7th edition

BRITCHAM
BRASIL

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Britcham Coordination
Fabrício Soares

Legal, Tax & Regulatory Committee
Luiz Guilherme Gomes Primos - President, São Paulo
Paula Costa - President, Rio de Janeiro
Rômulo Cristiano Coutinho da Silva - Vice-President, São Paulo
Paula Abreu - Vice-President, Rio de Janeiro

Designed by
André Bogdan
www.aloby.com.br

Review by
Steve Wingrove
Wordplay Traduções

Illustration by
Odilon Moraes
São Paulo, Dec. 1999

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Doing BUSINESS IN BRAZIL

7th edition

The British Chamber of Commerce and Industry in Brazil
BRITCHAM

São Paulo
Centro Brasileiro Britânico
Rua Ferreira de Araújo, 741 - 1st floor
05428-002 - Pinheiros - São Paulo - SP
Phone: +55 11 3819-0265

Rio de Janeiro
Av. Graça Aranha, 1 - 6th floor
20030-002 - Centro - Rio de Janeiro - RJ
Phone: +55 21 2262-5926

Paraná
Rua Mauá, 1248
80030-200 - Centro Cívico - Curitiba - PR
Phone: +55 41 3021-2100

Minas Gerais
Rua Timbiras, 1.754
30140-061 - Lourdes - Belo Horizonte - MG
Phone: +55 31 3248-2300

britcham@britcham.com.br
www.britcham.com.br

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Foreword

Over the past few years, Brazil has consolidated its leading role in the international scenario, either reactivating commercial agreements and relations with old partners or reopening relevant issues for discussion on the development of trade of goods and services throughout the international community.

Brexit opens the door for new business opportunities and discussions regarding the need for a Free Trade Agreement between the UK and Brazil. As is widely recognized, Brazil has not only a strong and globally integrated business base, but also a European-oriented culture and approach to business practice.

Despite the recent economic crisis worldwide and the severe recession it has faced, Brazil has been working to improve its business environment and keep its economy stable. In 2019, the country achieved substantial reforms in its pension system. By 2020, the National Congress is expected to pass a major tax reform, which should greatly simplify the calculation of taxes on sales and

consumption. Very soon, Brazil will access the OECD and the free-trade agreement between Mercosur and the European Community will be signed. These positive facts create good business opportunities and make the country an important and safe hub for the attraction of large foreign investments.

The economy has been responding positively. In 2020, Brazil's Gross Domestic Product (GDP) is expected to grow by 2.4%, the interest rate is close to international levels, and the inflation rate is expected to be 3.62% by the end of the year, confirming the scenario of stability.

With this background in mind, and aiming to continue the success of the previous editions of “Doing Business in Brazil”, The British Chamber of Commerce and Industry in Brazil is proud to publish the seventh edition of this book, providing the foreign investor with a complete guide to the Brazilian legal system (one that is well-known for its complexity).

There have been many changes in Brazilian legislation that have affected foreign companies and investments since the last edition of this book, as well as certain developments in other areas. These changes and developments have led the members of the Legal and Tax Committee to expand and update the chapters on aviation, tax, private pension funds, logistics, transportation agencies, and mortgage and securitization companies, among others, as well as to reflect upon the state of the law in general.

It is important to note that this edition was co-written by the members of the São Paulo and Rio de Janeiro Legal, Tax and Regulatory Committees, all of whom are renowned law firms and auditing companies. The Legal, Tax and Regulatory Committees have no doubt that “Doing Business in Brazil” will continue to be a useful guide for foreign (not only British) investors, Brazilian and foreign law firms, accounting and auditing companies, embassies and consulates, and financial institutions and insurance companies, which means that it is essentially for anyone with a commercial or economic interest in Brazil.

The Legal, Tax & Regulatory Committees of
The British Chamber of Commerce and Industry in Brazil
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The Legal, Tax & Regulatory Committees of
The British Chamber of Commerce and Industry in Brazil
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Abbreviations

ABS American Bureau of Shipping

ACE Economic Cooperation Agreements

ADR American Depositary Receipts

AEO *Operador Econômico Autorizado*
Authorized Economic Operator

AGE *Assembleia Geral Extraordinária*
Extraordinary General Meetings

AGO *Assembleia Geral Ordinária*
Annual General Meetings

AGU *Advocacia-Geral da União*
Federal Attorney General

ALADI Latin American Integration Association

ANA *Agência Nacional de Águas*
National Water Agency

ANAC *Agência Nacional de Aviação Civil*
National Civil Aviation Agency

ANATEL *Agência Nacional de Telecomunicações*
National Telecommunications Agency

ANBIMA *Associação Brasileira das Entidades dos Mercados Financeiro e de Capitais*
Brazilian Financial and Capital Markets Association

ANCINE	*Agência Nacional do Cinema* National Cinema Agency
ANEEL	*Agência Nacional de Energia Elétrica* Brazilian Electricity Regulatory Agency
ANP	*Agência Nacional do Petróleo, Gás Natural e Biocombustíveis* National Agency of Petroleum, Natural Gas and Biofuels
ANS	*Agência Nacional de Saúde Suplementar* National Supplementary Health Agency
ANTAQ	*Agência Nacional de Transportes Aquaviários* National Water Transport Agency
ANTT	*Agência Nacional de Transportes Terrestres* National Land Transport Agency
ANVISA	*Agência Nacional de Vigilância Sanitária* National Sanitation Agency
B3 | BM&F Bovespa	*Brasil, Bolsa, Balcão* Brazil Stock Exchange
BACEN | BCB	*Banco Central do Brasil* Central Bank of Brazil
BEPS	Base Erosion and Profit Shifting
BNDES	*Banco Nacional de Desenvolvimento Econômico e Social* Brazilian Development Bank
BofD	Board of Directors
BPTO	Brazilian Patent and Trademark Office
CADE	*Conselho Administrativo de Defesa Econômica* Administrative Economic Defence Council

CAMED	Chamber of Medicine
CAMEX	*Secretaria-Executiva da Câmara de Comércio Exterior* Foreign Trade Chamber
CAP	Cost Plus Taxes and Profit
CARF	*Conselho Administrativo de Recursos Fiscais* Higher Chamber of the Administrative Tax Appeals Council
CBD	Convention on Biological Diversity
CBF	*Confederação Brasileira de Futebol* Brazilian Football Confederation
CCB	*Cédulas de Crédito Bancário* Banking Credit Notes
CCEE	Electrical Energy Trading Chamber
CCO	Chief Commercial Officer
CDC	Consumer Protection Code
CDCA	Certified Agribusiness Credit Rights
CEO	Chief Executive Officer
CFO	Chief Financial Officer
CGEN	*Conselho de Gestão do Patrimônio Genético* Genetic Heritage Management Council
CGU	*Controladoria-Geral da União* Comptroller General of Brazil
CINM	International Business Centre of Madeira
CLT	Consolidation of Labour Laws

CMN	*Conselho Monetário Nacional* National Monetary Council
CNJ	*Conselho Nacional de Justiça* National Board of Justice
CNPE	National Council for Energy Policy
CNPJ	Entities Tax ID Number
CoAF	*Conselho de Controle de Atividades Financeiras* Council for Financial Activities Control
COFINS	*Contribuição para o Financiamento da Seguridade Social* Contribution for the Financing of Social Security
CONAMA	National Environmental Council
CONDECINE	*Contribution for the Development of the National Cinema Industry*
CONFAZ	*Conselho Nacional de Política Fazendária* National Council of Finance Policy
COO	Chief Operating Officer
COSRA	Council of Securities Regulators of the Americas
CPF	Individuals tax ID number
CPL	Cost Plus Profit
CRA	Receivables Certificate in Agribusiness
CSLL	*Contribuição Social sobre o Lucro Líquido* Social Contribution on Net Profit
CTC	Cape Town Protocol
CTN	National Tax Code

CUP	Paris Convention Agreement
CVA	Customs Valuation Agreement
CVM	*Comissão de Valores Mobiliários* Securities and Exchange Commission
DECOM	*Departamento de Defesa Comercial* Department of Commercial Defense
DIT	Department for International Trade
DNA	Deoxyribonucleic Acid
DR	Depositary Receipts
DrCI	Department of Asset Recovery and International Legal Cooperation
DU-E	Single Export Declaration
EED	Strategic Defence Company
EFTA	European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland)
ENCLLA	National Strategy Against Corruption and Money Laundering
EPC Contract	Engineering, Procurement and Construction Agreement
EPE	Energy Research Company
EST	Expressed Sequence Tags
ETVE	Entidad de Tenancia de Valores Extranjeros
EU	European Union
FCTA	Foreign Corrupt Practices Act

FDA	U.S. Food and Drug Administration
FDBT	Federal Department of Boards of Trade
FGTS	*Fundo de Garantia do Tempo de Serviço* Government Severance Indemnity Fund for Employees
FIFA	International Federation of Association Football
FIFO	'First In First Out'
FIF FIP	Investment Funds in Equity Fund Quotas
FIP	Equity Investment Funds
FIP – PD&I	Private Equity Funds - Intensive Economic Production in Research, Development and Innovation
FISTEL	*Fundo de Fiscalização das Telecomunicações* Telecommunications Fiscal Fund
FMIEE	Investment Funds in Emerging Companies
FNRB	National Fund for the Distribution of Benefits
FOP	Free on Board
FUNCINES	Funds of the National Film Industry
FUNDAP	Fund for Performance of Port Activities
Fust	Fund for the Universalization of Telecommunications Services
GATT	General Agreement on Tariffs and Trade
GFIP	*Guia de Recolhimento do Fundo de Garantia do Tempo de Serviço e Informações à Previdência Social* Employee Dismissal Fund and Social Security Information Payment Form

GNP	Gross National Product
GTIP	Group of Public Interest Evaluation
GURTs	Genetic Use Restriction Technologies
HMC	High Movie Council
HMO	Healthcare Management Organizations
IBAMA	*Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis* Brazilian Institute of Environment and Renewable Natural Resources
ICC	International Chamber of Commerce
ICMS	*Imposto sobre Circulação de Mercadorias e Serviços* State Value-Added Tax
ICTs	Scientific, Technological and Innovation Institutions
IDERA	Irrevocable Deregistration and Export Request Authorization
IED	*Investimento Estrangeiro Direto* Foreign Direct Investment
IHC	International Holding Companies
II	Import Duty
INCRA	National Institute for Settlement and Agrarian Reform
INSS	*Instituto Nacional do Seguro Social* National Social Security Institute
INPI	National Industrial Property Institute

IOF	Financial Operations Tax
IOSCO	International Organization of Securities Commissioners
IPI	*Imposto sobre Produto Industrializado* Excise Tax on Industrialised Products
IPO	Initial Public Offers
IPTU	Tax on Urban Property
IPVA	Vehicle Tax
IRPJ	*Imposto sobre a Renda da Pessoa Jurídica* Corporate Income Tax
IRRF	Withholding Income Tax
ITBI	Real Estate Conveyance Tax
ITC	International Trading Companies
ITCMD	Estate and Gift Tax
ITR	Tax on Rural Property
JSCP	Interest on Net Equity
JV	Joint Ventures
LAIA	Latin American Integration Association
LALUR	*Livro de Apuração do Lucro Real*
LCA	Letters of Credit for Agribusiness
LIFO	'Last in First Out'
LPCO	Export License, Permit, Certificate or Other

Ltda.	*Sociedade Limitada* – similar to a LLC
MCTIC	Ministry of Science, Technology, Innovations and Communication
MME	Ministry of Mines and Energy
MP	Provisional Measure
MPS	*Ministério da Previdência Social* Social Security Ministry
NCM	Mercosur Common Nomenclature
NEPA	National Environmental Policy Act
NRPOL	Reference Rules for Online Privacy
OECD	The Organisation for Economic Co-operation and Development
ONS	National System Operator
ORF	Open Reading Frames
PAC	Growth Acceleration Program
PCI	Price Quotation Method on Import
PCT	Patent Cooperation Treaty
PECEX	Price Quotation Method on Export
PGMU	General Universalization Targets Plan
PIC	Comparable Independent Price
PM	Provisional Measures
PNBL	National Broadband Program

PND National Privatization Program

PPB Basic Production Process

PPH Patent Prosecution Highway

PPI *Programa de Parcelamento Incentivado*
Investment Partnership Program

PPP Public Private Partnerships

PRL Resale Price Less Profit

PRODECINE National Film Development Programme

PROEX *Programa de Financiamento às Exportações*
Export Financing Program

PVA Wholesale Price Less Profit

PVE Foreign Visiting Teacher

PVEX Export Sales Price

PVV Retail Price Less Profit

RAB *Registro Aeronáutico Brasileiro*
Brazilian Aeronautical Registry

RDC Differentiated Procurement Regime
Regime Diferenciado de Contratação

RECAP Special Regime for Acquisition of Capital Goods for Companies

RECOF Regime for Industrial Establishment under Automated Customs Control

RECOM Special Input Import Customs Regime

REIDI — Special Regime of Incentives for Infrastructure Development

REIF — Real Estate Investment Funds Law

REPES — Special Regime for the Export and Service and Information Technology Platform

REPETRE — Special benefit for the import and export of goods to be used in the economic research, exploration and development of oil and natural gas in Brazil

RFB — *Receita Federal do Brasil*
Federal Revenue of Brazil

RGPS — *Regime Geral da Previdência Social*
General Social Security Regime

RIA — Regulatory Impact Analysis

ROF — *Registro de Operações Financeiras*
Financial Operations Registry

RZF — Free Trade Zone System

R&D — Research & Development

S.A. — *Sociedade por Ações* - similar to a Corporation

SAC — Secretary of Civil Aviation

SCD — *Sociedade de Crédito Direto*
Direct Credit Company

SDE — National Secretariat of Economic Law

SECEX — *Secretaria de Comércio Exterior*
Secretariat of Foreign Trade

SEP *Sociedade de Empréstimo entre Pessoas*
Peer to Peer Company

SFH *Sistema Financeiro de Habitação*
Housing Finance System

SFI *Sistema de Financiamento Imobiliário*
Real Estate Financing System

SIBACEN Central Bank Information System

SIN National Interconnected System

SISCOMEX *Sistema Integrado de Comércio Exterior*
Foreign Trade Integrated System

SisGen *Sistema Nacional de Gestão do Patrimônio Genético e do Conhecimento Tradicional Associado*
National System for the Management of Genetic Heritage and Associated Traditional Knowledge

SNJ Ministry of Justice's National Justice Department

SNP Single Nucleotide Polymorphism

SNVS National System of Sanitary Vigilance

SPEs Special Purpose Entities

SUS *Sistema Único de Saúde*
Unified Health System

SUSEP Private Insurances Office

STF Federal Supreme Court

STFC Switched Fixed Telephone Service

STJ Superior Court of Justice

STM	Superior Military Court
SUDAM	Acre, Pará, Roraima, Rondônia, Amapá, Amazonas, Tocantins, Mato Grosso, Mato Grosso do Sul, Goiás and part of Maranhão
SUDENE	Part of Maranhão, Piauí, Ceará, Rio Grande do Norte, Paraíba, Pernambuco, Alagoas, Sergipe, Bahia and parts of the states of Minas Gerais and Espírito Santo
TAC	Term of Commitment for Adjustment of Conduct
TCU	Federal Audit Court
TEC	Common External Tariff
TELEBRÁS	*Telecomunicações Brasileiras S.A.* Brazilian Telecommunications S.A.
TFA	Trade Facilitation Agreement
TJLP	Government's Long-Term Interest Rate
TK	Traditional Knowledge
TLD	Top Level Domain
TLP	Long-Term Rate
TPS	Public Benefit Survey
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TSE	Superior Electoral Court
TST	Superior Labour Court´

TUP	Terminal de Uso Privado Terminal for Private Usage
UNCED	United Nations Conference on Environment and Development
UNCITRAL	United Nations Commission on International Trade Law
UNEP	United Nations Environment Program
WHT	Withholding Income Tax
WIPO	World Intellectual Property Organisation
WTO	World trade Organisation
ZEP	Export Processing Zones

Chapter 1

An Overview of Brazil

Introduction

The Federative Republic of Brazil is the largest country in Latin America, and the fifth largest in the world. It covers over 8.5 million square kilometres and occupies over half of South America. Brazil shares borders with all the South American countries except Chile and Ecuador. Brasília is the capital, Portuguese is the official language, and the Real (R$) has been the currency since 1994.

Brazil has roughly 208.5 million inhabitants, who represent one-third of Latin America's population. Approximately 84% live in the urban areas along the Atlantic Coast, although the expansion of agribusiness and industrial activity to the interior of the country has caused the population to increasingly expand away from the coast.

Despite of the recession experienced in the last two years, the Brazilian economy is still one of the ten largest in the world. In 2017, Brazil's Gross National Product (GNP) was around US$2.06 trillion, an increase of 1.0% compared to 2016 figures, which shows an economy in recovery.

Accumulated inflation rates in December 2016 and December 2017 were 6.29% and 2.95%, respectively. The Brazilian external debt in June 2018 was approximately US$301.2 billion,

which represents a decrease of US$ 16 billion compared to 2017.

The largest States in Brazil in terms of GDP are São Paulo, Rio de Janeiro and Minas Gerais. These States are all in Brazil's southeast region and their combined population is around 74 million. The city of São Paulo produces around 19% of Brazil's GNP. B3 S/A (BRASIL, BOLSA, BALCÃO), which combines both the stock exchange of the State of São Paulo (B3) and the Commodities & Futures Exchange (BM&F), is one of the world's largest financial market infrastructure companies and the largest stock exchange in South America. It trades a large part of Brazilian production. In 2017,B3 had an Average Daily Trade Volume of R$ 8,724.6 million, an increase of 17.6% when compared to 2016.

During the 1990´s and through until 2002, Brazil underwent a massive privatisation programme, a measure introduced to deregulate the domestic economy and allow competition, aiming to develop various sectors of the economy.

This programme included the sale of industries and public service companies owned by Federal, State and Municipal governments. It also granted the private sector concessions to develop public services and natural resources. The programme reduced the role of the public sector in the Brazilian economy at Federal, State and Municipal levels; assigned more resources to social investment; reduced public sector debt; encouraged competition; and strengthened local capital markets.

The Brazilian Government has been continuing to encourage the private sector to invest in parts of the economy that have historically been the Government's responsibility, particularly in infrastructure. For example, in 2000 the Federal Government created a programme for the construction of thermal plants (the "Priority Thermoelectric Programme") with mostly private participation, and in 2004 created a new electricity model, which allows for participation and investment from the private sector. In addition, the Federal Government enacted a Public Private Partnerships ("PPP") bill in December 2004, with the aim of developing infrastructure projects through partnerships between public entities and private investors. The initial Federal PPP projects are in the highway, railroad, ports and irrigation sectors. State Governments are also engaged in implementing PPP projects.

The Government was also active during the 2008 financial crisis, as it reduced taxes on consumer goods and stimulated credit

operations, thereby alleviating some of the negative effects of the global economic crisis and maintaining internal consumption at comfortable levels. Another strategy was the investment program known as the PAC ("Programa de Aceleração do Crescimento" - Growth Acceleration Program), which was devised to develop large scale infrastructure construction works in Brazil.

The telecommunications sector has also undergone important changes since its privatisation, with the Government granting concessions, through bids from competitors, for the privatised companies. These companies currently operate in a competitive market.

The oil and gas sectors also operate in a competitive market. The state-owned company Petroleo Brasileiro S.A. - Petrobras - enjoyed a monopoly on oil and gas activities until 1997. Since then, the Government has been granting concessions to develop oil fields through bids, as a way to increasingly open the market to competitors. In 2007, Petrobras discovered large oil reserves off the coast of Rio de Janeiro. These oilfields, located in the pre-salt layer below 2,000 meters of water and 5,000 meters of salt and sand, attracted considerable interest from foreign and national oil companies. Petrobras raised US$70 billion in a share issue, which ended with the Brazilian Government owning 48% of the national oil company.

The discovery of high-potential offshore oilfields made the Brazilian oil and gas sectors attractive for the multinational oil majors and local players, but corruption scandals have hindered the company's original plans.

Brazilian capital markets have also been experiencing important developments. In December 2000 B3 introduced the so-called New Market or Novo Mercado, a listing category which aims to attract greater foreign investment in Brazilian companies by applying stricter rules on corporate governance, accounting and disclosure, whilst improving the treatment of minority shareholders. In addition, in 2003 the CVM issued a regulation that improved the rules for public offers of securities, in order to develop the securities market. Aimed at protecting investors, such regulation increased disclosure requirements and transparency with respect to conditions and risks involved with such offers. In 2010, 12 companies registered their Initial Public Offers (IPOs) at B3, with a total value of US$ 6.9 billion in market capitalisation. B3 also took steps to a fuller

integration with the international financial system, signing an agreement with the Shanghai Stock Exchange in 2011.

In 2007, Brazil passed Law 11.638/07 which mandates that companies with an annual income above R$ 400 million (approx. US$ 110 million) must perform financial audits as well as adopt an international accounting standard, which ensures transparency and compliance to regulations adopted around the world.

Brazil has also been experiencing structural reforms. In 2003 a Social Securities reform intending to reduce the imbalance between contributions and benefits paid, and the resultant increasing deficit, was approved. Also in 2003, the Congress approved the judiciary system reform, which includes a mechanism for external control of the judiciary system amongst other changes.

In 2017, the Congress approved the Labour Reform whose effects are still being assessed.

The combination of strong economic indicators and a governmental policy of reducing poverty through easier access to credit and stimulus to internal consumption has led to the growth of the middle class, which at present comprises more than half the Brazilian population.

A political crisis that resulted in a presidential impeachment, associated with the Car Wash Operation, a corruption scandal that implicated top politicians and the highest players of the infrastructure sector, have put Brazil into the biggest recession of its History, which lasted for two years.

Although the economy is recovering, the new Government has also suffered several allegations of corruption, which has hampered the growth expected for 2018.

Brazil will go through general elections in 2018 and tax and pension reforms are expected from the elected politicians. These reforms are deemed as necessary measures to re-establish the fiscal balance and the conditions for the resumption of a sustainable growth.

Along with Argentina, Paraguay, and Uruguay, Brazil is a member of the Mercosur. Mercosur is the result of the efforts of its members to strengthen their economic and political relationship. It is the world's fourth largest economic entity, after the European Union, the United States and Japan, and boasts a combined GNP of over US$1 trillion. Its four members have been modernising and opening their national economies. In 1996, Mercosur signed agreements with Chile and Bolivia, effective from that October and February 1997,

respectively, for the development of free trade among the countries. Mercosur also signed free-trade agreements with Israel in 2007 and with Egypt in 2010. Mercosur's agenda, however, extends far beyond economic and trade issues, as it also covers education, employment, the environment, consumer protection and culture.

Brazil is divided into 26 States and one Federal district (within which Brasília is located). This table shows the 5 regions, their populations and the percentage of the population living in urban areas:

Region	States	Population	Urban Population
North	7	15,000,000	73,5%
Northeast	9	53,000,000	73,1%
Southeast	4	80,000,000	92,9%
South	3	27,000,000	84,9%
Central-west	3	14,000,000	88,8%

The largest city in Brazil and South America is São Paulo, with a population of more than 12 million. This figure increases to about 20 million when the urban centres - the metropolitan area - around São Paulo, known as Greater São Paulo, are included. 14 other cities, including Rio de Janeiro, have populations of over 1 million.

Brazil hosted the 2014 FIFA World Cup and games took place throughout the country. The city of Rio de Janeiro hosted the 2016 Olympic Games.

The Political System

Brazil is a democratic federative republic, consisting of the Union, States, Municipalities and the Federal District. It has a representative form of Government with universal elections for the Executive and Legislative Branches.

A new Constitution was introduced in October 1988. It provided a Presidential type of Government with three independent branches: the Executive, the Legislature and the Judiciary. A national referendum held in 1993 confirmed the presidential system as the

preferred regime and the republic as the preferred form of Government.

After more than 10 years of military dictatorship, Brazil readopted multiparty democracy in 1979. However, the armed forces maintained control over the Executive branch until 1985, when the first civilian President was elected through indirect vote by an electoral college. Direct, 4-yearly elections for governors and mayors were readopted in 1982, and for the President, in 1988.

The Brazilian democracy is open to various forms of political participation in addition to the vote, Advocacy and lobbying by industry associations, trade unions, social movements, and non-governmental organisations is not regulated and very-much welcomed. There are still several mechanisms for the direct participation of citizens in the decision-making procedures and the exercising of power control, for example, popular consultations and referendums, executive branch impeachment proceedings, forums and public hearings involving the general voting public and companies.

The free press is a social and constitutional right, censorship is forbidden, and the right to a public opinion granted.

The Executive

At the Federal Level, the Executive is headed by the President. The President and Vice-President are elected by direct vote for four-year terms. It should be noted that since the implementation of direct elections in Brazil, voting is mandatory for citizens between 18 and 70 years of age. Both the President and Vice-President can stand for one re-election. The Executive's main responsibilities include:

- sanctioning and passing laws, as well as issuing decrees and regulations for their enforcement;
- proposing and carrying out public policies;
- entering into treaties, conventions and acts (which must be approved by the National Congress); and
- maintaining national security, public safety, and the Union-assigned public services.
- executing the Congress-approved annual budget.

The Executive also occasionally assumes the law-issuing roles of the legislature by passing Provisional Measures (PMs) in

urgent cases. PMs have the force of law, but must be approved converted measure into law by the National Congress within 60 days of its publication.[4] Congress is allowed to extend the validity of the PMs once only, for an additional 60 days. If it does not do so, the PM will cease to have effect.

The Congress may, by resolution, delegate to the President the power to legislate. The resolution may State that the Congress will examine the subject of the proposed law.

The Vice-President assists the President when requested, and performs other roles attributed to the office by supplementary laws. The Vice-President will replace the President if he or she is incapacitated, impeached or leaves office.

The President appoints and dismisses Ministers of State. They have two general roles: first, to run their ministries, and second, to advise the head of the Government on their department's policies. However, the responsibility for these policies lies with the President. They remain subordinate to the President, who is solely responsible - after consulting with his or her ministers - for Federal administration.

The Executive exercises direct and indirect administration. The direct administration includes the Ministers of State and their administrations, secretariats, chambers and committees, as well as the President's administration. The indirect administration comprises governmental administrative organizations, state-run companies and state-run companies with private investors, Federal foundations, and Federal regulatory agencies.

The Legislature

The Legislature consists of a two-chamber National Congress (the Senate and the Chamber of Deputies). The Senate is comprised of 81 Senators who represent the States of the Federation (three Senators for each State and Federal District). They serve staggered eight-year terms. The Chamber of Deputies is comprised of 513 deputies who represent their electorate, and serve for concurrent four-year terms. Members of the Senate and the Chamber of Deputies are elected by direct popular vote. The Chamber of Deputies employs a proportional representation system, meaning that each State and the Federal District elect between 8 and 70 Representatives each.

The legislature approves and oversees the execution and

effectiveness of the annual budget and performs the State's legislative functions by passing:

- constitutional amendments;
- complementary, ordinary and delegated laws;
- legislative decrees and resolutions; and
- Provisional Measures.

Before any proposed legislation can become law, it must be approved by both chambers and receive Presidential sanction.

The Federal Constitution prescribes the matters falling within the exclusive remit of the Chamber of Deputies and the Senate. It empowers both bodies to make their own rules on organisation, regulations and appointment of employees. The Federal Constitution also sets the National Congress its functions, stating which matters must be submitted to the President for approval, and which fall under its own authority.

Each house has committees that analyse and report their findings on the specific matters submitted to them. The Chamber of Deputies has 20 permanent committees whilst the Senate has 12. Furthermore, temporary committees such as Parliamentary Inquiry Committees, can be created to investigate certain matters. Both States and municipalities have legislative branches.

The Senate also has the mandate to approve the President's nomination of Supreme and Superior Courts Ministers, the Directors of the Regulatory Agencies, the President of the Central Bank, and other government officials as defined by specific legislation.

The Judiciary

The Judiciary is comprised of Federal and State courts, and is headed by the Federal Supreme Court (STF). The STF is the final appeal court for Federal and State courts on Federal Constitution matters. The 11 STF members are appointed by the President after an absolute Senate majority has been achieved.

Under the STF are special courts. These are the final courts of appeal for non-constitutional matters:

- Superior Court of Justice (STJ): this court hears appeals on how to interpret and apply Federal law;

- Superior Military Court (STM);
- Superior Electoral Court (TSE); and
- Superior Labour Court (TST).

Below these special courts are the Federal Regional Courts and the State Courts of Appeal. These hear appeals against decisions taken by both the Lower Federal Courts and the Lower State Courts (which are usually the first instance courts). Federal Courts can hear cases to which the Federal Government or any of its Government corporations or entities are party. The State Courts hear cases that involve individuals or entities not related to the Federal Government, nor to State or Municipal entities or authorities.

Finally, there are the First Instance Courts for Employment Matters; the Regional Employment Courts of Appeal (which only deal with employment litigation matters); the Lower Electoral Courts and Regional Electoral Courts (organisation, inspection and summing-up of the elections), and the Lower Military Courts (military crimes). All these courts form part of the Federal judicial system.

At the bottom of the court hierarchy are:

- Employment Courts and Regional Employment Courts of Appeal (for employment litigation only);
- Lower and Regional Electoral Courts (for election organisation, inspection and summing-up); and
- Lower Military Courts (for military crimes).

The Judiciary is fiercely independent in its role of applying the law, providing fair and equal justice, and protecting citizens' individual rights.

Political Divisions

States

Brazil is divided into 5 regions and 26 States, being,

- North: Acre, Amapá, Amazonas, Pará, Rondônia, Roraima and Tocantins;

- Northeast: Alagoas, Bahia, Ceará, Maranhão, Paraíba, Pernambuco, Piauí, Rio Grande do Norte and Sergipe;
- Southeast: Espírito Santo, Minas Gerais, Rio de Janeiro and São Paulo;
- Central-West: Goiás, Mato Grosso and Mato Grosso do Sul, and
- South: Paraná, Rio Grande do Sul and Santa Catarina.

Each has its own constitution, governor and State legislature. The Federal District, located within the borders of Goiás State, within the Central-Western region, also has its own governor and legislature.

The Governor exercises each State's executive powers. The Governor and Vice-Governor are elected by direct vote for four-year terms. Secretaries of State assist the governor in exercising their functions. Their number and powers vary from State to State but, under State laws and the State Constitution, they all govern the State. The State Assembly, comprised of the State deputies - also elected by direct vote - exercises the legislative power. The number of deputies for each State's Assembly is proportionate to its population.

The organisation of the State judiciary is the responsibility of each State, and is carried out by the highest State court, the State Court of Appeals. The State Court of Appeals is subordinate to both the STF (the Federal Supreme Court), and the STJ (the High Court of Justice).

Municipalities

Municipalities, which make up the states, are the smallest self-governing units in Brazil. They elect their own chief executives (mayors), deputy mayors and members of the legislature (councillors), and control the local public services.

Municipalities are created by State law and are subject to Federal law requirements on minimum population size, public revenue and the consent of the population. The mayor governs the Municipality, with the help of Municipal secretaries or departmental directors. The council is the Municipality's legislative body. It may legislate on certain local matters authorised by the Federal Constitution.

The State Courts have jurisdiction over the municipalities.

The Legal System

Brazil is a civil law country and its legal system is based upon laws enacted by the National Congress, State Assemblies and Municipal Councils as per the procedures set forth in their constitution or organisational law, as the case may be.

The courts base their decisions on this enacted law. If however, a case does not fall within a specific rule or law, the Introductory Law to Norms of The Brazilian Law states that courts may base their decisions on case law, general principles of law, analogy, custom and use[1].

Sources of Law

Basically, the seven sources of law are:

- Legislation. This is the principal source of law. The Federal Constitution gives the National Congress power to legislate on areas such as criminal, civil, commercial, and employment law.
- Case law. This is the courts' interpretation of laws, throughout its hierarchy. The most important role of case law is to provide uniformity to the courts' interpretation of law and rules.
- General principles of law. These apply general legal values to the interpretation of current laws and the drafting of new ones."
- Analogy. The court applies prior interpretations to analogous cases that are not covered by other laws.
- Custom and use. This subsidiary source of law can only apply if it does not contradict laws already in force. The parties to a dispute of any kind can refer to custom and use. This is used particularly in commercial disputes.
- Equity. In cases permitted by law, the court will apply principles of fairness[2].
- Legal doctrine. This includes legal opinions and academic texts. Paradoxically, some academics believe legal doctrine is not a source of law,

despite their works being quoted by the courts to substantiate their ruling.

The Federal Constitution

As mentioned earlier, Brazil is composed of the Federal Union, States and the Federal District and Municipalities. Each can pass laws and regulations with regard to subjects under their respective jurisdiction, as per the Federal Constitution, and in accordance with its provisions. The Federal Constitution of 1988 heads the legal system and provides the fundamental rights of the citizens. It also sets the country's political and administrative organisation. The Constitution defines the roles of the Executive, Legislative and Judiciary. It legislates on tax, socioeconomic and economic policies, civil and commercial law, employment relations and criminal law.

Article 1 of the Constitution also states essential principles such as national sovereignty, citizenship, dignity of life, social employment values, freedom of association and political pluralism.

The Federal Constitution is divided into different titles covering:

- Titles I and II – essential principles: Chapter I of Title II describes individual rights and liberties. It also guarantees the inviolability of the right to life, liberty, equality, security and property;
- Title III – the organisation of the state;
- Title IV – the organisation of the Legislature and National Congress amongst other public bodies, including the Executive and Judiciary;
- Title V – the defence of the state and democratic institutions;
- Title VI – taxes and the fiscal budget;
- Title VII – economic and financial order;
- Title VIII – social order; and
- Title IX – general dispositions.

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1. Article 4th of the Introductory Law to Norms of The Brazilian Law (Decree-Law # 4.657/1942).
2. Article 140 of the Civil Procedure Code (Law # 13.105/2015).

Each State has its own constitution and each Municipality has its own organisational law, which must be in accordance with the principals and rules set forth in the Federal Constitution.

There is a hierarchy in the application of the Laws within the Brazilian Legal System based upon legal criteria such as (i) temporality, (ii) jurisdiction, and (iii) specificity, among others. These criteria are used to avoid conflicts between laws or misuse of the prevailing legislation.

Recent Political and Economic History

Brazil started as a Portuguese Colony and had the unique experience of hosting the Conquering Royal Family that left its heir as the ruler of the country. This Ruler declared independence from Portugal before later returning to Portugal and leaving his son in Brazil. During his reign his Military Leaders declared Brazil a Republic without a fight and kept the Royal Family safe and prosperous.

The Republic alternated between democratic and not so democratic times, but at no point was there ever a full rebellion or a significant domestic war.

For the past half century, Brazil has experienced a varied political life. Following the military regime, which governed from 1964 to 1985, there was a 'transition' period, instigated and ruled by the military government, which led Brazil to full democracy with the approval of today´s Federal Constitution in 1988, thus setting the foundations for a Democratic Republic that respects due process of law, checks and balances, Congress and Judiciary independence, free press, and social and civil rights. After a period struggling with high inflation, an aging governmental structure. and the first impeachment of a duly elected President (Fernando Collor), in the 1990´s President Fernando Henrique Cardoso's Government put Brazil back on track, promoted economic and financial stability and decreased inflation, with rates falling sharply, regulatory agencies, privatization, PPP projects and State Budget management all contributing to a revamping of the business environment. The country then saw the growth of the Gross Domestic Product and the strengthening of the local currency

before facing an extraordinary and unique development - a former factory worker won the Brazilian Presidential election.

The Government of Luiz Inácio Lula da Silva

Luiz Inácio Lula da Silva's presidency, contrary to all expectations, unfolded with no real surprises at all in conducting the Brazilian economy. Lula kept Brazil's macroeconomic situation stable and this has brought unquestionable results. Under Lula, Brazil expanded its agribusiness, with ethanol becoming the face of the Government's investments in agribusiness and heavy Government funding in marketing programs advertising the product. However, areas such as soy and meat production also played a significant role in the expansion of agribusiness, witnessing a boom in production compared to previous years. In addition, the Brazilian economy also benefitted from a global rise in commodity prices.

Another mark of Lula's Government was the discovery of the pre-salt oil reserve, an offshore find that nearly doubled the country's oil reserves, although to date, no significant production has yielded from these fields. Former President Lula also further stabilized the currency by multiplying Brazil's foreign currency reserves and increasing the strength of the Real. Such was the increase in foreign currency reserves that, in 2011, Brazil was reported to be the fifth largest creditor of the United States' foreign debt.

Under Lula, Brazil also invested Treasury and Development Bank funds in infrastructure projects, mainly through the *Projeto de Aceleração do Crescimento*, or PAC, launched in 2007 by the Federal Government. Despite high investments, in 2010, only 46% of the PAC projects had either started or been concluded.

In addition to the measures mentioned above, President Luiz Inácio Lula da Silva, always escorted by Brazilian entrepreneurs representing various sectors of the market, visited countries on several continents, spreading the word on Brazilian products and developing foreign trade. As a consequence, Brazil signed commercial treaties with countries such as India, China and Russia, and also fostered trade with countries with which it had already had a firm commercial base.

Despite the advancement of the country and the President's notable popularity, Lula's Government was also marked by corruption scandals in the highest echelon of Government. Most

notably was the *Mensalão* case, which came to light in 2005, gaining notoriety as an allegedly widespread cash-for-votes scheme involving high-level Government officials, members of the Brazilian Congress, and business leaders in the private sector. The scheme allegedly consisted of monthly contributions to members of the Brazilian Congress in order to obtain political support in matters before the Federal Government (*Mensalão* can be loosely translated as "big monthly stipend"). Senior officials of President Luiz Inácio Lula da Silva's Government were implicated in the case, including, but not limited to, Lula's former chief of staff, José Dirceu.

The Government of Dilma Roussef

President Luiz Inácio Lula da Silva appointed Dilma Rousseff as José Dirceu's successor and new chief of staff to his Government in 2005. During the final years of his Government, Lula supported the Rousseff's successfully candidacy for the Brazilian Presidency. Following a disputed first round victory against opposition candidates José Serra of the PSDB and Marina Silva of the Green Party (PV), Rousseff went on to dispute the second-round vote with José Serra, a former Health Minister and Governor of São Paulo State. In October 2010, Rousseff was elected the first female president of Brazil, with 55% of the popular vote.

In 2013, under the Government of President Dilma, Brazil was the scene of a series of protests, especially in the major state capitals, which were initially against increases in public transport fares, but which then came to incorporate demonstrations against the mega-events of FIFA (Confederations Cup and World Cup) and even towards broader issues, such as the fight against corruption. These were the biggest protests in the country since the calls for the impeachment of Fernando Collor in 1992.

In response, the Brazilian government announced several measures in an attempt to meet protesters' demands, and the Brazilian Congress voted in a series of concessions (the so-called "positive agenda"), such as making corruption a heinous crime, archiving the PEC 37 which would have prohibited investigations by the Public Prosecutor's Office, and a secret ballot on voting to ban the mandate of lawmakers accused of irregularities. There was also a revocation of the recent increases in public transportation fares in several cities of the country, with the return to pre-movement prices.

In October 2014, the presidential elections were held in Brazil, resulting in the re-election of Dilma Rousseff, of the Workers' Party (PT). The victory was very narrow, becoming the closest presidential race in history. The presidential campaign was notable for a low voter turnout, riots and controversies, mainly due to the 'Operation Car Wash', which brought to the surface a huge corruption scheme that hit companies, the political class, and political parties as a whole.

Dilma began her second term in a weakened position, thanks mainly to the economic and political crisis, which led her approval rating dropping to just 9%, the lowest ever for a President of the Republic.

Operation Car Wash

On March 17, 2014, the Federal Police initiated a series of investigations that would come to be known as 'Operation Car Wash', initially investigating a corruption and money laundering scheme involving billions of reais and numerous politicians from the largest parties in the country. The operation had a direct impact on the country's politics, contributing to the unpopularity of the Dilma government.

Impeachment of Dilma Roussef

Driven by her low approval rates and the numerous scandals, the impeachment process of Dilma Roussef began in December 2015, resulting in the annulment of her mandate. Dilma Rousseff therefore became the second person exercising the position of President of the Federative Republic of Brazil to be impeached, Fernando Collor having been the first in 1992.

The Government of Michel Temer

After the impeachment of Dilma Roussef, the government was then assumed by the Vice-President Michel Temer. All the corruption scandals involving the Temer government, coupled with unpopular reform proposals, made Temer's popularity, according to CNI/Ibope polls, fall to 3% in September 2017, making him even more unpopular than Dilma Rousseff.

In 2018, Operation Car Wash had a historical development

with the arrest of former President Luiz Inácio Lula da Silva. Sérgio Moro, a federal lower-court judge, issued the arrest warrant due to a conviction in the second instance calling for 12 years and one month in prison for corruption and money laundering.

Among the main reforms, we should mention: the New Fiscal Regime, a constitutional amendment that establishes a limit for the increase of Federal Government expenditures for 20 years; the Law of Outsourcing, a law that allows the outsourcing of work for end-activities; and the Labour Reform, which was a significant change in the Consolidation of Labour Laws (CLT) and changed the future of politics by ending the history of mandatory union funding that started at 1964.

Unfortunately, new scandals arose out of the Operation Car Wash investigations that decreased President Temer's influence over Congress and the government failed to carry out the much needed Social Security Reform.

Current scenario

As a consequence of the political crisis, Brazil, together with a number of other countries, experienced a change in their ideological frameworks of both the ruling powers and a considerable part of their populations, with the emergence of new liberal and conservative movements, with the work of thinkers and influencers with ideals openly focused on right-wing ideas. In the political field, the greatest expression of this movement has been the election to the position of President of the Republic of the State Deputy Jair Bolsonaro.

In 2018, 47.3% of the seats in the Chamber were occupied by newly-elected Deputies, meaning 243 new faces, the greatest renewal since the Constitutional Convention of 1987. The Senate also underwent a meaningful renewal, with 46 of the 54 disputed seats being won by new names, whilst of the 32 who sought re-election, only eight have been successful.

Voters demanded that economic growth should be the focus of the new government in the medium to long term. A broad spectrum of politicians has agreed on the need for political stability and a relatively liberal economy. They also emphasize welfare reform, thereby attracting foreign investment, and controlling inflation as the basis for long-term sustainable economic growth.

The legislative agenda is full of economic topics. With Jair

Bolsonaro (PSL) in the Presidency, complex matters are emerging in the voting agenda of the National Congress.

The first matter the new government faced in the Legislative was the most urgent topic for the economic team led by the Minister of the Economy, Paulo Guedes: the Social Security Reform, passed in late 2019. Another crucial structural matter is Tax Reform, currently under discussion in the Congress.

Besides structural reforms, several microeconomic measures decreasing bureaucracy and improving the quality of regulation are being implemented to boost the economy, help create jobs and balance public accounts.

No country has ever pushed Social Security or Tax reforms through without a certain degree of turbulence, and the country is still suffering from the polarization that developed around the election time and the combatting of corruption, both of which still create political instability with every new development.

Jair Bolsonaro is still searching for and calibrating the tone of his government and balancing a liberal approach with a conservative moral agenda.

On the other hand, the recognition that the Brazilian State is too ponderous, thereby decreasing the productivity of the private sector, and has therefore become a burden to the population, has spread throughout society. Recently elected Governors, mayors and elected congressman, all promising new approaches, have a willingness to improve the business environment.

There is a great deal of energy in the country and the institutions have proven to be strong by keeping democracy, the rule of the law and the republic safe and functioning during the impeachment of two Presidents and the debacle of the greatest corruption scheme known to the modern times.

The forecast now is of clear skies after storms that look out over a society that is used to bending but not breaking in its path towards prosperity.

International Treaties

Given the influence of the American and French Constitutions, in Brazil the Executive and the Legislature together approve, ratify

and enact international treaties.

Under the Federal Constitution, the President has powers to sign international treaties. He or she may also delegate these powers to appointed plenipotentiaries. Except for less formal treaties known as executive agreements, all other forms of treaty, after having been signed by the Executive's representative, must go to Congress for approval. Once a treaty is approved - by Legislative Decree - the Executive will decide whether to ratify it. If it decides to ratify, the President will sign the ratification instrument and exchange it with that of the other signatory (for bilateral treaties) or forward it to the depositary mentioned in the treaty. The treaty must then be passed in Brazil by Presidential Decree and published in the 'Official Gazette'.

There have always been discussions in Brazil as to whether international treaties are binding over domestic legislation. The STF has ruled that treaties incorporated into the Brazilian legal system have the same force as ordinary laws. Therefore, if a treaty conflicts with a domestic law on the same subject, the most recent in time will prevail[3]. The exception is in tax matters: the Brazilian National Tax Code expressly establishes that treaties rank over ordinary laws. Moreover, treaties on human rights may have the same status of a constitutional amendment depending on the congressional approval quorum.

Brazil has reviewed its foreign trade policy and is now focusing on negotiating new free trade and preferential agreements. The Free Trade Agreement between Southern Common Market (Mercosur)[4] and the European Union (EU) seems to be a priority for Brazil. This trade agreement can intensify the already dense economic relations with the EU - Brazil ranks as the sixth main investor in the EU (offshores excluded), and it is the third destination of EU investment stocks in the world[5]. In June, 2019 the political announcement of the agreement took place and the formal documents are expected to be signed and approved by late 2021.

There are other advancements of Mercosur trade negotiations, such as the joint statement signed in June, 2018 with the Pacific Alliance[6], which signaled the shared intent to increase trade relations between the two blocs. Another important achievement was the launch of negotiations with the Republic of Korea in May, 2018, with Canada in March 2018, and the ongoing negotiations with the EFTA countries (Iceland, Liechtenstein,

Norway and Switzerland). It is also worth mentioning the recent analysis of a possible economic partnership agreement with Japan[7].

Mercosur is also expanding its preferential trade agreement with India, and conducting trade negotiations with Lebanon and Tunisia. In addition, Brazil is currently negotiating an expansion of the Agreement for Economic Complementation No. 53 (ACE No. 53) (a preferential trade agreement with Mexico).

Furthermore, official sources indicate that there are dialogues in view of opening trade negotiations with other partners, such as Singapore and New Zealand.

As part of the Brazilian Government's wider plan to attract foreign investors, Brazil has formally applied to become a full member of the Organisation for Economic Co-operation and Development (OECD). The country's collaboration with the OECD started in 90's and gradually deepened. In 2007, Brazil and other emerging economies became "Key Partners" of the organization. Currently, Brazil participates in numerous OECD committees and working parties, including as an Associate of the Inclusive Framework on Base Erosion and Profit Shifting (BEPS) and as a member of the Global Forum on Exchange of Information and Transparency for Tax Purposes. Furthermore, Brazil adhered to 82

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3. Please note that Brazil is subject to principles laid down by the Vienna Convention on Law of Treaties, such as the ones referring to observance and application of treaties. After years of congressional debates, the Vienna Convention was ratified by Brazil in 2009 and published under Presidential Decree n. 7,030/09 (before that, the convention was informally in force in Brazil, as its rules were considered applicable as international practice).
4. Created in 1991 in order to establish a common market in the South America region, the Mercosur today represents the 5th largest economy in the world with all its countries combined (US$ 2.78 trillion in 2017, ahead of the UK with US$ 2.62 billion and India with US$ 2.61 trillion).The founding members of the block were Brazil, Argentina, Paraguay and Uruguay. Venezuela joined the bloc in 2012, but has been suspended since December 2016 for failure to comply with its protocol of accession.
5. Cf. http://www.itamaraty.gov.br/en/speeches-articles-and-interviews/other-high-ranking-officials-articles/19403-the-eu-mercosur-negotiations-ambassador-e verton-vieira-vargas-europe-s-world-23-04-2018
6. Created in 2011, the Pacific Alliance is formed by Chile, Peru, Colombia and Mexico.
7. Cf. Joint Report by the Brazilian National Confederation of Industry (CNI) and Keidanren (Japan Business Federation).

out of 254 OECD legal instruments (and requested adherence to other 65), including the Convention on Mutual Administrative Assistance in Tax Matter[8].

Logistics

As noted in other chapters, Brazil is a country of continental proportions and in order to make possible the transport of goods and merchandise across such a large territory, an enormous logistical network is required, using varied means of transport. Considering Brazil's integration with the MERCOSUR and global markets, the combined use of multi-modal transport is the only way to serve such a large and heterogeneous territory.

The Brazilian Government plays a key role in the development of logistics infrastructure projects in Brazil. Projects can be tendered and regulated at the federal, state or municipal level, depending on the sector and territory involved.

At the federal level, the current policy for fostering investments in Infrastructure is embodied in the Investments Partnership Program ("PPI"), created by Federal Law 13,334/2016. The PPI is applicable for key ventures involving privatization, public concession, Public-Private Partnerships (PPP) and other forms of partnership with the private sector conducted by the Federal Government or state-owned companies (or delegated by such to local authorities), as well as those included in the National Privatization Program (Federal Law 9,491/1997).

At the state and municipal levels, each Government can set its guidelines and conditions for partnerships, subject to the general frameworks and guidance set by federal legislation.

It is widely known that Brazil faces several infrastructure challenges and a large sum of investment is needed. Despite the complex economic and political scenario, since 2016, both Federal and State Governments have developed a number of projects, either directly or via state-owned companies, involving public tenders or direct sales.

Brazil has 39 public ports that operate under the 'landlord' system. Within this system, the Government is responsible for the operation of the port and its infrastructure, whilst the port *terminals*

are leased to private companies. Brazilian ports have been duly modernized after the implementation of the changes required by the International Ship and Port Facility (ISPS) Code, issued by the International Maritime Organization.

Moreover, Brazilian legislation regarding ports has changed significantly over recent years. With the enacting of Federal Law 12,815/2015, the operation of fully private ports under the *Terminal de Uso Privado* regime ("TUP") became possible. The implementation and operation of a TUP demands an authorization granted by the National Agency of Waterway Transportation ("Antaq").

As for industrial waterways, or '*hidrovias*', multi-mode transport is necessary for their viable operation, since despite the fact that Brazil is well served by wide navigable rivers throughout its territory, it is dependent upon the road and rail infrastructure to complete the network. The most important river basin in commercial terms is the Paraná-Tietê, which is responsible for connecting the South and South-eastern regions. Another important area is the Paraguay-Paraná basin, connecting Uruguay with Mato Grosso State. Other basins include those of the Madeira, São Francisco and Tocantins-Araguaia rivers. The biggest in terms of volume is the Amazon basin, with 18 million tonnes transported by water in 2000, out of a total of 20.9 million tonnes for the whole of Brazil.

The road network is the unifying factor, linking diverse geographical areas and entering the cities. The country has some 1.8 million kilometres of roads, of which 146,000 are surfaced (State and Federal highways). These highways are administrated by the Government at Federal or State level, either directly or through the concession of toll roads.

The concession of toll roads is one of the most consolidated sectors in Brazil, with a substantial number of successful projects. Some concessionaires holding federal projects tendered between 2011 and 2014, however, are facing financial trouble due to a decrease in demand and struggles to obtain financing, and may have to return the concessions for re-bidding. Other concessions granted in the past are now reaching their termination dates are now being renewed or having their bidding processes re-launched, and new projects are under development.

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8. Cf. http://www.oecd.org/brazil/Active-with-Brazil.pdf

Bus lines are operated under Government license and companies are subject to regular inspections. Cargo transport is carried out on a free-market basis, free from Government authorizations or concessions.

Railway projects in Brazil are usually developed at the federal level, under public concession, and are subject to the surveillance and regulation of the National Agency of Land Transportation ("ANTT"). Most of the existing concessions were granted in the late 1990's, by means of a privatization program that transferred the right to exploitation of the Brazilian rail network, at that time held by a public company called RRFSA, to private parties.

For a long period, railway concessions were subject to limited regulation and surveillance. Since 2010, the sector's regulation and concession models have been the object of discussion and reforms aimed at increasing investments and expanding the railway infrastructure in Brazil. During this time, different alternatives have been considered for the granting of new concessions.

Despite the difficulties faced in making projects feasible, especially considering the heavy amount of investments required for the expansion and construction of railroads, the projects are now becoming more mature. Four public procurements are expected to be launched before the end of 2019 and others are being structured. The 'Ferrovia Norte-Sul' is the most advanced, with publication of its tender notice expected before the end of the year.

In parallel, the Government is negotiating the renewal of the main rail concessions, including those held by VLI, Vale, MRS and Rumo Logística, in order to transfer new investment undertakings to the concessionaires. The proposals still have to be approved by the Federal Audit Court (TCU).

Historically, airports in Brazil have always been operated by INFRAERO, a federal, state-owned company. Since 2011 however, Brazil has seen a change in its policy regarding the management and maintenance of airports, and a process has started for granting licenses to operate the largest airports to the private sector. The delegation of airports' investments and operation to the private sector initially aimed to promote investments in connection with the 2014 World Cup and 2016 Olympic Games. Since then, 10 airports have been the object of concession. The sector attracted substantial investments, but certain concessionaires have been facing financial difficulties in the aftermath of the Operation Car

Wash investigations. The existing concessions are detailed in the table below.

In addition, further concessions are being structured by the Brazilian Government: two in the southeast, four in the centre-west and 6 in the northeast. Foreign investments are expected.

Brazil's airport security is also up to international standards, with the government Airport Infrastructure Agency, INFRAERO, providing electronic surveillance of airports and metal detectors together with the police authorities.

It is important to note that in 2019 a change in law took place and now a 100% of the voting share in airline companies in Brazil are open to foreign investors.

There is a lot of expectation for further development of the logistic sector in Brazil and the increase of opportunities in this sector. There are a number of ongoing projects designed to implement the infrastructure required for logistics, and several others are being planned.

Chapter 2

Foreign Investment in Brazil

Direct Investment

Foreign direct investment (IED) means that the foreign investor has either established some sort of corporate entity to achieve its intended objectives or acquired an ownership interest in a Brazilian company that already exists.

All IED must be registered with the Central Bank of Brazil (BACEN) in the original foreign currency. The investor has 30 days from the inflow of funds to apply for the registration of the IED. Foreign capitals may take the form of: Cash, rights and assets sent to Brazil at fair market value, reinvested earnings, conversion of foreign-currency loans or current-account balances, liabilities and others.

All external loans, direct or through the issuance of securities abroad, as well as other forms of foreign capital, such as royalties due abroad or long-term import financing, are subject to the Financial Operations Registry (ROF), with the BACEN, and export prepayments. All this information is recorded in the Central Bank Information System (SIBACEN), which allows the inclusion and

exclusion of agents (individuals or legal entities), in addition to conducting consultations, records and updates as necessary.

The National Monetary Council (CMN) has the highest regulatory authority over foreign investments. Furthermore, the foreign-exchange policy is controlled and supervised by BACEN.

In general terms, there are no restrictions in respect of the repatriation of funds or remittance of profits, regardless of the length of time the funds remain in Brazil, provided that the sum of capital to be sent abroad is the same as that registered with the BACEN. Corporate entities receiving foreign investment are subject to the same general tax rules applicable to Brazilian companies owned by individuals or other corporate entities residing and domiciled in Brazil.

Usually, foreign ownership of local enterprises is allowed and, in general, no particular type of operation receives special treatment. However, there are some restrictions on foreign investor control in some economic segments such as communications (television, radio stations and newspapers), aviation (airlines), shipping (coastal and freshwater shipping), mining (exploration and extraction of mineral resources), hyoelectricity (electricity generation) and ownership of rural lands and lands near Brazil's borders.

The most common types of corporate entity

There are some lawful means by which foreigner investors can make direct investments in Brazil. Currently, there are two types of entities most commonly used for direct investments: the *Sociedade Limitada – Ltda.* (similar to a LLC) and *Sociedade por Ações - S.A.* (similar to a Corporation). The Ltda. has its capital divided into units of ownership (quotas) representing the interest of each member in the capital of the company. In the case of the S.A., its capital is divided into shares and it may be a privately held or publicly traded company. Publicly traded companies are subject to normative rules endorsed by the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários – CVM*).

Each one of them has its own characteristics, as follows:

	Ltda.	S/A.
Capital	Divided into shares	Divided into stocks
Responsibility	Subsidiary liability limited to the value of paid-up shares	Limited to the issuance price of acquired or subscribed stock
Name	The company name is followed by the expression "Ltda"	The company name is followed by "Sociedade Anônima" or "S/A" or is preceded by the word "Company" or its abbreviation "Cia"
Constitutional act	Bylaws	Bylaws
Administration	A nominated administrator with no restrictions on the period of time the individual should remain in the position	A Board of Directors, composed of board members, with a maximum three-year mandate, after which a new election is required, with re-election being possible

Brazil requires that foreigner investors, whether individuals or legal entities, are registered with a tax ID number provided by the Brazilian Federal Revenue Office (RFB). In the case of individuals, this tax ID number is called a 'CPF', and legal entities are registered with a 'CNPJ'. In both cases, the legal investor must appoint a person residing in Brazil to be their legal representative. The legal representative will be responsible and liable, among other duties, for the withholding and payment of income tax levied on the capital gains earned by a foreign-based individual or legal entity with the sale of assets or rights located in Brazil.

The excessive bureaucracy in all aspects of a company's life is part of the difficulties involved in starting a business in Brazil. Many requirements in the routines of entrepreneurs directly affect the quality of the Brazilian business environment. Brazil ranked 125th out of a total of 190 countries, for example, in the result of the World Bank's most recent "Doing Business" survey (conducted in 2018). Questions such as "time required to start a business", "tax payments" and "obtaining permits for construction" negatively influence the country's position.

Legalization process

Initially, when foreign documents arrive, it must be verified that the foreign investor comes from a country that has ratified the Hague Convention. This will allow the validation of foreign documents through the "Hague Handbook" or "Apostille" (a French-named notarization type with international validity), which certifies the public documents between the Convention signatory countries.

In order to have legal value, if the investor's documents are from a country not covered by the Hague Convention, they must be registered with the consulate in the country of issuance (or with an office offering Brazilian diplomatic representation) through a sworn translation procedure prior to submission to the Brazilian public agencies.

With the presentation of documents (as described above), the company or individual foreign investor may participate as a partner in a Brazilian company (and thus acquire legal personality in Brazil) by filing all the necessary information with the competent agencies.

One important step is the choosing of a foreign investor attorney, through the presentation of a power of attorney. The proxy

may also be the managing director or director of the company being formed. It is important to note that the legal representative must be domiciled in Brazil, and be a native or naturalized Brazilian, or an alien with a permanent visa in Brazil, in addition to have a fixed residence in Brazil, as he or she will have legal and tax responsibilities before the Brazilian authorities.

Indirect Investment

Stock Exchange Investments

Investors domiciled abroad may invest in the Brazilian financial and capital markets[1]. The *'Comissão de Valores Mobiliários'* (Securities Commission - CVM) provides that any investor domiciled abroad must first register as a non-resident investor. An "investor domiciled abroad" includes individuals, corporate entities, foreign mutual and investment funds, and collective investment entities.

To avoid repetition of "investors domiciled abroad" or "non-resident investors", we will use the term "foreign investor".

Before investing in Brazil, the foreign investor must:

- appoint one or more legal and tax representatives in Brazil;
- fill in an identification form; and,
- register with the CVM.

The foreign investor's legal and tax representative must either be, or include, a BACEN authorised entity[2], and must:

- keep and, when requested, provide BACEN and CVM identification information and the representation agreement with the foreign investor;
- register and keep updated registrations as a foreign investor with the CVM, and of the foreign investment with BACEN;
- provide BACEN and CVM with any information they request;

- endorse the foreign investor's signature on the identification information form; and,
- whenever the representation agreement ends or if any irregularities connected to it arise, immediately report such fact to BACEN and CVM.

All financial assets and securities, as well as certain financial transactions that the foreign investor negotiates, must: (i) be registered or kept in custody or a deposit account with BACEN or CVM authorised institutions; or (ii) be registered in the BACEN or CVM approved registration, settlement and custody systems.

The foreign investor's transactions in derivatives or other futures markets must: (i) be in, or registered with, the stock or commodities and futures exchanges, or in over-the-counter markets organised by entities authorised by the CVM; or (ii) be registered with the BACEN or CVM approved registration, settlement and custody systems.

Foreign investors can only use funds entering Brazil under CMN Resolution No. 4,373 to buy or sell securities of registered, publicly held companies on CVM-controlled exchange trading floors, electronic systems or over-the-counter markets. The funds may not be used to buy or sell securities negotiated in non-organised over-the-counter markets, or in over-the-counter markets that lack CVM authorisation.

Depositary Receipts

Publicly held corporations can use depositary receipts (DRs) to represent their shares in order to trade in foreign markets. Under a DR programme, a Brazilian custodian keeps custody of shares in a Brazilian corporation on behalf of a foreign finance institution. The depository issues DRs representing the company's shares. The investor can trade these DRs abroad in the currency of that country[3].

If the corporation's DR programme allows it, foreign investors may buy DRs in the primary market when the company

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1. CMN Resolution 4,373/14.
2. The investor may also appoint an individual or non-financial corporate entity.
3. Investments in DRs are regulated mainly by CMN Resolution No. 4,373/2014.

issues new shares. It may also buy and sell DRs in the secondary market either over the counter or in exchange transactions.

The CVM must approve DR programmes. It will analyse the custody and deposit agreements and other related documents before granting authorisation.

The custodian will register the foreign DR investments with BACEN before the first transfer of DR-related money to Brazil. The custodian must update the registration by informing BACEN of all increases and decreases.

Mutual Funds

Real Estate Investment Funds

Corporate entities or individuals domiciled abroad, foreign mutual funds, and other foreign mutual investment entities may invest in quotas of Brazilian real estate investment funds.

Real estate investment funds are closed-ended mutual funds for investing in real estate projects and properties[4]. The CVM authorises their creation and regulation.

Quotas representing interests in mutual funds - a type of security - may be listed for trading on stock exchanges. The fund administrator holds the fund's assets as fiduciary, and must be a CVM-authorised financial institution. The administrator must manage the fund according to its articles of association and follow quotaholder general meeting decisions.

Emerging Companies Funds

Corporate entities or individuals domiciled abroad, foreign mutual funds and other foreign mutual investment entities may invest in quotas of emerging companies' funds in Brazil.

Emerging companies funds (foreign capital) are closed-ended mutual funds, destined exclusively to foreign investors, with maximum terms of ten years[5]. The quotaholders may, however, extend this term by 5 years if two thirds of the issued quotas vote to do so at a general meeting. These funds invest in emerging companies' securities and the CVM authorises their creation and regulation. Emerging companies are those with annual sales of less than R$60,000,000[6]. The fund must check that the company has not exceeded this limit when it makes its first investment.

The fund cannot invest in any company:

- that belongs to a group of companies with net worth greater than R$120,000,000;
- in which the fund's quotaholders or the fund administrator, or their spouses or relatives, hold shares representing over 10% of the company's capital; or,
- in which the fund's quotaholders or the fund administrator or their spouses or relatives have a management position[7].

If the fund publicly issued the quotas with CVM registration, the fund may list the quotas representing interests in the fund for trading in stock exchanges or in over-the-counter markets. The fund administrator may be an individual, a company or a financial institution and must be authorised by the CVM to act as administrator of an investment portfolio.

The fund must have at least 75% of its investments in emerging companies' securities. The fund can invest the remainder in fixed income funds, fixed income securities, and securities of publicly held corporations that were acquired in stock exchanges or in over-the-counter markets.

Brazilian Eurobonds and Notes

Foreign investors may invest in Brazilian fixed-income securities that are placed and negotiated abroad. They may be placed either privately or publicly depending upon:

- the company's intended market base and the information it will provide investors;
- their features, such as currency (including Brazilian reais), amortisation schedule and interest

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4. Law No. 8,668/93 and CVM Instruction No. 472/2008.
5. CVM Instruction No. 278/98.
6. As shown in the financial statement of the year ended before acquisition of its securities.
7. Unless the fund administrator merely holds an exclusively advisory position in the company.

rates; and,
- the company's needs and the receptivity of the chosen foreign market.

Securities are referred to by a variety of names depending upon their maturity terms. Commercial papers normally mature within 30-360 days, whilst bonds and notes have longer maturity dates - over 360 days.

Chapter 3

Corporate Law

Different Types of Corporate Entities

Overview

The main reason for incorporating a legal entity in Brazil is that upon registration with the Board of Trade, it becomes a corporate entity with a legal personality separate from its owners. Therefore, as a general rule[1], creditors cannot seize shareholders' assets to settle the company's debts.

In this sense, a foreign entity interested in doing business in Brazil may either incorporate a branch or a local subsidiary in the country. Since the formation of a branch in Brazil represents more significant exposure to the parent company (as described below) and requires authorization from the Federal Government, the overwhelming majority of foreign entities prefer to incorporate a local subsidiary to operate the business. Also, in comparison to the incorporation of a subsidiary, the formation of a local branch entails certain adverse tax effects.

In summary, Brazilian corporate entities are ruled by the

Civil Code (as in the case of limited liability companies and most partnerships) and the Corporation Law (as in the case of joint-stock corporations).

The most common types of corporate entities in Brazil are limited liability companies (*sociedades limitadas*) and joint-stock corporations (*sociedades anônimas*). In this chapter, however, we will describe all the different types of corporate entities that exist.

Joint-stock corporation
(sociedade anônima)

As mentioned above, joint-stock corporations (or simply corporations) are one of the most widely-used corporate structures in Brazil. These entities are subject to more sophisticated regulations (set forth in the Corporation Law – Federal Law No. 6,404/76), in terms of governance structure, the raising of capital (*e.g.* trading of shares on the Stock Exchange), and conflict resolution mechanisms.

The capital stock (*capital social*) of joint-stock corporations is divided into shares and the shareholders' liability is limited to the value of the shares they have subscribed or acquired.

Corporations can be publicly listed or privately held. Publicly listed corporations are those with shares that are freely traded on the Brazilian Stock Exchange (*B3 – Brasil, Bolsa, Balcão*) or in over-the-counter markets. As such, they need to be registered with the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários – CVM*) and are subject to CVM regulations, in addition to the Corporation Law. Privately held corporations, on the other hand, are normally owned by a smaller number of shareholders and do not offer their stocks to the general public on the stock exchange.

Incorporation procedures

To form a corporation, the shareholders must hold an incorporation meeting to approve the corporation's bylaws and decide up on any other matters, such as the appointment of directors and officers, specification of the company's activities, allocation of capital etc.

1. In exceptional cases (such as fraud and unlawful acts), creditors can lift the corporate veil. Courts are more likely to lift the corporate veil in cases involving labour and tax-related debts.

The additional requirements for establishing a corporation are as follows:

- at least two shareholders must subscribe all the shares representing the capital stock described in the bylaws;
- a cash down-payment of at least 10% of the issue price of the subscribed shares must be deposited in a commercial bank and such amounts will be released after registration of the corporation with the Board of Trade.

If any shares are paid-up by using assets, goods, transfer of technology, trademark licensing etc., instead of cash, the company must call a general meeting to approve the valuation of such assets.

Capital structure

A corporation's capital stock can be divided into common or preferred shares (of different classes and series, if necessary), depending on the rights assigned to their holders. Common shares follow the rule "one share, one vote", while preferred shares may have restricted or non-voting rights (but on the other hand their holders are typically assigned certain special financial rights, such as priority on the distribution of profits).

All shares must be nominative, and the company must record their ownership in the Nominative Shares Registry Book. Corporations may also have book-entry shares, which must be kept in bank accounts in their owners' name at a designated financial institution.

In some cases, private corporations which have been privatised (*i.e.,* were formally state-owned entities) create a special class of preferred share: golden shares, which are owned by the Government and usually grant special rights to their holders, such as veto rights in relation to the corporation's most sensitive business decisions.

Debentures

Unlike limited liability companies, corporations are permitted to issue debentures (and other securities), which afford credit rights to their holders, pursuant to the terms and

conditions set forth in the deed of issuance of the debenture. Creditors may be shareholders or non-shareholders (depending of the nature of the issuance –public or private).

Shareholders' essential rights

Pursuant to local law, shareholders of a corporation have the following essential rights:

- a share in the company's profits (if any);
- a share of the company's assets in case of liquidation;
- the right to supervise the management of the company's business; and
- pre-emptive rights on the subscription of new shares and other securities convertible into shares (*e.g.* debentures),

Shareholders' agreement

Shareholders may execute shareholders' agreements to regulate specific matters concerning the business, such as negotiation of shares, first refusal rights, exercise of voting rights and appointment of management. Shares subject to the provisions of a certain shareholders' agreement may not be traded on the Stock Exchange.

Shareholders' agreements are binding to their parties and to the corporation itself, provided they have been filed at the company's head offices. The obligations undertaken by the parties thereto are subject to specific performance in case of non-compliance by any other party or the corporation.

Management bodies

A corporation may have the following management bodies in the context of its corporate governance structure: (i) a board of directors *(conselho de administração)*; (ii) a board of officers (*diretoria executiva)*; (iii) an audit committee *(conselho fiscal)*; and (iv) assistance committees *(comitês de assessoramento)*, which are formed to perform specific tasks and assist the board of directors in certain managements issues.

The board of directors is appointed by the shareholders at a general meeting. It is responsible for defining the general strategy of the business, as well as appointing the corporation's officers.

The board of directors plays an important dual role in the governance structure, serving both as advisors to senior officers about management issues and as monitors of management.

Officers are appointed by the board of directors and have the duty to oversee the daily business operations, as well as represent the corporation in all relevant commercial activities. The specific positions may vary on a case-by-case basis, but most corporations have at least some of the following officers: Chief Executive Officer (CEO), Chief Financial Officer (CFO), Chief Operating Officer (COO) and Chief Commercial Officer (CCO). Depending on the size of the business, the same person may hold more than one of these offices.

Both directors and officers may be replaced or removed at any time, without cause, by the General Meeting or the board of directors, as applicable. The management of a corporation is not personally liable for their acts provided that they are acting lawfully on behalf of the corporation.

The audit committee is responsible for the oversight of financial reporting and disclosure of the management of the corporation. In certain cases, the audit committee may also have oversight responsibilities in relation to other matters, such as the corporation's internal control and risk management policies. As a rule, this committee may be formed to operate either permanently or temporarily. If it does not operate permanently, shareholders holding at least 10% of the voting capital, or 5% of the non-voting capital, may request that an audit committee be formed.

Finally, the directors and officers may also create other assistance committees, which will have a mandate to perform specific tasks, such as risk management, internal audit and compliance. These committees are normally required to ensure the execution of the corporation's internal policies.

Public offerings

In the event of a change of control in a corporation, the purchaser is required to make a public offering to acquire shares held by minority shareholders (in addition to the shares of the controlling shareholder). In this case, the purchase price per share relating to the shares of the minority shareholders must be equivalent to at least 80% of the price per share paid to the controlling shareholder.

General meetings

General meetings may be classified as annual general meetings (AGO) or extraordinary general meetings (AGE). Corporations must hold their AGOs during the first four months of the fiscal year to decide on the following matters:

- management accounts and financial statements relating to the previous fiscal year;
- distribution of profits (if any); and
- appointment of members of the management bodies.

AGEs are convened to decide on any amendment to the bylaws, as well as any other matters not within the scope of the AGO.

Corporations must publish a notice of any meeting in the Official Gazette and local newspapers and respect the appropriate quorum to proceed with the meeting (either at the first or the second call).

Corporations may pay dividends to their shareholders out of their profits. There are no restrictions on the distribution and remittance of profits or dividends abroad. In this case, the company must execute a FX transaction to remit funds to its foreign shareholders, and the financial institution hired to execute such a transaction must inform the Brazilian Central Bank of the remittance of profits. Profits and dividends distributed to shareholders are currently not subject to income tax under Brazilian law.

Arbitration

Corporations' bylaws may provide that any dispute between shareholders, members of management bodies and the corporation itself shall be submitted to arbitration.

Mixed Capital Corporation (*sociedade de economia mista*)

Mixed capital corporations play an important role in the Brazilian economy. This is a type of state-owned entity, in which the Government must have the corporate control (*i.e.*, the majority of voting shares), but private investors may also acquire equity interest and be shareholders.

These entities must be created as a joint-stock corporation

and are subject to the same rules as any other corporation, in addition to certain additional obligations in terms of transparency, accountability and management, due to the fact that they are indirectly a part of the Public Administration.

When the Government acts as controlling shareholder of mixed capital corporations, it is subject to the same duties and responsibilities as controlling shareholders of other private corporations, but is allowed to pursue the public goals that motivated the incorporation of the entity. However, this mandate to pursue public goals should be interpreted in a restrictive manner and may not be construed as being permission to seek any public interests.

Limited Liability Company *(Sociedade limitada)*

Alongside corporations, limited liability companies (*sociedades limitadas*) are the most common type of corporate entities in Brazil. As per the legal framework set out by the Civil Code, these companies are now more similar to corporations and subject to a more complex legal regime. This is the corporate entity that most resembles UK and US private limited liability companies.

Although limited liability companies are subject to the provisions of the Civil Code, the Articles of Association may provide that the Corporation Law will be the subsidiary legislation – *i.e.* its rules will be applied if the Civil Code does not regulate any specific matter. If the company does not include this provision, the rules on professional partnerships will be applied when the Civil Code is silent.

Incorporation procedures

Both simple or business entities may be incorporated as limited liability companies, depending on the activities that are planned to be carried out by the entity pursuant to its corporate purpose set out in its Articles of Association (*contrato social*), which is the basic document of the company (equivalent to a corporation's bylaws) and specifies the basic rules for the operation, such as the provisions on voting rights, responsibilities of the managers, the kind of business to be undertaken, etc.

If the limited liability company is a business entity, it must register its Articles of Association with the Board of Trade (*Junta Comercial)* of the State where its headquarters is located. If the

limited liability company is a professional partnership, it must register its Articles of Association with the local Civil Registry for Corporate Entities (*Registro Civil de Pessoas Jurídicas*).

As a rule, a limited liability company can be incorporated in 45-60 days.

Capital structure

The capital is divided into quotas (which may have equal or unequal value) representing the contribution of quotaholders in money, credits, rights or assets. Quotas are not securities (therefore, they cannot be publicly traded) nor are they represented by certificates; ownership and the number of issued quotas are recorded in the Articles of Association. As a result, should there be a transfer of quotas, the Articles of Association must be amended to reflect the new quotaholding structure of the company. Quotaholders' liability is limited to the amount of their ownership interest. However, until the quota capital is fully paid-up, all quotaholders are jointly liable up to the value of the entire quota capital.

There is no minimum capital requirement for limited liability companies (except in a few specific cases), but such entities are required to have at least two shareholders, which may be either individuals or corporate entities (and they need not be resident in Brazil, provided that any foreign quotaholder is represented by a person residing in Brazil who will be authorized to service Court summonses).

Once the quota capital is fully paid-up, it may be increased at a later time. Existing quotaholders have pre-emptive rights in subscribing newly issued quotas. On the other hand, limited liability companies may reduce their quota capital (provided that the quota capital is fully paid-up), in the event of irreparable losses. In addition, these companies may also reduce their quota capital if it becomes disproportionate to their corporate purposes.

Management

Limited liability companies may be managed by one or more quotaholders – or even by a third party who is not a quotaholder (provided that the manager is resident in Brazil)[2]. In both cases, the manager(s) must be appointed in the Articles of Association or designated in a separate resolution taken by the quotaholders. The

assignment of a third party as the company's manager is subject to approval of (i) all the quotaholders if the quota capital is not fully paid-up; or (ii) 2/3 of the quotaholders if the quota capital is fully paid-up.

The manager may be removed or replaced at any time. However, if the manager has been appointed in the Articles of Association, the quotaholders may only remove him or her by means of a resolution passed by quotaholders representing 2/3 of the quota capital[3].

General meetings and resolutions

These companies must hold an ordinary general meeting of quotaholders within the first four months of the financial year to resolve certain matters, such as (i) approval of management accounts and the financial statements; (ii) distributions of profits (if any); and (iii) appointment of managers (when applicable).

The company must publish a notice of the meeting three times in the Official Gazette and in a widely circulated newspaper, unless all the quotaholders (i) are present at the meeting; or (ii) declare in writing that they are aware of the date and place of the meeting, as well as its agenda.

If the company does not have more than 10 quotaholders, the meeting can be convened and held with greater flexibility, as the quotaholders or managers are not required to comply with all the rules applicable to a general meeting. Moreover, the general meeting does not need to be held if the quotaholders approve a written resolution addressing all relevant topics of the proposed agenda.

Quotaholders must decide on certain legal issues raised by the Civil Code, besides those that may be listed in the Articles of Association. This table shows the different types of actions and the quorum required to pass the relevant resolution.

RESOLUTION	MAJORITY
To approve the managers' accounts	Majority of the quotaholders present
To appoint1[4] and remove the managers	Majority of the quota capital

To set the managers' remuneration	Majority of the quota capital
To amend the Articles of Association	3/4 of the quota capital
To takeover, merge, dissolve or end the company's liquidation	3/4 of the quota capital
To appoint and remove liquidators and approve their accounts	Majority of the quotaholders present
To request judicial reorganization	Majority of the quota capital

Right of withdrawal

Pursuant to the Civil Code, if most of a company's quotaholders decide to amend its Articles of Association or in case of a merger or amalgamation, dissenting quotaholders have a right of withdrawal – *i.e.* they are entitled to liquidate their quotas and be reimbursed by means of a valuation of such quotas (in most cases, based on the market value of the quotas).

Even though the Civil Code only provides for the right of withdrawal in these specific cases, local Courts (including Brazilian Higher Courts) have found that any quotaholder has the right to withdraw from a limited liability company at any time

2. Although this is not a usual governance structure in Brazil for this type of entity, limited liability companies are permitted to have a board of directors (serving both as advisors to managers about management issues and as monitors of management), as well as an audit committee (conselho fiscal), in addition to the managers appointed.
3. Unless the Articles of Association provide for a different quorum. In other cases, such as when the manager is not a quotaholder, quotaholders representing the majority of the capital stock must approve their removal.
4. Separately from the Articles of Association.

and without cause, if the *affectio societatis* has been affected – in other words, if the quotaholders are not personally and jointly committed to reaching a common goal anymore, as they were at the time of the formation of the company.

Exclusion of quotaholders

In exceptional cases, when the majority of the quotaholders of a limited liability company is able to provide evidence that a quotaholder (i) is a risk to the company's activities or (ii) has seriously violated his or her duties and responsibilities, such quotaholders may exclude the breaching quotaholder. In practical terms, the exclusion of a quotaholder: (i) can be resolved at a general meeting (with the vote of the majority of the other quotaholders), if this is expressly allowed by the Articles of Association; or (ii) can be determined by a Court with competent jurisdiction, if the extrajudicial exclusion is not permitted under the Articles of Association.

Distribution of profits

Finally, it is important to point out that the quotaholders may decide, at their own discretion, how they intend to distribute any accrued profits – *i.e.*, distributions do not need to be made on a *pro rata* basis vis-à-vis the equity interest held by each quotaholder. There are no restrictions on the distribution and remittance of profits or dividends abroad. In this case, the company must execute a FX transaction to remit funds to its foreign quotaholders and the financial institution hired to execute such a transaction will be responsible for informing the Brazilian Central Bank of the remittance of profits. Profits and dividends distributed to quotaholders are not subject to income tax under Brazilian law.

Liquidation, bankruptcy and judicial reorganisation

If a company is insolvent, depending on the case, it may file for bankruptcy (*falência*) or judicial reorganisation (*recuperação judicial*). In the first case, the company is extinguished after liquidation of its assets and payment (to the extent possible) of its debts. In the case of judicial reorganisation, the company and its creditors try to reach an agreement and approve a debt and liability reorganization plan pursuant to which the debtor will likely have better conditions to satisfy its obligations and try to

restructure the operation of the company.

Limited liability companies may go into liquidation: (i) as a result of the end of their term (when applicable); (ii) by a unanimous decision taken by the quotaholders (or a decision taken by the majority of them should the company have an indefinite term); (iii) if they only have one single shareholder (and are not able to cure this situation within 180 days); (iv) as a result of the expiry of its license to operate.

Large-sized entity

(sociedade de grande porte)

Large-sized entities (*sociedades de grande porte*) are entities or groups of entities under common control that have (i) more than R$240 million in assets; or (ii) more than R$300 million in gross annual revenue, both measured as of the prior fiscal year.

Large-sized entities are subject to the rules set forth in the Brazilian Corporation Law (Federal Law No. 6,404/76) relating to bookkeeping and preparation of financial statements and are also required to have independent auditors, regardless of the type of these corporate entities.

This means that even if a large-sized entity is organized as a limited liability company, it will be subject to such specific provisions of the Brazilian Corporation Law (which, as previously discussed, is not generally applicable to limited liability companies).

Single Holder Limited Liability Entity

(empresa individual de responsabilidade limitada)

Single holder limited liability entities (*empresas individuais de responsabilidade limitada*) are used by individual entrepreneurs. An entity such as this can be incorporated by a single quotaholder (individuals only), who will hold the whole of the quota capital and have his liability limited to the amount of ownership interest.

The minimum quota capital of these entities is the amount equivalent to 100 times the current federal minimum wage and the quota capital must be fully paid-up at the time of the incorporation of the entity. The sole quotaholder can only hold quotas of one single holder limited liability entity at any given time.

These entities are governed by the provisions applicable to limited liability companies (*sociedades limitadas*).

Foreign companies – Licence to operate

Under Brazilian law, foreign companies must obtain a licence to operate[5], issued by the Federal Government, before carrying out its business activities in the country. This is also applicable to the opening of local branches by such foreign companies.

In order to set up a branch in Brazil, foreign parent companies must submit an authorization request to the Federal Department of Boards of Trade (FDBT), so that the Department may issue its technical opinion. The final authorization, however, is given by the Brazilian President, by means of a Federal Decree approving the incorporation of the branch.

The authorization request must be accompanied by the following supporting documents:

- evidence of incorporation of the parent company;
- the company's Articles of Association or bylaws;
- a list of the members of all administrative bodies;
- an internal resolution approving the opening of a branch in Brazil;
- an internal resolution defining the capital that the parent company intends to assign to local operations;
- proof that the company has appointed a representative in Brazil with powers to accept the conditions required for the authorisation; and
- the most recent balance sheet.

Local law treats a branch (which must have the same shareholding structure as the parent company) as an extension of the parent company. Therefore, both the local branch and the parent company may be liable for any losses suffered by third parties in Brazil.

This is an important issue usually considered by foreign entities when deciding whether to incorporate a subsidiary of the foreign parent company or a branch of such company: since the foreign entity's

exposure is limited if it incorporates a subsidiary (as the subsidiary is a Brazilian company (even if controlled by a foreign entity) and would be solely liable for any obligations in connection with its operations), this is a more common corporate structure for foreign investors.

The foreign company must have a permanent representative in Brazil, who must have the power to handle any operational matters, as well as receive Court summonses.

Once the incorporation of the branch has been approved, the company must deliver the same documentation provided to the Federal Department of Trade Boards to the relevant registry and tax authorities, for incorporation purposes.

Local branches of foreign companies are required to publish their annual financial statements in the Official Gazette and in a widely circulated newspaper. On the other hand, the parent company must publish in Brazil all financial documents that are required to be disclosed pursuant to its country of origin's regulation. Furthermore, the Federal Government must approve any amendments to the foreign company's Articles of Association or bylaws which may affect local operations or consumers.

A foreign company with a branch in Brazil may request authorization to become a Brazilian company, by means of the transfer of its head offices to Brazilian territory. In this case, the foreign company will also be required to obtain prior authorisation from the Federal Government.

Partnerships

General Partnership (*sociedade em nome coletivo*)

This partnership is set up by at least two individuals, who will be jointly and severally liable for any obligations in connection with the partnership. Nevertheless, in the Articles of Association, the partners may regulate whether one of them will have the right to seek reimbursement for any losses exceeding a certain proportion established in the Articles of Association. All partners may take part in the management.

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5. In certain cases, even Brazilian companies may be required to obtain a licence to operate so that they are permitted to develop its business – *e.g.* financial institutions and insurance companies.

Limited Partnership (*sociedade em comandita simples*)

The limited partnership comprises two or more partners segregated into two categories:

- Active partners (*comanditados*), who take part in management and have joint and unlimited liability.
- Passive partners (*comanditários*), whose liability is limited to their capital contribution. These partners are not allowed to perform any managerial acts – if they do, they could be jointly and severally liable for the partnership's obligations (as they would be considered to have acted as active partners).

Joint Stock Command Company (*sociedade em comandita por ações*)

Joint-stock command companies (*sociedades em comandita por ações*) are governed by the provisions of the Corporation Law. Its capital is divided into shares.

These companies must be managed by one or more of its shareholders, who will have subsidiary and unlimited liability for all company's debts. Even if the manager resigns, he/she will remain liable for any debts incurred by the company under his/her management.

Unincorporated joint venture *(sociedade em conta de participação)*[6]

This partnership is not subject to usual incorporation procedures. It is formed by means of the execution of a private instrument between two or more partners with the purpose of carrying out one or more business ventures.

Pursuant to local law, a silent partnership is not an independent legal entity – therefore, it does not have a separate legal personality aside from its partners, except for tax purposes.

Silent partnerships' partners are categorised into two classes:

- Ostensive partners, who may be individuals or legal entities. These partners assume joint and unlimited liability in their own name before third

parties and are responsible for the partnership's management. In the event of bankruptcy of the ostensive partner, the silent partnership is automatically liquidated.
- Silent partners, who are not entitled to perform any managerial acts and are not liable before third parties, but only before the ostensive partner, in accordance with the terms and conditions set forth in the partnership agreement.

This partnership's distinguishing feature is that it constitutes rights and obligations only among its partners, but not towards third parties. In any business transactions, third parties shall deal exclusively with the ostensive partner, assuming the partnership does not acquire an independent legal personality.

Professional partnership *(sociedade simples)*

Professional partnerships are usually formed by certain professionals with the purpose of rendering mainly professional services – *e.g.*, intellectual, scientific, literary or artistic activities. These partnerships are only permitted to carry out a limited range of services, as they are not entitled to develop typical business activities.

It is important to highlight that the classification as a professional partnership refers to the nature of the activities carried out by a legal entity. In other words, professional partnerships are not exactly a type of corporate entity, but a designation assigned to entities that carry out activities such as those mentioned above. As such, a professional partnership may adopt any of the corporate structures regulated by the Civil Code (and therefore be subject to the relevant rules applicable to such corporate structures).

Small-sized entities *(empresas de pequeno porte)*

Based on its annual gross revenue, a legal entity may be considered a microenterprise (*microempresa*) or a small-sized entity

6. 'Special Partnership Agreement' and 'Silent Partnership' are also terms used to designate this type of partnership.

(*empresa de pequeno porte*). Microenterprises are entities with an annual gross revenue lower than or equal to R$ 360,000, while small-sized entities are those with an annual gross revenue higher than R$ 360,000 but lower than or equal to R$ 4.8 million.

For public policy purposes (*e.g.* to encourage entrepreneurial activity), these entities may enjoy certain legal benefits, such as more favourable tax rules, access to public bids in better conditions and to specific lines of public credit.

Joint ventures

A joint ventures (JV) is an arrangement between two or more companies created to carry out a certain task or execute a certain project. In Brazil, JVs are usually separated into two different types: contractual joint ventures (or consortia) and corporate joint ventures.

Contractual joint venture or consortium

A contractual joint venture (or consortium) is not a corporate entity, but simply an agreement executed by the parties regulating their rights, obligations and responsibilities. Except if otherwise specified in the consortium agreement (or expressly agreed with a third party in relation to any specific transaction or deal), each party is liable for its own obligations (*i.e.*, the contracting parties are not jointly liable for obligations arising out of the activities carried out by the consortium). As such, the insolvency of one of the parties does not affect the other parties and the consortium may continue with the remaining contracting parties.

The consortium agreement must appoint a leader for the consortium, who is responsible for bookkeeping and custody of the books and records that support its operations, pursuant to applicable rules.

The consortium agreement must also address at least the following matters:

- the name of the consortium (if any);
- the project that is planned to be executed by the consortium;

- duration, address and jurisdiction;
- each party's obligations and responsibilities;
- rules on the distribution of profits between the parties;
- management and accounting rules, representation of the parties and administrative fees (if any);
- how to resolve matters of common interest, with a description of the number of votes that each party will have; and
- each party's contribution to common expenses (if any).

The parties are liable for the taxes arising from the operations of the consortium, in the proportion referred to in the consortium agreement. However, they could be jointly and severally liable for the consortium's obligations related to the hiring of legal entities and individuals.

The consortium agreement (as well as its amendments) must be filed with the Board of Trade of the State where the consortium's head offices is located.

Corporate joint venture

In the case of corporate JVs, the parties incorporate a new company (which may adopt any corporate structure) and become its shareholders. Regardless of the corporate structure used for the JV, the partners' rights and obligations in relation to the business arrangement will be set out in the Articles of Association or bylaws of the newly incorporated entity.

Corporate JVs are frequently created for the purpose of taking part in public bids and privatisation auctions, for instance. In these cases, they are usually incorporated to act as a special purpose vehicle *(sociedade de propósito específico)*, in order to segregate its assets from those of its partners, and to isolate the risk involved in the execution of the project or the activity that is planned to be carried out by the JV.

Duties and Liabilities of Directors and Officers

Consequences relating to the assets of the "actions" of shareholders/quotaholders, officers and/or directors of Brazilian Companies.

Above, we talked in a broad sense about the duties and responsibilities of shareholders, officers and/or directors of a company in Brazil. Going forward, we will briefly comment on the consequences of the actions they carry out.

