Limited liability company – LLC

Some major differences between Brazil and the US legislation

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Abstract: This article draws a parallel between limited liability company – LLC in Brazil and the US –, from a regulatory perspective, based just on a study of compared legislation: the Civil Code, in Brazil, and the Revised Uniform Limited Liability Company Act – RULLCA, in the US. The scope is to highlight some major differences between these legal systems when dealing with the same issue. In the end, I expect that this study helps to identify pros and cons of the uniform regulatory framework of LLCs in both countries, which could be useful when reevaluating or amending their laws.

Keywords: Limited liability company. LLC. Compared legislation.

1. Purpose of the article and method

The purpose of this article is to draw a parallel between limited liability company – LLC in Brazil (called *sociedade limitada*) and the US, from a regulatory perspective, highlighting some major differences in the way uniform laws in these countries deals with the same issue. As stated, the article focuses on LLC, not addressing corporations or any other form of unincorporated business.

This section explains the method that guided the research and the scope of the article. Section 2 explains what an LLC is and some fundamental differences between Brazil and the US legal systems. Section 3 brings a brief history of the introduction and development of LLC legislation in both countries. Section 4 is the core of the article and analyses the differences between these legislations regarding the LLC: a) formation; b) management and control; c) financial rights and

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obligations; d) transferability of ownership units; e) dissociation and dissolution. The article concludes that although Brazil has a longer tradition with LLCs, the US made tremendous improvements in the last decades, even ahead of Brazilian legislation in some very important issues. Nowadays, the LLC is one of the most important types of business form in both countries and tends to remain so.

In a very near future (most precisely in January 10, 2019), Brazil will celebrate the *centennial anniversary* of adoption of the LLC business form. Moreover, 2017 marks the *20 year anniversary* of the watershed event that fostered the growth and massive adoption of LLCs in the US, called the *check-the-box* tax reform of 1997. Therefore, it is a special moment for a comparative study that can be useful to both of them, when reevaluating their regulatory framework about LLCs. According to this scope, the article was careful to contextualize the various issues in a way they make sense not just for readers already familiar with Brazilian and the US legal systems, but for anyone interested in the subject, in other jurisdictions. The intention is to render the study useful to a broader public.

Following a methodological criterion, along the text the pattern is to first mention Brazilian laws and then move to the US, drawing a parallel. Always mentioning the name of Brazilian institutions in quotes and in italics. That is because Brazil enacted the LLC form many decades before the US. For the same reason, the growth and development of this business form happened first in Brazil. Therefore, the article follows the chronological order of facts. That does *not* mean, of course, that one legal system is "better" or "more efficient" than the other. Each of them have its advantages and flaws. That was just a methodological choice to ensure coherence and uniformity along the text.

Accordingly, the scope of the article is *not* to evaluate which provision works best in a legal or in an economic perspective. The intent is just to highlight some major differences in the way both countries deal with the same issue.

Another criterion is to address the various issues based just on the uniform legislation of these countries about LLCs. In Brazil, it is the Civil Code (BRASIL, 2002). The US have two uniform laws about LLCs: the Uniform Limited Liability Company Act – ULLCA (from 1996) (UNITED STATES, 1996) and the Revised Uniform Limited Liability Company Act – RULLCA (from 2006, last amended in 2013) (UNITED STATES, 2013). This article focuses on the most recent of them, RULLCA. According to this option, court decisions, case law and the various state statutes are not mentioned. The reason is that in Brazil a single body of laws has been governing the LLC in the entire

country for almost a century. In the US, on the other hand, this type of unincorporated business is more recent in history. Therefore, differently from other traditional types of business forms, such as the partnerships or corporations, there is still no uniformity across the laws that govern it in state level. The same about courts decisions. In this context, base the study on one specific statute or state court would make the article especially suited for that jurisdiction, but less interesting (or even useless) in many others[1]. The focus on RULLCA bypasses this problem, because it is intended to be the national model for harmonizing[2] the various legislations in state level. This way, it provides a better parameter for comparison with Brazilian ones, because both of them look at the national level.

In fact, until 2016 only 19 of the 50 states in the US had adopted ULLCA or RULLCA[3]. However, this tends to change in the future, while the LLC remains growing and spreading across the country as one of the most important types of business form[4]. The same happened in the past, with the uniform laws regarding partnerships (now adopted in every state, except Louisiana) and many other types of business entities.

In a second phase, it was necessary to narrow down even more the scope of this article. In fact, Brazilian Civil Code and RULLCA are very extensive and complex, with hundreds of provisions in each one. It is not recommended (or even possible) to address all of these provisions in a single article. Therefore, the author decided to focus only on some major issues, highlighting the regulatory differences pertaining them between Brazil and the US.

2. Fundamental differences between Brazil and the US legal systems

It would not be correct to present a comparative research without first pointing out the fundamental differences between the target

[1] "Each state by constitution and statute has established its own system, and the lack of uniformity from state to state makes it impossible to give a detailed description to fit all states" (FARNSWORTH, 2010, p. 44).

[2] Of course, harmonization does *not* mean identical rules. Just rules that are *compatible*, even if they have different texts and meanings. See Hansmann and Kraakman (2000), and Gilson (2000).

[3] Highlighting some flaws of RULLCA original text, see Ribstein (2008).

[4] For a better understanding of how difficult is to develop a comparative study about LLCs in state level and how important it is to observe the uniform laws, see Goforth(2016). Suggesting the immediate adoption of uniform LLC laws in New York: "The New York legislature should either amend the statute to clarify the numerous uncertainties or simply adopt the Revised Uniform Limited Liability Company Act, which represents a more careful study of the issues that arise in the LLC context" (MILLER, 2015, p. 409).

legal systems. These differences go back to the distinct types of federation adopted in each country. As an author once noted: "it is impossible to understand the legal system of the United States without understanding its structure of government" (BURNHAM, 2006). In fact, this applies to every country.

