enforceable against third parties must be disclosed in the websites of CVM and the company.	
23. Discharge and Indemnification	<p>Directors are liable toward the company for damages caused in breach of their fiduciary duties.</p> <p>The review of management accounts for each fiscal year, carried out in the annual shareholders' meeting, generally releases (if approved) managers from liability. This decision may be annulled afterwards in case a breach has been identified.</p>		
24. Insurance	There is no requirement for a company to hire liability insurance or D&O insurance.	For listed companies, it is rather common for companies to provide D&O insurance as part of the benefits package offered to its managers. Certain companies also provide additional Indemnity agreements. Both benefits must be disclosed to the market according to CVM regulations.	

25. Resignation	<p>A director may resign from office without being obliged to state the reasons for doing so. Resignation is usually implemented by delivering a resignation letter to the remaining company's managers.</p> <p>The term of office ends on the date on which the resignation is delivered to the company. To be effective against third parties, however, the resignation must be registered with the Board of Trade.</p>	<p>Listed companies are subject to disclosure obligations governing changes in its management.</p>	
26. Restructuring of assets	<p>Similarly to bankruptcy proceedings, directors are expected to act according to their fiduciary duties in case of a restructuring, including assisting in the preparation of the restructuring plan.</p>		
27. ESG and D&I policies, metrics, reports	<p>Brazilian law does not provide for any specific obligations regarding ESG policy, although certain rules applicable to companies in general may be considered as part of a broad ESG framework (e.g. rules prohibiting discrimination).</p>	<p>Listed companies must prepare an annual questionnaire on corporate governance, including certain ESG-questions. This questionnaire adopts a "comply or explain" approach.</p>	