The name company herein is understood as Corporation (*Sociedade Anônima*) and/or Limited Company (*Sociedade Limitada*) since a large part of existing jurisprudence refers to Limited Companies.

Consequences relating to Assets

1. The Procedures for Piercing the Corporate Veil should be considered in a wider sense, which makes shareholders/quotaholders, officers and/or directors secondarily liable (sometimes even jointly and severally liable), if the companies in which they are shareholders/quotaholders, officers and/or directors do not comply with their obligations to pay or to do something.

2. Piercing the Corporate Veil, in principle, aims to affect the assets of its shareholders/quotaholders, officers and/or directors, if they have acted with malice or in bad faith, or have engaged in fraudulent activities, characterized by deviation of the purpose or the commingling of assets.

3. There are several legal documents mentioning the possibility of applying this doctrine. We have only listed some specific laws but there are many more:

   (i) Consumer Protection Law;
   (ii) Brazilian Tax Code;

(iii) State Tax Codes;
(iv) Local Tax Codes;
(v) Civil Code;
(vi) Legislation on Social Security;
(vii) Environmental Law;
(viii) Antitrust Law;
(ix) Labour Legislation;
(x) Corporation Law;
(xi) Income Tax Regulation;
(xii) Sports Legislation;
(xiii) Court-supervised Reorganization Law;
(xiv) Capital Market Legislation;
(xv) Legislation governing Financial Institutions;
(xvi) Code of Civil Procedure;
(xvii) Legislation on Private Pensions.

4. Prior to the enactment of the New Code of Civil Procedure (in 2015), piercing the corporate veil was abused by judges, mainly in tax, social security and labour courts.

5. The doctrine was applied without due process of law, that is, the creditor would request that the procedure be applied against the shareholders/ quotaholders, officers and/or directors, and the Judge could grant it, without even giving notice to the shareholders/ quotaholders, officers and/or directors that their assets would be pledged as collateral for debts of the companies, if their obligations could not be fulfilled.
In practice, the assets of the shareholders/ quotaholders, officers and/or directors were pledged, and only after they were aware of the pledge, could they defend themselves through the so-called Third-Party's Motion to Stay Execution.

6. In good time, there was a change in the Civil Procedural Law (the New Law of Civil Procedure of 2015) which began regulating the matter, so that

Piercing the Corporate Veil is applied as instigated by the interested party (creditor). In the meantime, the shareholders/ quotaholders, officers and/or directors are served with notice to make a statement with the right to a fair hearing, prior to the levying of execution upon their assets, which would not previously have occurred.

7. In principle, the liability of shareholders/ quotaholders, officers and/or directors is secondary, that is, primarily it is entreated to the Company's assets and, if they are unable to fulfil the obligations, it is entreated to the assets of the shareholders/ quotaholders, officers and/or directors.

8. What happens in practice, more often than not, is called the “unlawful dissolution of the company”. This occurs when a company becomes financially unfeasible and the shareholders/quotaholders, officers and/or directors, for financial and/or bureaucratic reasons (there is a lot of bureaucracy involved I dissolving a company in Brazil), abandon it, ceasing to officially dissolve (liquidate) them.

9. In these cases of “unlawful dissolution", attention must be paid to the debts owed to the employees, since the Labour Court applies "disregard" in these circumstances. In the same manner as Social Security, in most cases.

10. The Labour Court goes even further, as it considers that given the mere fact that the company does not pay its employees' salaries (even if they are working normally), the employee has the right to request the piercing of the corporate veil against the shareholders/ quotaholders, officers and/or directors, holding them responsible, personally, for the labour debts.

11. Labour courts have a tendency to hold the

shareholders/quotaholders, officers and/or directors accountable, even if they are no longer part of the company and have no debts, including incurring debts when they were part of the company. This system is widely disputed, but it is still applied by some labour judges.

12. For shareholders/quotaholders of a company, even if they only hold a minimum percentage of shares or quotas (1% or 2% of a Limited Company, for example), without any management power over it, the Labour Court insists on holding them accountable for unpaid salaries and/or social security liabilities.

13. Some labour judges even blame the shareholders/ quotaholders, officers and/or directors who join the companies after the debts were incurred.

14. In relation to tax debts, the decisions of the various courts have been more compliant, so that, even in cases of “unlawful dissolution", if there has been no intent, bad faith or fraud, but simply failure to pay a certain amount of tax, the simple fact of the company's financial inability to pay taxes, does not hold its shareholders/quotaholders, officers and/or directors accountable.

15. Also regarding “unlawful dissolution" of the company, another aspect to be considered, in relation to tax debts, is the responsibility of the shareholders/ quotaholders, officers and/or directors who are no longer part of the company, at the time it is “unlawfully dissolved". In these cases, the personal assets of the shareholders/quotaholders, officers and/or directors would only be accountable if their liability for non-payment of taxes could be proven at the time, *i.e.*, having acted with excessive power or in violation of the law, the articles of organization or the articles of incorporation.

Resignation of Directors and Officers

According to Black's Law Dictionary[7], resignation means "The act by which an officer renounces the further exercise of his office and returns the same into the hands[8] of those from whom he received it."

Resignation is a faculty of the officer or director that can be executed at any time and at his or her convenience. The company is not required to accept the resignation in order for it to produce its effects. However, certain legal duties must be complied with by the resigning officer.

Unless agreed otherwise, the resignation requires no motive or prior notice. The resigning officer is required (as per article 1.063, §3 of the Brazilian Civil Code, and article 151 of Brazilian Corporations Act) to present a letter of resignation to the company. The letter of resignation is irrevocable. The officer's resignation is effective before the company as of the receipt of the letter of resignation. For third parties, though, resignation will only be effective after the letter of resignation is filed with the board of trade and published. Not only the company, but also the resigning officer is entitled to undertake the filing and publication.

Liability of the resigning officer for regular management acts carried out in the company's ordinary course of business ends with the approval of the officer's financial statements by the partners' meeting, in accordance with article 1.071, I of the Brazilian Civil Code, and article 122, III of the Brazilian Corporation Act.

Restructuring and Insolvency

Introduction

The Brazilian Bankruptcy Law (Law No. 11,101/2005), enacted on February 9, 2005, provides for bankruptcy and for two forms of reorganization: (i) an out-of-court reorganization procedure known as extrajudicial restructuring (a "pre-pack"), and (ii) a court-supervised reorganization procedure known as judicial

restructuring. A debtor may use either procedure to produce a reorganization plan which will bind all creditors, provided certain requisites are met.

Bankruptcy

Creditors may petition to have the debtor declared bankrupt. If the debtor is declared bankrupt, a liquidation proceeding begins. In bankruptcy the debtor's assets are scheduled and liquidated, and the proceeds distributed to satisfy creditor claims.

One or more holders of unpaid, liquidated and enforceable claims that are higher than a certain minimum amount (40 times the minimum monthly wage; approximately £7,500) may file a petition for declaration of bankruptcy. A bankruptcy petition may also be based upon certain "bankruptcy acts", *e.g.*, granting security interests to a creditor in connection with an existing debt without leaving a sufficient amount of unencumbered assets to satisfy all outstanding debts.

Liquidation of the debtor's assets will be carried out in one of the following forms, in the order of preference set forth in the Law:

- disposal of the company, with the sale of its establishments as a block;
- disposal of the company, with the sale of its branches or manufacturing plants separately;
- disposal, as a block, of the assets constituting each of the debtors' establishments;
- disposal of the assets considered individually.

The bankruptcy law authorizes the adoption of more than one of the forms of disposal listed above. It also provides that the sale of assets shall start regardless of the completion of the general list of creditors, which is expected to expedite the proceedings as

7. https://thelawdictionary.org/resignation/
8. The word 'bauds' appears here in the original definition found in 'Black's Law Dictionary. This word, however, does not exist in the English language and may have been a typing error. For the purposes of understanding, the liberty has been taken here to interpret the term.

opposed to what happened under the previous legislation. The general rule for the sale and liquidation of assets is that the judge shall order a public auction. The law also provides for sealed bids and public proclamation modalities for disposal of assets.

The winning bidder shall not inherit the debtor's obligations, including tax and labour related obligations and occupational accident obligations, as opposed to that which occurred under the former law.

A general list of the creditors shall be drawn up by the judicial administrator and ratified by the court. Claims will be classified pursuant to article 83 of the Bankruptcy Law, whereupon the order of preference of the creditors will be ascertained. An important inversion has taken place in the order of preference enjoyed by different kinds of creditors under the new Bankruptcy Law: secured claims now enjoy preference over tax claims, up to the value of their guarantees. This represents a significant improvement in the chances of credit recovery, since tax debts are generally the bulk of the debts of a distressed company in Brazil. Furthermore, the priority enjoyed by labour claims in bankruptcy proceedings is now limited to a cap of 150 minimum monthly wages (currently equivalent to approximately US$ 38,188.77).

The order established in the new bankruptcy law is as follows:

- labour related claims, limited to one hundred and fifty monthly minimum wages per creditor, and occupational claims;
- claims with in rem guarantees, to the limit of the value of the encumbered asset;
- tax claims, regardless of their nature and length of constitution, except for tax fines;
- claims entitled to special privilege;
- claims entitled to general privilege;
- unsecured claims;
- contractual penalties and fines for breach of criminal or administrative law, including tax related fines;
- subordinated claims.

In addition, certain claims defined in article 84 of the Bankruptcy Law, such as fees payable to the judicial administrator and their assistants, as well as labour-related claims or occupational

accidents referring to services rendered after the decreeing of bankruptcy, and judicial fees related to the bankruptcy lawsuit, shall take absolute priority over all claims listed above.

Reorganizations

Only the debtor may propose a reorganization plan under Brazilian law. No plan may be adopted over the debtor's objection. Consequently, both extrajudicial and judicial restructurings require the debtor's cooperation and consent.

Extrajudicial Restructuring

Under extrajudicial restructuring, the debtor may contact his/her/its creditors to negotiate a restructuring plan. Labour claims, tax claims, claims deriving from advances against exchange and claims secured by chattel mortgages may not be included in this out-of-court restructuring modality.

The extrajudicial restructuring plan signed by any number of creditors may be submitted for court confirmation. If the plan is supported by more than 3/5 (60%) of the creditors (in the amount of claims in each class of creditors affected by it), the court may, at the request of the debtor, render the plan binding to all affected creditors, including the dissenting ones.

Commencement of out-of-court negotiations to implement a pre-pack does not trigger a stay of proceedings, contrary to that which occurs in judicial restructuring. Consequently, the debtor may need a "standstill" agreement with his/her/its creditors to obtain time to negotiate a pre-pack.

Judicial Restructuring

A petition for judicial restructuring must include a statement of the causes of the financial distress, financial statements for the three most current years of operations, a listing of creditors and claims, and a listing of employees and employee claims, amongst other things. Tax claims, claims secured by advances against exchange, and claims secured by chattel mortgages are not subject to a judicial restructuring.

The court decision commencing the proceeding will

include the appointment of a judicial administrator who will be responsible, amongst other things, for managing the claims verification process and overseeing the debtor's management of his/her/its business.

A stay of proceedings is triggered by the decree commencing a judicial restructuring. The stay-period, however, does not apply to legal actions aimed at the collection of debts that have yet to be liquidated (Article 6, §1). However, execution of any judgment rendered therein is stayed, whilst the stay may not exceed 180 days counting from the date the court decision is issued.

The debtor shall propose a restructuring plan within the 60 days following the publication of the decree starting the proceeding. The plan should include a statement of its financial feasibility, a report on the debtor's economic condition, and an appraisal of assets/business units signed by a certified professional or specialized company.

Once the plan is proposed and the list of recognized creditors and claims has been finalized, creditors may file objections to the plan within the term fixed by the judge. If no objections are filed, the plan is confirmed by the court without a creditor vote. If, however, one or more creditors object, the court will call a meeting of creditors to consider and vote on the plan. The plan may be modified or amended at the creditors' meeting, subject to the debtor's authorization, but it may not be modified in a manner that unfairly discriminates against creditors not attending the meeting. The plan which is approved by the required majorities in each class of claims (labour, secured, unsecured and micro-enterprise or small business) will be confirmed by the court and become binding to all creditors subject to a judicial restructuring proceeding (including those creditors who voted against approval of the plan).

Should the plan fail to obtain the requisite creditor majorities as established by the Bankruptcy Law, the debtor will be declared bankrupt. Also, should the debtor fail to comply with any of the provisions of the approved restructuring plan, he/she/it shall be declared bankrupt.

Media and Foreign Investment

The legal framework that governs the foreign investments in Brazilian news and broadcasting companies ("Brazilian Media Companies") is grounded in the Brazilian Federal Constitution, which includes the rule provided for in article 222 (introduced by means of the 36th Constitutional Amendment, dated 28 May, 2002). A few months following the modification of the constitutional rule, the Brazilian congress passed Federal Law No. 10,610, further regulating the matter.

These rules have proven to be an important legal milestone for the development of the local market and Brazilian Media Companies to the extent that they have allowed significantly greater flexibility for said companies to raise funds overseas and enter into strategic partnerships with foreign companies. The rules have also been supportive of Brazilian Media Companies while applying international accounting and management practices and standards in order to favour their international business with third party investors.

Current Legal Framework

Pursuant to said article 222 of the Brazilian Federal Constitution and Brazilian Federal Law No. 10,610, foreign investors are allowed to hold up to 30% of the voting capital stock and the total capital stock of Brazilian Media Companies, which must be mandatorily held by legal entities incorporated under Brazilian law.

Legal entities incorporated under Brazilian law, but controlled by foreign investors, must not exceed the abovementioned limit of 30% of the voting capital stock and the total capital stock of Brazilian Media Companies. The remaining 70% of the voting capital stock and total capital stock of said companies must be exclusively held by native Brazilian citizens[9].

9. For the purposes of the current legal framework, the expression "foreigners" shall mean foreign persons or foreign persons naturalized as Brazilian citizens for less than 10 years, and "native Brazilians citizens" shall mean native Brazilian persons or foreign persons naturalized as Brazilian citizens for more than 10 years.

Nonetheless, although foreign investors are authorized to participate in the capital stock of Brazilian Media Companies, the current legal framework provides for certain restrictions for the management of Brazilian Media Companies by foreigners that should be addressed when considering investing in the Brazilian media market.

Such restrictions include, for instance, situations where native Brazilian citizens must be responsible for the definition of the editorial content, the selection of the programme schedule and the management of the corporate activities of Brazilian Media Companies. Likewise, foreign investors cannot hold rights that could ensure access to more comprehensive and broader rights than those held by native Brazilian citizens[10].

In view of the corporate restrictions outlined above, the majority of the transactions involving equity interest held by foreign investors in Brazilian Media Companies have been concluded on the basis of a standard set of rules (mostly veto rights) that both complied with the current legal framework and addressed the interests of foreign investors, which generally vary depending on the type of investor, such as foreign media groups or financial/private equity investors.

Such issues must be carefully addressed by foreign investors since the agreements entered into with the holders of equity interest of Brazilian Media Companies may be declared null and void if they result in breaches of the corporate restrictions described above.

In addition to these considerations, it is worth mentioning that Brazilian Federal Law No. 10,610 authorized the Federal Executive Branch to request documents and information from Brazilian Media Companies in order to confirm their compliance with such corporate restrictions.

Brazilian Media Companies must also present annual statements to the relevant Board of Commerce where its constitutional documents have been filed certifying the composition of at least 70% of the voting capital stock and of the total capital stock, including the identification of native Brazilian citizens holding such percentage of the capital stock.

Furthermore, changes related to corporate purposes, directors and officers and corporate control, as well as the transfer of public concessions, permissions or authorizations to perform media activities are subject to the prior approval of the Federal Executive Branch, through the Ministry of Science, Technology, Innovation and Communications.

Despite the challenges being faced for the development of the Brazilian media market, the current legal framework has largely enhanced the opportunities for foreign investors in the local market, whether by means of private equity investments in Brazilian Media Companies, or through the establishment of strategic partnerships with Brazilian Media Companies.

Managers and Investors' Liability

Acknowledgements

The Brazilian market is undeniably important in the global scenario, and it is essential that any foreign investor should carry out a detailed business plan before moving into the market. Because of certain peculiarities inherent in doing business here, it is recommended that investors rely on local advice. It is also important to fully understand the issue of responsibility of foreign investors and managers in order to avoid shocks (during the implementation of a project in Brazil) which could have a direct impact on personal equity and that of other parties associated with the local business. In this guide, the most significant aspects related to the existing risks and ways to mitigate them will be discussed.

The Concept of Liability in Brazil

Before addressing the most significant aspects related to existing risks and ways of mitigating them regarding liability, it is necessary to briefly explain what the Brazilian legal system regulates by means of different legal texts, as well the liabilities attributed to investors, local managers, directors and other legal representatives of the Brazilian company, delimiting the degree of exposure to the

10. Although the concept of "superior rights" has not been legally defined, it shall be generally understood as a restriction for the creation of any corporate subordination of native Brazilian citizens to foreigners in connection with the management of Brazilian Media Companies.

risk of contingencies that this business might have.

As a general rule, the Brazilian Civil Code (Law No. 10,406/2002) adopts the principle of subjective liability of managers and investors in case of damages to third parties. Therefore, in order to have liability attributed to the manager for acts practiced in the management of the company that are harmful to third parties, it is necessary that the fault or gross negligence of the agent be ascertained, that is, the manager must have intended to commit the wrongful act.

Considering that a company with foreign investment is legally incorporated in Brazil, with its Articles of Incorporation/ Bylaws[11] duly registered with the competent board of trade, in theory, the manager would only be liable when deliberately acting against the principles listed in the company's corporate rules and other regulations, or against the applicable law.

However, the practical application by the Brazilian Judiciary, in numerous cases, does not reflect these fundamental principles when the focus is the liability of the manager or foreign investor. Analysing a wide range of different lawsuits, it can be seen that judges often pierce the corporate veil, imposing personal liability on otherwise immune corporate managers, directors, or shareholders for the company's wrongful acts.

The exercising of the management function of a company in Brazil, by itself, already undeniably causes the manager exposure of a personal and equity-related nature, insofar as s/he can be called to account for various obligations and debts of the company, especially those of an environmental, labour and consumer nature.

It should be noted that the Brazilian Corporation Law (Law No. 6,404/1976) establishes two criteria for management liability: (i) "to act within its attributions with fraud or gross negligence", and (ii) "violation of the law or the company's corporate regulations". The main difference between the two situations is found in the so-called 'burden of proof'. Contrary to the first, in which it is necessary that the fraud or gross negligence of the manager be proven, in the second hypothesis, the manager's wrongful acts are presumed. In this case, the burden of proving the occurrence of a motive that excludes the illegality of the fact and the exemption of liability lies with the manager.

Understanding the legal obligations is, therefore, essential in order to be able to act in such a way that distances or minimizes the liabilities that are inherent to the management position.

	SUBJECTIVE LIABILITY	OBJECTIVE LIABILITY
Application	It is imperative that the intent or fraud of the agent is ascertained. Therefore, the manager must have had the intention of committing the wrongful act.	It does not depend on the evidence of the intent or fraud of the agent causing the harm, only the causal relationship between the conduct and the damage, even if the causative agent has not acted with intent or guilt.
Elements	Negligence, imprudence and malpractice.	Causal relationship between conduct and result.

Because of the great subjectivity in the characterization of a regular management act, the doctrine absorbed the concepts of the Business Judgment Rule, which is covered by Article 158 of the Brazilian Corporation Law. It provides that the manager is not personally liable for the obligations that may incur on behalf of the company or by a regular management act made without conflict of interest, in good faith and being duly informed.

Management acts are those performed by the managers in the achievement of the corporate purpose, in accordance with the law, the company's corporate rules and their duties (diligence, loyalty, secrecy and reporting). The manager cannot guarantee a positive outcome of a management decision, having a margin of discretion within which they choose to take one decision or another.

11. Articles of Incorporation/Bylaws: a governing document that sets forth the basic terms of a corporation's existence, including the number and classes of shares and the purposes and duration of the company.

This issue is important so that it does not constitute executive accountability when a strategic decision taken results in loss to the company.

Given the high exposure of the manager's personal equity, it is recommended that measures are adopted that offer protection and reduce the risk of liability for ordinary acts of management. In this sense, the manager must: (i) know the exact contractual and legal extension of its responsibilities, complying with and enforcing regulatory standards related to the business purpose of the company; (ii) ensure that the management powers granted are expressly defined in the company's articles of incorporation/Bylaws or internal rules; (iii) submit the management's annual accounts to the shareholders and obtain their formal approval; (iv) enter into agreements with the shareholders of the company aimed at indemnifying or providing fair compensation for losses incurred due to the exercising of regular management duties; and (v) appear as the beneficiary of special insurance policies against third-party risks, known in other countries as Directors and Officers.

Brazilian Legal System

Brazil is one of the countries influenced by the European legal tradition, with the civil law model providing the structural base of its legal system. Also, regarding the Federal Constitution, it is the supreme law of the country, and all other laws and court rulings must follow it.

Brazil is a federation, formed by the Federal District, States and Municipalities, all with the authority to legislate and ensure compliance with the Laws. The Federal Government has exclusive jurisdiction to legislate on corporations, contractual rules, trade, financing, labour relations and intellectual property.

The regulation of companies in Brazilian law is composed of sparse laws in the legal system. Some of these laws deserve special attention, such as the Law of Introduction to the Civil Code, the Brazilian Civil Code and the Corporation Law, that establishes the general rules in the field of business (contracts, corporate types, civil liability, among other important issues).

In addition to the codified legislation, Brazil is a signatory to a series of international agreements in the business sphere, and because they have been approved by the legal system, in practice, they have the force of law.

Dispute Resolution Methods

The Judiciary, one of the three powers of the State, has assumed a fundamental function in the effectiveness of the Democratic State based on the rule of law.

Conflict resolution in Brazil is still very much linked to the Judiciary. In dispute situations, the rule is to use the judicial apparatus to deal with the problem.

The best-known non-judicial dispute resolution methods in Brazil are arbitration, mediation and negotiation. These mechanisms have been found in practice with several variants and under different titles. In addition to these, there are several new alternative dispute resolution methods that are not very widespread in Brazil, although they are highly efficient in preventing and resolving disputes if used correctly.

Disregard of the Legal Entity in Brazil

Companies in Brazil have their own legal personality that is completely different from that of their shareholders/quotaholders or investors, having autonomy regarding their equity and compulsory matters. They therefore have the capacity to hold rights, duties and contract obligations on their behalf. The legal existence of these collective entities is born with the proper registration of their corporate formation documents in valid public registries and ceases upon their liquidation.

The company's equity and assets are a guarantee to its creditors, in the same way that the personal equity of the shareholders/ quotaholders and investors serves as a guarantee for their private creditors. With some exceptions[12], the company's equity is not mixed with the personal equity of each partner, investor or legal representative.

Thus, as a rule, obligations and debts existing due to the negotiation acts practiced by the company should always be directed to it. Only after verifying that the company no longer has the means to pay its debts or fulfil its obligations, third parties can file a suit aimed at piercing the corporate veil and obtaining access to the assets

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12. One example is the general partnership where all partners bear jointly and unlimited liabilities.

of partners, managers, directors and legal representatives, whilst seeking legal redress.

Disregard of the legal entity[13] is the name given to the judicial act of imposing personal liability on otherwise immune corporate shareholders/quotaholders, managers, directors and other legal representatives. The law allows consideration of the corporate structure to be ineffective in exceptional cases, when it is expressly foreseen or when certain special conditions are present. Because it is an exceptional measure, in order to be applied, certain legal requirements must be fulfilled.

In Brazil, disregard of the legal entity was legally introduced in 1990 with the enactment of the Consumer Protection Code (Law No. 8,078/90) that brought about the application of the Minor Theory. The general rule (major theory) legally appeared with the promulgation of the new Brazilian Civil Code in 2002, in its Article 50, which established the universal rule for cases in which it is possible to disregard the legal autonomy of the company when it is used abusively.

As a rule, disregard reaches the equity of the shareholders/ quotaholders or managers who practiced the irregular act, but if the conduct cannot be individualized, disregard may reach the equity of them all.

Veil-Piercing Major Theory

For the Veil-Piercing Major Theory, adopted by Article 50 of the Brazilian Civil Code, it is necessary to prove the dysfunctional use of the legal entity, with the intention of defrauding the law or harming third parties. Thus, in the traditional concept of the theory, it is essential that the intentional, fraudulent or abusive use of the legal entity can be proven to have occurred.

It is not enough that the company is insolvent and therefore financially unable to fulfil its obligations to its creditors for the veil-piercing to be applied. The Major Theory only recognizes the piercing of the corporate veil when it is established that the shareholders/quotaholders, managers, directors or legal representatives have abused their rights, misused the company’s purpose or been aware of the commingling of assets between the assets of the individual and the assets of the legal entity, in order to embezzle or divert the company's equity to the detriment of its creditors.

Abuse of right	Misuse of company's purpose	Commingling (Confusion of assets)
Use of the company for the purpose of performing fraudulent, illegal, abusive acts or violating the articles of incorporation/ bylaws. Clearly exceeds the limits imposed by economic or social limits, good faith or good moral values.	Unlawful or irregular use of the corporate entity for a purpose different to that for which it was created, resulting in damages for third parties	Equity and other obligations of shareholders/quota holders and the company are so intertwined that it is difficult to distinguish between the two. It is demonstrated that the company pays the debts of its partners, or the partners receive credits from such, or vice-versa.

For the application of the veil-piercing major theory, proof is required that the company was used in a fraudulent way, as a mere instrument to conceal the practice of injuring the rights of creditors or third parties, which must be demonstrated by concrete evidence and verified by a reasoned decision.

Some more modern doctrines understand that the thin capitalization of the company should also be framed as an unlawful act and a factor conducive to the piercing of the corporate veil in cases where it is proven that fraud or gross negligence have occurred.

It is understood that the company is considered to be thinly capitalized when it has a high proportion of debt capital in relation to its equity capital, that is, the equity capital is insufficient to meet

13. Also known as "piercing the corporate veil", veil-piercing, lifting the corporate veil.

its basic needs and/or bear the risks inherent to the activity performed by the company.

Veil-Piercing Minor Theory

The Minor Theory presents the understanding that the legal entity's equity insufficiency is enough to order the piercing of the corporate veil, which is an exception to the Major Theory.

The foreign investor may well feel that the cases in which the minor theory is applied is the most troublesome aspect of Brazilian legislation. In these cases, the piercing is performed whenever the company's equity autonomy obstructs the compensation of damages caused by the legal entity.

This exceptional situation is found in our legal system under the understanding that "the core right" to be protected deserves special treatment, and the general rule, applied by the Civil Code, should therefore not be applied.

According to the minor theory, the inherent business risk, normal to economic activities, cannot be borne by the third party, but by the shareholders/quotaholders, managers, directors and legal representatives of the legal entity, even if they demonstrate good administrative behaviour, that is, even if there is no evidence of culpable or malicious conduct on their part.

The following fields are affiliated to the minor theory in Brazil:

Consumer Law, which provides that "the legal entity will also have the veil pierced whenever its legal autonomy is in any way an obstacle to the reimbursement of damages caused to consumers" (Article 28, paragraph 5, Law No. 8,078/1990).

Environmental Law, which provides that "the legal entity may have the veil pierced whenever its legal autonomy is an obstacle to compensation for damages caused to the quality of the environment" (Article 4, Law No. 9,605/1998).

Labour Law, which understands, through case-law, that the employee is economically disadvantaged and cannot bear the risks of the enterprise managed by his/her employer. Thus, since the company does not have sufficient equity to support the execution

of labour debts, the shareholders/quotaholders and, possibly, managers, directors and legal representatives, must be liable for the debts not paid by the company, and the payment will be made by their private assets.

In these cases, it means, not without criticism, that it is possible to pierce the veil of a legal entity for the individual to be held liable, simply because the legal autonomy is in some way an obstacle to reimbursement of damages caused (to the consumer, the environment, and so on), even if no illegal act has been committed.

Application of the Disregard of the Legal Entity under the New Brazilian Code of Civil Procedure

The New Brazilian Code of Civil Procedure (Law No. 13,105/2015), in its Articles 133 to 137, has instituted the so-called disregard of the legal entity's incident, providing that the shareholders/quotaholders, managers, directors and legal representatives affected by a decision that has "pierced the veil" of a certain company must be heard before, thus guaranteeing an adversarial proceeding.

In fact, it cannot be admitted that anyone within the framework of a democratic process model, except in cases of protection of urgency, is restricted in their assets and rights without due process of law, and the possibility of full adversarial proceeding and use of the resources inherent to the exercise of the right to defence.

Consumer Liability

Since it was adopted in Brazil, the Consumer Protection Code (*Código de Defesa do Consumidor* – CDC) has been trying to equalize the consumer relationship formed by the Consumer (considered as being the weaker party and therefore deserving of greater care by the legal system) and the Supplier (being the agent that develops the activity of production, assembly, construction, transformation, importation, exportation, distribution or commercialization of products or the provision of services). Because of this alleged condition towards the consumer, the provisions of the CDC were innovative in that they provided a different approach to the already mentioned institute of the

disregard of the legal entity.

In the scope of the consumer relationship, unlike the general rule from the Civil Code that advocates the Major Theory for liability of managers and investors, the Minor Theory of piercing of the corporate veil is observed.

Whenever the conduct of the supplier is interpreted in any way as being an obstacle to the compensation of damages caused to consumers, the lifting of the patrimonial protection veil is authorized, reaching the equity sphere of shareholders/ quotaholders, managers, directors and legal representatives. In this regard, the spectrum that the legislator has opened up is quite extensive.

The adoption of the Minor Theory, in order to protect the consumer in the daily relationship, results in a considerable increase in the degree of exposure to the risk of contingencies of the suppliers and its representatives in Brazil.

Here again, it is worth advising the company to adopt preventive policies for quality control, compliance and corporate governance.

In addition, it is strongly recommended that a company should maintain a fast and efficient channel of contact with consumers so that their needs are remedied before being transformed into administrative or judicial litigation. Good service and speed in solving problems helps to mitigate a company's risks.

Environmental Liability

Brazil is a continental country. Of its total area, 516 million hectares are covered by forests, an area equivalent to 60.7% of its entire territory. Faced with this fact, concerns about the environment deserve special attention in our legal system.

According to the Brazilian Federal Constitution, a person or entity that causes any type of damage to the environment is subject to criminal and/or administrative sanctions, and, furthermore, will be held responsible for repairing the damage caused.

The environmental issue in Brazil is especially complex because all federative entities have the power to legislate on the matter. Therefore, an investor wishing to develop an activity that could cause environmental damage must be prepared to meet a

series of requirements to start its business.

Civil liability for environmental damage, regardless of the legal qualification of the public or private debtor, is objective, joint and unlimited, and is governed by the polluter-payer principle, of the *in integrum* repair and the priority of *in nature* repair. As the legislation aims to protect the environment as a collective asset, a series of techniques to facilitate access to justice are legitimized, including reversing the burden of proof always in favour of the environmental victim.

In practice, once the environmental damage is detected, the liability of the agent (company) is established with the presence of the causal relationship between conduct and the damage produced, with those being held liable including: (i) those who do something; (ii) those who have not done something when they should have done it; (iii) those who do not care if others do something illegal; (iv) those who pay others to do something; and (v) those who benefit when others do something.

In other words, the spectrum of accountability is enormous when dealing with environmental liability. In the interests of environmental protection, all those who may have contributed to the environmental damage, even if not intended, are responsible for this result: the company, the managers (in the case of personal responsibility), company shareholders/quotaholders and any third parties.

If the legal entity does not have sufficient equity to repair or compensate for the environmental damage caused, it may have its veil pierced, regardless of the evidence of fault, negligence or any wrongful act.

Another important subject relating to environmental liability lies in the administrative area, which consists of the sanctions imposed by the administrative authority due to violation of environmental legislation. The administrative sanctions for violation of environmental legislation are as follows:

- Warning;
- Simple fine;
- Daily fine;
- Seizure of animals, products of fauna and flora, instruments, supplies, equipment of any kind used to infringe the law

- Destruction of the product;
- Suspension of the sale and manufacture of the product; and
- Interruption of construction or activity.

In the environmental sphere, liability can be criminal. Brazil was the pioneer in Latin America, creating the theory of criminal liability of the legal entity. Examining Article 225, paragraph 3 of the Brazilian Federal Constitution, it is clear that the penalties apply not only to individuals but also to legal entities.

It is undeniable that virtually all business activities have some impact on the environment. Therefore, to minimize these impacts, the order of priority of measures to be taken should first be prevention, then mitigation, followed by recovery, and finally compensation. Therefore, finding ways to avoid impacts and prevent risks should be the first thing to be adhered to.

Antitrust Liability

Free market competition is guaranteed by the Brazilian Federal Constitution, however there are various different laws in the legal system that regulate the competitive relationship. Any practice adopted by an economic agent that may, even though potentially, damage free competition is characterized as anticompetitive conduct, even if the offender had not intended to harm the market.

Market power by itself is not considered illegal, but when a company or group of companies abuses that power by adopting a conduct that harms free competition, in practice, then it is abusing economic power. Such abuse is not limited to a set of specific practices, since the analysis of the possibility of the harm caused to competition is complex and many factors are analysed in order to characterize a practice as abuse.

The state body responsible for overseeing and controlling Brazilian competition policy is the Administrative Council for Economic Defence (*Conselho Administrativo de Defesa Econômica* – CADE). Its activities consist of investigating and repressing the conduct that can be characterized as harmful to competition[14].

Article 36 of Law No. 12,529/2011 lists some forms of conduct that may characterize a breach of the economic order, insofar as they have as their object, or may produce,

anticompetitive effects, thereby distorting, or in any way prejudicing, free competition.

This provision sets out an exemplary and non-exhaustive list of pipelines that have the potential to cause harm to competition. Whether such conduct really will have this effect when adopted is a matter for analysis on a case-by-case basis. Among others, the examples of conduct mentioned in article 36 are:

- Cartels;
- Dumping;
- Territorial and customer base restrictions;
- Exclusive agreements;
- Abuse of a dominant position;
- Fixing of resale prices;
- Refusal to hire; and
- Creation of difficulties for the competitor.

One of the most common forms of behaviour in Brazil, that hurts competitive policy, is cartel practice. This constitutes an administrative offense punishable by CADE, under the terms of the Antitrust Law (Law No. 12,529/2011), and a crime, punishable by Law No. 8,137/1990.

Article 34 of the Antitrust Law establishes that the legal entity may have the corporate veil pierced due to abuse of rights, excess of power, infraction of law, illegal acts or violation of the articles of incorporation/Bylaws and also, whenever there is bankruptcy, insolvency, irregular closure or inactivity of the legal entity caused by mismanagement.

Labour Liability

The Consolidation of Labour Laws (*Consolidação das Leis Trabalhistas* – 'CLT', Decree Law No. 5,452/1943) is the law that

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14. Unfair competition is the commercial disagreement between parties, with no impact on the competitive environment, and is therefore a private matter, disciplined by Law No. 9,279/1996, not constituting an infraction of the economic order and being treated in its own scope, that is, in the Judiciary. Unfair competition, described as "unpredictable behavior", translating into acts "contrary to the practice of good moral values usually observed in the relations of the economic agents among themselves, as well as of those with the consumers".

regulates relations between employers and employees in Brazil.

In this sense, despite the clear legal determination regarding the labour liabilities established by Brazilian legislation, we have observed in many judgements that the application of disregard of the legal entity often surpasses reasonable logic.

Theoretically, the veil-piercing major theory should be applied to labour cases. However, labour courts have been executing judicial convictions against all shareholders/ quotaholders when the company does not have sufficient assets, regardless of whether there is fraud or gross negligence, abuse of company rights, and so on.

The labour courts in Brazil, with very few exceptions, have adopted the understanding that the employee is the economically disadvantaged party and cannot bear the risks of the enterprise managed by its employer. Consequently, when the company does not have sufficient equity to support the execution of labour debts, partners and, possibly, managers, directors and legal representatives, are held liable for the debts not paid by the company, in a joint and unlimited manner, with the payment of the debts being made by means of their private assets.

There is therefore a subversion of the major theory by the Labour Court, since there is no legal provision that establishes the liability of the partners or managers for the payment of labour sums when the company does not have sufficient equity. Following this understanding, the veil-piercing theory is incorrectly applied when there is no unlawful act, fraud, abuse of rights, or misuse of purpose.

Thus, it is recommended that shareholders/quotaholders and investors always maintain accurate control and effectively certify that all labour rules within their company are fulfilled in their entirety. Not only that, they should also always keep their employee records up to date, in order to prove regularity whenever necessary.

Tax Liability

Taking into consideration the complexity of the tax system in Brazil, which is composed of numerous special rules and legislation enacted at different levels of government (Federal, State and Municipal), it is essential to have one's company's tax planning in order so as to opt for the best corporate structure to

mitigate tax charges. The great number of rules that governs the current tax system can lead to the incorrect collection of taxes, which can generate serious losses for a company.

Good tax planning helps the company to precisely define, among other issues: (i) the possibility of using tax incentives or exemptions; (ii) the establishment of a schedule for tax payments, defining the best dates for the collection of fees and taxes and the delivery of ancillary obligations; (iii) the tax liabilities that shareholders/quotaholders, managers, directors and others involved in the management of the company may have for the payment of taxes, fees, fines and penalties due to the possibility of the piercing of the veil of the legal entity.

The Brazilian National Tax Code (*Código Tributário Nacional – CTN*, Law No. 5,172/1966) regulates the tax liability issue in Article 134, establishing the legal burden for the individual or legal entity which, in certain cases, can hold secondary, total or partial responsibility for the fulfilment of the obligation in the event that the primary taxpayer cannot fulfil the principal obligation.

It is evident that the mere exercising of the management of the company by these individuals does not make them liable for the company's tax debts in case of non-compliance with the tax procedures. Here, the major theory rule, as presented above, is applied in full.

However, individuals that act with an excess of power, that violate the law or the articles of incorporation/Bylaws of the company, may be considered jointly responsible for the payment of the outstanding taxes and obligations. Article 135 of the CTN regulates the joint liability of managers, directors and other legal representatives of the company when they perform acts with excessive powers[15] or break the law or act contrary to the articles of incorporation/Bylaws.

Sections III and VII of Article 134 govern the liability of the managers of assets of third parties and of the shareholders/ quotaholders of companies that go into liquidation.

15. Considering that the Articles of Incorporation/Bylaws regulate the manger's limits of power, it is correct to say that the legal representative performs acts with excessive powers when the Company's Articles of Incorporation/Bylaws are violated.

Types of Business Organizations and Specific Liabilities

Brazilian law allows for the formation of several types of corporate and business organization structures, with limited liability companies (*Sociedade Limitada – LTDA*) and corporations (*Sociedade Anônima – S.A.*) being the two most common structures chosen by foreign investors. There are also two other possibilities that are sometimes used by foreign companies: (i) the opening of a branch of the foreign company in Brazil, which must be authorized by means of a Decree of the Presidency of the Republic, in accordance with Article 1.134 of the Brazilian Civil Code; and (ii) the formation of a consortium, so that foreign companies and investors can coordinate their specific interests towards a common end.

In Brazil, according to the corporate type adopted, the partners of a certain company may be limited or unlimited in their liability for corporate obligations. Thus, it is essential to understand the limits and responsibilities of Brazilian companies under the Corporation Law.

The general rule, due to the principle of the company's legal personality, establishes the non-liability of the partners, considering that the companies' assets shall not be mixed with the partners' assets. Likewise, the liability of the partners and managers of the company is subsidiary, which means that, whilst the company's assets are not exhausted, one cannot draw on the personal assets of the partners and managers in order to satisfy the corporate obligations.

The liabilities attributed to the companies may be civil, criminal or administrative in nature.

Limited Liability Companies (*Sociedade Limitada – 'LTDA')*

The most common and most widely used corporate form in Brazil, this form is governed primarily by the Brazilian Civil Code and, secondly, by the Brazilian Corporation Law.

The preference for the use of limited liability company is especially due to five basic aspects that result in greater security and practicality for investors and entrepreneurs. These are: (i) a simple and extremely flexible corporate structure; (ii) a clear limitation of the liability of the partners, (iii) no legal obligation to publish financial statements each fiscal year, (iv) the ensuring of a certain degree of confidentiality of the companies' affairs; and

(v) no statute obligation to distribute profits.

The Brazilian Law provides that the *Sociedade Limitada* needs to be constituted by at least two quotaholders which, apart from a few exceptions, can be either individuals or legal entities and may or may not reside in Brazil. Quotaholders not resident in Brazil must be formally represented by a Brazilian legal representative/ attorney-in-fact residing in the country, with powers to receive service of process on behalf of the foreign quotaholder.

In limited liability companies, all partners are held jointly and severally liable for the complete payment of the corporate capital up to the full payment of the subscribed capital. Once the capital is fully paid up, the responsibility is restricted to the amount of each partner's ownership interest.

Corporations (*Sociedade Anônima* – SA)

A joint-stock corporation, or *Sociedade Anônima*, is governed by the Corporation Law and it is a commercial corporation. It could also be described as a business corporation having as its purpose the earning of profits to be distributed to the shareholders as dividends or interest on their own capital.

There are two kinds of *Sociedades Anônimas* in Brazil: publicly held companies that raise capital through public offerings and subscriptions and are supervised by the Brazilian Securities Commission (*Comissão de Valores Mobiliários – CVM*); and closed capital companies that raise capital through its shareholders or subscribers, and whose accounting and management are simpler.

Equity is represented by securities called shares. Depending on the rights or advantages conferred to their holders, the shares may be common, preferred or fruition shares. Common shares entitle their holders to the right to vote, whereas preferred shares, which grant special rights to their holders, may restrict or suppress the right to vote.

The main strengths of the Brazilian *Sociedade Anônima* are: (i) no joint liability among shareholders (when, for example, other shareholders fail to deposit their contributions to the corporate capital); (ii) protection of minority shareholders from any arbitrary decisions of majority shareholders; (iii) availability of external finance through access to capital markets; and (iv) liability is limited to the issue price of subscribed or acquired shares.

Branch of a foreign company

A branch can be described as an extension of the main company, a mere decentralization that does not confer any kind of autonomy in relation to the main company and should not be confused with the incorporation of a Brazilian company whose partners are foreign companies (the latter having their own legal personality distinct from their shareholders).

According to Articles 1,134 to 1,141 of the Brazilian Civil Code, a prior Presidential Decree is required for a branch of a foreign company to be set up in Brazil. Only a very limited number of multinationals operate in Brazil under this structure, due to the extremely bureaucratic requirements associated with the creation and maintenance of a branch in Brazil.

According to Article 1,138 of the Civil Code, a foreign company authorized to operate in the country is obliged to have a permanent representative in Brazil, with powers to solve any issues and to receive judicial summonses on its behalf. These representatives can be held directly liable for the company before third parties.

Consortium

In accordance with Article 278 of the Corporation Law, a consortium of companies consists of the association of companies be they under the same control or not, which will maintain their legal entity, in order to perform a certain endeavour, generally one of high cost, and which demands specialized technical knowledge and a high standard of technical instruments in order to be performed.

LIABILITIES OF PARTNERS	
Limited-liability companies	Restricted to the amount of interest held by each quotaholder in the subscribed corporate capital. However, all quotaholders are jointly and severally responsible if the corporate capital is not fully paid.

Corporations (publicly held or closed capital)	Liability is limited to the total value of the issue price of the shares subscribed or acquired by each quotaholder.
Branch of a foreign company	It is considered an extension of the head office of the foreign company and, therefore, its liability before third parties in Brazil may extend not only to its own corporate capital but that of the head office of the foreign company as well.
Consortium	The companies which take part in a consortium have no joint liability, each one being liable for the obligations incurred by them, except if otherwise expressly determined by the consortium. Based on this legal provision, creditors can seek to receive their credit directly from the consortium members, who are responsible for the obligations assumed on behalf of the consortium.

Brazil's Anti-Corruption Law and Compliance

Brazil is entering a new era of maturity in its business environment. With the entry into effect of Law No. 12,846/2013, also known as the "Anti-Corruption Law", the country has established some of the most rigorous and advanced anti-corruption legislation in the world. This scenario presents a challenge for organizations that operate in Brazil, in terms of creating a structure of corporate governance, compliance, risk management and internal controls.

These are profound changes that directly involve the corporate culture as a whole.

The meticulousness and structure of the Anti-Corruption Act are comparable with similar laws in the United States (the *Foreign Corrupt Practices Act*, or FCPA) and the United Kingdom (the *Bribery Act*). The legislation was approved in August 2013 and put into effect in January 2014.

The Law has become a tool with which to reinforce business ethics, since it can be used to investigate and punish those involved in cases of corruption. This requires changes in how companies relate to the public sector, by taking measures that prevent acts of corruption by their employees, contributors or suppliers.

The Anti-Corruption Law is not restricted to organizations that participate in bids or which enter into or maintain contracts with public bodies, it also applies to any company (regardless of its form of organization), foundation, association or foreign company, which has an establishment or representation in Brazil.

In this context, the existence of a properly structured and effective integrity program may not only prevent irregularities, but also be considered as one of the criteria for the application of administrative charges under the Anti-Corruption Law in the event of any harmful act. Thus, despite not eliminating the application of the penalty, a compliance/integrity program may imply its reduction.

The compliance program should be structured according to the characteristics and risks of the activity of each legal entity, and should include several effectiveness mechanisms, such as periodic audits, the opening of whistleblowing channels and the encouragement of complaints of irregularities and the protection of the complainant, as well as the regular analysis of risks in order to always keep the program in line with the activities of the organization.

The direct target of the Anti-Corruption Law is indeed the legal entities; however, it is important to note that there are direct provisions of liability of managers and investors in the body of the Law.

Legal Representation in Brazil – Relevant Information

Brazilian law considers legal representatives to be anyone who, through legislation or contract, is granted powers to practice

acts or management interests on behalf of another person (articles 115 and 653 of the Brazilian Civil Code). For the purposes of this guide, we will be considering Legal Representatives as being those individuals who effectively exercise management and business management acts on behalf of foreign investors and shareholders, such as: officers, directors, managers and attorneys-in-fact[16].

Investors who decide to nominate a legal representative in Brazil need to understand the extent of the risks and liabilities involved, due to the fact that this is an extremely delicate position to be occupied and one that certainly may affect the company on Brazilian soil and even have impacts abroad. as a result of the application of FCPA and UK Bribery Act provisions.

Legal representatives, in connection with their duties as attorneys-in-fact of the foreign investors or officers/directors of a Brazilian company, constantly act before Public Bodies, which means that keeping a close eye on this interaction is strongly recommended. Partners and investors must retain control over specific decisions by reserving certain rights and imposing restrictions on the legal representatives acts in the power of attorney, articles of association, bylaws, internal regulations and agreements or others corporate documents, establishing effective compliance and corporate governance plans so they can be confident that the activities are being conducted with a high level of fairness and reliability.

Likewise, risk assessment is a mandatory measure and should consider the legal representative's past activities and any other companies they might be linked with. It is quite common in Brazil that the relationship of a legal representative in a problematic company will entail risks for another company that also counts on its simultaneous services (a situation called "crossed risk"). Given this possibility, directors, officers/managers and attorneys-in-fact should undergo regular risk analyses in order to evaluate the potential of exposure that a company could be subjected to.

Nowadays, there is no doubt that foreign companies that conduct business in Brazil are considered directly liable and must be fully aware of the activities performed by its employees,

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16. ttorneys-in-fact who hold powers to receive summonses on behalf of foreign companies and foreign investors in Brazil.

suppliers and legal representatives, in order to identify, combat and mitigate acts of corruption.

Besides this, with the increase in the number of cases in which a legal entity's status may be disregarded, especially in environmental, consumer and labour cases, it has been verified that, besides partners, managers and shareholders/quotaholders (positions traditionally affected by disregard of the legal entity[17], the attorneys-in-fact of the foreign companies have also started to appear as defendants in lawsuits filed against such foreign companies, and some of their personal assets have even been seized.

In Brazil, there is a severe liability issue regarding companies' officers and attorneys-in-fact, considering that precedent judicial cases tend to increasingly favour the disregard of the legal entity, so that debts and accountabilities (tax, labour, environmental, consumer, corporate, among others) may be demanded directly from specific individuals (partners, officers, directors and attorneys-in-fact, for instance).

Attorney-in-Fact

The attorney-in-fact is the indispensable person who, in the name of the foreign company, will perform the acts inherent to his/her status as shareholder/quotaholder in the Brazilian company, and may perform numerous corporate acts before federal, state and municipal agencies and public authorities. As determined by the Brazilian Civil Code, the mandate is exercised when someone receives from another person the powers to, on his/her behalf, perform acts or manage interests. The power of attorney is the instrument that puts the mandate into effect.

Articles 119 and 126, paragraph 1, of the Corporation Law, provide for the obligation of the foreign company (shareholder or quotaholder of a company in Brazil) to establish an attorney-in-fact in the country to represent them permanently, with this including powers to receive summonses on suits brought against it.

The foreign company that intends to open, incorporate or be a partner of a company in Brazil will need to appoint an individual residing in Brazil to exercise the corporate acts inherent to its legal status, such as: (i) attend meetings, assemblies or other acts of deliberation; (ii) subscribe, acquire, dispose of, assign or transfer shares or quotas; and (iii) exercise all other rights inherent to the status of a shareholder or quotaholder of said Brazilian

company in which it holds interest.

It is important to emphasize that a foreign individual may act as an attorney-in-fact of foreign companies in Brazil, provided that he or she has residence in Brazil.

Officer or Director of the Brazilian Entity

As previously explained, foreign companies traditionally run their Brazilian entities by occupying the position of quotaholder or shareholder. In this sense, many foreign companies usually choose to open a brand-new company in Brazil in which they will act as partners (often by using *holdings).*

As a result of enrolling this new company in Brazil, there is a legal obligation to appoint an officer or director who will be required to legally represent the new business entity. The management may be performed by one or more individuals and is governed by, and registered in, the articles of incorporation or a separate corporate act.

In addition to being responsible for the full legal representation of the company, the officer or director appointed by the foreign partners may be held civilly, administratively or criminally liable if they fail to comply with the rules defined by contract or by law, including the obligation to repair any losses or damages borne by foreign partners.

The exercising of the position is ended by the dismissal, at any time, of the manager or director, or by the expiry of the term of office established in the company's articles of incorporation.

Member of the Board of Directors

From an analysis of Brazilian legislation, it is understood that the shareholders, in electing the members of the company's board (also known as the Board of Directors – BofD), are delegating to the nominated members the obligation to watch over the interests of all the shareholders regarding the operation of the company.

Therefore, BofD members should exercise their powers that the law, statute or shareholders' agreement confers to them, always according to the interests of the company, and incompliance with the requirements of its social function, as well as the duties of

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17. http://www.mcsa.adv.br/view.php?lang=en&publication=2" \l "_ftn6"

diligence, loyalty and reporting.

BofD members are not personally liable for any obligations they may incur on behalf of the company or by virtue of a regular management act, but may, however, be held civilly liable for any damages they cause if they act: (i) with fraud or gross negligence; (ii) or in violation of the law or the company's articles of incorporation.

Paragraph 2, article 146 of the Corporation Law establishes that the nomination of a BofD member who is resident or domiciled abroad is conditional upon the constitution of a resident legal representative in Brazil, with powers to receive service of process in lawsuits brought against him/her, by a power-of-attorney with an effective period that shall extend for at least three(3) years after the end of the member's term of office on the Board of Directors.

Fraud and Corporate Criminal Liability

In relation to the responsibilities of managers and investors in Brazil, fraud is an event that deserves attention since it is characterized as the practice of a business routine by agents invested in bad faith. Fraud is nothing more than the use of deceitful or tricky means in order to circumvent the law or an agreement, whether existing or in the future. It is worth mentioning that there is a need for harmful intent external to the relationship of the fraudulent parties in order for a fraudulent action to exist.

Some types of fraud under Brazilian Law are: (i) fraud against creditors; (ii) execution fraud; and (iii) fraud against the law.

In addition to the aforementioned civil liability, which is the general rule, the manager can be held criminally liable for his/her illegal conduct.

It is worth noting that in order for an agent's act to be regarded as criminally liable, the conduct in question must be seen as a crime and include those who have participated in it, through action (practicing criminal conduct) or omission (failing to make decisions or actions that could prevent the occurrence of the crime, when they had the duty, and possibility, of avoiding it).

Some regulations that establish criminal liability for managers or even foreign investors (in the person of his/her attorney-in-fact) are:

- Brazilian Criminal Code;

- Anti-Corruption/Money Laundering Law;
- Environment Law;
- Tax Code (Tax, Economic and Financial System);
- Consumer Relationship;
- Illegal Enrichment/Misappropriation;
- Law of Court-Supervised Reorganization and Bankruptcy;
- Labour Legislation (Discriminatory Practices at Work); and
- CVM/Capital Market - Insider Trading - Art. 27-D of Law 6,385/76, included by Law 10,303/01.

From the perspective of Brazilian criminal law, managers and directors cannot be held criminally liable for unlawful acts committed by the company. These agents may only incur criminal responsibility for acts practiced in person in the performance of their duties. Managers and even the foreign investor's attorneys will be held liable for acts of the company if they are aware that the company is not complying with all legal requirements and do not take any action to avoid this non-compliance.

Considering that fraud may have such harmful effects on corporate practice, there are ways of curbing this type of activity. In addition to the legislative protection already mentioned, it is suggested that corporate planning be performed at the time of the incorporation of the company, considering the inclusion of protection barriers in the Articles of Incorporation/Bylaws to avoid such conduct, such as, for example, (i) the delimitation of amounts for financial transactions and signatures of contracts; (ii) the adoption of an effective Board of Directors/Supervisory Board structure; and (iii) the implementation of Compliance and Corporate Governance rules, in line with Anti-Corruption and Anti-Money Laundering Laws.

Chapter 4

Corporate Criminal Law

What is penal law and what is its purpose?

Penal Law is that branch of Law concerned with the enforcement of the statutes enacted by Congress for the purpose of preventing conduct considered harmful to society, by imposing penalties which, depending on the seriousness of the crime and the circumstances in which it was committed, may include deprivation of liberty, restriction of rights, pecuniary penalties and other punishments.

Penal punishment is the severest expression of a State's law-enforcing power in that it involves the privation of liberty, a fundamental right of mankind, arduously attained and guaranteed by all democratic constitutions.

In Brazil, the National Congress has the legislative power to determine what conduct is to be most forcefully suppressed, and criminalization of this or that activity varies according to the historical, political and cultural setting.

For this reason, to understand the advent of so-called Economic Penal Law, one must consider the effects of the globalization process that began at the turn of the 21st century: new, fast-paced virtual markets; expanding e-commerce; volatile financial

transactions and everything else surrounding today's economic environment, which could never have been imagined in 1940, when the Brazilian Penal Code was promulgated.

Individual criminal responsibility is subjective, personal and cannot be transferred from one to another. Thus, there is no corporate criminal responsibility, except for environmental offenses. For one to be held responsible, it must be demonstrated, beyond any reasonable doubt, that contribution has in some way been made to the commissioning of the crime. Moreover, it has to be proven that the individual intended to commit the objective elements of the crime. By intent, it is understood that the perpetrator knew of the illegality of their actions and wilfully engaged in their commission. Brazilian criminal law accepts the prosecution of crimes committed recklessly, but only when expressly established by the Brazilian Criminal Code. Criminal law punishes not only those who act in pursuance of the crime, but also those who bear the responsibility to protect the legal interest and fail to do so.

The advent of economic penal law and its new concepts of criminal activity

Globalization, market expansion and the advent of a post-modern society have resulted in the emergence of new and formerly unimaginable crimes, extremely difficult to visualize and of transnational magnitude.

It is in this context that "Economic Penal Law" emerged to address what are referred to as "crimes of the powerful", "white collar criminality", "criminality of the upper world", etc.

In general, economic crimes are virtually invisible and non-violent, but are capable of causing damage that is difficult to pinpoint and often uncontrollable and irreversible.

Also typifying this type of crime are its agents, who are generally persons of wealth, respectability and high social status.

As regards the statutes addressing economic and financial crimes in Brazil, they are generally regarded as vague, imprecise and the cause of enormous legal insecurity.

Especially when it comes to financial crimes, the absence of clear and precisely defined provisions of law on certain aspects of the financial and tax system creates an ambiguous environment where offenders are often unaware that their conduct constitutes a

crime. Not uncommonly, owing to the complexity and ambiguity of Brazilian laws, taxpayers unwittingly evade taxes, fail to properly report and pay taxes on overseas money transfers, miscalculate the social security contributions of employees, etc.

But under the Brazilian legal system, "none are entitled to claim ignorance of the law". Hence, in the cases outlined above, unsuspecting offenders may be surprised to find themselves under investigation and subject to indictment for committing crimes. Procuring sound legal advice is therefore of extreme importance in Brazil. As far as the methods of investigating so-called 'economic crimes' are concerned, of particular note is the indiscriminate use of exceptional measures such as telephone wire-tapping and bank account and tax statement scrutiny, in violation of the rights and guarantees that are the cornerstones of a Democratic State such as Brazil. This situation has been aggravated by the inconsiderate use of search, seizure and detention of properties, as well as temporary arrests.

The Federal Justice system generally has jurisdiction over economic crimes, the Federal Prosecutor's Office being responsible for prosecution and the Federal Police for crime investigation and criminal inquiries. Nevertheless, in the last few years, the Federal Prosecutor's Office has become the most prominent law enforcement agency in the country, particularly after the recent Brazilian bribery scandals.

The current scenario in Brazil

As previously mentioned, following the nationwide bribery scandals, Brazil has increased law enforcement efforts against corruption and encouraged the adoption of compliance and integrity programs, as well as transparency in all aspects of corporate and public business.

The milestone of this new phase in the country's law enforcement is the widely known 'Car Wash Operation' conducted by the Brazilian Federal Police and the Federal Prosecutor's Office. The operation is designed to tackle suppliers and companies responsible for providing services and goods to Petrobras, the state-owned oil company, and the practice of alleged wrongdoings implicating individuals, public officials, politicians and high-profile executives in this country as well as others.

Simultaneously, new legislation has been enacted allowing

leniency agreements for legal entities with regard to corruption and financial matters, in the form of the so-called 'Brazilian Clean Companies Act' (Federal Law No. 12,846/2013) and the leniency of the Central Bank and Securities Exchange (Federal Law No. 13,506/17).

Examples of economic crimes

- **Crimes of corruption**

Corruption in Brazil may involve the violation of multiple laws, each one from a different origin[1]: either an administrative, civil, and/or criminal violation. Nonetheless, one particular feature of Brazilian legislation is that there is no specific regulation on private corruption. Companies are subject to administrative and civil liabilities in the event of violation of such regulations and only individuals are subject to penal responsibilities.

The Brazilian anti-corruption legal framework includes a great number of governmental agencies[2] with jurisdiction and authority to investigate corruption, with each pursuing its own procedures. Such authorities are found at federal, state and municipality levels and their jurisdictions are established by the Federal Constitution.

Practical consequences resulting from corrupt acts may vary according to the nature of the conduct, the date on which it was committed, the type of proceeding (administrative or judicial), the authority that launched or requested the launching of the proceeding, among others circumstances. The current anticorruption laws have extraterritorial reach and foreign legislation concerning corruption have effect with regard to wrongdoings which occur in Brazil.

Crimes of corruption are only applicable to individuals and

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1. Main criminal legislation: Criminal Code (Decree No. 2,848/1940); Financial Crimes Act (Federal Law No. 7,492/1986); White Collar Act (Federal Law No. 8,137/1990), Crimes set forth under the Public Procurement Act (Federal Law No. 8,666/1993) and AML. In the civil and administrative spheres, the main legislation consists of: the Administrative Improbity Act (Federal Law No. 8,429/1992); the Public Procurement Act (Federal Law No. 8,666/1993) and the Brazilian Clean Company Act – "BCCA" – (Federal Law No. 12.846/2013).
2. The main agencies for investigating corruption in the administrative sphere are the Brazilian Federal Police and Comptroller General of Brazil ("CGU").

they are defined in Brazilian Penal Code. Portions of these offenses, such as corruption, embezzlement and graft, are applicable solely to public agents. On the other hand, only private individuals are subjected to some other offenses, as in the case of active corruption.

For corporations, the legislation is regulated by the Brazilian Clean Companies Act, which establishes the civil and administrative responsibility of legal entities for illicit acts perpetrated against national or foreign public administrations. The liability is strict, which means that there is no need to demonstrate any default or corrupt intent in the illicit practice. Additionally, wrongdoings described in the legislation do not have to result in actual benefit to the public official and/or to the individual or corporation.

- **Crimes against the national Financial System - Law Nr. 7,492/1986.**

This is an extremely vague law filled with imprecise and excessively sweeping concepts; for these very reasons, it has drawn harsh criticism ever since it was promulgated.

The first point to note is that, since Law 7492/86 is the guardian of the National Financial System, it criminalizes any conduct that may cause harm to the proper operation of the System.

"Financial institutions" are defined in Article 1 as: "state- or privately-owned legal entities, the core or secondary business of which is one or more of: the collecting, intermediation or investment of third-party funds in domestic or foreign currency, or the safekeeping, issuing, distribution, trading, intermediation or management of securities". The following are equivalent to Financial Institutions: "I - legal entities engaged in the collecting, provision or management of insurance, foreign exchange, purchasing pools, savings or third-party funds" and "II - individuals regularly or otherwise engaged in any of the activities listed in this article".

The crimes addressed by Law 7,492/86 include crimes of negligent and fraudulent management (art. 4), off-book accounting fraud (art. 11), forbidden borrowing (art. 17) and currency control and tax violations (art. 22).

In 2017, Federal Law No. 13,506/17, a new law allowing leniency agreements for financial matters, was enacted, with both the Central Bank and the Securities Exchange Commission being counterparties. Notwithstanding, such agreements do not

encompass individuals and do not grant any sort of penal immunity. Hence, individualized plea agreements are entered into with the Federal Prosecutor's Office.

- **Crimes against the tax system, economic order and consumer relations - Law Nr. 8,137/90.**

Law 8,137/90, like Law 7,492/86, is replete with vague and imprecise concepts.

Crimes against the Tax System are addressed in articles 1 to 3, which severely penalize acts of tax evasion, defined as the suppression or reduction of taxes, social contributions or any related charges, or any other acts having such a purpose. For crimes against the tax system committed by Government officials, Law 8.137/90 establishes penalties as severe as 8 years' imprisonment.

A special feature of tax crimes involves the full payment of the tax debt. When such a payment is made, the penal responsibility is immediately extinguished, not matter how advanced the prosecution may be.

In a context of bribery scandals, the Higher Chamber of the Administrative Tax Appeals Council ("CARF") was a target of the 'Zelotes Operation'. This operation investigated a bribery scheme within CARF, involving large corporations in Brazil, as well former President Lula and his children.

The Zelotes Operation focused on strengthening the enforcement of compliance with regulations within the Brazilian Internal Revenue Service, which may conduct its own investigations regarding tax fraud and bribery and this may include direct assistance from the Federal Police and Public Prosecutor's Office.

- **Crimes against the economic order - Arts. 4 to 6 of Law Nr. 8137/90.**

The Brazilian Constitution protects and provides "the freedom to engage in economic activity without the need for authorization from Government organizations, except in specific cases stipulated by law", "the right to private property (and) free competition". Thus, interference by the State in these matters is justifiable only in the exceptional event that it is necessary to serve collective interests or is imperative to national security, as established

in article 173 of the Constitution. Thus, as a rule, the State's scope of action is limited to law enforcement, the provision of incentives, and planning, as established in article 174 of our Constitution.

It is therefore not the gaining of profit or competition, which is inherent to business, but rather those acts committed in abuse of economic power and which pose a threat to economic order, that Brazilian law condemns as crimes. Examples of activity regarded as criminal include, *inter alia*, "manipulating prices by arrangement, agreement or any other fraudulent means to the detriment of competitors or suppliers of raw materials; pricing products below their cost to prevent competition", and "making use of a dominant market share to unjustifiably raise the prices of products or services".

Leniency agreements for anticompetitive acts is the first form of leniency in Brazil and it includes penal immunity. Such an agreement is made with the Brazilian antitrust agency (CADE), which is an enforcement agency with rigid and well-defined standards for performing this sort of agreement.

- **Crimes against consumer relations - Art. 7 of Law Nr. 8,137/90.**

Provisions concerning crimes against Consumer Relations are contained in article 7 of Law no. 8,137/90, articles 61 to 76 of Law no. 8,078/90 - the "Consumer Defence Code" - and Law no. 1,521/1950 - the "Popular Economy Act".

Crimes against consumer relations are commercial practices that breach the duty of good faith while producing or providing services to consumers or posing a risk to the consumer market.

These laws seek to protect important individual rights, but also contain numerous provisions that absurdly treat mere civil liability as a crime, hence the indispensability of fully understanding these special penal laws.

Common targets of these offenses are retail companies, since there is a specific crime prohibiting the sale of expired goods. As logistics in Brazil is a difficult matter due to the country's size, plenty of companies have trouble in this regard.

- **Money Laundering - Law Nr. 9,613/1998.**

The criminalization of money laundering in Brazil arose

from international agreements for the prevention of the illegal trafficking of narcotics, and organized crime, based upon the assumption that it would be "necessary to strangle these criminal organizations' sources of funding".

Combated at a global level (*blanqueo de capitales, lavado de dinero, branqueamento, lavagem de dinheiro, blanchiment d'argent, geldwashen* or *gelswäscherei* and *riciclaggio di denaro sporco*), the crime of money laundering, addressed by article 1 of Law Nr. 9,613/98, amended by Law Nr. 12,683/12, consists of: "concealing or disguising the nature, origin, location, disposal, movement or ownership of assets, rights or money deriving directly or indirectly from any criminal activity[3]".

Under article 1 (1) of Law 9,613/98, the same penalty applies to anyone who, in order to conceal or disguise the use of assets, rights and money deriving from the crimes set forth in that article: "converts them into licit assets; acquires, receives, exchanges, trades, pledges or accepts as guarantees, keeps, stores, moves or transfers such assets, rights or money; imports or exports goods at prices not corresponding to their true value".

Finally, paragraph 2 of article 1 criminalizes as money laundering any activity that "through economic or financial activity, makes use of any assets, rights and money known to be derived from any criminal activity referred to in this article; knowingly takes part in any group, association, or office set up for the principal or secondary purpose of committing the crimes referred to in this Law".

The organizations and mechanism for the prevention of money laundering in Brazil include:

(i) the Council for Control of Financial Activities (COAF), created within the Ministry of Finance by Law Nr. 9,613/1998, for the purpose of "regulating, applying administrative sanctions to, receiving information on, examining and identifying any suspected money laundering";

(ii) the Department of Asset Recovery and International Legal Cooperation (DrCI), of the

3. Criminal activity includes not only crimes, but also misdemeanors.

Ministry of Justice's National Justice Department (SNJ), which has the primary functions of "defining effective and efficient policy, as well as developing an anti-money laundering culture" in Brazil; recovering assets illegally transferred out of the country and products of criminal activity, and entering into "agreements for international legal cooperation, in both penal and civil matters, as the central authority in the exchange of information and issuance of legal requests on behalf of Brazil"; and

(iii) the National Strategy Against Corruption and Money Laundering (ENCLLA), created within the Ministry of Justice in 2003 "to enhance the coordination of Government authorities involved in the various aspects of preventing and combating money laundering crimes and (from 2007) corruption".

The penalty for money laundering ranges from three to ten years' imprisonment and a fine, if there is no cause for increasing or decreasing the penalty.

Law Nr. 12,683/12 established some new compliance standards to be obeyed by companies included in the list of entities subjected to the administrative obligation of money laundering prevention, which has been broadened.

Examples of such prevention or compliance measures are: identification of customers; maintenance of up-to-date records of all transactions; registry with COAF; and keeping such registration updated, among many other measures, which might include provisions made by the regulatory agencies of each business.

If the new standards are not adopted or followed by a company, it could be held liable, regardless of whether there has been actual, or an indicia of, money laundering perpetrated through the company.

Conclusion

This article provides an outline of how Economic Penal Law emerged in Brazil and of its provisions, using an approach directed

primarily to laypersons in matters of law and especially penal law. The Brazilian legal framework has certainly changed considerably over the last few years owing to the federal operations.

As a consequence, Brazil is following on the trail of several other nations that have increased the use of compliance programs as a form of fighting against, mainly, corruption and money laundry. It has imposed obligations on private parties, encouraging transparency and dialogue with the enforcement agencies. The growing number of police operations that are being carried out in the country is setting the tone that the enforcement wave will not stop.

It would certainly take more than this summary to provide a full, in-depth understanding of the processes used by the Federal Police to investigate corruption, and economic, financial and tax crimes, how such crimes are prosecuted and examined by the Justice System, and the provisions of Brazilian statutory and case law on these matters.

Since, as explained in this article, these special penal laws are mostly vague and replete with imprecise concepts, any person wishing to invest in Brazil would do well to procure expert advice on any accounting, financial, tax and legal matters.

Chapter 5

Contract Law

The Agency and Distribution Relationship

One of the simplest ways to start doing business in Brazil, mainly in the sale of products, is through the appointment of agents and distributors for the country.

The adoption of one of these formats enables a foreign company to have a local presence in Brazil with low investment and no need to open a local subsidiary.

This local presence is very important because in the Brazilian world of business personal contact is essential and the customs processes and the bureaucracy imposed by the tax and labour laws require handling by someone accustomed to the country's business environment.

The agent, who in Brazil may also be known as a commercial representative, is mainly dedicated to business mediation and promoting the sale of the foreign manufacturer's products, which are to be imported by the purchaser. The agent is remunerated by means of commission, usually paid by the foreign manufacturer. The withholding of such commission payments by the purchaser's bank

(at the moment the foreign exchange agreement to pay the price to the manufacturer is closed) is also admitted as a mean of paying the agent. The agreement may also set forth some other liabilities imposed on the representative such as the product's warranty and the technical assistance services.

The distributor, in turn, procures the products from the offshore manufacturer (usually at a wholesale price), undertakes the import process and resells the imported product to the end user or to a network of previously defined dealers. Depending on the nature of the product, the distributor can also undertake the duty of accrediting the dealers that will form the retail sales channels according to the accreditation rules set forth in the distribution agreement. The distributor's remuneration is generated by the margins obtained from the resale of the products.

The choice of the most suitable model depends on the nature and destination of the product.

In the case of capital goods, that usually have higher prices, the most common practice is to appoint an agent, as in the distribution model the cumulative incidence of taxes would lead to an increase in the price of the product for the end user.

When it comes to basic materials, low cost products or products that will be sold to retailers or to the end user, the distribution model may prove more suitable, as the distributor will be taking care of the import operations and wholesales.

Hybrid figures may also be found (the local partner sometimes plays the role of agent and sometimes plays the role of distributor) and there is also the franchise model in which the same company may play the role of distributor and master franchisor, an arrangement which is best suited to retail chains, such as fashion stores or fast-food restaurants.

Choosing the right partner

Although the appointment of an agent or distributor is the simplest way to start an operation in Brazil, obviously some care must be taken by the foreign principal.

First, the operation in Brazil needs to be planned in advance, since this will enable the company to identify the exposure liabilities to which it or the appointed agent or distributor will be subject.

This sort of planning will also assist in identifying the

financial magnitude and organizational maturity that must be evidenced by the prospective agent or distributor, mainly if the agreement will involve large imported volumes or operations throughout Brazil.

Based on the information that emerges from the planning, it will be easier to profile the ideal agent or distributor, which will make the screening process that much easier.

The screening process can be performed with the assistance of the local British consulate or the Department for International Trade (DIT), and with the support of the British Chamber of Commerce. Specialised consultancy companies may also provide such a service.

It is also advisable that delegates of the foreign company conclude the selection process by visiting the facilities of the intended agent or distributor, either to strengthen the interpersonal relationship, or to ensure that the intended local partner properly fits the outlined profile.

Agency Agreements

Sales agents, be they individuals or legal entities, may provide independent professional services, subject to prior registration with a special Agents' Council before performing agency services. Apart from the provisions described below, the governing law must be Brazilian and any disputes arising under Agency Agreements must be settled before Brazilian civil courts.

Irrespective of any stipulations agreed between the parties (called 'Principal' and 'Agent'), Agency Agreements must contain:

- The general terms and conditions of the agency;
- A detailed list of the products covered by the agreement;
- Its duration, whether for a fixed or indeterminate term;
- The territory covered;
- Whether the agreement is exclusive or non-exclusive (for example: (i) will the agent be the principal's only agent within the territory? and (ii) can the agent represent any other third party

within the territory?);
- The commission rate, payment dates and whether the payments are conditional upon the principal being paid for the invoices issued by the principal;
- The parties' obligations and responsibilities; and
- The compensation due to the agent as a result of termination of the Agency Agreement.

As a rule, fixed term agreements end on their expiry date. However, the law admits a single extension of such term. Should the term be extended more than once or the parties have entered a new agreement six months prior to expiry, the agreement is deemed to have an indefinite term by force of law.

Agents may receive commissions by the 15th day of the month after the customer has paid the invoices issued by the principal. The agent will be paid commissions on the total amount of the goods they have sold. Moreover, if the agent offers an unconditional discount, subject to the principal's consent, the agent will receive commission on the final net price paid by the customer.

If the principal terminates the agreement without just cause, the agent must immediately be paid the full amount of the outstanding commissions, even if the invoices remain unpaid on the date of termination.

The principal can withhold commissions due and payable if the agreement has been terminated with just cause, or if the agent has caused losses. The principal may also sue the agent for damages if the losses exceed the amount of the commissions due to the agent and withheld by the principal.

If the principal terminates the agreement without just cause, the compensation due and payable to the agent will depend upon whether the agreement is for a fixed term or not. If the term is not fixed, the indemnity will be equal to 1/12 of the total amount of commissions the agent earned during the performance of the agreement. If the term is fixed, the indemnity will equal the average commissions earned before termination, multiplied by half of the outstanding months. Either party can terminate indeterminate term agreements performed for over six months by giving the other advance notice of 30 days. If this is not provided, the defaulting party must pay the other 1/3 of the commissions the agent earned in the

preceding three months.

A principal cannot refuse an agent's order after 120 days counting from its receipt, unless the agreement allows this (and the principal is a non-resident). The principal will not owe commissions if:

- A customer fails to pay because of insolvency;
- The transaction has not been definitively closed; or
- Delivery of the goods is suspended because there is a risk the customer will not pay.

The agent may represent the principal in court if the principal grants a power of attorney on the principal's behalf. Regardless of such authority, the agent must record all legal claims filed by customers and inform the principal about them. The agent must also suggest which steps should be taken to protect the principal's best interests.

Agents may subcontract, but the subcontracted agent will only be paid if the principal pays the agent the commissions due.

Any clause in the agreement holding the agent jointly or severally liable with customers for late or non-payment will be null and void. Agents cannot therefore guarantee payment by customers.

Brazilian laws do not require the agency or distribution relations to be contracted in writing, but it is essential that this is done so that everyone will be absolutely sure about what is being agreed upon.

Distribution Agreements

Regulation of these types of contract in Brazil is very flexible, leaving a lot of room for the parties to define the relation in the manner that best suits their needs.

Although most of the relationship is regulated by the agreement itself, the assistance of local lawyers for this task is highly recommended, if not essential, and it is not advisable to use standard forms available on the Internet.

The distribution agreements, besides having clauses specific to each industry and situation (for instance, performance targets to be accomplished by the distributor), usually have to address the following topics:

- **Products covered.** Many manufacturers produce a very large and diversified line of goods whilst distributors may specialise in a specific segment. It is therefore important that the product line covered by the contract is established in advance, with rules for the launch of new lines and for the cancellation of existing lines by the manufacturer.

- **Territory and exclusivity.** Another essential point to be addressed in the agreement is the definition of the territory of activities of the distributor, and the exclusive or non-exclusive basis of the distribution. Brazil is a country of continental dimensions and, in some cases, a single partner may not possess the operational or financial conditions to serve the entire country, in which case it will be necessary to appoint more than one distributor for different regions, with a delimitation of the area of activity of each one.

    - Brazilian law allows for any type of arrangement between the parties in this regard and the consequence of granting exclusivity for distribution within a specific area usually leads to the manufacturer being obliged to indemnify or pay commissions to the distributor if another agent or distributor trespasses on the territory.

    - It is also important for the parties to promptly define the manner in which a distributor ought to be remunerated should another distributor trespass on its exclusive territory, and also the hypotheses in which such remuneration must be paid, preventing a court from establishing such remuneration, which would certainly make at least one of the parties unhappy.

    - In the event the distribution is non-exclusive, it is important for the principal to establish in the agreement a rule that expressly forbids the appointed distributor from selling the product outside its territory, including specific penalties for the violation of this rule, as the manufacturer could be held liable for the territorial invasion perpetrated by its distributor.

- **Marketing.** No matter how better or well known a product might be, it does not sell itself, meaning it is necessary for the customers to at least know where to find it. Therefore, it is important to set forth in the agreement general rules for the promotion of the products, the responsibilities concerning the conducting of the marketing campaigns and payment of the related expenses, as well as the conditions for use of the trademark by the distributor and by the agent/dealers to be eventually accredited by the distributor.

- **Sales terms and conditions.** The general conditions for supplying the products can be established in the distribution agreement and/or in each individual sale and purchase agreement (at least one of these documents must set forth such conditions). If there is the risk of different conditions being established for distinct operations, it would be advisable to clearly state in the distribution agreement which rules shall prevail. It is important to keep in mind that the capital flows between Brazil and other countries are controlled by the Central Bank, and Brazilian laws do not accept the offsetting of debts and credits in international operations. Furthermore, when defining the sales terms and conditions it is necessary to observe the rules related to the customs value and those related to transfer pricing, as set forth by the domestic and international laws (especially the GATT).

- **Product warranty.** According to consumer protection laws, the party responsible for the product's warranty is, as a rule, the manufacturer, but in the case of imported goods such liability is transferred to the importer. Hence, the agent or distributor will possibly have to undertake those liabilities in Brazil, on behalf of the manufacturer. It is therefore essential that the role of each party in this regard is clearly defined. It also is worth recalling that the importation of spare parts, even for fulfilment of warranty obligations, is subject to the payment of import duties and customs costs and expenses, which makes it important that the party bearing such costs should be clearly established in the agreement.

- **Governing law.** As the distribution activity will be

performed in Brazil, it is recommended that Brazilian Law is adopted to govern the agreement, as the adoption of foreign laws, although not forbidden, could be considered abusive (and thus void) by a Brazilian court.

- **Duration and termination.** The law does not require the establishment of a specific term for the distribution agreement, which may be entered into for a fixed or indeterminate period of time.

However, it is essential that the means for termination of the agreement are established, most importantly the period of prior notice that needs to be given to the distributor if the agreement is to be entered into for indeterminate period of time.

If the distributor's investment is high/substantial (and such substantiality is assessed on a case by case basis), Brazil's laws authorize the judge to extend the agreement for a further period of time, even if a fixed term was agreed upon, so that the distributor may recover its investments.

In some cases, the manufacturer may be required to repurchase the stock upon termination of the agreement, so it is important for the parties to negotiate this specific matter.

- **Dispute resolution.** Brazil's laws allow the parties to agree to resolve disputes arising between them either judicially or by alternative means such as mediation and arbitration, and such laws grant enforcement of the decisions produced in those alternative proceedings, which will carry the same weight as a court decision.

Taxation

Irrespective of the type of agreement, each party is usually responsible for its own taxes. However, in the case of an agency agreement, payment of the agent's commissions, besides being subject to Brazilian taxation, might also be subject to taxation in the manufacturer's domicile (usually income tax withheld at source). Therefore, it is important for the parties to consider these questions,

and also take into account the existence and effects of any possible international covenants to avoid double taxation.

Investors should also pay special attention to the corporate income tax due from sales by non-resident principals via Brazilian agents. Under applicable law, corporate income tax will be due based upon the assumption that the sales have been made in Brazil, unless the agent cannot contractually bind the principal in relation to local customers. This calculation does not apply if the agent only forwards customer orders to the principal and has no power or authority to sign any contracts binding the principal.

The Franchising Agreement

Franchising, one of the alternative routes available to British exporters into the Brazilian market, additional to direct exports or sales via an Agent or Distributor, was firstly legislated by Law 8955, of December 15, 1994, irrespective of applicable rules of Contract Law in general.

Law 8955 (hereafter the "Former Law"), was revoked by Law 13,966, of 26th. December, 2019, effective after 90 days from its publication in the Official Gazette on 27th. December, 2019 (hereafter, the "New Law").

The definition of a Franchising Agreement (hereafter, the "Agreement") under the New Law is more detailed as compared to that under the Former Law.

It is defined as that whereby the Franchisor authorises the Franchisee to use trademarks and other intellectual property rights, always associated to the right of exclusive, or non-exclusive, production or distribution of products or services. It will further cover the grant of the right to use methods and systems of set-up and management of a business or an operational system developed or held by the Franchisor.

While the New Law contemplates, as much as the Former Law, direct or indirect remuneration due and payable by the Franchisee to the Franchisor, it now provides the franchising relationship will not be treated as a consumption relationship, nor will imply any labour link between the Franchisor and the Franchisee or otherwise the Franchisee's employees, including

during the training period.

Accordingly, Consumption Law, as much as Labour Law, provisions will not apply to franchises entered in accordance with the rules of the New Law.

The Franchisor is required to be the legal owner, or then the applicant therefor, of the rights on trademarks and other intellectual property rights negotiated under the Agreement, or otherwise to be duly authorised by the legal owner.

Further to private companies, the New Law now extends franchising to public companies and not-for-profit legal entities of whatever segment.

It should be noted the Franchisee, as a rule, from a strictly economic and financial viewpoint, is the weaker party under the Agreement, particularly in the case of an Agreement where the parties are a foreign Franchisor and a Brazilian Franchisee.

The use by the Franchisee of a specific technology owned by the Franchisor therefore requires the Franchisor, prior to the parties signing the Agreement, should deliver to the prospective Franchisee a Franchising Offer Circular (hereafter, the "Circular"), which will provide a list of relevant data and information on the franchise.

Although this was already viewed as a crucial issue under the Former Law, the list thereunder covered 12 items, while the list under the New Law has now been expanded to no less than 23 items, according to full disclosure of all relevant details for the prospective Franchisee's benefit.

The following matters are required to be covered by the Circular:

(i) A summarised description of the franchised business;

(ii) The Franchisor's full qualification, as well as that of any related companies, upon identifying them according to the Ministry of Finance Corporate Taxpayer's registration number;

(iii) The Franchisor's Balance Sheets and financials in general with regard to the 2 last fiscal years;

(iv) A list of all outstanding claims involving the

franchise which might entail a risk for implementation of the franchise in Brazil;

(v) A full description of the franchise, the business to be carried out and the activities to be developed by the Franchisee;

(vi) An ideal Franchisee profile in respect or prior expertise, schooling and other characteristics considered to be mandatory or preferred;

(vii) Requirements for the Franchisee's direct involvement in the operation and business management;

(viii) Specifications concerning: the initial investment deemed to be required to the franchise acquisition, implementation and startup; amount of the opening or franchise fee; the amount deemed to be required for set-up, equipment and opening inventory, as well as the relevant payment terms and conditions;

(ix) Clear information on fees, as well as any other amounts, due and payable from time to time to the Franchisor or to any other third parties appointed by the Franchisor, with specification of the calculation bases and what are they intended to be paid for, such as: compensation for the use of the trademark and other objects of intellectual property and services rendered by the Franchisor to the Franchisee; rent for lease of equipment and use of place of business publicity fees; minimum insurance;

(x) Complete list of all Franchisees, Subfranchisees or Subfranchisors, as well as all those who have ceased being so during the last 24 months, mentioning their names and full addresses;

(xi) Information on the territorial policy to be pursued, including: whether, or not, the franchise will be exclusive or otherwise if the Franchisee will be granted the right of first refusal on a certain territory to be defined under the Agreement and, if so, subject to any of the following conditions; whether, or not, the Franchisee can sell, or render services out ot the territory, as well as engage in exports; whether, or not, there are, and in such case will apply, rules of territorial competition between any Franchisor's own and franchised units;

(xii) Clear and detailed information on the Franchisee's obligation, if any, to acquire any products, services or inputs required for the franchise set-up, operation or management from suppliers appointed or approved by the Franchisor, including a complete list of such suppliers;

(xiii) A list of all services to be made available by the Franchisor to the Franchisee, namely: support, network supervision, services in general; incorporation of technical improvements to the franchise; Franchisee's and Franchisee's staff training, with specification of duration, contents and costs; franchise manuals; support in the analysis and choice of the place of business for the franchise set-up; layout and architecture standards for the Franchisee's premises;

(xiv) Information on the franchised trademark and other intellectual property rights, mentioning the relevant details concerning registration with the National Institute of Industrial Property;

(xv) The Franchisee's status following expiry of the Agreement with regard to: know-how involving product, process or management, confidential

information and trade, finance and business secrets the Franchisee will have had access to during the Agreement;

(xvi) Agreement standard draft and, if such is the case, of the Preliminary Agreement, including its attachments;

(xvii) Statement of existence, or non-existence, of rules dealing with transfer or succession and, if such is the case, description of such rules;

(xviii) Specification of situations in which penalties or indemnities can be enforced, as well as their amounts, as provided under the Agreement;

(xix) Information on purchase of minimum quotas to be complied with by the Franchisee before the Franchisor and/or any third parties appointed by the Franchisor, as well as the possibility and its conditions for refusal of products or services required by the Franchisor;

(xx) Reference to the existence of any Franchisees' Council or Association, with their power and authority before the Franchisor;

(xxi) Specification of the rules of limitation to competition between the Franchisor and the Franchisee, as well as between the Franchisees themselves during the Agreement, and furthermore of the territorial range, duration of such restriction and penalties in the event of non-compliance;

(xxii) Precise specification of the Agreement contractual term and extension conditions, if so provided;

(xxiii) Place, day and time for receipt of the Circular, as

well as starting date for opening of the envelopes, in the event of a Government entity.

The Circular is required to be delivered to the prospective Franchisee not later than 10 days prior to signature of the Agreement or the Preliminary Agreement, or further prior to payment of any type of fee by the Prospective Franchisee to the Franchisor or any connected individual or company. If the prospective Franchisee is a Government entity, then such fee will be treated as a pre-qualification charge, in which case the Circular will be disclosed at the opening of the bid.

If the Franchisor fails to comply with the prior term requirement for delivery of the Circular, the Franchisee is entitled to claim the Agreement to be null and void and recovery of any amounts paid.

In the event of sublease by the Franchisor to the Franchisee of the place of business, either party can file a claim for extension of the relevant Lease Agreement. It should be noted the rent due and payable by the Franchisee to the Franchisor in the case of a sublease of the place of business may exceed that of the lease, subject to such possibility being clearly provided under the Circular, but the amount in reference cannot be excessive and too onerous to the Franchisee, so that due economic balance is kept between the Franchisor and the Franchisee.

Failure to provide all mandatory information in the Circular will expose the Franchisor to pay back the Franchisee any and all amounts previously paid, irrespective of appllicable criminal liability.

The provisions of the Law applicable to the Franchisor and the Franchisee will, to the extent possible, equally apply to the Subfranchisor and the Subfranchisee.

Agreements intended to be valid and enforceable in Brazil will be written in Portuguese and governed by Brazilian law, while international Agreements will be written in Portuguese as well, or otherwise in a certified translation of Portuguese into the relevant foreign language at the Franchisor's cost.

For all effects of the Law, an international Agreement will be defined as such whenever it is subject to more than one legal system arising from the acts concerning its performance, the status of any of the parties in light of its nationality, home country or location of its object.

If the parties' choice is for a foreign Court, a duly qualified legal representative or attorney-in-fact resident of the relevant chosen country will be appointed with powers to represent the Appointor both in and out of Court, including the power to accept service of process.

The Franchisor and the Franchisee may choose to have any dispute arising from the Agreement settled before a foreign Court, namely, a Court with jurisdiction of the party's home country.

Furthermore, the parties may likewise choose to submit any dispute for settlement through arbitration.

Lastly, the New Law provides the law governing intellectual property in force in Brazil will apply

Electronic Commerce

Introduction

The Internet began as a simple concept, with the idea of transmitting data between two different places, connected via some kind of electromagnetic medium, such as radio or an electrical wire. The inventors intended it to be an efficient means of military communication during the Cold War, through multiple separated networks which could be joined together into a network of networks and withstand an attack or catastrophe.

So how has the Internet changed transactions and day-to-day business? The virtual world has changed enormously over the last two decades and the Internet is no longer used only as a source of information, but also for business transactions. E-commerce came about to simplify world trade. It takes advantage of the lack of physical barriers and the speed of transactions, reducing the need for paper transactions, even with respect to tax and administrative costs.

Technological advances have had a strong effect on human relations and caused a social and economic revolution. The growth of e-commerce is an example. But what is e-commerce? It is the use of electronic means (mainly the internet) to improve business between commercial partners to sell goods or provide services. E-commerce can be between:

- businesses (B2B);
- businesses and consumers (B2C);
- consumers (C2C); or,
- companies and employees (B2E).

Basically, this revolution has:

- substituted the paper used by individuals and companies with digital information;
- globalised markets and simplified the sending of information to any destination;
- provided access to - and dissemination dissimulation of - information, immediately; and,
- democratised information - the low cost of gathering information creates equal opportunities for all.