In Brazil, power and richness are extremely concentrated in the federal level (the Union) (MENDES; COELHO; BRANCO, 2008)[5]. The Federal Constitution clearly states that only the Union can enact laws concerning corporate and unincorporated businesses (BRASIL, 1988)[6]. Therefore, Brazil has a single uniform act (The Civil Code) governing LLCs in the entire country[7]. In this subject, no state member derogations are allowed[8]. Consequently, every legal entity can operate in the entire country, without need to qualify for carrying on business outside the primary state of incorporation. Complimentary qualification is required only from legal entities incorporated outside the country (called *sociedade estrangeira*)[9].

In the United States, on the other hand, the federation concedes much more power to state members (UNITED STATES, 2007)[10]. Therefore, each state can govern the functioning of business entities in the limits of its territory. Each state has its own statute dealing with LLCs[11]. According to this premise, to carry on business in a regular basis, outside the state of primary registration, it is necessary to qualify for it. The process of qualification consists in filling out a document with the respective authority[12] in each state the LLC wants to operate. Different from what happens in Brazil, foreign firms in the US are not only those incorporated outside the country, but also those incorporated inside the US, in another state member.

Maybe the most radical deviation among these countries is the fact that Brazilian laws create an artificial distinction between *sociedade empresária* and, by exclusion, the rest of the businesses, called *sociedade simples* (which means just "simple", in English) (BRASIL, 2002)[13]. The difference is artificial because both are profit seeking economic activities (*atividade econômica*). The practical differences are the proper place to register and reorganization and liquidation procedures, which follow different rules. To almost anything else, they operate in the same way. Tax treatment is also usually the same. The distinction is so artificial that both *sociedade empresária* and *sociedade simples* can use exactly the same LLC form (BRASIL, 2002)[14]. In fact, except for some regulated professions,

[5] It is not surprising, for example, that many states are almost bankrupt, because they cannot pay their debts to the Union. In December 2016, the Congress enacted a law providing the states with better conditions to pay their debts ("*renegociação das dívidas com a União*").

[6] Article 22, I.

[7] Brazil have 26 state members plus a Federal District, called Brasília.

[8] For pros and cons of this option, see Parentoni and Gontijo (2016).

[9] Yet there are some exceptions, such as legal entities incorporated in countries member of the MERCOSUR, because some MERCOSUR founding treaties provide them a different (and less complex) system concerning qualification to carry on business in these countries.

[10] Article I, Section 8.

[11] However, notice that federal laws play an important role in the system. Especially during economic crisis and scandals, such as the Enron case. For example, only federal law regulates securities, bankruptcy and other subjects. "United States has two parallel, at times interacting, systems of corporate law. One is state-made and one – incomplete but powerful – is federal" (ROE, 2009, p. 3).

[12] This authority is usually the Secretary of State.

[13] Article 966. To a detailed view of this distinction and its criteria, see Parentoni (2006). The roots of this distinction come from the Italian Civil Code of 1942. For this subject in Italian Law, see Angelici and Ferri (2006), and Auletta and Salanitro (2003).

[14] Article 983.

such as lawyers, all other profit seeking business uses the LLC form as if they were an *sociedade empresária*. Because of this distinction, all legal entities in Brazil must have a fixed purpose and all changes in that purpose must be immediately reported to the public register. In the United States, there is no such distinction. Consequently, an LLC may be organized for "any lawful purpose".

To finish this brief introduction, it is worth mentioning that in Brazil all kinds of business associations must be profit seeking. The Civil Code definition of business associations provides that by using the expression *atividade econômica* (BRASIL, 2002)[15]. For nonprofit purposes, the options are other types of association, such as general associations (*associações*) (BRASIL, 2002)[16] or foundations (*fundações*) (BRASIL, 2002)[17].

Whereas in the US both incorporated and unincorporated businesses can be profit or nonprofit (UNITED STATES, 2006)[18]. In fact, the same business can merge both purposes, as in the *Low Profit* LLC or L3C (BREWER, 2013)[19]. The structure and general rules applicable to an L3C are almost the same as in a regular LLC. L3C legislation is usually just an amendment on LLC statutes to include a few specific provisions. The main difference is that an L3C must prioritize socially beneficial goals. Of course, profits are welcome, but they are a second goal, instead of the main reason for creating the legal entity. This type of business works as an intermediary to raise funds for social causes. These funds should come mostly from private foundations, by means of Program Related Investments – PRI. PRI are religious, educational or charitable investments made by foundations that qualify for tax exemption.

The problem is that it is not so clear when an L3C would qualify to receive PRI. This uncertainty is compromising the model, leading to an underutilization of L3Cs (BREWER, 2013). This is a very controversial issue. Some authors affirm that the L3C is "unnecessary and unwise" (KLEINBERGER, 2010), while others highlight just the opposite: its importance and need for improvements (WALKER, 2012). Some authors go a step further and suggest that the Internal Revenue Service – IRS (the tax agency that corresponds, in Brazil, to *Receita Federal*) recognizes the nonprofit LLC as an independent entity, with proper tax treatment (SMITH, 2015).

[15] Article 981.

[16] Article 53.

[17] Article 62.

[18] Section 108 (b).

[19] For a historical evolution of this subject, see Wilson (2015).

3. A brief history of LLC's legislation in Brazil and the US

An LLC is a business form that provides both vicarious limited liability to all the partners (regardless if they participate in management and control) and more contractual flexibility than in a corporation, with favorable tax treatment[20]. Legal literature says that it is a "creature of contract" instead of a statutory creation (RIBSTEIN; KEATINGE, 2016). In sum:

> The limited liability company ("LLC") is a noncorporate business structure that provides its owners, known as 'members', with a number of benefits: (1) limited liability for the obligations of the venture, even if a member participates in the control of the business; (2) pass-through tax treatment; and (3) tremendous freedom to contractually arrange the internal operations of the venture (HAMILTON; MACEY; MOLL, 2014).

Its core characteristics are almost the same in Brazil, the US and worldwide. Of course, some topics are controversial, such as the limits of the contractual flexibility, especially when used to waive fiduciary duties, as usual in Delaware[21]. Nevertheless, emphasizing these controversies is not the intent of this article.

Indeed, Germany was the first country to design an LLC, in April 20, 1892 (*Gesellschaft mit beschränkter Haftung*). The German government planned to create a business form that would combine the typical limited liability of a corporation with contractual flexibility, such as in a partnership. Studies conducted at that time have shown that this structure would foster the development of small and medium sized business. The second country to adopt it was Portugal, in April 11, 1901 (*Sociedade por Quotas, de Responsabilidade Limitada*). Then it started to spread all around the world, always maintaining these fundamental characteristics[22].

After its independence from Portugal, Brazil enacted the Commercial Code of 1850, strongly influenced by the French Commercial Code of 1807. The Brazilian Commercial Code dealt mainly with corporations and sole proprietorships, because these were the most common business structures at that time. There was no provision about LLC

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[20] Articles 1.052 and 1.060 (BRASIL, 2002). And Section 304 (a) (UNITED STATES, 2006).

[21] "there is a growing sense that contractual freedom should be curtailed, at least in diversely-held Delaware alternative entities, and that predictable constraints on contractual freedom are difficult to achieve under a purely contractual model" (MILLER; ANTONUCCI, 2016). See also Horton (2016).

[22] For a brief history of LLC development around the world, see Lobo (2004).

in it (FERREIRA, 1960). The Federal Decree number 3.708 introduced the LLC some decades later, in January 10, 1919 (*sociedades por quotas, de responsabilidade limitada*) (BRASIL, 1919). This decree was one of the long-standing pieces of Brazilian Corporate Law. It lasted for more than eight decades, until 2003, without any amendments. Its core characteristics were conciseness (only 19 articles), simplicity (very clear provisions) and flexibility (prevailing freedom of contract). Legal literature and courts decisions gradually filled the gaps (BORGES, 1959). In this context, the LLC has become the most common type of business structure in Brazil.

Nevertheless, this scenario changed radically in 2003, when came into effect the Brazilian Civil Code enacted in January 10, 2002 (with a *vacatio legis* of one year). This body of laws imposed a different model for the LLCs, with mandatory rules restricting freedom of contract, demanding complex management structure and confusing provisions about voting quorums and other aspects. As expected, the legal literature heavily criticized the changes (PARENTONI; MIRANDA, 2016; DINIZ, 2012). Despite these flaws, the Brazilian Civil Code did not compromise the LLC. It still is one of the most important business structures in the country.

In sum, Brazil has had only two federal acts governing LLCs in almost a hundred years: The Decree n. 3.708 from 1919 and the Civil Code of 2002. With the differences already stressed.

It is also worth mentioning that there are two drafts for a new Brazilian Commercial Code, running in parallel, since 2013. Any of them, if enacted, will deal with LLCs, repealing this part of the Civil Code. One is in the Senate (*Senado*) while the other is in the Chamber of Deputies (*Câmara dos Deputados*) (BRASIL, 2011, 2013). It is *not* probable that they will be enacted in a near future, unless the political scenario of the country changes dramatically.

In the United States, on the other hand, for many decades there were just corporations, on one side, and the general partnerships (usually quoted as partnerships) on the other (KEATINGE et al., 1992). The former is known as *incorporated business* while the last is the *unincorporated business*. Between them, there is just the limited partnership, much less used. Beginning in the 90s, however, new types of unincorporated business were created: the limited liability partnerships – LLP, the limited liability limited partnerships – LLLP and the limited liability company – LLC. All of them unincorporated[23]. The most successful seems to be the LLC[24].

Market lobby played a primordial role for the introduction of this business form in the US. Since the 60s, some America's large corporations controlled companies in many other countries, using the LLC structure. However, they could not do the same in domestic market, because the LLC did not exist in the US. Hamilton Brothers Oil was one of these controlling companies. It then decided to persuade state legislators to enact a similar business form inside the US. The first attempt took place in Alaska, in 1976. Surprisingly, it failed (HAMILL, 1998). In the second attempt, Hamilton Brothers Oil targeted at Wyoming. It was a success and the bill enacted on March 04, 1977, exactly as proposed by the company[25].

[23] Ribstein (2010) called that "The Rise of the Uncorporation". See also Hansmann, Kraakman and Squire (2005).

[24] Nowadays, some authors suggest a rationalization of the system, with the extinction of less used business forms. For example, see Franklin (2016).

[25] "Nothing, not even a comma, in the proposed LLC legislation drafted by Hamilton Brothers was changed by the Wyoming Legislature. Promptly signed by Governor Herschler, the act became effective June 30, 1977" (BAGLEY; WHYNOTT, 1994).

After that, the critical question became tax-related. In the US, when receiving profits the shareholders pay taxes on both the corporate and their individual levels (*double-taxation*)[26]. Differently, partners in a partnership pay federal taxes for their profits only at the individual level (*pass-through*). In the vast majority of cases, partnership taxation is more favorable to business owners. Initially, the Internal Revenue Service applied a case-by-case test to define how the LLC should pay. The uncertainty of this method blocked the development of the new business form[27]. This situation lasted until 1988, when the IRS solved the problem, by ruling that the LLC would have, by default, the tax treatment of a partnership, unless it opted to be taxed as a corporation, by checking the appropriate box in the form (*check-the-box* – Revenue Ruling n. 76/1988). With the tax issue resolved, many states enacted its LLC statutes and the new legal entity took off.