This new economy is taking off in Brazil with discussions in all fields of Government and between private entities. As far as this matter is concerned, Bill of Law 4,906/2001, nearing a floor vote in the Chamber of Deputies (the Lower House of Congress)[1], is the most recent covering e-commerce. It reflects the Government's and private enterprises' desire to legislate and provide a solid legal framework on the subject.

Brazil has a population of roughly 191 million. It is the largest electronic market in Latin America. The number of 'dot coms' ending in 'dot br' has recently grown exponentially, with more than 2 million domain names registered with the NIC.br. Advances in telecommunications and infrastructure have also reduced costs, improved efficiency and created faster services.

With cheaper computers, improved telephone systems (including low-cost 3G wireless access) and even free Internet access, the electronic culture has become altogether more democratic. Lower income groups can now access the Internet, while the higher income groups are accessing it for longer.

Commercial transactions will increase on the Internet as privacy policies and enforcement continue to develop. Analysts

3. At the time of writing – December 2018.

estimate that by the end of 2010 e-commerce revenue had leapt from US$10.6 in 2009 to US$13.6 billion. Brazil has created a solid infrastructure and presents enormous potential for investors, as well as for brick-and-mortar and start-up companies setting up in e-commerce.

The law has difficulty keeping up with Internet issues because of the great speed of its development and the nature of cyberspace - that of a place without physical boundaries. This creates problems with the jurisdiction, legality and privacy of commercial transactions. So how are countries managing to trade successfully in this virtual world of so few legal rules?

Several international entities have drafted policies and guidelines on commercial Internet transactions. These include:

- the United Nations (UN) (represented by the World Intellectual Property Organisation (WIPO), whose head offices are in Geneva, Switzerland - currently, the WIPO has four external offices, with one in Rio de Janeiro, Brazil);
- the United Nations Commission on International Trade Law (UNCITRAL);
- the International Chamber of Commerce (ICC); and,
- the Organisation for Economic Cooperation and Development (OECD).

Private organisations in Brazil have tried to follow these guidelines. The Brazilian Internet Management Committee is the Government agency with powers to issue regulations applicable to the Internet.

In the absence of any specific regulation in force for the Internet and its related matters, the following are some common doubts that are raised during e-commerce transactions:

- How do parties carry out on-line agreements?
- Where and when should the agreement be carried out?
- How and (most importantly) where will a party

seek redress for damages for a breach?
- What if the other party never receives an e-mail notice to end the agreement?

Considering such areas of uncertainty, which laws should currently apply to commercial transactions performed over the Internet? The proposals so far have been:

- international conventions, including private policies;
- the law which applies in the seller's place of business; or
- the law which applies in the buyer's place of business.

Lawyers address many e-commerce issues by using the domestic, civil, commercial, criminal and consumer codes by analogy. The consumer code protects real consumers to the same extent as virtual ones, and applies to several Internet situations. However, the use of domestic law by analogy does not cover problems such as criminal hacking. There is obviously a need for specific legislation.

While e-commerce has developed merely under private policies, there exists the promise of much greater growth. Globalisation continues, making the world that much smaller and susceptible to changes. There will be a need to legislate on several areas of e-commerce such as privacy, digital signatures and taxation.

As an example, on April 1, 2011, during the 141st Meeting of the National Council of State Finance Secretaries (CONFAZ), 18 out of the 27 Brazilian States signed a Protocol amending the rules on taxation of internet sales and telemarketing. Currently, all State taxes (ICMS) paid on purchases made over the Internet stay in the State of origin of the goods, harming the States where the consumer is located. From now on, the entity sending the goods will be responsible for withholding and paying the ICMS to the State of destination.

Electronic Signatures

Commercial transactions involve the exchange of documents. For these documents to be legally valid, they must be

credible and trustworthy - in other words, genuine and tamperproof. Authenticity means both that no one has changed the document, whether voluntarily or fraudulently, and nor have any technical flaws or other external causes changed it. The document must also be private. A document is only secure when it is impossible to alter.

The electronic signature is essential. It identifies the person signing the document and proves his or her intent. It is also evidence of the document's authenticity. This avoids one-sided changes.

With the growth of e-commerce, certifying signatures has become essential to preserving the integrity, authenticity and security of documents. Cyberspace allows commercial transactions between any country regardless of time differences.

The jurisdictional problems arising from this dynamism have led many countries to introduce laws on the authenticity of electronic documents. The UN introduced its UNCITRAL Model Law on Electronic Commerce, hoping countries would use their national laws to incorporate it domestically, and most countries, including the United States, the member countries of the European Union, Canada and Australia, do indeed base their laws on this model.

The laws on electronic signatures are essential for developing e-commerce since they provide security, integrity and authenticity. These laws are the first steps towards regulating e-commerce. They also aim to protect consumers - their underlying principles are designed to protect the weaker party.

Several countries have adopted laws on electronic transactions, and especially on electronic signatures. In June 2001, a provisional measure[2] on digital signatures was issued in Brazil, creating the Brazilian Public Key Infrastructure, ICP-Brazil, which gave responsibilities to the Internet Management Committee to develop ICP-Brazil. This was reissued twice.

According to the second and final edition (PM 2200-2), published in August 2001, any digital document has legal validity if it was certified by ICP-Brazil. Also established was the use of certifications issued by other public key infrastructures (PKI) if the concerned parties agree to the validity of the document. PM 2,200-2 grants ICP - Brazil, or other PKIs, the power to recognize digital documents as legally valid documents. Therefore, a digitally signed document is binding and enforceable.

The ICP-Brazil guidelines are compulsory for any acts involving Government authorities. Transactions between private

entities do not have to follow ICP-Brazil guidelines, in which case the domestic courts have the last word on whether a document is valid.

Legislation on electronic signatures aims to remove e-commerce barriers and ensure the trust and integrity that contracting parties to electronic transactions need.

Privacy

Privacy has been extremely important for the development of the Internet and e-commerce and will be essential for its continued success. But how do we guarantee privacy in commercial transactions? When giving personal details to a website to buy goods, what stops the website from selling that data to other companies?

Many websites are adopting strict privacy policy guidelines. But what guarantees does the user have to show that the website follows these guidelines? Users respect websites with privacy policies. Sites see privacy policies as a competitive advantage to attract more visitors. There are some companies, such as BBBOn Line and Trust-e, which have developed programmes to certify websites that uphold confidentiality. In Brazil, the Vanzolini Foundation has developed an online authenticity seal of privacy used to identify websites which are committed to their users' protection. The seal of authenticity is granted after due diligence based on the Vanzolini Foundation's NRPOL (Reference Rules for Online Privacy) and ensures that the organization is concerned about the personal information of its users.

Privacy problems arise from the use of programmes such as cookies, or spam and the unauthorised use of personal details. Considering this, the Brazilian Federal Constitution protects the individual's right to privacy and intimacy[3]. This has been interpreted

2. A provisional measure is a presidential decree with immediate legal effect, but it is still subject to congressional amendment and approval or rejection, with consideration on a priority basis.
3. Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of the inviolability of the right to life, liberty, equality, security and property, on the following terms: (…). (CA No. 45, 2004) Constitution of the Federative Republic of Brazil 1988, Title II, Ch I. Brazil.

to cover data sent over telecommunications networks, including emails and other data sent over the Internet.

Workplace e-mail surveillance is controversial throughout the world and, in Brazil, has led to job dismissals and employment claims. Employment court decisions confirm that companies may control e-mail use if they first tell the employee of the surveillance, and guarantee the employee's rights to privacy.

Analysts estimate that, in a few years, almost all commercial transactions will use ecommerce, either to exchange documents or to execute agreements on-line.

In this regard, the Brazilian General Data Protection Law (Law No. 13,709/18) has recently been approved and will come into force in early 2020 (exactly eighteen months after the publication of the General Data Protection Law in the Official Gazette of the Federal Executive, which took place on August 15, 2018).

In short, the new General Data Protection Law provides for the processing of personal data, including in digital media, by an individual or legal entity established under public or private law, with the aim of protecting the fundamental rights of freedom and privacy and the free development of the personality of the individual. Such law aims to regulate how organizations can use personal data in Brazil and assign rights to individuals who have their data processed, whilst also establishing provisions for the transfer and processing of an individual's personal data abroad.

Chapter 6

Tax Law

General Rules of Brazilian Tax System

The Tax system

The 1988 Federal Constitution, Federal Tax Code of 1966 and enabling legislation govern the tax system in Brazil, which is based upon the principle of strict legality. Taxes may be levied at Federal, State or Municipal Government levels.

The Federal tax system is managed by the Brazilian Federal Revenue Service (*Receita Federal do Brasil - RFB*), which is part of the Ministry of Finance (*Ministério da Fazenda*). States and municipalities have similar bodies.

There is a separation of jurisdictions and powers between the judiciary and the administrative boards for the judgment of tax disputes. In this sense, a tax matter is usually analysed at the administrative level before being taken before the judiciary.

Federal corporate income taxes

Income tax regulations apply to all taxpayers. Only the Federal Government may charge income taxes. It does, however, transfer part of the taxes collected to States and municipalities.

Brazilian companies are taxable on their worldwide profits and capital gains. The origin of the capital is irrelevant, as is whether the investor is foreign or domestic. Foreign branches must pay tax in the same manner as resident entities.

The Brazilian tax year is the calendar year, irrespective of the corporate year. An annual income tax return must be filed by the date determined by the RFB - normally the last business day of July. The income tax return must also be filed when certain special events occur during the year (*e.g.*, mergers, liquidations, spin-offs).

There are two income taxes in Brazil: (a) the corporate income tax (*Imposto sobre a Renda da Pessoa Jurídica – IRPJ*); and (b) the social contribution tax on net profits (*Contribuição Social sobre o Lucro Líquido – CSLL*). They are charged on similar bases.

Corporate Income Tax (IRPJ)

The income tax regulations in force are consolidated under Decree 3,000, dated March 26, 1999, which is applicable to all taxpayers.

Brazilian corporate income tax is a Federal tax charged on net taxable income. It applies at a basic rate of 15%, plus a surtax of 10% on annual income that exceeds R$ 240,000.00 per year or R$ 20,000.00 per month.

Social Contribution on Net Profit (CSLL)

The CSLL is a social contribution tax that funds the social security system. It is also assessed on net taxable income. It is not deductible for corporate income tax purposes and the tax base of this contribution is similar to the tax base of the corporate income tax, although some specific adjustments may be applicable to one tax and not to the other.

In general, the rate for the Social Contribution on Net Profits is 9%. For financial institutions, private insurance and capitalization companies the applicable rate is 15%.

Calculation Methods

There are three methods provided by legislation to calculate corporate income taxes: Presumed Profit, Actual Profit and Arbitrated Profit.

Presumed Profit System

This system is available to many corporate entities. It has two advantages: firstly, bookkeeping requirements are less stringent; and secondly, if the actual profits of an entity are higher than those calculated under this system, the company saves on tax. Corporate entities, which may not choose to pay under the presumed profits system, are:

- those with an annual gross revenue above R$78,000,000;
- commercial banks, investment banks, development banks, savings and lending organisations, credit, financing and investment organisations, real estate credit entities, securities or currency exchange houses, leasing companies, credit co-operatives, insurance companies and pension plan funds open to the public;
- those which receive profits, capital gains or income from abroad (*i.e.* directly or via foreign subsidiaries);
- those which benefit from regional income tax incentives;
- companies that make monthly payment under the month-per-month estimative regime;
- factoring and similar entities; and
- those which pursue securitization activities involving real estate, financial and agribusiness credits.

The election of which system to use is made annually, at the beginning of the year and the choice may be renewed every year. The election is valid for both corporate income tax and social contribution tax on profits. Under the Presumed Profit System, the taxes must be

calculated and paid on a quarterly basis.

Under this system, the company's Actual Profit is irrelevant, since the tax authority will presume that the company made a profit of between 1.6% and 32%, depending upon the activity (*e.g.* commercial companies are usually subject to presumed rates of 8% for IRPJ and 12% for CSLL, and services companies of 32% for IRPJ and 32% for CSLL). The corresponding tax rates are applied on this Presumed Profit base plus the total amount of capital gains, financial revenue and other revenues.

Actual Profit System

Under the Actual Profit System, net taxable income corresponds to the company's net book profit, arrived at by applying Brazilian GAAP, adjusted by some inclusions and deductions as per Brazilian corporate taxes legislation.

Taxpayers under the Actual Profit system may choose to calculate taxes on a quarterly or annual basis. The choice must be made at the beginning of each calendar year and is valid for the entire fiscal year. Under the annual Actual Profit System, taxable income is computed on an annual basis, but monthly advances during the year are required to be made on an (i) actual basis; or (ii) estimated basis, which corresponds to the Presumed Profit tax base, commented upon above, with slight differences.

In general, companies must adopt the accrual basis of accounting for both accounting and tax purposes, although tax reporting may differ. For example, only a few provisions, such as provision for employee vacation payments, are allowed for tax purposes. The taxpayer must record the reconciliation between book and taxable income in a tax register (*Livro de Apuração do Lucro Real - LALUR*).

Taxable income does not include, amongst other items, dividend and profit income from other Brazilian entities earned as from January 1, 1996; or positive equity pick-up from investments in related companies.

Deductible expenses are generally all those items relating to the company's ordinary business, and which are necessary to maintain its source of income. The most important deductible items are:

- credits in bankruptcy or those not honoured in court-supervised composition with creditors;
- secured credits - after two years, if the taxpayer takes legal action to recover the credits;
- unsecured credits limited to:
    - credits under R$5,000 if outstanding for over six months;
    - credits between R$5,000 and R$30,000, if outstanding for over one year and the taxpayer has taken administrative collection measures; and
    - credits over R$30,000, if outstanding for over one year and the taxpayer has taken legal action for collection;
- inventory - the taxpayer must value inventory at actual cost using either 'First In First Out' (FIFO) or average cost. 'Last in First Out' (LIFO) is not acceptable, nor is standard cost unless the taxpayer adjusts it to actual cost at the end of the tax period. For companies without integrated costing systems, they must value finished goods at 70% of the highest sales price during the year, and work in process at either 80% of the finished goods valuation or at 1.5 times the highest raw material cost during the year;
- depreciation - charged on the asset's useful life. As a general rule, the maximum annual rates for tax purposes are: buildings - 4%; equipment - 10%; passenger vehicles - 20%. Where the company functions in two or three shifts, it may increase these rates by 50% and 100%, respectively; and
- technical assistance and royalty payments - subject to conditions, such as INPI approval.

Non-deductible expenses include, among other features:

- fines not inherent to the taxpayer's trade or business;
- provision for estimated inventory obsolescence or price fluctuations, except those established for the

payment of employee vacations and the thirteenth salary, and the technical provisions of insurance and capitalization companies, as well as private pension entities, whose constitution is required by the special legislation applicable thereto;
- lease payments and rental of goods or real estate property, except when related intrinsically to the production or sale of goods and services;
- depreciation, amortization, maintenance, repair, maintenance, taxes, fees, insurance and any other expenses relating to goods or real estate property, except if they are intrinsically related to the production or sale of the goods and services;
- expenses incurred with meals for shareholders and administrators;
- non-compulsory contributions, except those intended to cover insurance and health insurance, and complementary benefits similar to those of social security, established in favour of the employees and managers of the legal entity;
- donations, except those expressly foreseen in legislation;
- expenses with gifts; and
- depreciation, amortization and depletion expenses generated by the goods that are the object of the lease, by the lessee, in the event that the lessee recognizes the charge.

Taxpayers may defer tax on income in some cases, such as: (i) income from the sale of fixed assets received in the long term; and (ii) income not yet received from long-term Government contracts.

Arbitrated System

Under certain circumstances, such as inadequate or unreliable record keeping, the tax authorities may arbitrate profits. In this sense, the method is a type of punishment applicable in situations provided for by law. The income tax paid on the Arbitrated Profit is definitive and cannot be offset against future payments. The Arbitrated Profit system is similar to the Presumed Profit system, but

with higher percentages to be applied on the gross sales. In addition, penalties may be charged by the tax authorities.

Tax Losses

Companies which adopt the Actual Profit system may carry forward tax losses indefinitely against future profits. However, they can only offset up to 30% of the current year's taxable income. Tax losses generated as from January 1, 1996 are to be separated into 'operating' and 'non-operating' for offsetting purposes. Non-operating tax losses can only be used to offset future non-operating profits.

Tax losses are lost if between their generation and their utilization, cumulatively, there is a change in control and change in the type of activity performed by the taxpayer.

Carry-back of losses is not allowed.

Disguised Profit Distributions

Transactions between a business and its shareholders, quotaholders, related companies, partners and administrators or their families must be on a fair value basis. Amounts held to be income distributions under these provisions are taxable to the recipient and are not corporate tax deductible.

Interest on Net Equity *(Juros Sobre o Capital Próprio – JSCP)*

According to Brazilian law, in addition to dividends, Brazilian subsidiaries may also pay interest on net equity to its shareholders.

Interest on net equity is a hybrid instrument as it is deductible for Brazilian tax purposes while considered as remuneration for the investor based upon the shareholder's net equity.

In general terms, interest on net equity is calculated by applying the daily pro-rata variation of the Government's long-term interest rate (*Taxa de Juros de Longo Prazo - TJLP*) on the Brazilian entity's adjusted net equity accounts: (i) capital; (ii) capital reserves; (iii) profit reserves; (iv) treasury shares; and (v) accumulated losses.

The payment or credit of JSCP, however, is conditioned to the existence of profits, calculated before the deduction of interest, or the existence of accumulated profits and profit reserves, in an

amount equal to, or that does not exceed, double the sum of the interest to be paid or credited. Nevertheless, although not clearly stated in law, the Brazilian Central Bank does not usually allow remittances of interest on equity based on current profits when the company has accumulated losses in the prior year's balance sheet (December 31), and it normally requires the offsetting of the accumulated losses first.

Interest on equity is subject to 15% income tax withheld at the source on the date it is paid or credited to the recipient (25% withholding tax might be applied as well if the recipient is located in a low tax jurisdiction). If the shareholder is a resident entity, the withholding tax becomes a tax credit (moreover, in this case other tax consequences might arise considering that other Brazilian taxes might be charged).

On the other hand, the local payer is allowed to deduct interest on equity paid or credited to resident or non-resident shareholders as remuneration on their capital investment for purposes of corporate income tax and social contribution tax on net profits. However, in this case, the amount of JSCP paid or credited, even if capitalized, cannot exceed 50% of: (i) the net income of the period, before the provision for corporate income tax and the deduction of said interest; or (ii) the balance of accumulated profits of previous periods.

Additionally, tax legislation expressly allows the interest on net equity to be incorporated as capital or held in a reserve account destined to the capital increase.

Therefore, consideration should also be paid to the tax treatment applicable to the equity in the jurisdiction of residency of the foreign beneficiary (whether the income is taxable, whether Brazilian withholding tax is creditable, etc.) as there may be significant tax opportunities in paying interest on net equity.

Thin capitalization rules

The Brazilian Thin Capitalization rules aim to suppress excessive imbalances between the capital of companies domiciled in Brazil and their debts to related individuals or legal entities (*e.g.* companies, investment funds, etc.) resident or domiciled abroad that are, not in tax havens (defined as jurisdictions with favoured taxation) or privileged tax regimes, or to unrelated parties resident

or domiciled in tax havens, through maximum leverage ratios for purposes of deduction of the interest expense from the base for calculating corporate income taxes, under the Actual Profit system.

Therefore, according to current legislation, the interest paid or credited by a Brazilian company to a related party located abroad will be deductible from the base calculating corporate income taxes, under the Actual Profit system, when there is demonstration that the expense is necessary to the company's activity (a general rule for deduction of all expenses) and when the following additional requirements are satisfied:

- in the case of debt with a related party abroad that holds an equity stake in a Brazilian company, the amount of the debt at the time of appropriating the interest cannot exceed twice the value of the equity stake in the Brazilian company;
- in the case of debt with a related party abroad that does not hold an equity stake in a Brazilian company, the amount of the debt at the time of appropriating the interest cannot exceed twice the value of the entire net equity of the Brazilian company;
- in either of the two cases above, the sum of the debts with related parties abroad at the time of appropriating the interest cannot exceed twice the sum of the equity stakes of all related parties in the Brazilian company.

Brazilian companies are not prohibited from being thinly capitalized; rather, the deductibility of interest expenses generated by a thinly capitalized company is limited, since the amount of the interest that exceeds the legal limits, above, shall be deemed an expense not necessary to the company's activity, and as such will not be deductible from the base for calculating corporate income taxes.

Auditing of tax returns

Federal tax inspectors randomly audit tax returns. The scope and frequency of auditing does not follow a set pattern. The tax

authorities' right to assess income tax expires five years after the end of the tax year in which the tax return should be filed.

Taxpayers wishing to appeal against assessments must file their appeal within 30 days of the assessment. If the assessment is upheld, the taxpayer may appeal to the administrative court, and finally to the judicial court.

Permanent establishment

Only companies incorporated in Brazil are generally subject to taxation as residents. In principle, Brazilian companies must register for tax purposes. Companies that carry out taxable activities in the country, but have not properly registered for tax purposes, are also subject to taxation.

There is no general concept of permanent establishment (PE) specifically defined in Brazilian legislation. There are a few sparse decisions, which refer to the OECD Model Convention in the case of foreign companies doing business in Brazil through commissionaires or commercial representatives entering into agreements binding the foreign companies.

The edition of Normative Instruction no. 1,681/2016, that establishes country-by-country reporting requirements (*Declaração País a País*) to increase the transparency of international transactions within business groups and to fight abusive practices that erode the tax base, represented an initial positioning by the Brazilian Tax Authorities in view of determining the outlines of the concept of PE, for the purposes of this new reporting.

According to such legislation, PE should be considered a fixed place of business from which an entity performs all or part of its activities in another jurisdiction, including, especially: (i) a management office; (ii) a subsidiary or branch; (iii) an office; (iv) a factory; (v) a workshop; (vi) a mine, an oil or gas well, a quarry or any other natural resource extraction location; or (vi) a construction site, construction project or installation project, but only if its duration exceeds twelve (12) months.

It is important to highlight that, as a general rule, the tax burden on a non-resident's income is higher than that of a resident. For instance, while a resident's corporate profits are taxed at a combined rate of 34% (IRPJ and CSLL), gross non-resident service fees are taxed, in general, at 25% (income tax withheld at the source and

CIDE, if applicable), plus other taxes such as PIS/COFINS on imports of services (combined rate of 9.25%) and ISS service tax (2% to 5%).

Furthermore, the Brazilian Civil Code prohibits foreign entities from operating in Brazil without authorization. In principle, authorization is granted by establishing a branch which is taxable in Brazil in the same manner as a Brazilian legal entity.

Nevertheless, the following situations may possibly generate a taxable presence in Brazil and, therefore, it is recommended that the specific activities that would be carried out in Brazil be analysed in order to assess possible risks:

- De facto branch: the foreign company has an unregistered branch or office;
- Consignment: sales are made under consignment and proper accounting records are not kept by the consignee in Brazil;
- Binding agent: sales are made in Brazil through a resident agent or representative of a foreign company who has the power to bind the company to a contract and habitually exercises it.

Gross revenue taxes

PIS and COFINS are Federal taxes charged on revenues, on a monthly basis, under two systems: cumulative and non-cumulative.

The PIS and COFINS non-cumulative systems are mandatory for companies subject to the Actual Profit method of computing corporate income taxes.

Taxpayers under the non-cumulative system are subject to PIS at the rate of 1.65% and COFINS at the rate of 7.60% and are allowed to recognize tax credits at those same rates for PIS and COFINS levied on certain inputs, such as: (a) products purchased for resale; (b) goods and services used as inputs in the rendering of services or manufacturing (excluding labour); (c) consumed electrical power; (d) the rental of real estate and fixed assets applied in the activities; (e) the acquisition of certain fixed assets; and (f) returned goods, if the corresponding revenue was included in the previous month's PIS and COFINS taxable bases. Provided certain requirements are observed, these credits may be used to offset PIS

and COFINS due on the company's taxable revenue.

The PIS and COFINS cumulative system is applicable for certain entities, such as financial institutions and companies operating under the Presumed Profit system, among others entities, and for some revenues deriving from telecommunications, transport and software development services, which are generally subject to a 0.65% tax rate for PIS and 3% tax rate for COFINS with no credits available. Financial institutions are subject to a 4% COFINS rate.

Companies with revenues subject to the cumulative system and other revenues subject to the non-cumulative system are required to calculate PIS and COFINS separately in each system.

Revenues related to export transactions and the sale of permanent assets are, in general, exempt from these taxes.

There are special PIS and COFINS systems for companies engaged in certain types of industries, such as automotive, auto-parts, cosmetics, pharmaceutical, oil, beverage, packaging materials, energy and real estate, amongst others.

Tax on Manufactured Products
(Imposto sobre Produtos Industrializados - IPI)

IPI is a type of value added (or excise) tax on imports and products made in Brazil. It has regulatory purposes and the Government uses IPI to carry out its financial and economic policies. Unlike most taxes, the Government can raise the rates of this tax by Executive Decree and the Legislature cannot interfere in this. Furthermore, it can be collected in the same financial year in which the law or decree was published.

IPI rates vary depending upon how the Government has classified the product: they can be higher for nonessentials such as cigarettes and perfumes. Some products are exempt: for example, exports and sales to the Manaus Duty-Free Zone. It is sort of a value added tax, since in some cases the amount paid in previously taxed operations - as a tax credit - can be offset against IPI debts in later operations. The tax authorities restrict the use of IPI tax credits when the matching inputs are bought to make a product where the following sale of such product is not taxed.

Taxpayers may sometimes use IPI tax accumulated credits to pay other Federal taxes or contributions.

Tax on the Circulation of Goods and Provision of Interstate, Inter-municipal Transportation and Communication Services (*Imposto sobre Circulação de Mercadorias e prestações de Serviços de transporte interestadual, intermunicipal e de comunicação - ICMS)*

The ICMS is a State type of value added tax levied on the import of products and transactions involving goods (including electricity), inter-municipal and interstate transportation services and communication services.

As a rule, for the circulation of goods involving two different States, the rates are 7% (when the purchaser is located in the States of the North, Northeast and Centre West regions or in the State of Espírito Santo) or 12% (for purchases located in the South and Southeast regions). For transactions within the same State and in the case of imports, the rates may be 17%, 18% or 20% (as is currently the rate applicable for the State of Rio de Janeiro).

In view of the significant growth of e-commerce, following a request made by the National Revenue Policy Council (*Conselho Nacional de Política Fazendária – CONFAZ*) and several trade associations, Congress enacted Constitutional Amendment 87, dated April 16, 2015, altering the wording of the Brazilian Federal Constitution, with respect to sharing ICMS dues, and such provisions were regulated by ICMS Convention 93, dated September 17, 2015, with effect as of January 1, 2016. The Amendment establishes that revenue generated by the difference between in-state and inter-state rates will gradually be allocated to the destination state.

Sales of communications services and electricity are normally subject to ICMS at 25%.

ICMS is also due either when a product is resold on the domestic market or when it is physically removed from a facility. The taxable base is equal to the value of the transaction, including the ICMS itself (gross-up), insurance, freight and conditional discounts. IPI must also be added to the ICMS tax base when the transaction is carried out with a non-ICMS taxpayer or when it involves a product that will not be further manufactured or resold (*e.g.* fixed assets).

Each branch of a company is considered to be a separate taxpayer for ICMS tax purposes.

In general, ICMS taxpayers are entitled to a tax credit in the

amount of the tax paid on the previous transaction involving the same asset (inputs), provided the purchaser is an ICMS taxpayer with respect to that product, *i.e.* the subsequent transactions with the purchased product are also subject to ICMS. The tax credit may be offset against future ICMS payables.

If the purchaser is not an ICMS taxpayer, and depending upon whether its sales are subject to this tax, ICMS may become a cost and will not be recoverable as a credit.

Municipal Service Tax
(Imposto sobre Serviços - ISS)

The ISS is a Municipal tax levied on the revenues derived from the provision of services. Although it is a Municipal tax, the services subject to the ISS are listed in Federal law (Complementary Law 116/03).

The tax base is the price of the service and the rates vary from 2% to 5%, according to the Municipality where the service provider is located, where the service is provided and the type of the service. For some services, there is significant debate as to whether the ISS should be paid to the Municipality where the service provider is located or where the service is performed.

The taxpayer is, in principle, the service provider. However, the relevant Municipal tax legislation may impose a withholding responsibility to the company hiring the services.

When the provision of the service also involves the provision of goods, ISS applies on the total price of the service, except when there is a specific provision determining the applicability of ICMS on the value of the goods.

ISS also applies on the import of services. The Brazilian company retaining the services is obliged to collect the tax on the service fees paid to the non-resident.

Furthermore, Complementary Law 116/03 introduced an ISS exemption for certain exports of services.

Social contributions on imports
(PIS and COFINS Imports)

PIS and COFINS Imports are enforced on the import of products and, as a rule, applied at a combined rate of 11.75%

(respectively, 2.10% for PIS and 9.65% for COFINS). However, there are specific rates for some products, in the case of imports of pharmaceutical products, for instance, rates are 2.76% for PIS and 13.03% for COFINS and in the case of perfumes and certain cosmetics, rates are 3.52% for PIS and 16.48% for COFINS.

PIS and COFINS Imports may generate a tax credit to be offset against PIS and COFINS due on gross revenues provided the importer is subject to the non-cumulative PIS and COFINS basis on its domestic transactions. The tax base is the CIF amount plus ICMS and PIS and COFINS. Certain products may be subject to different tax rates.

PIS and COFINS Imports are also levied on the import of services, as a rule, at a combined rate of 9.25% (respectively, 1.65% for PIS and 7.60% for COFINS).

Import Tax
(Imposto de Importação - II)

This is a Federal tax on imports. The tax basis is normally the 'customs value' - usually the Cost, Insurance and Freight (CIF) value of imported goods. The rates are set on the Common External Tariff (TEC), which is based upon the Mercosul Common Nomenclature. Under the Mercosul Treaty all member countries must apply the same import duty on goods from third party countries. The rate between Mercosul countries is 0%.

The Executive can raise the import duty rates. Taxpayers must pay the tax in the same financial year as the law creating it, or in which the decree increasing its rate was published.

According to the Brazilian Customs Regulation (Decree 6,759, dated February 5, 2009), the base for calculating import taxes must observe one of the valuation methods indicated in Article VII, of the General Agreement on Tariffs and Trade (GATT) or the Customs Valuation Agreement (CVA).

The CVA requires the use of successive criteria to determine the real customs value, in the following order:

(i) value of the transaction: The customs value of imported goods shall be the transaction value, being the price actually paid or payable for the goods in a sale for export to the importing

country, plus certain expenses (*i.e.* insurance and freight);

(ii) value of a transaction with identical goods: If the customs value of the imported goods cannot be determined under item (i), it shall be considered the transaction value of identical goods sold for export to the same importing country and exported at the same, or approximate, time as the goods to be valued;

(iii) value of a transaction with similar goods: If the customs value of the imported goods cannot be determined under items (i) and (ii), the transaction value of similar goods sold for export to the same importing country and exported at the same, or approximate, time as the goods being valued shall be considered;

(iv) resale price (minus deductions): If imported goods or identical or similar imported goods are sold in the country of importation, in the state in which they are imported, their customs value shall be based on the unit price at which imported goods, or similar or identical goods, are sold in this way in the greatest total quantity at the time of importation, or at the approximate time of importation of the goods being valued, to persons not related to those from whom they purchase such goods;

(v) sum of the production costs and other amounts: the calculated value shall be equal to the sum of: (a) the cost or value of the materials and the manufacture, or processing, employed in the production of the imported goods; (b) an amount for profit and general expenses equal to that usually found in sales of goods of the same class or kind as the goods being valued, or sales for export by producers in the exporting country to the country of importation; (c) the cost or value of all other expenses necessary to implement the valuation option chosen;

(vi) flexible application of one of the above methods,

based on reasonable criteria, if none of the above methods can be applied.

If the customs value of the imported goods cannot be determined in accordance with items (i), (ii) or (iii), it shall be determined in accordance with the requirements of item (v) or, if this is not possible, the value shall be determined with basis on the provisions of item (vi), unless at the request of the importer the order of application of items (v) and (vi) is reversed.

The import price is then verified for customs valuation purposes at the moment the Import Declaration (*Declaração de Importação - DI*) is registered in the Integrated Foreign Trade System (SISCOMEX). The verification is based on internal lists of prices that are not publicly available and are used by Brazilian customs authorities as an initial basis for comparison.

As a general rule, the Brazilian customs authorities adopts the "transaction value" methodology.

Export tax (IE)

Export tax is a Federal tax applicable to goods exported from Brazil and is paid when such goods are registered with SISCOMEX. As the Government is trying to encourage exports, it has mostly stopped levying export tax. Because the tax is used to control foreign trade, the Government can set the rates depending on the country's economy, foreign currency balance and internal market needs.

Only the following exports are taxed: (i) leather and fur (9%); (ii) some cigarettes bought by South and Central American countries (150%); (iii) weapons (150%); and (iv) milk and cream, either concentrated or containing added sugar or other sweetening matter (up to 100%).

The tax is charged on the normal price of the export. This price is that of the product or a similar one in a free and competitive market: it cannot include other taxes and financing costs.

Withholding Income Tax
(Imposto sobre a Renda Retido na Fonte – IRRF)

The withholding income tax applies to certain domestic transactions, such as payment of fees to certain service providers,

payment of salaries and financial income resulting from banking investments. In most cases, the withholding tax is a prepayment of income tax on the individual or entity's final tax return. However, in some cases it is considered a final taxation.

Additionally, withholding income tax is due on most non-residents' income that has a Brazilian source of payment (*e.g.* royalties, service fees, interest, and others). According to Brazilian tax law, withholding tax is due upon the payment, credit, delivery, utilization or remittance of the funds.

The rates depend upon the nature of the payment, the residence of the beneficiary and the existence of tax treaties between Brazil and the country where the beneficiary is located. Most common rates range from 15% to 25%. As a general rule, income paid to beneficiaries located in low tax jurisdictions is subject to 25% withholding tax. Some specific types of payments to beneficiaries domiciled abroad benefit from a zero withholding tax rate (*e.g.* an agent's export commissions, interest on export financing, etc.)

In the case of the sale of assets (including shares or quotas) held by a non-resident in Brazil, the withholding tax on capital gains also applies when the transaction is performed by two non-residents. The capital gain is the positive difference between the sales proceeds and the cost of acquisition of the investment. Rates vary from 15% up to 22.50%.

CIDE (Contribution for Intervention in the Economic System – CIDE)

The CIDE is a 10% contribution levied on payments due to non-residents in the form of royalties, technical and administrative services, and technical assistance, among others, at a rate of 10%. It should be noted that, different to the withholding tax, the CIDE is a tax imposed on the Brazilian payer of the fees and, therefore, may not be reduced by tax treaties and does not generate a tax credit abroad.

There is a limited tax credit granted to the Brazilian entity for CIDE paid on royalties for the use of trademarks or trade names which reduces the effective tax rate.

Law 11,452, dated February 27, 2007, established that royalties for a software license are no longer subject to this levy, except in the case of transfer of technology.

'*CIDE Combustível*' is another contribution levied on the import and sale of oil and gas-related products including ethanol. The manufacturer, the formulator and the importer are the taxpayers of *CIDE Combustível*, according to Law 10,336/01.

Financial Operations Tax
(Imposto sobre Operações Financeiras - IOF)

The IOF is a Federal tax levied on credit, exchange, insurance and securities transactions executed through financial institutions. The tax also applies to gold transactions and includes intercompany loans.

The IOF is levied at varying rates, depending on the maturity terms and type of transaction. These rates can be raised by the Federal Government by decree and become effective immediately. The tax base varies according to the taxable event and the financial nature of the transaction.

The IOF-Exchange triggering event, as a rule, occurs on the liquidation of the foreign exchange transactions, usually at a rate of 0.38%. In the case of international loans, the IOF-Exchange will currently be levied both in the entry of sums into the Country and on the return of sums abroad, but the rates vary, according to the term of the loan agreement, and currently, stand as follows: (i) if the sums are returned abroad, even if symbolically, within a term equal to or less than 180 days, the tax is levied at the rate of 6% at the moment of entry of these sums into the Country, as well as at the rate of 0.38% at the time of the return of these sums abroad; and (ii) if the amounts are returned abroad, even if symbolically, during a period exceeding 180 days, the tax will be levied at a zero rate at the time of entry of these sums into the Country, as well as at a zero rate at the time of the return of these sums abroad.

Brazilian intercompany loans, on the other hand, as a rule are subjected to the IOF-Credit, at a rate of 0.0041% per day (limited to 1.50%), plus a surtax of 0.38%.

Tax on Rural Property
(Imposto sobre a Propriedade Territorial Rural - ITR)

The ITR is a Federal tax collected every year on the property, possession and use of rural real estate. The ITR does not extend to small rural properties when the land's user and owner (and family)

does not own any other property. The tax discourages the keeping of non-productive properties. ITR rates vary depending upon the land's location and use. The rates are calculated on the value of the basic property without its improvements.

Estate and Gift Tax (Imposto sobre Transmissão Causa Mortis e Doação - ITCMD) and Real Estate Conveyance Tax (*Imposto de Transmissão de Bens Imóveis Inter-Vivos - ITBI)*

The ITCMD is a State tax on transfers of goods and rights on death-related inventories or donations. The tax is collected by the State where the real estate is located when transferring real estate and its corresponding rights. The ITCMD on commodities, securities and credit transfers must be paid to the State where the donor lives or where the corresponding inventory occurs. The rate in São Paulo State, for example, is currently 4%.

The ITBI is a Municipal tax on transfers of real estate and *in rem* rights on any real estate. It differs from the State tax because it applies to transfers in which consideration is paid in exchange, while ITCMD applies to transfers by donation or causa mortis succession. In this sense the ITBI is not a gratuitous transfer, but rather a charged transfer and only applies to real estate and *in rem* rights, while the ITCMD is paid on the transfer of any goods and rights.

ITBI is based on the value of the real property or the *in-rem* rights to any real estate. Each Municipality sets its rates; in São Paulo city, for example, the rate is currently 3%. The ITBI is not due when real estate, or rights to any real estate, are transferred in paying up a corporate entity's capital, or through a company merger, consolidation, spin-off or closure. The ITBI is due if the buyer's main activity is buying these assets and rights, leases, or commercial leases of real estate.

Vehicle Tax (*Imposto sobre a Propriedade de Veículos Automotores - IPVA)*

The IPVA is a State tax levied on the ownership of motorized vehicles (*e.g.* cars, trucks, boats and other forms of transport). The tax base is the value of the vehicle with rates varying according to State legislation.

Tax on Urban Property *(Imposto Predial e Territorial Urbano - IPTU)*

This is a Municipal tax collected every year on the ownership, possession, and use of city real estate. The tax basis is the market value of the property. Municipalities can set progressive rates.

Contribution for the Development of the National Cinema Industry *(Contribuição para o Desenvolvimento da Indústria Cinematográfica Nacional - CONDECINE)*

The CONDECINE tax is levied on the marketing and promotion, production, license and distribution of commercial motion picture and video works.

It is levied at 11% on the payment, credit, use, remittance or delivery to foreign producers, distributors or intermediaries, of income from the commercial use of motion picture or video works, or their purchase or import.

Contribution for Improvements

This contribution is only occasionally levied on all real estate benefiting from public works, and calculated using the value of the improvement of the property. The Federal, State and Municipal Governments, as well as the Federal District, levy this tax depending upon which made the improvements.

Other matters

Tax fines and Interest

The fine for overdue Federal taxes is 0.33% per day (limited to 20%). Interest on overdue Federal taxes is at a floating SELIC rate.

Assessed tax infraction notices are generally subject to a 75% fine. If fraudulent intent is proven, the fine is increased up to 150%.

Tax Accounting

The consolidation of accounts has no tax effect.

Tax Treaties

Brazil has signed double taxation treaties with various countries. The main method of tax relief under the treaties is foreign tax credit. The existing treaties offer very limited opportunities to reduce or eliminate withholding taxes on payments abroad. Additionally, tax sparing clauses are also found in most treaties in force.

Brazil has double taxation treaties with the following countries: Argentina, Austria, Belgium, Canada, Chile, China, Czech Republic, Denmark, Ecuador, Finland, France, Hungary, India, Israel, Italy, Japan, Luxembourg, Mexico, Netherlands, Norway, Peru, Philippines, Portugal, Russia, Slovakia, South Africa, South Korea, Spain, Sweden, Trinidad and Tobago, Turkey, Ukraine and Venezuela.

Treaties with Switzerland and Singapore have been executed but are pending final approval from the National Congress.

The treaty between Germany and Brazil was reversed by Germany in 2006.

Low tax jurisdictions and privileged tax regimes

The RFB, under Normative Instruction no. 1,037/2010, defines low tax jurisdictions as those that do not impose taxation on income or imposes the income tax at a maximum rate lower than 20% (reduced to 17% as per Ordinance MF 488/2014).

In most cases, remittances to beneficiaries located in listed low tax jurisdictions are subject to a 25% withholding tax rate. Blacklisted jurisdictions are: Andorra, Alderney, American Samoa and Western Samoa, American Virgin Islands, Anguilla, Antigua and Barbuda, Aruba, Ascension Islands, Bahamas, Bahrain, Barbados, Belize, Bermuda, British Virgin Islands, Campione d'Italia, Cayman Islands, Cook Islands, Curaçao, Cyprus, Djibouti, Dominica, French Polynesia, Guernsey, Gibraltar, Granada, Grenadines, Hong Kong, Isle of Man, Jersey, Kingdom of Swaziland, Labuan, Lebanon, Liberia, Liechtenstein, Macau, Maldives, Marshall Islands, Mauritius Islands, Montserrat, Monaco, Nauru, Niue, Oman, Panama, Pitcairn Islands, Queshm Islands, Republic of Kiribati, Saint Helena, Saint Vincent, Saint Lucia, Saint Peter and Miguel and Island, San Marino, Sark, Seychelles, Solomon Islands, State of Brunei Darussalam, Sultanate of Oman, Territory of Norfolk Islands, Tonga, Tristan da Cunha,

Turks and Caicos Islands, United Arab Emirates and Vanuatu. New jurisdictions may be added to this list at any time.

Privileged tax regimes, on the other hand, are jurisdictions that:

(i) do not impose taxation on income or impose the income tax at a maximum rate lower than 20% (reduced to 17% as per Ordinance MF 488/2014);
(ii) grant tax advantages to a non-resident entity or individual (a) without the need to carry out substantial economic activity in the country/territory, or (b) conditional upon the non-exercising of substantial economic activity in the country/territory;
(iii) do not tax, or tax proceeds generated abroad at a maximum rate lower than 20% (reduced to 17% as per Ordinance MF 488/2014); or
(iv) restrict the ownership disclosure of assets and ownership rights or restrict disclosure about economic transactions.

The RFB has grey-listed as "privileged tax regimes" the following:

- Holding Companies in Denmark, Austria and the Netherlands, which do not perform a substantial economic activity;
- Uruguay - only with respect to *"Sociedad Anonima Financiera de Inversion" (Safis)* until December 31, 2010;
- Iceland - only with respect to International Trading Companies (ITCs);
- United States of America - only with respect to Limited Liability Companies, or LLCs, with participation of non-resident investors and those that are not subject to Federal income tax in the USA;
- Spain - only with respect to "Entidad de Tenancia de Valores Extranjeros" (ETVE);

- Malta - only with respect to International Trading Companies (ITC) and International Holding Companies (IHC);
- Switzerland - the schemes applicable to legal entities incorporated in the form of a holding company, domiciliary company, auxiliary company, mixed company and administrative company whose tax treatment results in the incidence of combined IRPJ lower than 20%;
- Costa Rica - the Free Trade Zone System (RZF);
- Portugal - the regime of the International Business Centre of Madeira (CINM); and
- Singapore - different rate regimes for various activities.

The concepts of a low tax jurisdictions and privileged tax regime are relevant for: (a) transfer pricing purposes; (b) thin capitalization rules; and (c) the deductibility of expenses.

Taxation of Indirect Investment

Under Brazilian Law, Income Tax rules on gains and income derived from transactions carried out in the Brazilian financial and capital market can vary depending upon the domicile of the non-resident investor, the type of registration of the investment held by the non-resident investor with the Central Bank, and how the disposition is carried out.

For foreign investors whose inflow of funds follows CMN Resolution No. 4,373/2014 and who are not from a jurisdiction considered a tax haven (Blacklist provided by Normative Ruling No. 1,037/10), are subject to a special regime, and income tax is imposed as follows:

(i) capital gains from the sale of stock on Brazilian stock exchanges are income tax exempt, except if related to combined transactions with a net fixed income result;

(ii) on income from equity funds, swap and other transactions on the futures market not carried out through a Brazilian stock exchange, income tax being imposed at a rate of 10%; and

(iii) on income from all other fixed income investments made through a Brazilian stock exchange or over-the-counter market, and on gains earned, except as provided for in item (i) above, where the income tax withheld at source will be imposed at a rate of 15%. In this case, the transactions conducted by the investors do not admit the offsetting of gains and losses, whilst the transactions need to be taxed separately, with no consolidation of results.

Investments performed in the financial markets by non-resident investors, acting through an investment mechanism regulated by Resolution CMN no. 4,373/2014 and allocating their funds locally, are subject to taxation only when the quotas of the funds are redeemed, at a rate of 15%, and 10% in the case of transactions in equity investment funds. Transactions conducted by the investors through the funds (part of the Fund portfolio) admit the offsetting of gains and losses, being taxed considering the appreciation of quotas.

The taxation rule mentioned above is generally applicable to all types of non-resident investors, whether individuals or institutions, which act pursuant to the CMN Resolution No. 4,373/2014 investment mechanism. Other foreign investors, as well as those located in jurisdictions considered to be tax havens, are subject to the same income tax rules currently applicable to Brazilian investors.

These other foreign investors pay Income Tax Withheld at Source (*Imposto sobre a Renda Retido na Fonte – IRRF*), as described below:

(i) on income from financial transactions (fixed income and variable income), including hedging transactions, at rates varying from 15% to 22.5%. The Income Tax is withheld at source and the rates vary according to the transaction type and terms;

(ii) on income from financial transactions (variable income), at rates varying from 15% to 22.50%, according to the transaction type and terms;

(iii) on income from Equity Investment Funds (FIP), Investment Funds in Equity Fund Quotas (FIF FIP), and Investment Funds in Emerging Companies (FMIEE), at a rate of 15% upon redemption, provided that the funds meet certain conditions set forth by Brazilian legislation. In case of gain on the disposal of fund units, the rate will also be 15%, however the Income Tax is not withheld at source, because it is paid directly by the investor; and

(iv) income from other long and short-term investment funds, other than those mentioned in items (ii) and (iii), at rates varying from 15% to 22.5%, according to the investment period.

Tax benefits on foreign investment in the financial and capital market

In addition, it is important to mention that the Brazilian Government has reduced non-resident investors' income tax on proceeds generated on Federal Government bonds to zero, provided that the inflow of funds is made in accordance with CMN Resolution No. 4,373/2014.

This measure benefits all foreign investors, except those located in jurisdictions considered as tax haven jurisdictions. This reduction also applies to the quotas of investment funds dedicated to non-resident investors where at least 85% of the portfolio consists of Federal Government bonds reflected in the net worth of the fund. The 85% is a daily limit - thus there is a need to actively manage the fund to maintain the ratio of 85% or implement controls to manage the limit.

Finally, Law No. 12,431/2011 provides that income derived by non-resident investors (who are not domiciled in tax haven jurisdictions) from publicly-traded bonds and securities issued by nonfinancial institutions and acquired as of January 1, 2011 are subject to Income Tax assessment at a rate of 0%. In order to be entitled to such benefit, certain requirements should be met.

FIP taxation

Income earned by foreign investors under Resolution No. 4,373/2014 that is derived from the redemption of FIP quotas may be subject to IRRF at a reduced zero rate, if the foreign investors comply with requirements provided by article 3 of Law No. 11,312/2006.

In order to enjoy such tax benefit, the following conditions must be observed:

(a) FIP investors cannot hold, individually or jointly with related persons, quotas representing 40% or more of all the FIP's quotas or 40% or more of the total income of the FIP;
(b) the FIP cannot hold in its portfolio, at any time, debt securities exceeding 5% of the FIP's net equity (*i.e.* convertible debentures and Government bonds are not included in the 5% limitation).
(c) the foreign investor cannot be resident or domiciled in a country defined by Brazilian law as a tax haven jurisdiction.

Provided that the FIP continues to be qualified to operate as a private equity fund under CVM Ruling No. 578/2016, the income derived from the FIP for the foreign investors will be exempted from Income Tax.

Nevertheless, in the event that a foreign investor cannot be a beneficiary of the tax benefit established by Law No. 11,312/06, the Income Tax shall be levied at a rate of 15% on income derived from the FIP.

Should the FIP fail to comply with the investment diversification rule provided by CVM Ruling No. 578/2016, the foreign investor located in a tax haven jurisdiction will be subject to Income Tax at distinct rates (22.5% - 15%), depending upon the investment period.

American Depositary Receipts (ADR) Taxation

According to Law No. 10,833/03, capital gains realized on the disposition of assets located in Brazil by a foreign investor,

whether to another non-Brazilian resident or to Brazilian residents, are subject to taxation in Brazil.

Regarding ADRs, although the matter is not free from doubt, the gains realized by a foreign investor on the disposition of ADRs to another foreign investor will not be taxed in Brazil, based on the fact that ADRs do not constitute assets located in Brazil for purposes of Law No. 10,833/2003. However, we cannot guarantee that Brazilian courts would adopt this theory.

The deposit of shares in exchange for ADRs may be subject to Brazilian income tax if the acquisition cost of the shares is lower than: (i) the average price per share on a Brazilian stock exchange on which the greatest number of such shares were sold on the day of the deposit; or (ii) if no shares were sold that day, the average price on the Brazilian stock exchange on which the greatest number of shares were sold during the 15 trading sessions immediately preceding such deposit. In this case, the difference between the acquisition cost and the average price of the shares, calculated as set forth above, shall be considered a capital gain subject to income tax at a rate of 15% (or 25% in the case of investors who are located in tax haven jurisdictions).

The withdrawal of shares upon cancellation of ADRs is not subject to Brazilian Income Tax, as long as the regulatory rules are appropriately observed with respect to the registration of the investment before the Brazilian Central Bank.

In the case of redemption of the shares or ADRs or capital reduction by a Brazilian corporation, with subsequent withdraw of the ADRs, the positive difference between the amount effectively received by the foreign investor and the acquisition cost of the securities redeemed is treated as capital gain derived from sale or exchange of shares not carried out on a Brazilian stock exchange market and is therefore subject to Income Tax at the rate of 15% (or 25% in the case of investors who are located in tax haven jurisdictions).

Dividends and Distributions of Interest on Net Equity *(Juros sobre o Capital Próprio – JSCP)*

Dividends paid on profits of periods beginning on or after January 1, 1996 will not be subject to income tax withheld at the source in Brazil. Dividends paid on profits generated before January 1, 1996 may be subject to Brazilian income tax withheld at the source at varying

rates depending upon the year in which the profits were obtained.

In accordance with the amendment to Law No. 9,249/1995, Brazilian corporations may make payments to shareholders characterized as distributions of interest on the net equity of the company as an alternative form of making dividend distributions. The JSCP is a hybrid instrument as it is deductible for Brazilian tax purposes while considered as remuneration for the investor based upon the shareholder's net equity.

In general terms, interest on net equity is calculated by applying the daily pro rata variation of the Government's long-term interest rate (*Taxa de Juros de Longo Prazo - TJLP*) on the Brazilian entity's adjusted net equity accounts: (i) capital; (ii) capital reserves; (iii) profit reserves; (iv) treasury shares; and (v) accumulated losses. The payment or credit of JSCP, however, is conditioned to the existence of profits, calculated before the interest deduction, or of accumulated profits and profit reserves, in an amount equal to or greater than the amount that is double the interest to be paid or credited.

The total amount distributed as interest on equity may not exceed, for tax purposes, the greater of (i) 50% of net income (after the deduction of the social contribution on net profits and before taking into account the provision for corporate income tax and the amounts attributable to shareholders as net interest on equity) related to the period in respect of which the payment is made; or (ii) 50% of the sum of retained profits and profit reserves as of the date of the beginning of the period in respect of which the payment is made.

Distributions of interest on equity paid are deductible by the company for Brazilian corporate income tax and social contribution on net profit purposes, as far as the above described limits are observed. Such payments are subject to IRRF at the rate of 15%, except for payments to shareholders situated in tax haven jurisdictions, in which case payments are subject to income tax withheld at the source at a rate of 25%.

These payments may be included, at their net value, as part of any mandatory dividend. To the extent that payment of interest on net equity is so included, the corporation is required to distribute to shareholders an additional amount to ensure that the net amount received by them, after payment of the applicable withholding income tax, plus the amount of declared dividends, is at least equal to the mandatory dividend.

IOF-Exchange

IOF is a tax imposed on financial transactions, such as credit, foreign exchange and insurance transactions or those transactions related to securities. The rate of the IOF varies according to the policies adopted by the Brazilian Government and is designed to restrict or stimulate the inflow of foreign capital and to limit credit to individuals. The IOF rate may be changed by an Executive Decree (rather than a law). In addition, a statute increasing the IOF rate will therefore take effect from its date of publication.

The IOF is imposed on several foreign exchange transactions (IOF-Exchange). Its applicable rates may be increased by up to 25%. Recently, rates imposed on foreign exchange transactions have been modified and are currently imposed at a rate of 0.38%, with the following main exceptions:

(i) IOF-Exchange is imposed at a rate of 6% on foreign exchange transactions, including simultaneous foreign exchange transactions, carried out by a foreign investor for the purpose of investing in the Brazilian financial and capital markets. In relation to these investments, the rate of IOF-Exchange imposed on the outflow of funds, from the country, will be zero;

(ii) IOF-Exchange is levied at a reduced rate of 0% in exchange transactions related to the entry into the Country of revenues deriving from the export of goods and services;

(iii) IOF-Exchange is levied at a rate of 0% on foreign exchange transactions for the remittance of interest on net equity and dividends earned by foreign investors;

(iv) IOF-Exchange is levied at a rate of 0%, as a general rule, on foreign exchange transaction related to the acquisition of foreign currency by financial institutions simultaneously contracted with a foreign currency sale transaction;

(v) IOF-Exchange is levied at a rate of 0% on settlements of simultaneous foreign exchange transactions executed after January 1, 2011 for

the inflow of resources through the cancellation of depositary receipts for investment in shares traded on stock exchanges;

(vi) IOF-Exchange is levied at a rate of 0% on settlements of simultaneous exchange for the inflow of resources derived from the modification of a foreign investor's registration, with direct investment being established by Law 4,131, dated September 3, 1962, for investment in shares traded on stock exchanges, as regulated by the National Monetary Council;

(vii) IOF-Exchange is levied at a rate of 0% on foreign exchange transactions, including simultaneous foreign exchange transactions, related to the attendance of initial or additional margin requirements in connection with futures transactions carried out within the Brazilian stock, commodities and future exchanges (*e.g.*, derivative transactions);

(viii) IOF-Exchange is levied at a rate of 0% on the liquidation of exchange transactions by a foreign investor for the inflow of funds, including by means of simultaneous transactions, for investment in the financial market and capital market. In relation to these investments, the rate of IOF-Exchange imposed on the outflow of funds, from the country, will be zero;

(ix) IOF-Exchange is levied at a rate of 1.10% on the settlements of foreign exchange transactions, performed on or after May 3, 2016, for the acquisition of foreign currency; and

(x) IOF-Exchange is levied at rate of 1.10% on the settlements of foreign exchange transactions, performed on or after March 3, 2018, for the transfer of funds abroad by a Brazilian tax resident.

Depending upon the type of inflow of foreign funds into the country, the IOF-Exchange may be levied on the outflow and inflow of funds. It may also be levied when the type of investment is

changed. In many cases, the outflow and inflow of funds will require simultaneous foreign exchange transactions.

IOF-Bonds

IOF tax may also be levied on the issuances of bonds or securities, including transactions carried out on Brazilian stock, futures or commodities exchanges (IOF-Bonds).

The President, however, has the legal authority to increase the rate to a maximum of 1.50%, per day, of the amount of the taxed transaction, during the period in which the investor holds the securities, up to the amount equal to the gain made on the transaction and only from the date of its increase or creation.

IOF-Bonds are assessed on gains realized in transactions with terms of less than 30 days consisting of the sale, assignment, repurchase or renewal of fixed investments or the redemption of shares of investment funds or investment pools. The maximum rate of IOF-Bonds payable in such cases is 1% per day, up to the amount equal to the gain made on the transaction, and decreases with the length of the transaction, reaching zero for transactions with maturities of at least 30 days.

The rate of the IOF-Bonds with respect to many securities transactions is currently 0%, as follows:

- transactions carried out by financial institutions and other institutions chartered by the Central Bank as principals;
- transactions carried out by mutual funds or investment pools themselves;
- transactions carried out in the equity markets, including those performed in stock, futures and commodities exchanges and similar entities, except for transactions with predetermined results;
- redemptions of shares in equity funds;
- with Certified Agribusiness Credit Rights (CDCA), Letters of Credit for Agribusiness (LCA) or a Receivables Certificate in Agribusiness (CRA), contracted after May 25, 2011;
- with the private bonds (*i.e.* debentures) mentioned

in article 52 of Law No. 6,404/1976;
- with Real Estate Receivables Certificates (CRI) and Financing Bills mentioned in article 37 of Law No. 12,249/10, contracted after May 25, 2011.

Finally, IOF tax is levied at a rate of 1.50% on the assignment of shares traded in the Brazilian stock market in order to permit the issuance of depositary receipts.

IOF-Bonds on derivatives

According to article 32-C of Decree No. 6,306/2007, IOF-Bonds will also be assessed at 1% on derivatives linked to the FX rate. In this regard, IOF-Bonds will be charged on the adjusted notional value on the acquisition, sale or maturity date of the derivative agreement that exceeds USD 10 million on the sell side. On the other hand, if the exposition on the sell side does not exceed USD 10 million, IOF-Bonds will be levied at a zero rate.

Transfer Pricing on Commercial and Financial Transactions

General Terms

The transfer pricing rules were first implemented in Brazil in 1996, being effective as of the 1st of January 1997 and partially reformed in 2012.

Such legislation aims to test the pricing policy on commercial and financial transactions – either inbound or outbound – between Brazilian residents and their related parties abroad, as well as with any company established in a low-income tax jurisdiction (“tax haven”) or under a tax privileged regime.

If the documented price, practiced between the parties, does not comply with any of the transfer pricing methods (comparable price), the occasional difference must be added to the corporate income tax (“IRPJ”) and social contribution on net profit (“CSLL”) calculation bases.

Related Parties

The Brazilian Transfer Pricing rules are applied, as a rule, to all imports and exports of goods, services and rights, as well as to intercompany financing transactions, when carried out between a Brazilian entity and any related party domiciled abroad or other parties either domiciled in low-tax jurisdictions or benefiting from privileged tax regimes.

A "Related party" has specific definition in transfer pricing legislation, based on the relationship between the parties upon their social, administrative or economic status. Under the legal definition, a party can be deemed related to a Brazilian entity when it is a foreign company that belongs to the same economic group (headquarters, branch, parent company, etc.), its shareholders and quota-holders, when it is an exclusive supplier or distributor, and so on.

OECD Guidelines

There are some important differences between transfer pricing rules applied by Brazil and the OECD Transfer Pricing Guidelines – which were recently updated to incorporate the results of the Base Erosion and Profit Shifting (BEPS) project.

Although Brazil is not yet a member of the OECD, the country has applied for full membership in this organization. Within this context, the Brazilian IRS and the OECD have jointly launched a project called "Transfer Pricing in Brazil", which will: (i) analyse Brazil's existing transfer pricing legal and administrative framework and its implementation; (ii) assess the strengths and weaknesses of that framework; and (iii) explore options for closer alignment between Brazil and OECD Members.

Under these circumstances, the Brazilian transfer pricing rules might change in the near future.

Arm's Length Principle

Brazil has adopted only the arm's length approach, in a way that the transactional profit methods (profit split and transactional net margin methods) have not been introduced as part of domestic legislation so far.

In this sense, legislators have chosen to restrict the taxpayers'

options to a few strict methodologies, some of them based on fixed profit margin rates.

Import Operations – Arm's Length Methods

Brazilian legislation allows the taxpayer to define the comparable price based on one of the following methods:

Resale Price Less Profit (PRL): defined as the weighted average of the resale price, less i) granted unconditional discounts; ii) taxes and duties applicable to the sale; iii) paid commissions and brokerage fees; and iv) a fixed profit margin, which is set by the law and varies from 20% to 40% depending on the economic sector of the company. The PRL method is applied to imported goods, services or rights resold in Brazil directly, without any transformation, or that are incorporated into domestic production.

Comparable Independent Price (PIC): defined as the weighted average price of goods, services or rights, identical or similar, calculated in the Brazilian market or in other countries, in purchase and sale operations carried out by the Brazilian company or third parties when acquiring identical or similar goods, services or rights abroad.

Cost Plus Profit (CPL): defined as the average cost of production of identical or similar goods, services or rights in the country where they were originally produced, plus taxes and charges on exports in that country, plus a 20% profit margin, calculated on the pre-tax cost.

Price Quotation Method on Import (PCI): this is a subdivision of the PIC method, specifically to commodities operations, defined as the daily average prices of goods and rights listed on the internationally recognized Futures and Commodities Exchange.

The operations regarding payments of royalties as well as

technical, scientific or administrative assistance will not be subject to the transfer price testing, since the deductibility of these expenses is regulated by separate specific legislation.

It is important to note that, regardless of legal specifications on the matter, these conditions are applied only to those operations that involve any effective transfer of technology – meaning those subject to the registration procedure with the National Industrial Property Institute ("INPI").

Export Operations – Arm's Length Methods

Except for transactions with entities domiciled in tax havens and commodities exports, Brazilian legislation provides safe harbours (waiver of transfer pricing calculation) for exports in the following conditions:

- Profitability: If the net profit before taxes derived from exports to related parties corresponds to at least 10% of the total of these revenues, provided that the net export revenues to related parties do not exceed 20% of the total net export revenues; and
- Representativeness: If the net export revenues, in the calendar-year, do not exceed 5% of the total net revenues in the same year.

If the Brazilian resident does not meet any of the safe harbours requirements, the taxpayer must define the comparable price based on one of the following methods:

Export Sales Price (PVEX): defined as the average export sales price when the company itself, or any other Brazilian company, exports the same or similar goods, services or rights to third parties, during the same period and under similar conditions.

Cost Plus Taxes and Profit (CAP): defined as the average purchase or cost of production of goods, services or rights exported, plus taxes charged in Brazil on exports, plus a 15% profit margin

calculated on the sum of costs, taxes and contributions.

Retail Price Less Profit (PVV): defined as the average of the retail price of the same or similar goods, services and rights in the country of destination, reduced by taxes within the price and a 30% profit margin.

Wholesale Price Less Profit (PVA): defined as the average of the wholesale price of the same or similar goods, services and rights in the country of destination, reduced by taxes within the price and a 15% profit margin.

Price Quotation Method on Export (PECEX): this is a subdivision of the PVEX method specifically for commodities operations, defined as the daily average prices of goods and rights listed on the internationally recognized Futures and Commodities Exchange.

Financial Transactions – Arm's Length Method and Sub-capitalization

The interest rate set on financial transactions must comply with the rate of Brazilian sovereign bonds issued in foreign markets or Libor for 6 months (depending on the contract currency) added to a 3.5% spread for inflow transactions or 2.5% for outflow transactions.

When regarding inflow transactions, the interest rate should not be higher than the abovementioned limit, while in outflow agreements, it should not be lower. Occasional differences should be added to the IRPJ and CSLL calculations.

In addition to the transfer pricing test, sub-capitalization rules also apply to inflow transactions, in order to test the tax deductibility of the interest expenses incurred by Brazilian companies in favour of related companies abroad.

Brazilian legislation establishes a 2:1 debt-to-equity ratio between the loan amount and the Brazilian company's net equity. A lower limit is established when the lender resides in a low-income tax jurisdiction.

Tax Aspects of Electronic Commerce

Introduction

The taxation of electronic commerce is of great concern to companies working in this field. While electronic commerce changes the way companies do business, many of them still have doubts about taxation. Amongst other things, electronic commerce can:

- change the tax presence of a business;
- create and alter origins of revenue;
- change the way companies do business with each other;
- create new intangible assets and liabilities; and,
- change the revenue and therefore taxation.

New products and pricing models from internet companies have brought about these outcomes. Internet companies also have access to markets a traditional company would not normally reach. This access makes these companies global businesses.

The changes in how we do business can create great tax opportunities and risks. This is why we must manage tax issues from the start of any e-business venture. E-commerce tax opportunities involve direct and indirect taxes and tax systems.

Direct and Indirect Taxation

Direct tax opportunities reflect on revenue characterisation, tax presence and transfer pricing. These opportunities may increase company gains by reducing the effective tax burden and increasing cash flow with tax deferrals.

Indirect tax advantages include lower taxation. The advantage will depend upon the jurisdiction the company claims to be under and how it makes the sale; for example, whether it is for the sale of goods or to provide services. These strategies allow for lower final prices for goods and services, thus increasing their competitiveness.

E-commerce allows companies to tax plan globally by taking advantage of the tax differences of various jurisdictions, as well as lower labour costs. Companies can, by careful planning and business purpose, improve their efficiency and reduce their global tax burdens.

If it is not well planned, risks can arise. Despite e-commerce being global, the laws that regulate it are local. One of the risks faced in Brazil is the volatility of the tax laws: one example is the discussion over taxation of operations involving digital goods through e-Commerce, especially due to recent changes in Brazilian legislation generally applicable to this tax field.

ICMS

The "ICMS" (Brazilian equivalent of VAT) is a noncumulative state tax levied on the import of goods, as well as on any operation related to the circulation of goods[1], including e-commerce transactions.

The ICMS rate may vary according to the tariff code NCM of the goods involved (Similar to the Harmonized System) and to the State where the seller and the buyer are located. In general, for operations within the same State and in case of imports, the rates may vary from 17% to 25% with some lower rate exceptions. In the State of São Paulo, for instance, the general rate is 18%.

When operations involve two different States (interstate transactions), the following rates may apply:

- -4% when the goods are imported or when the imported goods are subject to an industrialization procedure that results in final goods with import content higher than 40% (this rule is not applicable to products without anything similar on the market in Brazil or anything similar to those that are manufactured in Brazil under a basic productive process – PPB, and goods with nothing similar on the national market, as defined by the Foreign Trade Chamber – CAMEX);
- -7% on the sale of goods from companies located in the South and Southeast, except for in Espirito Santo State, to buyers located in States in the North, Northeast and Centre West regions, or in

the state of Espirito Santo; or

- -12% for remaining interstate transactions.

As of January 2016, when Constitutional Amendment no. 87/2015 (EC 87) entered into force, a new rule started to be applied on interstate operations carried out with end consumers, deemed as non-taxpayers for ICMS purposes, with major effects on e-commerce operations.

According to Constitutional Amendment no. 87/2015, interstate rates (of 4%, 7% or 12%) will apply regardless of the status of the end consumer, whether they are an ICMS taxpayer or not, and will be paid to the State of source. As to the difference between the interstate rate and the internal rate (usually ranging from 17% to 25%), it should be paid to the State of destination, where the final consumer is located.

In addition, the liability for collecting the difference between rates, in case of goods intended for a final consumer deemed as a non ICMS-taxpayer falls on the seller, which will be responsible for calculating and collecting the ICMS, by means of a specific tax collection form, observing the legislation and the ICMS rate of the State of destination.

This latter situation had major effects on e-commerce market players, mainly because all companies assessing this market, regardless of size, structure and resources, began to be forced to comply with the legislation of all the States with which it carried out interstate sales intended for final consumers deemed as non ICMS-taxpayers.

IPI

IPI is a tax on manufactured products. This tax is similar to an excise tax. It is levied on most manufactured products, whether made in Brazil or imported. Although the IPI is ultimately passed on to the final consumer, it is charged on each production step or phase taken by independent manufacturers.

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1. The main aspects of ICMS are regulated by National Supplementary Law 87/96 ("LC 87/96"). The tax is also levied on the provision of interstate and intercity transportation services and communication services.

The IPI is usually levied *ad valorem* (imposed at rate percent of value) on the purchase or importation of the raw material and components that are used in the manufacturing process of the products to be taxed or on the resale of the imported product. In the case of imported products, the IPI is calculated on the customs value, plus the import duty.

The rates vary in accordance with the tariff code of the product under the NCM (similar to the Harmonized System).

Therefore, any e-commerce business may be subject to IPI on the resale of imported products, for instance.

IRPJ and CSLL

As a general rule, Brazilian legal entities must submit an annual income tax return encompassing the period from January 1 to December 31. Corporate income tax ("IRPJ") is paid on a monthly or quarterly-basis, at an ordinary rate of 15%, on profits up to R$ 240,000 per year and 25% on profits in excess thereof. Taxable income is calculated using one of three methods, namely, (i) the "*lucro real*" (actual profit), (ii) the "*lucro presumido*" (presumed profit) or (iii) "*lucro arbitrado*" (arbitrated profit):

(a) The Actual Profit method is based on the net profit calculated using Brazilian accounting principles, adjusted in accordance with the applicable tax legislation. It allows the deduction from the taxable basis of certain costs, expenses and carry forward tax losses (limited to 30%) provided for in the legislation.
(b) The Presumed Profit method establishes a Presumed Profit margin that is applied on a company's gross revenues, deducted from the returns, cancelled sales and unconditional discounts granted. The most common margins are 8% for industries and 32% for services, but other margins may apply in specific cases. This method is only available to domestically held companies with annual revenue not exceeding R$ 78,000,000, upon compliance with other statutory requirements.

(c) Arbitrated profit is a method applied at the discretion of tax authorities in certain limited circumstances, such as to the taxpayer that does not maintain proper records of its revenues and costs/expenses.

The Social Contribution on Net Profits ("CSLL") is applicable to the corporate adjusted net income of companies organized under Brazilian law at the rate of 9%. The CSLL is also applicable on Actual Profit, Presumed Profit and Arbitrated Profit.

COFINS and PIS

The Social Contribution levied on revenue ("COFINS") is assessed based on the monthly gross revenue of the company, regardless of its denomination or accounting regime, at the rate of 3% if the cumulative regime applies (applicable for legal entities calculating Corporate Income Taxes based on the Presumed Profit regime). In the non-cumulative regime (applicable for legal entities calculating the Corporate Income Taxes based on the Actual Profit regime), because some of the costs and expenses are creditable, the rate of COFINS is 7.6%. Revenues resulting from sale of services to foreign buyers are exempt from this social contribution, as long as there is an inflow of funds related to the transaction.

The Social Integration Program Contribution ("PIS") is applicable on the monthly gross revenue earned by a Brazilian company at the rate of 0.65% (applicable for legal entities calculating Corporate Income Taxes based on the Presumed Profit regime). Similar to the COFINS, if the company is subject to the non-cumulative regime, the rate of this contribution is 1.65%. Revenues resulting from the sale of services to foreign buyers are exempt from this social contribution, as long as there is an inflow of funds related to the transaction.

The cumulative regime (lower rates of 0.65% and 3% but with no right to deduct credits) is mandatory for certain types of revenue defined in the Law, including those derived from the development and licensing of software and related services (including analysis, programming, installation, configuration, advisory, consulting, technical support and software maintenance or updating, and electronic pages), even when the legal entity is subject

to the non-cumulative system for the other revenues not expressly mentioned in article 10, item XXV, and article 15, item V, of Law no. 10,833/03.

Paragraph 2 of article 10 of Law no. 10,833/03 presents an exception to the cumulative regime: the commercialization, licensing and assignment of the right to use *imported software*. Although the Law is not clear in this regard, the Brazilian Federal tax authorities understand that the cumulative system is not applicable on the revenues arising from commercialization or licensing of software developed by a third party (foreign or local).

ISS

ISS - and especially whoever collects it - is also causing controversy. National Supplementary Law 116/03 ("LC 116/03"), which provides a list of services that can be taxed by the municipalities, regulates the main aspects of the ISS. The ISS calculation basis is the service price, and rates vary from 2% to 5% depending on the municipality entitled to impose the tax.

As a rule, the ISS is collected in the municipality in which the service provider is located. However, LC 116/03 establishes that for some of the expressly listed services, the tax should be paid to the municipality in which the services are actually rendered. Considering the tax challenges arising from the digitalization of the economy, which includes significant legislative changes (in order to expand the taxation on new technologies) and prevent disputes between states and municipalities to define which is entitled to charge the tax, e-commerce companies should keep track of developments to avoid substantially increased tax burdens, as well as the risk of any future questioning of its transactions.

Thus, even though the ISS is levied on specific services listed by LC 116/03, the Internet has introduced several new services such as the provision of e-mail services, hosting, electronic auctions, and others. It is therefore not clear upon which of these the ISS should be levied, and a careful and detailed analysis of the specific service and applicable rules is required. One example that is worth pointing out relates to the changes carried out by Supplementary Law 157/16, which has introduced some new activities to the list of services subject to the ISS, such as streaming and cloud computing, among others.

The importation of services has been subjected to ISS taxation, adding to the cost of the company/individual that hires services provided by e-commerce businesses located abroad.

WHT

The income generated or paid from Brazilian sources and remitted to a foreign beneficiary is subject to the taxation of the Withholding Income Tax ("WHT") at source in Brazil. The obligation to collect this tax falls on the Brazilian source that is required to withhold the income tax and transfer it to the proper tax authorities.

This is the case for interest, royalties, leasing, capital gain and the remuneration of services paid by Brazilian sources to an entity abroad. The WHT applicable rates vary depending on the nature of the payment.

The payment for services may be subject to a rate of 25% or 15%, depending on the type of service or the domicile of the beneficiary. The standard WHT rate for the payment of technical services (as well as for technical or administrative assistance) is 15%. For general non-technical services, the rate is 25%. The rate of 25% is applicable for all cases in which the beneficiary is located in a low tax jurisdiction (as defined by the Brazilian Federal tax authorities).

Although there is no express provision in local legislation, the current understanding of the Brazilian tax authorities is being applied: (i) payments related to the licensing of software as a service (SaaS) are subject to the WHT at a rate of 15%; (ii) payments for the right to distribute software are also subject to the WHT at a rate of 15%; and (iii) payment for the acquisition of non-customized software ("off-the-shelf") is not subject to the WHT.

Royalties are generally considered as payments for the use or licensing of patents, trademarks and other technology transfers and copyrights. The remittance has to be preceded by the registration of the relevant contract before the Brazilian Institute of Industrial Property ("INPI").

CIDE

The Contribution on Economic Activities ("CIDE") is levied on foreign remittances relating to payment of copyrights, royalties

on trademarks and patents, technical services, technical assistance, administrative assistance and similar services. As a rule, CIDE is owed by the Brazilian company and is levied on the amounts paid abroad, at the rate of 10%.

This contribution does not fall within the reach of international double taxation treaties. CIDE is a local entity's cost and it is not therefore creditable to non-residents. To the extent that the services are rendered in an electronic commerce scenario, CIDE should also be levied.

CIDE is not levied on the remuneration paid for the licensing of use or the rights to commercialize or distribute software, except when the transaction involves the transfer of the corresponding technology (*i.e.* with the transfer of the source code of the software, subject to registration with the National Institute of Industrial Property - INPI).

Brazilian tax authorities currently understand that the payment related to the software as a service is subject to the CIDE.

PIS-IMPORT and COFINS-IMPORT

The PIS and COFINS are also levied on the import of services into Brazil ("COFINS-Import" at a rate of 7.6% and "PIS-Import" at a rate of 1.65%). In the event of an importation of services, the tax basis will be the amount paid to the foreign service provider, without deducting the Withholding Income Tax and adding the ISS and the PIS-Import and COFINS-Import themselves. The importation of products is also subject to PIS-Import and COFINS-Import, however the applicable rates and tax basis are different from that used for the calculation of such social contributions levied on the importation of services.

The amount paid regarding PIS-Import and COFINS-Import may be added to a company's local credits calculated on its costs and expenses to offset the COFINS and PIS due on its gross revenues, only if the non-cumulative method is applicable to such gross revenues. In this case, some legal requirements must be observed.

The PIS-Import and COFINS-Import are not levied on offshore remittances for the acquisition of the right to distribute software licensing, since the Federal Brazilian tax authorities classify such payments as "royalties" payments. It is important to observe whether or not there are services (such as support, training, etc.)

also included in the distribution agreement, because if this is the case, the price charged for such services must be clearly separated from the price charged for the right to distribute the software license (treated as royalties by the tax authorities), in order to avoid the levying of PIS-Import and COFINS-Import on the total value of the agreement, at the combined rate of 9.25%.

Brazilian tax authorities understand that the payment related to the software as a service is subject to the PIS-Import and COFINS-Import.

IOF

The financial transactions tax ("IOF") is applicable to credit, foreign exchange, insurance, securities, and gold transactions, effected through financial institutions of the national financial system. The tax rate varies according to the nature of the transaction, and the tax is withheld and paid directly by the financial institution involved in the transaction.

In the case of remittance of foreign currency abroad, the IOF is generally levied at a 0.38%, but different rates may apply depending on the nature of the transaction.

Other tax issues

For tax purposes, the provision of an electronic invoice (regarding ICMS and IPI) and a services electronic invoice (regarding ISS) is a legal obligation, as is compliance with other ancillary obligations provided for in the legislation of each State and Municipality where the operations are carried out.

The conflict between goods and services

The on-line delivery of goods, such as software, music and books, sometimes creates difficulties in showing whether the transaction does indeed involve the sale of goods or the provision of services.

The main controversy at present involves software, in relation to which it is important to point out that, according to the relevant legal writings and the leading case established by the Brazilian superior courts, particularly the Supreme Federal Court

(STF)[2], there is a long-established distinction - for tax determination purposes – between:

(i) Custom-made software, understood as that made to order, adapted to the characteristics of its recipient, according to its specific requests; and
(ii) "off-the-shelf" software, understood as that standardized and sold to the general public, even if customizable. The customer is authorized to use it under a license, sublicense or assignment of right of use.

At first, such distinction focused on the taxation of the software considered as being a service (item 'i' above) or as being merchandise (item 'ii' above), and, consequently, considering that, on the one hand, only custom-made software is subject to ISS charged by municipalities and, on the other, off-the-shelf software is subject to ICMS, charged by the States.

In this regard, it should be noted that the conflict of jurisdiction between States and Municipalities involving the taxation of software (by ICMS or ISS) is long-standing.

Furthermore, despite the STF signing the abovementioned understanding, in the late 1990s, the legislation of most States[3] did not make any distinction - for the purpose of levying and collecting ICMS - concerning the nature of transacted software, because they used to define the fixed calculation basis corresponding to twice the value of the media in which the software was made available.

At that time, any software was considered to be subject to ICMS within the scope of the States if such was made available in physical form, since the calculation basis of the said tax corresponded to twice the value of that media[4].

By adopting the ICMS collection system described above, many States, on the one hand, abandoned ICMS tax collection on revenues from transactions involving so-called "off-the-shelf" software and, on the other hand, did not incur elevated costs in verifying the effective nature of the transacted software. The companies, on the other hand, ceased to have any interest in the discussion of this matter and, due to the immateriality of the ICMS amounts levied on the transactions promoted, ended up paying the ICMS and the ISS (calculated based on the revenues earned from the license of use).

This scenario, however, has changed enormously since 2016 with the amendment of ICMS Agreement no. 181/15[5] and subsequently with the amendment of ICMS Agreement no. 106/2017[6]. This is because, from these standards, the ICMS tax on the licensing of off-the-shelf software started to being levied on the total amount charged by the license, and included transactions carried out with or without physical media, including downloading or availability in a cloud, by means of the observance of a tax burden of 5% on such amount.

Thus, States have started to tax transactions with off-the-shelf software[7], commercialized by any means (physically, by download or in the cloud), whilst Municipalities, despite the distinction between off-the-shelf and made-to-order software fixed by the STF, have not waived taxation of these transactions because software licensing, without distinction, is a service taxable by the ISS.

Therefore, the current scenario with regard to such taxes is of extreme legal uncertainty, since in the case of transactions with off-the-shelf software, including custom-made software, States (ICMS) and Municipalities (ISS) will not waive collection of the same, to the effect that taxpayers practicing such transactions will be at risk of double taxation.

We are currently still awaiting the final position of the STF[8] defining the matter of taxation of these operations through ICMS or ISS.

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2. Extraordinary Appeal nos. 176,626-3/SP and 199,464-9/SP.
3. For example, the State of São Paulo, through Decree no. 51,619/07.
4. Until then, software transacted without physical media, fell outside the scope of ICMS taxation, since the tax was based on the calculation basis of only twice the value of the media.
5. Authorizes the states that specify the granting of a reduction of the calculation basis for transactions involving software, programs, electronic games, applications, electronic files, and the like.
6. Disciplines the procedures for the collection of ICMS levied on transactions with goods and digital goods commercialized by means of electronic data transfer, and grants an exemption on the operations prior to that destined to the final consumer.
7. The States have been observing the historical case law of the STF and have a uniform understanding that software made to order, as a service, should not be taxed by the ICMS, *i.e.* custom-made software is not subject to the ICMS.
8. Under the records of Direct Unconstitutionality Actions (ADI) 1,945 and 5,958 (ADI) and of Extraordinary Appeal No. 688.223.

Internet Service Providers

The tax liability of Internet Service Providers - ISPs - has also proven to be a grey area. Is the service a telecommunications service, and therefore taxed by the States by means of the ICMS, or a data-processing service taxed by the Municipal governments by means of the ISS? Administrative and judicial decisions have gone both ways, causing great confusion.

ICMS Convention nº 78/2001 gives States the power to reduce the ICMS tax rate on these transactions to 5%. However, if taxpayers choose to use this benefit, they cannot use any other ICMS credits to offset the tax due at a rate of 5%. In any event, as mentioned above, many legal scholars and court decisions believe that ISS and not ICMS should be applicable here. Such ICMS Convention is valid only up to September 2017, but it has been extended several times in the past.

Nevertheless, the Supreme Court of Justice (STJ) has already determined that ICMS is not to be levied on services rendered by internet service providers[9].

Thus, considering that this controversy has already been solved by the STJ, it is only recommended that the service characterization as an ISP should be carefully observed.

Permanent Establishment - PE: Defining a company's permanent establishment has proven to be a problem throughout the world and Brazil is no exception. The company's permanent establishment is important in deciding under which jurisdiction it falls. However, the Internet has allowed companies to change the way they buy, sell and contract, allowing them to move their tax presence from one country to another.

Brazilian legislation on permanent establishments is rather scarce and in general it is focused on situations where a non-resident company that exports to Brazil possesses an agent operating inside the country. In such cases, agents are able to contractually bind the foreign company. However, legislation is mute in relation to online transactions.

Furthermore, the tax treaties signed by Brazil for income tax purposes do not always define the amount of e-commerce that is necessary to infer permanent establishment. This too has caused doubt between what is an e-business transaction in or with Brazil.

Conclusion

The taxation of e-commerce is one of the most disputed issues in the e-business universe. The analysis of tax opportunities and risks, as well as proper management, are important to avoid potentially harmful litigation, tax debts and unforeseen costs.

Importing and Exporting

Export earnings are a key priority of the Brazilian Government's economic policy because of the need to produce large balance-of-payment surpluses to fund debt repayment and imports. For similar policy reasons, the Brazilian Government applied import limits in the 1980s, except on strategic resources such as oil and capital goods unavailable locally.

Nevertheless, the drive to modernise Brazilian industry and curb inflation led to a deregulation of trade policy in the 1990s, with the extinction of import limits and the use of import tariff cuts as a tool employed by the Government to target areas of the economy dominated by oligopolies or monopolies. This put pressure on these areas to cut prices in light of foreign competition.

In the 2000s, Mercosul was consolidated and expanded through the execution of preferential agreements with most Latin-American countries and some other countries such as India and Israel, for example. In parallel, Brazil increased the number of trade remedy measures applied against other countries' exports, whilst it also became a more frequent target of these measures by other countries.

SECEX, a Ministry of the Economy agency, controls imports and exports in Brazil. Companies engaged in foreign trade must register with SECEX as an importer or exporter.

Trade Organisations

Mercosul *(for more details refer to Chapter 21)*

This is a common market established between Brazil, Argentina, Paraguay and Uruguay, having associations with Chile

9. Special Appeal No. 456.650, which led to the creation of STJ Precedent No. 334.

and Bolivia. Venezuela became a member in 2012 but was suspended in 2017 because of the understanding of the other members that it is no longer a democracy.

Mercosul has a population of about 300 million and a total GNP of around US$2,700 billion.

The main Mercosul objectives, as stated in the Asuncion Treaty, are:

- to establish the free transit of goods, people, capital and services by removing customs and non-tariff barriers;
- to pursue a common trade and economic policy, adopting a Common External Tariff ("TEC");
- to coordinate macro and area economic policies not only on foreign trade, but also other areas such as agriculture, industry, tax and monetary systems, to ensure free competition among members; and
- to commit members to adjust their laws to ease integration.

On customs duties and non-tariff limits, every member country has a list of exceptions to the TEC. Mercosul introduced the TEC and the lists of exceptions in January 1995.

To avoid serious damage to the member countries' domestic markets because of a sudden increase in imports, safeguard clauses provide for temporary import quotas. Commercial and industrial free-trade zones currently fixed or approved may continue to run but receive the same tariff treatment as if they were non-member states. However, member countries have executed bilateral agreements to extend the Mercosul treatment to their respective free-trade zones.

To gain a Mercosul certificate of origin, goods must have a substantial transformation characterized by the fact that the resulting product is classified in a heading that is different to the one in which the imported inputs were classified. Alternatively, a local content of 60% is also sufficient to confer Mercosul origin. There are specific rules of origin, though, for a long list of products.

Capital movement is, in principle, free between the member countries, including stock exchange transactions by both corporate

entities and individuals, with limits in special situations.

Mercosul has entered into free or preferential trade agreements with Bolivia, Chile, Colombia, Cuba, Ecuador, Egypt, India, Israel, Mexico, Peru, and the Southern African Customs Union (formed by South Africa, Namibia, Botswana, Lesotho and Eswatini). The Mercosul is currently negotiating with other countries and economic blocks, such as the European community.

Others

Brazil also belongs to the Latin American Integration Association (ALADI), which provides reduced duties and other benefits. Member countries include Argentina, Bolivia, Chile, Colombia, Cuba, Ecuador, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela. Brazil is also a member of the WTO.

Exports

Exporters must register with the SECEX, which controls imports and exports. The following transactions need special export authorisation:

- transactions involving a nonconvertible currency;
- transactions without currency coverage;
- consignment of goods; and
- weapons. ammunition and goods containing nuclear and radioactive materials.

Certain exports of raw lumber, animals and some other products are either specifically banned or severely restricted. The Ministry of Agriculture regulates the export of certain products of animal origin.

Tax Incentives

Several tax and financial incentives are still available to exporters, although the extent of these incentives has recently been reduced. The main tax concessions are summarised as follows:

- exported products are free from IPI. The rules also provide for a credit instrument for excise taxes paid on raw materials used to make goods for export;
- a credit instrument is allowed for turnover taxes paid on raw materials such as energy consumed and amortization;
- exports are free from ICMS. Similar to the IPI, a credit mechanism for ICMS paid on raw materials or inputs used in the manufacturing process is also available;
- exports of products or services are also exempt from PIS and COFINS provided certain conditions are met; and
- materials, parts and semi-manufactured goods imported for use in producing goods targeted for export, "drawback", are free from excise taxes and import duties.

Export guarantee insurance

The Brazilian Ministry of Finance provides export guarantee insurance covering up to 100% of losses arising from political risk and extraordinary causes, and 95% of losses arising from commercial risks.

Financing

Banks provide financing for exporters against forward sales contracts and by discounting drafts accepted by foreign importers. This financing is also available for "indirect exporters" or manufacturing companies that export through trading companies.

The BACEN allows banks to re-lend funds gained abroad to Brazilian exporters with IOF-tax exemption. Exporters may use these funds to buy raw materials to make goods for export.

Export duties

Exports of certain agricultural commodities and manufactured products are subject to export taxes.

Government rules

Exporters must register with SECEX to qualify as an export company. To perform an export transaction, the exporter must submit a Single Export Declaration ("DU-E").

On exports, SECEX will verify and evaluate whether the export prices are reasonable, using the international trade market as a guideline. The period of time needed for payment and the commission paid to the sales agent will also be subject to Government scrutiny.

Export Processing Zones (ZEP)

Export Processing Zones (ZPE) are free-trade areas created to set up manufacturing plants for export production in locations where the respective State or Municipal governments provide a suitable infrastructure. An exemption from excise tax (IPI), import tax (II), IOF and AFRMM is available for merchandise to be exported and the authorization may last for up to 40 years.

Twenty-six ZPE authorisations have been granted so far. However, only the one located in Pecém, in the State of Ceará, is operating.

Trading companies

Commercial companies that buy manufactured goods solely for export may register as trading companies, thus entitling them to tax benefits and the use of special customs warehouse rules. These rules simplify both export and import transactions. Trading companies are also eligible for extra financing allowed by the BACEN for companies with 75% domestic capital.

In summary, the main features of trading company rules are as follows:

- The trading company must set itself up as a corporation with registered voting shares and a minimum capital equivalent of about US$200,000. Up to 50% of the capital may be in the form of preferred shares without voting rights; and
- A special customs warehouse allows a tax deferral for imported goods until sold on the local market,

and on manufactured goods for exports, in which case the tax deferral becomes a tax exemption on effective exportation. The maximum deposit period is one year, but the trading company may be able to get an extension.