To avoid problems related to statutory diversity, the American Bar Association's Subcommittee on Limited Liability Companies drafted a Prototype of LLC Uniform Law, published in November, 1992. However, states were already in a rush to provide this new business form and many of them enacted its statutes before the prototype[28]. Consequently, the first generation of these statutes was much diverse in its provisions.

Again, the Uniform Law Commission stepped in to promulgate the first LLC uniform law, known as ULLCA, in 1996. The problem is that just a few states amended their laws according to ULLCA. In another attempt to ensure uniformity among state laws, the Uniform Law Commission promulgated the Revised Uniform Limited Liability Company Act – RULLCA, in 2006, last amended in 2013. The same result: even less states adopted RULLCA. In part because some leading authors pointed out several problems and contradictions on it[29].

Because of this historical process, the LLC is still the business form with less uniformity in the country. That does not mean that it is not important. It sure is. So much that all states have LLC statutes nowadays[30]. In fact, it is one of the most (if not *the* most) popular type of business form both in Brazil and the US, according to some statistics. In Brazil, *sociedade limitada* represents approximately 72% of the total

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[26] Of course, there are exceptions, such as the "S corporation". Nevertheless, these exceptions come with extra restrictions.

[27] Brazil did not experience similar questions, because LLCs and corporations have almost the same tax treatment.

[28] Suggesting the fast adoption of the LLC business form by the States (RIBSTEIN, 1998).

[29] For example, see Ribstein (2008).

[30] Hawaii was the last one to enact, in 1997. Available at: <http://www.limitedliabilitycompanycenter.com/>. Access: 5 Feb. 2018.

registered legal entities[31]. It encompasses large companies (such as holdings), as much as medium and small business, including startups, in almost any market, regulated or not. In the US, LLCs already represent more than one third of all active firms (GOMTSIAN, 2015) and they are the dominant form for small business (KLEIN; COFFEE; PARTNOY JUNIOR, 2010). That is a remarkable number, considering that the LLC is one of the most recent types of business structure in the country. As in Brazil, it spreads for many markets and firms of different sizes. The impact of LLCs in the US economy is so strong that the magazine The Economist coined a new term for it: *distorporation* (GOMTSIAN, 2015).

Despite the similarities, there are also major regulatory differences between these countries. The next sections will highlight some of them.

4. Some major differences between Brazil and the US legislation regarding LLC

As stated in the section "Purpose of the article and method", the intent of this research is not to cover *all* the differences between uniform legislation about LLC in Brazil and the US. Instead, the proposed method is to address just *some* major issues, concerning *five key aspects* of this legal entity: a) formation; b) management and control; c) financial rights and obligations; d) transferability of ownership units; e) dissociation and dissolution. The scope is to provide readers with a comparative overview of these systems.

4.1. Formation

Brazil demands that the founders of an LLC file a document with the proper registry[32] *before* the legal entity starts its operation (BRASIL, 2002)[33]. The same happens in the US (UNITED STATES, 2006)[34]. However, from here on there are major differences.

In Brazil, for instance, *much of the clauses* that regulate the LLC must be *publicly registered* in a document called *contrato social*. Because of that, the contract *must be in written form*. The Civil Code imposes a long list of mandatory clauses, such as the ones dealing with (BRASIL,

[31] Available at: <http://www.ibpt.com.br/noticia/372/Censo-das-Empresas-Brasileiras-2012>. Access: 5 Feb. 2018. Data from 2012. Data that is more recent was not found.

[32] Called *Junta Comercial* for the *Sociedade Empresária* and *Cartório de Registro Civil das Pessoas Jurídicas* for the *Sociedade Simples*.

[33] Article 967.

[34] Sections 110 (a) and 201 (d).

2002)[35]: number and identification of owners; name, purpose and headquarters of the legal entity; owners capital contributions; their participation in profits and losses; other rights and duties of the owners; how to proceed in case of dissociation or dissolution; etc. Moreover, the owners can insert in this document any other lawful provisions. As one can see, Brazilian laws impose a maximum level of disclosure for contractual provisions regarding an LLC. Anyone interested can have a copy of this document from the public office.

For non-mandatory clauses, it is possible to contract non-registered complementary provisions that will bind one or more of the owners, similar to a shareholder's agreement. This is called *Acordo de Cotistas* (BULGARELLI, 1995). Because there are many mandatory clauses, however, the extent of this agreement is restricted.

The US adopts a completely different system. Only a *minimum* number of clauses must be publicly registered. All the rest is subject to freedom of contract and privately defined by the owners. Therefore, there are two separate documents governing the LLC inside the US. The first one contains the mandatory clauses and must be filed with the Secretary of State. It is the *Certificate of Organization* or *Articles of Organization* (UNITED STATES, 2006)[36]. This document is skeletal and contains only *minimum information* about the legal entity, such as the name of the LLC, its founders (registered agents) and their addresses. The second document, which really governs the LLC, is the *Operating Agreement* (UNITED STATES, 2006)[37]. It is a contract privately defined by the owners and non-registered. It *can be written, oral or even implied* (UNITED STATES, 2006)[38]. More often than not courts judge cases based on it.

Another major difference between Brazil and the US uniform legislation is about contribution with services to form an LLC. In Brazil, legislators *never allowed* this kind of contribution. The Federal Decree 3.708 from 1919 forbidden it and the Civil Code of 2002 has a similar provision (BRASIL, 2002)[39]. Therefore, members must contribute to an LLC capital account by any other means, such as transferring rights, goods, real estate, etc. On the other hand, the US admits any kind of contribution, *including just services* (UNITED STATES, 2006)[40].

As for the minimum number of members required to form an LLC, Brazil demands at least *two of them*[41]. In other words, Brazil forbids a single-member LLC. The alternative for sole investors is another type of legal entity, very controversial[42], called *Empresa Individual de Responsabilidade Limitada – EIRELI*. However, EIRELI has more rigorous requirements than an LLC. For example, as a rule there is no minimum capital contribution imposed by law to form an LLC. In an EIRELI, differently, a minimum capital contribution is required, of about US$ 28,000.00 in 2017

[35] Article 997.

[36] Sections 102 (1) and 201 (b).

[37] Sections 105 to 107. Discussing if the Operation Agreement is in fact a contract and its binding effects (HEMINGWAY, 2015).

[38] Section 102 (13). Oral agreements are problematic, especially when admitting new members. The best option for the owners usually is to draft a written document and have it signed by all of them.

[39] Article 1.055, § 2º.

[40] Section 402.

[41] Note that the articles 1.055 and 1.059 of the Civil Code refers to the owners, in plural, which means two or more of them, while the article 1.033, IV tolerates the LLC with a single owner as an exception, for the maximum period of 180 days. After that, the remaining owner must admit a new one, dissolve the LLC or transform it into an EIRELI.

[42] Questioning the efficiency of an EIRELI, see Rodrigues, Ferrer and Simões (2016).

(BRASIL, 2002)[43]. In the US, it is clearly possible to form a single-member LLC (UNITED STATES, 2006)[44].

The last aspect about the formation of an LLC mentioned here refers to who should prevail in case of a conflict of rules: (i) state-made law or (ii) the private contract of the LLC (*Contrato Social* or *Operating Agreement*). In Brazil, the provisions of the Civil Code are usually *mandatory*. They prevail over contractual clauses (less freedom of contract, but more uniformity and predictability) (PRADO et al., 2011). As an exception, some rules expressly state that they are subsidiary, by using terms such as *unless otherwise agreed* or similar[45].

On the other hand, in some jurisdictions in the US – Delaware, for example – statute provisions are mainly *subsidiary*[46]. It is just the opposite reasoning: unless expressly stated that a rule is mandatory, the operating agreement can lawfully change that rule according to the LLC owner's interests (more freedom of contract, but less uniformity and predictability). That is also true when considering RULLCA as the default parameter for comparison[47].

4.2. Management and control

In both countries, the LLC can be *member-managed* or *manager-managed*. In the first model, all members have equal management rights (each owner is also a manager and can take decisions that bind the legal entity to third parties, unless otherwise stated)[48]. This structure is like that of a partnership. Differently, in a manager-managed LLC instead of all the members just a specific and separate group of people – composed of members, hired professional managers or a mix of them – can bind the legal entity[49]. Similar to the corporate model in which only the officers can represent the corporation, following orders from the board of directors.

Therefore, a manager-managed structure can include three groups of people: (i) owners that are just members of the legal entity, without any management position or power; (ii) owners that are both members and managers; or (iii) non-owners hired to manage the legal entity.

Again, in both countries the rule is that the LLC is *member-managed unless otherwise agreed*[50]. Despite this similarity, from here on there are major differences.

In Brazil, voting rights *must be based on capital contribution*. More contribution means more voting rights and power to rule the LLC. When dealing with this issue the Civil Code uses the expression *capital*[51] instead of *voting capital* or similar, applied to highlight the situation in which part of the capital could not have voting rights, such as the corporate

[43] Article 980-A, *caput*.

[44] Sections 201 (a) and (d).

[45] See, for example, the Civil Code article 1.013, *caput* and 1.063, § 1º (BRASIL, 2002).

[46] See Miller and Antonucci (2016), and Horton (2016).

[47] In RULLCA, exceptional mandatory rules are, for example, those concerning the waiving of fiduciary duties and M&A operations. See Sections 201 105, (c) (5), (13) and (14) (UNITED STATES, 2006).

[48] Article 1.060 (BRASIL, 2002). Sections 102, (12) and 407, (b), (2) (UNITED STATES, 2006).

[49] Article 1.060 (BRASIL, 2002). Sections 102, (10) and 407, (c), (1) (UNITED STATES, 2006).

[50] Article 1.060 (BRASIL, 2002). Sections 407, (a) and (b), (1) (UNITED STATES, 2006). "Under most statutes, in the absence of a provision or agreement to the contrary, management of the LLC is vested in the members, who are like general partners in this respect, and who not only participate in decision-making but also may have the power to bind the company" (KLEIN; COFFEE; PARTNOY JUNIOR, 2010).

[51] For instance, articles 1.055 and 1.057 (BRASIL, 2002).

preferred stock. The law then refers to *all* the capital, not just the voting interests. Moreover, article 1.010 expressly states that all membership units can vote. Therefore, someone who contributed to the capital account with US$ 10,000.00 usually will have ten times more votes than someone who contributed with US$ 1,000.00. That is because the Civil Code imposes high voting quorums for some matters, such as 75% (BRASIL, 2002)[52]. If the LLC could have non-voting interests, it would be difficult – if not impossible – to reach these quorums[53].

In the US, *members can choose* if their votes will be on a *per capita* basis (one or more fixed number of votes assigned to each member, regardless of his/her contribution to the legal entity) or on a *pro rata* basis (voting rights proportional to his/her contributions) (UNITED STATES, 2006)[54]. The operating agreement is the proper place to define that.

A related question is to define if *all* the members must have the right to vote in an LLC deliberation or if one or more of them can permanently waive this right. In Brazil, although it is not explicit in the legislation and controversial among legal scholars[55], the Brazilian Registry General Office (*Departamento de Registro Empresarial e Integração – DREI*) ruled that *no member can permanently waive his/her right to vote*[56]. Therefore, voting in an LLC in Brazil is more a duty of its members than just a right.