The warehouse rules apply to warehouses controlled by ports and airports, those of general warehouse businesses and those managed by public or private entities. However, the benefit of these rules is granted only to goods deposited by registered trading companies.

Imports

Government ruling

All importers must register with SECEX. As a general rule, imports are not subject to any kind of import licencing requirements. However, some products are subject to import licencing by the health and agriculture authorities, and the army, amongst others. Should an import licence be necessary, it is normally valid for 90 days, for each importation. The importer gets this authorisation through SISCOMEX, an on-line computer register that processes all import licences. SISCOMEX normally issues the authorisation within five days of application and the goods must be loaded for shipment within 90 days of the issue of the import licence.

SECEX controls the prices of imported goods with price quotes on the international market and reference to specialised publications and manufacturers' price lists. SISCOMEX will not allow foreign currency payments for imported products that are unreasonably costly.

In relation to imported products eligible for tax incentives, SECEX will verify beforehand whether the imported product is similar to products made locally. SECEX allows the import of used products if the importer meets certain conditions, including intended use, useful life and importance to the economy. The importation of certain products, such as petrochemicals, human blood, drugs, weapons, herbicides and pesticides, and leather, is subject to prior approval from the relevant Government department.

Customs

SECEX essentially reviews import prices to examine whether a foreign company is dumping its products on the Brazilian market. The Brazilian customs authorities, in turn, review import prices in order to police underpaid import duties, through under-invoicing.

SECEX and the customs authorities compare prior transactions, information from commodities exchanges, industry publications, foreign manufacturer price lists and other sources of price information in their investigation.

Tariffs

Import duties have a maximum of 35% and an average of 15%. Duties are levied on the CIF value of the product according to value. The import value of the goods, for tariff purposes, is calculated by applying a special foreign exchange rate, set by the Ministry of Finance, to the CIF value. The taxable event is the physical entry of foreign-made goods into the country. The classification of products to determine import taxes is based mainly on the Harmonized system drawn up the World Customs Organization.

As well as the abovementioned import tax, the following taxes and customs duties are levied on imports:

- IPI. Rates vary from zero for basic goods, to 300% for cigarettes. The tax calculation basis for IPI includes import duties.
- ICMS. Rates vary from zero to 25%. The tax calculation basis for ICMS includes import tax and IPI.
- PIS and COFINS. PIS and COFINS are charged on the import of goods and services, normally at a combined rate of 11.75%. A credit mechanism may be available to offset PIS and COFINS liabilities provided the Brazilian entity operates under the non-cumulative system and certain conditions are met. Imports of certain products (mainly agribusiness and pharmaceuticals products) benefit from a zero PIS and COFINS rate.

There are other minor customs fees including a processing fee of about US$ 100 for import authorisation, a freight duty that funds the merchant navy fleet, levied at 25% of the freight cost, as well as miscellaneous harbour and airport charges.

Tax Incentives

In Brazil tax incentives have been provided for decades to promote the economic growth of certain sectors of industry, in the form of government financing, tax exemptions and/or tax relief.

Tax incentives are crucial to encouraging and motivating national and international investors to invest in Brazil and one way of attracting them in light of Brazil's complex tax system. As a result of these incentives, which will be discussed in more detail below, companies are in a better position to manage their investments, both financially and strategically.

Tax incentives can be offered at the federal, state and municipal level in the most diverse sectors and for the most varied purposes.

From a Federal standpoint, tax incentive programs are designed to promote policies to develop local industry, involving measures such as export incentives and capitalization of local industry. Nonetheless, state and municipal incentive programs decisively assist with the creation and growth of regional employment.

States and municipalities normally apply exemptions or prepayments for taxes levied on goods and services, taxes over which they exercise their authority as set forth in the Constitution, so as to help potential investors obtain access to Federal programs. Therefore, before the company chooses where it will establish its new plant in a given region in Brazil, it is advisable that it pays close attention to federal, state and municipal programs and incentives to determine which tax incentives it can use.

It is important to stress that the Brazilian government frequently revises the incentives provided in terms of their scope, basic approach to tax benefits, categories and tax rates offered. Hence, companies that intend to take advantage of local programs and incentives must always seek to obtain up-to-date information on such programs and incentives.

In general, governments do not offer cash subsidies to cut

preliminary expenditures on industrial buildings or equipment; this may occur, exceptionally, at municipal level owing to the organization and authority established by the Constitution for each Brazilian state, which determines that municipalities are responsible for property-related taxes.

In the following paragraphs, we will provide an overview of the main tax incentives currently available.

SUDAM and SUDENE income tax incentives

SUDAM and SUDENE are both administratively and financially independent special autarchies with the purpose of promoting inclusion and sustainable development in the North Eastern and Amazon regions. These regions encompass the following geographic regions:

- SUDAM: Acre, Pará, Roraima, Rondônia, Amapá, Amazonas, Tocantins, Mato Grosso, Mato Grosso do Sul, Goiás and part of Maranhão.
- SUDENE: Part of Maranhão, Piauí, Ceará, Rio Grande do Norte, Paraíba, Pernambuco, Alagoas, Sergipe, Bahia and parts of the states of Minas Gerais and Espírito Santo.

The Brazilian Federal Government administers both autarchies and they are affiliated to the Ministry of National Integration. Companies located in the North Eastern and Amazon regions can receive a partial tax exemption of up to 75% on the standard corporate income tax for Brazilian companies.

Eligibility for the concessions depends upon SUDAM and SUDENE's approval of a feasible industrial project for the setup, extension, modernization and diversification in the economic sector considered as a priority for regional development.

SUDAM and SUDENE not only evaluate the project in terms of its technical and economic feasibility, but also verify whether the project is appropriate considering the overall economic development needs of the region.

The tax benefit can only be utilized by companies that calculate their corporate income tax (IRPJ) and social contribution tax (CSLL) according to Actual Profit methodology, in which the tax

base is determined as the accounting profit or loss before taxes adjusted by add-backs and exclusions, and is applicable for a reduction of up to 75% of the income tax (IRPJ) due.

Below is an illustrative calculation of the impact of the SUDAM and SUDENE tax benefits:

CIT calculation basis	BRL	
Profit before taxes	40.189	[1]
(+) Add-backs according to legislation	32.632	
(-) Exclusion allowed	(2.814)	
(=) Actual profit calculation basis	**70.007**	
(-) NOL offset	(21.002)	
(=) CIT calculation basis after NOL	**49.005**	
Income tax (25%)	7.351	
Income tax surcharge (10%)	4.876	
(-) SUDAM/SUDENE tax incentive	(4.141)	[5]
Income tax due	**8.086**	[6]
Social contribution (9%)	4.410	
Social contribution due	4.410	[7]
Total CIT due (Income tax 25% + Social contribution 9%)	**12.496**	[6] + [7]

SUDAM / SUDENE tax incentive	BRL			
Profit before taxes	40.189	[1]		
(+) Add-backs according to legislation	14.832			
(-) Exclusions according to legislation	(23.058)			
Total calculation basis	**31.963**	[2] * [3]		
Calculation basis proportional to incentivized operation	**22.130**	[2]		
Income tax (15%)	3.391			
Income tax surcharge (10%)	2.202			
Total of federal tax incentive	**5.522**	[4]		
% of tax incentive allowed by legislation (75%)	**4.141**	[4] * 75%	= [5]	
Additional information:				
Revenue of SUDAM / SUDENE branch	120.394	69%		[3]
Revenue of other branches	53.498	31%		
Company's total revenue	**173.892**			

Corporate Income Tax deductions

Companies that calculate the Corporate Income Tax (IRPJ) may enjoy certain tax incentives that are considered as deductions from the income tax payable.

These deductions derive from specific programs, such as the workers' meal program, which consists of a program to improve the nutrition of employees; cultural projects and sports incentive programs, intended to promote cultural and sports activities; maternity leave extension, where the full compensation of the employee is paid by the government for a period of four months, enabling the deduction of expenditures in full for purposes of IRPJ calculation if the company extends the maternity leave for another two months.

It is worth mentioning that there are certain particularities, such as thresholds that can be either individual or combined, ranging from one percent (1%) to four percent (4%), depending on the tax incentives adopted by each taxpayer.

Technological Innovation (Tax Incentive Law or *"Lei do Bem"*)

Tax incentives for technological innovation, popularly known as the 'Tax Incentive Law', are offered to companies that invest in technological research, development and innovation. Within such context, technological innovation is defined as the design of a new product or process, or also the inclusion of new functions or characteristics in products or processes, the results of which lead to the improvement or development and effective enhancement of a company's quality or productivity, resulting in higher competitiveness in the market.

This tax benefit can be used by companies subject to Corporate Income Tax (IRPJ) under the Actual Profit regime and basically provides for the following incentives:

- Additional deduction, for purposes of IRPJ, from sixty (60%) to one hundred percent (100%) of total expenditure in technological research, development and innovation, provided that they are, or can be

classified in the future, as operating expenses.

- Accelerated depreciation, in the acquisition year, of machinery, equipment, devices and instruments dedicated to and exclusively used in technological innovation activities.
- Accelerated amortization, in the fiscal year they are incurred, of expenditures classified as deferred assets relating to the acquisition of intangible assets exclusively associated with technological research, development and innovation activities.
- Withholding Income Tax Exemption - IRRF on remittances to non-residents for purposes of registration and maintenance of trademarks, patents and cultivars (cultivated plant varieties) overseas.
- 50% decrease of the Federal VAT (IPI) on machinery, equipment, devices and instruments, as well as on the respective spare parts and supporting tools exclusively used in technological research, development and innovation activities.

It is important to mention that tax incentives for technological innovation do not require prior approval before being adopted. However, taxpayers eligible for the incentive must file the form containing the projects and respective expenditures with the Ministry of Science, Technology, Innovations and Communications (MCTIC) annually, by July 31 of the following year.

"Rota 2030" Program

Provisional Presidential Decree No. 843, published on July 5, 2018, establishes tax incentives for the automotive sector and replaces Inovar-Auto, which was effective until December 31, 2017. One of the main benefits of the new automotive regime is that, in addition to carmakers that manufacture or sell cars in Brazil, all companies that supply auto parts to car and SUV, truck, bus and tractor makers and chassis manufacturers, can be eligible for the program.

The purpose of the new program, which will be effective for the next 15 years, is to support technological development, competitiveness, innovation, automobile safety, environmental

protection, energy efficiency, and increase the volume of vehicles produced in Brazil. The main reason behind the program is that the automotive sector is undergoing an intense transformation with substantial investment in new technologies focused not only on automotive production methods but also on on-board products such as connectivity, mobility devices and passenger and/or product transportation logistics systems.

The tax incentive should be calculated based on the volume of Research & Development (R&D) expenditures in Brazil and may reach up to 12.5% of the amounts spent on such new technologies. The credit can be calculated monthly as from August 2018, and it can be used to offset IRPJ and CSLL due by eligible companies from 2019 onward.

The new legal provision, which is also pending regulation, has established a new tax regime for imported auto parts. Pursuant to the Decree's text, if there is no capacity for local manufacture of the auto parts subject to the tax regime, full import tax relief will be granted for the respective products.

Similar to Inovar-Auto, Rota 2030 will require careful attention in the analysis of the projects and expenditure that will be eligible for the program. Moreover, remaining in the program will require attention with respect to eligibility, monitoring and accountability related to tax incentives.

Basic Production Process (PPB)

The Basic Production Process (PPB) is a tax benefit ordinarily offered to Brazilian companies responsible for the production and sale of goods related to a specific niche of the technology sector (IT and automation goods and services). The PPB corresponds to a minimum set of operations carried out at the plant that characterizes the effective manufacture of a given product and, to this end, basically consists of the minimum length of the manufacturing stages necessary for the manufacture of the respective product.

The incentive initially targeted the IT industry, and was subsequently expanded to include a large variety of electronic and telecommunication products. The PPB benefit is offered to companies operating projects that have been approved by the Ministry of Science, Technology, Innovations and Communications (MCTIC) and they must annually invest a percentage rate of no less

than four percent (4%) of their gross revenues in the domestic market, deriving from the sale of IT and IT-related communication goods and services, in R&D activities within the country.

The tax benefit percentage rates vary according to the eligibility period. Their incentives are basically related to Federal VAT (IPI) and State VAT (ICMS) on transactions involving the circulation of goods and provision of interstate, inter-municipal and communication services.

IPI tax relief adopts the following percentage rates:

- Eighty percent (80%) up to December 2024;
- Seventy-five percent (75%) from January 2015 to December 2026; and
- Seventy percent (70%) from January 2027 to December 2029.

Currently, this benefit has been expanded through Provisional Presidential Decree No. 810, dated December 11, 2017, which became Law No. 13,674, on June 11, 2018, introducing several changes, including the need for, and mandatory performance of, an annual independent audit to examine the projects submitted for MCTIC's approval.

With respect to the ICMS, the benefit varies according to the State in question. Basically, the benefit can be related to a reduction of the ICMS levied on interstate transactions, or also to a tax credit deferral or exemption, or a "special credit". In the case of the State of São Paulo, SF Resolution No. 14, dated February 7, 2013, determines the purpose of the calculation base reduction for industry products and electronic data processing, manufactured by an industrial establishment covered by the provisions of article 4 of Law No. 8,248, dated October 23, 1991 (PBB), reducing the calculation base on domestic shipments made by the manufacturing establishment.

IT Law

The tax incentive known as “IT Law”, governed by Law No. 11,774, dated September 17, 2008, and Law No. 13,023, dated August 8, 2014, grants IT companies (IT and communication goods

and services) that invest in the research and development of hardware and electronic components, a reduction in the IPI rate from fifteen percent (15%) to three percent (3%) on the sale of certain products. Products eligible for IPI rate reduction must be included in the Basic Production Process (PPB), which consists of a process that determines the nationalization level necessary for each type of product, so that it can be considered eligible for the tax incentive.

This tax incentive is given by the federal government to promote investments in innovation in the hardware and automation sector by Brazilian industry.

RECOF *(Regime for Industrial Establishment under Automated Customs Control) and RECOM (Special Input Import Customs Regime)*

RECOF is the Special Customs Regime for Industrial Establishment under Automated Customs Control (the so called "Traditional RECOF") or the Public Digital Bookkeeping System (so called "RECOF SPED"). Such regime allows the beneficiary company to import or acquire goods in the domestic market with suspended tax payment, provided that those goods are utilized to manufacture products for export (there are minimum export volume requirements to be observed).

The regime is very beneficial for exporting companies, as shipment to the foreign market is not taxed and, upon eligibility for RECOF, companies can acquire products with suspended tax payment but will only have to pay taxes on products sold in the domestic market.

The suspended tax payment applies to the II (Import Tax), IPI (Federal VAT), PIS (Contribution to the Social Integration Program) and COFINS (Contribution to Social Security Financing).

The Special Input Import Customs Regime (RECOM) is focused on the custom-made manufacture of certain products; it is a regime that is only applicable to imports made by manufacturing companies on the account and order of the legal entity that ordered the product and is domiciled abroad.

RECOM allows the import, without foreign exchange hedge, of car chassis, bodies, parts, pieces, components and accessories that will be submitted to the manufacture of products for export and

partial sale in the domestic market, upon payment of the Import Tax and suspended IPI tax payment; the IPI levied on the resulting products will be payable on the shipment from the wholesale establishment similar to the industrial establishment.

Both regimes provide for a specific list of products that can be imported under these systems (mainly car, aircraft and electronic parts). There are numerous requirements that must be met, including strict control over the imported inventory. The biggest advantage of these systems is that the products can be imported without a foreign exchange hedge, that is, the foreign party can maintain ownership of the products and hire a Brazilian importer for the production.

REPETRO

REPETRO is a special benefit for the import and export of goods to be used in the economic research, exploration and development of oil and natural gas in Brazil. It allows the export of goods without physical shipment from the Brazilian territory and subsequent import to Brazil under the temporary entry regime.

There are basically three types of benefits: (a) temporary import of foreign equipment exempt from the II (Import Tax), IPI (Federal VAT), PIS (Contribution to the Social Integration Program) and COFINS (Contribution to Social Security Financing); (b) import of raw material, parts and pieces to be used in the production of goods to be exported (drawback), and (c) deemed export, which allows Brazilian suppliers of goods to sell such goods to foreign parties with export-related benefits, but with the possibility of keeping the goods in Brazil. This last REPETRO category must be combined with the subsequent temporary import of goods. The benefits from the State VAT (ICMS) – tax on transactions involving the circulation of goods and provision of interstate, inter-municipal and communication services - may also be available, depending on the provisions of the ICMS law effective in the State in which the activities are performed.

This regime is applicable to companies that are authorized or permitted to explore oil and gas in Brazil and their subcontractors. The import process within the scope of REPETRO is complex and provides for specific requirements, such as an online inventory control with the tax authorities.

REIDI

The Special Regime of Incentives for Infrastructure Development (REIDI), established by Law No. 11,488/07, is a special tax regime created to promote the development and implementation of projects in the infrastructure sector. These projects are specifically developed by companies interested in investing in the transportation, port facilities, energy, health and irrigation sectors.

The main tax benefit is the exemption from payment of the PIS (Contribution to the Social Integration Program) and COFINS (Contribution to Social Security Financing) on domestic and foreign acquisitions. Legal entities must have a previously approved infrastructure project to be eligible for the benefits. These projects must be approved for the implementation of infrastructure works in the transportation, port, energy, basic sanitation and irrigation sectors.

REIDI benefits will be valid for a five-year period, counting from the approval of the infrastructure project by the competent tax authorities.

RECAP and REPES

The Special Regime for Acquisition of Capital Goods for Companies (RECAP) is an important incentive offered to predominantly exporting companies, which consists of a special tax regime with suspended payment of PIS (Contribution to the Social Integration Program) and COFINS (Contribution to Social Security Financing) on the acquisition of fixed assets.

A predominantly exporting company is one in which the revenues deriving from exports during the previous calendar year are 50% or more of the total gross revenue; it should be stressed that the company will assume the commitment of maintaining such percentage rate for the two (2) subsequent calendar years.

On the other hand, the Special Regime for the Export and Service and Information Technology Platform (REPES) is intended to benefit companies specializing in software development and the provision of information technology services.

The incentive is offered in the form of suspended PIS and COFINS payment, levied on the gross sales revenue, when goods to be incorporated in fixed assets and services are acquired by the eligible company. Such incentive will only be offered if the taxpayer

exports an amount of 50% or more of the annual gross revenue from the sale of goods and services.

Special ICMS benefits and regimes

As the ICMS plays an important role in the majority of companies, despite the benefits set forth in the legislation, it is also possible to request a special regime from state governments. A special regime can offer specific ICMS tax benefits that are not necessarily stated in the state legislation.

This is because each State has the authority to regulate domestic ICMS rules, and they aim to attract investments. For this reason, Brazil faces a "tax war" between the States. In order to generate more revenue for the State Government, ICMS benefits are frequently offered in one State without the approval of the CONFAZ (the National Finance Policy Council) which includes the other States. Consequently, some States are frequently questioning the tax benefits granted in one State without being duly approved, by not accepting tax credits of products originated from other states. The situation is complex and controversial.

Upon publication of Supplementary Law No. 160, dated August 7, 2017, tax incentives unilaterally offered by the States could be maintained, provided that the respective States publish in the respective official gazettes a list identifying all regulatory acts relating to tax or financial exemptions, incentives and reliefs and register and file it with the National Finance Policy Council (CONFAZ). Such legal provision gives more legal security to States and those eligible for the tax incentives.

Therefore, companies should pay special attention to the state incentives and regimes during the process involved in determining their site location.

FUNDAP

The Fund for Performance of Port Activities (FUNDAP), established by Law No. 2,508, dated May 22, 1970, and regulated by Decree No. 163-N, dated July 15, 1971, is a special State incentive consisting of the deferral of the ICMS – tax on transactions involving the circulation of goods and provision of interstate, inter-municipal and communication services, due on imports made by trading

companies located in the State of Espírito Santo which, in practice, results in a significant financial benefit.

Chapter 7

Labour Law

Employment Law

The Consolidated Labour Laws or Brazilian Labour Code (CLT) of 1943 contains the country's foremost employment law principles. Since then, however, scattered statutes have been passed regarding social security and pension funds, salary adjustments, strikes, unemployment insurance, prior notice of dismissal, health and safety standards, as well as distinct regulation for some specific professions. The Federal Constitution of 1988 also provides workers with rights that supersede some of those in the CLT. Moreover, on November 11th, 2017, a major reform in labour legislation entered into force (Law 13,467/2017) and modified a number of institutes respecting the labour relations in Brazil.

Briefly, the key points regarding the reform in question are the strengthening of collective bargaining between companies and employees, as well as an increased flexibleness of the law together with diminished State interference in collective labour relations. In addition, important topics such as outsourcing, remote working, arbitration, work day compensation and zero-hour contracts, among others, are now subject to modern regulations aimed at improving legal certainty in employment relations.

Definition of an Employee

The Brazilian Labour Code defines an employee as a person who performs habitual services for and under the direction of an employer (subordination), while receiving payment (salary) as consideration for the services rendered.

Subordination is an essential requirement of the employment relationship. Based on such principle, genuine autonomous workers should be recognized by the Labour Courts as non-employees. According to the labour reform, even if the relationship is exclusive and the services are rendered on a regular basis, an independent arrangement of autonomous work, namely, without subordination, will not imply an employment relationship, neither its' repercussions provided by law.

Companies belonging to a group of corporate entities under the same control, direction or management are jointly liable to the same employment obligations and liabilities as any of the other group's companies. Nonetheless, the legal framework originated by the Labour Reform establishes that the mere fact that they have the same individual or legal entity as a shareholder in two distinct legal entities will no longer be sufficient to imply economic group status among the entities in question.

Employee hiring procedures

Companies incorporated in Brazil do not need prior authorization to hire Brazilian nationals as employees. On the other hand, for foreign employees, a residence authorization (introduced by the New Migration Law - Law 13.445 issued in May of 2017) needs to be obtained prior to applying for a temporary visa which should be granted by the Ministry of Justice.

Every employee must have a Labour and Social Security ID Card, which must be presented to the employer at the time of the admission. Prior to hiring, the employee must also complete a medical examination and provide the employer with a number of other personal documents.

Hiring practices that discriminate against potential employees on the bases of gender, ethnicity, colour, marital status, family situation or age are prohibited.

Employee agreements

Individual labour agreements may be set forth in writing or may be implied from the work relationship or rendering of services between a person and the company. Employers and employees may freely negotiate labour agreements, provided, however, that the provisions of the law and the terms and conditions of the collective bargaining agreements, if any, are always observed.

Duration of individual employment contracts

The term of an employment contract may be for an indefinite or fixed term, the latter permitted only in specific circumstances.

Generally, the term of an employment contract is indefinite, *i.e.* if an indefinite term is expressly stated in a contract or if a contract does not stipulate a term. The new labour legislation also stablishes the possibility of an intermittent work arrangement between the employer and employee (zero-hour contract).

Unions

Although the Federal Constitution of 1988 provides that unions must be founded and organized without any State interference, excluding the requirement of any previous authorization, it also establishes the recognition of only one local union for each economic category (union of companies) or professional category (union of workers). Nonetheless, once enacted, the terms and conditions of a collective bargaining agreement executed between unions are mandatory not only for their affiliates but for all the employees and companies represented by them.

Under the Brazilian legal system, collective bargaining agreements are those executed between the employers' unions and workers' unions, or between the employees' labour unions and a specific company, for purposes of establishing general and normative rules which govern the relationship of a given category of employers and employees.

According to the labour reform of 2017, union contributions are no longer mandatory for those who are not affiliated. Moreover, collective bargaining agreements will prevail over legal rules, including the Consolidation of Labour Laws (CLT), when their

subject concerns: (i) working hours; (ii) annual "banks of hours"; (iii) breaks; (iv) employees' representatives in the workplace; and (v) remote work and intermittent work (zero-hour contract), among other topics.

Remuneration and the minimum salary

Salaries, with the exception of commissions, must be paid at least monthly and in Brazilian currency. Employees are entitled to receive what is known as a '13th Salary', corresponding to one monthly salary, per year.

Part of the remuneration, however, may be paid in kind, *e.g.* when the employer is responsible for providing employees with housing, food and/or clothing.

Remuneration includes not only the employee's fixed salary, but also amounts relating to any commissions and legal benefits (such as the 13th salary, among others). According to the Labour Reform, amounts paid as allowances, travel grants and bonuses are no longer part of the employee´s salary (as they were under the former regime) and thus will not form part of the employment contract nor will they be considered for labour or social security tax bases.

As a general rule, the employee's salary may not be reduced, except in the cases of a few exceptions determined by law.

All workers in Brazil are guaranteed a minimum wage, established by law, equivalent to BRL 998[1] (approximately £197). Collective labour bargaining agreements may establish a so-called "professional salary", which is the minimum wage for a specific class of workers.

Employees with monthly salaries of over BRL 1,903[2] (approximately £374) must pay income tax on a sliding scale of between 7.5% and 27.5%. Employers withhold income tax from the employees and pay it directly to the tax authorities.

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1. Currently, the minimum wage is R$ 998.00; the amount is revised yearly by Governmental authorities.
2. This figure is determined by official Government tables, which may be periodically altered.

Social security and additional contributions

All companies and employees are required to pay monthly contributions to the National Institute of Social Security (INSS) to ensure the payment of retirement salaries, sickness, accident or disability compensations, maternity leave, family allowance, funeral assistance, medical, dental and hospital care through the Unified Health System (SUS). Additional contributions are also owed to fund educational programs for professional enhancement and support of companies, as well as promotion of activities related to the well-being of workers.

On average, the amounts payable by employers in relation to social security and additional contributions are 28% of the monthly payroll.

Employees are assigned percentiles that vary between 8% and 11% of their monthly remuneration limited to a monthly contribution of BRL 643[3] (approximately £126).

Salary increases

In general, the negotiated collective bargaining agreements may establish an annual salary increase and employers have to apply such percentage to the salaries of all their employees.

Other salary increases based upon merit or promotion may be freely negotiated by employers and employees.

Working hours

The regular working period may not exceed 8 hours per day or 44 hours per week, except where, as per an individual contract between the employer and the employee or a collective bargaining agreement, additional hours worked on one day are offset by a reduction in those worked on another day, provided that the total number of work hours does not exceed ten hours per day.

Workdays of more than four hours but less than six, must correspond to an interval for meal and rest of fifteen minutes. On the other hand, workdays of over six hours correspond to a minimum interval of one hour. The labour reform of 2017 brought in the possibility of reducing the aforementioned interval to thirty minutes through a collective bargaining agreement.

Employees are also entitled to a weekly rest period of 24 hours, preferably taken on Sundays.

Compensation for overtime work must be at least 50% greater than the compensation for a regular work-hour.

Holidays and leaves of absence

After each 12-month working period, an employee is entitled to 30 consecutive days of vacation, which must be taken within the subsequent period of 12 months. In addition, the employee is entitled to receive a vacation bonus equivalent to one-third of his/her compensation.

Maternity leave is granted for a period of 120 days. During maternity leave, the salary is paid by the employer which, in turn, is reimbursed by the National Institute of Social Security.

Paternity leave is granted for five days.

Terminations

Individual agreements may be terminated upon expiry of their fixed term, if any, or by the filing of notice from either the employer or the employee.

In the event of termination, the employee is entitled to receive: (a) the balance of his or her pay; (b) the corresponding payment for vacations not yet taken; and (c) a proportionate amount of the Christmas bonus equivalent to the number of months he or she has worked during the calendar year. In the event of fixed-term agreements being terminated without cause, the terminating party must pay damages in the amount of 50% of the compensation established for the remaining term of the agreement. In the case of contracts with an indefinite term, the terminating party must give prior notice of at least thirty 30 days, or payment in lieu of notice and a penalty equivalent to 40% of the balance of the Government Severance Indemnity Fund for Employees (FGTS).

Employees who have attained the temporary employment stability set forth either by law or by collective bargaining

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3. This figure is determined by official Government tables, which may be periodically altered.

agreements (such as union leaders, expectant mothers and employees who have been away from work due to a work accident), may not be dismissed. Such employees with employment stability may only be dismissed with just cause under the conditions determined by the Brazilian Labour Code.

Government Severance Indemnity Fund for Employees (FGTS)

Employers must make a monthly deposit of 8% of each employee's salary on his/her behalf in an account administered by a Federal bank. The deposited funds may only be withdrawn under special circumstances, such as dismissal, retirement, purchase of real estate and death, among others.

For dismissals without cause, employers are required to pay employees an amount corresponding to 40% of the account balance. Currently, an additional deposit of 10% must also be made by the employer, although the corresponding amounts are not paid to the employee who has been dismissed.

Immigration and Expatriate Rights

The visa system for Brazil

A visa is a document issued by consulate offices abroad which allows the entry of a foreign citizen onto a country's territory. It is no different concerning Brazil. The consulate offices abroad, which receive and assess the requests, must comply with the requirements provided by the current law.

The visa policy for Brazil considers the "principle of reciprocity", which is quite simple to understand: when a country requires a Brazilian citizen to hold a visa for entry and stay in its territory, their citizens must also display, for entry and stay in Brazil, a certain type of visa, according to the reason for entry or stay.

Currently, Brazil already has a bilateral agreement with more than 90 countries for the exemption from visas. This exemption is

determined by the Brazilian authorities, always under a reciprocity regime, according to the provisions of the current Brazilian law on migration. But, as the authorities themselves warn, this regime may be altered at any time and without prior notice.

For information on the countries with bilateral relations with Brazil and those in which Brazilian citizens can enter without needing a visa, and also to obtain a list of Brazilian consulate offices abroad, it is best to consult the website of the Ministry of Foreign Affairs of Brazil, at the following address: www.itamaraty.gov.br.

As a rule, the request for a visa for Brazil requires fulfilment of three basic requirements: completion of a specific form, submission of a valid passport and payment of the due taxes.

The visas are classified according to the nature of the trip and the foreigner's interest in staying in Brazil. Never according to the passport submitted. It is crucial that the concerned party knows which visa is suitable for the purpose of their entry and stay in Brazil. Obtaining an unsuitable visa may result in denial of entry.

For each type of visa, the submission of specific documents is required and, in certain cases, depending on the region, you may also have to submit an international immunisation certificate. One of the documents that may be required in certain situations is a letter of invitation.

There is no specific model for the letter of invitation, which is a document drawn up in Brazil for submission by the foreign citizen at the consular office. Nevertheless, some specific data must be included: the full name of the foreign citizen; their country of nationality; the purpose of the visit; and information about the period of time for which the foreign citizen plans on staying in Brazilian territory.

The letter of invitation must be signed by the responsible party in Brazil, with the signature duly authenticated at a Brazilian notary office, and the original document must be sent to the concerned party abroad, to be submitted as one of the documents required to obtain a visa.

The Brazilian consulate offices abroad hold all the information in order for the foreign citizens to be aware the requirements and documents that must be submitted for each type of visa. The foreign citizen should submit their visa request to these consulate offices abroad.

'*Itamaraty*' is the body of the Brazilian government

responsible for the concession of visas to foreign citizens wishing to enter and stay in Brazil. But the processing and concession of visa requests are performed by their offices abroad. A visa for Brazil can never be awarded within national territory, for instance, at airports, ports or any other entry point along the Brazilian border.

Itamaray in Brazil and the Federal Police - the body which controls migration at the Brazilian borders - cannot authorize the entry of a foreign citizen into Brazilian territory without a visa, when one is necessary.

It is important to highlight that obtaining a visa does not mean the foreign citizen has the right to enter national territory.

Whenever a foreign citizen arrives in the country, the immigration police at the airports, ports or any borders will assess the compliance with the minimum conditions for this entry to occur.

The Federal Police, the Ministry of Justice or the Ministry of Labour may also (in relation to individuals who have already entered the country with the proper visa) receive and decide on requests for extension of a stay or residence permits. The Ministry of Labour acts whenever the visa is for work or scientific research purposes in Brazilian territory.

This is a general overview concerning the concession of visas for entry into Brazil. It is always advisable to research and, whenever you feel it necessary, approach the proper authorities for more information on the correct visa for the situation and activity which justifies your stay in Brazil.

Types of visas

In November 2017 Brazil enacted new legislation addressing immigration. Under the current Brazilian immigration rules, foreign nationals may apply for the following types of visa:

- Visitor;
- Temporary;
- Diplomatic;
- Official;
- Courtesy.

Visitor visa

The new Immigration Law made a substantial change regarding the classifications of the types of visas for Brazil. The categories of visas were reduced to five, and some of the subcategories were changed, with the current categories being: visiting, temporary, diplomatic, official and courtesy visas, which may be expanded by new regulations.

The Visitor visa category has not changed much, this being a temporary visa, with the subcategories established as: Tourism, Business, Transit, Artistic or Sports activities. The Visitor visa is designed for people travelling for a short period of time and does not allow remuneration in Brazil (with some reservations).

All Visitor visas are granted for 90 days but it is possible to extend this period for another equal period not exceeding 180 days in one year. It is important to highlight that the Brazilian authorities have the power to reduce the 90-day period if they consider there is a relevant circumstance.

The **Tourism visa** is issued for those traveling for leisure.

The **Business visa** is issued if the visitor will undertake activities including participation in meetings, fairs or corporate events, provide journalistic, film or reporting coverage, prospect for business opportunities, sign contracts, conduct an audit or provide consultation, or operate as an aircraft or vessel crew member.

The **Transit visa** is only for those travelling through Brazil to another country.

The **Artistic or Sports Activities visa** is issued for artistic and sports activities and will not exempt its holder from the need to obtain authorization and registration with the Ministry of Labour to perform artistic activities. This visa also extends to technicians working on shows and other professionals who, on an auxiliary basis, participate in the activity of the artist or sportsperson.

The Ministry of Foreign Affairs will communicate with the Ministry of Labour in relation to visiting visas issued for artistic or sporting activities, for auditing and consulting, or for acting as a vessel's employee, and will state the financial sums to be received by the visitor.

Regarding the remuneration for those within this category, the Immigration Law allows only payment of daily allowances, artists' pay cheques, compensation, or other travel expenses.

The visitor's visa may be transformed into a residence permit or an official or courtesy diplomatic visa in national territory, provided that the visitor fulfils the requirements established by law.

Temporary Residency visas

Temporary visas are granted for foreign nationals who are willing to establish residency in Brazil during the length of time of the visa, provided they can be classified under any of the following categories:

- *health care;*
- *humanitarian:*
- *student;*
- *work;*
- *working-holiday;*
- *as a minister of a religion or as a member of a monastery (or similar) or a congregation or religious order;*
- *voluntary work visa;*
- *investor visa;*
- *family reunification;*
- *artistic or sports activities visa;*
- *due to international agreements;*
- *other provisions according to the Brazilian immigration policy.*

Health Care: Granted to people visiting Brazil for private health treatment provided s/he can prove that they have the financial resources to support themselves in Brazil. The length of the visa is for up to one year.

Humanitarian: Granted for stateless people or nationals of countries suffering severe institutional instability, armed conflict, natural disasters, human rights' violations, or other international humanitarian violations. The length of the visa depends on specific regulations issued by the Brazilian Government in each humanitarian situation.

Student: The Brazilian government may award a temporary

visa for one year to a foreign citizen who wishes to travel to Brazil as a student, either to attend a regular course, an internship, or a study/research exchange programme.

Nevertheless, due to its nature, this visa cannot be for the purposes of immigration or professional activity. As the exercising of a professional activity is prohibited, students who do not comply with this rule may be subject to a fine or, as a last resort, deportation.

The basic proceeding for a foreign citizen to pursue educational study in Brazil, requires them to be accepted by the educational establishment and be granted the student visa. The visa is only awarded by means of presentation of the document which evidences the approval or enrolment in the school or university. One of these documents is the letter of acceptance.

The permanency period of the student visa is one year which may, however, be successively extended for an equal period, in order to allow attendance of the full duration of the chosen course in Brazil.

Whenever there is an extension request, it must be presented to the Federal Police or be subject to the Ministry of Justice's general protocol, thirty (30) days before the termination of the ongoing permanency period of stay.

At the moment of the extension request, if such is the case, the student must communicate the course alteration, the transfer to another institution or any other situation which implies an alteration of the initial conditions which granted the visa.

This temporary visa ('IV'), the study visa, also known as ITEM IV, after its initial concession in the country of origin, obliges the concerned party to enter Brazil within three (3) months, which is considered to be the visa validity term.

Then, once in Brazilian territory, the student must go to the Federal Police Department in their area of residence within thirty (30) days to register themselves and request their residence.

Citizens who wish to study in Brazil may choose from a range of opportunities:

a) **Diverse courses:** primary and secondary school, technical or even language courses;
b) **Graduation:** with the specific documents and proof of conclusion of secondary school or equivalent; a student who wishes to attend a graduation course in Brazil must pay attention to

the calendars and demands of the selection process of each university. Some universities select foreign citizens according to their entrance examinations, whilst others have programmes to receive foreign citizens, and these may adopt a special selection process.

c) **Post-graduation:** besides the specific documents, you should also submit proof of conclusion of a higher education course or equivalent;

d) **Exchange programme:** for students aged between 15 and 18. Exchange programmes are normally managed by educational companies, associations or organizations. In such cases, the entity organizing the exchange programme is responsible for the student's selection and enrolment in Brazilian schools. The student is not required to speak Portuguese. Generally, the exchange programmes envisage a learning period of the national language, either in their country or in Brazil.

e) **PEC-G or PEC-PG participant:** this is a student programme arranged by mans of an agreement and, exceptionally, the visa request is made in Brazil by the educational institution with the concession authorization being communicated to the Consulate at a later date. In this case, the concerned party must prove their participation in a selection process, as well as submit a certificate of participation on the programme; The PEC-C is managed by the Ministry of Education and Ministry of Foreign Affairs, in partnership with the educational institutions participating in the programme, focused on developing countries. The selection process occurs annually in September and the applications must be presented to Brazilian embassies or consulates. It is possible to indicate two course options and two residing cities options. The PEC-PG programme is designed for university professors, researchers, professionals or holders of a higher education degree from developing countries with agreements with Brazil.

There is also a programme called F**oreign Visiting Teacher (PVE)** which supports the visits of foreign teachers invited to pursue doctorate courses at Brazilian institutions.

f) **Religious Student:** for ministers of a religious belief; member of a confessional or devotional institution or monastery (or similar); or a religious congregation or order - besides the general documents, the concerned party must always submit a proof of acceptance from the religious education institution.

g) **Curricular Internship:** this is an educational act with a professional aspect since, besides study, it allows for the execution of an internship with private or public legal entities. There must not be any incompatibility. In this case, the student may receive a grant and all the benefits provided under Brazilian internship laws. This is the only modality which allows an extension to the period of stay once.

As a rule, the necessary documents for the submission of a visa request are as follows:

1. passport with a validity period of longer than six (6) months;
2. completion of the visa request form;
3. document with parent's names;
4. recent certificate of criminal record (issued within the past three (3) months);
5. recent photo;
6. original letter of acceptance document or proof of enrolment with a Brazilian university;
7. evidence of financial standing; for a scholarship student, the proof of the scholarship and its amount;
8. responsibility document, signed by the parents;
9. evidence of health insurance;
10. return ticket to the country of origin; and
11. payment of the correspondent fee at the Consulate.

This does not affect the power of the authorities to request other specific documents relating to each area of study in Brazil.

Every subject area covered by this programme is an excellent opportunity to get to know the country, language and culture, and to live with the local people and discover learning experiences in other spheres.

Work: these visas are granted for those who are going to Brazil to perform labour activities under an existing job proposal which may be either with or without a formal employment relationship in Brazil.

Temporary residency under the work visa may be granted for up to two years, which may be extended for an indefinite period.

A working visa under a formal employment contract requires: (i) an offer of a job under an employment contract subject to Brazilian Labour Legislation, whilst the Brazilian employer may be either a company or a single person; (ii) the employment contract may be for a fixed or indefinite period; (iii) the employee must prove s/he has professional or academic qualifications which are compatible with the job position in Brazil, and which may be assessed by means of a certificate of technical, bachelor or post graduate studies OR at least 12 years of primary education along with four years of experience in a job position which does not require technical, bachelor or post graduate studies OR three years' experience in artistic and cultural activities. The requirements above do not apply to domestic employees, who can also apply for a work visa under an employment contract.

A working visa without a formal employment contract with a Brazilian company and not submitted to Brazilian labour laws may also be granted for the following activities: (i) services or technical assistance for the Brazilian Government; (ii) services rendered under an agreement of international cooperation; (iii) services or technical assistance for private companies; (iv) representatives of foreign financial institutions or similar companies; (v) representatives of foreign private non-profit organizations; (vi) professional training of overseas employees in Brazilian branch, subsidiary or head offices; (vii) employees of international vessels; (viii) trainee and professional internships; (ix) employees of foreign television broadcast companies, newspapers, radio stations or magazines; and (x) auditors and consultants. The length of the visa varies from one to

two years, depending on each of the categories, and may be extended for the same period of time as the first visa granted.

Working-Holiday Visa: for those who travel primarily for purposes of tourism, with the possibility of undertaking paid employment. This visa is granted on the basis of bilateral agreements for those over 16 years of age. Agreement of this type have been established with New Zealand and France. The length of the visa will be as stated in the bilateral agreement. The length of the visa under the agreement made between Brazil and both France and New Zealand is for 12 months.

Minister of religious confession or a member of a monastery (or similar) or of a congregation or religious order: for those visiting Brazil to provide religious assistance without an employment relationship in Brazil.

Voluntary work visa: granted to those willing to perform voluntary and non-paid work for non-profit-organizations.

Investment: It is very important for Brazil to obtain economic cooperation designed to aid the country's development. Both the private and public sectors believe that private initiative should be privileged without any prejudice to the origin of the capital, be it domestic or foreign, which favours the concession of visas to investors, with an undeniable economic dimension.

In recent years, investments in Brazil have been growing in several sectors: agriculture, mining, manufacture, general services, infrastructure, renewable energies and, lately, also in digital technology.

Brazil is proud of the dimension of its market and of the presence of a tradition which equally incorporates foreign and national investors. It is possible to find out about the opportunities that now exist in Brazil, in terms of cooperation or investments, and foreign companies and investors are ready to participate in government programmes and auctions which address these purposes.

Within this context, the presence of investments is extremely important to Brazil, which has improved the regulation and supervision of these activities, as well as the diplomatic follow-up on several countries, with the disclosure of a country with

opportunities, richness and acceptance of foreign interest. This is why investments have grown in several areas, mainly in the contemporary business environment, such as energy sources and technology.

To make investments in Brazil, the it is necessary to have been granted a residence permit, in advance, by the Ministry of Labour. When this residence permit is provided, it is possible to request a temporary visa, which the current law on migration, from 2017, divided into two types:

(I) Temporary visa for the immigrant, being a private individual, who intends to invest in legal entities in Brazil using their own resources of overseas origin

These visas are provided in relation to projects with potential for job or income creation in the country, and are performed through one of three ways provided by law:

1. through an external investment directly made in a Brazilian company, regulated by the Central Bank of Brazil;
2. with the incorporation of a simple or corporate company in Brazil;
3. through other possibilities provided for in the policies for attraction of foreign investments.

The concession of the prior residence permit for an immigrant shall depend on the proof of investment, thus defined as being:

- in foreign currency, at a sum equal to, or greater than, R$500,000.00 (five hundred thousand reais), through the submission of an Investment or Business Plan.
- in an amount lower than R$500,000.00 (five hundred thousand reais), provided that is

not lower than R$150,000.00 (one hundred and fifty thousand reais), for an entrepreneur to establish themselves in Brazil with the aim of investing in innovation and basic or applied research activities, of a scientific or technological nature, always considering, in this case: the originality, relevance, impact and technical innovation aspects.

The submission of the Investment or Business Plan is always mandatory for the authorization of residence for the individual foreign investor. This investment plan must have an execution period of three (3) years and contain the following topics:

a) business definition, with the indication of the sector, description of the service and term for the activities;
b) the purpose of the enterprise: clarifying the importance of the investment for the region and economic sector; including the technologies and services involved, as well as the partnerships and strategies for business development;
c) job or income creation: with the hiring plan relating to the first three (3) years.

Besides this, it must be accompanied by documents which state the articles of incorporation or the investment's beneficiary company; the evidence of the external investment through the Central Bank's system. Other documents or even due diligence for the proof of presence may still be requested by the Ministry of Labour. The residence period has no term.

(II) Temporary visa granted to an administrator, manager, director or executive immigrant with management powers, who is travelling to the

country to represent a commercial company or business conglomerate, who makes an external investment in a company incorporated in the country

The company represented here should demonstrate potential job or income creation in the country. The concession of this type of temporary visa depends on the exercise of the function assigned to this executive, by a contract duly registered with the competent body.

Similar to the previous visa, the residence permit, prior to the issuance of the visa, should be requested from the Ministry of Labour, safeguarding the cases defined in a resolution issued by the National Immigration Council. The residence permit does not imply the automatic issue of the visa.

In the case of assignment of a member to occupy a position on the Board of Directors, Advisory Board, Executive Board, Consultative Committee, Audit Committee or any other statutory body, in an insurance or capitalization company or open private entity, the approval of the immigrant for such position will be submitted by the Private Insurances Office - SUSEP.

In the case of assignment of a manager, with general powers of representation, in a financial institution and other institution for which operations have been authorized by the Central Bank of Brazil – Bacen - the petitioner must submit Bacen’s letter of approval of the assignment of the immigrant for such position.

In the case of assignment of a legal representative of a foreign company operating with air transport and ancillary services, the petitioner must submit a power-of-attorney granting powers to the immigrant and the letter of acceptance of the representative, or his/her alternate, assignment in Brazil, issued by the National Agency of Civil Aviation - Anac.

The previously-granted residence permit must be accompanied by the following documents:

a) evidence of external investment in an amount equal or higher than R$600,000.00 (six hundred thousand reais) by the Administrator, Manager, Director or Executive assigned, through the submission of a specific document from the Central Bank, proving the integration of the investment in the beneficiary company or the exchange contract issued by the Bank receiving the investment; or
b) evidence of the external investment in an amount equal to, or higher than, R$150,000.00 (one hundred and fifty thousand reais) by the Administrator, Manager, Director or Executive assigned, under the same prior conditions, and creation of a minimum of ten new job positions during the two years following the company's incorporation, or entry into service of the Administrator, Manager, Director or Executive; or
c) in the case of investment by a legal person not residing in Brazil, regarding the application of external resources through the Equity Investment Fund (FIP), the petitioner must submit: evidence of appointment of the person who will represent the legal entity (person who will receive the visa) the act of appointment of the person who will represent the legal entity (person who will receive the visa); proof of foreign capital participation and of a transfer corresponding to one of the abovementioned amounts, beside other documents requested.

The residence period deferred in the permit shall always be without a specific term and the

requesting company must communicate to the Ministry of Labour the withdrawal of the Administrator, Manager, Director or Executive, the transfer to another company not belonging to the same group, or even the possibility of the joining of functions, depending on the concession of new residence permits to accommodate these alterations.

Lastly, national capital companies with branches abroad which assign an immigrant to occupy the permanent position of Administrator, Manager, Director or Executive, must comply with all the other documentary requirements, such involving the submission of a power-of-attorney granting powers to the immigrant and the letter of approval of the assignment of the representative or his/her alternate in Brazil.

With all the documents, compliance with the proceedings and the terms, proof of the regularity of the activities, the proven transfer of foreign capital and prior permits from the Ministry of Labour, investment visas are welcome and part of a crucial policy for domestic development.

Family Reunification Visa: This type of visa and residence permit for the purpose of family reunion will be granted, among other circumstances, to an immigrant who has a Brazilian spouse or partner; to the child of an immigrant; or to an immigrant who has a Brazilian or immigrant child to whom a residence permit has been granted; to the first or second degree relative of a Brazilian or immigrant who has a residence permit; to those who have a Brazilian under their care or guardianship; and to the sibling of a Brazilian or immigrant with a residence permit, as long as economic dependence is proved.

The application for a temporary visa for meeting purposes will have a maximum validity period of one year, whilst this period cannot be mistaken for the period of residence. In cases where the marriage between the foreigner and the Brazilian spouse was made by proxy, the visa will not be granted.

An immigrant with a temporary visa for family reunion must register with the Federal Police within 90 days of entering the

country for the purpose of registering the term of residence.

The holder of a residence permit based on family reunion may undertake any activity in the country, including paid work, under the same conditions as Brazilian citizens, in accordance with the law.

The residence permit may be granted to a person who has previously obtained Brazilian citizenship and does not wish or does not qualify to reclaim it. In this case the residence permit may be granted for an indefinite period.

An immigrant or visitor who is in the country and who wishes to apply to regularise their immigration status based on family reunion may apply for a residence permit at one of the units of the Federal Police.

Artistic or Sports activities: this type of visa may be granted to foreign nationals who are visiting Brazil to participate in exhibitions, shows, artistic presentations or meetings, sports competitions or other similar activities, with the intention of staying in the country for a period exceeding ninety days. This visa is applied to all the ancillary staff required to perform the artistic or sport activities.

International Agreements: future bilateral or multilateral international agreements related to immigration in which Brazil is engaged.

- **MERCOSUR Visa**
  The agreement on the Mercosur Residence Visa is valid for: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru and Uruguay. The application for a residence visa must be made at the Brazilian Consular Office in the country where the foreigner is staying, when no work or study visa is required. If the foreigner is in Brazil, they should go to the Federal Police in order to apply for a temporary residence visa based on the Agreement. The process to obtain the residence permit provided for in the Mercosur Residence Agreement begins with the granting of a temporary residence visa of two years' duration and, afterwards, with its ateration to a permanent

residence. Ninety (90) days before the expiry of the two-year period, the foreigner should request the change from temporary residence to permanent residence.
A foreigner who benefits from the Mercosur Residence Agreement has equal civil rights in Brazil. Employment and social security duties and responsibilities are also protected, as is the right to transfer resources, and to name, register and grant nationality to the children of these immigrants.

Diplomatic, Official and Courtesy Visa

The Diplomatic Visa is granted to foreign authorities and employees who have diplomatic status and the Official Visa is granted to foreign administrative staff, where the foreigner is traveling to Brazil on an official mission, on either a temporary or permanent basis, representing foreign Governments or International Organizations recognized by Brazil.

The exercise of remunerated activity in the country, within this category, will depend on the approval of the Ministry of Labour and has the following characteristics:

- Whoever is engaged in paid activity will not have immunity from civil or administrative jurisdiction for acts directly related to the performance of the activity;
- Authorization to engage in paid activity will end when the beneficiary ceases to fulfil the condition of dependent, or on the definitive departure date of the holder from the national territory, after the termination of their duties;
- National legislation will be observed regarding the positions or the private functions of Brazilian nationals;
- The recognition of diplomas and degrees obtained abroad, when necessary for the exercising of the position or the function, will depend on the compliance with the rules and procedures

applicable to Brazilian nationals or foreign residents;

- In the case of regulated professions, the same requirements must be met as those applicable to Brazilian nationals or resident foreigners; and
- The dependents will be subject to Brazilian labour, social security and tax legislation in relation to the activity performed and will pay the taxes and charges arising from the exercise of this activity.

Diplomatic and official visas may be transformed into residence permits, provided that the requirements for obtaining a residence permit are met and all the privileges and immunities resulting from the visa shall cease.

The dependent of a holder of a diplomatic or official visa may exercise paid work in Brazil, subject to Brazilian labour legislation, provided there is reciprocity of treatment in relation to the Brazilian national.

The **Courtesy Visa** is granted to individuals and foreign authorities making unofficial visits to Brazil; spouses, dependents and other family members who do not benefit from Diplomatic or Official Visa status for family reunification; domestic workers of foreign missions based in Brazil or of the Ministry of Foreign Affairs; and foreign artists and sportsmen traveling to Brazil for free and cultural events.

A private employee or domestic worker holding a courtesy visa may only engage in remunerated activity for the employer to which they are bound, being protected by Brazilian labour laws, under the terms established in an act of the Minister of State for Foreign Affairs.

The employer of a courtesy visa holder shall be responsible for the departure of his or her private employee or domestic worker from Brazil, within thirty days of the date on which the employment relationship ceases.

Application to become a Brazilian Citizen by Naturalization

Under the naturalisation criterion, a foreigner will have four options under which they may apply for Brazilian nationality: ordinary naturalisation, extraordinary naturalisation, special

naturalisation, and provisional naturalisation.

- **Ordinary naturalisation** may be requested by foreigners of any nationality provided they have legal capacity, in accordance with Brazilian law; at least four (4) years residence in Brazil; ability to communicate in Portuguese; no criminal record or proof of rehabilitation. With regard to those originating from Portuguese-speaking countries, they must have uninterrupted residence in Brazil for one year and good moral character.
- **Extraordinary naturalisation** can be requested by foreigners of any nationality, as long as they have lived in Brazil for more than 15 years without interruption and without criminal convictions.
- **Special naturalisation** may be granted to a foreign spouse or partner who has been in a relationship with a Brazilian national for more than five years, to a member of the Brazilian Foreign Service in activity, to a person in the service of Brazil abroad, or to a person who is or has been employed in a Brazilian diplomatic mission or consular office for more than ten uninterrupted years.
- **Provisional naturalisation** may be granted to an immigrant child or adolescent who has established residence in Brazil before the age of ten, whilst the naturalisation must be requested by their legal representative.

Stock Option Plans

Stock option plans in Brazil became more frequently used in the 1990s, when large-sized multinational companies started to offer their employees the opportunity to acquire some of the company's shares after a certain length of their employment contract. Nevertheless, up to the present day, there has been no labour legislation, nor any social security legal document that specifically governs stock option plans in Brazil.

Hence, companies and employees are free to stipulate, through specific agreements, the description and conditions of the plan, the employees eligible to participate, the respective costs and related benefits, along with the time limit for the employees to exercise their options, among various other conditions.

Generally speaking, the stock option plans granted by Brazilian companies vary greatly and follow specific structures used by their parent companies all over the world. Moreover, it is possible to note that many publicly traded Brazilian companies are also offering stock option plans to their employees.

It is worth mentioning that Labour Courts in Brazil are extremely protective towards employees. As such, and with very few exceptions, judges and inspectors apply the principle "*in dubio pro operario*" when deciding on labour disputes. In other words, if any doubt remains regarding a particular situation, the interpretation most favourable to the workers' health and safety perspective must prevail.

This is the context in which the following comments on whether any benefits gained by employees through stock option plans may be categorized, or not, as salary under the framework of Brazilian labour law.

According to article 457 of the Brazilian Consolidated Labour Laws, along with the fixed wage amount, other payments regularly provided to the worker by the employer as consideration for the services rendered must also be considered as salary. Nonetheless, according to the Labour Reform, amounts paid as allowances, travel grants and bonuses are no longer part of the employee´s salary (as they were under the former regime), and thus will not form part the employment contract, neither be considered for labour and social security calculation basis.

In this regard, the usual interpretation of the Brazilian Labour Code stipulates that in the absence of any correspondent cost supported by the employee to regularly receive a specific advantage arising from the employment contract, the advantage in question should be considered as salary. This means that if the employee receives a benefit in the form of free shares or stock options (not paying anything for these shares or stock options), the financial gain obtained by the worker in the form of dividends, or especially as proceeds coming from the sale of shares, will be seen as salary and not as the outcome of a commercial transaction.

It is possible, though, to identify a chargeable nature in the transactions deriving from stock option plans whenever the beneficiaries, while exercising the option granted, actually purchase the shares, using their own money, at a fixed value, based upon defined trading criteria, which are not depreciated as to the market value relevant at the time the options were granted.

Another parameter inferred from the rules comprised in the Consolidated Labour Laws, which has served as a basis for interpreting the nature of stock option plans offered to employees in Brazil, is the presence - or absence - of risk.

The Brazilian Labour Code provides that *"An employer is regarded to be any business entity, individual or collective, that, while assuming the risks related to the economic activity, hires, pays and directs the personal rendering of service executed by an individual"* (Article 2).

Therefore, in relation to stock option plans, the interpretation rendered by the Brazilian Labour Courts establishes that the benefits granted are to be considered as salary if the employer bears all the risks of the share's performance and guarantees a future profit in favour of the employee, regardless of the market variations or the company's capital. In summary, when the employer assures positive results to the employee in connection with shares or stock options, these results will be deemed as salary for any and all intents and purposes.

In addition to the abovementioned points, if employees do not participate voluntarily in the stock option plans, the program will probably not be seen as a commercial contract; on the contrary, it will most likely be qualified as compensation for the work performed. Hence, the employees must state their actual intention to participate in the stock option plan in writing, in addition to granting authorization (also written) for discounts to be made from their payslip associated to the investment.

It is worth noting that, according to Brazilian Law, if benefits arising from stock option plans are assumed as salary, they will be considered as part of the basis for labour and social security calculations, and will also influence paid vacation + 1/3 bonus, 13th salary, severance pay and the Government Severance Indemnity Fund for Employees ("FGTS") - equivalent to 8% of the salary amount.

In spite of the aforementioned context, the Brazilian Labour Courts have been frequently ruling to recognize stock option plans

as commercial transactions instead of salary payment, provided that: (i) the employee actually pays for the benefits received in consequence of the stock option plan; (ii) the stock option plan has been subject to the risks of the market as well as to the financial performance of the company. Thus, stock option plans with the actual characteristic of granting the employee beneficiaries the opportunity to invest in the stocks of their employer (company or economic group), even if the offer in question is different from those for regular investors in the market, have not been recognized as salary payments.

Brazilian labour law is distinct from the legislation that rules social security contributions and withholding income tax calculated on salary paid to employees. As such, in addition to analysing the Consolidated Labour Laws, one should also analyse Brazilian tax legislation, in order to determine which sums paid through stock option plans should be taxed for payroll taxes purposes, which tax burdens ranging from 20% to 31.8%.

The first requirement to be evaluated when qualifying stock option plans for social security purposes is whether or not the benefits granted are in compensation for work carried out by the employee, especially in the case of regular payments. It is worth noting that, under social security law, extraordinary gains are exempt from the related contributions.

The lack of specific legislation on stock option plans results in a great deal of uncertainty. While gaps in legislation can be solved through the application of case law, analogy, as well as usage and customs, the excessive protectionism of the judicial system, and the social security authorities' eagerness to collect, strongly affects the outcome of relevant disputes and may lead to imbalanced results.

Within this context, it is worth mentioning that Law No. 12,973, sanctioned in 2014 (providing that some requirements are met), allowed the deduction of payments of stock-based remuneration for corporate income tax purposes after their accounting recognition, which can be done by corresponding credit in cash, other asset or net worth (transferring the ownership of the shares).

Some controversy still remains, however, regarding the nature of financial gains related to stock option plans. Fortunately, specific key parameters have, nevertheless, been established by Brazilian Labour Courts to avert the salary nature regarding stock option

plans, and to consider such plans as *"a contractual benefit"*, with parameters such as: a) the stock option plan should clearly represent an investment opportunity in the company's shares; b) participation in the plan must be optional, in other words, never imposed; c) an effective disbursement should be made by the beneficiary for the exercising of the options and acquisition of the corresponding shares; d) the beneficiary must bear the risks of fluctuation in the shares' value; e) the benefit granted must not be directly connected to performance or productivity targets.

Chapter 8

Banking Law

The Brazilian Securities and Exchange Commission

Overview

The key laws dealing with capital markets in Brazil are Law No. 6,385, dated December 7, 1976, as amended (or the "Brazilian Securities Law"), and Law No. 4,595, dated December 31, 1964, as amended (or the "Banking Law"). In addition, Law No. 6,404, dated December 15, 1976, as amended (or the "Brazilian Corporation Law"), contains relevant provisions for the regulation of the Brazilian capital markets.

The Brazilian Securities Law created the Brazilian Securities and Exchange Commission *(Comissão de Valores Mobiliários* or *"CVM"),* and regulates the overall operation of the Brazilian capital market, public offering of securities, listing of securities on exchanges, disclosure requirements, activities of brokers and intermediaries, types of securities negotiated and the types of companies that can be traded on the Brazilian capital market.

The Banking Law, meanwhile, created the National

Monetary Council *(Conselho Monetário Nacional* or *"CMN"),* and regulates the overall operation of the Brazilian banking market, including currency and credit policies. In addition, the Central Bank of Brazil (or "Central Bank") regulates details about the banking market, types of financial institutions, and types of financial transactions (including exchange transactions).

The regulation of the Brazilian capital markets is also made through resolutions, circulars, instructions, opinions, deliberations and other administrative rules issued from time to time by the CMN, Central Bank, CVM and self-regulatory organizations, such as the stock exchanges, the organized over-the-counter markets ("Organized OTC") and the Brazilian Association of the Financial and Capital Markets Entities (*Associação Brasileira das Entidades dos Mercados Financeiro e de Capitais* or "*ANBIMA*").

CVM

The CVM is a governmental agency that is bound to the Ministry of Finance and is one of the regulatory and supervisory authorities of the Brazilian capital market. The CVM is managed by a board composed of a president and four officers who are appointed for a five-year term of office by the President of Brazil after being approved by the Brazilian Senate. Each member of the board must have a flawless reputation and recognized expertise in the securities market. Re-election is not permitted and one fifth of the board must be replaced every year. Members of the board are removed only if they resign or are convicted in a final decision taken within a judicial or disciplinary administrative procedure.

The CVM is responsible for regulating and supervising the Brazilian capital market and their participants in order to: (1) promote the expansion and the efficient and proper functioning of the Brazilian capital market; (2) protect security holders and investors against the irregular issues of securities, illegal actions of publicly-held company directors, officers and controlling shareholders, as well as use of material information not yet disclosed to the market; (3) avoid or inhibit any kind of fraud or manipulation that may give rise to artificial demand, offer or price formation in the Brazilian capital market; and (4) ensure public access to material and useful information concerning the securities being traded and their issuers. The CVM is also incumbent to

granting and administering publicly-held companies and public offering registrations under the Brazilian capital market.

The CVM also has police powers over all participants in the Brazilian capital market. These participants include brokers, dealers, financial institutions, stock exchanges, organized OTC markets, publicly-held companies, investment fund portfolios and custodians, independent auditors, consultants and market analysts.

The CVM may take actions and impose administrative sanctions on any person or entity that fails to comply with the Securities Law, the Brazilian Corporation Law and other regulations that the CVM is responsible for enforcing. The primary sanctions that the CVM may impose include: (1) issuance of warnings; (2) pecuniary penalties; (3) suspension of the registration or authorization to participate in the Brazilian capital market; (4) temporary prohibition from participating in the Brazilian capital market; and (5) suspension and removal of directors and officers of breaching companies, including companies participating in the Brazilian securities distribution system. In addition, a party in breach of Brazilian securities regulations is also subject to civil and criminal liabilities.

The CVM and International Securities Regulation

The CVM interacts with its counterparts around the world in several ways. It is a member of the Council of Securities Regulators of the Americas - COSRA, and the International Organization of Securities Commissioners - IOSCO.

To date, the CVM has entered into memoranda of understanding concerning information sharing and legal assistance with the securities regulators in the following countries: United States of America (the SEC and the Commodities Future Trading Corporation), Germany, Argentina, Australia, Bolivia, Canada/ Quebec, Cayman Islands, Chile, China, Ecuador, Spain, France, Greece, Hong Kong, Israel, Italy, Luxembourg, Malaysia, Mexico, Paraguay, Peru, Portugal, Romania, Russia, South Africa, Singapore, Thailand and Taiwan.

CMN

The CMN is the main structure of the National Financial System and is one of the regulatory and supervisory authorities of

the Brazilian banking market. This council is composed of the Finance Minister, Minister of Planning, Development and Management, and President of the Central Bank. The board of the CMN meets at least once a month to set out rules, especially about currency and credit policies, and to regulate the internal value of the Brazilian currency (adjusting inflation or deflation situations) and the external value of the Brazilian currency (evaluating national finances and payments).

The CMN also has to: (1) verify the financial transactions volume of the Brazilian market; (2) coordinate policies (monetary, credit, budgetary, fiscal and public debt); (3) establish conditions for the Central Bank to issue paper money; (4) establish the guidelines and rules of the foreign exchange policy; and (5) establish limits for interest rates, commission and other form of remuneration for banking or financial services in Brazil.

Central Bank

In this sense, the Central Bank is a government agency that is bound to the Ministry of Finance and executes all the CMN's financial guidelines.

The Central Bank has to (1) issue paper money; (2) supervise capital flows; (3) set out rules about financial transactions; (5) analyse the solicitation to become a financial institution, approving or rejecting the banking license; (6) regulate foreign exchange; and (7) impose sanctions for non-observance of the regulations applicable to financial institutions.

In addition, the BCB is empowered to intervene in financial institutions or place them under special administrative regimes and to supervise compulsory liquidations.

Brazilian financial institutions can operate under many forms all of which are regulated by different rules issued by the Central Bank and the CMN. The main types of institutions that are engaged in the financial market are: (1) multiple banks (*bancos múltiplos*); (2) investment banks (*bancos de investimento*); (3) development banks, such as the National Bank for Economic and Social Development (*BNDES*); (4) exchange banks (*bancos de câmbio*); (5) credit, financing and investment companies; and (6) other types of financial institutions and equivalent entities, such as co-operative banks, credit co-operatives, commercial lease companies, securities

brokerage companies, securities distributor companies, exchange brokerage companies, real estate credit companies, mortgage companies and development fostering organizations.

Moreover, there are two new types of financial institutions. As per Rule 4,656, dated April 26, 2018, the Central Bank introduced tech financial institutions - FINTECHs, which must have an online financial operation. A Direct Credit Company (*Sociedade de Crédito Direto - SCD*) uses shareholders' capital to operate its credit transactions and a Peer to Peer Company (*Sociedade de Empréstimo entre Pessoas - SEP*) links creditors with debtors, for a fee.

B3

Overview

B3 S.A. – *Brasil, Bolsa, Balcão* ("B3") is one of the world's largest financial market infrastructure companies, providing trading services in an exchange and OTC environment.

The scope of their activities includes the creation and management of trading systems, clearing, settlement, deposit and registration for the main classes of securities, from equities and corporate fixed income securities to currency derivatives, structured transactions and interest rates, and agricultural commodities. B3 also acts as a central counterparty for most of the trades carried out in its markets whilst also offering central depository and registration services.

In the area of vehicle and real estate financing, B3 offers products and services that streamline local credit analysis and approval throughout Brazil, making access to secured loans easier, faster and safer. In vehicle financing, it is a leader in the provision of electronic delivery of the information required for the registration of contracts and annotations of encumbrances with traffic authorities.

Special Listing Segments

In addition to the traditional listing segment, in December 2000, B3 launched three special listing segments: *Nível 1, Nível 2* and *Novo Mercado*. Each special listing segment includes companies that

agree, on a voluntarily basis, to adopt the principles of corporate governance standards as well as those required by the Brazilian Corporation Law. Each of these special listing segments has its own rules which determine different obligations. Nevertheless, the capital stock shares of every company listed on the B3 special listing segments are traded together.

The *Novo Mercado* segment demands the highest standards of corporate governance and disclosure requirements among B3's special trading segments. Publicly-held companies listed on the *Novo Mercado* segment have to comply with a number of obligations, including: (1) their capital stock must be solely represented by common shares (voting shares); (2) in their public share offerings, they must endeavour to make their best efforts to favour capital dispersion and broader retail access; (3) they must have a free float of at least 25%; (4) the controlling shareholders must tag along minority shareholders' stakes at the same conditions afforded to them, in the case of a sale of their controlling stake; (5) at least 20% of the members of their board of directors must be composed of individuals who are not related to them, their management or controlling shareholder; (6) the president of the company's board of directors and its CEO must not be the same person; (7) they (or their controlling shareholder, as the case may be) must launch a tender offer at the economic value of the publicly-held company, in the case of delisting from the Novo Mercado or cancellation of registration as a publicly-held company; and (8) they must comply with additional disclosure requirements concerning their quarterly and annual financial statements, including their translation into English.

The *Nível 2* segment provides similar standards of corporate governance as the Novo Mercado segment. However, the capital stock of publicly-held companies listed on the *Nível 2* segment may be represented by preferred shares (with restricted or no voting rights). In this case, holders of preferred shares are entitled to voting rights on a number of matters, including: (1) the transformation, consolidation, merger or spin-off of the publicly-held company; and (2) agreements between the publicly-held company, on the one side, and the controlling shareholder, on the other.

Publicly-held companies listed on the *Nível 1* segment have to comply, amongst other requirements, with the following obligations: (1) in their public share offerings they must endeavour to make their best efforts to favour capital dispersion and broader retail

access; (2) they must have a free float of at least 25%; (3) the president of the company's board of directors and its CEO must not be the same person; and (4) they must comply with additional disclosure requirements concerning their quarterly financial statements.

In addition, a company may apply to list the shares of its capital stock on BOVESPA MAIS, a segment for small and incipient companies that agree to guarantee more rights and information to investors.

Trading on B3

B3 makes the "homebroker" system available to investors. Through the "homebroker" system, investors place orders through the Internet to their brokers, which, in turn, are linked to the electronic systems of B3.

To control price volatility, B3 uses the "circuit breaker" system, by which it suspends trading sessions for 30 minutes or one hour whenever the B3 index falls below the limits of 10% and 15%, respectively, in relation to the closing index levels of the previous trading session.

Clearance and settlement of transactions involving the trading of securities on the B3 occurs after the trading date, and may take fewer or more days depending on the securities that are traded. For example, transactions involving the trading of shares usually take three business days for clearance and settlement.

Trading on the B3 is restricted to authorized brokerage firms. Trading sessions take place from 10:00 a.m. to 5:00 p.m. (BRT) or 11:00 a.m. to 6:00 p.m. during daylight savings time in Brazil. Trading is also permitted from 5:45 p.m. to 7:00 p.m. (BRT) or from 6:45 p.m. to 7:30 p.m. during daylight savings time, under a differentiated trading period called "aftermarket". Aftermarket trading is subject to regulatory limits on price volatility and on the volume of securities traded by investors through the Internet.

Public Offerings

Public offerings of Securities are an important means of corporate financing, the main characteristics of which are its appeal

to an uncertain group of investors and access to popular savings. Given such characteristics, the access to this market is restricted and heavily regulated in order to protect the public investor, promote a secure market environment and, therefore, stimulate the development of - and interest in - the capital markets.

The Brazilian capital markets is mainly regulated by Law 6,385, dated December 7, 1976, as amended, and Law 6,404, dated December 15, 1976, as amended, as well as by regulations issued by the CVM, especially CVM Ruling No. 400, dated December 29, 2003, as amended, which sets forth the legal regime for the public offering of securities.

Public investor protection, in the context of public offerings, takes place mostly in the promotion of an effective disclosure system, which should allow investors to take an investment decision on the securities issued by a relevant issuer based upon complete, accurate, precise, true, updated, clear, objective and necessary information relating to its business or financial condition, as well as all other material information. Such information is reflected in the Prospectus and, recently, in the Reference Form of the issuer, prepared pursuant to CVM Ruling No. 480, dated December 7, 2009, both made available to public investors during the market sales efforts of the public offerings.

One of the most important themes related to public investor protection within the context of such transactions is the liability of the issuer and the financial institutions which play the role of coordinators of public offering of securities. Such liability arises from the fact that the underwriters are, among the other institutions who act in public offerings (attorneys, auditors, consultants and the issuer itself), the most qualified party and those with the best means of performing due diligence on the disclosure material prepared by the issuer.

Moreover, CVM Ruling No. 400 expressly and solely assigns to the lead coordinator the liability "to take all cautions and to act with high standards (and) methods of diligence to ensure" the quality and sufficiency of the information prepared by the issuer and made available to the public in general during public offerings. Such liability ceases only when the diligence of the lead coordinator can be sufficiently proven, by means of, for example, the performance of studies, hiring of experts (such as lawyers and auditors), and the carrying-out of a number of investigations in the process of such

public offerings. At the same time, one should bear in mind that the issuer is also liable for the truth, quality and sufficiency of the information disclosed in the offering materials.

International practice has established certain procedures which are deemed sufficient to ensure the effectiveness of such investigations carried out by the lead coordinator, as a means of successfully proving its diligence, amongst which one can mention the following:

(i) Due diligence process, which consists of verifying documents that support the description of the issuer and its' businesses, including material agreements, corporate acts and legal proceedings, resulting in a legal opinion to be issued by the external lawyers of the issuer and the underwriters;
(ii) Back-up request, the main goal of which is to certify the accurateness and quality of the operational (non-accounting) information of the issuer, as described in the offering materials, such as the production capacity of a certain facility or the number of employees hired by each branch of the issuer; and
(iii) Circle-up request, which consists of reviewing the figures and accounting information, as described in the offering materials, visa-vis the financial statements and the accounting records of the issuer, resulting in the issuance of a comfort letter by the issuer's independent auditors.

Notwithstanding the great burden of liability assigned to the underwriters, especially to the lead coordinator, in the context of public offerings, as mentioned above, it is important to highlight that, according to Brazilian Law, they will only be liable for their lack of diligence during public offering processes. In other words, the ultimate liability for possible insufficiency and inaccuracy of the information disclosed in the Prospectus and the Reference Form pertains to the issuer, and the underwriters may only be held liable to the extent that they have not acted with a high standard of

diligence in their professional activities.

Finally, CVM Ruling No. 400 sets forth that any of the institutions (coordinators, attorneys, auditors, consultants, the issuer itself, and their employees) which act in a potential or projected public offering should not, until the offering is made public, disclose any information about the projected offering to the public. Furthermore, when the offering becomes public, the parties involved in it must not make any statement by any mean of communication until the offering has been completely finalized.

Debentures

Overview

Debentures are credit instruments representing loans for their issuers, and are used in Brazil just as bonds are in international capital markets. In addition to the Brazilian Corporation Law, deeds of issuance and receipts representing debentures determine the rights (credit, political or otherwise) to which debentures entitle their holders.

One important feature of debentures is their flexibility, as they may be tailored to better fit a certain transaction. As such, Brazilian capital markets laws and regulations permit the issue of debentures through one or more series, the option of their convertibility into shares of the issuer's capital stock, the creation of different types of guarantee and the selection of a convenient form of remuneration, and a maturity term vis-à-vis each issuer's needs.

Issuance and face value

A company may issue debentures more than once and each issue may be divided into a series. The general shareholders' meeting is primarily incumbent to issuing debentures; however, in publicly-held companies, the board of directors may decide on the sole issue of non-convertible debentures that are not secured by in rem guarantees.

Debentures of the same series must have the same face value and must entitle their holders to the same rights. The face value of the debenture is expressed in Brazilian currency (Real); however, in

specific cases, Brazilian law permits that the face value is expressed in foreign currency. The face value may be adjusted in line with updating indexes applicable to public debt instruments, exchange rate variation or other indexes that are not expressly prevented by Brazilian law.

Guarantees

Debentures may be secured by: (1) in rem guarantees (*e.g.* the pledge of a certain asset or assets, escrow of receivables or mortgage on real properties); or (2) floating charge-like guarantees (*garantia flutuante*), *i.e.* a general privilege of the debenture upon the issuer's assets, which, however, does not prevent transactions concerning such assets from taking place.

Debentures may also be unsecured by any guarantee and: (1) grant to their holders the same rights as to the general creditors of the issuer (unsubordinated debentures); or (2) rank after the general creditors of the issuer but before its shareholders (subordinated debentures).

In addition, debentures may count on the personal guarantee (*fiança*) of the controlling shareholders of the issuer or a third party. The guarantees may be cumulative, *i.e.* one series of debentures may be secured by a floating charge-like guarantee and another by an in rem guarantee affecting a particular asset or assets of the issuer.

New issues of debentures with floating charge-like guarantees are subordinated to prior issues; however, debentures from the same issue must be treated equally.

As long as it is regularly registered with the competent public officials, the commitment of the issuer to not dispose or encumber any of its real properties is enforceable against third parties.

Conversion

Debentures may be convertible into shares of the issuer's capital stock. Shareholders in the issuer have pre-emptive rights to subscribe for newly-issued convertible *debêntures*.

Maturity

Maturity terms of the debentures may be freely determined; they may have short, medium, or long-term maturities

or even be "perpetual", depending on the specific circumstances of each transaction.

The maturity date may be pre-determined or subject to certain events, including default in the payment of interests or dissolution of the issuer.

Fiduciary Agent

The fiduciary agent represents the holders of debentures before the issuer, and is formally appointed in the deeds of issuance of the debentures. The appointment of a fiduciary agent is mandatory whenever the debentures are publicly distributed in the market.

The fiduciary agent may be an individual or a financial institution as long as they fulfil certain requirements (*e.g.* financial institutions must have the management and custody of third parties' assets as their corporate purpose and be authorized as a fiduciary agent by the Central Bank of Brazil).

Placement

Debentures may be placed either privately or publicly. As opposed to a private offering, the public offering of debentures must be previously registered with the CVM and, therefore, are subject to a greater number of requirements from the Brazilian capital markets laws and regulations. In addition, public offerings must be underwritten by financial institutions authorized as such by the Central Bank of Brazil and the CVM.

CVM Ruling No. 400, dated December 29, 2003, as amended (*Instrução CVM No. 400* or "CVM Ruling No. 400"), is one of the main rules applicable to the public offerings of debentures in Brazil. On March 22, 2006, through CVM Ruling No. 429 (*Instrução CVM No. 429* or "CVM Instruction No. 429"), the CVM created the automatic registration of public offerings of debentures.

Automatic registration is usually in effect within five business days of the filing of the required documents with the CVM and the commencement of the public offering, and may only be used for non-convertible debentures, with or without a guarantee, provided that: (1) the distribution program under which the debentures are to be issued is filed with the CVM in advance under CVM Ruling No. 400 and the offering is conducted

in accordance with the self-regulation code for the public offering of securities from ANBIMA; or (2) the debentures are offered to less than twenty investors.

Public offerings of debentures may also be launched under one of two simplified registration procedures put in place by Brazilian capital markets regulations. Under CVM Ruling No. 471, dated August 8, 2008 (*Instrução CVM No. 471* or "CVM Ruling No. 471"), before anything else, ANBIMA analyses the required documents provided for the registration of a public offering of debentures and recommends its registration to the CVM in a fast-track reviewing procedure or recommends against it. CVM Ruling 404, dated February 13, 2004 (*Instrução CVM No. 404* or "CVM Ruling No. 404"), regulates the so-called 'standardized debentures', for which it establishes a simplified registration procedure and standard clauses and conditions to be adopted in deeds of issuance of debentures that are designed for trading on a special segment of stock exchanges or entities of the organized over-the-counter market.

In addition, under Ruling No. 476, dated January 16, 2009 (*Instrução CVM No. 476* or "CVM Ruling No. 476") Brazilian capital market regulations do not require registration for public offerings of debentures that are distributed to a maximum of seventy-five investors of which there is a limit of fifty which may be subscribed. CVM Ruling No. 476 was an important step towards the simplification of securities offerings in Brazil, allowing companies access to capital markets and, therefore, providing a flexible and cost-efficient procedure to raise funds within a shorter time frame than normally required for public offerings.

Mortgage and Securitisation Companies

The SFI

Federal Law No. 9,514, dated November 20, 1997, introduced regulation on the Real Estate Financing System (*Sistema de Financiamento Imobiliário* - "SFI"), into the Brazilian legal environment. The main purpose of the law is the promotion of real

estate financing, according to conditions compatible with the creation of the respective funds.

According to this Law, the SFI may be operated by public savings banks (*caixas econômicas*), commercial banks, investment banks, banks with real estate credit activities, real estate credit companies, savings and loans associations, mortgage companies, securitization companies and any other entities determined by the CMN.

This section will look at mortgage and securitization companies, which are considered to be the new financial instruments that have resulted from the law that established the SFI.

Mortgage Companies

Mortgage Companies can be defined as those companies which have as their corporate purposes:

- the granting of financing specifically for the purposes of construction, refurbishment or sale of commercial or residential units and urban land;
- the purchase, sale and refinancing of mortgage credits, being either their own or those acquired from third parties;
- the administration of mortgage credits, be they their own or those belonging to third parties;
- the administration of real estate investment funds, provided that prior authorization from CVM is obtained;
- the transfer of funds to be used for the financing of construction or acquisition of residential units; and
- the conducting of any other transactions previously and expressly approved by the Brazilian Central Bank (BACEN).

Mortgage Companies (and their incorporation, organization and operation) are mainly regulated by Resolution No. 2,122, which was issued by BACEN, on behalf of the CMN, on November 30th, 1994.

As a general rule, Mortgage Companies are incorporated under the corporation structure (*sociedade por ações*, regulated by Law No. 6,404/76), and the expression "Mortgage Company" needs

to be part of their corporate name. In addition to this, they are considered to be financial institutions, meaning that their incorporation and operation is subject to the approval of BACEN. Although considered to be financial institutions, Mortgage Companies are not subject to the same rules of the SFH, and cannot be converted into commercial banks.

In addition to the activities that may be performed by Mortgage Companies, as described above, they may also:

- issue mortgage bills and mortgage deeds, as authorized by BACEN;
- issue debentures;
- contract loans, in Brazil and abroad;
- conduct any other means of fund raising, provided that the means elected are approved by BACEN.

BACEN's regulations further establish the limits for financial application, the minimum paid-up capital and net worth for a Mortgage Company to operate, as well as the need for the financial statements of mortgage companies to be audited by independent auditors registered with the CVM.

Securitization Companies

The corporate purposes of Securitization Companies, which are not considered financial institutions, are incorporated under the corporation structure, their purposes being the acquisition and securitization of credits, and the issuance and release, to the financial market, of (a) Real Estate Receivable Certificates (*Certificados de Recebíveis Imobiliários* - "CRI"); (b) Agribusiness Receivables Certificates (*Certificados de Recebíveis do Agronegócio* - "CRA"); and Banking Credit Notes (*Cédulas de Crédito Bancário* – "CCB").

The CRI may only be issued by Securitization Companies, and may be defined as a credit title that may be freely negotiated, which is based upon real estate credits, and constitutes a promise of payment in cash.

The main elements of the CRI, CRA and CCB are:

- the name of the issuing company;
- the order number, place and date of issue;
- the reference that it is a CRI;
- a script format;
- the name of the title holder;
- the payment date or, if it is issued for payment in instalments, the amounts and maturity dates of each instalment;
- the nominal value;
- the interest rate;
- the adjustment rules;
- the place of payment; and
- identification of the Securitization Credit Term that gave origin to the CRI.

Furthermore, CRI, CRA and CCB may have a floating guarantee, which grants the CRI a general privilege in relation to the assets (considered as a whole) of the Securitization Company, in case of liquidation (but which does not impair the negotiation of the assets individually).

The securitization of real estate credits, in turn, is defined as the transaction according to which real estate credits are bound to an issuance of bonds, according to a "Credit Securitization Statement". This is drafted by a Securitization Company, of which the following elements should be a part:

- the identification of the debtor and the nominal value of each credit on which the issuance is based, indicating, on a single basis, the real estate to which the credit is bound, and the competent Real Estate Registry, with details of the Real Estate Registration (matrícula);
- the identification of the bonds issued;
- the granting of any other additional redemption guarantee, if applicable.

Investment Funds

Market Overview

Over recent years, the investment funds industry in Brazil has become a popular alternative for Brazilians who used savings accounts as their primary source of investments.

According to the Brazilian Financial and Capital Markets Association (ANBIMA), which is the self-regulator of investment funds in Brazil, in December 2015 the Brazilian fund industry had a total net equity worth of about BRL 2.9 trillion (USD 800bi). Nowadays, based on ANBIMA's latest 2018 report, the funds industry has reached a total net worth of about BRL 4.4 trillion (USD 1.2bi).[1]

This industry keeps increasing in size as the publicity of the segment is on fire, and it tends to spread even more among different types of investors as it provides more options of investments with similar or even lower fees than those charged by large banking corporations. A professional and dedicated management team will ensure the profits are also higher than a regular fixed income investment.

In light of the above, we would here like to provide an overview of the different types of existing investment funds in Brazil, their regulations and main characteristics.

To present a better understanding of the investment fund industry, we have divided this overview into two groups of funds: (i) the retail funds, which are regulated by CVM Ruling 555 on October 1, 2014; and (ii) the investment funds regulated by specific regulations, such as the private equity funds, real estate funds and receivable funds, designated as alternative funds.

Ruling 555 is not only the main regulation for retail funds, but also provides guidance for all types of investment funds in Brazil. Because of its importance and secondary applicability in regulating alternative investment funds, we will first provide a detailed explanation of Ruling 555. The alternative investment funds will be explained in accordance with each specific regulation.

Common terms for Investment Funds

Concept and Constitution of Investment Funds

Investment funds are a collection of assets jointly owned by investors whose goals will depend on the type of investment funds

chosen. The investment funds are not constituted as an independent legal entity, and the quotaholders will always be liable for the debts and obligations of the investment fund unless the portfolio manager or the administrator is held liable for fraud, negligence or wilful misconduct. It is important, however, to highlight that the responsibility of the quotaholders is limited to the amount of capital they have subscribed to the fund.

In this sense, from the investor's perspective, by subscribing capital to a fund, they are acquiring a "quota", which represents their rights over the fund's portfolio in proportion to the amount of quotas they have subscribed. Therefore, the investor will always have rights over all the fund's assets in proportion to the amount of quotas they hold.

Even though investment funds are not considered independent entities or companies in themselves, they are liable to taxation. In this sense, investment funds are generally able to sue and to be sued.

The main document of any investment fund is its bylaws, which regulate the management of the assets, the investment policies and all the rights acquired and owned by its quotaholders.

In addition, the investment fund, which is represented by its administrator for regulatory purposes (a description of service providers is provided below), must inform the CVM and disclose material facts or acts that could somehow affect the fund or the assets of its portfolio with a letter to all its quotaholders on a regular basis. The disclosure of material facts allows the quotaholders or prospective investors to access information that may reasonably influence quota prices or alter the investor's decision to purchase new quotas, or sell or redeem existing quotas.

Furthermore, each of the investment funds mentioned in this article must follow specific regulations guiding their formation and registration before the CVM. In this sense, it is always necessary to register the investment fund with the CVM. The necessary documents will vary according to the specific applicable rule. Usually, the registration procedure requires the following documents: (i) the fund's bylaws; (ii) evidence that the fund's bylaws

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1. http://www.anbima.com.br/pt_br/informar/estatisticas/fundos-de-investimento/fi-consolidado-historico.htm

have been registered at the title and deeds registry office; (iii) indication of the name of an independent auditor; and (iv) the fund's memorandum or prospectus, when applicable.

It is important to emphasize that the authorization for operation will usually be automatically given after completion of the application and the documents mentioned above. Furthermore, to start functioning, it is necessary to distribute the fund's quota in a public offering (see the section entitled "Public Offering"), so that the target audience can invest in it.

Open-ended and Closed-ended Funds

Investment funds are also divided into two different types, regarding their redemption: (i) open-ended funds; or (ii) closed-ended funds.

In open-ended funds, the quotaholders are able to request redemption at any time in accordance with the fund's bylaws.

On the other hand, with closed-ended funds, distribution is only permitted upon termination of the investment fund's term or redemption on a few occasions during the year as provided by the fund's bylaws and when such occasions have been approved by quotaholders at a quotaholders' meeting.

In addition, quotas in open-ended investment funds may not be traded on the secondary market. Investors may only exit the investment by redeeming their quotas in accordance with the terms and procedures set out in the fund's bylaws. However, quotas in a closed-ended investment fund are listed for trade on the secondary market or on the stock exchange.

As set forth below, some alternative funds are structured only as closed-ended funds in accordance with the CVM's regulation.

Main Services Providers

Investment funds in general have the following service providers, whose duties and obligations towards the fund are set forth in specific regulations:

(i) fiduciary administrator, *i.e.* the legal representative of the fund. S/he creates its bylaws and, later on, ensures, defends, and protects the rights of the investors/quotaholders;
(ii) portfolio manager, *i.e.* the professional manager

and the one responsible for the asset portfolio; responsible for studying the assets and looking after the investments;

(iii) custodian, *i.e.* the financial institution that will perform operational duties and safekeeping of the investment fund's assets;

(iv) distributor, *i.e.* the intermediary hired to distribute (or coordinate the offerings of) its quotas; and

(v) independent auditor, who will examine the records of the fund.

All the service providers mentioned above must be hired by the fiduciary administrator on behalf of the investment fund.

Administrators and portfolio managers are the most common service providers of investment funds. Both need to be authorized in advance by the CVM as regulated by Ruling 558, enacted by the CVM on March 26, 2015.

The replacement or removal of the fund's service providers must be approved at a quotaholders' meeting following the procedures described under the fund's bylaws.

Furthermore, the bylaws should stipulate the administrator's remuneration with regard to its sum and its due date. The administrator's fees should be sufficient to remunerate both the administrator and the fund's service providers. If the administration fee is not sufficient for the payment of the expenses mentioned above, the administrator will be responsible for meeting the payments. However, within private equity funds, payments exceeding the administrator fee will only be made with the approval of the quotaholders.

Additionally, the bylaws should also specify whether the fund will pay a performance fee to the portfolio manager. This fee is a fixed rate, is related to a percentage of the fund's annual net worth and may be paid yearly or each semester.

The performance fee shall be set forth considering the parameter contained in the investment policy. The fee should not be linked to any percentage less than 100% and has to respect a minimum semi-annual charging period. Finally, the performance fee will only be charged after the deduction of the total sum of the fund's expenses, including the management fee.