The United States *accept non-voting membership units*[57] and go a step further, in some jurisdictions, by allowing series LLC (*SLLC*). The SLLC is an additional form of limited liability protection through which operating agreements can create one or more series of membership units – with separate managers, property, rights and debts – inside the same LLC (such as different classes of stock in a corporation). However, with a significant difference: only the assets

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[52] Article 1.076, I.

[53] Deep discussing non-voting membership units in Brazilian LLC (PARENTONI; MIRANDA, 2016).

[54] Sections 407, (c), (1). "The default rules for voting in an LLC differ among the statutes. About half of the LLC statutes default to members voting on a *per capita* basis (one vote per member), while the other half default to members voting on a *pro rata* basis (by financial or other contribution to the firm)" (HAMILTON; MACEY; MOLL, 2014).

[55] See Parentoni and Miranda (2016).

[56] To be more precise, the Brazilian Registry General Office ruled that an LLC can have preferred ownership units, with different rights and obligations, since May 2017. But they *cannot* have voting restrictions: (BRASIL, 2017). Item 1.4, II, (b).

[57] RULLCA leaves that definition to the operating agreement. This classic book deals with corporations, but the author's reasoning also fits in the LLC: "Most states allow firms to establish almost any voting practices they please. For example, Delaware permits firms to give shares any number of votes (including none) and give votes to bondholders in addition to (or instead of) shareholders. The votes may cumulate or not, at the option of the firm" (EASTERBROOK; FISCHEL, 1991).

of that specific series shall be enforceable for its debts, "shielding" the other series and the rest of the legal entity[58]. Delaware was the first jurisdiction to adopt it, in 1996 (UNITED STATES, 2006)[59]. The SLLC is a very controversial issue. There are still many doubts regarding, for example: (i) bankruptcy of one or more series instead of the LLC as a whole; (ii) tax treatment of each series; (iii) how to deal with different liabilities when a foreign LLC does business in jurisdictions that do not allow series[60]. To avoid these problems, RULLCA simply does *not* permit SLLCs.

Another important topic is about decision-making quorum. The Brazilian Civil Code imposes *mandatory quorums for member deliberation*. They *cannot* be altered by *contrato social*. There are mandatory quorums, for example, to nominate or remove managers. In a member-managed LLC, the quorum for both nomination and removal is of majority of the membership units (BRASIL, 2002)[61]. In a manager-managed LLC, the quorum for the same situation is of: (i) 2/3 (two thirds) of the ownership units in case of paid-in capital or (ii) unanimous consent if the capital is not fully paid-in (BRASIL, 2002)[62]. As mentioned, quorums in the Brazilian Civil Code are in general high and scholars heavily criticized them.

In the US, RULLCA provides a general rule and some exceptions. The rule is that in the ordinary course of business members can take decisions by a *majority* of votes (UNITED STATES, 2006)[63]. For example, to nominate or remove managers. This rule is subsidiary, so *the operating agreement can change it, according to each LLC preferences*. However, in some cases RULLCA demands unanimous consent, such as for decisions outside the ordinary course of business or to amend the operating agreement (UNITED STATES, 2006)[64]. These exceptional provisions clearly cause a lock-in effect. Think of a

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[58] "A series LLC is the latest and by far most sophisticated form of business entity created. The concept is that a single entity may be formed in a state, but separate series or 'cells' may be internally created within the LLC. […] The series LLC is essentially a single umbrella entity that has the ability to partition its assets and liabilities among various sub-LLCs or series. Each sub-LLC may have different assets, economic structures, members, and managers. The profits, losses, and liabilities of each series are legally separate from the other series, thereby creating a firewall between each series. In addition, it eliminates the administrative burden and expense of forming multiple LLCs. The structure is very similar to a parent corporation with subsidiaries only without the expense, formalities, and heavy taxation". Available at: <http://www.limitedliabilitycompanycenter.com/series_llc.html>. Access: 5 Feb. 2018.

[59] § 18-215.

[60] Especially when considering RULLCA Section 901, (b) (UNITED STATES, 2006).

[61] Article 1.071, II and III combined with article 1.076, II.

[62] Article 1.061.

[63] Section 407, (3) and (c), (1).

[64] Section 407, (4).

situation in which 99% of the votes converge, but it is still not a unanimous decision. This situation is even more problematic than Brazilian high quorums.

4.3. Financial rights and obligations

As for the member's financial rights and obligations, Brazilian default rule provides that unless otherwise agreed each member share profits and losses *in the same proportion as he/she own interest units* in the LLC (BRASIL, 2002)[65]. For example, 10% of the membership units grant the owner 10% of profits and losses. However, the registered written agreement (*contrato social*) can provide for a different distribution. For instance, stating that a member with 30% of the units share 20% of the profits and 10% of the losses. The ultimate limit for freedom of contract is the Civil Code article that, to protect member's private interest, impose that *all members of an LLC must participate in profits and losses* (BRASIL, 2002)[66]. Therefore, it is possible to stipulate that a member will share 99% of the business profits or just 1% of the losses, regardless of his/her contribution to the firm's capital. However, it is illegal to grant him/her with 100% or 0%.

Based on that, big firms, including some law firms (GONÇALVES NETO, 2006), admit junior professionals as members instead of hiring them as employees. Mostly because Brazilian labor laws impose too many costs to hire, maintain or fire an employee. Hence, to admit members instead of hiring employees is a legal way to avoid these costs. Of course, the person must be treated as a real member, with the corresponding rights and obligations. Otherwise, labor laws consider that as fraud (BRASIL, 1943)[67].