Additionally, any increase in the administrator's and/or the

portfolio managers' remunerations must be approved at a quotaholders' meeting.

Retail Funds

The retail funds are regulated by Ruling 555 of the Brazilian Securities Exchange. These are now the most popular investment funds in Brazil's fund industry. Ruling 555 is applicable to every type of investment fund, including those regulated by specific rules, which, as said before, are known as alternative funds.

Ruling 555 also provides limits of concentration for retail funds' portfolios. These will vary according to: (i) the class of the fund (see the section entitled "Retail Funds Classification"); (ii) the type of asset or security; (iii) the issuer of the relevant assets and securities, such as financial institutions, private companies, the federal government, and others; (iv) the location of the asset (see the section entitled "Foreign Investments"; and (v) the target investors.

Target Group

The target groups for a retail fund may be divided into: (i) professional investors; (ii) qualified investors; and (iii) the general public. As described from section "Private Equity Funds" on, the target groups will be chosen not only in accordance with the fund's bylaws, but also with limits of concentration. The limits of concentration shall be defined and framed by the regulation of the specific investment fund, in order to decrease its risk. The CVM allows professional investors to assume a greater risk than the qualified investors and the public in general.

Classification of Retail Funds

Retail funds are classified by Ruling 555 as: (i) fixed income funds; (ii) foreign exchange funds; (iii) equity funds; and (iv) multi-market funds.

(i) A fixed income fund has its assets indexed to local interest rates, price indexes, or both. This type of fund must have at least 80% of its net worth related or synthetized with derivatives indexed to the interest rate and/or price indexes. In addition, Ruling 555 also establishes types of fixed income

funds: (a) short-term funds; (b) referred funds; (c) simple funds; and (d) external debt funds. These subtypes have their thresholds for investments provided and detailed by the ruling.

One of the innovations brought in by Ruling 555 was the creation of the "Simple Fund", a subtype of fixed income funds. This is a low cost fund, with a simple structure and a conservative investment policy. The Simple Fund net worth should have 95% of its assets in government bonds, securities issued by financial institutions with low risk, and derivative transactions designed only for hedge purposes. The Simple Fund is low cost due to the absence of a performance fee and because it does not have to perform offshore investments.

(ii) Foreign exchange funds hold their assets indexed to a fluctuation in foreign currency or the exchange coupon. As a result of Article 116 of Ruling 555, at least 80% of the fund's net worth should be represented by assets relating to a foreign exchange index chosen by the fund.

(iii) Equity funds should have their risk factor linked to the price fluctuation of shares sold on the stock exchange. The cap for the equity fund is to have at least 67% of its net worth composed of: (a) shares; (b) subscription bonuses or receipts; (c) a certificate of share deposits; (d) shares, equity or index funds; and (e) Brazilian Depositary Receipts at level II or III. These percentages are specifically provided in Article 115 of Ruling 555.

The excess capital in the equity fund's portfolio may be invested in any other type of net asset, observing the limits of concentration set out in Article 103 of Rule 555.

(iv) Multi-market funds should invest their net worth in assets of different indexers and risk factors. Consequently, this type of fund usually has a diverse portfolio. The investment policy should have a broad spectrum of risk indexes, without any type of concentration.

Foreign Investments

Retail investment funds may invest in foreign assets, as long as they respect the following limits, as set forth in Ruling 555:

(i) up to 20% of the fund's net worth when the target group is the public in general;
(ii) up to 40% of the fund's net worth when the target group is qualified investors; and
(iii) up to 100% of the fund's net worth when the target group is professional investors.

There are exceptions and conditions for these limits, such as: (i) the Simple Fund may not invest in foreign assets; (ii) a fixed income fund classified as an external debt fund may invest in unlimited foreign assets; and (iii) when investment funds targeted at professional investors choose to maintain 100% of their investments in foreign assets, the suffix *"investimento no exterior"* (offshore investment) must be included in the fund's title.

Additionally, an investment fund aimed at qualified investors may also invest in unlimited foreign assets when it is determined by its bylaws that:

(i) at least 67% of its equity will be invested in foreign assets;
(ii) all conditions set forth in Annex 101 of Ruling 555 and requirements of the specific class are met;
(iii) the description required by Article 10122 "Article 101, item IV, Rule 555 – detail in its bylaws about the different net assets that will be acquired offshore, indicating: a) geographic region where the assets were issued; b) whether the management is active or passive; c) whether the acquisition of the fund's quotas and offshore investment vehicles is allowed; d) the risk that the assets are submitted to; and e) any other relevant information."
of Ruling 555 is fulfilled; and
(iv) the suffix "investimento no exterior" is included in the fund's title.

Taxation

Resident investors are generally subject to withholding tax on the gains from the funds' shares, at rates which vary according to the characteristic of the fund and the term of the investment, especially in relation to alternative investment funds.

For retail fund gains made in the short term, investment funds are subject to withholding tax at 22.5%, if the redemption or sale of quotas occurs up to 181 days after their acquisition. The rate will be 20% in any other case.

For gains made in the long term, investment funds are subject to withholding tax at 22.5% if the redemption or sale of quotas occurs up to 180 days after their acquisition. The rate will be 20% for sales or redemption that occurs between 180 and 360 days; 17.5% if it occurs between 361 and 720 days; or 15% if the redemption or sale of quotas occurs more than 720 days after the quotas were acquired.

Also, equity funds as described in the "Foreign Investments" section are subject to withholding tax at 15% in accordance with tax regulation.

Receivable Funds

As mentioned above, in Brazil there are other types of funds regulated by specific CVM rules, such as the receivable funds, which have been developed to promote securitization transactions in the country.

The CVM regulates receivable funds through Ruling 356, dated December 17, 2001; and Ruling 444, dated December 8, 2006, for non-standardized receivable funds. While Ruling 356 serves as a guide for the formation and operation of receivable funds, Ruling 444 introduces non-standardized receivable funds.

Receivable funds, regulated by Ruling 356, target only qualified investors and invest their capital in a variable range of receivables and instruments assigned rights, deriving from commercial, industrial, financial, real estate or mortgage categories with established limits for each of these as well as for warrants.

Nonetheless, non-standardized receivable funds target only professional investors. The investment is focused on distressed assets such as: receivables from companies under judicial or extrajudicial recovery processes, or future receivables with no fixed value, among other assets not referred to in CVM Ruling 356.

In addition, it is important to clarify that receivable funds may be constituted either as an open-ended or as a closed-ended fund.

As stated above, receivable funds apply their capital in assigned credit rights in a variable range of receivables and instruments representing rights, deriving from commercial, industrial, financial, real estate or mortgage categories with established limits for each of these as well as for warrants.

On the other hand, non-standardized receivable funds will aim to invest their capital in non-standardized credit rights without any limitation of its assets.

For non-standardized credit rights, it is understood that: (i) the credits are overdue or the payments are outstanding when they were assigned; (ii) credits derived from government – federal, state or municipal – revenues; (iii) the credit rights have been derived from active suits and were the object of the action or were pledged or given as warranty; and (iv) credits will arise from companies under judicial or extrajudicial recovery processes.

According to Article 4 of CVM Ruling 356, after 90 days of the commencement of its activities, any receivable fund must allocate at least 50% of its net worth in receivables. However, at the CVM's discretion and upon request of portfolio manager or fund administrator, this period may be postponed for an equal period of time, as long as the fund's administrator presents reasons justifying the extension of the period. This article applies to both receivable funds and non-standardized receivable funds.

After investing this capital in the specific receivables, both types of funds may invest the rest of their net worth in: (i) National Treasury securities or Brazilian Central Bank securities; (ii) securities issued by states or municipalities; (iii) bank deposit certificates or receipts; or (iv) securities or assets of fixed income, except shares from social development funds.

Real Estate Funds

Law No. 8,668, June 25, 1993, and Ruling 472, issued by the CVM on October 31, 2018, regulate real estate funds. A real estate fund is a pool of assets jointly owned by the fund's quotaholders and invested in real estate.

According to Article 2 of CVM Ruling 472, the real estate fund will be constituted as a closed-ended fund, in which the

redemption of quotas is only possible at the termination of the fund. In addition, the real estate fund may aim at any target audience, such as general investors and qualified investors, in accordance with the fund's bylaws.

Real estate funds may have investments in a number of assets, including, but not limited to: (i) rights in connection with real estate; (ii) real estate; (iii) quotas issued by companies performing real estate activities; (iv) securities, debentures, and warrants issued by public offering by issuers with real estate activities; (v) other real estate fund quotas; and (vi) quotas of real estate, private equity and receivable funds, provided that the funds are limited to a real estate activity.

When the fund manager invests more than 5% of its own capital in the securities above, the portfolio manager will have to be registered and authorized by the CVM in advance in order to manage the securities portfolio.

The fund manager must provide the real estate fund, directly or indirectly, with the following services: (i) maintenance of a specialized department, which will be analysing and monitoring the real estate projects; (ii) the controlling and processing of securities; (iii) bookkeeping of the quotas of the fund; (iv) creation of an independent audit; and (v) safekeeping of the assets of the fund.

Private Equity Funds

The purpose of private equity funds is to acquire shares and to convert securities into stocks issued by listed or unlisted companies. The goal of private equity funds is to participate in the management of the company and in the decision-making process. In order to be active in the company management, the funds have to either buy the control of the company, by acquiring shares, or enter into a shareholder agreement, in order to achieve their purposes.

In Brazil, CVM Rulings 578 and 579, dated August 30, 2016, regulate private equity funds. According to Article 5 of CVM Ruling 578, the private equity fund is a pool of collectively owned assets that should necessarily be invested in: (i) shares; (ii) debentures; (iii) subscription bonuses; or (iv) other securities that may be convertible into shares of corporations and limited liability companies, in whose decision-making process the fund shall participate, with effective influence in the definition of its strategic policy and management, through the nomination of directors to the board.

Private equity funds shall be constituted as closed-ended funds because of their nature, which not only involves participating in the decision-making process of the invested companies, but also in promoting the development of such companies by increasing their value. As a result, private equity funds are long-term investments with the purpose of aggregating value for the target companies. These funds are characterized by the non-liquidity of their assets. In addition, the target group of investors of private equity funds are qualified or professional investors.

According to Article 11of CVM Ruling 578, private equity funds must keep at least 90% of their assets in shares or securities convertible into stocks. However, the CVM provides exception to this limitation in the investment portfolio.

Additionally, Ruling 578 established that private equity funds should be categorized in at least one of the categories provided in the regulation based in their portfolio. Thus, a private equity fund should choose the most suitable category according to its investment policy.

Article 1 of Ruling 578 outlines the categories of a private equity fund, which are: (i) Private Equity Funds – Seed Capital; (ii) Private Equity Funds – Emerging Companies; (iii) (FIPs-PD&I); and (v) Multi-strategy.

The category of a private equity fund, as mentioned above, will depend on the annual gross income of the limited liability companies and/or corporations invested in by the private equity fund.

Private equity funds are also allowed to invest up to 20% of their net equity in offshore private equity assets and special classes of private equity funds, and those offered exclusively to professional investors may invest up to 100% of their net equity abroad.

Furthermore, the regulation permits private equity funds to grant different economic/financial rights to one or more classes of quotas, which allows different rights to: (i) administrative and management fees; and (ii) priority ordering with respect to payment of earnings, amortizations or the fund's settlement balance.

Public Offerings

Investors

The CVM provides a distinction between the investors considering the amount of investments they hold.

Therefore, the following entities or individuals are considered professional investors, in accordance with Article 9-A of CVM Ruling 554, dated December 17, 2014:

(i) financial institutions and others authorized to function by the Brazilian Central Bank;
(ii) insurance companies and capitalization companies;
(iii) pension funds;
(iv) individuals or legal entities with financial investments that exceed the amount of BRL 10,000,000.00 (ten million reais) and that also provide an affidavit or declaration attesting to their condition as professional investors;
(v) investment funds;
(vi) investment clubs that have their portfolio managed by a CVM authorized portfolio manager;
(vii) autonomous investment agents, securities portfolio managers, analysts and consultants authorized by the CVM in relation to their own resources; and
(viii) non-resident investors.

By qualified investor, the Article 9-B of Ruling 554 acknowledges:

(i) professional investors;
(ii) individuals or legal entities with financial investments that exceed the amount of BRL 1,000,000.00 (one million reais) and that also provide an affidavit attesting to their condition as professional investors; and
(iii) individuals who have passed technical qualification exams or have been certified and registered by the CVM to act as autonomous investment agents, securities portfolio managers, analysts and securities advisers, in relation to their own assets.

Restricted Public Offerings

In order to start functioning, alternative investment funds need to distribute their quotas to investors through public offerings. For open-ended CVM 555 retail funds, there is generally no need to register or develop a distribution process. The closing or reopening of such funds for new investors will occur upon the discretion of the portfolio manager according to their investment strategy or any other occurrence.

Therefore, investment funds issue public offerings regulated by the CVM, under the following circumstances:

(i) CVM Ruling 400, as explained in detail in the paragraph on Public Offerings above, establishes that to proceed with the public offering regulated by such Ruling 400, the investment fund needs to fulfil a number of requirements and present the CVM with certain documents, such as the prospectus, which should contain the most important information about the public offering in accordance with the Ruling; and

(ii) CVM Ruling 476, as explained in detail in the paragraph on Public Offerings above, concerns professional investors and what are known as restricted public offerings.

Chapter 9

Project and Trade Finance

Project Finance

Project finance comprises the financing of an economic unit. The lenders are principally looking to the earnings from that unit to repay their loans and to its assets as their principal security.

Generally, project finance describes a series of financial structures with a common characteristic: the financing will not be based primarily on its sponsors' credit risk or on the value of the physical assets involved in the project. The financing will depend on the degree of confidence in, and performance of, the project itself (which will generate cash flow and be financially and economically self-supporting in the medium to long term). This cash flow will be used to repay the debt to the lenders and to sustain the project, and is a very good fit for the financing of projects which involve the long-term exploitation of an asset (via, for instance, a concession), with a predictable revenue stream.

In Brazil, project finance became an increasingly important tool as public services began to be privatized or subject to concession arrangements in the mid-1990s. A series of constitutional amendments and new legislation triggered numerous attempts by private developers to implement project finance structures to fund

the construction of a new infrastructure, resulting in the development of a new foundation for industry in Brazil. In the electricity sector, programmes were established to increase generation and transmission, and several hydro and thermo-projects were successfully financed. The Federal and State governments also granted concessions for the construction or refurbishment of toll-roads, with a substantial portion of the necessary investments being raised under project finance structures. In the oil and gas sector, which was also liberalized, project financing has been widely used to increase the country's exploration and production capacity, as well as to expand the refining, transportation and distribution infrastructures.

The project financing industry has further developed in the past decade to include projects in other sectors, including railways, ports, industrial plants and mining projects, as well as projects for power generation from alternative/renewable sources such as wind farms, biomass, thermo-projects and small hydro-projects. The major infrastructure projects for the sports events that were held in Brazil, such as the FIFA World Cup in 2014 and the 2016 Olympic Games in Rio de Janeiro, also relied on large and innovative project finance structures and more flexible bidding procedures.

The local development bank - Banco Nacional de Desenvolvimento Econômico e Social - BNDES, along with other official state-owned financial institutions such as Caixa Econômica Federal (directly or through the FGTS Investment Fund - FI-FGTS), Banco do Nordeste do Brasil and Banco do Brasil, have taken an active role in providing financing for infrastructure projects in Brazil. BNDES' dominance, for instance, was mainly attributed to the very low interest rates that used to be applied by the development bank until 2017. At the end of 2015, Brazil experienced the peak of a severe economic and political crisis, putting an end to an era of optimism.

Notwithstanding the economic and political crisis that the country has still been experiencing, the infrastructure sector and its financing have been the target of constant pro-market improvements, being considered an essential sector for the achievement of a sustainable economic growth.

Since 2016, reforms aimed at recovering the national economy have been implemented.

In the infrastructure sector, one of the most important reforms has been the creation of the Brazilian Investment Partnership

Program ("PPI"), a framework under which projects of different public-private regimes can be qualified, so as to receive a special treatment designed to reduce bureaucracy and foster the private investment in the infrastructure sector.

In 2018, by the time it had completed two years of existence, hundreds of brownfield and greenfield infrastructure or energy projects had been privatized or awarded under new concessions, as part of and benefiting from the PPI framework. A significant part of such projects have been taken on by foreign investors.

In line with a policy to reduce public expenditures and create incentives for a more active role by the private sector, BNDES has also been subject to a reform in its policies. Basically, the main purpose of such reforms was to increase financing for the infrastructure sector by attracting new investors, especially large international financial institutions.

For instance, since 2017, BNDES has adopted a new interest rate, the Long-Term Rate ("TLP"), which, aligned with the other interest rates practiced in the market, has given more space for the competitiveness and participation of private banks.

As a result of the recent changes, in 2018 BNDES' participation in project financing has been the lowest in thirteen years, with a 5.3% stake. Such new policies have been offering much more room for, and will require stronger participation from, international lenders and, mainly, institutional and other capital market investors through project bonds, especially non-recourse infrastructure debentures.

Infrastructure debentures (the so-called project bonds) were created through the enactment of Law 12,431, back in 2011, with the purpose of providing an additional source of long-term financing. In 2018 alone, more than 10 billion Reais was raised through the issuance of infrastructure debentures, the largest amount since 2012. It is estimated that in the near future, this capital market instrument will be responsible for 20% of the total of project finance investments in Brazil. Currently, 466 infrastructure projects have already been approved and are awaiting the issuance of their incentivized infrastructure debentures, with investments surpassing 200 billion Reais.

Multilaterals, ECAs and international lenders have already increased their participation in the Brazilian market. Some of these players are developing new products such as loans denominated in

or indexed to the Brazilian currency (Reais), so as to insulate Brazilian borrowers from foreign exchange risk. Recent projects that have been submitted to bidding proceedings also contemplate mechanisms to mitigate the risk of foreign exchange variations, creating additional investments for innovative project finance structures.

This new scenario will also offer an important role for private commercial banks with experience in the sector, which traditionally cannot offer long-term financing, but will be called upon to provide bridge loans or mini-perms and, most importantly, bank guarantees to back up infrastructure debentures until relevant project completion is achieved, taking into account the unwillingness and inability of institutional or other capital market investors to assume construction risk. These and other banks with capital market experience also play a fundamental role as underwriters of debt instruments such as debentures.

Main legal aspects

The main legal aspects of implementing a project finance transaction in Brazil can be grouped into two major categories: (i) specific public law and regulatory aspects applicable to each type of project; and (ii) general commercial and civil law aspects applicable to all transactions.

Public Law and Regulatory Aspects

To the extent that a project is developed in a regulated industry or as a public service, such as those in the electricity, oil and gas, telecommunications, transportation or water and sewage sectors, the activities of the project company are subject to public law and regulation by specialized agencies.

Most projects in these sectors involve the granting of a concession pursuant to a bidding process. Not long ago, the Brazilian Public Bidding Law (Law No. 8,666, as of 1993) was the main legal diploma in public contracting. As a result of the need to reduce the bureaucracy and enable the country to host global sports events in 2014 and 2016, Law No. 12,462, dated 2011, introduced a Differential Public Procurement Regime - RDC, guaranteeing greater flexibility to the regime established by the Brazilian Public Bidding Law. Concessions are also subject, as applicable, to the Brazilian

Concessions Law (Law No. 8,987, dated 1995) and to Law No. 11,079, dated 2014, that provides for the legal framework applicable to projects structured under a public-private partnership scheme.

The government has also passed other laws simplifying bidding procedures, such as the State-Owned Companies Law (Law No. 13,303, dated 2016) that provides the legal statute of state-owned companies, at all levels of the Brazilian Federation, including mixed capital entities. Such law has also established new rules regarding private partners' participation in such companies and mandatory corporate governance rules.

The terms and conditions of the concession agreement, as complemented by the provision of applicable law, will be crucial for lenders to access the feasibility of the project. Usually, lenders will seek assurances that concessions cannot be terminated at the Government's discretion or that appropriate compensation will be available in case of termination. Furthermore, lenders will look for adequate mechanisms to ensure that cost increases affecting the project, such as those resulting from changes in legislation, *force majeure* or foreign exchange variations, are passed through to the tariffs or rates charged by the project. Another important aspect for lenders will be their ability to foreclose on the assets used under the concession.

All of these and other relevant aspects are addressed to some extent in Brazilian public law and in most concession agreements. However, in certain cases, the provisions of Brazilian law do not converge with lenders' interests. For example, although the law provides for the reestablishment of a concession's economic equilibrium in case of a change in the law, it does not go so far as to contemplate an automatic pass-through of cost increases.

The public-private partnership law of 2004 addresses some of these lender concerns. For example, it expressly provides for the transfer of the project company's control to the lenders in case of default and for the payment of any termination compensation directly to the lenders. A similar provision was later introduced in the Brazilian Concessions Law.

Law No. 13,448, dated 2017, also brought more assurance to lenders. Among its innovations, the law introduced a re-bidding process, an amicable termination of existing concessions under current or eminent default, followed by a new bidding proceeding, which can include the assumption of existing financing agreements

by the new concessionaire.

In terms of regulations, Brazil has agencies specialized in each sector, such as the national electricity agency (ANEEL), the national petroleum agency (ANP) and the national water agency (ANA). Each of these agencies issues rules applicable to their respective field of activity and is, in certain cases, empowered to initiate proceedings to apply penalties or even to suspend or cancel the concession agreement.

Governing Law

It is said that in project finance "contract is king". Since lenders are relying on the performance of the project, they will usually review all project agreements to ensure that they are acceptable or "bankable". During the construction phase, the main contract will usually be the Engineering, Procurement and Construction Agreement (or an EPC Contract). The EPC Contract must be drafted so as to properly allocate and mitigate construction risk (mainly cost overruns and delays). After the beginning of the project's operations, the two principal agreements are usually the agreement under which the project purchases its raw materials (for example, the fuel purchase agreement in a thermoelectric plant) and the agreement pursuant to which the project's output is sold. Lenders will want to ensure that such agreements are structured in order, to the greatest extent possible, to insulate the project company from having insufficient revenues to pay all of its fixed and variable costs, including debt payments.

In addition, the project company will enter into the various financing agreements, consisting mainly of the loan agreements and security documents. A typical security package would include the shares of the project company itself, as well as all of its assets, accounts and revenues.

Other agreements are likely to be necessary to implement a project finance structure. These may include an operation and maintenance agreement, account management agreements, inter-creditor agreements, sponsor support agreements and letters of credit.

Most of the agreements described above (the main exception being the loan agreement where a foreign lender is involved) are likely to be governed by Brazilian law. While Brazilian law recognizes the parties' freedom to negotiate and implement their own agreements, the principles and mandatory rules of the Commercial

Code, Civil Code, Code of Civil Procedure, and other laws, will be applicable to the agreements and to any enforcement action brought by any of the parties.

For example, an EPC Contract is subject to certain specific provisions contained in the Civil Code. The creation and perfection of security is also subject to the Civil Code and any foreclosure thereon will be subject to civil proceedings established by law.

Brazilian civil and commercial law applicable to such agreements is in many aspects similar to other jurisdictions with a civil law tradition. In some cases, parties from a common law jurisdiction may find that a system such as that in Brazil provides greater protection to borrowers and imposes lengthier proceedings for the enforcement of contractual rights.

Conclusions

The implementation of an infrastructure project in Brazil and the raising of the necessary funds through a project finance structure are subject to a very wide and complex set of laws and regulations. In addition to the fundamental public and private law aspects described above, project developers and lenders will need to review other legal aspects such as environmental, labour and tax legislation. Many foreign investors may find that the complexity and reach of Brazilian laws and regulations are in excess of that to which they are accustomed in their own jurisdictions. Qualified legal advice is therefore essential to the development and financing of infrastructure projects in Brazil.

Trade Finance

Trade finance means the financing of export and import transactions. The main sources and methods of trade finance available in Brazil are those granted by the Brazilian Government through the BNDES and PROEX, as briefly outlined below (information regarding the applicable administrative rules, terms and conditions at the time the trade finance is planned should be checked at the sites http://www.bndes.gov.br and http://www.bb.com.br).

Export Financing

Private and public funding sources can finance exports. Each trade finance transaction has its own characteristics, terms and conditions. Some cover all phases of production and export, including working capital, others cover only the production phases.

Cross-border pre-export finance transactions are widely adopted given the exemption of Brazilian withholding income tax that would otherwise apply to interest payments to foreign creditors. These must be carefully structured, although since the exemption may not be available for all jurisdictions, certain transfer pricing and thin capitalization rules may apply to transactions within the same economic group, and the funds should be effectively employed in the financing of Brazilian exports, which must be proven by proper evidence.

In addition to private sources, such as commercial banks, domestic funding for export transactions is available from two public funding sources:

- the BNDES-EXIM, which covers exports of goods and services; and
- the PROEX, covering either imports or exports.

BNDES-EXIM

BNDES-EXIM funds the export of goods and services through financial institutions accredited by the BNDES. The BNDES-EXIM works in the following areas:

- **BNDES-EXIM *Pré-Embarque* (pre-shipment):** Credit to produce goods for export. The sale of these goods will have been negotiated in advance with the importer abroad. This credit facility is based on the Free on Board (FOB) value of the contracted export transaction. The beneficiaries are industrial and exporting companies of manufactured products. These companies may secure the credit facility by any surety, mortgage, personal guarantee or pledge of credit rights under

the export contract (the most common) negotiated directly with the financial institution, or, if they are micro, small or medium-sized companies, through the use of the BNDES FGI (Investment Guarantee Fund) to complement the guarantees offered.

- **BNDES-EXIM P*ré-Embarque Empresa Âncora* (anchor company pre-shipment):** Credit to support exports by small and medium-size companies through an anchor company. In accordance with BNDES policies, trading and exporting companies may be, for instance, anchors. This credit facility is based on the FOB value of the contracted export transaction.
- **BNDES *Exim Automático* (automatic):** The BNDES Exim Automatic is aimed at supporting the export of Brazilian goods, in the post-shipment phase, through a network of accredited banks. This credit line may be operationalized through two financing structures: (i) financing through letters of credit issued or confirmed by a foreign bank in favour of the exporter; and (ii) financing through disbursement authorizations issued by a foreign bank through a specific contractual instrument signed between the foreign bank and the BNDES. In neither structure is there a right of recourse against the exporter. In both operational structures, the disbursement of funds by the BNDES to the exporter, through the agent bank, is performed in Reais in Brazil.
- **BNDES-EXIM *Pós-Embarque* (post-shipment):** Credit to support and make foreign sales of goods and services possible. This form of refinancing is made by discounting receivables under the export transaction (promissory notes or bills of exchange) or by assigning credit rights from the export transaction (letters of credit). Personal guarantees cannot secure these transactions. Bank guarantees, including sureties and letters of credit, are accepted as long as banks approved as guarantors by the BNDES issue the security instrument.

PROEX

The PROEX Export Financing Programme supports the export of Brazilian goods and services negotiated for future payment. PROEX provides credit at competitive interest rates and on internationally common payment terms. PROEX repayment terms vary from 60 days to 10 years depending upon the value added to the goods exported and the complexity of the services provided.

The Banco do Brasil S.A. is the only authorized agent of the Federal Government.

PROEX credits are available to importers and exporters of Brazilian goods and services through two methods:

Direct export financing

Financing is provided with funds from the National Treasury. Brazilian exporters and foreign importers may apply for the credit only in Brazilian currency. The credit will either be:

- Supplier's credit: negotiating receivables and documents representing the export transaction. This is purely a credit for the exporter; or
- Buyer's credit: a credit for the importer, between the Brazilian Government and a foreign corporate entity.

Equalization - financing by matching interest rates

This is only available in foreign currencies. Its aim is to make Brazilian exports more attractive by offering financing costs similar to those offered internationally. The National Treasury will pay the lender a percentage to cover the difference between the costs of raising funds abroad (to finance the export) and the costs of making these funds available to the exporter or importer (by supplier or buyer's credit, respectively). Brazilian exporters or importers abroad can apply for this financing at any commercial bank approved by BACEN to operate in the foreign exchange markets. There are also two types of matching interest:

- supplier's credit: the exporter initially makes credit available to the importer and further discounts receivables in connection with the

export transaction at any bank authorized to operate in exchange; and

- buyer's credit: a credit institution or a bank abroad entitled to receive the proceeds of the interest rate equalization finances the importer to enable it to pay the exporter in a lump sum.

As opposed to direct export financing companies of any size are entitled to apply for such financing, however the percentage subject to equalization is limited to up to 85% of the export value.

To benefit from a PROEX or BNDES-EXIM credit line, or both, the exporter, importer and guarantor cannot have any debts with the Brazilian Government or with any public or private corporate entity controlled by the Brazilian Government.

Chapter 10

Competition Law

Article 5, item XXII of the Brazilian Federal Constitution of 1988, guarantees the right to property, fundamental to the existence of the market itself, but affirms that it must adhere to its social function in the following section (Article 5 , item XXIII), demonstrating the balance that must be maintained between individual and collective interests, as can be observed in the wording of item XXXII of the aforementioned article, when establishing that "the State shall promote, in the form of the law, consumer protection ".guarantees the right to property, fundamental to the existence of the market itself, but affirms that it must adhere to its social function in the following section (Article 5 , item XXIII), demonstrating the balance that must be maintained between individual and collective interests, as can be observed in the wording of item XXXII of the aforementioned article, when establishing that "the State shall promote, in the form of the law, consumer protection ".

In fact, the Federal Constitution itself deals with the Economic and Financial Order in its item VII, which is applicable to all economic activity, without distinction.

Within this item of the Federal Constitution, article 170 defines the bases for the country’s economic activity: (i) valorisation of work and free initiative; (ii) social justice; (iii) the social function

of property; (vi) protection of the environment; (ix) reduction of regional and social inequalities; (x) pursuit of full employment; (ix) favoured treatment for small businesses; (xii) free exercise of economic activity, dependent on authorization only in cases provided by law.

We can see that the constitutional text does not grant total freedom to private initiative, since it also considers pillars such as valorisation of labour, social justice, the social function of property, consumer and environmental protection, inequalities and the pursuit of full employment to be social activity.

Thus, the Constitution makes it clear that the balance between liberalism and social rights points to a form of exploitation of economic activity that should always result in the benefit of the community, even though economic agents also reap the fruits of their work and the allocation of capital.

It should be noted, therefore, that Brazil is based upon a Constitution in which the rights to free enterprise, private property, free competition and the free exercise of economic activity are liberal and aim to create the foundations of the market, whilst the rights to social justice, the social function of property, consumer protection, protection of the environment, reduction of regional and social inequalities and the search for full employment are social rights.

Free competition has aspects of individual rights and also diffuse law, because it is the right of the economic agent to be afforded opportunities for a real competition with the other agents, and it is the right of all society to maintain the operability of competition between agents to obtain the social benefits derived from it.

But this is not a novelty of our current Federal Constitution. In Brazil, antitrust legislation began with Law 1,521 / 1951, which defined crimes against the economy. However, this legislation has had little application because of the delay in completing the definition of its proceedings, as well as because of its excessive stringency. Subsequently, Brazil approved Law 4,137/1962, which created the Administrative Council for Economic Defence (CADE), but did not provide the necessary means for the effectiveness of its action.

Since the entry into force of these standards, it was the authorities' objective to achieve expeditious completion of administrative procedures, typical of the perspective of the economic policy maker, which was reinforced by the experience of the first phase of CADE, an administrative situation when the economic fact

that had given it opportunity had become irrelevant, even by the disappearance of the injured party.

Based on this experience, the President issued Provisional Measure 204, which was proposed on August 2, 1990.

The Provisional Measure was followed by others, with minor modifications of content - due to the fact that Provisional Measures at the time were valid for a predefined period of 30 days and not subject to reissue - until the definitive enactment of the law in January 1991.

Law 8,158, dated January 8, 1991, which prepared the National Secretariat of Economic Law (SDE), originated from the need to provide public administration and society with an adequate instrument to regulate market behaviours that avoided - or at least reduced - the frictions caused by the institutional change from a strictly regulated and controlled environment to an environment of liberalization of economic activities.

Finally, it was with the enactment of Law 8,884/1994 that the provisions of articles 170 and 173, § 4, of the Federal Constitution of 1988 were put into effect, through the creation of the Administration Council for Economy Defence - CADE, as an independent autarchy, a Decision Making Board of the Executive Branch with decisions driven by due process and ruled by Members protected by fixed mandates.

CADE is currently governed by Law No. 12,529, dated November 30, 2011. It is responsible for controlling the concentration of economic power that results from the integration of two or more companies, previously independent, aimed at the acquisition of market share, and for the repression of abuse of economic power.

The competition defence relies on preventive and repressive measures. These include merger control mechanisms and the prosecution of practices that are in breach of the laws protecting the economic order.

Regarding the analysis of acts of concentration, the law is not extremist, and at any time during the administrative process it may be considered legitimate to perform market concentration, provided it is necessary for the national economy and the common good, and provided it does not harm the consumer or end user.

Mergers or acquisitions of any kind must be submitted to the Brazilian antitrust authorities in advance, if one of the economic groups involved in a transaction has posted a gross annual turnover in Brazil of R$ 750 million or more in its latest balance sheet and the

other Company has posted a gross annual turnover in Brazil of R$ 75 million or more in its latest balance sheet (sums can be updated), whilst it is forbidden to move ahead before approval. The proposed merger should be analysed within 240 days with a possible extension or an additional 60 days following a request from the parties, or 90 days when requested by the antitrust authority.

Other transactions that can be considered harmful to the competitive environment may be requested for analysis by the antitrust authorities up to one (1) year after consummation. In this case, it is important to note that, as a general rule, the Antitrust Law does not prohibit the parties from closing the transaction before obtaining clearance from CADE, *i.e.* they can transfer the assets and proceed with the necessary payments, the buyer can manage the target, etc., even before approval of the transaction by the antitrust authorities. However, the parties are subject to any remedies that may later be imposed by CADE should it conclude that the transaction produces effects that are harmful to competition.

CADE can approve acts which potentially restrict or harm free competition, or that may result in the control of a relevant market of services, if certain objectives indicated in the Antitrust Law are clearly presented in the transaction and there is a transference of such to the end Consumer. Partial divestments or behavioural remedies may also be imposed for the approval of the transaction.

If CADE does not approve the acts submitted, it will state that the parties must reverse the action already taken.

Regarding anticompetitive behaviour pursuant to Articles 170 and 173, § 4, of the Federal Constitution of 1988, the Antitrust Law objectively considers infractions as being acts that impair free competition, artificially dominate the relevant market and arbitrarily increase profits or exercise a dominant position in an abusive manner.

The standard contains an exemplary role of conducts that configure the hypotheses above, through the analysis of relevant economic and market circumstances, especially (i) cost of inputs; (ii) product changes; (iii) price of products and services or their development in comparable relevant markets; or (iv) the existence of an adjustment or agreement resulting in the increase of such prices.

It is important to note that if the economic agent can demonstrate the relationship between the price increase and any of the factors mentioned in items "i" to "iii", it will be free of any penalties, and in the case of item "iv", subject to penalty if it has participated in

an adjustment or agreement for unjustified price increase.

The concerted action between competitors, characterized as "the agreements between competing companies (which therefore act in the same geographic and material relevant market) and which aim to neutralize the existing competition between", is also subject to a CADE penalty.

Horizontal agreements are those between economic agents that operate in the same relevant market (geographic and material) and are therefore in direct competition. Vertical agreements, on the other hand, discipline relations between economic agents which carry out their activities in diverse and often complementary markets.

The following acts have also been condemned by antitrust legislation: (i) a tying arrangement,, that is, conditioning the purchase of one product or service on the purchase of another; (ii) the imposition of restrictions or conduct on participants in the products or services, as well as discrimination against them; (iii) manipulation of supply or demand for goods and services, or unjustified refusal to supply, and the imposition of artificial barriers to the entry of competitors into a relevant market.

It is worth mentioning that although there is much discussion about CADE's exclusivity in controlling the market, it is reasonable to say that this power is shared with some regulatory agencies when referring to a specific sector of the market, under the terms of the respective legislation, as is the case of ANATEL, or in the case of healthcare assisted by the National Health Surveillance Agency (ANVISA), since it may instruct the processes that will be decided by CADE.

It is still worth pointing out as a guarantee of the Democratic State of Law, Article 31 of Law 12,529 / 2011, which states: "This law applies to natural or legal persons under public or private law...", that is, both public entities as individuals are subject to the commandments of the law.

CADE, in controlling the conduct of economic agents, may apply the following penalties:

I. in the case of a company, a fine of 0.1% (one tenth of a percent) to 20% (twenty percent) of the gross turnover of the company, group or conglomerate obtained in the last financial year preceding the

administrative procedure, in the branch of business activity in which the infraction occurred, which will never be inferior to the advantage obtained, when its estimation is possible;

II. in the case of other natural or legal persons governed by public or private law, as well as any associations of entities or persons constituted in fact or in law, even temporarily, with or without legal personality, that do not engage in business activity, and it is not possible. If the gross revenue value is used, the fine will be between R $ 50,000.00 (fifty thousand reais) and two billion reais (R $ 2,000,000,000.00);

III. in the case of an administrator, directly or indirectly responsible for the infraction committed, when proven guilty or fraud, a fine of 1% (one percent) to 20% (twenty percent) of that applied to the company, in the case provided for in subsection I of the caput of this article, or to legal entities, in the cases provided for in item II of the caput of this article.

In the event of a repeat offense, the fine's limitation ceiling can be doubled.

In calculating the amount of the fine referred to in item I of the caput of this article, Cade may consider the total billing of the company or group of companies, when it does not have the value of the billing in the branch of business activity in which the infraction occurred, defined by Cade, or when it is presented in an incomplete way and/or is not demonstrated in an unequivocal or suitable manner.

Other additional penalties, such as (i) prohibition from contracting with the public administration; (ii) IP licencing; (iii) selling of Quotas or Shares; and (iv) others that may be designed, can be imposed.

Company officials must be conscious of the legislation restrictions since, in addition to penalizing the company responsible for the infraction of the competitive environment, the individuals directly or indirectly involved also respond for the infraction.

It should be noted that, in all its cases, CADE respects broad

defence and due process, and its decisions can be reviewed by the judiciary in case of illegality.

Settlements can be reached either with or without admission of guilt, at CADE's discretion, but it is required in cases involving a leniency agreement.

It is important to highlight that certain anti-competitive practices are also crimes in Brazil, and several activities that are listed as anticompetitive can also be considered for penalization under other legislations such as the Government Procurement and Government Contracts Law, Anticorruption Law, and others.

Any foreign company that operates or has a branch, agency or office, establishment, agent or representative in Brazil is, by law, deemed as being located in Brazil. Companies or entities that are part of an economic group involved, by fact or by law, in the violation of the economic order will be held jointly liable.

CADE decisions may be challenged in a court of law. However, the full scope of a court review has still not been definitively settled.

Chapter 11

Public Utility Bids and Contracts

Public Bidding and Public Contracts

The public administration, like private entities, performs engineering works and services, and buys and sells goods etc. To do so, it sometimes needs to contract in third parties. These contracts must follow a selection process, or bid.

The bidding process aims to be transparent in order to safeguard the public interest. The administration must use a bidding process that provides the most advantageous contracts possible. The other main aim of the bidding process is to give private companies and individuals equal opportunities to enter into contracts with the public administration, observing the principle of equality.

There are several statutes establishing rules about bidding processes in Brazil. Currently, the most important are:

i. Law No. 8,666/93, which sets out the general rules for bidding procedures and government contracts;
ii. Law No. 8,987/95, which covers the rules for

delegating the provision of public services to private sector companies through authorisations, permissions and concessions (Concessions Law);

iii. Law No. 11,079/03, which sets out the rules for PPPs (PPP Law);
iv. Law No. 10,520/02, which establishes rules on reverse auctions;
v. Law No. 12,462/11, which provides special bidding rules for certain projects; and
vi. Law No. 13.303/16, which provides specific rules concerning public companies, mixed capital companies and their subsidiaries, within the Union, States, Federal District and Municipalities.

Some states have their own bidding and contracting statutes, which mostly follow the general principles and regulations set out under federal laws.

In addition, as part of Brazil's defence strategy (*Decree No. 6,703/08*), Law No. 12,598/12 was enacted on 22 March, 2012. This sets out special rules for public procurement relating to strategic defence products. The main purpose of this law is to provide special conditions (such as in relation to tax and the transfer of technology) to encourage domestic companies to develop technology for Brazil's defence. To benefit from these conditions, a company must be deemed a strategic defence company (*Empresa Estratégica de Defesa*) (EED).

General public procurement rules

Law No. 8,666/93, in addition to the organs of direct administration, is applicable to special funds, autarchies, public foundations, public companies, mixed capital companies and other entities directly or indirectly controlled by the Federal Government, States, Federal District and Municipalities.

It is prohibited to admit, predict, include or tolerate, in the convening acts, clauses or conditions that compromise, restrict or frustrate its competitive character and to establish differentiated treatment of a commercial, legal, labour, social security or any other nature, between Brazilian and foreign companies, including with regard to currency, modality and place of payments, even when financed by international agencies.

Law No. 8,666/93 provides that public law and principles shall regulate public contracts. It defines public contracts as being "all contracts between the public administration and private entities in which there is a binding arrangement stipulating reciprocal obligations". Public contracts must reflect what the bidder has proposed and comply with the bid notice terms.

The parties to the contract must submit contract-related disputes to the courts with jurisdiction over the public administration's headquarters. This applies even to contracts with foreign entities, but not to:

i. contracts where payments are made through international finance organization loans if Brazil is a member of that organization (such as the World Bank); and
ii. contracts for buying equipment made and delivered abroad.

The public administration will normally insist on the other party providing a performance bond for contracting work, services and purchases. They may submit them in cash, Government bonds or bank guarantees. The bond cannot exceed 5% of the contract value. However, if the services are important or the contracts are technically complex and involve considerable financial risk, this limit may increase to 10%.

The public administration may:

i. unilaterally change the contract to better meet the public interest;
ii. unilaterally terminate the contract;
iii. monitor the other party's performance of its contractual obligations; and
iv. apply penalties for non-performance of the contract.

Principles

The law reinforces the constitutional principle of equal protection under the law. A bidding procedure should also be designed to select the most advantageous bid for the government.

Moreover, the bidding procedure must be processed and decided upon in strict accordance with the basic principles of:

i. Legality;
ii. Impartiality;
iii. Morality;
iv. Equality;
v. Publicity;
vi. Lack of administrative corruption;
vii. Compliance with the bid rules; and
viii. Objective judgment.

These principles apply to all public procurements.

Types of bids under Law nº 8,666/93

The five types of bids are:

i. competitive bid - where the parties prove, in a preliminary eligibility phase, that they meet the bid notice's minimum qualifications;
ii. quote request - used by previously enrolled interested parties. The supplier must enrol at least three days before the date scheduled for the receipt of bids;
iii. invitation to bid - where the administration invites at least three parties to make a bid. These parties do not have to have been previously enrolled. The invitation must be in an appropriate place and allow other bidders enrolled in the same speciality, if they publicise their intention to take part, at least 24 hours before placing the bids;
iv. bidding contest - the administration invites parties to submit technical, scientific or artistic works. The winners will receive the awards or remuneration mentioned in the public announcement, which must be published in the official press at least 45 days prior to the contest; and,
v. auction - the sale of seized assets or public

administration assets that are no longer of any use to it. The winner will be the highest bidder whose bid equals or is greater than the appraised value of the assets or products.

Competitive bidding is the most commonly used bidding procedure in infrastructure projects, as engineering works and services above BRL1.5 million must be subject to competitive bidding (*Article 23, Law No. 8,666/93*).

Waiver and inapplicability of public bidding

There is a difference between waivers and inapplicability of bids. Waivers are optional in bidding processes, but inapplicability is mandatory. There can be no bid where there is no competition within that sector. Examples of where the public administration can waive the need for a bid include:

i. when the country is at war, in turmoil or undergoing an emergency or public calamity;
ii. where bids have attracted no interested parties - these bids cannot be repeated if they prejudice the public administration;
iii. whenever the bids clearly exceed domestic market values, or are inconsistent with official entities' fixed prices;
iv. where domestic public entities acquire the goods or services that a specially created public administration body or agency provides; and
v. where there is an impending threat to national security.

Bids become inapplicable in the absence of competitive conditions. Examples include:

i. where only the manufacturer or producer of an exclusive commercial agent or company can supply the materials, equipment or items;
ii. contracts within Article 13, related to specialised technical services. These include opinions, expert

reports and appraisals; technical assistance or consultancy and financial audits, taking up the defense on judicial and administrative proceedings; and

iii. contracting a well-known artist.

Qualification of the bidder

Parties wishing to bid must submit documents proving their legal eligibility, technical qualification, economic and financial qualification, and good standing with the tax authorities. Applicants may submit original documents, copies certified by a notary office or by an employee of the bidding agency, or by publishing them in the official press.

The public administration may partially or fully waive the need for documentation in invitations to bid, contest bids, supplying of goods for immediate delivery and auctions. In international bids, foreign companies not operating in Brazil must meet the same requirements "as fully as possible". They must submit equivalent documents, which must be consulate certified and officially translated. The company must have a legal representative in Brazil with express powers to receive service of process and answer in both administrative and judicial matters.

Restrictions on foreign participants

Foreign bidders in public bids face certain restrictions including:

i. in a consortia of Brazilian and foreign companies, the Brazilian company must be the lead company; and,

ii. for awarding purposes, the public administration will add foreign bids to the taxes only Brazilian bidders pay on the final sale transaction.

If there is a tiebreak between bids under equal conditions, the administration will award the contract depending upon whether the goods and services are produced or provided:

i. by Brazilian domestic capital companies;
ii. in Brazil; or
iii. by Brazilian companies.

However, a 1995 constitutional amendment removed the distinction between Brazilian companies with domestic and foreign capital: a Brazilian company is now merely one that is incorporated and has management in Brazil. This means the constitutionality of Article 3 is debatable.

Criteria for the winning bid

The winning bid is decided objectively based on the following criteria (*Article 45(1), Law No. 8,666/93*):

i. Lowest price;
ii. Best technology; and
iii. Technology and price.

Appeals

Administrative appeals depend upon the bid phase they refer to, and resolve:

i. a bidder's eligibility or disqualification;
ii. the judgement of bids;
iii. the annulment or revocation of a bidding process;
iv. denials of enrolment applications and changes or cancellations of existing enrolments;
v. the termination of the contract due to breach of its clauses, specifications or terms; and
vi. the imposition of warnings, temporary suspensions or fines.

Parties must appeal to the authority that made the decision. Such will either review or maintain its decision and send the appeal or remedy to a superior authority.

Procurement (reverse) auctions

Procurement auctions are a Federal Government initiative to speed up and reduce the operating costs of bid processes, as well as reduce the cost of the goods and services. The Government introduced procurement auctions in the 2000's, which allow the use of the Internet to acquire goods and services. Federal Law 10,520/02 establishes that the public administration shall use them for the purchase of common goods and services. 'Common' here means goods or services with performance and quality standards that may be objectively defined in the bid notice using normal market specifications. Typical uses include the purchase of administrative materials and so on.

The only criterion the Federal administration uses to choose successful bids is the lowest price. For this reason, it cannot use procurement auctions in bids that attribute a value to technical proposals. Procurement auctions can be used irrespective of the value of the goods or services, and they are not obligatory but an option: the public administration can use other types of process if it sees fit.

To take part in a procurement auction, the bidder must first send a simple statement establishing that the company is in good standing with the Ministry of Finance, INSS and FGTS, and meets the legal eligibility and technical and financial requirements included in the bid notice. Once this has done this, the bidder may hand in its sealed bid.

The bid supervisor will open the bid immediately to see if it complies with the bid prospectus. The bidder with the lowest price and bidders whose bids are less than 10% above the lowest bid, go to a second round of bids. Each party may bid against the other until only one bidder remains. If there are less than three bids at less than 10% above the lowest bid, the best three bids of any value will go through to the next round. The bid supervisor must then check the content of the winning bid to see if it meets the bidding prospectus requirements. If it does, the supervisor will open the envelope that contains the qualification documents of the best bidder to see if they comply with the terms of the bidding prospectus. If the bidder satisfies these requirements, the supervisor will declare it the winner.

If the best bidder fails to meet the bid qualifications, the supervisor will look at those of the remaining bids in descending order until a winner is declared.

Public Service Concessions

Public services aim to satisfy certain basic public needs and demands, such as health, safety and transport. The Brazilian Federal Constitution recognizes public services as essential and necessary, the rendering of which is an obligation of the public authorities. Such services may be rendered directly by the Government or by private parties, and are contracted by the public administration under certain specific rules established by Federal Law No. 8,987/95, the so-called 'Concessions Law'. It will provide these services directly or indirectly by delegating them to private entities in one of three ways: by concessions, permissions or authorizations. The law regulating public services provides the criteria for deciding which mechanism it must use in each case.

A concession is the delegation of the performance of an Executive public service by the granting authority. The authority can delegate services by bid to a corporate entity or consortium of companies if it displays the capacity to carry out the services on its own account and risk, for a set, renewable period.

A permission is discretionary and temporary. It is usually used in emergencies or transitory situations. It allows a private party to perform public utility services or use public goods. The party receives its remuneration by being able to commercialize the services or goods. Unlike concessions, if the administration terminates its permission, the party is not normally entitled to any indemnity.

Authorizations are the third mechanism. Because Brazil is reforming how it regulates public utilities, authorizations are also receiving attention. They used to be revoked at any time at the granting authority's discretion. In the telecommunications sector for example, authorizations for private services are granted to companies that meet the requirements established under the General Telecommunications Law and specific regulations. The energy sector uses a similar system to grant authorizations for certain low-capacity, electricity generation services.

The Government is responsible for providing public utility services directly or by grant or permit. It will only grant these through a public bid.

The law provides for:

i. the regime for public utility companies, the special nature and extension of their contract, and the conditions for forfeiture, control and termination of the grant or permit;
ii. the rights of users;
iii. the tariff policy; and,
iv. the obligation to maintain adequate services.

The Concessions Law governs how the Government authorizes third parties to perform public services. Under a concession, the services must meet the user's needs by satisfying requirements such as those of regularity, continuity, efficiency and safety.

The Government can only grant public service concessions following a bid process and choosing a company to provide the services in the bid. The public administration will sign a concession agreement with that company. The draft of the concession contract is usually attached to the public notice. The public administration cannot substantially alter this after the bid or risk cancellation of the process. The law applies to many services.

These include concessions for operating:

i. Federal highways;
ii. Federal dams, locks, reservoirs and irrigation works;
iii. customs stations and terminals for public use, except those in ports or airports;
iv. air and space navigation and airport infrastructure;
v. interstate rail and water ways;
vi. transport of passengers by road across State or national boundaries;
vii. ports;
viii. mining; and,
ix. sanitation services, rubbish removal and related activities.

The concession will end when the:

i. contractual term expires;
ii. Government expropriates the concession;
iii. Government forfeits the concession;
iv. contract ends;
v. contract is annulled; and
vi. concession-holding company goes bankrupt or ceases trading, or if the owner of a sole-owner company dies or is incapacitated.

Public Private Partnership – PPP

PPPs were introduced into Brazil by the PPP Law (Federal Law No. 11,079/03). The law established two new types of concession, which can be seen to supplement the Concessions Law (see above, *Specific rules for concessions*):

i. **Sponsored concession *(concessão patrocinada)***. This is basically similar to concessions under the Concessions Law. The state is allowed to supplement the concessionaire's revenues and/or share and mitigate risk with the concessionaire; and
ii. **Administrative concession *(concessão administrativa)*.** This is a combination of providing long-term services to the state (and not to end users) and the private construction of the facilities necessary to provide the services.

While some provisions of the Concessions Law apply to PPP projects, the main differences between the PPP Law and the Concessions Law are that under the PPP law:

i. Its rules apply to all federal PPPs.
ii. It sets out general rules for the PPPs of states and municipalities (although some states, such as São Paulo, Rio de Janeiro and Minas Gerais, and even some municipalities, have their own laws on PPPs).
iii. The minimum value for a PPP is BRL10 million. The minimum duration is five years and the

maximum duration is 35 years.

iv. Lenders have step-in rights. The state is authorised to pay the consideration arising from the PPP agreement directly to the lenders, if the relevant financing agreements establish this.

v. The state's consideration can be paid to the concessionaire:
   - in cash;
   - in the form of non-tax credits or other rights against the state;
   - through use of government real estate; or
   - other lawful means provided in the concession agreement.

vi. The state can set out a performance-based compensation system.

vii. The state can only make payments to the concessionaire after the services are made available, although partial payments for partial availability of services are allowed.

viii. The state can provide guarantees for its payment obligations, in the form of:
   - the allocation of revenues;
   - the use of special funds;
   - the issue of performance bonds with independent insurers;
   - warranties provided by multilateral institutions or independent banks; or
   - warranties provided by special funds or companies created by the state for this purpose.

The federal government will establish a fund to provide security for its obligation under the PPP concession agreement.

The concession agreement will establish objective risk-sharing between the parties.

Differentiated Procurement Regime

Law No. 12,462/11 was created to establish special bidding rules for projects relating to the 2014 World Cup and the 2016 Olympic Games (Differentiated Procurement Regime) (*Regime*

Diferenciado de Contratação) (RDC). But several projects are now regulated by Law No. 12,462/11, and Law No. 8,666/93 is likely to be amended in the near future.

The RDC can be used for infrastructure works and contracting services for the airports serving the state capitals, at a distance of up to 350 kilometres from the cities that hosted World Cup matches and the Olympic Games. Also, for projects included in the old Growth Acceleration Program (*Programa de Aceleração do Crescimento*) (PAC), works and engineering services within the scope of the Unified Health System (*Sistema único de saúde*) (SUS), works and engineering services for the construction, expansion and administration of penal establishments and socio-educational assistance units, actions in the field of public security, and works and engineering services related to improvements in urban mobility or expansion of the logistics infrastructure.

To benefit from the law, the public entity must clearly express the adoption of the differentiated procurement regime in the invitation to bid, to avoid being governed by the rules established under Law No. 8,666/93.

There are some differences in relation to Law No. 8,666/93. It has been suggested that the law was introduced as a test regime to replace Law No. 8,666/93. The main differences are:

- The preference for an online bidding procedure, despite the complexity of infrastructure projects;
- The procurement procedure starts with the economic proposal stage, which is when the bidders disclose their prices;
- Only the winning bidder has its qualification documents analysed;
- The public budget is not disclosed to the bidders before the procedure.

Although the RDC is still valid, it is very likely that it will be replaced by new legislation which is currently under discussion.

Specific Rules for Public Companies and Mixed-Capital Companies

Federal Law No 13.303/16 provides specific rules for public

and mixed-capital companies and their subsidiaries, covering any and all such companies of the Federal Government, States, Federal District and Municipalities that pursue economic activity in the production or sale of goods or services, even if the economic activity is subject to the monopoly regime of the Union or the provision of public services.

When these companies do not hold the controlling portion of the shares when participating in another company, they must adopt, with the duty to supervise, practices of governance and control proportional to the relevance, materiality and risks of the business in which they are participants.

A public company, or a mixed-capital company and its subsidiaries must observe rules of corporate governance, transparency and structures, risk management practices and internal control, composition of management and, if shareholders, mechanisms for their protection.

Due to the provisions of Law No. 13,303/16, the development of Integrity/Compliance Programs for such companies is now mandatory, as is the creation and disclosure of their Integrity and Conduct Code.

Contracts with third parties to provide services to public companies and mixed-capital companies, for the acquisition and rental of assets, the sale of assets and assets that are part of their respective assets, or the execution of works to be integrated into such assets, as well as to the implementation of the real burden on such assets, must be preceded by public bidding.

In the biddings and contracts refereed in this law, the following guidelines must be observed;

i. Standardization of the object of the contracting;
ii. Search for the greatest competitive edge for the companies related hereto;
iii. Division of the object, seeking to increase the number of competitors;
iv. Preferred adoption of the reverse auction;
v. Observance of a compliance policy in the transactions with interested parties.

The biddings and contracts shall especially observe the rules related to:

i. Environmentally correct final disposition of the solid waste generated;
ii. Mitigation of environmental damages through conditioning and environmental compensation measures;
iii. Utilization of products, equipment and services that have been proven to reduce the consumption of energy and natural resources;
iv. Assessment of neighbouring impact;
v. Protection of the cultural, historic, archaeological and non-tangible equity;
vi. Accessibility for persons with disability or reduced mobility.

The bid may be waived in situations determined by law, especially:

i. for works and engineering services up to R$ 100,000.00 (one hundred thousand reais); and
ii. for other services and purchases of up to R$ 50,000.00 (fifty thousand reais) and for disposals, in cases provided by the Law;

Direct contracting will also be made when there is unfeasibility of competition.

The bidding procedure shall comply with the following sequence of steps:

i. preparation;
ii. disclosure;
iii. submission of offers or proposals;
iv. judgment;
v. verification of the effectiveness of the proposal;
vi. negotiation;
vii. qualification;
viii. filing of appeals;
ix. adjudication; and
x. ratification of the outcome or revocation of the procedure.

The following judgment criteria may be used:

i. lowest price;
ii. highest discount;
iii. best combination of price and technique;
iv. best technique;
v. best artistic content;
vi. highest price offer;
vii. best economic return; or
viii. best destination of disposed assets.

A guarantee may be required in the engagement of works, services and purchases. The contractor shall choose one of the following modalities of guarantee:

i. security in cash;
ii. performance bond; or
iii. bank guarantee.

The public and the mixed-capital companies may adopt a procedure of private interest manifestation for the receipt of proposals and projects to meet previously identified needs.

Public Private Partnerships

Introduction

In Brazil, a public service is an activity that the State, by constitutional decree, must develop for the benefit of the public. Activities which are considered to be public services in Brazil include roads, railways, ports, airports, urban mass transportation, environmental services, etc. The State may provide such services directly or through concessions and permissions. The concept of concessions in not new in the Brazilian Legal System and the concession model in Brazil is currently based upon two main legal statutes: The Concessions Law[1] and the Public Private Partnership Law.

The Concessions Law establishes that Concession is the

operation of public facilities and services, for a determined period, at the concessionaire's risk. This can involve the exclusive rendering of a service or the rendering of a service coupled with the construction of public works or facilities. The concessionaire may recoup its investment exclusively from the revenues collected from the users, within the term of the concession.

Such concession model worked very well for projects which had a substantial margin of safety, *i.e.* projects with low risk. It did not work, however, for projects with more risk involved. It barely worked for green field projects, except for the assumption and improvement of already existing facilities. This is because the Concession Law established that the concessionaire had to operate at its own risk.

Even though there were some projects to which the Government provided financial support, either in the form of financial support, construction of concession work/facilities, or risk mitigation, many advocate that this kind of support was illegal. Thus, given the understanding that the Concessions Law did not allow the State to either complement the concessionaire's revenue or assume or mitigate risk, the only solution was to enact a new statute.

In light of that, the Public Private Partnership was established in the Brazilian Legal System through the enactment of Law no. 11,079, dated December 30, 2004 ("Law no. 11,079/04") in which two kinds of concessions were established that could be understood as a complement to the provisions of the Concessions Law.

Such new types of concessions are:

i. The Sponsored Concession ("Concessão Patrocinada"), which is basically a concession in the fashion of the Concessions Law in which the State is allowed to complement the concessionaire's revenues and/or share, and mitigate risk with the concessionaire; and
ii. The Administrative Concession ("Concessão Administrativa"), which is a modality of provision of long-term services to the State (and not to the end users) coupled with the private construction of the necessary facilities for the rendering of the services.

Law No. 1,1079/04 is applied to the Public Administration bodies of the Executive and Legislative Branches, Special Funds, autarchies, public foundations, public companies, economic societies and other companies controlled directly or indirectly by the Union, States, Federal District and Municipalities.

Main provisions of Law No. 11,079/04

Some of the provisions of the Concessions Law are applicable to PPP projects, but there are others that are exclusive to such types of concessions. In this sense, it is important to establish the main provisions in the Federal PPP Law:

i. The statute's rules are applicable to all Federal PPPs; it also provides general rules that are applicable to State and Municipality PPPs[2];
ii. The minimum value for a PPP is R$ 10,000,000.00 (ten million reais); the minimum term is five (5) years and the maximum term is thirty-five (35) years;
iii. The lenders have step-in-rights and the State is authorized to pay the consideration arising from the PPP agreement directly to the lenders, if the relevant financing agreements so establish;
iv. The State's consideration may be paid to the concessionaire in cash, in the form of non-tax-credits, in the form of other rights before the State, use of Government real estate, or other lawful means provided for in the relevant concession agreement;
v. The State is authorized to establish a

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1. Law no. 8,987, dated February 13, 1995 - Such statute deals with the matter within the scope of Article 175 of the Brazilian Constitution. It is a Federal statute, applicable to all Federal Government concessions, and also sets out general rules that should be followed by the States and Municipalities, which can enact their own specific concession statutes.
2. Nevertheless, some States such as São Paulo, Rio de Janeiro and Minas Gerais, and even some municipalities, have their own laws regarding Public Private Partnerships.

performance bond based upon the remuneration benefit of the concessionaire;

vi. The State may only make any payments to the concessionaire after the services are made available; partial payments for partial availability of services is allowed;

vii. The State may provide warranties to its payment obligations in the form of segregation of revenues, use of special funds, hiring of performance bonds with independent insurers, warranties posted by multilateral institutions or independent banks, warranties provided by special funds or companies created with this aim by the State;

viii. The Federal Government will establish a fund to provide warranties to its obligation pursuant to PPP concession agreements; and

ix. The concession agreement shall establish objective risk sharing between the parties.

The Agreement should provide the requirements and conditions under which the public partner will authorize the transfer of control or temporary administration of the special purpose company to its financiers and guarantors with whom it does not maintain a direct corporate bond, with the purpose of promoting its financial restructuring and ensuring the continued provision of the services.

It may also provide a variable compensation to the private partner linked to its performance, according to the quality standards and goals defined in the contract.

The Bid Process

According to clause 10 of Law No. 11,079/04, prior to a PPP agreement a competitive bidding procedure should take place, and this requires:

i. authorization by the public authority, based upon a technical study;

ii. an estimate of the budgetary and financial impact during the periods in which the PPP

agreement shall be in effect;

iii. a statement by the party responsible for authorizing the expenditure that the obligations undertaken by the PPP agreement are in line with the Budget Guidelines Act and have been considered in the Annual Budget Act;

iv. an estimate of long-term flow of public funds, necessary for fulfilling the financial obligations undertaken by the Public Administration throughout the term of the contract and in each fiscal year;

v. the project is included in the Multi-Year Plan in effect;

vi. submission of the draft invitation to tender and the draft contract for public consultation; and

vii. a prior environmental license or release of the guidelines for the environmental licensing of the project, as required by regulation.

Sponsored grants in which more than seventy percent (70%) of the private partner's remuneration is paid by the Public Administration will depend on specific legislative authorization.

The engineering studies for the definition of the sum of the investment in the PPP should have a preliminary project detail level, and the investment value to define the reference price for the bid will be calculated based on market values considering the overall cost of similar works in Brazil or abroad or based on cost systems that use the input market values of the specific sector of the project, measured (in all cases) by a synthetic budget, and prepared by means of an expedited or parametric methodology.

Law No. 11,079/04 also established that the invitation to bid should contain a draft of the PPP agreement and may further provide:

i. the requirement of a bid bond;

ii. the use of private mechanisms for dispute resolution, including arbitration based upon Law No. 9,307, dated September 23, 1996.

The bidding notice shall specify, when applicable, the guarantees of the consideration from the public partner to be granted to the private partner.

Special Purpose Company

Before a contract is awarded, a special purpose company must be set up and this will be responsible for implementing and managing the PPP. Any transfer of control over the special company is subject to prior authorization by the Public Administration. The Special Purpose Company may be a publicly traded corporation.

The SPE shall comply with corporate governance standards and adopt standardized accounting and financial statements.

The Public Administration is prohibited from holding a majority of the SPE voting capital, except in situations in which a majority of the SPE voting capital is acquired by a financial institution controlled by the Government in the event of default of financing agreements.

The judgment may be preceded by a stage of qualification of technical proposals, disqualifying the bidders that do not reach the minimum score, and this may adopt as criteria:

i. a lower value of the consideration to be paid by the Public Administration;
ii. the best proposal, considering a combination of the criteria above with the best technique.

College Management Body and the Investment Partnership Program

The Federal Government issued Decree no. 5,385 on March 4, 2005, creating a college management body[3] with the following main responsibilities:

i. Establishment of bidding procedures;
ii. Making proposals to the Investment Partnerships Council[4] of the priority services to be the object of a PPP project;
iii. Authorization for the opening of bidding processes;

iv. Approval of invitations to tender; and
v. Evaluation of contract performance reports.

The Investment Partnership Program created by Law 13.334, dated 2016, aims to expand and accelerate the PPP and Concessions programs at Federal level. The main objectives of the program are to:

i. expand investment to meet Brazil's social and economic development goals;
ii. ensure the expansion and quality of the public infrastructure;
iii. promote fair competition for those interested in providing services for the population; and
iv. ensure legal stability.

Limits for PPP projects

Article 28 of Law 11,079/05 establishes that the Federal Government may not grant guarantees in credit operations or make voluntary transfers to the States, Federal District or Municipalities if the sum of current expenditures derived from the partnerships already contracted by these authorities has exceeded, in the previous year, five per cent (5%) of the current net revenue for the fiscal year, or if the annual expenditures of the contracts in effect, in the ten (10) subsequent years, has exceeded five per cent (5%) of the net current revenue.

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3. Comitê Gestor de Parceria Público Privada.
4. O Programa de Parcerias de Investimentos (PPI) - The Investment Partnerships Program, was created by Law 13,334 of 2016.

Chapter 12

Environmental Law

Brazilian Biodiversity and the ABS[1] Laws

The importance of a balanced and preserved environment is crucial to the survival of humankind. Environmental awareness only began to gain strength in the twentieth century and discussions about biodiversity would surface much later.

Biological diversity, or biodiversity, is the variety of life on earth. It comprises variances within species, among species, and of ecosystems. It also refers to the complex relationships among living things and between living things and their environment[2].

In 1987, the subject of biodiversity gained greater prominence in the international scenario, propelled by the issuance of Decision No. 14/26 by the United Nations Environment Program ("UNEP"). The referred provision was responsible for creating a working group of specialists on biological diversity, who were assigned the duty of consolidating the existing efforts and turning them into global mechanisms for environmental conservation. In 1992, after several meetings, the Convention on Biological Diversity ("CBD") was approved, during the United Nations Conference on

Environment and Development ("UNCED"), also known as the Rio de Janeiro Earth Summit.

The CBD has three main goals: the preservation of biological diversity; the sustainable use of its components; and the fair and equitable sharing of the benefits arising from the use of genetic resources.

Brazil is known for its rich biodiversity and ranks first in the list of the 17 megadiverse countries[3]. Due to the importance of biodiversity to the country, Brazil is an important player in the international scenario, especially in relation to access to genetic resources and associated traditional knowledge.

Traditional knowledge (TK) is knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity[4].

Indigenous and/or local communities have been the holders of the associated traditional knowledge for centuries. Access to the traditional knowledge has been used as a faster way to achieve results in the development of commercial products, because it is possible to save years of work and research by using the information possessed by these communities. According to the information from the Ministry of Environment[5], Brazil has 220 indigenous ethnic groups and various local communities (quilombolas [communities

1. On the international level, access to genetic resources and traditional knowledge and benefit sharing are referred to by the initials ABS.
2. Business and the 2010 Biodiversity Challenge: Introduction to the Convention on Biological Diversity. A background paper for the Business and the 2010 Biodiversity Challenge Meeting, London, 20-21 January 2005.
3. The group of "Like-Minded Megadiverse Countries" was created in Mexico in 2002 and made official by the "Cancun Declaration". The term "like-minded" is justified by the fact that the group not only includes countries rich in biodiversity, but also those with similar social, economic, political and cultural interests. The 17 megadiverse countries are: Brazil, Indonesia, Colombia, Mexico, Australia, Madagascar, China, the Philippines, India, Peru, Papua New Guinea Ecuador, United States, Venezuela, Malaysia, South Africa, and Congo. Together, those countries contain about 70% of the planet's genetic diversity.
4. Source: http://www.wipo.int/tk/en/tk/
5. Source: 2010 Information Newsletter published by the Department of Genetic Resources of the Biodiversity and Forests Agency from the Ministry of Environment.

of descendants of slaves], ribeirinhos [riverside communities], caiçaras [native inhabitants of the South-Eastern Brazilian coast], raizeiras [traditional communities located in the Cerrado biome], seringueiros [rubber tappers], quebradeiras de côco babaçu [babassu breakers], amongst others).

CBD also recognizes that the results and benefits obtained by the accessing of genetic resources and the associated traditional knowledge must be shared on a fair and equitable basis.

Brazil ratified the CBD, undertaking the obligation to establish internal rules regarding access to the genetic resources under its jurisdiction and to protect the traditional knowledge of local communities and the indigenous population that is valuable to the conservation and sustainable use of the biodiversity.

The provisions of the CBD became a part of the Brazilian legal system through: (i) Decree No. 2,519/1998, followed by Decree No. 4,339/2002, which established principles and guidelines for the implementation of the National Biodiversity Policy; (ii) Decree No. 1,345/1994, responsible for putting the National Program to National Biodiversity ("Pronabio") in place; and (iii) Provisional Measure No. 2,186-16, dated August 23, 2001.

The last of these decrees was considered the first legal milestone in the area of biodiversity, as it was the first regulation of this kind, comprising a very complex technical subject. During the years of its validity, the Provisional Measure was criticized for the bureaucracy it established. However, it is important to recognize that the regulations allowed companies and universities to access genetic resources and associated traditional knowledge and its respective benefits were indeed shared.

The Provisional Measure remained in effect up to 2015, the year in which Federal Law No. 13,123 (known as the 'Biodiversity Law') was enacted. Afterwards, Federal Decree No. 8,722 was issued, in order to regulate the rules of the referred Law.

The Biodiversity Law includes, amongst other elements, the accessing of the country's genetic heritage and the traditional knowledge associated with this genetic heritage. The possibilities of researching and developing products are only granted to foreign companies and institutions when conducted jointly with Brazilian legal entities.

For purposes of the law, genetic heritage is the information arising from the genetic origins of flora, fauna, microbial or other

nature species, including those originating from living beings' metabolism, whilst the associated traditional knowledge is information or actions from the indigenous population, traditional communities or traditional farmers regarding the properties, and direct or indirect uses associated with genetic heritage.

The definition of genetic heritage "…covers physical (molecules or substances) and intangible (genetic or biochemical information taken from a sample) components. All native species are considered part of Brazilian genetic heritage, including traditional local and creole plant varieties or animal breeds and microorganisms isolated in Brazilian territory. Non-native species are not included, unless they have been introduced in Brazil, grow spontaneously, and have developed distinctive properties"[6].

If a certain company or university intends to research or develop products using Brazilian Biodiversity it is no longer required to obtain prior authorization. Now an online Registration (SisGen - National System for the Management of Genetic Heritage and Associated Traditional Knowledge) must be filled in. The registration must be performed before remittance of samples abroad, commercializing of by-products or final products, applying for intellectual property rights, or publishing research results.

The benefits resulting from the economic exploitation of finished products or reproductive material (from agricultural activities) derived from access to genetic heritage or its associated traditional knowledge, even if the products are produced outside the country, must be distributed in a fair and equitable manner.

Benefit sharing is due only when the component of genetic heritage or the associated traditional knowledge is the main element contributing to the adding of value to the product[7]. The party responsible for the benefit sharing is the product manufacturer regardless of who performed the access in the production chain.

If the finished product or reproductive material has not been

6. "ABS in Brazil" - Paper elaborated by UEBT – Union for Ethical Biotrade, GSS – Sustentabilidade e Bioinovação and the Environmental Law Team of TozziniFreire Advogados. vhttps://www.ethicalbiotrade.org/s/UEBT-ABS-Brazil_version-web-Feb-2017.pdf
7. This is the element whose presence in the finished product is essential to the existence of its functional features or to the creation of the marketing appeal.

produced in Brazil, the importer, controlled company, subsidiary, affiliate, or commercial representative of the foreign manufacturer is jointly and severally responsible for the benefit sharing with the manufacturer of the finished product or the reproductive material.

As a general rule, one percent (1%) of the net revenue obtained from the commercialization of the product or reproductive material for agricultural activities is the amount due for the purpose of sharing benefits derived from access to the genetic heritage. The amount will now be destined to the National Fund for the Distribution of Benefits (FNRB) and is no longer paid to the provider of the genetic resource as established by the revoked law. It is possible to reduce this percentage to 0.1 (one tenth) by entering into a sectoral agreement rather than making a contribution to the FNRB. In addition, in order to encourage non-monetary distribution, companies may choose to implement projects and reduce the amount due as benefit sharing by 25%.

When there is benefit sharing related to access to traditional knowledge from an identifiable source, the manufacturer of the final product must negotiate and share benefits directly with the providers. However, in addition, 0.5% of the net income from sales of the final product must be paid to the National Fund for Benefit Sharing, since the Biodiversity Law recognizes the collective nature of the traditional knowledge. Finally, if there is access to traditional knowledge from a non-identifiable source, the same percentage of 1% of the net revenue owed by the access to genetic resources must be forwarded to the FNRB.

Enforcement of the Biodiversity Law is guaranteed by IBAMA (Brazilian Institute of Environment and Renewable Natural Resources), an arm of the Ministry of Environment. In order to execute the legal provisions, IBAMA is entitled to:

- Impose administrative penalties, which range from (i) BRL 1,000 to BRL 100,000 when the infraction is committed by an individual; and (ii) from BRL 10,000 to BRL 10,000,000 when the infraction is committed by a legal entity;
- Seize (i) the samples containing the accessed genetic heritage; (ii) the instruments employed in the acquisition or processing of the genetic

heritage or of the associated traditional knowledge that has been accessed; (iii) the products deriving from the access to the genetic heritage or to associated traditional knowledge; or (iv) the products obtained from information regarding the associated traditional knowledge;

- Temporarily suspend the manufacturing and sale of the finished product or reproductive material deriving from access to the genetic heritage or to the associated traditional knowledge up to its regularization;
- Suspend (fully or partially) the specific activity related to the infraction; and
- Suspend or cancel any certificate or authorization granted.

It is important to mention that due to the sensitiveness of the subject, when information about a breach of the biodiversity laws is published by the press, it is usually connected to the practice of "bio-piracy". Therefore, in addition to the imposition of administrative penalties, it should not be forgotten that companies that violate the law may have their names associated with "bio-piracy", which threatens a serious risk of damage to their brands and images.

Recent years have been characterized by ongoing climate change, the extinction of species, and social inequality. The sustainable use of biodiversity and benefit sharing by the companies within their industrial sectors is a competitive edge and a solid way to implement CBD principles. It also merges with environmental policies, stimulates socioeconomic development, increases public health, and encourages research, development and innovation.

The Legal Framework for Environmental Protection

Article 225 of the 1988 Constitution enshrines its fundamental rules on environmental protection. This provision not only assures everyone's right to an ecologically balanced

environment — defined as an asset of common use, essential to a healthy quality of life —, but also imposes upon the Government and the community the duty to defend it and protect it for the present and future generations. Moreover, article 170 of the 1988 Constitution states that the economic order shall observe, amongst other principles, the defence of the environment.

To guarantee the right to an ecologically balanced environment, the 1988 Constitution establishes that all levels of government (federal, state and municipal) must share the power — and the duty — to protect the environment. This includes both the concurrent jurisdiction over law-making (articles 24 and 30, I and II) and for common administrative responsibility (article 23). Hence, environmental law in Brazil comprises a wide body of statutes and executive acts issued by all members of the federation.

To avoid contradictions, the 1988 Constitution set forth rules distributing these responsibilities between the different levels of government. Therefore (i) regarding the concurrent legislative competence, the National Congress is limited to passing general rules, binding to all other members, which may enact supplementary rules, pursuant to their particularities (article 23), with the Municipalities being in charge of legislating on matters of local concern (article 30, I and II), and (ii) regarding common administrative jurisdiction, as determined by article 23 of the 1988 Constitution, Complementary Act 140/11 regulates the cooperation between the Union, the States and the Municipalities, setting forth rules on the granting of environmental licenses and the stewardship of polluting activities.

One of the main general environmental rules passed at the Federal level is Act 6,938/81, which sets forth the National Environmental Policy Act (NEPA). There are many other relevant statutes, such as Act 9,433 (National Policy for Water Resources), Act 9,966/00 (Oil Act), Act 9,985 (National System for Protected Areas), Act 11,428/11 (Rain Forest Act), Act 12,187/09 (National Policy for Climate Change), Act 12,305/10 (National Policy for Solid Waste Management), and Act 12,651/12 (Forest Code). However, due to its limited scope, this chapter will focus on certain aspects of the NEPA.

Amongst other goals, the NEPA aims to promote a balance between socio-economic development and protection of the environment (article 4).

A key feature of this statute is the creation of the National

Environmental Council (CONAMA), a regulatory body, coordinated by the Ministry of the Environment, composed of representatives from the three levels of government, civil society and the productive sectors. CONAMA's resolutions regulate critical instruments contained in Brazilian environmental law, including the Environmental Impact Assessment – EIA (Resolution 01/86) and the environmental licensing process (Resolution 237/97).

Pursuant to such regulations, the following activities depend on the obtaining of environmental licenses in advance: location, construction, installation, expansion, modification, and operation of facilities or activities "that make use of natural resources, considered effectively or potentially polluting", and "capable, in any way whatsoever, of causing environmental degradation".

Under the CONAMA Resolution 237/97, as a rule, the environmental licensing involves a three-stage process: (i) Advance Licence, granted at the preliminary stage of the enterprise or activity, approving its location and conception, certifying its environmental feasibility, and establishing basic conditions to be met in the next stages; (ii) Installation License, which authorizes the installation of the activity in accordance with the specifications contained in the approved plans, programs and projects, including environmental control measures and other conditions; and (iii) Operation License, which authorizes the operation of the activity after verification of compliance with the requirements set forth in the other licenses.

According to the 1988 Constitution, the environmental licensing processes of activities "that may potentially cause significant degradation of the environment" are subject to a prior Environmental Impact Assessment - EIA (article 225, § 1, IV), which is regulated by CONAMA Resolution 01/86.

The NEPA also regulates the civil liability regime for environmental damage in Brazil, which, together with other norms (Act 9,605/98, the Environmental Crimes Acts, and Decree 6,514/08, which addresses environmental administrative infractions), will be addressed in the next chapter.

Enforcement of Laws and Regulations: The Question of Liability

1. Three types of environmental liability

In Brazil, there are three types of environmental liability — civil, administrative and criminal — as established by article 225, paragraph 3, of the 1988 Constitution: "conducts and activities deemed to be harmful to the environment shall subject the offender, either a natural or a legal person, to criminal and administrative penalties, regardless of the obligation to repair the damage", that is, civil liability. Thus, a sole incident may give rise to three different, parallel and independent liabilities upon the same person.

2. Civil liability

Act 6,938/81 established a strict civil liability regime for environmental damages, allowing several players to file claims in the form of individual and collective lawsuits. This liability has the following main features:

(a) **Strict liability.** Civil liability for environmental damages is strict, *i.e.*, it is applied regardless of fault on part of the polluter. According to article 4, VII, among other goals, the Act 6,938/81 is designed to "impose upon the polluter and the predator the obligation to recover and/or indemnify the damage caused". Besides this, "the polluter is obliged, regardless of fault, to indemnify or recover the damages caused to the environment and to third parties affected by its activity" (article 14, § 1). Thus, liability is imposed regardless of either intent to cause harm, or a breach of a duty to exercise reasonable care (negligence).

It is therefore irrelevant, for example, that the polluter acted with due care to develop an activity, or that the best available technology was used. For civil liability to be applied, it is enough for the following elements to take place: (i) environmental damage; (ii) conduct (act or omission); and (iii) a causal link between them.

(b) **Absolute liability *("teoria do risco integral").*** The Brazilian High Court *("Superior Tribunal de Justiça - STJ")* has widely accepted the so-called *"teoria do risco integral"* (absolute liability theory), according to which typical defences based on intervening causes (such as third parties' behaviour or acts of God, whether or not it was foreseeable) are not admitted. Thus, whoever creates a risk of damage to the environment and third parties, due to this sole fact (= mere existence), may be held liable when such risk takes effect.

(c) **Far-reaching concept of causation ("indirect polluter").** The notion of causation is not explicit in the law, but rather inferred from the legal definition of polluter, who is "the natural or legal, public or private person, directly or indirectly responsible for an activity that causes environmental degradation" (article 3, IV, of Act 6,938/81). Because it encompasses persons indirectly connected to the harm, causation has a wide, abstract scope.

The Brazilian courts, displaying great aversion to environmental risks, have been applying the far-reaching notion of "indirect polluter". See, for instance, the following ruling from the STJ: "to determine the cause of urban-environmental damage and hold co-defendants jointly and severally liable, the following persons must be treated equally: whoever acts; whoever fails to act when they should have acted; whoever is

indifferent to others' actions; whoever remains silent when they should have reported; whoever finances others' actions; and whoever enjoys benefits from others' actions" (STJ, 2nd Panel, REsp 1.071.741-SP, Justice Herman Benjamin, 24 March 2009).

Thus, anyone who falls into this vast array of conditions and persons may be held liable, not only strictly, but also jointly and severally, as described below.

(d) **Joint and several liability.** Under Act 6,938/81, a polluter is a person directly or indirectly responsible for an activity that causes environmental degradation. Courts generally infer from this provision that liability for environmental damages is not only strict, but also joint and several. This interpretation is based on the express reference to "indirect polluters" by the law, and, additionally, on the rule provided by the Brazilian Civil Code (article 942) according to which joint and several liability should be applied when several persons have caused a single instance of harm. In any event, the one who pays for the entire damage is entitled to claim for reimbursement against the other co-polluters.

(e) **Environmental damages.** The damages to be repaired and/or compensated due to an incident or activity that causes environmental damages cover not only the ecological contamination (*i.e.* damage to natural resources, such as fauna, flora, air, water, soil), but also individual and social (= collective) harms, including actual damages *("danos materiais")* and moral damages *("danos morais" or "extrapatrimoniais")*, which may comprise punitive damages. Although strict liability disregards fault, when fixing the value of moral and punitive damages, courts usually take into account

the blameworthiness of the polluter's conduct.

(f) **Burden of proof.** On October 24, 2018, the STJ recognized the shifting of the burden of proof as a comprehensive, binding rule applicable to all civil lawsuits involving environmental damages ("*Súmula* 618"). This consolidated the understanding that defendants should bear the burden of proving that: (i) there is no damage; or (ii) they are not responsible for (= linked to) the damage.

3. Administrative and criminal liabilities

(a) **Punitive goals.** Both administrative and criminal liabilities are aimed at punishing those who practice behaviour deemed to be in violation of the environmental law.

Administrative liability is applied by the relevant environmental agencies (either federal, state or municipal), within an administrative proceeding, and, once characterized, usually results in the imposition of fines on the wrongdoers and embargos on the activities. Other sanctions may be imposed, such as warnings, suspension of activities, limitation of rights, amongst others.

Criminal liability is applied by the Criminal Court, within a judicial proceeding filed by the Public Prosecutor's Office, and, once characterized, may result in the imposition of: (i) fines applied to the companies and, in some cases, involving at least gross negligence; (ii) imprisonment for individuals. It should be noted, however, that criminal liability normally takes place in cases of great importance and reprehensibility of one's behaviour, and is deemed to be the utmost and extreme form of liability.

(b) Selected administrative infractions and crimes.

Decree 6,514/08 sets forth administrative infractions and sanctions regarding the environment, and governs the federal administrative procedure to investigate such infractions, whereas Act 9,605/98 provides for the Environmental Crimes Act. Such rules have several provisions describing conduct as either an administrative infraction or a crime against the environment, and setting forth the respective penalties. It should be noted that, in some cases, the same conduct is treated both as an administrative infraction and a crime.

The following infractions and crimes are noteworthy:

Pollution

Administrative infraction: "Causing any sort of pollution at such levels that they lead, or may lead, to damage to human health or provoke the death of animals or significant destruction of biodiversity" (Fine: R$ 5,000.00 - R$ 50,000,000.00) (Decree 6,514/2008, article 61). The same penalty may be imposed in case of "disposing of solid, liquid or gaseous residues or refuse, oils or oily substances that disrespect the requirements set down in laws or normative acts" (Decree 6,514/2008, article 62, V).

Crime: "Causing any sort of pollution at such levels that they lead or may lead to damage to human health, the death of animals or significant destruction of flora" (Intentional conduct: Imprisonment for one to four years, plus a fine - Act 9,605/98, article 54, lead paragraph: Incorrect conduct: Imprisonment for six months to one year, plus fine - Act 9,605/98, article 54, § 1).

Performing polluting activities without the relevant environmental permit
Administrative infraction: "Building, reforming, expanding, installing or operating facilities, activities, works or services that use environmental resources held to be effectively or potentially polluting, without a proper permit or authorization from the competent environmental agencies, in disrespect of the permit obtained, or failing to observe the pertinent legal norms and regulations" (Fine: R$ 500.00 - R$ 10,000,000.00) (Decree 6,514/08, article 66).

Crime: "Building, reforming, expanding, installing or operating potentially polluting facilities, activities, works or services, anywhere in the national territory, without a proper license or in disrespect of the pertinent legal norms and regulations" (Intentional conduct: Imprisonment for one to six months, or a fine, or both penalties cumulatively) (Act 9,605/98, article 60).

(c) **Limited scope of causation and the role of fault.** The STJ has acknowledged a critical difference between, on the one side, civil liability, and, on the other, administrative and criminal liabilities: civil liability, as seen above, may cover a vast array of people who are indirectly connected to a third party's activity that causes environmental damage, while administrative and criminal liability are, as a rule, limited to those who actually perform the acts described as infractions in the applicable rules.

It should be noted, however, that those who occupy positions that entitle and require them to prevent others violating the environmental rules (such as, in some cases, shareholders) may,

depending on the actual facts, also be punished by the relevant authorities if they fail to exercise their duties of care (either because of negligence or intent), and if such failure is deemed to be a cause of the environmental damage or infraction (*e.g.* operating without the relevant license).

According to Decree 6,514/08, an administrative infraction is "every act or omission that violates the legal rules" of environmental protection (article 1).

Moreover, it should be emphasized that, pursuant to Act 9,605/1998, both legal entities and individuals may be criminally prosecuted for environmental crimes.

According to article 3 of Act 9,605/98, "legal entities shall be held liable in the administrative, civil and criminal spheres, as provided for in this Act, in cases in which a violation is committed by a decision made by its legal or contractual representative, or its collegiate body, in the interest or benefit of the legal entity".

Article 2 of that same Act provides that, "whoever in any way contributes to the practice of the crimes provided for herein is liable for the pertinent penalties to the extent of his fault, as well as the director, administrator, member of the board and technical body, auditor, manager, agent or representative of a corporate entity who, being aware of the criminal conduct of others, fails to prevent such practice when it was within his power to do so".

(d) **Criteria to fix the penalties.** When it comes to environmental violations, both administrative and criminal liabilities have the same criteria for establishing the penalties to be imposed on the

wrongdoers: (i) the gravity of the fact, taking into account the reasons for the infraction and its consequences for public health and the environment; (ii) the antecedents of the wrongdoer as regards complying with the legislation on environmental matters; and (iii) the economic situation of the wrongdoer, in the case of a fine (article 4 of Decree 6,514/08, and article 6 of Act 9,605/98).

(e) **Burden of proof.** As a rule, administrative acts — including those that impose administrative penalties — are presumably valid, and the alleged violator has the burden of repealing such presumption. As for the criminal liability, according to the Brazilian Constitution, “no one shall be considered guilty before the rendering of a final (res judicata) penal sentence” (article 5, LVII). In criminal cases, the plaintiff (Public Prosecutor’s Office) has, as a rule, the burden of proving that the alleged violator committed the crime.

Chapter 13

Real Estate and Property

Applicable Legislation

Brazil's key real estate legislation covering real estate transactions includes the: (i) 1988 Federal Constitution (Constitution); (ii) Civil Code (Federal Law No. 10,046/2002) (*Código Civil*); (iii) Urban Land Statute (Federal Law No. 10,257/2001) (*Estatuto da Cidade*); (iv) Rural Land Statute (Federal Law No. 4,504/1964) (*Estatuto da Terra*); (v) Public Register Law (Federal Law No. 6,015/1973) (*Lei de Registros Públicos*); (vi) Real Estate Development Law (Federal Law No. 4,591/1964) (*Lei de Incorporações*); (vii) Urban Lease Law (Federal Law No. 8,245/1991) (*Lei de Locações*); and (viii) Real Estate Investment Finance Law (Federal Law No. 9,514/1997) (*Lei do Sistema de Financiamento Imobiliário*).

Right of title

The right of title is the individual's or corporate entity's right to use, enjoy and dispose of their property and to recover title from any party who may be unlawfully holding it. The right of title includes – that is, being registered in the same title - the soil with its

surface, its accessories and surroundings, such as buildings and trees and hanging fruit, and the air and subsoil. Right of title does not include mines, products derived from the subsoil or waterfalls, which are considered to be distinct from the soil for purposes of exploitation.

Receiving title to property is only effective when the new owner registers the transfer instrument with the Real Estate Registry Office. Transfer instruments include:

- a public deed for the purchase and sale of real estate;
- the minutes of a court decision in an expropriation judicial proceeding; and,
- other transfer documents such as those for the contribution of real estate as capital in a corporate entity.

Executing an instrument involving property will only create rights and duties between the parties; it will not be enforceable against third parties unless the parties register it with the Registry Office. The real estate record file contains all relevant information regarding the real estate, such as (i) ownership title; (ii) past transactions involving the real estate; (iii) any liens and encumbrances; (iv) built-up area; and (v) limits and boundaries. Furthermore, all acts that create, change, end or transfer any rights to real estate must also be recorded. These include:

- purchase and awards at a public auction;
- gaining title by adverse possession through continuous and uncontested possession; and
- creation of "in rem" rights to property such as mortgages, rights-of way and attachments.

Purchase and Sale of Right of Title

Main Stages and Documents

The process of acquiring real estate is usually divided into three main stages: (i) the pre-contractual stage; (ii) the contractual stage; and (iii) the post-closing stage.

Commercial negotiations usually occur during the pre-

contractual stage as the parties start discussing key aspects of the proposed real estate transaction, which are usually governed by the terms and conditions of a non-binding term sheet or letter of intent and/or protected by an exclusivity and/or confidentiality instrument.

The pre-contractual stage is usually governed by a memorandum of understanding. Key issues that are usually agreed upon at this point are: (i) the definition of the real estate subject to the transaction; (ii) the terms and conditions for the buyer to perform legal due diligence of the real estate and/or technical due diligence (such as environmental, social or boundary issues); (iii) the definition of the base price of the real estate and criteria for future adjustments to it, based, for example, on the due diligence findings; and (iv) the conditions for the transaction to bind the parties and the resulting structure for its implementation.

After completion of the pre-contractual stage, the buyer and seller may execute either: (i) a public deed of purchase and sale, under which the buyer is entitled to acquire ownership of the real estate; or (ii) a purchase and sale commitment, as either a public deed or private instrument, under which the buyer acquires the right to seek ownership of the real estate upon satisfaction or waiver of conditions precedent agreed by both parties.

The parties can freely decide at which point in time they will be legally bound to complete a transaction. They may decide, for instance, to become legally bound at the pre-contractual stage, upon execution of a binding letter of intent setting forth the parties' obligations to complete the sale of the real estate. However, the execution of a private or public instrument transferring real estate only establishes rights and obligations between the parties and is not enforceable against third parties not involved in the specific transaction unless duly registered. Until the relevant transfer instrument is effectively recorded, the individual registered in the real estate record files remains the owner of the real estate and is entitled to exercise all the rights related to the title of the property.

Therefore, the relevant document, for example a public deed of purchase and sale, must be taken to be registered with the Real Estate Registry Office upon its execution, to irrevocably and irreversibly transfer the title or for the creation of in rem rights on a property. Within 30 days of the request for registration, the Real Estate Registry Officer must register the change of title or request additional documents or any information needed to complete registration.

Seller's Liability

The seller must act in good faith in all aspects of a real estate transaction. This means that the seller must provide any document or disclose any information that the buyer may reasonably request in the course of its investigation of the seller's title or other relevant aspects of a real estate transaction.

The Brazilian Civil Code establishes that unless otherwise provided contractually, the seller must indemnify any losses suffered by the buyer in the event ownership is lost by the buyer by virtue of a bad title.

Due Diligence

The buyer usually performs legal due diligence covering: (i) ownership of the real estate, by analyzing the real estate record files covering all registered transactions relating to the property; (ii) circumstances that could characterize the sale of a property as a fraud against creditors (*Fraude Contra Credores*) or foreclosure fraud (*Fraude à Execução*); (iii) title deeds of real estate donated by public entities, to search for any restrictions imposed on the exercise of the owner's rights over the real estate; (iv) liens and encumbrances indicated in the real estate record file of the real estate; (v) risks or issues related to lease agreements and any other forms of occupancy; (vi) existence and adequacy of operational licenses in relation to real estate; (vii) enrollment records of the real estate with the applicable municipality (in the case of urban properties) or with the National Institute for Settlement and Agrarian Reform (INCRA) (in the case of rural properties); and (viii) possible environmental liabilities and a ground survey to detect underground contamination.

Sellers' Warranties

The seller usually gives the buyer warranties relating to: (i) ownership and possession; (ii) liens and encumbrances; (iii) occupancy; (iv) judicial and administrative lawsuits; (v) existence and adequacy of operational licenses; and (vi) compliance with environmental regulations.

Buyer's Liability

In certain cases, the buyer can inherit liability for matters that occurred before it bought or occupied the real estate.

After the acquisition of the real estate, the buyer inherits

liability related to the real estate itself (such as liens and encumbrances and condominium expenses) and liability related to any real estate unpaid taxes. Additionally, environmental civil liability related to a property is considered 'propter rem', meaning that upon transfer of ownership of real estate the new owner will be liable for its pending environmental liability.

Buyer and Seller Costs

The buyer usually pays the costs associated with: (i) their own lawyer, a real estate broker and other professionals involved in the real estate due diligence; (ii) the execution and registration of public deeds; (iii) taxes levied on the transfer of title to the real estate; and (iv) taxes levied on the real estate after the transfer of title.

The seller usually pays the costs associated with: (i) their own lawyer's fees; (ii) the preparation of documents and information for due diligence; and (iii) tax levied on the real estate before the transfer of ownership.

Limits to the right of title

Third party rights or the public interest may limit the right of title. Examples include:

- Municipality zoning controls placing limits on building constructions, industrial installations or commercial property, and State environmental zoning controls;
- national security and interest controls;
- controls against insolvent individuals or bankrupt companies disposing of property;
- Government controls such as compulsory purchase orders of private property;
- the right of use of the property by another; and,
- the right of title must be exercised in conformity with its social and economic purposes, preserving fauna, flora, natural beauty, ecological balance and artistic and historic heritage, as well as avoiding air and water pollution.

Extinction of the rights of title

The rights of title end on:

- the transfer of title to a third-party;
- expropriation by the Government, when the expropriating authority transfers a title on private property and pays compensation;
- waiver; or,
- the property's destruction or abandonment.

Condominium and joint ownership

One or more people may own a fixed asset. Although title is an absolute and exclusive right, several people may exercise the right over the same fixed asset, forming a civil condominium. Under this condominium, each co-owner has legal title to a certain percentage of the real estate, and each co-owner pays all charges related to the property according to that share.

Furthermore, co-owners have the right of first refusal to buy each other's portion of the real estate. If one co-owner sells its portion of the real estate without the other co-owners' prior consent, the second co-owner is entitled to initiate legal action within six months of the sale aimed at holding the sale null and void. The order would allow the co-owner to buy that portion by depositing a sum relating to the price of the property in court.

Another form of condominium is joint ownership, the characteristics of which are areas of exclusive use and ownership, and common areas. Owners within joint ownership must set out rules to govern their real estate. The document containing these rules is called the Joint Ownership Contract. The owners must register the contract before the Real Estate Registry Office.

Surface rights

Brazilian law provides for surface rights, under which the owner of real estate can transfer the ownership of its surface. The concession of surface rights creates two separate ownership rights over the same area: the ownership of the soil, and the ownership of the surface, including plantations and constructions. However,

there is no separate registry for the title to the real estate accessories and surroundings.

Rights of possession

The right of possession is the right to exercise certain powers of ownership. These include the right to claim, keep or recover possession of the property; the right to receive fruits from it such as rent and income; the right to be repaid for necessary improvements or accessions made to the property; and the right to keep possession of the property.

Real Estate Leases

Negotiation and Execution of Leases

The lease of urban real estate in Brazil is chiefly governed by Federal Law No. 8,245/91 (Urban Lease Law). The Urban Lease Law sets out the general rules of the landlord and tenant relationship during the lease term. Some of its provisions are public policy and are therefore mandatory, even if the parties have provided otherwise in the relevant lease agreement.

Execution of a lease agreement is subject to general requirements, including: (i) the legitimacy of the parties, meaning they must be legally constituted and/or represented in order to consent; (ii) the form of the contract must not be prevented by law; and (iii) the contract must have a legal and possible subject.

In addition, the execution of a lease agreement is subject to the landlord holding the leased real estate in possession and the absence of impairments or legal bars regarding the leasing of the property. The power to lease the property must be evidenced by the landlord.

Leases can be written or oral, public or private. However, some rights arise from the choice of different forms and, for instance, the right of commercial lease renewal depends on the existence of a written contract.

Although registration of the lease agreement with the competent Real Estate Registry Office is not required for perfecting the lease, some rights are only enforceable against third parties after the lease registration, including the tenant's right: (i) of first refusal; and (ii) to have the lease agreement effective through to the end of its term in the event of the sale of the leased property by the landlord.

Rent Reviews

After three years from the execution of a lease agreement, if the rent amount is unsatisfactory for any of the parties, the unsatisfied party can appeal to a court for an adjustment based on market prices.

Indexation of the rent is legal under Brazilian Law and common practice in Brazil. It must be based on a legally accepted index and currently can only be made on an annual basis.

Lease Term

Neither the Urban Lease Law nor the Civil Code provides minimum or maximum terms for lease agreements. Any non-residential written lease agreement that has a term, or amounts to a term, of at least five years can be renewed for an equal period of time at the discretion of the tenant, if the tenant: (i) is not in default; (ii) has performed the same activity on the leased property for at least three years; and (iii) files a lawsuit with the court between one year and six months before the expiry of the term of the lease. Therefore, the term of non-residential leases is usually at least five years.

The terms and conditions of the lease must be maintained and complied with by a new owner if a transfer of the ownership of the real estate occurs, provided the lease agreement includes an appropriate provision, and it is registered in the real estate record file with the competent Real Estate Registry Office.

Assignment and Sub-Lease

Unless otherwise provided in the lease agreement, all total or partial assignments of the lease or sub-lease of the real estate require the landlord's prior written consent. In addition, for non-residential leases the parties can agree that any tenant change of control will be subject to prior approval by the landlord.

Maintenance of Leased Real Estate

The landlord must perform any required repair or construction related to the building structure of the leased premises.

The tenant is responsible for the maintenance, at its own cost and expense, of the leased premises, ensuring that they are, at least, in as good a state of repair, order and condition as at the start of the lease, excepting ordinary wear and tear.

Termination of the Lease

The landlord cannot terminate a lease agreement in force for a determined term, unless in the case of any of the following events: (i) breach of contract by the tenant; (ii) the tenant not complying with the landlord's right to enter the leased premises in order to make emergency repairs; (iii) when the lease agreement has an undetermined term; and (iv) mutual agreement.

The tenant can terminate the agreement with or without cause at any time during the lease term. The lease agreement can provide for the payment of a penalty for early termination without cause (normally equivalent to three monthly rents). This penalty is paid in proportion to the time elapsed between the initial date of the lease and the termination date. This penalty is not due: (i) when a lease agreement has an undetermined term; and (ii) if emergency repairs that are the responsibility of the landlord take more than 30 days.

Rural Property

Urban property and rural property are distinguished by their use and location. According to the Brazilian Federal Constitution of 1988, sections 182 to 191 establish standards of location to discriminate each type of property.

Rural properties are those located in rural zones, according to the Municipal Zoning Law. The Land Law (Law No. 4,504/64) defines a rural property as being real estate suited for agricultural use and cattle breeding.

Purchase and lease of rural property by foreigners

There are no restrictions to the ownership or possession of urban real estate by foreigners in Brazil.

In relation to the ownership and possession of rural real estate, there are two kinds of restrictions: (i) acquisition and lease of rural real estate by foreign individuals or entities (Federal Law No. 5,709/71 and Federal Law No. 8,629/93); and (ii) acquisition of the possession, ownership or any other in rem right over rural properties located within 150km of the Brazilian border by foreign individuals or entities or by Brazilian legal entities with the majority of their capital held by foreigners (Federal Law No. 6,634/79). Such

restriction also applies for the acquisition of interest by a foreign entity or individual, directly or indirectly, in a company that owns, possesses or has any in rem right over rural real estate located within 150km of Brazil's borders.

There is a national debate regarding the application of the restrictions set forth by Federal Law 5,709/71 to Brazilian entities held by foreigners because, in the view of many lawyers and scholars, it would not be compatible with the Brazilian Federal Constitution of 1988.

The National Board of Justice (CNJ) published a recommendation, dated July 13, 2010, for real estate registry officers to observe the provisions of Federal Law No. 5,709/71. The Brazilian Federal Attorney General (AGU) published a legal opinion on August 23, 2010, reestablishing the restrictions for the acquisition of rural real estate in Brazil by Brazilian entities held by foreigners (Opinion CGU/AGU/ nº 01/2008-RVJ).

Real estate investment funds

The Government issued regulations for Real Estate Investment Funds Law (REIF) in 1993, designed to provide funds for developing real estate ventures for later sale or lease. These ventures include buying and erecting buildings, investing in housing and urban and rural redevelopment projects. The funds are closed condominiums and therefore not corporate entities. They have either a fixed or indefinite term, and their quotas are securities for legal purposes.

The CVM must approve, regulate and inspect REIF operations and administration. Brazilian or foreign investors who raise real estate investment funds through sharing securities must invest in real estate ventures made up of assets and rights in real estate.

A fiduciary entity approved by the CVM manages the REIF's assets and rights to real estate. Each REIF's internal rules must include:

- the identity of the entity responsible for its management as well as the management fee;
- the investment policy;

- the admission fee or the rules to set the fee; and,
- the rules for subscription of quotas by investors and for the sharing of income and capital gains.

Investors holding quotas in a REIF are not entitled to "in rem" rights to the assets forming the REIF.

Chapter 14

Regulated Sectors

Telecommunications (Anatel)

After the Government privatized the telecommunications industry in 1997, through Constitutional Amendment No. 8/1995, which made the state telecommunications monopoly flexible, it created the autonomous regulatory agency - Anatel, the National Telecommunications Agency. In 1995, another important aspect in the process of removing barriers to privatization was the approval of Law No. 8,987/1995, which regulated the concessions and permissions of public services provided in the Federal Constitution. It can be seen that, in Brazil, the privatizations and the adopted regulatory model paved the way for enormous private investments in the sector. This has, in turn, allowed the expansion of access to telecommunications services for the Brazilian population.

Anatel has administrative, technical, political and financial autonomy and is not subject to any Government body. This means that there is: a delegation of authority to the regulatory agency by the political power to guarantee decision-making autonomy to the public administrator; the guarantee of fairer technical decisions; the containment of the influence of government bodies or pressure groups; and the availability of its own sources of financial resources

through inspection fees.

Besides its autonomy, Anatel is socially and politically controlled. There is an external control body, made up of individuals from society for the formulation and evaluation of public policies, through public hearings and consultations. The Executive Branch has a degree of control through a management contract signed with the regulatory agency, in order to achieve certain goals. This guarantees a certain amount of transparency, accessibility and greater independence in decision-making. Anatel decisions can only be challenged in the courts.

Anatel decisions are made by Commissioners. The President appoints them, and the Senate approves them for a fixed five-year term. An Advisory Council of representatives from the Executive and Congress, and members of the industry and consumer public oversee and monitor the agency's initiatives. Directors' meetings are open to the public and are recorded, except where confidentiality is a concern. Anatel also invites the public to discuss proposed regulations. An independent inspector analyses the Agency's regulations and procedures and reports its findings to Anatel's Directors, the Ministry of Telecommunications, Congress, and certain Executive organs. The inspector also publishes their findings in the Official Gazette.

Anatel's mission is to promote the development of telecommunications. It aims to do so by adopting a modern and efficient telecommunications structure able to offer the whole country a reasonable and broad service at affordable prices. Its main functions include:

- implementing a national telecommunications policy;
- defending and protecting the rights of consumers;
- managing the radio-frequency spectrum and use of satellites;
- supervising the market and arbitrating in conflicts between providers;
- creating the General Concession Plan;
- controlling, preventing and punishing financial infractions;
- analysing, from a regulatory standpoint, acts or

transactions that could have an impact on the market, such as the transfer of control of regulated companies (the acts and transactions of which are considered by CADE);

- restricting, limiting or setting conditions for the purchase or transfer of concessions to guarantee competition and prevent financial concentration in the market, and
- setting the tax structure for each service offered to the public.

Telecommunications Fiscal Fund *(Fundo de Fiscalização das Telecomunicações - Fistel)*

Anatel's main funding comes from the Telecommunications Fiscal Fund - Fistel. The Fund is comprised of fees paid by the regulated industry and was created to provide financial resources to cover expenses incurred by the Federal Government in its supervision of telecommunications services, and to develop the means and to improve the technique required for such execution.

Fund for the Universalization of Telecommunications Services *(Fundo de Universalização dos Serviços de Telecomunicações – Fust)*

Law No. 9,472/1997, which created Anatel, contains provisions related to the definition of periodic universalization targets. The progressive universalization of telecommunication services is being implemented by general plans prepared by Anatel and approved by the Executive Branch. These proposals address, for example, the availability of facilities for collective or individual use, the provision of care for the physically handicapped, public or social institutions, rural areas, deprived urban areas, and remote regions. Within this context, the law which created Anatel provides that the 'Fund for the Universalization of Telecommunications Services' – Fust - is the primary mechanism for the implementation of universalization obligations.

Public service concessionaires should also make investments in the universalization of services using their own resources. This portion of direct action is fully provided for in Anatel's founding law, in the invitation to bid and in the concession agreement. It is forbidden to use Fust resources to cover costs with universalization

of services that, according to the concession agreement, the concessionaire itself must support.

The law creating Anatel establishes that the obligations of universalization:

- are established by a general plan with periodic goals;
- are composed of neutral investments in relation to the competition;
- are financed by the Fust, with direct government investments or by investments by the concessionaires;
- cannot use forms of finance that distort competition.

This aspect of the neutrality of investments in universalization is a concern expressed in Law No. 9,472/1997, to establish clarity concerning the sources of financing. This avoids the application of public resources in areas already served by companies that compete freely amongst themselves, ensuring the rational allocation of limited public resources available for universalization. In addition, the competitive market is protected from possible distortions that create asymmetric obligations or allocate public resources to certain economic agents.

General Universalization Targets Plan *(Plano Geral de Metas de Universalização - PGMU)*

The General Universalization Targets Plan has undergone several reforms designed to expand existing goals (for example, to serve rural areas, derived urban areas and remote regions) or to include new targets (such as high-speed broadband data transmission).

PGMU I (Decree No. 2,592/1998) establishes the goals for the progressive universalization of the Switched Fixed Telephone Service *(Serviço Telefônico Fixo Comutado – STFC)*. All costs for meeting the targets set forth in this plan are borne by the related concessionaires, according to the concession agreement. The universalization obligations can be reviewed by Anatel to guarantee efficient investments. This is done by reviewing and replacing goals,

creating new goals or anticipating the goals of PGMU I. It is important to clarify that the review of the goals that can be performed by Anatel must respect the limits established in the concession agreements and be preceded by the indication of the respective sources of financing.

Concessions were granted for a period of five years, with a one-time extension for 20 years. Originally, it was established that, at the time of the extension of the agreements, new universalization goals would be imposed. Thus, Anatel could not determine the expansion of services that did not guarantee the adequate financial return for the concessionaire. In addition, universalization targets are not exclusive to the concessionaire; third parties could be contracted for the implementation of the services resulting from the new goals.

Government initiatives for universalization of telecommunication services

Telecommunication expansion efforts are no longer focused on the SFTC, but rather on broadband data transmission. Law No. 9,998/2000 and Decree No. 4,733/2003 address the following objectives: implementation of accesses for the use of digital information network services for public access, and public policies to guarantee access to the global computer network by the public.

Backhaul

In 2003, Brazilian companies and the Government established goals for the period from 2006 to 2011 (PGMU II, Decree No. 4,769), which provided for the installation of public telephones in different locations. However, these goals have been changed because ‘Backhaul’ is an instrument that allows the use of more efficient technology. According to Decree No. 6,424/2008, “Backhaul is the STFC support network infrastructure for broadband connection, interconnecting the access networks to the operator backbone".

National Broadband Plan (Plano Nacional de Banda Larga – PNBL)

In 2010, the Brazilian government established the National Broadband Program *(Programa Nacional de Banda Larga- PNBL)* (Decree No. 7.512) with the aim of promoting and disseminating the use and supply of information and communication technology goods and services, in order to:

- broaden access to broadband Internet connection services;
- accelerate economic and social development;
- promote digital inclusion;
- reduce social and regional inequalities;
- promote the generation of employment and income;
- extend Electronic Government services and facilitate citizens' use of government services;
- promote the training of the population for the use of information technologies; and
- increase Brazilian technological autonomy and competitiveness.

In order to achieve the objectives of the PNBL, Telecomunicações Brasileiras SA - TELEBRÁS had to support public policies for broadband Internet connection, provide infrastructure and support networks for telecommunications services provided by private companies, States, Federal District, Municipalities and non-profit entities; and provide broadband Internet connection services to end users only in locations where there is no adequate offer of such services.

4G auction

In 2014, Anatel auctioned the 450 MHz and 2.5 GHz bands, frequencies that are used for the fourth generation of mobile telephony in Brazil. The operators Claro, TIM and Telefónica/Vivo acquired the three national lots offered in the 4G auction.

Anatel's current priority actions (Regulatory Agenda 2019-2020)

The Regulatory Agenda is a management tool that provides greater publicity, predictability, transparency and efficiency for the regulatory process of an Agency, enabling society and regulated entities to monitor the commitments that have been pre-established by the regulatory body. Some of the most important items on Anatel's 2019-2020 Agenda are:

- a study of the 700 Mhz, 2.3 GHz, 3.5 GHz, 3.3 to 3.4 GHz and 26 GHz bands for the 5G bid notice;
- public consultation on the updating of the

assignments and destinations resulting from the decisions of the World Conferences in the first half of 2019 and final approval in the first half of 2020;
- revision of the 700 MHz and 2.5 GHz regulations and revision of the regulation of conditions of use of the radio spectrum for STFC, SCM and SMP with regard to technical requirements;
- revision of the regulation for the realization and follow-up of the Term of Commitment for Adjustment of Conduct (TAC).

The 2019-2020 Regulatory Agenda establishes a better target for the agency's initiatives and facilitates the planning, coordination, and control of various actions required to achieve results, as well as providing maximum transparency in regulatory activities.

Electric Energy (ANEEL)

The current state of the Brazilian electricity service reflects the privatisations that the Brazilian economy has experienced over recent years. This has mainly involved selling state-owned electricity companies to private corporations.

With the privatisations, the Government's aim has been to reshape the electricity service. The previously publicly financed model of vertically integrated, state-owned companies, as well as the absence of competition caused by monopolies, has undergone major changes. The prevailing characteristics in the industry are now:

- competitiveness in generation and trading;
- private investments with public finance; and,
- dividing the agent's roles into the specific areas of generation, transmission, distribution and marketing.

The Government has gradually withdrawn from its former role of entrepreneur and has assumed the supervision and inspection of electricity services. The Government changed into a regulatory

agent for electricity services by creating the National Electricity Agency (ANEEL) under Law No. 9,427/96, subsequently regulated by Decree No. 2,335/97.

ANEEL's main regulatory and inspection duties are to:

- fix rates and quality standards;
- foster economic efficiency in the industry;
- preserve the investments made by profitable enterprises;
- make electricity services widely available;
- avoid abusive costs;
- administratively adjudicate differences between electricity agents and consumers;
- take action to ensure effective competition between service agents;
- impose penalties;
- support conservation efforts; and,
- approve the transfer and change in shareholding control of agents, licence-holders or approved companies within the electricity services or installation area.

The Energy Research Company (EPE) is in charge of strategic planning for this industry, whereas the implementation of Government policies and concession bidding procedures are incumbent on the Ministry of Mines and Energy *(Ministério de Minas e Energia / 'MME')*. The MME may delegate these duties to ANEEL and Electrical Energy Trading Chamber (*Câmara de Comercialização de Energia Elétrica* / 'CCEE').

In summary, EPE, MME and ANEEL aim to provide a favourable environment in which the electricity market may develop, while balancing the needs of its agents and society at large. ANEEL has taken part in developing the mentioned duties, mainly by issuing resolutions to regulate the services.

ANEEL has often sought the direct participation of the public by presenting draft normative resolutions for public hearings to receive suggestions and comments, as well as proposals for resolutions and actions already under way.

These resolutions cover many areas. One such relevant

area regulated by a normative resolution is the concentration of companies providing electricity services. To foster competition among agents and avoid economic concentration in electricity services, Resolution No. 278/00 defined the percentage caps for the ownership interest held by agents, based on installed capacity, transmission and distribution of electricity. Therefore, under Resolution No. 278/00, no agent may hold an ownership interest of more than 20% in the installed capacity of the Brazilian electricity service. Resolution No. 278/00 also provides more specific rules to avoid economic concentration and favour domestic competition.

These limits are especially important at this specific moment in time, given the probable privatisation of the remaining state-owned electricity generating companies. These companies hold a significant interest in the installed capacity of the Brazilian electricity service.

It is most likely that ANEEL will continue to fulfil the objectives established for it by regulating the services and imposing targets that will ensure quality and competitiveness within the Brazilian electricity service.

Whereas there is free competition among power generation and trading agents, power transmission services - over which private players are in fierce dispute - are granted under an assured compensation system, that is, the concession for building and maintaining a transmission line is granted by offering the winning bidder a 20-year services agreement whose initial rate value is tantamount to the lowest tariff proposed at the concession auction. For their part, nearly all of the power distributors have already been privatised and operate within an open competition scenario and regulated system. Age-long consumers receiving low voltage power (below 69 kV) are exclusive clients of a distributor. Consumers receiving high voltage power (69 kV or above) may buy electric power directly from generators, traders and importers on a non-exclusive basis.

The new model of the electric sector in Brazil

Law No. 10,848/2004 and Decree No. 5,163/2004 established the new electric sector model, which provides for the commercialization of electrical energy, especially to:

- ensure conditions for free contracts and regulated contracts;
- establish marketing rules and procedures, including those relating to the international exchange of electrical energy;
- establish the general criteria for guaranteeing the supply of electrical energy that ensures the proper balance between supply reliability and reasonable prices, to be proposed by the National Council for Energy Policy (CNPE).

In Brazil, there is a group of bodies responsible for the proper functioning of the electrical energy sector. The National Council for Electrical Energy *(Conselho Nacional de Política Energética - CNPE)*, chaired by the Minister of State for Mines and Energy, is the body that advises the President of Brazil on the formulation of energy policies and guidelines.

As seen above, the EPE was created to provide services to the MME in the area of research aimed at subsidizing the planning of the energy sector, covering electrical energy, oil and natural gas, as well as its derivatives and biofuels.

Regulation is provided by Aneel and the operation of the national interconnected system is performed by the National System Operator *(Operador Nacional do Sistema - ONS),* the entity responsible for coordinating and controlling the generation and transmission of electricity in the national interconnected system (SIN), which covers more than 97% of the electricity production capacity in Brazil.

The Electrical Energy Trading Chamber (CCEE) enables the purchase and sale of energy throughout the country. One of the main activities of the CCEE is to account for the purchase and sale of electricity, calculating the monthly differences between the amounts contracted and the amounts actually generated or consumed by market agents. In order to do so, it monitors contracts between buyers and sellers, as well as measuring the physical amounts of energy moved by agents.

In the new model, there is a separation into two spheres for the commercialization of electrical energy. Captive consumers act in the regulated contracting environment, acquiring electricity from the distributor. In the free market, electricity is acquired by large consumers. Such consumers are categorized as: "special free", which

acquire electricity through renewable sources (with contracted volumes exceeding 500kW); and "free", which acquire electricity from a supplier that is different to the local concessionaire (with contracted volumes exceeding 3,000kW).

Direct contracting by large consumers is beneficial to the market because it reduces incentives for the monopoly of electricity distribution.

Generation of electricity: auctions for contracting energy

Since 2004, there have been more than 20 auctions for the contracting of electrical energy in the regulated environment. These auctions occurred both for the re-contracting of existing energy contracts and for obtaining long-term contracts to expand the offer. The expansion of bidding by means of auctions occurred in 2005 (with signed contracts of 15 years or more) and constituted the so-called purchase power agreements, which guaranteed the winners easy access to the resources capable of financing the expansion.

Transmission of electricity

The electrical system in Brazil is large-scale because it is interconnected by an extensive network of transmission lines. The transmission system provides for the transfer of energy between the regions of the country. Approximately 85% of electricity is produced by hydroelectric plants.

Brazil has a regulatory framework that ensures stability for investments. This is proven by the large number of competitors that have entered high bids in the auctions.

Distribution of electricity

Electricity supply in Brazil is mainly made through concessionaires (approximately 60). In each concession, made in the area where energy is distributed under a monopoly regime, there are different tariffs for consumers. As an exception, there exist "free" consumers which are those with the right to purchase their energy from any supplier.

Thus, the determination of distinct energy tariffs for different

areas is contained in Law No. 8,631/1993, which provides for electricity tariff levels to be charged to final consumers.

Utilization of Brazil's energy matrix

The Brazilian energy matrix is made up of renewable sources, mainly from hydroelectric plants. However, the country's hydroelectric generation potential is still underutilized. The new model was successful in enabling the contracting of electricity, thus favouring the economy. In this way, infrastructure regulation had a significant effect on the increase of investments in the sector.

Oil & Gas (ANP)

Introduction

The history of the oil and gas industry in Brazil may be divided into three very distinct periods: (i) the pre-World War II period, when petroleum was not in the focus of Brazilian economic policies; (ii) the State monopoly period, characterized by the creation of Petrobras in 1953 as a result of a strong popular nationalist movement; and (iii) the open market period, after Constitutional Amendment No. 9, dated 1995, which allowed the State to retain exploration and production companies other than Petrobras to perform petroleum activities in Brazil.

These periods reflect the increasing importance that the petroleum industry achieved in the international scenario. Brazil, following this trend, has made significant investments in this sector, particularly in the development of its extensive offshore resources.

During the State monopoly period, Petróleo Brasileiro S.A. - Petrobras played a major role in developing the knowledge of the Brazilian sedimentary basins, at a time when the Brazilian potential was widely discredited and no other company would bear the high risks and costs involved.

Law No. 9,478 ("Petroleum Law"), enacted in 1997 to regulate the changes provided in Constitutional Amendment No. 9/95, introduced the concession regime in Brazil, which was

responsible for expanding Brazil's proven oil reserves from 7.1 billion barrels in early 1998 to 14.2 billion barrels by the end of 2010.

As a result of such a significant improvement, Brazil has developed one of the world's most advanced offshore petroleum industries, which in turn has led to the discovery of vast oil fields in the pre-salt layer, an area of ultra-deep water that already holds proven reserves of approximately 9 billion barrels of oil equivalent.

Seeking to increase the country's control over the exploration of such huge potential, in late 2010, the Brazilian Government approved a new regime applicable specifically to the exploration of reserves located in the pre-salt area with the adoption of a production sharing agreement model. Since then, Brazil has had a mixed regulatory regime.

Since 1999, multiple bidding rounds - auctions by means of which the Federal Government grants the right to explore and produce oil and natural gas - have been carried out in Brazil: 16 of exploratory blocks and 4 of marginal accumulations under the concession regime, and 6 in the pre-salt area, under the production sharing agreement.

In 2017 and 2018, for the first time, the National Council for Energy Policy ("CNPE") established guidelines for planning bidding rounds until 2021, which included the open acreage process *(oferta permanente)*, covered in more detail below.

In addition to the bidding rounds calendar, the Brazilian Government is employing efforts to promote the development of the national natural gas market. Two programs were launched in 2016 and 2019, respectively: the "Gas for Growth" *(Gás para Crescer)* and the "New Gas Market Agenda" *(Agenda do Novo Mercado de Gás)*, both aimed at increasing competition in the sector.

Besides the measures adopted by the Government and the CNPE, the Strategic Plan of Petrobras for 2020-2024 indicated that the divestments forecast in the plan vary between US$ 20-30 billion for the period of 2020 to 2024, with the highest concentration of transactions occurring in 2020 and 2021. Among the assets Petrobras intends to divest is 70% of its concessions in mature fields onshore and shallow waters, and 50% of the national refining capacity, with a total of 1.1 million barrels of processed oil per day.

The definition of a regular agenda of bidding rounds planned for the coming years, the open acreage process, the Petrobras divestment plan, and the opportunities in the natural gas

sector, provide investors with positive expectations about Brazil over the next few years.

The Petroleum Law

The Petroleum Law introduced a new National Energy Policy in Brazil, based upon free competition and focusing on expanding the country's competitiveness in the international market.

The law established the basic regulatory framework applicable to all levels of the Brazilian petroleum industry, determining how the market may access and perform the regulated activities, including:

- (i) exploration and production of oil and natural gas;
- (ii) refining of oil and processing of natural gas;
- (iii) transportation of oil, its derivatives and natural gas; and
- (iv) importation and exportation of oil and natural gas.

One of the major changes introduced by the Petroleum Law was the adoption of the concession regime for oil and natural gas exploration and production activities. According to the Petroleum Law, such activities may be awarded to any company in the context of specific bidding rounds following which concession contracts are executed.

The Petroleum Law also created two important entities, namely the CNPE and the ANP.

The CNPE is a council linked to the President of the Republic, comprising, among other members, nine Ministers, whilst it is chaired by the Minister of Mines and Energy. The council is responsible for advising the Government on the creation of energy policies and guidelines, and, among its most important duties, it defines which exploration blocks are to be offered to the market in the bidding rounds conducted by the ANP.

The ANP is the regulatory agency responsible for the regulation and supervision of all petroleum activities in Brazil. Among its other duties, the ANP is responsible for (i) promoting studies in order to define exploration blocks; (ii) conducting bidding rounds to award oil and natural gas exploration and production

rights, either under concession contracts or production sharing agreements; and (iii) authorizing oil and natural gas refining, liquefaction, processing, transportation, storage, importation and exportation.

Exploration and Production Regimes

As mentioned above, the exploration and production activities in Brazil are currently governed by two legal regimes, namely the concession contract regime (“Concession Regime”) and the production sharing agreement regime (“PSA Regime”). The regime to be applied depends on the location of the deposits.

To different extents, both regimes allow the acquisition of exploration and production rights by any company that meets certain qualification requirements established by the ANP, as will be detailed below. Such acquisition may be direct, through participation in the bidding rounds conducted by the ANP, or indirect, through acquisition of participating interests assigned from other companies, subject to the approval of the ANP.

Concession Regime

The Concession Regime has been in effect since 1997, pursuant to the Petroleum Law, and is based on the execution of concession contracts awarding oil and natural gas exploration and production rights in exploration blocks offered during the bidding rounds regularly conducted by the ANP.

Access to the bidding rounds is open to any company or consortium of companies that meet the ANP’s legal, technical and financial qualification requirements. The criteria used by the ANP to determine the winning bidders are based on the amount of the signature bonus, which corresponds to 80% of the final grade, and the minimum exploratory program, which corresponds to the remaining 20% of the final grade. The local content offered by each bidder used to be one of the criteria considered for the determination of the winner; however, since bidding round 14, in 2017, the percentages of local content started to be expressly defined in the Tender Protocol and, therefore, are no longer a bidding criterion.

The concession contract is entered into by the ANP and the concessionaires. In addition to the payment of the signature bonus

offered during the bidding round, the concession contract determines the payment of: (i) a retention fee that is proportional to the size of the concession area retained; (ii) royalties, in amounts that may vary from 5% to 10%, depending on the geological risks, production expectations and other factors, as established by the ANP; and (iii) special participation for blocks with high levels of production or profitability.

Under a concession contract executed with the ANP, a company or consortium of companies has the obligation to perform a minimum exploration program within the area of each block, at its own cost and risk, and owns the production in case of success. A concession contract establishes two distinct phases:

(i) The Exploration Phase, during which the concessionaires are obliged to perform all activities contemplated by the minimum exploratory program, such as conducting seismic works and eventually drilling at least one exploratory well; and
(ii) The Production Phase, which may last up to 27 years and will begin only upon the issuance of the declaration of commercial viability, after completion of the appraisal of a discovery by the concessionaire(s).

PSA Regime

At the end of 2010, a new regulatory framework regime was approved in Brazil under Law No. 12,351 ("PSA Law") specifically for the exploration of the pre-salt reserves, with the adoption of a production sharing agreement model.

According to the PSA Law, the new regime only applies to fields located within the pre-salt areas and such other areas as the Government may eventually deem strategic.

The PSA Law used to define Petrobras as the sole operator of all blocks under the production sharing agreement regime, with a minimum participating interest of 30% in each new block within the pre-salt area. The remaining 70% interest used to be offered to other companies under competitive bidding rounds.

In 2016, though, Law No. 13,365 revoked the obligation of

Petrobras to be the sole operator of these fields. Instead, the company now has a preemptive right to be operator of the blocks under the production sharing agreement regime. After the definition of the areas that will be offered in a bidding round, CNPE must issue a communication to Petrobras in order to give the company the opportunity to, within 30 (thirty) days, exercise its preemptive right. Should Petrobras express its desire to participate as operator, it should indicate the percentage of participation it intends to have in the consortium, which may not be less than 30%. After Petrobras' manifestation, CNPE will establish the Petrobras percentage in the consortium, considering the minimum percentage of 30% and the percentage indicated by Petrobras.

In addition, should Petrobras exercise its preemptive right to be the operator, it will only be obliged to participate in the consortium with the winner of the bid if the percentage of the profit oil offered by the winner is equal to the minimum percentage established in the Tender Protocol. If the percentage of the profit oil offered by the winner is higher than the minimum percentage established in the Tender Protocol, Petrobras may decide not to participate in the consortium. In this case, the winner shall indicate the operator and the percentage of participation of each member of the consortium.

Where Petrobras exercises its preemptive right and also participates as operator, the other companies must form a consortium with Petrobras and Pré-Sal Petróleo S.A. ("PPSA"), a non-operating entity created by Law 12,304, dated 2010, to act as Government representative in the production sharing agreements. On the other hand, if Petrobras decides not to participate in the consortium, the remaining companies will only need to form a consortium with PPSA.

The main roles of PPSA are the management and supervision of the production sharing agreements, as well as the representation of the Government on the operating committees. PPSA has the right to appoint half of the members of the operating committees, including its chairman, who will have powers of veto.

Similarly to the Concession Regime, exploration activities under the PSA Regime will be developed at the sole cost and risk of the partners in the consortium, except for PPSA, that bears no risks. In case of a commercial discovery, these companies will be entitled to: (i) a share in the production for reimbursement of the exploration

costs (known as "cost oil"); and (ii) a share of the surplus production (known as "profit oil"), which is the production after deducting the cost oil and the payment of royalties.

In addition to the royalties, the PSA Regime also establishes the payment of a signature bonus. However, unlike the Concession Regime, the value of such signature bonus will be determined in advance under the relevant production sharing agreement, but will not be among the criteria used to determine the winners of a bidding round.

The criteria used by the ANP to determine the winning bidders during the PSA Regime's bidding rounds is based exclusively on the highest share of profit oil offered by the companies to the Government.

The PSA Law also determined the creation of a social fund maintained with the revenues of the pre-salt production. The purpose of this social fund is to ensure a permanent benefit to the country by means of investments in projects to reduce poverty and develop areas such as education, science, and environmental sustainability, including mitigation of climate changes.

PPSA is responsible for the management of the agreements for commercialization of the oil belonging to the Government under the PSA regime, including for entering into agreements on behalf of the Government with sale agents or for directly commercializing oil, preferably through a bidding process.

Transfer of Rights

In addition to the two legal regimes described above, in 2010, Law No. 12,276 authorized the Government to assign to Petrobras the right to extract up to 5 billion barrels of oil equivalent from non-granted areas located in the pre-salt area. Payment by Petrobras was made with federal public debt bonds. Law No. 12,276/2010 also authorized the Government to subscribe for Petrobras' shares and to pay such shares with the federal public debt bonds. Such direct contracting of specific areas of the Government to Petrobras is known as "Transfer of Rights" *(Cessão Onerosa)*.

In 2010, Petrobras and the Government entered into a Transfer of Rights Agreement, pursuant to which 6 blocks of the pre salt area were assigned to Petrobras, but subject to the limitation of maximum volume to be extracted of 5 billion barrels of oil equivalent.

Considering the existence of volumes exceeding the

maximum volume contracted, in 2019, CNPE authorized ANP to hold a specific bidding round for the volumes exceeding those contracted under the Transfer of Rights Agreement. Such bidding round was held in 2019 for the granting of production sharing agreements, and two of the four blocks offered were sold for over R$ 69 billion as a signing bonus. Petrobras exercised its preemptive right to be the operator for both areas.

Open Acreage

In 2017, based on CNPE Resolution No. 17, ANP created a new bidding process for offering areas, called Open Acreage *(Oferta Permanente)*, which consists of the continuous offer of fields and exploration blocks returned (or in the process of being returned) and exploration blocks offered in past bidding rounds that were not awarded, for purposes of awarding concession agreements for exploration or rehabilitation and production of oil and gas. ANP is allowed to permanently offer these fields and blocks on an Open Acreage concession basis, except for those located in the pre-salt area or other strategic areas. On July 20, 2018, the ANP published the first version of the tender protocol of the Open Acreage. Bidders who meet all the registration requirements set forth in such tender protocol will have their application considered fit to be judged by the Bidding Round Special Commission ("CEL"). If approved, registered bidders may submit applications for any blocks or areas on offer at any time, provided that they submit an offer guarantee together with an interest declaration.

A cycle of the Open Acreage will start with the approval of one offer guarantee accompanied by an interest declaration presented by a registered bidder. CEL will then announce a schedule for a cycle for submission of bids. A public session for the presentation of offers must be held within 90 days of approval of the offer with the interest declaration. The schedule allows for the participation of companies that are already registered and companies that are not yet registered but wish to participate in a cycle, and each cycle shall have a specific schedule established by CEL.

Currently, the Open Acreage includes 567 blocks with exploratory risk, located in 34 sectors of 10 Brazilian sedimentary basins, and two areas with marginal accumulations, located in two sectors of two Brazilian sedimentary basins. The blocks are located

both onshore and offshore. These areas have already been analysed for environmental feasibility by the state environmental agencies and by the Group of Interinstitutional Work of Oil and Gas Exploration and Production (GTPEG) and they will remain permanently on offer, which will ensure potential buyers large periods of time to evaluate each of the blocks or areas and to show interest, depending on each company's size and portfolio.

In November 2019, a public consultation was launched by the ANP as regards the inclusion in the offer of exploratory blocks and areas with marginal accumulations, the exclusion of blocks and areas that were awarded in the 1st cycle of the Open Acreage, and improvements to the drafts of both the tender protocol and the Open Acreage concession agreements. The period of public consultation ended in January 2019 and a public hearing was held in February 2020.

Downstream

As mentioned above, the Petroleum Law established the basic regulatory framework applicable to all levels of the Brazilian petroleum industry, including the refining of oil and processing of natural gas, transportation of oil, its derivatives and natural gas, and the importation and exportation of oil and natural gas.

Although most of the rules contained in the Petroleum Law are also applicable to natural gas activities, after considering the several peculiarities applicable to the natural gas market, including the high costs associated with the construction of transportation and distribution networks, as well as its natural-monopoly features, in 2009 the activities pertaining to the natural gas market were specifically regulated under Law 11,909 ("Gas Law"). Among other provisions, the Gas Law categorizes the natural gas pipelines as: (i) transfer pipelines, when used to move natural gas between facilities belonging to the same owner; (ii) transportation pipelines, when used to move natural gas from processing or storage facilities to other storage facilities or transportation pipelines or delivery points of State distributors; and (iii) outflow pipelines, when used to move natural gas from producing wells to processing or liquefaction facilities.

Most provisions of the Gas Law were subsequently regulated by Decree 7,382, in 2010, including the rules for third-party access to natural gas pipelines, natural gas swaps and the rules

applicable to the gas pipeline's exclusivity period, which is not to exceed ten (10) years. The Decree also determined the creation of a Ten-Year Plan for Expansion of the Natural Gas Pipeline Network, to be developed by the Ministry of Mines and Energy.

In 2016, the Ministry of Mines and Energy ("MME") launched the "Gas for Growth" *(Gás para Crescer)* program, with the goal of proposing the basis for a competitive natural market, with diversity of agents, liquidity and transparency. Such program resulted in Bill of Law No. 6,407, dated 2013 ("New Gas Law"), which is currently pending approval by the House of Representatives.

Although the New Gas Law has not been approved yet, the Brazilian Government has implemented some changes indicated by the Gas for Growth program by means of Decree No. 9,616, dated December 21, 2018, which amended the current Decree that governs the Gas Law (Decree No. 7,382/2010) and granted ANP powers to implement certain regulatory changes related to gas transportation and access to essential infrastructure.

In 2019, a new program called the "New Gas Market Agenda" *(Agenda do Novo Mercado de Gás)* was launched, with the purpose of creating conditions for the development of the natural gas sector in Brazil. A committee for promotion of competition in the Brazilian natural gas market was then created by the ANP, the Brazilian antitrust agency *(Conselho Administrativo de Defesa Econômica – CADE)* and the Empresa de Pesquisa Energética - EPE. Such committee held studies in the following main subjects: (i) alternatives to reduce the price of natural gas; (ii) expansion of the existing pipelines for transportation and gathering of gas for the production of the Campos, Santos Sergipe and Alagoas basins; (iii) increases in the use of natural gas as a raw material by the petrochemical industry; and (iv) opening of the natural gas transportation and distribution markets.

As a result of such program, in June 2019, CNPE published a new Resolution (Resolution No. 16) establishing guidelines and improvements in energy policies aimed at promoting free competition in the natural gas market.

Transportation

The Petroleum Law provides that any company or

consortium of companies incorporated under Brazilian law may be authorized by the ANP to construct and operate any type of oil and natural gas transportation facilities, either for national supply or for importation or exportation. The relevant authorization will depend upon the applicant's prior qualification, according to specific regulations established by the ANP.

According to the provisions introduced by the Gas Law, access to the existing transportation pipelines and marine terminals other than liquefied natural gas terminals should be granted to any interested third party, subject to payment of an appropriate fee to the owner of the infrastructure. The ANP will be responsible for determining the price and payment conditions in case there is no agreement between the parties, as well as the preference right of the owner of the facilities for transportation of its own production.

Under the Gas Law, transportation of natural gas may be awarded by the ANP under two regimes: (i) authorization, for transportation pipelines involving international agreements; or (ii) concession preceded by public biddings, for all other transportation pipelines considered to be of general interest. In both cases the maximum duration will be of 30 (thirty) years, renewable for an equal period.

The current substitute for the New Gas Law unifies the regime by which the transportation of natural gas may be awarded by ANP. Should such Gas Law Bill come to be approved, the only applicable regime will be the authorization regime.

Refining, Processing and Storage

According to the Petroleum Law, and also the Gas Law in relation to natural gas, the activities of refining oil and processing, liquefaction, regasification or storage of natural gas may be performed by any company or consortium of companies incorporated under Brazilian law.

The authorization to undertake such activities will depend upon the submission of a project to the ANP in compliance with technical, financial and legal conditions determined by the agency, as well as the applicable environmental and safety requirements.

In 2019, the CNPE set new guidelines for the refining sector in Brazil by means of Resolution No. 9, which are to be followed by

Petrobras in its divestment program for the promotion of free competition. Such guidelines were deemed to be of interest to the National Energy Policy.

Distribution

The distribution of oil and its derivatives is subject to registration with, and authorization from, the ANP. A company intending to become a distributor must comply with several requirements established in specific ANP regulations.

Distribution of natural gas, on the other hand, is within the sole authority of the States, according to article 25 of the Brazilian Federal Constitution, and therefore is not regulated by the Petroleum Law or the Gas Law. Nevertheless, the Gas Law authorizes certain categories of consumers (free consumers, self-importers and self-producers) to build their own distribution infrastructure if their needs cannot be fulfilled by the local distributor. In such case, the local distributor will be responsible for the operation and maintenance of the facilities. The State will ultimately become the owner of any such facilities after compensation is paid to the relevant builder.

The current substitute for the New Gas Law basically maintains the same rules for free consumers, self-importers and self-producers established by the Gas Law in force. However, Resolution CNPE No. 16/2019 recommended the Ministry of Mines and Energy and the Ministry of Economy to encourage the States to adopt reforms and structural measures in the distribution of gas to reflect good regulatory practices, including regulatory principles for free consumers, self-producers and self-importers.

Exportation and Importation

Both the Petroleum Law and the Gas Law determine that the importation and exportation of oil and natural gas is subject to ANP authorization. To obtain such authorization, a company has to register with the ANP as an importer or exporter of oil and natural gas, which will depend upon the submission of a variety of information and documents to the agency certifying the good legal and financial standing of the company.

The current substitute to the New Gas Law does not change those requirements.

Petrobras Divestment Program

The Petrobras Divestment Program was created in 2014 in order to increase short term liquidity and reduce investments. Formerly, such program followed a divestment methodology based on the Regulation of the Simplified Bidding Procedure of Petrobras approved by Decree No. 2,745, of August 24, 1998.

In 2017, the Federal Accounting Court *(Tribunal de Contas da União - TCU)*, by means of a preventive order, suspended all sales procedures based on such methodology in view of a number of irregularities highlighted by its technical team, such as a) a lack of transparency in the "competitive process"; b) the possibility of choosing potential buyers in a confidential process; and c) the considerable portion of acts related to the divestiture that was not subject to resolution of the governing bodies of Petrobras.

After the preventive order issued by the Federal Accounting Court suspending the sales procedures, but before any decision on the merit, Petrobras reviewed its divestment methodology to amend the issues deemed to be irregular by the Federal Accounting Court.

On March 15, 2017, the Federal Accounting Court concluded that the irregularities verified in the rules of the divestment methodology had been duly eliminated by Petrobras, and ordered Petrobras to apply the new divestment methodology to the disinvestment projects.

By July 2019, Petrobras had raised more than US$15 billion through this divestment program. The divestment includes sale of equity interest in subsidiaries, assignments of exploration rights, sale of assets located in mature fields, and sale of refineries in Brazil.

Health

The National Agency of Sanitary Surveillance – ANVISA

Created in 1999 to replace the Ministry of Health's Department of Sanitary Vigilance, ANVISA's responsibilities are to:

- coordinate the National System of Sanitary Vigilance (SNVS), the National Programme of Blood and Blood Derivatives, and the National Programme to Prevent and Control Hospital Infections;
- check the price of medicines and health products controlled by the Chamber of Medicine (CAMED);
- regulate, control and inspect tobacco products;
- provide technical support to the INPI in issuing patents;
- control the advertising of products under sanitary vigilance;
- control ports, airports and borders and aid integration with the Ministry of Foreign Affairs and foreign institutions to deal with international sanitary vigilance; and
- protect society's health by controlling the production and commercialisation of products and services subject to sanitary vigilance, as well as the product's surroundings, production methods, raw materials and technology.

Sanitary control of health-related products and services

ANVISA's sanitary controls include the authority to issue rules on the:

- extraction, production, transformation, purification, splitting, packaging, repackaging and

importing and storing of medicines, drugs, pharmaceutical raw materials, hygiene products, cosmetics, perfumes, domestic sanitary products, and products intended for aesthetic correction; and
- healthcare service providers such as clinics, hospitals, treatment units and laboratories and the food register.

ANVISA also inspects companies that provide healthcare. It shares this responsibility with the State and Municipal departments of sanitary vigilance.

Specific legal rules govern companies that wish to provide healthcare. They must have three essential documents in order to be able to offer healthcare and take part in public tenders:

- authorisation to perform in specific areas - ANVISA issues this authorisation to the healthcare company once only;
- a licence to work - the State or Municipal Secretary of Sanitary Vigilance grants the licence to the healthcare establishment and it is renewable yearly; and
- the ANVISA Certificate of Good Practice - for the production site and distributors, renewable every two years - For off-shore sourcing of pharmaceutical products, active ingredients (according to a discretionary list published by ANVISA) and medical devices (risk 3, 4 and some others), the product manufacturer is also required to have an ANVISA GMP inspection certificate.

ANVISA and the Department of Sanitary Surveillance have the power to warn, fine, suspend the healthcare or withdraw authorisations and licences for breaches of sanitary vigilance law.

Medicines

A company wishing to commercialise pharmaceutical

products must register them with ANVISA which will check their effectiveness and peculiarities against the directions for use and packaging. ANVISA classifies medicines for sale over the counter, by prescription or controlled sale. A company can only commercialise a medicine after ANVISA's voluntary or automatic granting of registration.

A company does not have to register a medicine if it is part of the Brazilian Pharmacopoeia. The company will, however, have to ask for a Registration Waiver Certificate.

The three categories of medicine are:

- new medicines or reference medicines;
- similar medicines; and
- generic medicines.

Two really important issues that deserve attention in Brazil concerning the medicines market are price control and the granting of patents, and compulsory licensing.

Production of Active Ingredients

Companies producing or importing active ingredients must register with ANVISA. Despite the obligation having been in place since 1976, ANVISA has only just started to actively regulate the registration of ingredients and to require manufacturers to undergo ANVISA´s GMP inspection. Implementation started with a short list of ingredients that is expected to grow each year.

Cosmetics, Perfumes and Personal Hygiene Products

ANVISA divides cosmetics, perfumes and personal hygiene products into two groups: risk levels 1 and 2. This will consider the adverse effects each product might cause, its formula, purpose and form of use. The possible adverse effects depend upon the product's intended use, the areas of the body it will cover, how the user uses it and any precautions he or she needs to take.

ANVISA also publishes a list of restrictive and negative ingredients that products in Level 1 or 2 must not contain.

Domestic Sanitation Products

Domestic sanitation products are substances or preparations intended for cleaning, disinfecting, deodorising and odorising homes or collective and public environments. Anyone can use these products for domestic purposes or specialists can use them for professional purposes.

ANVISA need only be notified about products from Risk Group I whilst those from Risk Group II need to be registered.

Medical Devices

ANVISA classifies medical devices according to the intrinsic risk they represent to the health of consumers, patients, operators or third parties. Products classified as Low risk (class 1 and 2) follow a fast track procedure and high risk products (classes 3, 4, and a list of others are required to follow a longer, more demanding procedure that requires ANVISA´s international GMP inspection of the manufacturer if located off-shore.

ANVISA accepts registering families of products with similar specifications.

Foodstuffs

Most foodstuffs do not need to be registered or notified to ANVISA. These include:

- raw materials for foodstuffs and natural foods;
- intentional food additives listed in the Brazilian Pharmacopoeia, those used according to Good Manufacturing Practices and those granted exemption by the Ministry of Health;
- food products prepared according to the Standard of Identity and Quality, used as food ingredients, intended to prepare processed foods at licensed establishments, providing they are included in food legislation, and;
- bread, pasta, confectionery, sweets, rotisserie and ice cream products, for direct sale only to consumers over the counter of the producer,

even when packaged in recipients to simplify their sale.

There are two lists for other foods that ANVISA publishes. For foodstuffs in the registration exemption list, the company needs to give the State, Federal or Municipal sanitary authority the product's first manufacturing date before selling it. The inspection depends upon the nature of the product, the risk associated to it, the date of the last inspection, and the company's track record.

Companies can only commercialise others such as diet or athletes' food after registration with ANVISA.

Regulatory Impact Analysis

Regulatory Impact Analysis (RIA) is a tool that is based on the best available evidence, from the definition of a regulatory problem to evaluating the possible impacts of regulatory choices. This analysis contributes to the transparency of the regulation process because it relies on popular participation to subsidize the decision-making process of the regulator. The main phases of RIA are:

- analysis and definition of the regulatory problem (verification of causes and consequences, with identification of affected agents and definition of objects);
- identification of the greatest possible number of regulatory options to solve the problem;
- comparison of the impacts of regulatory options through qualitative or quantitative analysis (cost-benefit analysis).

The Public Benefit Survey *(Tomada Pública de Subsídio - TPS)*, created by ANVISA, is a new public participation mechanism that guarantees transparency. As part of this procedure there exists the possibility for a Preliminary AIR Report that, before the decision is made, is submitted to a public inquiry in relation to any regulatory problem.

The National Agency of Supplementary Health – ANS

Created at the end of 1999, the National Agency of Supplementary Health - ANS is linked to the Ministry of Health with powers to regulate Healthcare Management Organizations HMO(s).

ANS' mission is: (i) to defend the public interest in healthcare; and (ii) regulate healthcare operators and the relationship between service providers and consumers. It:

- provides the Unified Health System's list of procedures, types of cover, and indemnity rules;
- controls the divisions and quality of health plan operators;
- inspects health plan operators; and
- collects economic and financial information on healthcare operators, and controls the liquidation of bankrupt companies within the sector.

The ANS can impose penalties for breaches of supplementary health legislation on private healthcare plan operators and their:

- executive officers;
- administrators;
- directors;
- decision-making council;
- advisory council; and
- financial committee.

In addition to the operator's criminal and civil liability, the ANS can impose the following penalties:

- a warning;
- a fine;
- suspension from office; and

- the cancellation and transfer of the operating licence by auction.

Organizational Structure and Administrative Procedures of ANS

ANS is made up of five committees who, essentially, are responsible for the following roles, according to Normative Resolution No. 197, of 2009, and '*Pietrobon, Prada e Caetanos*' (2008):

- Operators' Habilitation and Rules Committee – responsible for the regularization, registry, and follow up of the operators;
- Products' Habilitation and Rules Committee – responsible for the regularization, registry, and follow up of product operators (healthcare plans);
- Inspection Committee – responsible for the ANS inspection activities and interaction with consumer defence bodies;
- Sectorial Development Committee – responsible for the articulation with the Brazilian public health service (SUS) and for information management;
- Management Committee – responsible for mean-resources management (financial, human, patrimonial, and administrative resources), enabling the development of ANS' end-activities.

ANS' main role is to set rules, such as the resolution of the National Council of Supplementary Health (the entity responsible for the sector prior the creation of ANS), administrative rulings, and so on. Regulations provided by ANS are aimed at regulating articles of Law 9,656/98 and Law 9,961/00, due to their lack of specification regarding certain subjects within the sector.

All resolutions are submitted to the respective committee, which decides upon their acceptance or not. Once approved, the operator must follow the rule sets forth.

The institutional activity of ANS is provided by means of administrative proceedings. Federal Law 9,784/99, as well as some ANS normative resolutions, set forth the due legal procedure.

General Points

ANS governs, controls and inspects health plans, insurance policies and agreements. It:

- approves the private healthcare plans and operators' registers. Operators may not act or commercialise their products without registration with the agency;
- regulates the directors of private health plan operators;
- approves price rises;
- evaluates private health plan operators' technical and management ability to guarantee cover in the patient's area;
- imposes, if necessary, fiscal or technical management control on the operator;
- liquidates operators whose licences has been revoked; and
- transfers the portfolios of plans to other operators.

Registration

After setting itself up as a company, a healthcare plan operator must provisionally register the operation with the ANS.

Only individuals who reside in Brazil can manage healthcare plan operators. The company must communicate the election, nomination or appointment of an administrator within thirty days of ANS registration. ANS may refuse the registration, ordering the operator to immediately substitute that person.

Price Increases

Healthcare plan operators must request that ANS approve its annual price increases in individual and family plan contributions. Collective plan operators must inform ANS of the percentage increase at least thirty days in advance. Companies' contracts are free from ANS contribution controls.

Transfer of Company Control

ANS may approve any transfer of company control in healthcare plan operators. This includes isolated or group shares belonging to individuals or companies, or groups of people representing a common interest; shareholder or quotaholder agreements; and contracts between contributors.

Financial Guarantees

The ANS requires operators to provide these financial guarantees to start and stay in business.

Healthcare insurance companies already have their own rules. Company-sponsored self-management plans have sponsorship rules. These operators do not need to give ANS financial guarantees. The plan administrators must have only the minimum capital the local region demands.

For up to 180 days, the ANS may financially and technically manage a health plan operator. It will always manage the finances when, according to fixed criteria, it may suffer from liquidity shortage.

The financial and technical management bodies must decide upon the measures the operator needs to take to cure the irregularities found in its financial management, and to re-establish the continuity or quality of healthcare or to start to liquidate the health plan operator extra-judicially.

During an extrajudicial liquidation, ANS will appoint the liquidator, giving it broad management and liquidation powers, will supervise the extrajudicial liquidation, with powers to transfer healthcare plan operators' portfolios where there is a risk of interrupting the continuity of healthcare or during the financial or technical management.

If the manager of the operator does not comply with ANS' order to transfer its portfolio, it may disqualify them from that or other operators' boards of directors or from holding a management position for ten years. Furthermore, if the operator does not comply, the ANS will auction its portfolio.

The ANS may, in an extrajudicial liquidation, freeze assets belonging to:

- the operator's managers;
- the operator's finance committee members; and
- those who have held a position within the operator during the 12 months prior to the liquidation.

Transfer of portfolio

Operators may only transfer private healthcare portfolios with ANS approval. ANS may, after a hearing or after having considered the operator's finance or technical director's proposal, order an auction of the portfolio. The auction is always of the full portfolio. Two or more operators may buy the portfolio if this improves the portfolio's ability to cover the financial risks and obligations and provides consumers with greater cover.

Public Health Service – SUS

If a private medical plan holder receives treatment in a State hospital, that plan's operator must reimburse the hospital for that treatment. The Government keeps a record of all private medical plan holders. The Government cross-references the names of patients treated in State hospitals against that list, to see where reimbursement is due. It will charge these costs according to its Unified National Equivalence Table.

Private Healthcare Plans

In Brazil there is a legal-institutional division of private healthcare plans. The four groups are: group medicine, cooperatives, insurers and self-management. Over 1,000 companies make up this market, which circulates US$14.8 billion a year - or about 2.6% of Brazil's GNP. About 1 in 4 of the Brazilian population has a private medical plan.

Group Medicine

Group medicine is similar to the USA's Health Maintenance Organisations (HMO), which started in the 1920s. Group medicine arrived in Brazil in 1960, in Greater São Paulo, when the Government offered incentives to form company associations.

Medical Cooperatives

Cooperatives began in 1967, as the doctors' response to the arrival of the first group of medical companies. The Law of Cooperatives regulates all cooperatives. They provide patient services through collective contracts, and family or individual plans, and provide doctor, hospital and laboratory cover by the cooperative's professionals.

Cooperative doctors are partners and service providers. The cooperative pays its members proportionally in accordance with their productivity, type and quality of care. They also share in the cooperative's profits.

Health Insurance

Health insurance covers the risk of hospital and medical care. The insurance company pays the patient or company providing the patient with medical care. Individuals and companies may take out health insurance whilst patients must have a free choice of doctor and hospital.

Self-Management

This is a self-run health plan, managed by the company or a specialised body, and is non-profit making. The company sets the form of the plan and defines the approved doctors, hospitals, grace periods and cover. This reduces costs by cutting out intermediary health plan companies. The plans cover active and retired employees, or those of an associate entity.

Healthcare Plan Rules

After a long period of relative freedom, the Congress intervened in healthcare plans in 1998, by passing Law No. 9,596 and later amendments. The legislation:

- forbids providers from refusing coverage because of age, unknown pre-existing illness or deficiency, but allows occasional price increases;
- regulates the power to remove authorisation from

hospital service providers;
- limits the grace period;
- extends cover to new-born children for their first 30 days;
- allows companies to terminate contracts only if the insured party has committed fraud or is over 60 days late in paying its monthly contribution;
- provides cover for mental health;
- guarantees rights to remain in a company's collective plan to: (i) an employee who is dismissed without just cause; and (ii) a retired employee who has contributed towards the plan for over 10 years, so long as they assume the full premiums;
- requires the company to compensate the Public Health Service each time a public hospital treats a healthcare plan user;
- creates six age ranges. Contributions for each may vary between companies, but the last cannot be more than six times that of the first; and
- extends coverage to kidney and cornea transplants.

Private Health Plans Sector: Regulation of ANS

The health insurance sector in Brazil is defined as supplementary, because the citizen can choose to pay private insurance to have access to medical care. ANS was created to regulate a market of health plans that operates without intervention of the State power. The regulatory framework provided by Law No. 9,656/1998 (private health insurance plans and insurance) and Law No. 9,961/2000 (ANS creation law) has the following objectives:

- to define the system of regulation, standardization and supervision of the supplementary health sector;
- to guarantee the beneficiaries of private health care plans full health care coverage, according to the segmentation of the contracted plan;
- to define the rules for entry, maintenance and exit

of health plan operators in the market;
- to provide transparency and ensure the integration of the supplementary health sector to the Public Health Service - SUS, and also provide reimbursement of the expenses generated by users of private health care plans in the public system

Hydro Resources (ANA)

Brazil contains 12% of the world's fresh water reserves, but such resources are distributed in a quite uneven manner across the territory, meaning there is the need for an official intervening party to balance and promote compensations between regions and users.

The National Water Agency ("ANA") was created in July 2000, through Law No. 9,984. It used to be subordinate to the Ministry of Environment but, this year, after the election of the new President, organizational changes took place in the structure of Ministries. Currently, ANA occupies a position within the structure of the Ministry of Regional Development, and its Board is composed of five members, appointed by the President and approved by the Congress, for a four-year term. It is an administratively and financially autonomous Agency and, ultimately, is responsible for the execution of the goals and guidelines set forth by Law No. 9,433/1997, which established the National Water Resources Policy, popularly known as the Waters Act.

ANA is in charge of four main assignments:

(i) **regulating** the access and use of water resources under the Federal domain, the public water system and untreated water adduction, and also issuing and monitoring compliance with the applicable laws;

(ii) **monitoring** the situation of water resources, through initiatives such as coordination of the National Hydro-meteorological Network which collects data such as water level, flow, rain levels, and river sediments;

(iii) **enforcing** the law, coordinating the

implementation of the Waters Act, by carrying out and supporting projects and programs, for instance, managing offices, and the instalment of committees for the basins of Federal rivers and agencies; and

(iv) **planning**, which is achieved by means of the elaboration or participation in strategical studies, such as the Water Basins' Plans, and Water Resources' Situation Report.

The assignments outlined above give ANA, among other things, the power to:

- grant, through authorization, the right to use water resources in water bodies under Federal jurisdiction and also allow discharge of effluents;
- plan and promote actions to prevent or minimize the effects of droughts and floods, as part of the National Water Resources Management together with the Central Office of the National System of Civil Defence, in support of the States and municipalities;
- define and monitor the conditions of operation of reservoirs for public and private use in order to ensure the multiple use of water resources, as set forth in the plans for water resources of their watersheds;
- regulate and inspect, under Federal jurisdiction, the provision of public irrigation under concession and the adduction of untreated water when bodies of water are involved. It is also responsible for disciplining the provision of such services, setting standards of efficiency, and establishing fees whenever applicable, as well as managing and auditing all aspects of any concession agreements;
- organize, implement and manage the National Program for Information and Safety of Dams;
- promote coordination between the dam supervisory bodies;
- coordinate the drafting of the Dam Safety Report

and receive claims on potential non-compliances that may present risks, or on accidents that have occurred involving dams.

The granting of the right to use water resources and to discharge effluents in the Federal bodies of water is an administrative act issued by the public authority upon which it allows the requesting party to use them for a determined period of time in the established conditions provided in the act. Therefore, the grants define the conditions that must be observed when collecting water resources or discharging effluents.

Within the context of the new ventures in Brazil, in the planning phase, it is advisable to have information about the availability of: (i) connection to public water systems and public sewage systems; and/or (ii) the need to use water resources that are under Federal jurisdiction. This second scenario will require a water grant from ANA. Furthermore, it is important to point out that this text comprises the information of the water resources under Federal jurisdiction, but there are resources that are under State jurisdiction. In these cases, the granting of the right to use water resources must be obtained from the relevant State Agency.

The following uses of water resources depend on the obtaining of a grant:

(i) the abstraction or collection of water from a body for final consumption, including public supply or input from a production process;
(ii) collection of water from a groundwater aquifer for final consumption or input from a production process;
(iii) discharge of sewage and other effluents or flue gases, treated or not, intending to definitively dilute, transport, or dispose of such;
(iv) use for hydroelectric purposes; and
(v) other uses that incur in alterations of the regimen, quantity or quality of the water of a certain body.

Usually, the granting of use of water resources that are under Federal jurisdiction has definite terms, which do not exceed thirty-

five years. With respect to the granting of the right to use water resources to public services concessionaires or permission holders and hydroelectric power producers, the term of the authorizations will be the same as that pertaining to concession agreements or administrative acts.

As mentioned before, the distribution of water resources in the Brazilian territory is very uneven. Therefore, it is important to point out that the granting of water resources will also depend on the availability of such asset in the region.

There is also the possibility of requiring an "anticipatory grant" *(outorga preventiva),* which, in general terms, aims to obtain a certificate from the public authority that states that there are water resources available for the intended purposes of a certain venture during a limited period of time. It is important to point out that it does not grant the right to actually exploit water resources, but withholds the water flow that is possible to be granted in the future. This kind of grant enables the investors to better plan their ventures and has a definite term, limited to three years.

Cinema (ANCINE)

The Government created the National Cinema Agency - ANCINE in September 2001. ANCINE is linked to the Ministry of Development, Industry and Foreign Trade and is administratively and financially autonomous. It is independent of the direct administration and is based on a collegiate board made up of a Chairperson and three commissioners. They are all Brazilian and appointed by the President of the Republic. They serve non-concurrent four-year terms of office.

ANCINE oversees the High Movie Council (HMC), its policies and general guidelines. The HMC is a collegiate body under the Presidency's Civil Cabinet and is made up of Ministers of State and five well-respected representatives of the national film and video industries. The Council's main policy is the National Film Policy. The policy helps to develop the Brazilian film, video and audio-visual industries, and to achieve self-sustainability in all markets (including foreign markets), without jeopardising the diversified share of foreign works in the Brazilian market.

ANCINE's core purpose is to foster training and technological development in these industries, respecting the copyright of national and international works. Brazilian and foreign companies wanting to do business and benefit from public funds or tax incentives for these industries must register with ANCINE.

Tools of the National Film Policy

Tools critical to the working of the National Film Policy include:

- Film and Video Industries Information and Control System (Information System);
- Contribution for Developing the National Film Industry (CONDECINE);
- Funds of the National Film Industry (FUNCINES); and
- National Film Development Programme (PRODECINE).

By means of regular reports, controls of box offices, and publishing copyright notices, the Information System gives ANCINE:

- the overall volume of Brazilian and foreign film, video and audio-visual works shown or sold;
- the profitability of these operations; and
- information on the copyright holder in Brazil.

With this system, ANCINE can regulate and decide whether businesses are running under the National Film Policy general guidelines and its own goals.

The taxable events of the CONDECINE tax are:

- production, licensing and distribution of film and video works for business purposes; and
- payment, credit, use, remittance or delivery to distributors or intermediaries abroad, of earnings from film and video works, or their acquisition or import at a fixed price.

As a rule, the CONDECINE contribution is charged every five years, for each market segment and by film, video or audio-visual work title or chapter. The CONDECINE contribution on advertising is payable yearly. In these cases, individuals or legal entities showing, broadcasting or advertising the works will be jointly liable for any failure to pay the contribution.

Under certain circumstances, the CONDECINE contribution is charged annually at 11% on the earnings from exploiting film and video work per market segment in which they are promoted.

CONDECINE is a tax of questionable constitutionality and is a matter of countless judicial disputes.

Foreign films or video advertising work may only be broadcast in Brazil, in any market segment, if adapted to the Portuguese language by a Brazilian production company registered with ANCINE, and consequent payment of the CONDECINE contribution.

However, Law No. 10,454 dated May 13, 2002, provides that the following are CONDECINE-free:

- film and video works aimed for exclusive presentation at festivals, so long as they have the prior approval of ANCINE;
- film and video works with journalistic and sports purposes;
- previews of programmes and film and video works;
- exportation of Brazilian film and video works and Brazilian programming broadcast abroad;
- Brazilian audio-visual works;
- the payment, credit, use or delivery, to producers, distributors or intermediaries abroad, of earnings from exploiting film and video works, or their takeover or import at a fixed price, plus the amount matching the takeover or licensing rights to national programming, even of foreign audio-visual works, if they are created and broadcast directly in Brazil by companies based in the country;
- Brazilian advertising film and video works for

charity, philanthropic and political advertising purposes; and

- the payment, credit, use or delivery to producers, distributors or intermediaries abroad, of earnings from exploiting film and video works, or their takeover or import at a fixed price, plus the amount matching the takeover or licensing of rights to international programming created, made available and broadcast from abroad to Brazil, provided the benefiting company chooses to use 3% of the amount earned for producing Brazilian full, mid and short length films, and provided the film is approved by ANCINE.

The Brazilian Securities Exchange Commission - CVM - runs and oversees the FUNCINES and invests in projects and programmes designed for Brazilian independent production of films, and the construction, remodelling and restoration of cinemas. It also buys shares in Brazilian publicly-held companies that produce, market, distribute or show Brazilian independently produced films. FUNCINES earnings cannot be used in works whose majority shares the Fund holds - in order to avoid a massive concentration of investment funds in one work.

Companies choosing to take part in the FUNCINES, and being taxed on their taxable income, may deduct their investment in FUNCINES quotas from income tax.

PRODECINE aims to raise and invest funds to encourage the production, distribution, marketing and presentation of Brazilian independently produced films and video works and technical infrastructure projects for the film business. Those that produce, distribute and show a Brazilian independently produced motion picture that is a blockbuster can receive an Additional Income Award.

Cinemas and other public exhibition places must, for twenty years after publication of the regulatory decree, show Brazilian motion pictures for a certain number of days each year. This also applies to video distributors.

Clearly, lawmakers intend to encourage the national motion picture, video and television industries, as well as raise investment for them.

Filming in Brazil

Brazilian Law requires that the filming of foreign productions in Brazil is reported to ANCINE in advance, which will mediate, along with the Brazilian diplomatic representations abroad, the visa concession for cast and crew to participate in the shooting.

Before filming, the foreign production company must engage in a contractual partnership with a Brazilian production company, which will be responsible under Brazilian Law for the production in this country.

Therefore, the Brazilian production company will submit the Communication of Foreign Audio-visual Content Production in National Territory to ANCINE. This communication is a requirement for obtaining the relevant visa for the foreign cast and crew.

The Brazilian producer is responsible for ensuring compliance with Brazilian legislation and for providing assistance for customs clearance of equipment, among other things.

Filming of foreign productions of a journalistic nature must be reported directly to the respective Brazilian diplomatic representations abroad.

Screen Quota Policy

The Screen Quota system requires screening companies to include a minimum number of Brazilian feature films in their programming, which is assessed by the number of days of exhibition, the variety of films that must be exhibited and the maximum occupation limit for the same film in screens of a cinema site. These parameters are established annually by means of a Presidential Decree.

The implementation of the Screen Quota policy has been effective over the last few years and is closely monitored by ANCINE.

The current Screen Quota goes back to 2017. Single screen cinemas must show Brazilian-produced films for at least 28 days per year and screen a minimum of three Brazilian-produced films per year. These requirements gradually increase to 800 days and 24 different titles, depending on the number of screens of the cinema site.

Pay TV Regulation

ANCINE is also in charge of regulating Pay TV operations in Brazil and all operators and cable channel programmers (including foreign channels and programmers) must register with the agency (operators must also register with ANATEL) and comply with Brazilian regulations.

A foreign channel programmer must appoint a Brazilian representative (an individual or a company) for ANCINE and a Brazilian born individual must undertake "editorial" responsibility for the programming (even when the programmer already has someone entrusted with the programming tasks abroad).

The registration of the foreign programmer/channel will be conducted by the representative who needs to register himself with ANCINE before registering his represented entities.

The registration process is done online, through the agency's web-based system.

The representative must submit a monthly report to ANCINE containing the complete schedule of programs broadcast by each channel it represents in the previous month and such report must comply with the layout defined by the agency.

From time to time, each channel is also required to submit to ANCINE (through its respective representative) the current number of its subscribers, together with some other market information.

Failure to comply with these report requirements subjects the representative and the foreign programmer to fines and other sanctions.

Local content for Pay TV

Brazilian regulations require that all qualified space channels must show at least 3:30h of Brazilian content per week during prime time and that 50% of such content should be produced by an independent Brazilian producer.

A qualified space channel is one whose programming during prime time is predominantly intended for entertainment, *i.e.*, made up of films, TV shows, documentaries, etc.

Prime time for channels focused on children's programming is from 7h to 11h and from 17h to 21h (Brasília time) each day. Prime time for the remaining channels is from 18h to 24h (Brasília time).

An independent Brazilian producer is a Brazilian company that is not an affiliate of, or contractually controlled by, a programmer, packager, distributor or broadcaster and that is not bound by any exclusivity agreements in a way that prevents it from marketing its production to third parties.

Provided certain circumstances are met, such as the nature of the channel or the size of the relevant programmer, ANCINE, upon application, may reduce or even waive this obligation for the channel.

Local content requirements are also closely monitored by ANCINE and failure to comply with them also subjects the representative and the foreign programmer to fines and other sanctions.

ANCINE Sanctions

ANCINE can penalise companies showing, distributing and renting videos if they fail to follow its guidelines.

If companies fail to show Brazilian works for twenty years, they must pay a 5% penalty of the daily box office sales for the six months before the violation, multiplied by the number of days the failure continues to be in effect.

Failure to pay the CONDECINE fee or comply with the Information System requirements or any other ANCINE rules on implementing the general guidelines and the National Film Policy, results in a fine of between two thousand and two million Brazilian Reals.

If a project misuses PRODECINE and FUNCINE funds, it may have to return them with delinquent interest at the Special Clearance System reference rate plus a fine of 20% on the total funds.

Transport (ANTAQ, ANTT and ANAC)

Introduction

The period between the 1980s and 1990s in Brazil was marked by great political instability, with strong state intervention

and excessive bureaucracy in the economy. Notwithstanding, in 1988, the current Federal Constitution was published and focused on free initiative and the social values of work.

This scenario resulted in three main developments in the early 1990s, deemed as being necessary to bring economic stabilization: (i) opening of the market; (ii) fiscal adjustment; and (iii) the creation of the National Privatization Program *(Programa Nacional de Desestatização - PND)*. PND made the privatization of state-owned companies in several sectors possible, including *Eletropaulo* (responsible for the distribution of electrical power in São Paulo) and *Companhia Vale do Rio Doce* (one of the largest mining companies in the world).

In 1995, the then President Fernando Henrique Cardoso initiated an Administrative Reform, aimed at achieving greater results and more efficient public management control. It was a decentralization measure designed to attract the private sector, which later resulted in the growth of political and social demands for public interest services.

In this context, and responding to international investors' demand for administrative efficiency and regulatory commitment, the Federal Government decided to create several regulatory agencies, focused on: (i) the fact that private companies and the Public Administration would now co-exist in rendering public services in certain sectors; and (ii) the need to regulate a new economic environment to stimulate competition and, simultaneously, guarantee the quality of the services.

Specifically in connection with the transport sector, three main regulatory agencies have been set up: ANTAQ, ANTT and ANAC, which are briefly described below.

National Transportation Agency – ANTAQ

Up to the early 1990s, ports in Brazil were operated by the Federal Government through its Government-controlled entity, *Portobrás - Empresa Brasileira de Portos S.A.*, and its subsidiaries, the so-called *Companhias Docas,* created to be in charge of concentrating and carrying out all port activities in Brazil, as a governmental monopoly.

This scenario started to change with the enactment of Federal Law No. 8,630/1993, which included assuring any private

party the right to construct, reform, expand, improve and operate port terminals. In 2001, these changes led to the creation of the National Water Transportation Agency *(Agência Nacional de Transportes Aquaviários – ANTAQ)* responsible, for example, for granting authorization to private parties to construct and operate private terminals.

ANTAQ was set up by Federal Law No. 10,233, on June 2001, which, amongst other regulations, establishes the body's duties. In summary, ANTAQ regulates, supervises and oversees services provided in the water transport sector, but also supervises waterway and port infrastructure provided by third parties.

At present, Brazilian ports may be of two types: (i) public terminals, located inside organized public ports, in which, although the regulation and administration of the port area are of a public nature, the port services may be privately operated; and (ii) private terminals, in which the regulation is of a public nature but both the port area administration and port services are privately operated.

Therefore, private parties have the right to build, expand, operate and maintain port terminals either by means of a lease agreement (public terminal) or an authorization from ANTAQ (private terminal). In case of a lease agreement, it will be entered into by the private operator and the Federal Government after a mandatory public bidding procedure. On the other hand, when it is a case of authorization from ANTAQ, it refers to private terminals located outside the organized port area, built on privately-owned land or, at least, on land whose legal rights for use are held by the private interested party.

National Ground Transportation Agency – ANTT

At Federal level, the National Ground Transportation Agency *(Agência Nacional de Transporte Terrestres – ANTT)* is the regulatory agency in charge of granting public concessions, permissions and authorizations for railroads, highways, pipelines and multimodal transportation, terminals and routes, while the Ministry of Transportation is in charge of establishing policies for these sectors.

ANTT was created by Federal Law No. 10,233/2001, which also created ANTAQ.

Several States, including Bahia, Pernambuco, Espírito Santo,

Minas Gerais, Paraná and São Paulo have highways operated and maintained by private entities. These concessions are regulated in each State by their respective transportation department or regulatory agency.

ANTT is also responsible for revising and readjusting the tariffs for the services provided, as well as authorizing projects and investments to improve existing infrastructure and services.

National Civil Aviation Agency – ANAC

The National Civil Aviation Agency *(Agência Nacional de Aviação Civil – ANAC)* is a federal regulatory agency responsible for regulating and supervising the civil aviation sector and its infrastructure. ANAC´s main jurisdictions are set forth by Federal Law No. 11,182/2005, while the Secretary of Civil Aviation (SAC), set up by Federal Law No. 12,462/2011, and currently incorporated as part of the Ministry of Transportation, is in charge of establishing policies for the airport and aviation sectors. In addition, SAC also establishes guidelines to be complied with by ANAC, INFRAERO and other governmental entities and private concessionaires that operate airport infrastructures.

The Brazilian Aeronautical Code (Law No. 7.565/1986) establishes the main aspects of airport operations and infrastructure. Pursuant to the Brazilian Aeronautical Code, it is possible for the Federal Government to delegate the power to commercialize airport infrastructures to States or Municipalities, by means of public conventions.

INFRAERO is a State-owned company created by Law No. 5,862/1972, which operates and manages some of the Brazilian Federal Airports. INFRAERO is also a shareholder in some of the private concessionaires currently operating some of the Brazilian Airports.

Both INFRAERO and the private concessionaires are subject to guidelines issued by the SAC. Services rendered by INFRAERO and private concessionaires include the control of passengers and baggage, the security, cleaning and maintenance of airports, as well as expansion of the airport infrastructure in some cases.

Chapter 15

Social Security

Public Social Security

The public Social Security system consists of rights and obligations established by the Federal Constitution that comprises an integrated combination of actions implemented by the Government and society, designed to ensure rights related to healthcare, Social Security and welfare. The essential goal of Social Security in Brazil is the granting of benefits and services to workers, retired persons, pensioners and people in need.

The Brazilian Social Security structure has embraced a considerable part of William Beveridge's vision,[1] *in verbis*:

> "None of the insurance benefits provided before the war were in fact designed with reference to the standards of the social surveys. Though unemployment benefit was not altogether out of relation to those standards, sickness and disablement benefit, old age pensions and widow's pensions were far below them, while workmen's compensation was below subsistence level for anyone who had family responsibilities or

> whose earnings in work were less than twice the amount needed for subsistence. To prevent interruption or destruction of earning power from leading to want, it is necessary to improve the present schemes of social insurance in three directions: by extension of scope to cover persons now excluded, by extension of purposes to cover risks now excluded, and by raising the rates of benefit".

Article 195 of the Brazilian Federal Constitution establishes that the financing of the Social Security system must come from the following resources: (i) Federal Government, States, the Federal District, and Municipalities; (ii) taxes collected from Employers, Companies and other equivalent entities; (iii) taxes collected from workers and other taxpayers; (iv) funds from Prognostic Contests (lottery, betting etc.); and (v) from importers of goods and services from abroad or from whomsoever legislation determines as their equivalent.

The taxes collected from employers, companies and other equivalent entities are based: (i) on the payroll and other types of work income (regardless of an employment relationship); (ii) on income and revenues (Contribution for the Financing of Social Security – COFINS); and (iii) on profits (Social Contribution on Net Profit – CSLL).

Contributions are paid not only by legal entities, but also by workers and other people who are insured by Social Security and provide their part of the contribution based on the compensation they receive.

There are also the Social Security Contributions that are classified as differentiated, which include: (i) Contributions paid by financial institutions, agribusiness and any sporting association that maintains professional football clubs; (ii) any special matter related to the civil construction sector; and (iii) some sectors to which the benefit of payroll tax exemption is granted, and for which the contributions are calculated based on the gross revenue (and not on the employees' compensation).

When it comes to the Social Security structure, the costing is considered to be one of the most relevant components. The

1. Social Insurance and Allied Services. London: HMSO, 1995, p. 7.v

available resources depend directly on the list of benefits granted to taxpayers and their dependants and how well this distribution system is organized.

The calculation basis of the Social Security Contribution is the amount upon which a certain percentage is applied that will define the part to be received by Brazilian Social Security Authority (and potential conversion into a benefit or service). In the Brazilian General Social Security System (RGPS) the calculation basis is called 'contribution-salary'.

It is important to mention that the contributions paid by employers, companies and other equivalent bodies, that are based on payroll and other types of work income, have no minimum or maximum limits. However, when it comes to employees and independent workers, there is a minimum limit for the contribution-salary: (i) the salary base of the worker category (established by legislation or by a Collective Bargaining Agreement) or; (ii) the state salary base (according to Complementary Law No. 103/2000) or; (iii) if none of the previous items exist, it will be according to the National Minimum Wage (monthly, daily or per hour) considering the effective number of working hours during the month.

For domestic employees, the minimum limit is the one established in state legislation (Complementary Law No. 103/2000) or, if there is no state legislation on the matter, the National Minimum Wage (monthly, daily or per hour) considering the effective number of working hours during the month.

As for the so-called insured individual taxpayers and insured optional taxpayers, the minimum contribution-salary limit is the national Minimum Wage.

With regards to the maximum limit of the contribution-salary, it is the same for all types of taxpayers and is defined by the Ministry of Social Security (MPS). The amount is frequently readjusted using the same indexes that are used to regulate Social Security continued benefits and payments.

All this Social Security funding ends up being used to cover the cost of certain benefits. The main benefits covered are:

Disability Retirement

The disability retirement pension is granted in the following situations: (i) when the taxpayer is considered no longer able to

perform his work duties (either because of disease or injury); or (ii) when the taxpayer is consider in no condition for rehabilitation in order to return to their current position or to provide useful and efficient services.

However, in order to receive this benefit there must be an assessment of the real disability condition of the taxpayer. There are specific medical tests done by Social Security-designated doctors to verify the taxpayer's disability and, after the results are disclosed, a decision is made on whether to grant or deny the benefit (the benefit is paid as long as the disability persists). It is also possible for the taxpayer to ask for a private doctor to participate in the medical assessment (but the taxpayer will have to bear all the costs of this).

Retirement by Age

Taxpayers are entitled to retirement by age when they turn sixty years old (for men) or fifty-five years old (women).

Social Security Convention No. 102 from the General Conference of the International Labour Organisation determines that:

> "Article 26
> 1. The contingency covered shall be survival beyond a prescribed age.
> 2. The prescribed age shall be not more than 65 years or such higher age as may be fixed by the competent authority with due regard to the working ability of elderly persons in the country concerned".

The proof of the taxpayer age must be made based on one of the following documents:

(a) Birth or marriage certificate disclosing the date of birth;
(b) Army reservist certificate (granted to those who received exemption from mandatory army duties) or voter registration card; and
(c) Identity card or any other document that is issued based on the civil registry of birth or marriage and as long as there is no doubt regarding the legitimacy of the document.

Retirement based on the time the taxpayer has contributed to Social Security

Taxpayers may claim this retirement plan after thirty-five years of contributions (for men) and thirty years of contributions (for women). There are several discussions around this type of retirement plan, especially if it is a viable cost to be projected in the Social Security structure over the next few years.

The 'contribution time' is understood as the lapse of time that goes from the first Social Security contribution paid to the date of the retirement request or when the paid work activity ceases. The legislation also provides certain periods that will not be considered in the calculation of the contribution time (*e.g.* when an employment contract is suspended). As a general rule it is considered for the calculation of the total 'contribution time':

(a) the period of remunerated activity that is covered by social security legislation;
(b) the period of contributions paid by the taxpayer when he is no longer in a remunerated activity;
(c) the period in which the taxpayer received sickness benefit or disability retirement payments (between periods of working activity);
(d) the period in which the taxpayer received payments for maternity leave benefit;
(e) the time of service provided by rural workers prior to November 1991; and
(f) the period of working activity as a rural worker, as long as there is proof of the payment of contributions according to the terms of Law No. 6,260 (dated November 6, 1975) with indemnification of the previous period.

Special Retirement

To be eligible for Special Retirement, there are certain legal requirements that the taxpayers have to meet. Among these requirements is the continued work, for a certain period of time (that may vary depending on the agent to which the taxpayer was

exposed), under health threatening or dangerous circumstances.

The taxpayers are those who have to prove to the Social Security Authority that they were exposed to chemical, physical or biological agents, or any other condition that may have affected their health or physical integrity for the period equivalent to that required for granting the benefit.

Sick Leave Benefit

The Sick Leave benefit is granted to taxpayers who are considered disabled (meaning they are in no condition to perform their regular working activities) for more than 15 consecutive days.

For cases of taxpayers who already had a previous disease or injury before the period they started to contribute to Social Security, the Sick Leave benefit will not be due. The exception to this is when there is proof that the disability occurred due to a progression or an intensification of a pre-existing disease or injury.