In the US, this issue is in part similar and in part different from Brazil. It is similar because RULLCA default method is the same: profits and losses follow the same ratio as each member's ownership interest (UNITED STATES, 2006)[68]. However, it is different because RULLCA does *not* forbids excluding a member from sharing profits and losses. Therefore, in the US this issue is *a purely contractual decision*. The limits imposed by RULLCA deal more with the protection of third party creditors instead of the member's private interest (UNITED STATES, 2006)[69].

4.4. Transferability of ownership units

Both in Brazil and in the US, an ownership interest in a LLC entitles a member to have *financial rights* (which means to share in the profits of the firm) and *management rights* (to bind the legal entity to third parties, sign contracts or file law suits in its name and decide what to do with the entity assets). Moreover, in both legal systems a member can transfer these rights *together* or *separately*[70]. It is possible, for example, to assign just the financial rights of one or more units to a third party while the owner retains the corresponding rights to vote and take part in the management of the LLC. Nonetheless this basic similarity, there are major differences in the way the legislation of both countries deals with this issue.

In Brazil, the default rule is that an LLC member can *freely transfer* his/her ownership

[65] Article 1.007.

[66] Article 1.008.

[67] Article 9.

[68] Section 404.

[69] Sections 405 and 406.

[70] Article 286 (BRASIL, 2002). Sections 401, (d), (1); 501; 502, (a), (2) and (3) (g) (UNITED STATES, 2006).

units to everyone, *encompassing both the financial and voting rights*. However, the proceeding varies if the acquirer is another member or a third party outside the legal entity. The Civil Code provides that the transference of ownership units *among members* is free and the transferor do *not* need to give notice of his/her intention to the non-transferring members, because they do not have preemptive rights to buy the units. Differently, if the transferee is a *third party*, the transaction remains free, but the transferor must give *prior notice* of it to the non-transferring members, because they can *block the entrance* of unwanted persons, based on fair reasons and by the vote of more than 25% of the ownership units (BRASIL, 2002)[71].

Moreover, in a member-managed structure, even if the written agreement provides that all members are also managers, this clause applies just to the *previous* members. In other words, *an entrant does not become automatically a manager*. He/she acquires just the financial and voting rights attached to the units. To become a manager, he/she must be nominated following the proper quorum (BRASIL, 2002)[72].

In sum, Brazilian default rule is an incentive for free transferability of ownership units among members, without neglecting the right of the non-transferring members to block the entrance of unwanted third parties. In addition, the entrants acquire financial and voting rights, but do *not* become managers unless expressly nominated (GONÇALVES NETO, 2012).

In the US, only the *financial rights* are *freely transferrable* without the need of prior consent. For transference of *management rights* RULLCA demands the *consent of all other members*, no matter if the acquirer is already a member or a third party (UNITED STATES, 2006)[73]. This rule is like that of partnerships[74]. On one side, it preserves the control structure prior to the transaction. On the other side, however, unanimous consent creates a lock-in effect.

Of course, both countries allow the members to *circumvent the default rule by contract*, either to permit free transferability or to restrict it even more. For example, by providing preemptive rights to the remaining members in Brazil, when one of them wants to sell his units to third parties. In the US, for instance, to allow the transferability of management rights with a lower quorum, such as majority instead of unanimous consent. From a legal perspective, the key aspect is that no matter if contracted to restrict or to enhance the transferability; it is strongly recommended that members address these questions in a *written agreement*, *before* a conflict arises[75].

Finally, another major distinction between Brazil and the US uniform legislation refers to public traded LLCs. In Brazil, since its inception in 1919 this legal entity was *never allowed to be publicly-traded* because *sociedade limitada* ownership units are *not* considered securities. Consequently, there is no public market for them in Brazil. Although, in the last years CVM[76] has gradually ruled that LLCs *can* publicly trade *some specific types of securities*,

[71] Article 1.057.

[72] Article 1.060, sole paragraph.

[73] Section 401, (c), (3).

[74] "As for transferability, member of LLCs mays transfer, or assign, their financial interest in the LLC, but, in the absence of unanimous consent of the other members or a provision or an agreement to the contrary, not their right to participate in management (that is, their voting rights)" (KLEIN; COFFEE; PARTNOY JUNIOR, 2010).

[75] Stressing the importance of contract clauses dealing with transferability of ownership units, see Gomtsian (2015).

[76] The Brazilian federal agency that regulates securities market, equivalent to the SEC in the US.

such as commercial papers, bank credit notes (BRASIL, 2009)[77], and corporate promissory notes (BRASIL, 2015b)[78], as well as receive financial support from investment funds (*Fundos de Investimento em Participações – FIP*) (BRASIL, 2016)[79]. The trend is to enlarge this list in a very near future[80]. Nonetheless, until now LLC ownership units *cannot* be publicly traded in Brazil.

In the US, LLC ownership units also *cannot* be publicly traded. However, some strategies can lawfully bypass this rule. That happens especially in Delaware, because of the highest level of freedom of contract provided by the Delaware Statute – DLLCA. Therefore, 20 (twenty) public listed LLCs were formed there until 2013[81]. In this context, courts discuss if LLC ownership units are securities. The main line of reasoning uses a test created for corporations, known as the *Howey Test*, to define if an LLC ownership unit can be treated as an investment contract and, consequently, as a security. Since the members of an LLC will only know if their units are securities in a case-by-case approach, usually after a trial, the problem with this method is uncertainty and unpredictability (GIRNYS, 2011/2012). After all, frequently courts come up with very different solutions for LLCs with similar structures[82].

4.5. Dissociation and dissolution

There are some important conceptual distinctions in this subject. First, *withdrawal of a member capital contribution*, on one side, and *withdrawal from the LLC*, on the other. The first happens when the member of an LLC cash back part or the total of his/her personal capital account inside the LLC, therefore reducing or extinguishing this account, but *continues to be a member* of the legal entity (for example, sharing profits and losses, taking part in management and voting). Like any other financial interest, the member account in an LLC can be withdrawn or transferred by the owner, at will. Diversely, withdrawal from the LLC means a *buyout* by which the person receives back all his/her capital account *plus fair value of equity interest* and, therefore, *ceases to be a member* of the legal entity (PARENTONI; LIMA, 2016).

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[77] Article 33.

[78] Article 02.

[79] Articles 15 and 16. For further details, see Parentoni and Féres (2016).

[80] Nowadays the main discussion is about allowing LLCs to issue bonds. See Crisóstomo (2011). Following the same line of reasoning, see Amaral (2014).

[81] Data provided by Gomtsian (2015).

[82] For a list of contradictory decisions regarding this issue, see Girnys (2011/2012).

A second basic distinction is *dissolution* versus *dissociation*. Dissolution happens when *all* the members leave the business, which winds up after liquidation and, therefore, the legal entity *ceases to exist* (called *dissolução total* in Brazil). Differently, if just one or more of the equity members leave the legal entity (no matter if by their will or if expelled), but the LLC *remains in operation* with the other members, this is called dissociation (in Brazil, *dissolução parcial*) (BARBI FILHO, 2004; FONSECA, 2012).

For an LLC *at will* (which means an LLC without a definite term of duration and that is not just for a specific purpose), in Brazil *any member* can withdrawal at *any time* by sending a notice to the LLC with at least 60 days in advance (BRASIL, 2002)[83]. For future events, his/her commitment with the business ends in the day the LLC receives that notice, no matter if the payback will be in cash or in instalments (BRASIL, 2015a)[84].

As an *exception*, if one or more of the members made substantial investments in the business[85], believing that the other members would remain committed until he/she could have at least a chance of payback, this member can file a lawsuit to *force* the others to remain in the LLC for a *reasonable period* (BRASIL, 2002)[86].

In the US, after the "check-the-box" tax reform many statutes were amended to restrict withdrawal rights, unless otherwise agreed by the members. However, RULLCA has taken the opposite path, by stating that *a person has the power to dissociate as a member at any time, rightfully or wrongfully* (UNITED STATES, 2006, p. 132)[87]. The person's duties and obligations as a member ends in the day of dissociation, for events occurred since that day (UNITED STATES, 2006)[88]. Therefore, RULLCA and Brazil rules are alike.

When it turns to the LLC *for a definite term of duration*, in Brazil the rule is that *no member can leave* the business *before the fixed term*, unless authorized by the remaining ones (BRASIL, 2002)[89]. If this unanimous consent cannot be achieved, the option is to file a lawsuit in which the leaving member face the burden of proving a reasonable cause to his/her intention. In this case, the leaving member commitment with the

[83] Article 1.029. It is worth mentioning, however, that this rule is not undisputed among legal scholars.

[84] Article 605, II.

[85] Such as specific investments that can turn into sunk costs.

[86] Article 473, sole paragraph.

[87] Section 601, (a).

[88] Section 603, (2) and (3), (b).

[89] Article 1.029.

LLC only will end with a sentence *transited in rem judicatum* (BRASIL, 2015a)[90].

In the US, RULLCA provides that *any member has the power to leave* the LLC even before the definite term of duration. But if the operating agreement considers it a wrongfully dissociation, that member is liable for damages caused by the dissociation not just to the LLC but also to the remaining members (UNITED STATES, 2006)[91].

Payment method and deadline for buyout in dissociation also differs in Brazil and the United States. The first provides that the equity interests of any leaving member must be paid in *cash* and in no more than *90 days*, unless otherwise agreed in the LLC contract (BRASIL, 2002)[92]. RULLCA does not have a similar provision, which leaves that definition to the operating agreement (or to the decision of the members, if the operating agreement is also silent).

A novelty in the Brazilian system is that the actual Civil Code provides mandatory requirements and proceedings for *extrajudicial exclusion of partners* in an LLC (BRASIL, 2002)[93]. Therefore, this proceeding only applies if: (i) the registered contract of the LLC has a prior clause authorizing it; (ii) a reasonable cause is proved (*justa causa*); (iii) the decision must be discussed in a formal meeting of the voting members, especially called for that purpose; (iv) the target member (the one they want to expel) have the right to defend himself during that meeting; and (iv) only minority equity members can be expelled this way. RULLCA, on the other hand, leaves this question to the private decision of the members, with much more freedom of contract, by saying that "*the person is expelled as a member pursuant to the operating agreement*" (UNITED STATES, 2006, p. 134)[94].

5. Conclusion

The LLC is one of the most important types of business form both in Brazil and the US. However, these countries have a very different legal tradition. Consequently, their uniform laws deal with the same subject by means of different and sometimes contradictory provisions. This research tried to highlight some of these differences, pertaining the following aspects of the LLC: a) formation; b) management and control; c) financial rights and obligations; d) transferability of ownership units; e) dissociation and dissolution.

In the end, I came to the conclusion that although Brazil has a longer tradition with LLC, first enacted almost a hundred years ago, the US made tremendous improvements in the last decades, even ahead of Brazilian legislation in some very important issues, such as the forms of contribution to the firm's capital, voting rights and series LLC. Whereas, Brazil keeps the lead in fields such as transferability of ownership units among members, encompassing both the financial and voting rights.

The comparative analysis of legislation developed in this research could be useful to better understand the logic that guides each legal system, identifying pros and cons of their provisions on the same subject. Therefore, it is a first step to everyone that wants to

[90] Article 605, IV.

[91] Section 601, (a), (b) (1) and (c).

[92] Article 1.031, second paragraph.

[93] Article 1.085. See also Spinelli (2015).

[94] Section 602, (4).

deeply understand these systems. It could also be especially valuable to governments and regulators when reevaluating or amending their laws.

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