The Sick Leave Benefit is due, regardless of a time lapse, for taxpayers who have had an accident of any type.

In terms of Bilateral Agreements, it is worth mentioning that Brazil has Social Security Agreements with the following countries: Germany, Belgium, Cabo Verde, Canada, Chile, Korea, Spain, United States, France, Greece, Italy, Japan, Luxembourg, Portugal and Quebec.

Complementary Social Security

The Brazilian Federal Constitution regulates not only the mandatory public pension plan, but also provides regulation for the private pension plan system (article 202 of the Federal Constitution). This type of private pension structure has the following characteristics: (i) complementarity; (ii) self-ruled (has autonomy with regard to the government's official pension plan system); (iii) non-compulsory (optional); (iv) contract defined; (v) financial capitalization system; (vi) transparency; (vii) does not require an employment relationship with participants; and (viii) cooperation and consensus between the parts.

The main purpose of Private Pension Entities (that are

classified as 'open' or 'closed') is to grant complementary or even equivalent benefits to those granted by the government official pension plan.

Since they offer benefits to complement the official pension plan, it is the responsibility of those Private Pension Entities to ensure that their plans are supported by actuarial calculations and that there is full coverage of the proposed social risks involved. Therefore, the guarantee of advantages for each participant enrolled in the private plan plus the satisfaction of the social security needs creates the reason for the Private Pension Institute.

There has been a significant increase in interest for private pension plans since they normally offer better benefits to participants than the official pension plan (that does not provide a benefit that matches the compensation workers used to receive during their working days).

Any of the Private Pension Entities, either the 'open' or 'closed' ones, may create and operate pension plans as long as they have specific authorization to do so, which basically consist of having the rules of the plan approved by the regulatory and supervisory authorities. These authorities must recognize that the entities are capable of meeting the minimum standards of transparency, solvency, liquidity and economic-financial and actuarial balance.

It is important to clarify that entities can demonstrate their solvency, liquidity, and economic-financial and actuarial balance when they can prove to have enough resources in order to offer benefits that are intended to complement the official pension plan. The actuarial calculation is a scientific technique used to guarantee this, and part of it also considers the consolidation of investment funds (FIEs), which are regulated by articles 49 and 50 of Law No. 4,728/1965.

Another point that should be explained is the difference between the Private Pension Entities classified as 'open' and 'closed'. Among the different characteristic between these two classifications is the profit that is pursued by the 'open' entities.

'Closed' Private Pension Entities can pool resources into investment funds and also pool resources through real estate or even through participation in Special Purpose Entities (SPEs). However, different to the 'open' Private Pension Entities, the 'closed' Private Pension Entities do not aim to make profits, nor do they provide services

or products to the consumer market (LC No. 109/2001, article 31).

As a general rule, the benefits offered by Private Pension Entities are:

- Retirement – A benefit that participants receive after ceasing their working activities. The benefit is paid as an income for a long period or even for the rest of the participant's life;
- Specific payments (*e.g.* insurance) – This type of payment normally correspond to a benefit that is paid due to certain events that may occur, and can either be paid in a lump sum or in instalments for a short period of time;
- Death Pension – This refers to a benefit that is paid to dependants in case of the participant's death. The contract can establish payments for a certain period of time or even for the dependant's lifetime.

Benefit plans may be created and managed by 'open' entities (LC No. 109/2001, article 36) as well as by 'closed' entities (CGPC Resolution 8/2004). These plans will set individualized accounts for each participant as well as non-individualized funds that are structured to offer all the different types of benefits (lifetime monthly income; temporary monthly income; survivor's pension; or multiple wage payment).

While individualized accounts comply with the precepts of the financial capitalization system, the non-individualized funds adhere to the financial system of allocation or capital cover.

Considering the different types of financial systems, 'open' entities may offer: (i) individualized plans; and (ii) collective plans. The individualized plan, as the name suggests, is that agreed upon by an individual and the main purpose of which is to guarantee certain benefits to the participant or their dependants. The collective plan meanwhile is one that is established with legal entities to benefit a group of people who are bound to it (*e.g.* employees of a certain company).

A broad range of basic benefits may be set up in the individual and collective plans of 'open' entities, such as:

(a) Survivor's income: this refers to the income paid to the participant who survives for the period established in the contract;
(b) Disability income: this refers to the income paid to the participant in case of a total and permanent (irrecoverable) disability that may appear after the participant complies with the minimum eligibility period established in the plan;
(c) Death pension: this refers to the income that is paid to the participant's dependants (or anyone else indicated in the contract) due to the participant's death (after the minimum eligibility period is fulfilled). This can be a payment made for a lifetime or for a specific period of time;
(d) Savings paid in case of death: this refers to the amount paid in a lump sum to the dependants or others indicated in the contract as the participant's beneficiary in case of death (after the eligibility period established in the contract); and
(e) Savings paid in case of disability: this refers to the amount paid in a lump sum to the dependants or others indicated in the contract as the participant's beneficiary in case of total and irrecoverable disability (after the eligibility period established in contract).

All the benefits listed above, with the exception of the first (a – 'Survivors income') are considered as benefits of risk or based on risk.

As for the 'closed' entities, there are two types of benefits that may be agreed upon: (i) benefits of risk; and (ii) benefits for a pre-agreed period.

The benefits of risk are those are those in which the trigger event for the payments may occur at any time (illness, disability or death) while the benefits for a pre-agreed period are those in which the trigger event is already known between the parties since it refers to a date previously agreed between them (*e.g.* being alive after the date established in the contract). Also, just as happens with 'open' entities, the 'closed' entities may offer the basic types of benefits such as survivor's income, disability income, death pension, savings paid in case of death, and savings paid in case of disability.

Chapter 16

Insurance & Reinsurance

Insurance

Introduction

Insurance, in Brazil as in most countries, is a highly regulated industry. Unlike other Federal countries, however, the responsibility for legislating on and regulating insurance transactions lies exclusively with the Federal Government, not with State or local governments. In 1966, the Federal Government created the National System of Private Insurance, comprising the National Council of Private Insurance (CNSP), the Superintendence of Private Insurance (SUSEP), the Brazilian Reinsurance Institute (currently '*IRB Brasil Re*'), private insurers and reinsurers, and insurance brokers. Types of private insurance regulated thereunder are: (I) life; and (II) nonlife (*i.e.* property, casualty, automobile, and others). Areas of insurance currently not covered by the basic regulatory framework discussed here include:

- workers' compensation and employment insurance (funded by the Federal Government);
- health insurance and managed health care

(regulated by ANS, a Federal agency);
- private or "supplemental" pension or retirement plans (regulated by the National Monetary Council, that is also in charge of regulating financial institutions);
- title insurance (non-existent in Brazil).

In addition to the above-mentioned regulatory framework, the new Civil Code, which came into effect in 2003, contains an entire chapter on Insurance, comprising Articles 757 through 802. Marine insurance continues to be regulated by Articles 666 to 730 of the 1850 Commercial Code. The Civil Code provisions include, *inter alia*, the definition of an insurance contract, the requirement of governmental authorization, a requirement of good faith relationship between insurer and insured, and special provisions covering damage and life insurance. Damage insurance encompasses regulation on civil liability insurance.

Currently, private insurance revenues amount to an average of 3.9% of Brazilian gross domestic product. If private health insurance and pension plans are considered in the statistics, the revenues of private insurance in Brazil add up to 5.82% of the gross domestic product.

Regulatory Questions

CNSP

This Council is comprised of representatives from several Ministries, the Central Bank and the CVM, and is presided over by the Minister of Finance or, in his absence, by the Chairman of SUSEP. This reflects a trend within the statutory framework to treat insurance companies, in many respects, as financial institutions. Its function is to issue guidelines and rules governing private insurance policies and rates, establish general guidelines for reinsurance transactions, organizational and administrative rules for insurance companies, proper investment instruments for insurance companies, and general provisions for insurance contracts and accounting, actuarial and statistical rules applicable to insurance companies.

SUSEP

This body is principally charged with executing the directives issued by the CNSP; however, its activities have often

encompassed measures that are regarded more as rule-setting than rule-enforcing, reinforced by its importance within the CNSP. Among its specific attributes are overseeing the constitution, organization, functioning and operation of insurance and reinsurance companies, which includes granting operational licenses, approval of by-laws and their amendments, approval of director appointments, fixing of capital, and technical reserves requirements.

In addition, SUSEP issues detailed rules governing the policies that can be issued for each branch of insurance coverage. SUSEP has the power to impose fines and other penalties for failure to comply with the applicable laws and regulations.

Ownership and management of Insurers

There are no restrictions on foreign ownership of a licensed Brazilian insurance company. However there are minimum capital and reserve requirements, varying with the lines of business. A Brazilian insurance company must take the form of a S.A. (*sociedade anônima*), akin to a corporation. All executive directors of Brazilian insurance companies must be residents of Brazil, but members of a supervisory board need not be resident.

Insurance brokerage

Insurance brokerage is no longer a regulated activity. Brokers can be either individuals resident in Brazil or Brazilian legal entities, including foreign owned companies. Officers and executive directors of companies must be residents of Brazil. The law expressly prohibits licensed brokers and the owners, officers and directors of brokerage companies from being owners, officers, directors, representatives or employees of insurance companies. Insurance companies can receive proposals from brokers or directly from customers; in the latter case, an amount equivalent to the customary brokerage fee must be paid to FUNENSEG, a governmental foundation supporting insurance brokers.

Reinsurance

Introduction

The formulation of the “general guidelines” for Brazilian reinsurance

transactions is the responsibility of the CNSP[1].

Prior to the opening of the Brazilian reinsurance market, with the enactment of Supplementary Law No. 126, dated 15 January, 2007, IRB-Brasil Resseguros S.A. ("IRB Brasil Re.", or simply "IRB") was in charge of regulating all reinsurance transactions effected in Brazil. Such role no longer pertains to IRB, but to SUSEP.

Types of reinsurance companies

Pursuant to Supplementary Law No. 126/2007, three (03) different types of reinsurance companies are authorised to operate in Brazil: (a) local reinsurers; (b) admitted reinsurers; and (c) occasional reinsurers. Such Supplementary Law sets out the guidelines for each of these reinsurers. The CNSP has issued certain resolutions to detail the practice in this industry.

One of the first resolutions on such matter was Resolution No. 164, issued on 17 July, 2007. In compliance with the abovementioned Supplementary Law, Resolution No. 164/2007 has established transitory rules to govern the reinsurance market. Furthermore, on 17 December, 2007, the CNSP issued Resolution No. 168, containing the current rules and requirements that each type of reinsurer must comply with in order to operate in Brazil.

(a) **Local Reinsurers** *("Resseguradores Locais")* - are companies registered in Brazil and structured as corporations (S.A.s - "*Sociedades por Ações*") having the sole purpose of acting as a reinsurer and/or retrocessionaire. The provisions of Decree-Law No. 73, dated 21 November, 1966, are applied to such reinsurers whenever applicable. Furthermore, investments and the capitalisation of such type of reinsurer is set out in separate regulations issued by the CNSP.

(b) **Admitted Reinsurers** *("Resseguradores Admitidos")* - despite being registered abroad, these have representative offices in Brazil set up as a limited

1. Clause VII of Article 32 of Decree-law No. 73/66.

liability companies (Ltda. - *"Sociedade Limitada"*) or as corporations (S.A. - *"Sociedade por Ações"*). In order to be admitted in Brazil, these reinsurers must comply with CNSP regulations, particularly CNSP Resolution No. 168/2007 and SUSEP Regulation No. 359/2008. The main legal requirements for operating as an admitted reinsurer are as follows:

(i) it must be duly registered with SUSEP prior to operating in Brazil and be incorporated under the laws of its home country for underwriting local and international reinsurance in the fields within which it intends to operate in Brazil;
(ii) it must prove that it has operated in the country of origin for more than five (5) years;
(iii) it has financial capacity of at least US$100,000,000.00 (one hundred million US Dollars);
(iv) it is listed with, at least, the following solvency ratings: (a) BBB, if issued by Standard & Poor's; (b) BBB, if issued by Fitch; Baa3, if issued by Moody's; and B+, if issued by AMBest;
(v) it has appointed an attorney-in-fact resident in Brazil, with broad administrative and judicial powers, including the power to receive summonses and notifications;
(vi) evidence that the country of origin's regulations permit free currency movement and convertibility.

The admitted reinsurer must, in addition to the requirements outlined above: (i) maintain an account in foreign currency linked to SUSEP in the minimum amount of US$1,000,000.00 (one million US Dollars) for operating life/health insurance and US$5,000,000.00 (five million US Dollars) for operating in all fields; and (ii)

regularly submit its financial statements.

The representative office of an admitted reinsurer must have as its only corporate purpose the intention of acting as a representative of the foreign reinsurer in Brazil and must have in its corporate name the expression "Representative Office in Brazil" *("Escritório de Representação no Brasil").*

Furthermore, such office must be set up as a branch of the foreign reinsurer in Brazil or as a Brazilian subsidiary with: (a) minimum participation of 4/5 of the corporate capital being held by the foreign company; (b) inclusion, in the Brazilian corporate resolution that opens the Brazilian branch, or in the Brazilian subsidiary's articles of association, of the statement that its sole purpose is to represent the foreign reinsurer in Brazil; (c) the declaration that it will follow the rules for the appointment of the members of its boards; and (d) the local branch's company officer being the foreign reinsurer´s appointed attorney-in-fact who is resident in Brazil or an associate attorney in-fact *("representante adjunto").*

(c) **Occasional Reinsurers** *("Resseguradores Eventuais")* - these reinsurers are also foreign companies and do not have a representative office in Brazil. In order to operate in the Brazilian market, they need to be enrolled with SUSEP and comply with the Supplementary Law and applicable regulations. Like admitted reinsurers, occasional reinsurers must also register with SUSEP; be incorporated under the laws of their home country for underwriting local and international reinsurance in the fields in which they intend to operate in Brazil; have operated in the country of origin for more than five (5) years, and; appoint an attorney-in-fact resident in Brazil with broad representative powers.

In addition to the foregoing, such Occasional Reinsurers must evidence the following:

(i) that they have financial capacity of at least US$150,000,000.00 (one hundred and fifty million US Dollars);
(ii) that they have a solvency rating provided by a rating agency recognised by SUSEP equal to or greater than the minimum established by CNSP, being: (a) BBB, if issued by Standard & Poor's; (b) BBB, if issued by Fitch; (c) Baa2, if issued by Moody's; and (d) B++, if issued by AMBest;
(iii) that they hold a foreign currency account bound to SUSEP in the form and in amount defined by the CNSP to secure their operations in Brazil; and
(iv) periodically submit their financial statements in the form defined by CNSP.

Both admitted and occasional reinsurers must comply with other requirements ultimately established by the CNSP.

Foreign reinsurers based in tax havens (*i.e.*, countries and territories in which there is no income tax or income tax is levied at a rate lower than 20%) and in any country in which its legislation contemplates corporate ownership secrecy, are prohibited from being registered as occasional reinsurers. The Brazilian Federal tax authorities issue a blacklist of such jurisdictions from time to time, the latest having been issued in 2010.

Ceding risks

Supplementary Law No. 126/07 and Resolution No. 168/2007 currently establish that insurance companies should preferably contract, or offer, at least forty percent (40%) of their reinsurance assignments with local reinsurers. CNSP more recently enacted Resolution No. 225/2010, which amended Resolution No. 168/2007 to determine that insurance companies should contract at least forty percent (40%) of their treaty (automatic) and facultative reinsurance assignments with local reinsurers. Accordingly, as per Resolution No.

225/2010, insurance companies must place at least forty percent (40%) of their automatic and facultative reinsurance assignments with local reinsurers.
Furthermore, Resolution No. 168/2007 was also amended by CNSP Resolution No 232/2011, which included new paragraphs in Article 14 of former Resolution, setting out, for example, that insurance companies or local reinsurance companies cannot assign more than 20% of the premium arising from each coverage to affiliate companies[2]. Such limitation of 20% was completely waived for performance bonds and for certain types of credit insurance.

IRB

Since the enactment of Supplementary Law No. 126/2007, IRB no longer holds monopoly over the reinsurance and retrocession market. Accordingly, IRB must compete in the reinsurance and retrocession market with the private sector, *i.e.* with local, admitted and occasional reinsurers.

2. The definition of affiliate companies is set out by Paragraphs Two and Five of Article 14 of Resolution 168/2007.

Chapter 17

Intellectual Property

Patents

Patents are an extremely impFtant asset for doing business both in Brazil and around the world. Brazil is signatory of the Paris Convention Agreement (CUP) and the Patent Cooperation Treaty (PCT). The 1996 Industrial Property Law was revised in view of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in order to guarantee patent protection to vital technological sectors related to chemicals, foods and pharmaceuticals, which were previously unprotected in Brazil. The so called "new" Brazilian IP Law also foresees patent protection for biotechnological inventions covering genetically engineered microorganisms.

Secrecy period and publication

After the filing, the application is kept confidential for eighteen months from the priority date. After this term the application is published in the Brazilian Official Gazette.

Request for examination

The request for examination must be filed within three years of the filing date.

Voluntary amendments to the original application may be submitted through until the date examination is requested, as long as such amendments do not broaden the scope of the application as it was originally filed.

Examination

The Brazilian Patent Office will then publish either an official action notice in the Brazilian Official Gazette, or a decision granting or rejecting the application.

A response to the official action must be filed by the applicant within a non-extendible 60 or 90-day period, depending on the nature of the action, otherwise the application will be considered abandoned. The application will then be allowed, rejected or a new official action may be formulated by the Examiner.

Non-patentable subject matter and subject matter not considered to be an invention

According to Article 10 of the Brazilian IP Law, the following are not considered to be inventions or utility models:

I. discoveries, scientific theories or mathematical methods;
II. purely abstract concepts;
III. schemes, plans, principles or methods of a commercial, accounting, financial, educational, publishing, lottery or fiscal nature;
IV. literary, architectural, artistic or scientific works, or any aesthetic creation;
V. computer programs per se;
VI. the presentation of information;
VII. rules of games;
VIII. operating or surgical techniques, and therapeutic or diagnostic methods, for use on human or animal bodies; and
IX. natural living beings, in whole or in part, and biological material, including the genome or

germ plasm of any natural living being, when found in nature or isolated there from, and natural biological processes.

In addition, in light of Article 18 of the Brazilian IP Law, the following are also not patentable:

I. that which is contrary to morals, good customs and public security, order and health;
II. substances, matter, mixtures, elements or products of any kind, as well as the modification of their physical-chemical properties and the respective processes for obtaining or modifying them, when they result from the transformation of the atomic nucleus; and
III. living beings, in whole or in part, except transgenic micro-organisms meeting the three requirements for patentability - novelty, inventive activity and industrial application – as provided for in article 8 and which are not mere discoveries.

For the purposes of this law, transgenic microorganisms are organisms, except the whole or part of plants or animals, that exhibit, due to direct human intervention in their genetic composition, a characteristic that cannot normally be attained by the species under natural conditions.

Examination by ANVISA (Brazilian FDA)

According to Section 229-C of Law 9,279/96 and Resolution RDC No. 168, dated August 8, 2017, the patent applications in connection with pharmaceutical products or processes are dependent on prior consent from the National Sanitary Surveillance Agency *(Agência Nacional de Vigilância Sanitária - ANVISA)*. In this field, the BPTO forwards the application to this Agency for analysis in light of public health.

In cases in which the subject matter of a patent application is contrary to the Public Health, the prior consent will be denied.

On the other hand, if a patent application contains a pharmaceutical product or process of interest to the policies of

medicines or pharmaceutical assistance under the National Health Service (SUS), ANVISA will issue an opinion based on patentability requirements, which will be interpreted as “third party observation” for the substantive examination to be conducted by the BPO.

Finally, if a patent application does indeed contain subject matter that is not of interest to the policies of medicines or pharmaceutical assistance under the National Health Service (SUS), the prior consent will be granted and the application will return to the BPTO for substantive examination.

Post-examination amendments

Although not stated in Article 32 of the Brazilian IP Law, Resolution 93/2013 establishes that amendments submitted after the examination is requested may be accepted in certain specific cases. Specifically, post examination amendments are only acceptable if they are intended to correct formal issues and/or to further limit the claimed matter for which examination was requested.

Divisional application

According to Article 26 of the Brazilian IP Law, it is possible to file a divisional application until the end of the examination of the parent application, that is, before a final decision is issued by the Brazilian PTO granting or rejecting the application.

However, the same limitations for post examination amendments imposed by Resolution 93/2013 also apply to divisional applications filed after the request of examination of its parent application. Specifically, the claims of a divisional application filed after the request for examination must be restricted to the claims of the parent application. In practice, this means that a divisional application may only be filed to split the set of claims of the parent application.

Appeal against rejection

If the application is rejected, a 60-day term is automatically opened during which an appeal can be filed against the decision to reject.

Appeals against allowing decisions are no longer possible. Please refer to the topic on the opposition proceedings.

Allowance and Grant

Within 60 days of the granting decision, payment of the issuing fee should be made (an additional subsequent 30-day grace period is available for payment of the issuing fee with a surcharge). A few months thereafter the Letters-Patent is issued. Administrative annulment proceedings can be started by third parties, or even by the Patent Office itself, within a period of 6 months counting from the publication of the issuance of the Letters-Patent.

Term of validity of patents

Patents of Invention in Brazil are valid for a 20-year term starting on the filing date. However, the Law also foresees a minimum term of 10 years as of the issuance of the Letters-Patent document.

Utility Model Patents are valid for a 15-year term starting on the filing date, however, the Law also foresees a minimum term of 7 years as of the issuance of the Letters-Patent document.

Opposition and annulment proceedings

The Brazilian Industrial Property Law 9.279/96 has introduced several changes in the way applications are to be opposed by third parties.

There is no longer a fixed term for presenting an opposition. Any interested party may, at any time during examination, present documents and information to subsidize the examination. Should the Examiner consider the said subsidies to be relevant, he will then issue an official action inviting the applicant to present a manifestation.

In order to delimit the term for presenting subsidies, the Brazilian Patent Office states, in Normative Instruction 30/2013, that "the end of the examination is deemed to be the date of the conclusive opinion report regarding patentability, or the thirtieth day prior to the publication of the decision of acceptance, rejection or definitive abandonment, whichever of these is the last to occur".

As stated above, should the application be allowed regardless of the subsidies presented, it is no longer possible to present a regular appeal against the allowance. However, any

interested party may request the administrative annulment of a granted patent within a 6-month term as of the date the issuance of the patent is published.

The request will be examined by the President of the Patent Office, who will invite the patentee to present a manifestation within 60-days.

After said term, an opinion will be issued, and both the third party and the patentee will be invited to manifest themselves within 60-days.

The final decision will then be published and the administrative proceedings will be terminated.

Working requirements

In accordance with the Brazilian Industrial Property Law, a Patentee who has not started to work the patent, in the country, within three years, counting from the date on which the patent was issued, or has discontinued the working for more than one year, may be forced to grant a compulsory license at the request of any third party.

The licensee should initiate actual working within the term of one year after the grant of the license otherwise the license may be cancelled under request of the patentee.

In case working has not started after two years of the granting of a compulsory license, the patent may be declared forfeited, either "ex-officio" or at the request of any interested third party.

Please bear in mind that actual working may only be replaced or supplemented by importation in cases where local production is considered to be economically unfeasible.

Finally, please note that nominal workings may be performed through an offer of license that should be published in the Brazilian Official Gazette. This option also has the interesting advantage of reducing the annuity fees to half of their normal amount while the offer is pending.

Marking of Products

The Brazilian law has no specific requirements regarding the marking of a product with indication of the patents or patent applications protecting such product.

Maintenance

Every year, annuity fees must be paid in connection with applications and patents. However, the annuities become due only at the beginning of the third year of the life of the application/patent or, in other words, two years after the filing date.

The regular payment of the annuities must be made within the 3-month period following the anniversary of the filing date. After said initial term, an additional grace period of six months is granted for the payment. However, during this grace period, a fine of 50% must be added to the regular amount due for the annuity fee.

After the end of the grace period, if payment has still not been made, then a notice communicating the abandonment of the application, or the forfeiture of the patent, will be published in the Official Gazette. From the date this publication is made, there starts a term of three months within which the case may be restored through payment of a specific fee. After this last opportunity, the case will be irrevocably abandoned or forfeited.

Accelerating examination in Brazil

The Brazilian Patent Office has recently been adopting a number of initiatives to promote ways to accelerate examination in Brazil. Details of the main initiatives, and their corresponding Resolutions, are provided below:

Resolution 151/2015 establishes that examination may be expedited by the applicant when:

- The applicant is a natural person older than 60 years of age;
- The applicant has physical or mental disability, or serious illness; and
- The invention as covered by the patent application is allegedly being infringed.

Resolution 80/2013 establishes the possibility of acceleration of the examination for patent applications involving matters related to diagnosis, prophylaxis or treatment of:

- AIDS;
- Cancer; and

- Neglected diseases (Chagas disease, Malaria, Tuberculosis, etc.)

Resolution 175/2016 establishes the acceleration of the examination for environmentally friendly technologies, the so called "Green Patents Program". The Resolution establishes the list of technologies that may benefit from the green patents program, which are related to alternative energy, transportation (*e.g.* electric and hybrid cars), energy conservation, waste disposal and treatment, sustainable agriculture, and the like.

The Brazilian PTO has also signed Patent Prosecution Highway (PPH) agreements with several other patent offices. Each PPH agreement is ruled by a specific resolution, which have in common the following requirements that applications must meet to participate in the PPH Programs:

- The application must belong to a family whose older patent application has been filed with the Brazilian Patent Office or the Cooperating Patent Office, or under the PCT, have the Brazilian (RO / BR) or the cooperating patent office as their receiving office;
- The Cooperating Patent Office, acting as a national institute, has examined an application of the same family, clearly indicating which claims meet the patentability requirements (novelty, inventive step and industrial application), and has subsequently issued a letter of "Intention to Grant" or "Notification of Grant"; and
- Each PPH agreement established with the cooperating patent offices is limited to specific technical fields listed with certain IPC symbols.

The Brazilian PTO currently has PPH agreements with the United Stated Patent Office (established in Resolution 210/2018), Japanese Patent Office (Resolution 184/2017); Chinese Patent Office (Resolution 209/2018), European Patent Office (Resolution 202/2017); Denmark Patent Office (Resolution 223/2018); and United Kingdom Patent Office (Resolution 222/2018).

Trademarks

Trademark protection in Brazil is obtained by registering the trademark with the Brazilian Patent and Trademark Office (BPTO).

There is no intent-to-use trademark filing in Brazil. An application can be filed at any time, whether the trademark has been used in Brazil or not.

The Brazilian Industrial Property Law introduced two exceptions to this rule:

(i) For well-known trademarks, special protection is granted, regardless of whether or not they have been registered in Brazil. This provision is aimed at protecting holders from piracy of well-known trademarks that are registered outside of Brazil, but not in Brazil. It also reinforces the protection of Article 6 bis of the Paris Convention, which has long granted protection for well-known trademarks regardless of their registration.

(ii) For any person who, in good faith, at the date of priority claim or of the application filing with the INPI by a third party, was using an identical or similar trademark for at least six months in Brazil, to distinguish or certify a product or service that is identical, similar or akin. In such instances, they will have preferential right to registration.

In Brazil, for a trademark to be registered it must be new, lawful, and cannot be identical or confusingly similar to previous applications or registrations filed with the BPTO, nor may it be an expression of common use or a generic expression.

Although not required prior to filing an application with the BPTO, a search on the trademark database of the BPTO is recommended. The purpose of the search is to check whether any trademarks are already registered and/or applied for by third parties which in any manner conflict with the trademark sought, and thus prepare strategies to avert scenarios that may block the application. Therefore, before using a trademark in Brazil, it is highly

recommended that a foreign company perform a clearance search in order to evaluate the possible scenarios and strategies.

The application for a trademark registration is made using the appropriate form, upon payment of the respective fees set by the BPTO and submission of documents and information on the trademark and the applicant.

The application submitted to the BPTO will be subject to a preliminary formal examination and subsequently filed and published in the Official Gazette. Once the application for trademark registration has been published in the Official Gazette, a term for third parties interested in filing any oppositions will start. Should there be any opposition, a term to file a response will start.

Once the term to file an opposition, or the term to respond in case of any opposition, has elapsed, the BPTO will carry out a technical examination. Upon completion of the examination, the registration will be permitted or denied by the BPTO.

If it is permitted, the term to prove payment of the fees for issuance of the certificate and the first-ten-year protection will commence. Upon proof of payment of the official fees for issuance of the certificate and the first-ten-year protection of the trademark registration, the registration will then be granted upon publication in the Official Gazette.

Each trademark must be filed in a class that identifies the intended product and/or service. It is important to point out that, unlike other countries, Brazil does not accept multi-class trademark applications. Therefore, each class of interest constitutes a single trademark process.

After the granting of the registration, a trademark registration may be cancelled if:

(i) it is not used for five years from the date of its registration;
(ii) its use is interrupted for more than five consecutive years; or
(iii) the trademark has been used in a modified form that implies alteration of its original distinctive character, as found on the certificate of registration.

If the application is rejected, a term for appeal will start.

Foreign companies should understand that Brazil is a signatory of the Paris Convention, and therefore, trademarks which have been registered in signatory countries take priority in their registration in Brazil. However, the priority will only be granted if claimed, as per established in the Paris Convention (within six months of the foreign application) and in the Brazilian Industrial Property Law.

In case of a trademark infringement, by or against a foreign company, court proceedings for trademark infringement could follow. The infringer could be ordered to stop using the trademark in Brazil and pay damages to the injured party.

It is important to note that Brazil is currently preparing to become a signatory to the Madrid Protocol.

Well-Known Trademarks
(BPTO's Resolution 107 of August 19, 2013)

The Brazilian Industrial Property Law affords special protection to famous (highly renowned) trademarks in all fields of activity. Once a trademark is recognized as being well-known, the Brazilian Trademark Office (BPTO) duly records this status and the trademark will have special protection that extends to all classes of products and services, enforceable for a period of 10 years.

A trademark is considered to be well-known if it brings incontestable knowledge and prestige to the Brazilian public in view of its market tradition and qualification.

After the BPTO's Resolution 107 dated August 19, 2013, a party interested in obtaining this special protection can file a specific petition with the BPTO claiming such status. Nevertheless, for the recognition of the status, evidence of the fame must support the petition claiming the well-known status, such as:

I. Temporal extension of the disclosure and effective use of the trademark in the national market;
II. Profile and fraction of the user of the products or services to which the trademark applies, and the profile and fraction of the public that immediately

and spontaneously identifies the trademark with the products or services to which it applies;

III. Profile and fraction of the user of the products or services to which the trademark applies, and the profile and fraction of the public that immediately and spontaneously identifies the trademark due to its tradition and classification in the market;

IV. Means of commercialization of the trademark in Brazil;

V. The geographical extent for which that the trademark is recognized and commercialized;

VI. Means of publicizing the trademark in Brazil and, eventually, abroad;

VII. Amount invested by the titleholder in advertising in the last five years;

VIII. Sales volume of the product or service revenue in the last five years;

IX. Economic value of the trademark;

X. Indication that non-protection of the trademark under this special status is causing its dilution;

XI. Information that shows that the public can identify the trademark values;

XII. Information that demonstrates the confidence of the public.

The well-known status of the trademark will be analysed by a special commission at the BPTO. The party claiming the special protection, or the interested third parties, can file an appeal to the President of the BPTO against the decision which recognizes or denies the well-known status.

Trademarks which are simply well-known in their field of activities also receive special protection in Brazil, but they will not have a change of their status in the BPTO's database, as happens in the cases of the well-known trademarks.

Law for Innovation in Technology

Local Innovation Incentives Framework

Brazil has a strong academic research environment, international-grade workforce and services, national and international companies with local manufacturing facilities, and the not only the biggest but also the most sophisticated consumer market in Latin America. Nevertheless, due to past policies of limitations on IP Rights, barriers to foreign products, state intervention and lack of challenge to compete in international markets, it is still struggling to create a local environment that can develop a broad range of innovative products and solutions that can be inserted into the market. Successes in specific areas are not enough, regardless of how impressive they may be.

Brazilian citizens and expanding groups in the Government are increasingly dissatisfied with this situation meaning there has been a move towards the creation of induction policies and legislation to attract the local and international private sector to R&D in Brazil.

We can point out three groups of such incentives:

a) Preference for Government Acquisition:
   a. Products/services with total or partial local production;
   b. Products/Services that rely on locally developed technology.

b) Tax Incentives:
   a. Deduction of operating expenses incurred with research and development designed for technological innovation;
   b. 50%-cut of IPI taxation on acquisitions of machinery, devices and instruments for research and development in technology;
   c. Full depreciation, for tax purposes, of fixed

items for research and development in technology in the year of the assets' acquisition;

d. Full amortization, for tax purposes, of intangibles exclusively tied to research and development activities aimed at technological innovation in the year of the assets' acquisition.

e. Support for Innovation, Research and Development
   i. Funding
   ii. R&D and IP Filing Structure
   iii. Government Supply Challenge

Government Acquisition Preference – 'Buy Brazil Act'

Although the concept of local content has been a tradition for purchases in specific sectors such as Oil and Gas, the recognized preference for Government Acquisition was established in the Government Procurement and Government Contracts Law, dated 2010, which creates preferential price margins for suppliers of products and services that comply with the concepts of local or locally developed production.

The legislation amendment known as "Buy Brazil Act" has being benchmarked against similar policies in the USA, China and other countries. In Brazil, the Government Purchasing Body has discretion on whether or not to grant preferences in a competing procurement process and has to support the decision in terms of the social externalities of the additional financial burden. Up to now, due to restrictions on the government budget, combined with the established requirements, these preferences did not achieve widespread practice in Government Procurement.

TAX INCENTIVES

Provided that some requirements are meet, Brazilian legislation (mainly Law No. 11,196/2005) sets forth a number of tax breaks for local entities that carry out research and development toward technological innovation.

Operating expenses incurred in the conception of new products or in the process of manufacturing and/or aggregation of new functionalities or characteristics to the existent product or process are deemed to be deductible for corporate income taxes purposes in Brazil.

Equipment, machinery, devices and instruments for research and development in technology are also the target of tax breaks. The acquisition of such items is taxed by the Tax on Manufactured Products ("IPI") with a 50%-cut on the amount due. For fixed asset items, the legislation also allows full depreciation for corporate income tax purposes in the year of the assets' acquisition.

Furthermore, intangible assets exclusively tied to research and development activities for technological innovation may be fully amortized for corporate income tax purposes in the year of the assets' acquisition.

The Law for Innovation and Law No. 11.196/2005 strengthen the fact that technological innovation is an aggregation of quality and an essential requirement for a competitive, prosperous and sustainable economy, with better jobs and salaries, and less dependency on commodities and royalties paid abroad.

Innovation, Research and Development Support – Innovation Law

The Law for Innovation in Technology (Law Nº 10.973/2004), enacted in December 2004 and significantly amended in 2016 in an attempt to make it more effective, is based upon three pillars:

- the fomenting of an environment conducive to strategic partnerships between universities, technology institutes and companies;
- stimulating science and technology institutions to innovate; and
- promoting innovation within companies.

According to the Law, the Union, the States, the Federal District, the Municipalities and the respective development agencies can stimulate and support the formation of strategic alliances and the development of cooperation projects involving companies, non-profit private entities dedicated to research and

development activities aimed at the generation of innovative products, processes and services and the transfer and diffusion of technology, and Scientific, Technological and Innovation Institutions – ICTs. Such ICTs are defined as a body or entity of the direct or indirect public administration or a private, non-profit entity legally constituted under Brazilian law, with headquarters and forum in Brazil, that includes scientific or technological research or the development of new products, services or processes in its institutional mission or its social or statutory objective.

The expected support may be rendered to international technological research networks and projects, technological entrepreneurship actions and creation of innovation environments, including incubators and technology parks, and the training and qualification of qualified human resources.

The Federal Official Agencies for funding, fostering and supporting Research and Development may establish agreements and contracts with the purpose of giving funding and management support to the projects, with the express consent of the supported institutions.

Public administration bodies and entities, in matters of public interest, may directly contract ICTs, non-profit private entities or companies, alone or in consortiums, that are focused on research activities and recognized technological qualification in the sector, with the aim of performing research, development and innovation activities involving technological risk, for the solution of a specific technical problem or obtaining an innovative product, service or process.

The Union, the States, the Federal District, the Municipalities, the respective development agencies and the ICTs will support the creation, implementation and consolidation of environments promoting innovation, including parks and technological centers and business incubators, as a way of encouraging technological development, increasing competitiveness and the interaction between companies and ICTs.

Business incubators, technology parks and technological poles, and other innovation-promoting environments will establish their rules for fostering, designing and developing projects in partnership and for selecting companies to enter these environments.

For the intended purposes, the Union, the States, the Federal District, the Municipalities, the respective development agencies and the public ICTs will be able to:

I. transfer the use of real estate for the installation and consolidation of innovation-promoting environments, directly to the interested companies and ICTs, or through a profit-making or non-profit entity whose institutional mission is the management of technology parks, technological centers or business incubators, by means of compulsory, financial or non-financial consideration, in the form of regulation;
II. participate in the creation and governance of technology park management entities or business incubators, provided that they adopt mechanisms to ensure segregation of financing and execution functions.

One of the mission of the Federal Government, the States, the Federal District and the Municipalities is the attraction of research and development centers of foreign companies, promoting their interaction with ICTs and Brazilian companies and offering them access to the instruments of development.

The Union, the States, the Federal District, the Municipalities, the ICTs and their development agencies should promote and encourage the research and development of innovative products, services and processes in Brazilian companies and in private non-profit Brazilian entities, through the granting of financial, human, material or infrastructure resources to be adjusted in specific instruments and designed to support research, development and innovation activities, in order to meet national industrial and technological policy priorities.

The granting of financial resources, in the form of economic subsidies, financing or equity interest, aimed at the development of innovative products or processes, will be preceded by project approval by the grantor body or entity.

The tools to stimulate innovation in companies are, among others:

I. economic subsidy;
II. financing;
III. equity interest;
IV. technological bonuses;
V. technological challenges;
VI. tax incentives;
VII. scholarships;
VIII. use of the purchasing power of the State;
IX. investment funds;
X. participation funds;
XI. financial securities, with or without tax incentives;
XII. investment in research and development in public service concession contracts or in sectoral regulations.

In addition, the Public ICTs may, for a fixed term, under the terms of a contract or agreement:

I. share their laboratories, equipment, instruments, materials and other facilities with an ICT or companies as actions aimed at technological innovation to achieve the incubation activities, without negatively affecting its end activity;
II. allow the use of its laboratories, equipment, instruments, materials and other existing facilities in its own premises by an ICT, companies or individuals engaged in research, development and innovation activities, provided that such permission does not directly interfere with its end activity or conflict with it;
III. allow the use of its intellectual capital in research, development and innovation projects.

The Union and other federative entities are authorized to hold a minority participation in private companies for the purpose of developing innovative products or processes that are in accordance with the guidelines and priorities defined in the policies of science, technology, innovation and of industrial development in each sphere of government.

The intellectual property on the results obtained will belong to the company, as defined by the legislation and its constitutive acts.

The government partner may condition the equity participation through a capital contribution to the obligation of intellectual property licensing to serve the public interest.

The proceeds received as a result of the future sale of the equity must be invested in research and development or in new equity for the purpose of this public police.

In the companies in question, the bylaws or articles of association may confer special powers on the shares or quotas held by the Union or its entities, including vetoing the deliberations of the other members in any matters it specifies.

The minority interest referred to in the lead paragraph will be provided by means of a financial or non-financial contribution, provided it is economically measurable, and may be a form of remuneration for the transfer of technology, IP licensing, or the granting of the right to use or explore the ownership held by the Union and its entities.

The support provided to companies must comply with the priorities, criteria and requirements approved and disseminated by the public body, subject to availability and equal opportunities for companies and other interested organizations.

Patenting has been encouraged, since the law determines that scholars should be evaluated not only upon published texts but also upon the number of patent applications that are filed, as well as offer them a share in any profits that their patent might bring.

The independent inventor who can prove the filing of a patent application is entitled to request the adoption of its creation by a public ICT, which will decide on the appropriateness and the opportunity provided by the request, as well as the elaboration of a project aimed at the evaluation of the creation for future development, incubation, industrialization and insertion in the market.

Once the invention is adopted by an ICT, the independent inventor will undertake, under contract, to share the economic gains obtained from the industrial exploitation of the protected invention.

The Union, the States, the Federal District, the Municipalities, the development agencies and the public ICTs should support the independent inventor who can prove the patent deposit of his/her creation, among other forms, by means of:

I. analysis of the technical and economic feasibility of the object of its invention;
II. assistance in transforming the invention into a product or process with the financial and credit mechanisms provided in legislation;
III. assistance for the constitution of a company producing the object of the invention;
IV. guidance for the transfer of technology to already constituted companies.

Domain Names

Securing domain names in different countries is currently a priority for most companies, since the domain has become more than simply a virtual representative of a company, but also an important marketing tool for ensuring corporate visibility.

The more similar a company name is to its domain name, the more easily it will be located on the web. Therefore, companies should aim to ensure the best possible domain for their business in all countries where they have a market presence.

In Brazil, the registration of ".br" domains is effected by NIC.br (Núcleo de Informação e Coordenação do Ponto BR - Information and Coordination Center of the dot BR), which has the responsibility for organizing, centralizing and avoiding any duplication of registered domain names.

Registration of domain names by foreign companies and individuals in Brazil

The registration of .br domains is available to foreign individuals and corporate entities, provided an attorney-in-fact in Brazil is appointed to legally represent them.

It is also possible to register domains under several TLDs (Top Level Domains), such as "adv.br", "agr.br", "art.br", "edu.br", etc., however the applicants, whether individuals or legal entities, must, in these cases, demonstrate their eligibility to secure the chosen category.

To register a domain name, a foreign company or individual must first register themselves with NIC.Br, by submitting the following documentation:

(a) A Power of Attorney granting powers to a Brazilian individual to act on behalf of the foreign company or individual as local attorney-in-fact, with specific authority to perform all necessary actions associated with registering domain names;
(b) An Affidavit evidencing the applicant's field of activities of the products or services commercialized;
(c) An Affidavit confirming that the applicant (if it is a corporate entity) will incorporate a Brazilian subsidiary within twelve months of the submission the documentation; and
(d) The attorney-in-fact's identification document.

The documentation will have to be notarized and apostilled (if the country in which the foreign applicant is domiciled has ratified the Hague Convention), or legalized at the nearest Brazilian Consulate (if such country has not ratified such convention). Upon their arrival in Brazil, the legalized documents will have to be translated into Portuguese by a certified translator, as well as registered with a local Registry of Titles and Deeds. These steps are necessary to ensure the effectiveness in Brazil of any foreign document.

After the foreign entity or individual is duly enrolled with NIC.br, they may apply for a ".br" domain under their own name, which is a straightforward online exercise. It must be noted that the maintenance fee (that may be annual or valid for up to 10 years) charged by NIC.br must be paid locally in Brazilian currency.

If a foreign company has already incorporated a Brazilian subsidiary, or if the foreign company incorporates a subsidiary during or at the end of the 12 month-period mentioned in item 'c' above, it is mandatory that the domain name be registered in the subsidiary's name. Alternatively, the company may also register a domain name in its own name and thereafter transfer it to the Brazilian subsidiary once incorporated, to comply with the NIC.br rule. Failure to comply with such regulations may trigger the

cancellation of the domain registration.

Lastly, when a foreign company allows its Brazilian subsidiary to register a domain name containing its trademark, a license agreement should be executed in order to fully protect its intellectual property rights.

Dispute Resolution

Pursuant to applicable law, the priority of a domain record is given on a first-come first-served basis.

Such rule invites the registration of domain names by opportunists, who wish to ensure the registration of well-known trademarks, and therefore negotiate such domains with their rightful owners.

Likewise, the practice of 'cybersquatting', which consists of registering a domain similar to a trademark to profit from it, and 'typosquatting' when the domain name has typos in it, are also very popular. Both practices are illegal in Brazil, which unfortunately has not stopped the practice.

In order to try and resolve these issues, NIC.br adopted an administrative dispute resolution procedure named SACI-Adm. When disputes over a specific domain arise, such mechanism may be used to secure ownership of the domain primarily for the holder of a relatable trademark registration in the real world. The procedure is filed electronically and requires the plaintiff to declare the existence of registered trademarks or company names that are identical or sufficiently similar to the extent that they could cause confusion. SACI-Adm decisions may trigger the cancellation or suspension of domain(s).

SACI-Adm system, although an alternative, simpler mechanism for dispute resolution, does not prevent a foreign company or individual from securing or recovering a specific domain name by issuing legal proceedings in a competent court.

IP and the Internet

Introduction

The Internet, being an easy path for dissemination and transmission of content, has increased the violation of copyrights and industrial rights, thus creating a challenge for current intellectual property protection methods. Within this scenario, the Copyright Law has become that much more relevant.

The conflict between the autonomy of information circulation and creator rights escalates with the universalization of the web, since online tools that facilitate search and access to information may conflict with the legitimate interests of the creator of the content.

In this regard, it is important to stress that the Internet is not an environment where posted content becomes public domain, or where third-party creations can be freely used – and so there is a need to establish a fair balance which guarantees that information circulates for the benefit of the public interest, but also stimulates innovation and profit for the creator.

Brazilian Copyright Law

The technology used to access and reproduce content is in constant evolution in the Internet environment, but the right to the Intellectual Property and protection of such remain the same. In Brazil, there is no specific law governing internet-related intellectual property. In any event, Law No. 9,610, dated 19 February, 1998 (the "Brazilian Copyright Law") applies to all cases.

Furthermore, the Brazilian Copyright Law provides that the author of any intellectual work is the holder of the economic and moral rights relating to such work. Economic rights ensure the ability to use and dispose of the intellectual work commercially, and may be subject to transfer, assignment, sale and distribution by the author(s), in whole or in part, to third parties, who will have the right to exploit the work.

In turn, moral rights are connected to the personality of the author, thereby entitling the author to claim, at any time, the authorship of the work and to have his/her name, pseudonym or

conventional sign linked to the intellectual work whenever used. It involves the right to oppose any changes that may harm the work or the author's reputation. As a result, moral rights cannot be disposed of, waived or assigned.

In Brazil, Law No. 12,965, dated 23 April 2014 (the "Internet Civil Landmark"), provided extraterritorial coverage of copyright, extending to foreign companies, and also completely exempted providers from civil liability when trafficking third-party content, leaving the application of subsidiary liability only for application providers – when, after being judicially informed about copyright breach, they do nothing about it (responsibility for omission, negligence, inertia or convenience).

Therefore, in order to avoid discussion or disputes involving potential third party intellectual property on the Internet, a company should obtain an author of content's prior approval, waiver or assignment of the economic rights of the creator regarding the online use and/or dissemination of such content.

Trademarks

Trademarks are an important asset in the digital environment, being protected under the abovementioned rules, and specifically by Industrial Property Law No. 9,279, dated 14 May, 1996.

Trademark disputes involving the Internet are more complex, since they are often associated with domain registrations. In this regard, the unity between industrial property and copyright in order to compose Intellectual Property in the Internet environment provides protection to all information belonging to a space or establishment that specifies or identifies a trademark.

In this case, Brazilian jurisdiction may apply the so-called 'two-step' rule, which consists of two reviews: "For the eyes of the consumer, is it possible to distinguish one trademark from another?" and "Is there at least one point of innovation sufficiently relevant to distinguish one trademark from the other?"

Since Digital Law is multicultural and dynamic, the best dispute solution is through mediation and arbitration.

Biotechnology

Brazil's biodiversity is amongst the largest in the world, comprising at least six terrestrial biomes, namely the Amazon, the Cerrado, the Caatinga, the Atlantic Forest, the Pantanal and the Pampa (IBGE, 2004), and contains about 15% of the total of the world's two million catalogued species (Zucoloto & Freitas, 2013). However, the transformation of the country's natural potential into wealth is still modest. Such biodiversity can be considered as a window of opportunity for scientific development. Estimates of the value of Brazil's biodiversity range from a billion to a trillion dollars. Irrespective of whether these estimates reflect the reality, what is known is that the global social-economic interests converge over biodiversity, as it constitutes a source for the feeding of the world's population and of the active ingredients in the production of medicines. In this scenario, Biotechnology assumes an ongoing importance to enable the use of living beings or parts of living beings, modified or not, in the generation of new products with specific purposes.

The impact of biotechnology has occurred mainly in areas such as, medicine, agricultural science, biochemistry, genetics and molecular biology. New plant varieties, drugs and vaccines, and also research in the field of immunology, with the development of monoclonal antibodies, have brought a new dimension to the field of biotechnology.

Genome analysis has been used for the isolation and characterization of genes supposedly involved in biological processes controlling characteristics of extreme economic relevance in plants, animals and microorganisms. Thus, pest resistant, genetically engineered plants, capable of producing drugs and biopolymers, can be obtained.

Biotechnological inventions result from high investments, specialized infrastructure and detailed regulatory approval. Therefore, for such inventions to be stimulated, an adequate protection regime is necessary, one which at least guarantees the return of the time and capital spent on research and development (R&D).

With respect to this field, Brazil protects the biotechnology inventions by means of patents with the INPI. New plant varieties,

comprising said biotechnological inventions, are entitled to protection with the SNPC.

It is also important to emphasize that applications concerning pharmaceutical products or processes need prior consent from ANVISA, according to article 229-C of Law 9,279/96.

Finally, according to Law 13,123/2015 and Decree No. 8,722/2016, the granting of intellectual property rights on finished products or on reproductive material obtained from access to Brazilian genetic heritage or associated traditional knowledge depends on prior registration or authorization with the CGEN.

Brazilian Law

The protection of inventions in Brazil began in 1809, and patent protection was granted to authors of invention or industrial discovery in 1882. Since then, legislation has been continuously revised (a total of five laws and one industrial property code).

Currently, patent protection is regulated by Law 9,279/96. Two articles specifically limit the protection of inventions resulting from biotechnology and/or derived from access to genetic resources. These are Article 10, items VIII and IX and Article 18, item III:

> "Article 10 - The following are not considered to be inventions or utility models: (…)
> VIII - operating or surgical techniques and therapeutic or diagnostic methods, for use on the human or animal body; and
> IX - natural living beings, in whole or in part, and biological material, including the genome or germ plasm of any natural living being, when found in nature or isolated therefrom, and natural biological processes."

> "Article 18 - The following are not patentable: (…)
> III - living beings, in whole or in part, except transgenic micro-organisms meeting the three patentability requirements - novelty, inventive activity and industrial application - provided for in article 8 and which are not mere discoveries;

Sole Paragraph - For the purposes of this law, transgenic micro-organisms are organisms, except the whole or part of plants or animals, that exhibit, due to direct human intervention in their genetic composition, a characteristic that cannot normally be attained by the species under natural conditions."

Regarding the new plant varieties, the "Law of Plant Varieties" came into force in 1997. Brazil is a signatory of the Act of 1978, and follows some precepts of the UPOV Act of 1991 as well.

The regulation of aspects related to biosafety, such as the use of genetic engineering and the release into the environment of genetically modified organisms, is based on the Biosafety Law (Law 11,105/05).

In this respect, it should be noted that Article 6 (VII) of the Biosafety Law prohibits the patenting of genetic use restriction technologies (GURTs). According to the sole paragraph of that article, genetic use of restriction technologies refers to any human intervention process for generation or multiplication of genetically modified plants to produce sterile reproductive structures, as well as any form of genetic manipulation aimed at activating or deactivating genes related to plant fertility by external chemical inducers.

The Brazilian panorama and international treaties in the biotechnology scenario

Current Brazilian legislation does not preclude the protection, by industrial property, of inventions in the biotechnology area, as mentioned in the previous item. A comparative analysis between the Brazilian legislation and the TRIPs agreement does not show any inconsistency between the two texts, specifically when comparing Articles 10 and 18 of Law No. 9,279 and the corresponding provisions of TRIPs.

The TRIPs agreement prohibits legal exclusions from protecting any area of technology, with the exception of a few specific cases. In the area of biotechnology, the exclusion of patent protection by member countries may fall on inventions (as provided in section 5, Article 27 of TRIPs):

a. that are contrary to public order or morality, including to protect human, animal or plant life and health, or to avoid serious harm to the environment;
b. involving methods of diagnosis, treatment and surgery on animals or humans;
c. involving animals or plants other than micro-organisms;
d. that are essentially biological processes for the production of animals and plants, other than non-biological or microbiological processes.

Patentability requirements
Patent Protection in the area of Biotechnology

According to Law No. 9.279/96, the following requirements must be observed for the granting of patent privilege: 1) originality; 2) inventive step; 3) industrial application; 4) descriptive sufficiency; and 5) support of the claims in specification.

Regarding articles 10, items VIII and IX, and Article 18, item III, of Law No. 9.279/96:

> "Article 10 (VIII)
> Operating or surgical methods, as well as therapeutic or diagnostic methods for application in the human or animal body are not deemed invention. Diagnostic methods out of the human body are eligible for patent protection if the aforementioned patentability requirements are observed.
> …
> Article 10 (IX)
> Subject-matter found in nature, even isolated therefrom, is not considered invention. However, formulations and/or compositions containing such subject-matter are entitled to patent protection.
> …
> Article 18 (III)
> All or part of living organisms, except transgenic

> microorganisms, are not patentable. The sole paragraph of the same article defines that transgenic microorganisms are organisms, except the whole or part of plants or animals, that exhibit, due to direct human intervention in their genetic composition, a characteristic that cannot normally be attained by the species under natural conditions."

According to the Guidelines for Examination of Patent Applications in the Field of Biotechnology (INPI Resolution n° 144/2015), the term "microorganism" is used for bacteria, archaea, fungi, unicellular algae not classified in the Kingdom Plantae and protozoa.

Shortly, the guidelines for examination of patent applications in the biotech field address issues such as single nucleotide polymorphism (SNP), promoters, complementary DNA (cDNA), expressed sequence tags (EST), open reading frames (ORF) and fusion proteins, chimeric/humanized antibodies. Such guidelines, for example, state that if a SNP is described as being natural, it cannot be protected. However, its use for an in vitro diagnostic method is entitled to protection. Concerning promoters, the presentation of experimental data proving that they are able to promote the expression of a gene sequence is necessary, not to mention that such sequence must be represented by its SEQ ID NO. It should be noted that cDNAs and ESTs should be protected whenever they are not equal to natural sequences. Moreover, it is necessary to associate said sequence with a function. Furthermore, it is not possible to protect ORFs, since they are considered a natural product. Concerning fusion proteins, it is important to emphasize that all functional parts that form the final protein must be described in a patent application. Finally, the characterization of humanized antibodies requires the presentation of a SEQ ID NO containing the amino acid sequence of the variable portion of the antibody and the definition of the other elements (Fc portion). Examples of inventions comprising the abovementioned subject-matter are SNPs as markers for predisposition of multifactorial diseases, cDNA or EST sequences for the detection of early cancers, and antibodies for chemotherapy.

To be sufficiently described, Hybridomas must be filed in an international depositary institution recognized by the Budapest Treaty, and are not included under the prohibition established in

article 18, item III, of Law 9,279/96.

Protection of New Plant Varieties

Plants, even if genetically modified, are excluded from patentability under Law 9,279, but are subject to protection by Law No. 9,456 (Law of Plant Varieties).

The necessary conditions for the protection of plant varieties are: 1) distinctiveness; 2) homogeneity; 3) stability; 4) originality (commercial); and 5) appropriate denomination.

With regard to the end purpose of protection, it should be noted that it will fall on the reproductive or vegetative propagation material of the entire plant. In other words, the protection may encompass anything from the seed (in the case of sexual reproduction) or seedlings and shoots, to even the entire plant, in case of vegetative multiplication (asexual reproduction).

Copyright and Software

The Brazilian Software Law (Law No. 9,609/98) provides that the protection of the intellectual property of a software, owned by the author of a software, is the same as that granted for literary works, and therefore also governed by the Brazilian Copyright Law (Law 9,610/98), and not by the Industrial Property Law (Law No. 9.279/96), which covers trademarks, patents and industrial designs.

However, not all provisions of the Brazilian Copyright Law concerning moral rights are applied to software, except for the right of the author of a software to claim authorship of their software and to oppose unauthorized changes, if they entail defamation, mutilation or other modification of the software, or their honour or reputation.

The right to exclusive copyright protection of a software in Brazil lasts for fifty years, counting from 1 January of the year following its publication, or, in the absence of publication, from its creation.

During this 50 year-period, only the software owner may authorize the use of the software, under a Software License Agreement. The exclusive right to transfer the software technology

is also guaranteed to the owner. However, in such event, it is necessary to register the technology transfer agreement with the INPI for it to be opposable vis-à-vis third parties.

Unless otherwise stipulated, the rights relating to a software created by an employee of a company during the life of the employment relationship shall be exclusively owned by the employer, contractor of services or public agency.

It is important to note that the protection of such rights does not depend on the registration of software with any authority or public body. Notwithstanding, the software creator may register the same with the INPI, in order to ensure the authorship of the software.

Lastly, the rights granted by the Software Law and by the Copyright Law are also guaranteed to foreign companies or individuals domiciled abroad, provided that the country of origin of the software grants equivalent rights to Brazilians and foreigners domiciled in Brazil.

Piracy

The statistics concerning piracy in Brazil are alarming. It is ranked as the fourth largest market for pirated products in the world. Illegal pirated goods of all natures circulating in this country create a staggering turnover of R$ 63 billion per year. This in turn means that R$ 27.8 billion does not enter the public coffers. Estimates indicate that approximately 51% of all software used in Brazil is unlicensed, and more than 70% of music, video and images used on the Internet is never reported to rights holders. For many years, IP owners have been losing fortunes to piracy and unfair competition. Strategic legal counselling is key in helping companies recover their revenues and getting infringers to pay royalties.

The enforcement of IP rights in Brazil involves planning, technology, intelligence, training and coordination. The legal framework for anti-counterfeiting programs includes the Industrial Property Law (Law nº. 9,279/96), the Copyright Law (Law nº. 9,610/98) and the Software Law (Law nº. 9,609/98). Furthermore, Brazil is a member of many international treaties in the field of intellectual property, such as the Paris Convention for the Protection of Industrial Property (Decree nº. 75,572/1975), the Berne

Convention for the Protection of Literary and Artistic Works (Decree nº. 75,699/1975), the TRIPs Agreement (Decree nº. 1,355/1994), and many others. Finally, the Civil Procedural Law (Law nº. 13,015/2015), the Criminal Procedural Code (Decree nº. 3,689/1941) and the Customs Regulations (Decree nº. 6,758/2009) provide for important and effective measures for combating product piracy.

Based on the above laws and treaties, enforcement provisions allow IP holders to take civil actions for damages with ex parte restraining orders and criminal ones seeking the imprisonment of the infringers. Border measures are procedures widely used by trademark and copyright owners as well. Below is an overall look at the main enforcement procedures allowed under the Brazilian legal system.

Criminal Lawsuits

With very few exceptions, criminal cases on the grounds of trademark and patent infringement as well as unfair competition practices are mostly prosecuted before State Courts and through private criminal lawsuits, which are brought by the holder of the IP right. On the other hand, most of the copyright infringement activities (with the exception of software) are prosecuted by means of public criminal actions, which are initiated by the public authorities.

While the penalty for industrial property infringement may range from detention of three months to one year, or a fine, the penalty for intellectual property infringement, when the violation has an economic purpose, may vary from imprisonment of two to four years, and a fine.

The Brazilian Criminal Procedure Code states that before a criminal action for industrial property infringement is initiated, the illegal activity must be first confirmed. Hence, prior to the filing of the lawsuit seeking the detention of the infringer, the IP holder is obliged to first proceed with a preliminary criminal search and seizure action where experts appointed by the criminal court will seize and examine samples of the products. If the infringement is confirmed, the expert opinion is ratified by the criminal court and the IP holder will have 30 days to file the criminal action.

In cases of copyright infringement, the public authorities can initiate the public criminal action ex officio or at the request of the IP

holder. In both situations, the copyright owner may participate in the action as assistant to the public prosecutor.

The Brazilian law also grants enforcement authorities the discretionary power to conduct raids against piracy and counterfeiting, which are regarded as criminal activities. These are usually conducted in city zones with many street peddlers and/or stores selling counterfeits.

Following the seizure of the merchandise, the products are analysed by police experts, a final report is prepared, the goods are destroyed, and the IP holder and/or the public authorities are required to file criminal actions.

Civil Lawsuits

The IP holder may also initiate court actions seeking damages. Both the Brazilian IP Law and the Civil Procedural Code allow the granting of ex parte preliminary restraining and search and seizure orders, but the following requirements must be met: evidence of the plaintiff's rights; substantial and unquestionable proofs of the infringement; and elements showing the irreparable damages that the IP holder is suffering with the ongoing infringement.

Regarding software violation, the Brazilian Software Law sets forth a specific procedure according to which the software holder must first file a preliminary inspection action with an injunction request allowing a court appointed expert to audit the defendant's computers in search of pirated licenses. If the software infringement is confirmed, then the software developer will have the opportunity to file a civil lawsuit for damages against the infringer asking the Judge to grant an injunction ordering the defendant to delete the infringing licenses.

The Brazilian legal framework also foresees other types of civil enforcement actions. One procedure often used is the preliminary action for the early production of evidence, which is normally used in cases where the evidence of the infringement can suddenly disappear or be modified. Similar to the procedure for software infringement, upon confirmation by the court-appointed expert's report, the IP holder is required to file a civil lawsuit for damages based on the contents of the court's opinion.

Finally, with the violation of any IP right, the obligation to pay damages comes into being. To this end, the Brazilian Industrial

Property Law states that the damages will be calculated upon the most favourable criteria to the injured party, as follows: (i) the benefits that would have been gained by the injured party if the violation had not occurred; (ii) the benefits gained by the author of the violation of the rights; or (iii) the remuneration that the author of the violation would have paid to the proprietor of the violated rights for a granted license which would have legally permitted them to exploit the subject of the rights. In software cases, Brazilian Courts usually determine that the infringer should pay five to ten times the price of each of the illegal software items found during the auditing procedure.

Border Measures

In Brazil, a pilot project involving a database with information about trademarks was implemented at the beginning of 2014 to optimize official measures against trademark counterfeiting taken by Customs Authorities and Federal and State Police, etc. The Brazilian Trademark Office is in charge of this system, therefore trademarks registered in Brazil and their representatives (attorneys, industrial property agents) are automatically included in this database. A new registration is recommended when the trademark owner grants power to a different attorney for taking measures against trademark infringement and counterfeiting, including border measures before Customs. Since it is still a relatively new procedure, the regulation may be amended at any time.

After the detention of products suspected of counterfeit, the Customs Authorities will contact the IP owner or its legal representative in the country. The IP owner will then have ten business days (which can be extended for another ten business-day period) to obtain samples of the products and to file infringement actions in the form of ex parte injunctions against the importers. Unfortunately, as opposed to other jurisdictions, the Brazilian Customs Authorities understand that border measures must involve the Judiciary. For them, any detention they perform is only temporary, aimed at letting the IP owner know of the possible infringement. If the trademark holder wishes the products to remain seized and later on destroyed, then the Customs Authorities require the IP owner to file infringement lawsuits against the importer (otherwise the products will be returned to the importers).

Chapter 18

Consumer Rights

Brazilian Consumer Law - Overview

I. Introduction

01. The Consumer Defense Code, or "CDC", (Federal Law No. 8,078/90) governs consumer relations in Brazil.
02. In accordance with article 2 of the CDC, "a consumer is every individual or company that acquires or uses a product or service as an end user".
03. The definition of a supplier, in turn, is provided in article 3, lead paragraph, of the CDC. "A supplier is every individual or public or private company, whether national or foreign, as well as unincorporated organizations, which engage in the production, assembly, creation, construction, transformation, import, export, distribution or marketing of products or provision of services."

04. The Brazilian Courts agree that a consumer may only be considered as an individual/company that acquires a product/service in order to use it in its own interest, meet a private need, and not to use it in any business, or productive or professional activity.
05. Thus, should an individual/company acquire a product/service in order to develop a business activity such as, for instance, integrating it into the production process, transformation, marketing or provision of services to third parties, then said product/service will be characterized as an input and such legal relationship will be governed by the Civil Code rather than the CDC.
06. The law assumes that the consumer is the more vulnerable party in a commercial relationship and thus puts the burden of proof on the supplier.

II. Duty of Information - Contracts

07. The CDC imposes to duty to provide information on suppliers, this being one of the most important duties established in the law. Suppliers must provide consumers with clear, correct, accurate and ostensive information, in Portuguese, about the characteristics, attributes, quantity, composition, price, warranty, shelf life and origin, amongst other relevant details of the products and services, as well as the risks to the health and safety of consumers.
08. Additionally, pursuant to article 31 of the CDC, all sufficiently accurate information provided by the supplier to the consumer is binding upon and obliges the supplier and shall be included in a subsequent agreement that may be executed.
09. Contracts governing consumer relations shall not oblige consumers when they have not been given the chance of previously being acquainted with their contents or when they are written in such a way that it is difficult to understand their meaning

and scope. Also, contractual clauses should be interpreted more favorably to consumers.

10. In most of the cases involving consumer contractual relationships, the agreements are an adhesion contract, where the clauses are established unilaterally by the supplier, without the consumer being able to bargain or substantially modify the contents thereof. Written adhesion contracts shall be worded clearly, and in easy to read, legible print, thereby facilitating their comprehension by the consumer. Clauses limiting consumer rights should be prominently displayed (written in bold, for example) for immediate comprehension.
11. Moreover, it is required that the contract be printed in a size-12 font.

III. Product Liability

12. Consumers are protected by a legal, mandatory warranty derived from the CDC rules, regardless of whether the supplier agrees upon a contractual warranty with the consumers.
13. No **contractual** clause agreed upon between suppliers can release them from their responsibility before the consumer market under the CDC. Notwithstanding, the supplier that is responsible before the consumer is entitled to ask for compensation from the supplier that has effectively caused the damage suffered by the consumer.
14. The legal warranty implies joint and strict liability, *i.e.* all participants in the supply chain answer jointly and strictly for a product/service defect and the consumer may opt to make their complaint before one or all the suppliers.
15. Also, in case of damage arising from products/services, the consumer will have five (5) years to claim compensation for damages in Court; such period of time shall start being

counted from the date on which such damage and those responsible for it become known. Consumers are entitled to file an action for damages in the jurisdiction where they are domiciled.

IV. Advertising

16. The activity of advertising in relation to consumer relations is addressed in article 37 of the CDC. According to the provisions of said article any kind of advertising information or communication containing misleading or abusive content is prohibited, as set forth below:

    a. **misleading** advertising means advertising that is false, whether in whole or in part, even due to omission, and which may lead consumers into error as to the nature, characteristics, quality, quantity, properties, origin, price, dangers or any other essential details about products/services; and
    b. **abusive** advertising means discriminatory advertising of any kind, which may encourage violence, resort to fear or superstition, take advantage of a child's lack of judgment and experience, or disrespect environmental values, or which may induce consumers to behave in a way that is damaging or dangerous to their health or safety.

17. However, it should be noted that "puffing advertising" – the use of exaggerated expressions, such as "the best taste", "the most beautiful", "stunning" – is not considered abusive and nor does it compel the supplier to fulfill it, given the subjective (and not objective) nature of such expressions. On the other hand, former court decisions have understood that puffing advertising will bind the supplier if it is associated

to the idea of price – "the cheapest on the market", for example.

V. Penalties

18. In case of non-compliance with Brazilian consumer law, civil, administrative and criminal penalties may be imposed, as described below:

(i) Civil Penalties - Litigation

19. In the civil sphere, consumers may bring individual legal action seeking indemnity from the supplier. Claims can be filed in Small Claims Courts or in Civil Courts. Small Claims Courts have jurisdiction over cases of less complexity involving up to 40 minimum wages.
20. In Brazil, the Attorney General *(Ministério Público)*, the Federal, State and Municipal consumer protection agencies, as well as private associations for consumer protection, are entitled to bring class actions based on non-compliance with the consumer laws, and they are indeed commonly filed.
21. All kinds of remedies are permitted in individual and collective litigation, the most common being injunctive relief, the imposition by the court of an obligation against the defendant, and monetary compensation. With respect to material damage, the general rule is that the indemnification amount should correspond to the actual damage, which includes loss of profits. Brazilian Courts normally restrict indemnifications to direct and immediate damages, therefore excluding indirect or consequential damages.
22. In the case of moral damage, there is no specific economic loss that can serve as the basis for the indemnification amount. As a result, the indemnification for moral damage will work as a financial compensation for the suffering

experienced by a party. The Court will be ultimately responsible for defining a compensation amount that is suitable in the particular circumstance. Unlike material damages, the criteria used to define the amount of moral damages will be necessarily subjective. With the evolution of different Court precedents, certain parameters in terms of indemnification amounts have been created to be applied in specific situations. These parameters, although originally created through subjective analyses, serve as objective references for future cases. However, they may not act as a substitute for consideration of reasonableness by the Court on a case-by-case basis.

23. Also, punitive damages (*i.e.* the establishment of an additional indemnification amount to serve as punishment and disincentive to future similar actions) are not permitted in Brazil and they have not been recognized as an autonomous category of damages. However, factors such as the economic situation of the offender and a disincentive to repeat the offensive action in the future can be considered in the determination of indemnification amounts, especially because, in practice, the discretionary range afforded to the Court when it comes to moral damages prevents an exact identification of different damages components. In any event, indemnifications in Brazil have not been set at substantially high amounts when compared to jurisdictions that embrace the concept of punitive damages.

(ii) Administrative Penalties

24. In the administrative sphere, a supplier that fails to comply with the consumer law may be subject to administrative penalties, pursuant to article 56 of the CDC, regulated by Decree No. 2181/97:

"Article 56. Violation of the consumer defense rules are cause, depending on the case, for the following administrative penalties, without prejudice to those of a civil or penal nature or to those defined in specific regulations:

I. a fine;
II. confiscation of the product;
III. destruction of the product;
IV. annulment of the product's registration with the competent agency;
V. a bar on manufacturing the product;
VI. suspension of the product or service supply;
VII. temporary suspension of the activity;
VIII. revocation of the usage permit or concession;
IX. revocation of the license for the establishment or activity;
X. a total or partial shutdown of the establishment, project or activity;
XI. administrative intervention;
XII. imposition of counter advertising.

25. In accordance with article 57 of the CDC, fines will be always graded according to the seriousness of the violation, the advantage received and the supplier's financial situation, and will be set at an amount not less than US$ 100.00 and no greater than US$ 3,000,000.00 (approximately).
26. The criteria used to impose the fine, *i.e.* the seriousness of the violation, the advantage received, and the supplier's financial situation, will also guide the imposition of the remaining administrative penalties, pursuant to article 56 of the Consumer Defense Code, as described above.
27. Any penalty of an administrative nature will only be imposed by the competent administrative agency after the administrative proceeding has been concluded, wherein the defendant is assured

of the right to a full defense. Additionally, any administrative decision is always open to review.

(iii) Criminal Penalties

28. The CDC also sets forth several crimes involving consumer relations, but the penalty of imprisonment is rarely imposed.

Chapter
19

Aviation

The Brazilian Aeronautical Registry

The Brazilian Aeronautical Registry (the *Registro Aeronáutico Brasileiro* or "RAB") is the Brazilian aircraft register. The registration of aircraft is regulated by Chapter V of the Brazilian Aeronautical Code[1]. The RAB is maintained by the National Agency of Civil Aviation (*Agência Nacional de Aviação Civil* or "ANAC"), which is a department of the Brazilian Government. The role of the RAB is to:

- issue certificates of registration, airworthiness and nationality;
- register aircraft;
- register encumbrances on aircraft;
- provide certificates proving the registration of liens and encumbrances on an aircraft;
- Act as designated point of entry for purposes of registration of international interests with the International Registry, as per the terms of the Cape Town Convention on International Interests in

Mobile Equipment ("Cape Town Convention") and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment ("Cape Town Protocol"), both dated November 16, 2001 ("CTC").

Definition of Aircraft

Pursuant to the Brazilian Aeronautical Code, aircraft are defined as being all manoeuvrable equipment able to fly and transport persons or goods[2]. Aircraft are classified as civil or military aircraft. Military aircraft are subject to specific legislation and are therefore not subject to registration before the RAB. Civil aircraft consist of public and private aircraft. Aircraft employed in the service of public administration are considered public aircraft. Private aircraft however, besides those utilized by private entities and persons, also encompass aircraft utilized by bodies performing State or Municipal roles (*e.g.* aircraft used by publicly owned or State controlled companies).

Effects of the Registration of Aircraft with the RAB

The registration of aircraft before the RAB grants Brazilian nationality to the aircraft[3]. The registration of aircraft with the RAB can only be made in the name of Brazilian individuals, foreign individuals with domicile in Brazil or legal entities operating in Brazil. Should the owner of the aircraft be a foreign entity, either an authorization decree to operate in Brazil needs to be obtained[4], or a provisional registration of the aircraft can be made with the consent of the foreign owner provided the user or lessee of the aircraft satisfies the criteria referred to above concerning Brazilian citizenship or residence. According to the Brazilian Aeronautical

1. Law 7,565, dated December 19, 1986.
2. Brazilian Aeronautical Code, art. 106. *Considera-se aeronave todo aparelho manobrável em voo, que possa sustentar.*
3. Ibid. arts 108 and 109.
4. Brazilian Aeronautical Homologation Rules - NSMA *(Norma de Serviço do Ministério da Aeronáutica)* 58-47. Chapter 47-85(4).

Code, registration of title to the Aircraft with the RAB is one of the means of acquiring ownership of an aircraft.

Provisional Registration of Foreign Aircraft with the RAB

The Brazilian Aeronautical Code provides for a provisional registration of an aircraft in the event it is made in the name of the operator, user, lessee, future buyer or by whom, although not the owner of the aircraft, has the express consent of the owner with respect to its use. In this case, the registration shall also identify the owner of the aircraft.

Deregistration of Aircraft from the RAB

The Brazilian nationality and registration marks will be cancelled upon deregistration of an aircraft. The express written consent of the beneficiary of any liens or encumbrance on an aircraft will be required for purposes of deregistration.

By means of Decree No. 8,008, dated May 15, 2013, Brazil implemented the CTC, which is regulated by ANAC´s Resolution No. 309. Due to the implementation of the CTC, the deregistration may occur upon request of a creditor in cases where an Irrevocable Deregistration and Export Request Authorization ("IDERA") has been filed with the RAB.

The deregistration may also be effected by means of a judicial decision, or *ex officio* in cases where the aircraft has been registered in another country.

Aircraft Agreements

Charter or 'Wet Lease' Agreement

The Brazilian Aeronautical Code defines a charter as an agreement by which one of the parties, the registered operator of the aircraft, undertakes before the other party, the so-called charterer, against payment of freight, to carry out one or more pre-established flights, or for a certain period of time, with the registered

operator maintaining control over the crew and operation of the aircraft at all times.

The charter may be executed by private instrument or public deed and its registration with the RAB is optional.

The registered operator is obliged to:

- put the duly equipped and airworthy aircraft, together with a crew, at the disposal of the charterer, together with all necessary documents;
- provide the agreed flights or maintain the aircraft at the disposal of the charterer, during the agreed term.

The charterer is obliged to:

- limit use of the aircraft to the purpose provided for in the agreement and in accordance with the conditions thereof;
- pay the freight in accordance with the terms, place and conditions agreed upon.

Operating Lease Agreement or 'Dry Lease' Agreement

The Brazilian Aeronautical Code defines an operating lease as an agreement by which one of the parties undertakes to grant the other, for a determined period of time, the use of an aircraft or its engines, for a certain sum in remuneration.

The operating lease may be executed by private instrument or public deed, with the signature of two witnesses, and must be registered with the RAB.

The lessor is obliged to do the following:

- deliver the aircraft or the engine to the lessee, at the agreed time and place, with the documentation required for flight operation, in proper condition for its intended use. Unless otherwise provided in the lease, the lessor shall be responsible for maintaining the aircraft in such proper condition

during the term of the lease;
- assure the lessee regular enjoyment of the aircraft or the engines during the lease term.

The lessee is obliged to do the following:

- use the leased aircraft for the agreed purpose and to care for it as if it were its own;
- pay the lease sum punctually in accordance with the terms, place and conditions agreed upon; and,
- return the aircraft or the engine to the lessor in the same condition in which it was received, except for wear and tear resulting from normal use.

An operating lease or sublease can only be assigned pursuant to a written document with the express consent of the lessor and it must be registered with the RAB.

If the operating lease or sublease is not registered with the RAB, the lessor, the lessee and the sub-lessee will be jointly and severally responsible for any losses or damages caused by the aircraft.

In the case of operating leases, foreign aircraft may be brought into Brazil under the temporary admission regime, with payment of import taxes and duties proportional to the length of the stay of the aircraft in Brazil.

International operating leases are subject to the approval of the Central Bank of Brazil, in order to allow remittance of lease payments abroad.

Finance Lease Agreement

In accordance with Brazilian Leasing Law, a finance lease is an agreement between the lessor and the lessee which has as its object the lease of assets purchased by the lessor in accordance with the specifications set forth by the lessee[5].

The Brazilian Aeronautical Code provides that finance lease agreements may be executed by private instrument or by public deed and must include the following provisions:

- descriptions of the aircraft and its respective value;

- term of the agreement, amount of each periodic instalment (or the criterion for its calculation), date and place of payment;
- clause establishing the purchase option or the renewal term, as a right of the lessee;
- indication of the place where the aircraft shall be registered during the term of the lease;
- in the case of imported aircraft, the consent of the lessor to the registration of the same with the RAB.

Besides these express provisions within the Brazilian Aeronautical Code, the Brazilian Leasing Law imposes certain additional requirements. The most relevant requirements to international leases are:

- reasonableness of the lease payments;
- criteria for determining the useful life of the goods being leased;
- compatibility between the term of the lease and the useful life of the goods;
- concurrence between the international market price of the goods and the total cost of the lease;
- no affiliation or interdependence between the foreign lessor and the Brazilian lessee.

Foreign aircraft leased in Brazil are subject to the country's importation rules. Like cross border operating leases, international finance leases are also subject to the approval of the Central Bank of Brazil.

Conditional Sale Agreement

Although not specifically mentioned in the Brazilian Aeronautical Code, Conditional Sale Agreements are also a very common structure used in aircraft transactions. In such cases the seller retains the title to the aircraft until all payments provided for in the document have been made in full.

5. Law No. 6,099, dated September 12, 1974, as amended.

Aircraft Mortgages

The Brazilian Aeronautical Code provides for two types of mortgages on aircraft:

- statutory mortgage; and
- contractual mortgage.

Statutory Mortgage

In accordance with the Brazilian Aeronautical Code, a statutory mortgage will be instituted on an aircraft in favour of the Brazilian State itself whenever the purchase of the aircraft (or parts of it) abroad is in any way guaranteed by the National Treasury. Registration of this type of mortgage will be made ex officio with the RAB.

Contractual Mortgage

Brazilian law recognizes contractual mortgages, which have their origin in the mutual consent of both parties. Such mortgages can be made by public deed in Brazil (or before the Brazilian consul abroad) or by private or public instrument in accordance with the laws of the foreign country in which the aircraft is registered. In this case, the instrument must be notarized and/or apostilled or consularized, as the case may be, at the nearest Brazilian Consulate in the jurisdiction of its execution, and later on translated into Portuguese by a Brazilian public sworn translator.

The aircraft, even one under construction, including any engines, parts and accessories, may be the object of a contractual mortgage. Only the owner of an aircraft is entitled to grant a mortgage on it. When it is owned by more than one person, the express consent of all the co-owners is required.

Aircraft mortgages must be registered with the RAB in order to be deemed duly constituted under Brazilian Law. The Aircraft Certificate of Registration will be amended to reflect the mortgage.

The Brazilian Aeronautical Code provides that the mortgage must contain the following details:

- the name and domicile of the contracting parties;
- the principal amount of the mortgage debt together with the applicable interest rate thereon, as well as any other charges;
- the date and place of payment;
- the nationality and registration marks of the aircraft together with the serial numbers of any components (such as the engines);
- the insurance certificate/policy with respect to the aircraft.

The mortgage may contain the usual covenants on the part of the mortgage or in relation to the aircraft providing they do not offend legal concepts of public policy. Covenants which have the intent or effect of attempting to convey title to the mortgagee (except in the case of the statutory mortgage) will, however, be null and void.

The Brazilian Aeronautical Code also typifies chattel mortgages (*alienação fiduciária*).

As with mortgages, a chattel mortgage must be formally constituted by means of a written instrument, executed by the parties and two witnesses and registered with the RAB. After perfection, the fiduciary ownership of the aircraft is transferred to the creditor, and returned to the debtor/owner upon fulfilment of the secured obligations.

Differently from the mortgage, which normally has to be necessarily enforced before courts, chattel mortgages are subject to out-of-court enforcement. Also, in an insolvency scenario, claims secured by mortgages are subject to the recovery plan, while claims secured by chattel mortgages are considered *extraconcursais* and, therefore, are not subject to the effects of the insolvency, including stay periods and enforcement of rights.

Foreign Registered Mortgage

Brazil has ratified the 1948 Geneva Convention. In accordance with Article I of such Convention, Brazil will recognize a foreign mortgage as being valid if:

- the mortgage was duly created according to the law of the Contracting State in which the aircraft for which the mortgage was granted, was registered; and
- the mortgage is duly registered in the public register of the Contracting State where the aircraft is registered.

Where the foreign mortgage is that of a State which is not a party to the Geneva Convention, a Brazilian court will determine its validity on the basis of the law of the country where the aircraft is registered (*lex registri*).

Mortgage and Chattel Mortgage registered in Brazil

The Brazilian Aeronautical Code provides that in rem rights on an aircraft will be determined by the law of the aircraft's nationality. It also provides that an aircraft will be considered to have the nationality of the State in which it is registered. Thus, a mortgage or a chattel mortgage on a Brazilian registered aircraft will be governed by Brazilian law. However, the capacity of the contracting parties to enter into the mortgage will be governed by the law of their domicile.

Formalities

Documents drafted in a language other than Portuguese must be translated into Portuguese by a public sworn translator before their filing with the RAB. If executed abroad, as a rule, the document must be notarized and legalized at the nearest Brazilian Consulate or apostilled, as the case may be, in the jurisdiction of execution.

Regarding the legalization, Brazil enacted Decree No. 8,660, dated January 29, 2016, in order to become a signatory to the Hague Apostille Convention ("Apostille Convention"). Due to the implementation of the Apostille Convention, the legalization at the consulate will not be mandatory if the document was executed in a signatory country, with only the notarization and apostille being necessary.

Repossession and Foreclosure

Repossession Claim

Upon an event of default under the lease, the lessor may commence a repossession claim *("ação de reintegração de posse")* against the lessee.

In order to comply with the requirements set forth by Brazilian law for such a claim, the lessor shall have the lessee served with an extrajudicial notice delivered by an officer of a Registry of Titles and Documents of the city where the lessee is located, notifying them that an event of default has occurred and is continuing under the lease, and demanding that the lessee remedy such event of default or the lease will be considered automatically terminated in accordance with the specific provision to that effect included therein *("cláusula resolutória expressa")*.

If the lessee does not remedy the default, a repossession claim will then be presented to the court based on the fact that the termination of the lease has made continued possession of the aircraft by the lessee unlawful. If the judge is satisfied with the documentation presented with the initial claim, s/he may grant provisional repossession of the aircraft to the lessor, without hearing the lessee.

In the event that the judge is not satisfied with the documentation presented together with the initial claim, s/he will request that the lessor justify its allegations and summon the lessee for the hearing where such justification will be presented. If the judge is satisfied with the justification, s/he will issue an order for provisional repossession.

Whether or not the provisional repossession is granted to the lessor, the claim will proceed in accordance with the ordinary rite, as regulated by the Code of Civil Procedure, until a final decision by the court.

Foreclosure Claim

Mortgages and chattel mortgages are regarded as extra-judicial executive titles (*título executivo extra judicial*). Such an executive title is enforceable through an enforcement action (*ação de execução*).

The enforcement action will commence with an attachment of the aircraft and its subsequent sale. Where the aircraft is attached by the mortgagee or otherwise detained this will be noted with the RAB. In the case of aircraft engaged in a regular line of public transportation, the judge may determine that the attachment should be made without interruption of the service.

In this type of procedure, the mortgagor is granted three (3) days to pay the debt or to offer property for attachment covering the amount of the debt. Once this term has elapsed without the mortgagor having paid, the court will order the attachment of the mortgaged aircraft.

The mortgagor will have the right to present a stay of execution (*embargos*). The enforcement will be suspended until the court decides on the defences presented by the mortgagor. If the court decides against the mortgagor, it will order the evaluation and sale of the aircraft in a public auction.

At the first auction, the minimum bidding price may not be less than the evaluation and the aircraft will be sold to the party who makes the highest bid.

The enforcing mortgagee is entitled to an adjudication of the aircraft to it in the auction as payment for the mortgage debt for the amount of the evaluation should there be no bidders.

Should the mortgagee be able to prove that there is an imminent risk of it not being able to recover the mortgage debt after an event of default by the mortgagor, it may file a petition for writ of prevention. This is a provisory judicial measure to protect a creditor from imminent risks (such as the loss of the aircraft by reason of the mortgagor taking it out of the jurisdiction) and other abuses.

Air Services

Article 21, XII, ‘c’ of the Federal Constitution of Brazil states that the commercial use of air navigation, airspace and airport infrastructure activities, under concession, permit or authorization, is incumbent on the Federal Government.

In turn, the Brazilian Aeronautical Code, as an infra-constitutional law, regulates any and all activities relating to air

navigation performed by the private sector under concession or authorization of the Federal Government.

The Brazilian Aeronautical Code defines which air services can be private or public. Private air services are those performed without remuneration, for the benefit of the aircraft's operator, whereas public air services encompass specialized air services as well as services of public air transportation of passengers, cargo or mail, whether regular or non-regular, domestic or international. Please note that the term "public" stems from "performed against remuneration".

Regular Air Transportation

In accordance with the provisions established above, the Brazilian Aeronautical Code sub-divides public air service into regular air service and non-regular air service. Regular public air service is carried out under a concession from the Federal Government granted to companies who have head offices and management based in Brazil

These companies may be organized as corporations (*sociedade anônima*), with allowance made for the use of non-voting preferred shares, within the limit provided for by Brazilian law, for purposes of complying with the above ownership requirements. In such a case, the by-laws of the corporation must prohibit the conversion of non-voting preferred shares into voting shares.

The abovementioned citizenship requirements do not apply to international regular public air transportation, which can be carried out by domestic as well as foreign companies, as per the provisions of article 203 of the Brazilian Aeronautical Code, subject to the provisions, treaties or bilateral agreements in force between the respective foreign State and Brazil and, in their absence, to the provisions of the Brazilian Aeronautical Code.

In order to operate in Brazil, the foreign air transportation company must be designated by the Government of its own country, be authorized to do business in Brazil, and obtain authorization from the Federal Government to operate air services.

Domestic public air transportation service, on the other hand, is reserved for Brazilian legal entities. However, with the enactment of Provisional Measure No. 863, dated December 13, 2018 ("MP 863"), article 181 of the Brazilian Aeronautical Code, that

required that Brazilian citizens should hold at least 80% of the capital share was revoked. According to MP 863, foreigners can now hold 100% of the capital share of air transportation companies. The only requirement is that the head offices and administration must be located in Brazil.

Provisional measures are valid for sixty (days), and may be extended for an equal period. After such period, they must be converted into law or they will no longer be valid. According to the Federal Constitution of Brazil, the legal effects of actions taken under provisional measures not converted into law must be regulated by a legislative decree, although it is common for such decrees never to be enacted, creating a scenario of legal uncertainty,

Domestic public transportation is understood as the transportation where the starting point, intermediary and destination points are located within national territory.

Non-regular Public Air Transportation

Authorization from the Federal Government is necessary for a company to provide non-regular services of public air transportation of passengers, cargo or mail.

Authorization is granted by the Federal Government to companies which fulfil the requirements for a company to operate a regular public air service (outlined above) or for those which provide evidence of headquarters in the country and whose majority of partners, control and management are Brazilian.

With regard to air-taxi services, the Brazilian Aeronautical Code expressly establishes such services as being a modality of non-regular public air transportation of passengers or cargo and that the respective remuneration must be agreed upon between the user and the transporter, under the inspection of the Ministry of Aeronautics, in order to provide the user with immediate customer service.

All Regular Air Transport Companies and Non-Regular Air Transport companies must also provide evidence of:

- their financial capacity;
- the economic feasibility of the service they wish to render;
- a suitable aircraft, personnel and maintenance

technical structure, whether its own or contracted, in addition to fulfilling the requirements mentioned above.

The Brazilian Aeronautical Code also requires these companies to submit their acts of incorporation and other corporate acts that imply transfer of shares representing more than 2% of the corporate capital, change of control, capital increase, mergers, spin-off and change of corporate type to the prior approval of ANAC before having such acts registered with the respective Board of Trade.

Chapter 20

Sports Law in Brazil

The Emergence of Sports Law in Brazil

"Sports" and "Law" denied each other for a long time in Brazil, remaining in opposite fields and behaving as separate beings. Over time, sports became a mass commercial phenomenon, furthering a substantial increase of economic interest related not only to its performance, but also to marketing, licensing rights, athletes' transfers and other rapidly developing markets connected to its globalization. As such, all fields related to sport have been increasingly subject to State laws governing matters inherent to its professionalization and litigations arising from its performance. This transformation, from a legal perspective, furthered the emergence of Sports Law in Brazil.

The Brazilian Sports Law Scenario

Today's world of sport is becoming increasingly professional, competitive and corporate. As can be seen, sport has become a business generating multiple legal relationships of great economic significance and social repercussion, increasing the concept of "sports business". It is under the notion of "sport business" that

the Brazilian legislators introduced several new norms and regulations into the country's legal structure.

Despite legislative precedents dating from as far back as 1941, such as Executive Law 3,199, that remained in force until it was supervened by Executive Law 6,251/75, Brazilian sports legislation only started to see any significant evolution with the publication of the 1988 Federal Constitution, the first to broach the subject. This defined that the Union, the States and the Federal District are responsible for sports legislation. This legal foundation also established that the judicial power will only accept suits pertaining to discipline and competitions after all stages of sport courts have been exhausted, as well as establishing that it is the duty of the State to encourage the practice of sports as an individual right, observing:

- the autonomy of ruling sports associations as regards their structure and operation;
- the provision of public funding primarily for the promotion of educational sports and, in specific cases, for high-performance sports;
- different treatment for professional and amateur sports; and,
- the protection and incentive for Brazilian-created sporting activities.

Once Brazilian sports reached a constitutional level (1988), a new legislative cycle geared for sports began, launched by Law No. 8,672/93, better known as 'Zico's Law'. This Law promoted the first attempt to adapt Brazilian Law to the modern worldwide system for the development of sport. It facilitated investment partnerships for sports, upheld autonomy and established legal procedures for sport courts.

This Law remained in force until 1998, when Law No. 9,615, popularly called 'Pelé's Law', was published during the time the former athlete Pelé was Brazil's Extraordinary Minister for Sports. Law No. 9,615/98 currently stands as the general law for Brazilian sports, supplemented by the Brazilian Consolidation of Labour Laws (CLT) for labour aspects, and the Brazilian Civil Code (CC/2002) for civil aspects, among others. Pelé's Law absorbed and amended a large part of Law No. 8,672/93, while also providing for relevant

innovations in Brazilian legislation. This Law was regulated by Decree No. 2,574/98.

Pelé's Law revolutionized the relationship between sports entities and professional athletes in Brazil by establishing that an athlete's sports link to a sports entity is accessory to the employment relationship between the same parties. This replaced the former "*passe*" system, where an athlete would remain bound to a sports entity even after the termination of their labour contract, and brought Brazil up to par with modern athletes' transfer market standards. This law also identified basic sporting principles; defined the nature and purpose of sport; introduced the Brazilian system of sport; ruled upon professional sports practices; set standards for transparency and compliance in the administration of sports entities; disciplined sports courts; established rules for the public funding of sports; while dictating other rules for sports in general.

During recent years, Law No. 9,615/98 has undergone several amendments. These are amongst the most important:

- Law No. 9,981/00 that re-established the option for clubs to become companies (subsequently reformed by Law No. 12,395/11);
- Provisional Measure 2,141/00 (subsequently renumbered 2,193 and revoked by Law No. 10,672/03) with the purpose of correcting eventual flaws in Law No. 9,615/98;
- Law No. 10,264/01, called 'Piva's Law' that, together with Decree No. 7,984/13, provided funds for Olympic and Paralympic sports; and,
- Law No. 10,672/03 known as the "professional sports accountability law".
- Law No. 12.395/11, which provided for changes regarding the transfer of athletes, including the training sports entities' right of first refusal for renewal of an athlete's first professional labour contract; established new rules to govern the licensing of athletes' image rights and arena rights; among other changes.
- Law No. 13,155/15, the latest law to bring major changes to Pelé's Law, created relevant transparency

standards and compliance mechanisms applicable to sports entities (including "Profut" and "APFUT") and further amended the rules governing the licensing of an athlete's image rights.

As can be seen, in a short space of time, Brazilian Sports Law became a full body of legislature. Other laws of note include:

- Law No. 8,650/93 that provides for a professional football coach's labour relationship;
- Law No. 10,220/01 that raised the status of a rodeo rider to that of professional athlete;
- Law No. 10,671/03 that, together with Decree No. 6,795/09, instituted the Supporter's Defence Statute, which rules specific consumer rights pertaining fans;
- Resolution No. 01, dated December 23, 2003, that approved the Brazilian Sports Law Code to which all sporting competitions held after its enforcement are subject;
- Law 10,891/04 that, together with Decree No. 5,342/05, established athlete scholarships in the domestic sporting scenario. Providing an incentive for athletes involved in Olympic and Paralympic Sports, non-professional athletes and underage athletes ;
- Decree 6,653/08, which incorporated the International Convention against Doping in Sports to Brazilian Law, and Decree 8,829/16, that created the Brazilian Doping Control Authority.

Furthermore, modern Brazilian Sports Law is also complemented by norms which did not derive from the State, but were issued by international sporting federations (*i.e.* the *Fédération Internationale de Football Association* (FIFA)'s regulations) and national sporting federations and leagues (*i.e.* the Brazilian Football Confederation (CBF)'s regulations and statutes), with restricted effect, subjecting only those professionally registered under such entities. In later years, the case law drawn from the prior decisions pertaining to discipline and competitions of each Sports Court, such

as the Brazilian Football Superior Tribunal of Sports Justice, also became increasingly relevant for the improvement of Brazilian Sports Law related to the formal practice of all kind of sports in Brazil.

Conclusion

According to recent estimates, the sports market in Brazil already currently amounts to almost 2% of the Brazilian Gross Domestic Product, a percentage that tends to increase with every passing year. With the economic relevance of local sports soaring, interest in all aspects of Brazilian Sports Law tends to continue to increase in the future, as does the complexity of legislation and jurisprudence in the field.

Chapter 21

International Trade

Brazilian International Relations

Brazil has a long history of supporting multilateralism and it has always been an active member of the World Trade Organization ("WTO") and other multilateral organizations. The country has also focused on promoting Latin American integration. Brazil is part of the Mercosur and the Latin American Integration Association ("LAIA") and it has trade agreements with most Latin American countries. More recently, mainly due to the difficulties in the multilateral and regional spheres, Brazil also started seeking to negotiate preferential trade agreements with countries outside of the Latin American region.

WTO

Brazil is a founding member of the GATT and of the WTO, and it actively participates in trade negotiations as well as in the dispute settlement system.

Brazil has participated as complainant at the WTO Dispute Settlement System in 31 cases, the most recent cases being:

- DS568: China – Certain Measures concerning imports of sugar; consultations requested on October 16, 2018;
- DS522: Canada – Measures concerning trade in commercial aircraft; consultations requested on February 8, 2017, under panel proceedings;
- DS514: United States – Countervailing Measures on Cold and Hot-Rolled Steel Flat Products from Brazil; consultations requested on November 11, 2016;
- DS507: Thailand – Subsidies concerning sugar; consultations requested on April 4, 2016;
- DS506: Indonesia – Measures concerning the importation of Bovine Meat; consultations requested on April 4, 2016; and
- DS484: Indonesia – Measures concerning the importation of Chicken Meat and Chicken products; consultations requested on October 16, 2014; the panel report recommending that Indonesia should bring the measure into conformity was adopted on November 22, 2017. Brazil and Indonesia agreed that the reasonable period of time for Indonesia to implement the DSB's recommendations and rulings would be 8 months, which meant July 22, 2018. On July 27, 2018, Brazil and Indonesia informed the DSB of their Agreed Procedures under Articles 21 and 22 of the DSU (sequencing agreement).

As a respondent, Brazil participated in 16 cases and the most recent case is "Brazil – Certain measures concerning taxation and charges" (DS472 and DS497), requested by the European Union on December 19, 2013, and by Japan on July 2, 2015. The Appellate Body's report was circulated on December 13, 2018.

Finally, the country has participated as a third party in 132 cases.

Mercosur

Mercosur was created in 1991, with the signing of the Treaty of Asuncion, and current members include Brazil, Argentina, Paraguay and Uruguay.

This regional bloc was created with the aim of enabling the free circulation of goods, services, people and capital, through the reduction of trade barriers, the harmonization of the regulatory framework related to trade matters, as well as the coordination of several policies that affect trade flows. Ultimately, the bloc aimed to become a free market, inspired by the European Union integration process.

Currently, Mercosur has the status of a customs union, with no import tariffs for products originating from its members, a common external tariff, and some degree of regulatory harmonization.

An important feature of this customs union status is the Decision of the Council of the Common Market No. 32/2000, which establishes that Mercosur members must negotiate agreements that affect the Mercosur Common External Tariff as a bloc. This aimed to enhance the customs union but it later became a sort of barrier to trade negotiations, since there were a number of instances when there was no consensus among the members regarding the advancement of new trade agreements.

Venezuela acceded to Mercosur in 2012, and in this scope, it would have had to follow certain steps before the full incorporation of Mercosur's framework in the country. However, Venezuela was suspended from the bloc in December 2016 because it had not fulfilled its obligations under the adhesion protocol and it was suspended again on August 2017, due to the "rupture of the democratic order", which violated Mercosur's Democratic Compromise, under the Ushuaia Protocol of 1998.

Bolivia started its adhesion process in 2015.

LAIA and Regional Trade Agreements

LAIA (the 'Latin American Integration Association') was created in 1980 to promote progressive economic integration amongst Latin American countries. One of the pillars of this integration process was established as being the negotiation of several bilateral or plurilateral free agreements amongst its members, called Economic Cooperation Agreements ("ACE"). The Mercosur itself is inserted under the LAIA framework as ACE 18.

During the 1990s, Mercosur concluded negotiations of free trade agreements with Chile and Bolivia and, in the following decade, with Mexico, Peru, Colombia, Ecuador, Venezuela and Cuba.

Brazil has also executed agreements with Saint Kitts and Nevis and with Suriname.

In general, these agreements provide a reduction of tariffs for a vast list of products, but they do not contain significant rules on non-tariff barriers, services, government procurement and other trade rules. Currently, the agreement with Chile is the only agreement in force that provides for a chapter on trade in services.

In recent times, Brazil started to update these agreements to strengthen economic integration. In 2016, Brazil and Peru signed an Agreement of Economic-Commercial Extension, which contains provisions on services, government procurement and investments. On November 21, 2018, Brazil signed a second free trade agreement with Chile, with provisions on trade facilitation, e-commerce, small and medium enterprises, investments, government procurement, services, amongst others. These two agreements are not yet in force. The strengthening of the agreement with Mexico is also under negotiation.

Extra-regional free trade agreements

In the past decade, although the priority for Brazil has been to negotiate trade provisions under the WTO, Brazil has also sought, together with Mercosur, to negotiate free trade agreements with countries outside the Latin America Region.

Mercosur currently has free trade agreements with India, Israel, the Southern Africa Customs Union (South Africa, Namibia, Botswana, Lesotho and Swaziland), Egypt and Palestine (not yet in force).

Currently, the bloc is also negotiating agreements with the European Union, the European Free Association (EFTA, composed of Switzerland, Norway, Iceland and Liechtenstein), Canada, Singapore and South Korea, as well as an extension of the agreement it has with India.

The most important negotiation is that being conducted with the European Union. The negotiations began in 1999 but were interrupted in 2004. The discussions were only resumed in 2010. Negotiations are "nearly at an end" but there are still sensitive issues, mainly concerning market access of agricultural products, the automotive sector, intellectual property, and others.

International Trade and Customs Regulations

As a member of the WTO, Brazil is bound by the organization's framework and it has internalized the WTO Agreements through Decree No. 1,355/1994.

Nonetheless, the Brazilian trade and customs regulations can be complex and challenging for foreign companies intending to do business in Brazil.

Market access

Because Brazil is part of the Mercosur Customs Union, the country's import duties are established under the Mercosur Common External Tariff. The tariff rate for each product is based on the Mercosur Common Nomenclature (NCM), an 8-digit code derived from the Harmonized System.

Duties usually range from 2% to 20%, but they may reach up to 35% for industrial products and 55% for agricultural products.

Despite the customs union, each Mercosur member is maintaining a list of exceptions until 2021, meaning the adoption of tariff rates that are higher or lower than the Common External Tariff for certain tariff lines. Furthermore, there are other exceptions involving the possibility of adopting reduced rates for capital goods and for information technology goods, as well as a temporary reduced rate for goods in case of shortage of domestic supply.

Importers may also benefit from lower tariffs for imports originating in countries with which Brazil and Mercosur have free trade agreements. As mentioned in the previous section, the bloc currently has agreements in force with most Latin American countries, as well as India, Israel, Egypt and the Southern Africa Customs Union. In order to benefit from preferential tariffs under free trade agreements, the importer must present the Certificate of Origin of the product.

Import-Export procedures

The Brazilian Internal Revenue Service controls the

importation of goods with specific laws and regulations and imposes penalties for not complying with them.

Laws and regulations related to importation are intended to restrict the entry and exit of illegal and dangerous products and the application of duties and fees are intended, in a way, to protect the domestic industry.

Radar

Under Brazilian law, only legal entities established in Brazil may act as importers or exporters.

Companies intending to operate in international trade must hold a RADAR, which is a permit that provides access to the SISCOMEX/Portal Único, the system where all import and export operations must be recorded.

There are three types of RADAR – Limited, Unlimited and Express. The 'Express RADAR' permit is suitable for companies that intend to import amounts corresponding to up to US$ 50,000.00 CIF in a six-month period, for companies certified as Authorized Economic Operators, and for public or semi-public companies. The 'Limited RADAR' permit allows the company to import amounts corresponding to up to US$ 150,000.00 CIF in a six-month period. The 'Unlimited RADAR' permit allows unlimited imports. The three types allow exports without any limits on value.

The Express RADAR requires less formalities than the Limited and Unlimited modalities, which demand an estimate of the financial capacity of the company, based on the federal taxes paid in the preceding five years.

If the company is granted a modality of RADAR which is deemed insufficient for its intended import activities, it may request a review of its financial capacity estimate, based on the capital available in the current assets of the company.

Import procedures

After being registered with a RADAR permit, the company must check the tax rates and the administrative controls for the importation of the goods with SISCOMEX/Portal Único, based on the corresponding NCM.

Administrative controls are imposed by several governmental bodies, such as: the National Agency for Sanitary Vigilance; the National Institute of Metrology, Quality and

Technology; the Brazilian Institute for the Environment and National Resources; the Ministry of Agriculture; the Ministry of Science, Technology and Innovation; the Federal Police; and the Brazilian Army. Each body establishes its own requirements to grant an import license for the products subject to its administrative controls.

When the importation is subject to licensing, the importer must provide the SISCOMEX system with the information required by each competent authority prior to shipment of goods overseas, as a general rule, or before the registration of the Import Declaration, depending on the case.

If there is no administrative control applicable to the operation, the company can start the import procedure by registering the import declaration in the system.

The import documents include the commercial invoice, bill of lading/airway bill, and the packing list.

According to Brazilian Law, the commercial invoice must contain, at least:

- full name and address of the exporter and importer or final owner;
- characteristics of the goods, including marking and numbering, and reference numbers for the different volumes;
- quantity and type;
- gross and net weight;
- country of origin, country of acquisition, and country of departure;
- total price and price per unit of each type of goods, and the value and nature of any given discounts;
- transportation cost;
- conditions and currency of the payment; and
- condition of sale (Incoterms).

After all documents are prepared and, usually, after the arrival of the products in Brazil, the importer must register the Import Declaration in SISCOMEX. The registration of the import declaration initiates the customs clearance for import.

Export procedures

Before performing any export operations, the company must hold a RADAR permit. The exporter must also verify with the SISCOMEX/Portal Único system whether there is any administrative control required for the exportation of the specific goods, based on the NCM. As for imports, controls are imposed by several governmental bodies and each body imposes its own requirements.

If there are any controls, the exporter must observe the necessary procedures to obtain the approval for export from the competent governmental body in the SISCOMEX.

The company must then register the Single Export Declaration in the SISCOMEX/Portal Único and will then require, if needed, the Export License, Permit, Certificate or Other. (“LPCO”).

Export controls and economic sanctions

Brazilian laws on export controls, sanctions and embargos apply to products exported or re-exported from Brazil.

Brazilian export controls comprise the analysis and approval by the governmental bodies of both the company and the goods for each export operation.

In particular, Law 9,112/95 regulates controls on “sensitive goods”, such as those with potential military applications and, consequently, also regulates the export of goods or related services with potential application in the development of weapons of mass destruction, whether nuclear, chemical or biological, as well as their delivery vehicles, such as missiles.

SECEX Ordinance 23/2011 contains lists of "countries with peculiarities", meaning restrictions to import and export operations. If a sale is to be made to an embargoed country, the list of forbidden goods must be checked.

Brazil imposes restrictions or embargoes on exports to certain countries strictly based on the decisions agreed by the United Nations and by other International Organizations. Brazil does not impose sanctions unilaterally, and there are no individuals or specific companies subject to financial sanctions.

Trade facilitation

Brazil is currently implementing the WTO trade facilitation

agreement. Amongst the most important initiatives are the implementation of the Single Window Program and the Authorized Economic Operator.

The Single Window ("Portal Único") will allow the whole customs clearance process to be made through a single system to which all governmental bodies enrolled in international trade controls will have access. The program should reduce the bureaucracy of customs and reduce the deadlines for customs clearance on imports from the current average of 13 days to an estimated average of 8 days, thereby reducing costs in operations. The Single Window was already implemented for export operations and is under implementation for import operations.

The Authorized Economic Operator ("AEO") certifies international trade operators that present reduced risks of security and/or of non-compliance with customs regulations, depending on the modality. The program offers benefits to certified importers and exporters allowing a faster customs clearance process.

The program has already been implemented for importers, exporters and other trade operators, in the modalities called AEO Security and AEO Conformity levels 1 and 2. The AEO Integrated is currently under implementation and will allow that the certification is also be granted by other governmental bodies which participate in the international trade controls (such as the Ministry of Agriculture, ANVISA, etc.). The fist agency to implement the AEO Integrated was the Ministry of Agriculture. Furthermore, the AEO certification will allow these operators to benefit from the program in other countries, since Brazil negotiates mutual recognition agreements with other partners.

Trade Remedies

Trade remedies were developed to protect the domestic industry of a country from imports that cause injury to it, due to unfair practices such as dumping and subsidies, or due to an increase in imports.

There are three trade remedies: anti-dumping measures, countervailing measures and safeguarding measures.

Trade remedies are regulated under the WTO agreements

but each country has its own domestic laws that detail the procedures for the application of such measures.

In Brazil, the administrative procedures for the application of trade remedies are carried on by the Department of Trade Defense of the Secretary of Foreign Trade, and the trade remedies are applied by the Chamber of Foreign Trade, a collegiate body composed by several ministries.

An outline is provided below of the administrative procedures for the application of each of these measures.

Anti-dumping

Anti-dumping measures intend to neutralize the negative effects of imports involving dumping that causes injury to the domestic industry. These measures involve a surcharge applied to the importation of the product from the origins where the dumping practice was found.

In Brazil, the issue is regulated by Decree No. 1,355/1994, which internalizes the WTO Anti-Dumping Agreement, Law 9.019/1995 and Decree 8.058/2013.

Dumping occurs when the export price of a certain product is lower than the price of the same product in the domestic market of the exporter ("normal value"). An analysis of the dumping covers a 12-month period.

The analysis of injury is based on the assessment of the performance of the domestic industry, which includes: the actual or potential drop in sales, profit, output, market share, productivity, return on investments and degree of utilization of installed capacity; factors affecting domestic prices, including the breadth of the dumping margin; and the actual or potential negative effects on cash flow, inventories, employment, wages, domestic industry growth, and ability to attract investment. The analysis of the performance covers the most recent five 12-month periods, the last one corresponding to the period of analysis of the dumping.

The antidumping investigation is initiated at the domestic industry's request. The petitioner must file a petition with the Department of Trade Defense Department containing evidence of dumping in the imports from the investigated origins, injury to the domestic industry and the causal link between the dumping and the injury. The Department of Trade Defense will evaluate the petition

and, if all requirements are met, it will publish a Circular SECEX in the Official Gazette initiating the anti-dumping investigation.

After the initiation of the investigation, exporters and importers of the product under investigation will be notified and receive a questionnaire to be completed containing information on sales in the domestic market, exports/imports, and production costs, amongst others.

Besides sending the questionnaires, the Trade Defense Department usually makes visits to check the premises of the domestic industry and exporters participating in the procedure, in order to confirm the data provided to it.

Exporters participating in the investigation are able to influence the outcome of the investigation and to ensure that any duties imposed are based on accurate data. Moreover, the cooperating exporters may be subject to individual dumping margins, which tend to be lower than the "all others" margin and benefit from the application of the "lesser duty", which is the lowest value necessary to repair the injury caused by the imports with dumping to the domestic industry.

The period for submitting new information is limited to 120 days from the date of publication of the preliminary determination by the Department of Trade Defense. The period for submission of statements on the data and the information in the records of the case is limited to 20 days after the period for submitting information. Investigations should be finished within 10 to 18 months. The Chamber of Foreign Trade will decide on the imposition of trade remedies as soon as it receives the final recommendation issued by Department of Trade Defense.

Measures are imposed for a period of five years and may be renewed after a sunset review procedure, which demonstrates that the end of the measure will result in the continuity or resumption of dumping and injury.

Sunset reviews provide for the extension of the anti-dumping measures beyond the initial five-year term, for a subsequent period of five years. This extension must be requested by the domestic industry, which must provide a *prima facie* case that the extinction of the trade remedy would result in continuity or resumption of the dumping and injury to the domestic industry. Under Decree No. 8,058/2013, sunset reviews may take 10 to 12 months.

Decree No. 8,058/2013 also establishes other procedures

such as: new shipper reviews, an anti-circumvention review, and a restitution review.

The new shipper review provides that new producers or exporters of a product subject to anti-dumping measures, which did not export the product to Brazil during the period investigated for dumping, may request the calculation of an individual dumping margin. Based on a special authorization by CAMEX, the exporter may export to Brazil with no application of anti-dumping duties for a certain period of time, so that DECOM may have enough data to calculate the dumping margin for such new shipper.

The anti-circumvention review aims to address attempts to avoid anti-dumping duties by the exporters through small changes in the production chain or product. The review allows the extension of anti-dumping duties to: (i) parts and components originating from the country subject to anti-dumping measures, destined for industrialization in Brazil of the product subject to the measures; (ii) products of third countries, produced with parts and components originating from the country subject to anti-dumping measures, resulting in the product that is the object of the measure; and (iii) products originating from a country subject to anti-dumping measures, which presents marginal changes in relation to the product that is subject to the measure, but which does not change its use or final destination.

The restitution review allows importers to request the restitution of the duties paid, if they can demonstrate that the margin calculated for the restitution period is inferior to the duties in force.

Countervailing measures

Countervailing measures intend to compensate the subsidies directly or indirectly granted to the exporter by a foreign country that cause injury to the domestic industry. Countervailing measures are a surcharge applied to the imports of the product from the origins where the subsidies were granted.

The issue is regulated in Brazil by Decree No. 1,355/1994, which internalized the WTO Agreement on Subsidies and Countervailing Measures, Law No. 9,019/1995 and by Decree No. 1,751/1995.

The investigation is initiated at the domestic industry's request and the petition must present evidence on the existence of

subsidies, injury to the domestic industry, and the causal link between the subsidies and the injury.

The Department of Trade Defense will evaluate the petition and, if all requirements are met, it will publish a Circular SECEX in the Official Gazette, initiating the investigation. In the meantime, the exporting country's government will be invited to consultations in order to provide clarifications on the alleged subsidy, and countries will seek to reach a satisfactory solution.

After the initiation of the investigation, exporters and importers of the product under investigation, as well as the governments involved, will receive a questionnaire and they may present information, documents and other evidence relevant to the case. Besides sending the questionnaires, the Department of Trade Defense may undertake checking visits, in order to confirm the data it has received.

The investigation is concluded in 12 to 18 months. If the Trade Defense Department makes an affirmative decision concerning subsidies, injury and a causal link, the Chamber of Foreign Trade will decide on the application of countervailing duties, for a period of five years.

Safeguards

Safeguarding measures may be applied to a product when the imports of such product increase in such quantities and in such conditions that they cause or threaten to cause serious injury to the domestic industry.

The safeguarding measures consist of an increase in the import duties, in addition to the Common External Tariff, of quantitative restrictions to the imports, or of a combination of both measures.

In Brazil, the issue is regulated by Decree No. 1,355/1994 and Decree No. 1,488/1995.

Different to the anti-dumping and countervailing measures, the safeguards are not restricted to certain origins, but they apply to all imports of the product under investigation.

The safeguarding investigation is initiated upon publication of a SECEX Circular and the interested parties (importers and exporters) have the opportunity to participate in the procedure and present their views.

If DECOM decides that there has been an increase in the volume of imports, and there exists serious injury or a threat of serious injury, and the causal link, the Chamber of Foreign Trade will decide on the application of safeguard measures for an initial period of four years.

Analysis of Public Interest

In some exceptional cases, the application of antidumping or countervailing measures may have negative impacts on other economic players, harming the public interest that supersedes the benefits of the trade remedy. In these cases, CAMEX may suspend the application or reduce the antidumping or countervailing measures.

Although CAMEX already had the power to suspend the application of duties due to public interest issues, in 2012, CAMEX created the Group of Public Interest Evaluation – GTIP, that is now in charge of an administrative procedure to analyze public interest matters in light of the antidumping measures in place that is more transparent and that allows defense by all interested parties.

The legal framework on the public interest evaluation procedure has evolved significantly since then and the number of public interest analyses has increased in the past years.

The Chamber of Foreign Trade's Resolution No. 29/2017 currently regulates the procedure for such public interest analysis.

The procedure is carried out by the Secretary of International Affairs of the Ministry of Finance. It may be initiated upon the request of private entities or ex-officio, upon the request of any governmental body, and interested parties are also invited to participate and answer the questionnaire provided by the Secretary of International Affairs.

After the procedure is concluded, the suspension or reduction of the anti-dumping or countervailing duties is decided by the Chamber of Foreign Trade.

Customs Regime

Although Brazil is a party to the Trade Facilitation Agreement (TFA) negotiated under the framework of the World Trade Organization, bureaucracy still sets the tone in the foreign trade industry.

Companies interested in operating in this sector, in addition to obtaining the usual tax registrations (CNPJ, at the federal level, and State Fiscal Registration) must also apply to access the Foreign Trade System (SISCOMEX) through which bureaucratic import and export activities are carried out.

The accreditation/authorisation process for granting access to SISCOMEX is named RADAR, since its purpose is to enable the customs authorities to identify untrustworthy companies in advance and prevent them from operating in the foreign trade industry.

Although the entire accreditation process can be carried out directly by the legal representatives or employees of a company, it is more common in Brazil to hire customs brokers ("*despachantes aduaneiros*"), professionals who specialise in these bureaucratic procedures, which turns out to be more efficient than trying to achieve the RADAR by using one's own resources.

Brazil is a founding member of the WTO and consequently most of its imports are not subject to licencing.

When prior licencing is required, this process can be performed electronically, through SISCOMEX, which makes things a little more agile.

The normal importation process begins with the international acquisition of the goods, with upfront, instalment and long-term payments being allowed, under certain rules, but always through foreign exchange operations controlled by the Central Bank.

Import quotas, rules on certification of origin, as well as other bureaucratic requirements (such as sanitary and phytosanitary) also apply in certain cases.

As a rule, Brazil does not admit the importation of used goods, and the exceptions found in the legislation are very rare.

The type of inspection to be carried out by the customs authorities, upon registration of the Import Declaration, is determined electronically by SISCOMEX, which parameterises the consignment to be sent to one of the four inspection channels.

If the consignment goes to the green channel, the goods are released without physical or document checks, with payment of the relevant taxes being sufficient.

In the yellow channel, the goods are subject to physical inspection and/or document checks.

In the red channel, the goods are subject to physical inspection and to document checks.

There is also a grey channel, used when there is suspicion that fraud in the import process has taken place, and in this channel the goods are only released upon provision of a guarantee, usually a customs insurance. This is the stricter inspection regime, where the authorities usually inspect not only the operation but also the financial and commercial suitability of the importer.

The parameterisation of inspection channels by SISCOMEX is usually done automatically and randomly, but the customs authorities can manually modify this parameterization, even for the grey channel, provided there are justified reasons.

The Brazilian customs legislation is quite complex, and it is advisable for companies that wish to operate with foreign trade to hire specialised advice, logistics companies, customs brokers and even lawyers, since, in addition to fines, many infractions are punished with a penalty of forfeiture (confiscation) of the imported goods, which may result in significant financial losses.

Taxation

Imported goods are subject to the payment of several taxes upon relevant customs clearance, notably Import Duty (“II”), Excise Tax on Industrialised Products (“IPI”), Social Contributions (PIS and COFINS-Importation) and the State Value-Added Tax (ICMS).

Except for the Import Duty, which always becomes a cost to the importer, the IPI and ICMS follow the concept of "value added" (non-cumulative), and the payment made upon importation generates a tax credit of the same amount to be used in subsequent operations. Depending on the company's income tax calculation system, PIS and COFINS may also follow this criterion.

The rates of these taxes vary according to the tariff code of each product (harmonised system). Regarding the Import Duty, Brazil adopts the Common External Tariff, in force for all Mercosur member countries.

It is possible to consult these rates in the tax simulator (in

Portuguese) provided by the Internal Revenue Service, available at http://www4.receita.fazenda.gov.br/simulador/BuscaNCM.jsp

This simulator also indicates, in most cases, the additional bureaucratic rules to be followed by the importer.

Heavy taxation, which involves the clearing of goods, requires companies planning to base their operations on imports to pay close attention to their working capital needs, as the tax and administrative costs of importing can easily exceed 50% of the FOB price of the goods.

There are, however, some special customs regimes that can alleviate these needs. We will focus here on three of them: warehouse/dry port, the temporary admission regime, and the drawback regime.

Dry Ports

The dry port or customs warehouse regime is available to any importer and enables him to defer (delay) the payment of customs taxes.

Under such regime, imported goods are stored in bonded warehouses (dry ports), located throughout the country, upon arrival and the relevant taxes are charged only when such products are cleared.

In practical terms, goods stored in dry ports are deemed to not yet have entered in the country, thus avoiding the collection of taxes upon arrival.

Although this regime may involve higher storage costs compared to non-bonded warehouses, the dry port regime has the advantage of providing prompt availability of the merchandise to the importer and of postponing the incidence of taxes to the moment of the effective customs clearance, thus rationalising the working capital needs.

The regime can be used both by the foreign company (exporter), as remote stock, and by the importer, in Brazil, giving flexibility in negotiations with customers, agents and distributors.

The hiring of the warehouse is usually brokered by the customs brokers, but this negotiation can be conducted directly between interested companies and dry ports.

Legislation allows the goods to be stored in dry ports for up to two years after their arrival in Brazil, and it is also possible, in exceptional cases, to extend this for another year.

Temporary Admission

Under the temporary admission regime, legislation permits the temporary withdrawal of goods from the customs premises, with total or partial suspension of the taxes due on importation, provided that certain legal requirements are met, notably proof of the transitory character of the withdrawal, the absence of exchange coverage (payment to the exporter) and the suitability of the goods for the intended purpose.

This regime is widely used, amongst other purposes, for the exhibition of goods in trade fairs, for which the legislation allows total suspension of the taxation.

If the goods are to be applied in an economic activity, such as equipment rented abroad to be used in a certain stage of construction works or of a production process, the taxation will be proportional to the time spent outside the bonded area.

The standard term of the temporary admission regime is six months, but in some cases, a longer period may be granted upon application to the customs authorities and the submission of documents justifying the need for a longer period.

Drawback Regime

The drawback regime is aimed at industrial companies that use imported raw materials in the manufacture of products that will subsequently be exported.

Legislation allows for three types of drawback: suspension, exemption, or refund of taxes levied on exports, the first two options being dependant on specific qualification of the importer by the Internal Revenue Service.

Any of the three modalities represent a tax discharge. ‘Suspension’ becomes ‘exemption’ upon proof of exportation; the ‘exemption’ avoids the need to pay the taxes and, with the ‘refund’, all taxes levied on the goods and paid by the importer upon importation will generate tax credits of the same amount upon proof of exportation.

Under the suspension regime, the usual drawback term is one year, renewable for an equal period, except in the case of manufacturing capital goods with a long production cycle, in which case the term can be up to five years.

Chapter 22

Dispute Resolution

Traditional Dispute Resolution

Settling a dispute in court in Brazil has always being considered by the critics of the Brazilian court system and the respective civil/commercial and labour court structures as complex, time consuming and not infrequently frustrating.

The purpose of this Section is not to take any sides, but to provide an outline of the abovementioned systems forming the structure of the Judiciary in the country and the main types of proceedings available, whilst also highlighting the most relevant requirements for a person or legal entity intending to commence legal proceedings in Brazil or facing court litigation as a defendant in Brazil.

I. Civil and Commercial Disputes

Jurisdiction of the Brazilian Courts

Courts in Brazil hold general jurisdiction over persons and legal entities domiciled in Brazil, regardless of their nationality (the word domiciled may in this case also comprise companies headquartered abroad but which have branches, agencies or

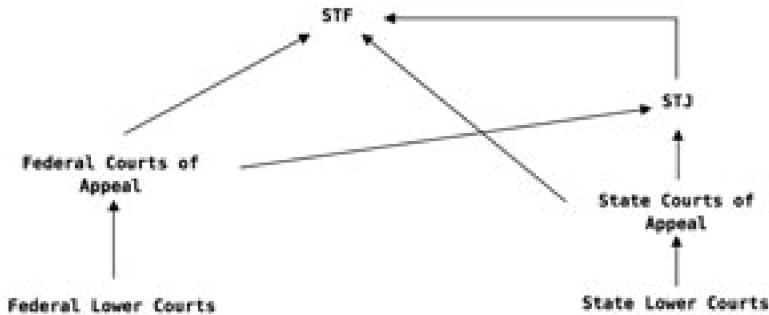
subsidiaries in Brazil). In addition to this, from a civil or commercial perspective, Brazilian courts hold special jurisdiction to hear claims against non-domiciled persons or entities in cases in which: (i) Brazil is the place of performance of the obligation in question or the main obligation of the agreement in question; and/or (ii) the dispute results from an event or act that took place in Brazil; and/or (iv) when Brazil was chosen by the parties in a forum selection agreement. It may also try cases when there is no other court available for the claimant in certain circumstances.

In such cases, if the parties involved in the dispute in Brazil also start legal proceedings abroad, such simultaneous foreign action will normally have no effect on the lawsuit filed in Brazil (except when the claimant of the foreign suit starts identical legal proceedings in Brazil and abroad, in which case the Brazilian courts may find that the second proceeding was a breach of duty of good faith and dismiss it). However, when the foreign proceeding reaches its final decision, the interested party will be able to apply to have the foreign judgment recognised in Brazil and, if successful, the ongoing Brazilian proceeding will be dismissed. Brazilian courts will also not grant anti-suit injunctions or interfere in any way in the lawsuits filed abroad.

Brazilian courts will also hold jurisdiction on cases: (i) concerning real estate located in Brazil; and/or (ii) distribution of a deceased person's assets located in Brazil to the heirs and creditors, even if the deceased is a foreign national domiciled abroad (since 2007, however, in certain cases, heirs have been able to settle distribution of assets amicably, through use of a public deed in Brazil, without having to start legal proceedings). In both cases, Brazilian courts will regard their jurisdiction as exclusive and therefore will refuse recognition of foreign decisions concerning these issues, on the grounds that the foreign court lacks jurisdiction.

The Structure of the Brazilian Court System

When it comes to civil and commercial disputes (not counting here maritime disputes, since jurisdiction to rule over such disputes is held by the Brazilian Admiralty Court – *'Tribunal Marítimo'*), the Brazilian Court system can be depicted as follows (the arrows indicating the standard potential path of a lawsuit):



To allow a better understanding of the diagram above, this report begins with the lower courts, where most cases start. But first, it is important to highlight that in the case of disputes involving commercial or civil matters, two sub-branches of the Brazilian Judiciary may have (non-overlapping) jurisdiction: Federal courts and State courts (municipalities in Brazil do not have their own court system). All decisions rendered by these courts may be interim or final.

The jurisdiction of the Federal courts, as opposed to the jurisdiction of the courts organised by each State (also in the case of some Brazilian quasi-states and the Brazilian Federal District Capital - Brasília), will depend upon the matter under dispute *("ratione materiae")* or the legal nature of one of the litigators *("ratione personae")*. Thus most of the litigation involving the Federal Government, for instance, will be decided by Federal courts and most of the litigation between private parties will be ruled by State courts.

Federal Lower Courts ("Varas Federais")

These courts are spread throughout the capitals and major cities of the country. They have jurisdiction to hear most of the disputes in which the Federal Government, Federal bodies and agencies, and some Federal Government-owned enterprises *("Empresas Públicas")* are involved as claimants, defendants or intervening parties. Also, these courts have jurisdiction over all disputes involving a foreign Government or organism, on the one side, and companies or individuals domiciled in Brazil or a Brazilian municipal administration on the other.

State Lower Courts (including the Brazilian Federal District/Capital) *("Varas Cíveis dos Estados e do Distrito Federal")*

Each State is empowered to organize its own branch of the judiciary. These courts are distributed throughout almost the entire country, and have jurisdiction to hear most disputes that exist between private parties. In addition, these lower courts have jurisdiction over disputes involving Government-owned or controlled corporations (*"Sociedades de Economia Mista"*, such as Petrobras, for example), disputes based on private law or State and Municipal environmental laws, disputes involving the Government of the respective State, as well as state-owned companies, municipal administrations, and companies. Furthermore, there are lower courts specializing in bankruptcy (and even in the case of a Federal body taking part in the bankruptcy or rehabilitation - *"recuperação judicial"* - proceedings, for instance, as creditor, although this will not result in jurisdiction of the Federal courts to the detriment of the particular State bankruptcy court). There are also lower courts specializing in Public Register disputes. The territorial jurisdiction of each of these State lower courts is provided in the Brazilian Federal Constitution and the laws of the respective States.

Federal Courts of Appeal ("Tribunais Regionais Federais")

Currently, there are five of these courts in the country. Their territorial jurisdiction is divided into five different regions (each covering two or more States). Mostly, these courts try the appeals filed in the lawsuits started in the Federal lower courts (see above) located in the particular region.

State Courts of Appeal *("Tribunais de Justiça dos Estados e do Distrito Federal")*

Each State and the Brazilian Federal District/Capital have a Court of Appeal. Mostly, these courts hear the appeals filed in lawsuits that started in the lower courts (see 1A, above) of the State where the respective court of appeal is located.

Superior Court of Justice *("Superior Tribunal de Justiça - STJ")*

One of the main roles of this Federal court is to hear appeals filed against decisions rendered either by a Federal (see 2, above) or State court of appeal (see 2A, above) whenever such decisions (i) contravene a treaty, convention or Federal law; (ii) validate a local

government act that contradicts Federal Law; or (iii) interpret a Federal law differently, in conflict with a decision(s) from other court(s) of appeal (and/or the Superior Court of Justice and/or the Federal Supreme Court) on the same matter.

In addition, this court will hear the appeals filed against Federal lower court decisions in disputes involving a foreign Government or organism and a private party domiciled in Brazil or a Brazilian municipal administration (see above).

In most cases (except, for instance, those referred to in the paragraph immediately above), the STJ does not review facts or evidence existing in the records of a lawsuit, but it does impose a number of requirements before it can accept an appeal. Thus, for example, one cannot re-open the analysis of arguments referring to the interpretation of a given contract's provisions with the STJ.

Also worthy of mention is the power of this court to recognize - and, therefore, render - foreign decisions (either judicial or arbitral) effective and enforceable in Brazil (or not), and to authorize, through exequatur in letters rogatory from foreign courts, services of process, depositions or other procedural acts originating in those foreign courts that must take place in Brazil, as long as such decisions or letters rogatory do not contravene Brazilian public policy *("ordem pública")* and other relevant requirements are complied with.

Federal Supreme Court *("Supremo Tribunal Federal - STF")*

This is the apex of the Brazilian court system. One of the main roles of this Federal court is to consider appeals against decisions rendered by a Federal or a State court of appeal or even decisions rendered by the Superior Court of Justice, whenever these decisions:

- Directly contravene the Brazilian Federal Constitution and involve legal, economic, social or political matters relevant not only to the dispute itself but also to the nation as a whole;
- Declare a given treaty, convention or Federal law as non-constitutional;
- Deem a law issued by one of the Brazilian States or municipalities to be valid, to the detriment of the Brazilian Federal Constitution;

- Deem a law issued by one of the Brazilian States or municipalities to be valid to the detriment of Federal Law.

Furthermore, the STF is empowered to hear any conflicts of jurisdiction between itself and the Superior Court of Justice or other Brazilian superior courts (Superior Labour Court - *"Tribunal Superior do Trabalho - TST"* and Superior Military Court - *"Superior Tribunal Militar - STM"*) and disputes between these superior courts.

As with the Superior Court of Justice, the STF refuses to analyse evidence existing in lawsuits that started either in a Federal or a State lower court.

Along with these courts, the Brazilian court system also comprises small claims courts, which are also empowered to rule on civil and commercial disputes. However, their jurisdiction is limited to disputes where the monetary amounts involved are equal to, or less than, 60 minimum salaries (Federal Small Claims Courts - *"Juizados Especiais Federais"*) and 20 minimum salaries, without a solicitor, and 40 minimum salaries, with a solicitor (State Small Claims Courts *"Juizados Especiais dos Estados e do Distrito Federal"*).

Effects of the decisions of the Federal Supreme Court, Superior Courts and Courts of Appeal

From the perspective of civil and commercial disputes, as of today the only binding court precedents in the Brazilian legal system are the following: (i) *"Súmulas Vinculantes"*, which are certain case law decisions that will function as stare decisis (precedent), issued from time to time by the Federal Supreme Court; and (ii) decisions (either injunctions or final judgments) also rendered by the Federal Supreme Court in two specific types of lawsuits (which have to be filed by the President, the Brazilian Federal attorney general, the governor of a given State or a political party, among other entities expressly authorized by the Brazilian Federal Constitution), which basically deal with conflicts between laws or other governmental acts and the Brazilian Federal Constitution.

Although it cannot be properly considered as a binding case law structure, the Superior Court of Justice also has a similar system for dealing with appeals regarding legal issues that are repeatedly discussed in different lawsuits all over the country: the court will acknowledge such repeated appeals, choose one, or a small batch, as

leading cases and instruct the pertinent courts of appeal where identical appeals have been detected to interrupt their course and remit them to the STJ until the trial of the leading case or leading cases has taken place. Only those appeals filed against judgments contravening the decision rendered by the STJ in the leading case(s) may be heard. The other repeat appeals will be immediately dismissed.

Of course all Brazilian Superior Courts and Courts of Appeal, as well as the Federal Supreme Court, set a number of precedents and these (especially those set by the Federal Supreme Court, the Superior Court of Justice and other superior courts) clearly influence the judges of the lower courts (even allowing the superior courts or courts of appeal to immediately dismiss an appeal when its grounds clearly conflict with such precedents). However, with the exception of the binding decisions referred to above, these judges are not tied to such precedents and may freely rule on a dispute according to their own opinions.

Examples of Proceedings and Injunctions

The New Brazilian Code of Civil Procedure, enacted on March 18, 2016, provides for a number of different types of legal proceedings that are filed and conducted by electronic means. Most of these are devised to cope with specific controversies (land disputes, tax controversies, repossession of assets etc.). However, most of the civil and commercial disputes are carried out in court by means of two types of lawsuits:

"Execução" - which is designed to be a more expeditious proceeding, allowing the claimant, at the very beginning of the lawsuit, to include the debtor's name in the Default Register *("Cadastro de Inadimplentes")*, that may accelerate the proceeding. To be entitled to file this (theoretically) more expeditious lawsuit, the obligation to be enforced must be unconditional and clearly described in writing in a document *e.g.* a promissory note or a contract or other instrument, signed by the defendant and at least two witnesses (public deeds and certain kinds of private instruments do not require witness signatures). The defendant's defence takes place in a separate lawsuit *("Embargos à Execução")* which will not stay the course of the *Execução* (the sale of assets or payment of the creditor) unless the court considers: (i) the requirements of the interim protection have been met; (ii) the defendant's line of defence

to be sound; (iii) there are risks or certainty of damage that are difficult to repair should there be any further execution; and (iv) that the claimant's credit is duly secured by attachment of the defendant's (or a guarantor's) assets. The discovery phase in this type of lawsuit is limited, not usually comprising, for example, hearings or depositions.

"Rito Ordinário" - This is the legal vehicle this is most commonly used to bring a dispute into the Brazilian (lower) courts. Actually, most of the special types of lawsuits borrow at least one of the characteristics of this standard proceeding. Torts and other disputes that usually demand a comprehensive discovery stage are brought to court by means of this proceeding.

Injunctions - The New Brazilian Civil Procedure Code provides two types of injunction – 'urgent' and 'evidence' injunctions - in order to prevent losses to the party which requests a given relief, or to secure the satisfaction of a final judgment. Depending on the quality of the grounds presented by the party and the risks the party is facing at the time the writ requesting an injunction is filed, the judge (either from a lower court, court of appeal, superior court or even from the Federal Supreme Court, according to the level at which the injunction is requested) is entitled to grant the same even without prior communication to the other party, which will be affected by such order *("inaudita altera parte").*

Urgent injunctions can be anticipated or precautionary, the anticipated ones being requested in order to avoid damages to the party that a delayed judicial performance may cause. The judge's decision in a precautionary injunction is on merit of the cause and serves to avoid losses to the claimant. It is filed before the main lawsuit and its decision can be revoked after analysis of the main litigation in the main case. The precautionary injunction ensures a right of the claimant and may comprise: sequesters, attachments, restraining orders, exhibition of documents, accounting records and other advance production of evidence typical of the discovery stage but that has to be immediately secured due to risks of destruction or disappearance.

Evidence injunctions are based on the credibility of the documentary evidence presented, that can grant the claimant, in summary cognition, judicial protection when there is prima facie evidence of the existence of his right. It is a non-urgent injunction, since it does not require proof of *periculum in mora*, being based solely

on evidence, that is, on the sufficient documentary demonstration of the facts constituting the claimant's right.

It is important to highlight that, notwithstanding the fact that Brazilian arbitration law enables the parties to request injunctions from the arbitration court, it is possible to file a pre-emptive writ of injunction with a judiciary court prior to the start of the arbitration proceedings (as already mentioned above, depending upon the type of injunction, the claimant may start the arbitration proceedings within 30 days of the enforcement of the injunction).

Costs (amount the loser pays the winner) - The Code of Civil Procedure establishes that the loser shall: (i) refund the sucessful party’s expenses in court (which, depending upon the case and the court, may exceed USD 20,303.57 - not counting expert costs); and (ii) pay the opposing party’s counsel fees set by the court (which do not comprise the contractual fees possibly charged by the counsel: in principle, contractual fees would not be reimbursed by the party which loses the dispute). Said fees awarded to the counsel of the winning party may vary from 10% to 20% of the economic benefit of the case (or if it is not possible to measure the economic benefit, the percentage will be applied on the value of the case), and shall be determined based upon “equitable consideration”, taking into account aspects such as the “level of professional effort”, the place where the lawsuit took place, the “nature and importance of the case”, the kind of service rendered by the counsel and the time spent by the counsel in providing services. However, in a declaratory action, the tendency is not to use percentages and/or the economic benefit of the dispute as a criterion for setting the court awarded fees, because the scope of a declaratory suit is limited to a judgment recognizing (or not) the existence of a given relationship and does not directly involve any award of damages or compensation. In this type of suit, the court usually sets the amount of the fees for the winning party’s counsel according to the level of professional effort of the counsel involved and the nature and complexity of the dispute.

It is also important to highlight that, in an *“Execução”*, the abovementioned fees are set by the court immediately after the filing of the initial complaint, in favour of the claimant’s counsel. If the defendant voluntarily complies with the obligation being enforced by means of an *“Execução”* within three days of being served, the amount of the counsel’s fees will be reduced by 50%. In cases where the defendant decides to challenge the claimant’s alleged cause of

action and respective claims (through *"Embargos de Devedor"*) and loses, the defendant will have to bear additional fees set by the court in favour of the claimant's counsel (increased by up to 20%).

Discovery

Any licit type of evidence and means of producing it can be used prior or during a lawsuit. Nevertheless, unless forced by a court subpoena or similar, anyone asked to surrender a piece of evidence has the right to refuse.

A court can order tax authorities or banks to surrender privileged information regarding a defendant's financial activities, or authorize court experts to break file (including electronic) codes and seize the information available. In any of these cases, the party which asks the court for such drastic orders must present at least some preliminary evidence to justify such acts, and will be liable for misuse of such evidence (unless the misuse results from the courts or third parties gaining improper access to such finding).

Brazilian court proceedings are normally public, but any lawsuit dealing with privileged information must be carried out under a veil of secrecy (however, due to the heavy workload faced by Brazilian courts, it is advisable to request that the judge order submission of the case to such treatment). Hence, only the parties involved, their respective counsels, court and party-appointed experts, the judges, and the court personnel will be allowed to handle the records of the case.

One new aspect introduced by the New Brazilian Code of Civil Procedure is the possibility of inverting the burden of proof to the party for which the obtaining of the proof is easier.

Along with these types of evidence are others, including appraisals, construction exams, medical and other scientific exams, proof borrowed from other lawsuits and the elaboration of Notarial Minutes. These are the main types of evidence that can be produced and which will have a material influence on the outcome of a lawsuit.

When it comes to civil and commercial disputes, although important, witness or party depositions (individual or legal representatives in the case of legal entities) represent a subsidiary means of evidence. In fact, deposition under oath regarding the merits of the dispute will not apply to the parties or their legal representatives (in the case of legal entities, for example), and some witness depositions may not be accepted or may be deemed

potentially biased when it comes to one of the party's family members, close friends, employees or recognized enemies. Also, if it is found that the alleged witness has an interest in the outcome of the dispute, the testimony might be considered as potentially biased.

It is important to highlight that the judge will not be tied to the results of the evidence shown or requested by the parties, and may, regardless of any request, order additional evidence or restart the discovery stage all over again, or even decide against the available evidence. Both, however, are exceptions.

The discovery stage may also comprise evidence (documents, witnesses, etc.) located abroad. In this case, the judge will ask the applicable foreign court, through letters rogatory, to produce such evidence.

Finally (although the intention of this Section is not to exhaust the matter), as already covered in section I.4 ("Injunctions"), in the case of justified urgency, one can file a write requesting the immediate production of evidence, to be used later in a lawsuit.

Situation of a Foreign Domiciled Company or Individual in a Dispute

The Brazilian court system and their alleged domestic/cross border jurisdiction may be a cause of concern to a foreign legal entity or individual, even those with some experience with Brazil. Engaging a local lawyer to support and represent the foreign legal entity or individual in a dispute in Brazil is of paramount importance, even in a dispute relating to a contract with a provision selecting a foreign court as having exclusive jurisdiction.

Brazilian courts may not refuse to hear a dispute due to a choice of foreign court agreement in the cases where the law grants them jurisdiction (there is conflicting case law on this issue).

Especially when it comes to product or service liabilities involving a Brazilian domiciled individual or legal entity as the true end user, Brazilian courts, according to Brazilian consumer defence law, may consider themselves as having jurisdiction to hear any claim (or counterclaim) filed by such Brazilian plaintiff.

As Claimant

One of the peculiarities of Brazilian legislation that the foreign domiciled individual or foreign headquartered legal entity should be aware of prior to initiating judicial proceedings in Brazil,

is that they need to provide the court with a guarantee for costs: judicial fees and opposing party counsel fees (normally a deposit in an escrow account).

This will not be necessary when the foreign claimant: (i) is domiciled or located in a country which has treaties with Brazil banning such requirement; or (ii) has valuable real estate in Brazil (in certain cases, courts waive such requirement if there are other valuable assets in Brazil, such as shares in Brazilian companies); (iii) files an *"Execução"* (see Chapter I.4); or (iv) files a counterclaim *"reconvenção"*.

Security can be ordered by the court regardless of any requests from a defendant, and usually amounts to around 10% and 20% of the already available economic value of the claim. In case of non-compliance, the suit will be dismissed without prejudice.

Recently, there have been a number of decisions from the STJ (Superior Court of Justice) that exclude the obligation of a foreign domiciled and headquartered legal entity from securing the lawsuit costs when the legal entity has a representative in Brazil.

When the dispute has to be settled by foreign law, the Brazilian judge may order the party which raised the issue to provide the court with evidence of its content and coming into force, such as certified and officially translated copies of the foreign statute, and affidavits from counsels or scholars qualified in the foreign jurisdiction.

As Defendant

As already mentioned above, an individual or a company domiciled abroad but which, at any given moment, has done business with someone in Brazil (even through active websites) could be sued in Brazil, especially when this regards product liability in cases in which the Brazilian claimant is deemed as being the end user and thus protected by Brazilian consumer law. In such cases, if the defendant has no plans to do business in Brazil and the jurisdictions where the defendant and/or the defendant's assets are located would not recognise or enforce a Brazilian court's final judgment under such circumstances, the defendant should consider not appearing in court or appearing only to challenge the court's jurisdiction.

On the other hand, if the challenge is denied, the defendant may lodge a defence in the merits and also start a lawsuit involving the same dispute in a court abroad, the jurisdiction of which is accepted by the Brazilian courts, with the aim of getting the ongoing lawsuit in Brazil dismissed at a later date, by means of recognition

of the foreign decision in Brazil (see Chapter I.7). This, of course, should be analysed on a case by case basis.

Recognition and Enforcement of Foreign Judgements

Any final *(res judicata)* foreign arbitration award or court judgment can be recognised (wholly or partially) and enforced in Brazil, provided it meets certain mandatory requirements. The proceeding aimed at such confirmation would be performed before the Brazilian Superior Court of Justice - STJ. Upon recognition, the foreign judgment will become effective in the country, and will be enforced accordingly (see Chapter I.4).

The STJ will only recognise the foreign judgment when it is satisfied that the foreign court had jurisdiction to render it according to Brazilian rules of private international law (see I.1 above). Also, court judgments rendered in lawsuits where the defendant located in Brazil has not been served by means of a letter rogatory will not normally be confirmed by the STJ (there is no such requirement for arbitral decisions when the agreement, institutional rules or the law of the seat of the arbitration provide for other means of service). Furthermore, it will also not recognise a judgment that is contrary to Brazilian public policy or that offends national sovereignty and the dignity of a human being.

The Court will refuse recognition to a foreign judgment when there is already a final *(res judicata)* decision on the merits rendered by a Brazilian court referring to the same parties and the same dispute, even if the Brazilian suit has been filed afterwards. Otherwise, the STJ will recognise the foreign judgment, which will then become final and effective (res judicata) in Brazil and the pending lawsuit filed in Brazil will be dismissed.

Litigation against Public Bodies, Government-Owned Entities

There is no legal immunity for these entities in Brazil. However, it is important to highlight that when it comes to litigation against public bodies (Government and its branches, governmental agencies and other public legal entities), whether Federal, State or Municipal, although some restraining orders can be requested, no sequester, attachment or similar can be granted by the courts, even in order to secure the satisfaction of a final judgment. The courts receive deposits from the public bodies and, with few exceptions, make payments to settle the debts of said public bodies in chronological order.

When it comes to Government-owned enterprises *("Empresas Públicas")* or Government owned or controlled corporations *("Sociedades de Economia Mista")*, the situation is different: such entities, no matter whether under Federal, State or city administration, are deemed by the Brazilian Federal Constitution as being subject to the laws applicable to private companies. Therefore, injunctions can be freely requested against such entities.

II. New Code of Civil Procedure

The New Code of Civil Procedure, enacted on March 18, 2016, brought about a number of modifications, some of the most important being: (i) all cases dealing with disposable rights may have a conciliation hearing before the defendant presents its defence; (ii) counsel fees are also due in the appeal stage of the case (the Court of Appeal can increase the opposing party's counsel fees); (iii) unification of the procedural deadlines for all kinds of appeals (15 working days, with an exception made for *"Embargos de Declaração"* – five working days); (iv) the deadlines are now counted in working days; (v) deadlines for lawsuits are suspended, each year, from December 20 to January 20; (vi) the possibility of including the debtor's name in the Public Default Register *("Cadastro de Inadimplentes")*; (vii) disregarded of a legal entity can be requested in the initial statement of the claim; and (viii) possibility of obtaining an attachment of the debtor's monthly pay that exceeds 50 minimum salaries (USD 12,729.59).

III. Labour Disputes

Labour litigation in Brazil is handled by a separate division to the (Federal) Judiciary, structured in three levels: (i) the labour courts (spread across almost the entire country); (ii) the labour courts of appeal, almost every State has one of these specialized courts of appeal (the exceptions being: the State of São Paulo, which has two, as well as the States of Amazonas and Roraima, which share the same labour court of appeal, the case being the same for the States of Rondônia and Acre); (iii) the Superior Labour Court. Labour disputes and decisions involving constitutional matters may eventually lead to appeals to the Federal Supreme Court - STF.

Labour dispute proceedings are governed by the

Consolidated Labour Laws - CLT, with subsidiary application of the Code of Civil Procedure. As opposed to other kinds of litigation (either tax, civil or commercial), the claimant, as well as the defendant, does not need to hire an attorney-at-law to represent his or her interests before the lower courts (labour courts and labour courts of appeal). The dispute starts with the filing of the initial complaint and a local lower court will be selected randomly. At this point, the court selected to hear the dispute schedules a date for what is called a "unified hearing" and issues the respective service of process documentation containing the date of said hearing. This hearing is called "unified" because it comprises a conciliation phase, during which the judge will encourage the parties to settle. If the parties fail to settle, the second phase of the hearing begins with the defendant submitting their reply, at which point both claimant and defendant may present their respective witnesses.

If the conciliation phase is unsuccessful, or if there is an excusable absence of one of the witnesses, the judge may postpone the discovery phase of the hearing until a later date. However, as a rule, the parties and the available witnesses are heard on the same date. If the case is simple and the reply submitted by the defendant is short, the judge can issue a decision on the merits at the same hearing, although it is more typical for a new date to be set for the decision to be issued.

In labour litigation, the burden of proof falls heavily on the defendant (the alleged reason for this is that the defendant is normally the employer, thus holding most of the information and records referring to the labour relationship under dispute) and the discovery phase is focused on documents, as well as the depositions of the parties and witnesses (although the parties may submit written opinions from their own expert witnesses when the complexity of particular technical aspects of the case requires expert evidence).

Upon receiving official notice of the decision, the parties have five days to file a clarification motion (addressed to the lower court judge, requesting the court for clarification on given aspects of the decision deemed as obscure and/or contradictory and/or omitting relevant points of the dispute), or eight days to lodge an appeal to the pertinent labour court of appeal. If the defendant, or the plaintiff, when not granted with the benefit of free legal aid, appeals, it will be necessary to deposit a sum in a court-controlled escrow account, equivalent to the amount of the pecuniary penalty

imposed on the party presenting the appeal (if any), up to a cap currently equivalent to £ 1,872.00. In cases where the court denies the appeal, the defendant, in order to file an appeal to the Superior Labour Court, besides meeting very strict requirements, may need to make an additional deposit (up to the amount in local currency equivalent to £ 3,747.00).

Once the appeal phase has expired, if any of the plaintiff's claims remain granted by the Court (either in full or in part), a new phase begins, aimed at determining the amount of the credit adjudged against the defendant. After the amount is determined, collection starts and, if the defendant fails to comply with the decision, the court will normally freeze the defendant's bank accounts up to the amount of the credit being collected. Furthermore, whenever the defendant presents itself as a legal entity, and no property is found to assure the credit, labour courts commonly apply the commandment of disregard of the corporate entity and proceed to freeze any shareholder and/or management bank accounts until the credit is ensured.

As for Collective Labour Disputes, these take place before the pertinent labour court of appeal, which will settle the dispute rendering a decision binding to all (employers' and employees') unions involved. There are three main reasons for starting Collective Labour Disputes in Brazil: (i) dispute over the interpretation of a given legal provision, or a provision in a collective employment agreement, among others; (ii) disputes resulting from claims by employees' unions; and (iii) strike-related disputes. The enforcement of the decision settling a Collective Labour Dispute requires a specific proceeding.

Alternative Dispute Resolution

Conciliation and Mediation

In Brazil, the legal system regulates three main methods for ADR: arbitration, mediation and conciliation. All are considered to be less time-consuming and more cost-effective, when compared to a judicial lawsuit.

Conciliation and mediation differ from Arbitration as the impartial third party – chosen or accepted by the parties –

responsible for conducting the mentioned procedures has no decision-making power.

The mediator and the conciliator, who are not required to be lawyers, will assist the parties in a dispute in an attempt to achieve a mutually acceptable settlement – regarding available or unavailable rights that allow a transaction (when the possible consent of the parties must be ratified in court).

They will only assist parties in identifying the points of conflict and the interests at stake in order to find a mutual ground for settlement, since neither mediator nor conciliator cannot force the parties to accept a settlement.

Despite being similar in form, substance and scope, while mediation is usually reserved for cases in which the parties had a previous relationship that will most likely continue once the dispute is over – such as, for example, disputes between family members, neighbours and partners - conciliation, on the other hand, usually involves parties who do not have a personal relationship.

Until recently, conciliation and mediation were not (formally) ruled by any applicable law. Consequently, certain practical rules have been used for structuring them in an orderly manner, such as the rules provided by Brazilian Mediation and Arbitration Chambers and Tribunals, for instance, most of which are headquartered in the city of São Paulo.

In 2015, the Brazilian Congress passed a new Code of Civil Procedure that provided some rules to make judicial proceedings more open to these ADRs. In article 3, paragraph 3, the Code provides that conciliation, mediation and other ADRs must be encouraged by judges, lawyers, public defenders and prosecutors, even in the course of judicial proceedings.

Another provision that displays this ADR-oriented perspective is that which determines that judges must schedule a conciliation or mediation hearing before the defendant presents its defence in a civil proceeding. Although there are exceptions to this rule and some judges still resist its application, this provision is a clear step towards the goal of expanded use of ADRs.

The Code of Civil Procedure also includes a section composed of 10 articles (Arts. 165 through 175) establishing general rules about conciliation and mediation.

Shortly after the New Code of Civil Procedure was approved, Congress also passed a Mediation Act (Law No.

13.140/2015) that regulates not only in-court mediation proceedings, but also out-of-court mediation proceedings.

Although it is mostly about mediation, this Act also contains provisions regarding judicial conciliation proceedings.

The Mediation Act establishes eight guiding principles for mediation:

- Mediator's impartiality (see below);
- Isonomy between the parties;
- Oral proceedings;
- Informality;
- Party autonomy;
- Quest for consensus;
- Confidentiality; and
- Good faith.

This Act also provides that if a mediation clause exists, the parties will at least have to appear at the first session. However, no party can be obliged to remain in mediation proceedings.

The mediator can be someone chosen by the parties or a court-appointed professional. The chosen person has a duty to disclose possible conflicts of interest much like an arbitrator. The standard provided in the Mediation Act for this disclosure duty is that of any information that could raise justifiable doubt in the eyes of a party.

Also, in the interest of impartiality, the mediator will be prohibited from representing or counselling any of the parties for one year counting from the day of the last mediation session. They will also be barred from serving as an arbitrator or as witness in any proceeding – judicial or arbitral – regarding the dispute they have mediated.

Brazilian Courts are required by law to keep a Mediator and Conciliator Registry with a list of professionals enabled to mediate/conciliate in-court proceedings. In out-of-court mediation proceedings, any person of age can be chosen by the parties to serve as mediator.

Any party interested in having a dispute settled out-of-court by means of mediation can submit a request to a Chamber, which will then set a date and time for a cost-free interview, at which time

the Chamber will inform the party of its rules of procedure and render any other useful information as required.

The party has to confirm its interest in the mediation no later than a fixed (usually short) number of days. The Chamber will then send a notice to the other party, which will also be required to confirm its interest in writing within the same deadline.

If both parties agree to submit to mediation, the Chamber will deliver a list of mediators for their choice. If the parties fail to agree on the mediator's choice, then the Chamber Chairperson will appoint a mediator at their discretion.

A preparatory meeting will be called no later than a fixed number of days from the date the mediator is appointed and this meeting is aimed at preparing and executing the mediation commitment. The mediation commitment must be signed by both parties (if individuals) or their legal representatives (if companies) and provide for the number of meetings (one or more) and for the payment of the mediation costs and mediator's fees by both parties. Except when otherwise agreed by both parties, the mediation process will, as a rule, not exceed 30 days.

If the mediation proves to be successful, an agreement will be drawn up and signed by both parties, the mediator and two witnesses, which will be kept on file by the parties and the Chamber.

The final term of mediation, in the event of an agreement, constitutes an extrajudicial enforceable title and, when judicially approved, a judicial enforcement order.

If it does not succeed, the mediator will record the unfavourable outcome.

It should be noted that if the mediator fails to settle the dispute, no fact, action or statement occurred or made during the process will be permitted to be disclosed or used in any ensuing arbitration or in court.

Arbitration

Introduction

Alternative dispute resolution (ADR) has been standard practice in Brazil for over two decades, since the passing of Law Nr. 9.307/96 - the Arbitration Act. The Arbitration Act has gained worldwide praise for bringing Brazil up to par with the arbitration provisions of most jurisdictions.

In 2015, the Brazilian Congress passed a new Code of Civil Procedure which purported to make proceedings more efficient and included making ADR use as widespread as possible. In that spirit, a Mediation Act was passed and the Arbitration Act was amended.

Not only the Brazilian Congress is committed to ADR, but also the judicial system has followed in its stride. Over the last decade, the Superior Court of Justice (Brazil's highest court for disputes that do not rely on constitutional matters) has adopted quite a favourable approach to arbitration. In this sense, it has set precedents reaffirming principles such as kompetenz-kompetenz.

Under the Arbitration Act, two of the most important barriers to arbitration in Brazil were effectively eliminated: (i) the arbitration clause is now subject to specific performance, which determines that once the conflict has arisen, a party does not need to negotiate an additional agreement to initiate arbitration with the other party or parties[1]; and (ii) the arbitration awards are final and binding to the extent that parties cannot seek judicial remedies to discuss the merits of the case[2]. The awards can only be subject to judicial challenge[3] (for annulment; not for any modification on its merits) with grounds on (i) the nullity of the arbitration agreement, (ii) the capacity of an individual to act as arbitrator, (iii) the failure to encompass formal requirements set forth in the Arbitration Act, (iv) not complying with the limits of the arbitration agreement, (v) any acts of corruption, (vi) not complying with the deadline set forth in the Terms of Reference, and (vii) not complying with the due process of law, the equal treatment of the parties, the impartiality of the arbitrator, and their discretion in taking the final decision.

Parties can decide whether to submit to "institutional arbitration", whereby an institution will administer the proceedings[4], or to "ad hoc arbitration", in which the proceedings are conducted by the parties themselves. They are also free to select the governing set of rules, seat of arbitration and most of the related procedural matters.

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1. Law No. 9,307/96, art. 32.
2. By now, Brazil has many worldwide renowned arbitration institutions – as well as branches of international ones.
3. Law No. 9,307/96, art. 1, paragraphs 1 and 2; art. 2, paragraph 3. Both amended by Law No. 13.129/15.
4. Law No. 9,307/96, art. 13, paragraph 4, added by Law No. 13.129/15.

Amendments to the Arbitration Act

The Arbitration Law was updated in 2015 to address matters on which authorities and case law varied as well as to include express provisions related to matters on which case law and authors agreed. The amendment also sought to strengthen the cooperation between state courts and arbitral tribunals. The highlights are:

- Public entities can submit to arbitration, as long as certain conditions are met (see below);[5].
- Parties can agree to derogate from any provisions in arbitration rules that restrict the choice of a sole arbitrator to a list provided by the arbitration institution;[6].
- Parties can submit preliminary injunctions to state courts before the arbitral tribunal is assembled. Once constituted, the tribunal will have jurisdiction to grant, overrule or maintain any preliminary injunction presented before state courts;[7].
- The arbitrators can send a letter of request to a judge in order to have any measures they see fit enforced;[8].
- Arbitrators can issue interim awards;[9].
- Filing the Request for Arbitration interrupts the statute of limitations, as long as it leads to the assembly of the Arbitral Tribunal;[10].
- The procedure for setting aside an arbitral award has been outlined in article 33;
- Labour Law-related disputes can be submitted to arbitration.

Arbitration Involving Private Parties and Public Entities

There used to be discussion as to whether state-controlled companies could submit to arbitration and under what requirements. The Arbitration Act has since been updated to include a provision that expressly states that public entities can enter into binding arbitration clauses with private parties.

In this sense, the only requirements for a public entity to submit its dispute to arbitration are: (i) that the arbitration will not be decided by equity – *i.e.*, its award must have grounds in the law; (ii) that the principle of publicity in Public Administration be

preserved – which is not to say that some disputes should not be confidential when it satisfies public interest; and (iii) that the dispute revolves around property rights.

The amendment of the Concessions Law in November 2005 had already expressly provided the possibility of adopting arbitration to resolve disputes concerning public services concessions[11]. Prior to this, specific laws had provided for arbitration in power purchase agreements[12] and concessions in the gas and oil industry[13], natural gas[14], telecommunications[15], land and water transportation[16], as well as public-private partnerships[17] and oil and natural gas production-sharing deriving from the Pre-Salt layer[18].

Recognition and Enforcement of Foreign Arbitral Awards

The Brazilian court system exercises a limited review of foreign awards[19].

Grounds for refusal of enforcement by the Superior Court of Justice are set out in the Arbitration Act[20] and essentially repeat the public policy and due process of law provisions of article V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”), eventually ratified by Brazil in July, 2002[21].

In fact, because the Arbitration Act had already used such similar language, the impact of the ratification of the New York

5. Law No. 9,307/96, arts. 22-A and 22-B, added by Law No. 13.129/15.
6. Law No. 9,307/96, art. 22-C, added by Law No. 13.129/15.
7. Law No. 9,307/96, art. 23, paragraph 1, added by Law No. 13.129/15.
8. Law No. 9,307/96, art. 19, paragraph 2, added by Law No. 13.129/15.
9. Law No. 8,987/95, art. 23- A, amended by Law No. 11.196/05, art, 120.
10. Law No. 10,848/04, art. 4º, paragraph 5.
11. Law No. 9,478/97, art. 43, X.
12. Law No. 11,909/09, art. 21, XI.
13. Law No. 9,472/97, art. 93, XV.
14. Law No. 11,909/09, art. 21, XI.
15. Law No. 9,472/97, art. 93, XV.
16. Law No. 10,233/01, art. 35, XVI.
17. Law No. 11,079/04, art. 11, III.
18. Law No. 12,351/10, art. 29, XVIII.
19. Law No. 9,307/96, art. 36.
20. Law No. 9,307/96, articles 38-39.
21. Decree No. 4,311/02.

Convention lies mostly overseas. Pursuant to the Convention, awards issued in Brazil become automatically subject to the same set of conditions for recognition and enforceability used by signatories to the Convention to enforce domestic awards[22].

This provision for equal protection plays a major role in the negotiations of an arbitration clause with a public entity because the majority of these entities must ensure that the seat of arbitration is located in Brazil.

Arbitration and Corporate Governance

A specific provision for arbitration in Corporate Law came about amidst the 2001 corporate-governance-driven reform of Law Nr. 6,404/76[23]. It provides that the bylaws of corporations may use arbitration in an attempt to settle all disputes between shareholders and a corporation, or between minority shareholders and controlling shareholders.

In addition, according to current São Paulo Stock Exchange (B3) regulations, all corporations listed in the New Market and in the Differentiated Corporate Governance Level 2, as well as their controlling shareholders, officers, directors and members of the audit committee, must resolve their disputes by arbitration conducted by the B3 Market Arbitration Chamber and be governed by its Rules[24].

The act that amended the Arbitration Act in 2015 also added a section in Law Nr. 6,404/76 providing that shareholders have a right to withdraw – sell their stock – if they do not agree to the inclusion of an arbitration clause in the company's bylaws.

Model Arbitration Clauses

Model clauses are widely published by arbitration institutions and can prevent disputes arising from ineffective provisions that often undermine arbitration proceedings. The Arbitration Act provides that defective clauses can still be enforceable by way of a lawsuit prior to arbitration in which the state court will fill in the blanks so that an Arbitral Tribunal can be assembled – taking parties' will into consideration.

As a general rule though, the arbitration clause should include provisions about:

- The scope of arbitration (which may or may not

include the enforcement of the agreement);

- The set of rules for arbitration, and whether to incorporate amendments thereto;
- The arbitration institution and, in some cases, alternate institutions to be used in the event the first-choice institution ceases to operate;
- The number of arbitrators and rules of appointment;
- The language to be used in the proceedings, including the hearings;
- The seat of the arbitration; and
- The judicial seat to resolve any disputes regarding the arbitration procedure – preliminary injunctions included.

ADR Institutions in Brazil

Parties can elect a particular institution to administer ADR proceedings in Brazil from a wide array of choices.

The British Chamber of Commerce and Industry is a founding member of the Chamber of Mediation and Arbitration of Eurochambers - CAE, located in São Paulo, in association with the Chambers of Commerce of Germany, Austria, Benelux, Spain, Finland, France, Greece, The Netherlands, Italy, Portugal and Sweden.

22. New York Convention, article III.
23. Law No. 6,404/76, art.109, paragraph 3, added by Law No 10,303/01, art.2.
24. BOVESPA, New Market Rules, Clause 13.1, and Differentiated Corporate Governance Levels 1 and 2, Clause 13.1.

Chapter 23

Compliance

Introduction

Due to several events over recent years concerning bribery and corruption among government officials, public entities and major corporations in Brazil, compliance has become a priority for investors who are considering business opportunities in the country, as well as for Brazilian companies that are interested in remaining eligible for investments and credit facilities. A compliance risk assessment has turned out to be an essential step before the conclusion of any corporate transaction held in Brazil in order to avoid exposure to heavy fines and/or other sanctions that may have an adverse impact on companies' activities.

Since the late 1990's, Brazil has focused more intensely on preventing corruption and bribery practices, with the enactment of an anti-money laundering regulatory regime supported by Law No. 9,613/1998 (amended by Law No. 12,683/2012). Although such regulation was important in strengthening the national financial system and providing criminal consequences for behaviour associated with money laundering, it was necessary to adopt a broader approach to this matter and one that was more aligned with other international commitments assumed by many countries but

not Brazil at that time.

In 2000, Brazil joined and ratified the "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions" issued by the Organization for Economic Co-operation and Development, a landmark in the prevention of corruption and bribery. In 2003, Brazil renewed its commitment to adjusting its domestic legislation after signing the "United Nations Convention against Corruption", ratified by a presidential decree in 2006. Both events were crucial to expressing Brazil's clear intention to assume a better position in the global market and attract long-term investments from clean companies.

The adherence to such international conventions introduced Brazil to another level in the fight against corruption and bribery and encouraged the country to promote more effective actions to develop a safer and more transparent business environment. Based on the commitments expressed in said conventions, Brazil agreed to approve laws that address matters such as compliance, anti-corruption and anti-bribery following broadly accepted international standards.

The purpose of the new legal framework related to such matters was not only to introduce compliance in the agenda of all organisations that deal with the Brazilian government at all levels (*i.e.*, federal, state and local) and with foreign public administrations, but also to impose administrative liability on legal entities for unlawful acts against governmental authorities or public interest such as those involving bribery and corruption.

The laws then enacted represented a powerful tool and the authorities have applied it on many occasions, launching several operations and investigations to dismantle schemes involving the misuse and deviation of public funds and improper relationships between public and private sectors. Companies in Brazil were forced not only to assess and control internal risks, but also to develop a business culture guided by a stricter observance of the law and principles of ethics, transparency and corporate responsibility.

The Challenges to introducing Compliance into Brazilian Legislation

In order to fulfil international commitments and reach the highest standards in compliance, it was necessary to adapt the existing Brazilian legislation and conceive new rules designed to

govern several subjects united under the title of compliance.

Although compliance is usually associated with fraud, corruption and bribery prevention, the target is not that simple since it is intended to pursue and avoid certain forms of behaviour that may harm the public administration or interest. Harmful acts practiced by legal entities against the government and society may not always be that easy to identify.

Compliance also refers to certain intangible values that orient and determine business relationships, even those between private-owned companies or among top management, employees and companies' collaborators (*e.g.* suppliers, service providers, business partners). It was certainly a challenge to turn conceptual discussions concerning proper behaviours while doing business in Brazil into law, especially with governmental authorities.

Moreover, under Brazilian law, the liability of legal entities is limited to the fields of administrative and civil law, which usually result in pecuniary penalties and indemnification of damages. Corporations can only be held criminally liable in exceptional cases, restricted to environmental crimes. On the other hand, individuals may be held criminally liable and investigated for corruption, for instance.

The complexity of the Brazilian legal system that simultaneously punishes the same conduct in different spheres of liability, such as criminal, administrative and civil, was also an obstacle.

The Brazilian Criminal Code already establishes penalties for embezzlement, corruption, influence peddling and fraud, amongst other crimes. In addition to this regulation, there are specific laws that also regulate conduct and penalties.

The Public Improbity Act punishes conduct that may cause damage to the public administration. The acts set forth under this law are organized in three groups: (i) promotion of unjust enrichment of public agents; (ii) embezzlement of public money; and (iii) violation of public administration principles or duties of honesty, impartiality, legality and loyalty related to a public office. The penalties include compensation for damages, suspension of political rights and fines, amongst others.

In addition to the Brazilian Criminal Code and the Public Improbity Act, there are other laws to observe such as the Organized Crime Act, the Bidding Law, and the statutes governing white-collar crimes.

The new legal framework does not supersede already existing laws and investors must be aware of such diversity of laws and the lack of one single act that consolidates all possible liabilities that may apply to an individual or his/her organisation.

Clean Company Act

A significant development in the fight against fraud, bribery and corruption was the enactment in 2013 of Law No. 12,846, Brazil's so-called 'Clean Company Act'. Such law was the first specific anti-bribery and anti-corruption legal instrument in Brazil. The Act provides severe civil and administrative responsibilities for all legal entities regardless of their organisational form or corporate structure; however, it does not set a criminal liability for companies as do the UK Bribery Act or the US Foreign Corrupt Practices Act.

In order to avoid misunderstandings, the Brazilian Clean Company Act listed all forms of conduct considered to be against the national and foreign public estate or interests, and provided for the strict liability of legal entities at both civil and administrative levels for bribery practices involving government officials and public entities in Brazil or abroad. The Act sets forth that legal entities' liability does not exempt its directors, officers or any individual who is involved with the unlawful act from personal liability.

The liability of legal entities shall survive any amendment to its articles of association or any corporate reorganisation such as mergers, spin-offs and amalgamations.

The Act imposes severe penalties, such as the publication of the decision nationwide and fines of up to 20% of the company´s gross revenue in the previous year depending on the seriousness of the offense and the negative results caused by the unlawful act, amongst other considerations. In the event that determination of the gross revenue for the application of the fine is not possible, the Act provides reference figures that start from R$ 6,000.00 and may reach R$ 60 million. It is important to point out that the payment of the fine does not exclude the obligation to fully compensate the damages caused.

According to the Act, parent companies, subsidiaries, affiliates or consortium members are jointly and severally liable for the practice of unlawful acts by a legal entity that is a member of its corporate group or consortium. However, such liability is limited to

the payment of penalty fines and the full compensation of the damages caused.

From a civil liability perspective, the courts may order: the forfeiture of assets, rights or amounts representing advantage or profit directly or indirectly obtained from the infraction; prohibition from receiving incentives, subsides, grants, donations or loans from public agencies and public financial institutions or from financial institutions controlled by the government; partial suspension or interdiction of the company's activities; or the shutting-down of the company as the ultimate and most severe measure.

However, in the event the company: (i) acknowledges the misconduct; (ii) firmly collaborates with the investigations; and (iii) the investigation results in the identification of the persons involved in the violation, said company can qualify to obtain the benefits of a leniency agreement. According to the Clean Company Act, the maximum authority of each agency or public entity may enter into leniency agreements with legal entities held accountable under the Act that effectively cooperate with the investigations and the administrative proceeding.

Notwithstanding, the abovementioned agreement can only be executed if the following requirements are cumulatively fulfilled: (i) the company shall be the first to declare its interest to cooperate with the investigation of the unlawful act; (ii) the company completely ceases its participation in the investigated infraction from the date upon which the agreement is proposed; and (iii) the company recognizes its involvement in the unlawful act and fully cooperates with the investigations and administrative proceeding, sending representatives to attend, whenever requested and at its own expenses, all procedural acts until the conclusion of the administrative proceedings.

The leniency agreement can cause the reduction of the fines by up to two-thirds of the total applicable fine, and the company may also be exempt from other sanctions. It is important to emphasize, however, that the execution of a leniency agreement does not release the company from the obligation to fully repair the damages caused.

The effects of the leniency agreement shall be extended to legal entities of the same economic group, provided that such legal entities agree to sign the agreement and be bound by the same terms and conditions.

Moreover, the penalties could also be reduced if the company

proves to have internal compliance mechanisms and procedures, as well as auditing proceedings, encourages whistleblowing, and has effectively implemented codes of ethics and conduct.

Considering the ambiguous wording and lack of details, the Act did not make it clear how companies could obtain such benefits. In March 2015, Decree No. 8,420 was enacted to regulate the Clean Company Act. The regulation not only clarified the benefit granted to companies' subject to penalties under the Act, but also outlined the requirements for identifying the effectiveness of a compliance program under the Act.

Decree No. 8,420/2015 provided for a 1% to 4% reduction in the penalty fee if the company evidences that it has an effective compliance program that fulfils all the listed requirements. According to the regulation, the effectiveness of a compliance program is measured by the following guidelines:

1. the firm commitment to the program from the highest senior level management;
2. the existence of clear rules, procedures, standards, and policies of ethical behaviour and integrity, applicable to all employees and managers regardless of their position;
3. periodic training;
4. the permanent assessment of risk to update the compliance program;
5. internal controls to ensure that the reliability of financial statements, books, and records are accurate and complete;
6. the independence of a compliance officer(s) in charge of implementing and enforcing the program;
7. the continuous monitoring of the program to improve the prevention, detection, and remedy of any failure;
8. the existence of communication channels where employees and third parties are free to report offenses and where whistleblowers acting in good faith are protected;
9. the procedures to prevent fraud and illegalities in public tenders, administrative contracts, or any

interaction with the public sector, are firmly in place;

10. disciplinary sanctions in case of violation of the compliance program;
11. transparency with respect to donations to candidates and political parties;
12. measures to ensure the prompt interruption of irregularities or violations and the prompt remedying of damages generated.

Ancillary Regulations

In April 2015, the Brazilian Comptroller General issued Ordinance No. 909 to assist authorities in the assessment of compliance programs, providing the necessary steps for verifying the enforcement of the requirements established by Decree No. 8,420/2015.

The Ordinance provides that a company that is involved in an investigation of a wrongful act under the Brazilian Clean Company Act must submit a profile report and a compliance report in order to obtain the assessment of its program and become eligible for a penalty fee reduction. In addition, the company must prove that its daily routines fulfil the provisions set forth by its program, including details of the compliance program on prevention, detection and mitigation of harmful events that are under investigation. The authorities are firmly committed to granting the benefit of a penalty fee reduction only to those companies that have an effective compliance program and not a fake one.

As the Clean Company Act is a Federal law, most of the states in Brazil have adopted similar initiatives to prevent corruption and bribery and support compliance at State level. The States' clean company acts are generally similar to the Federal one, but it is still advisable to review the local legislation before making a business decision. With the enactment of local acts, investors must consider that penalties may be applied at both Federal and State levels.

Medium and small-sized companies are also subject to compliance, but under rules more suitable to their business structure, pursuant to Ordinance No. 2,279/2015 issued by the Office of the Comptroller General and the Federal Secretariat of Micro and Small-sized Companies.

The Clean Company Act is promoting several changes in corporate organisations in Brazil, since compliance has become a priority in their agenda, not only to be eligible for benefits in case of the filing of an administrative proceeding or investigation, but mainly to evidence to the market, lenders, business partners and customers that the company pursues on a permanent basis the status of a clean company in full compliance with the applicable laws and regulations.

From a governmental perspective, Law No. 13,303/2016 and Decree No. 8,945/2006 provide regulations for state-owned companies, mixed-capital companies and their subsidiaries, that include mandatory requirements for the development of compliance programs and other actions similar to those foreseen in the Clean Companies Act. The Decree also reinforced that the penalties provided in the Clean Company Act also apply to state-owned companies, mixed-capital companies and their subsidiaries.

Contributors

1. AN OVERVIEW OF BRAZIL

Introduction
Written by: Control Risks do Brasil
Updated by: Primos e Primos Advogados

The Political System
Written by: Control Risks do Brasil
Updated by: Correia da Silva Advogados

Political Divisions
Written by: Control Risks do Brasil
Updated by: Primos e Primos Advogados

The Legal System
Written by: Control Risks do Brasil
Updated by: Ulhôa Canto Advogados

Recent Political and Economic History
Written by: Control Risks do Brasil
Updated by: Correia da Silva Advogados

International Treaties
Written by: Ulhôa Canto Advogados

Logistics
Written by: Demarest Advogados

2. FOREIGN INVESTMENT IN BRAZIL

Direct Investment
Written by: Domingues e Pinho Contadores

Indirect Investment
Written by: TozziniFreire Advogados
Updated by: Domingues e Pinho Contadores

3. CORPORATE LAW

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Written by: De Luca, Derenusson, Schuttoff e Azevedo Advogados
Updated by: Graça Couto Advogados

Duties and Liabilities of Directors and Officers
Written by: Loeser e Portela Advogados
Updated by: Lessa Bastos Advogados

Resignation of Directors and Officers
Written by: Loeser e Portela Advogados
Updated by: Gaia Silva Gaede Advogados

Restructuring and Insolvency
Written by: Felsberg, Pedretti e Mannrich Advogados e Consultores Legais
Updated by: Correia da Silva Advogados

Media and Foreign Investment
Written by: Felsberg, Pedretti e Mannrich Advogados e Consultores Legais
Updated by: Demarest Advogados

Managers and Investors' Liability
Written by: Mourão Campos Sociedade de Advogados

4. CORPORATE CRIMINAL LAW

Written by: Técio Lins e Silva, Ilidio Moura & Advogados Associados
Updated by: TozziniFreire Advogados

5. CONTRACT LAW

The Agency and Distribution Relationship
Written by: Henry Advogados Associados
Updated by: Primos e Primos Advogados

The Franchising Agreement
Written by: Henry Advogados Associados

Electronic Commerce
Written by: Souza, Cescon, Barrieu & Flesch Advogados
Updated by: Demarest Advogados

6. TAX LAW

General Rules of Brazilian Tax System
Written by: Castro Barros Advogados

Taxation of Indirect Investment
Written by: Tauil & Chequer Advogados Associado a Mayer Brown LLP
Updated by: Castro Barros Advogados

Transfer Pricing on Commercial and Financial Transactions
Written by: Gaia Silva Gaede Advogados

Tax Aspects of Electronic Commerce
Written by: PricewaterhouseCoopers Auditores Independentes
Updated by: Demarest Advogados

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Written by: KPMG Auditores Independentes
Updated by: Demarest Advogados

Tax Incentives
Written by: KPMG Auditores Independentes

7. LABOUR LAW

Employment Law
Written by: TozziniFreire Advogados
Updated by: Correia da Silva Advogados

Immigration and Expatriate Rights
Written by: Nabas International Lawyers

Stock Option Plans
Written by: Machado Associados Advogados e Consultores
Updated by: Correia da Silva Advogados

8. BANKING LAW

Written by: TozziniFreire Advogados

9. PROJECT AND TRADE FINANCE

Project Finance
Written by: Souza, Cescon, Barrieu & Flesch Advogados
Updated by: Machado Meyer Advogados

Trade Finance
Written by: Correia da Silva Advogados
Updated by: Machado Meyer Advogados

10. COMPETITION LAW

Updated by: Correia da Silva Advogados

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Written by: Pinheiro Neto Advogados
Updated by: Castro Barros Advogados

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Written by: Castro Barros Advogados

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Written by: TozziniFreire Advogados

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Written by: Pinheiro Neto Advogados
Updated by: Graça Couto Advogados

Enforcement of Laws and Regulations: The Question of Liability
Written by: Machado, Meyer, Sendacz e Opice Advogados
Updated by: Graça Couto Advogados

13. REAL ESTATE AND PROPERTY

Written by: TozziniFreire Advogados

14. REGULATED SECTORS

Telecommunications (ANATEL)
Written by: Souza, Cescon, Barrieu & Flesch Advogados
Updated by: Correia da Silva Advogados

Electric Energy (ANEEL)
Written by: Pinheiro Neto Advogados
Updated by: Correia da Silva Advogados

Oil & Gas (ANP)
Written by: Tauil & Chequer Advogados Associado a Mayer Brown LLP
Updated by: Ulhôa Canto Advogados

Health (ANVISA and ANS)
Written by: Correia da Silva Advogados

Hydro Resources (ANA)
Written by: TozziniFreire Advogados

Cinema (ANCINE)
Written by: Correia da Silva Advogados
Updated by: Primos e Primos Advogados

Transport (ANTAQ, ANTT and ANAC)
Written by: TozziniFreire Advogados

15. SOCIAL SECURITY

Written by: PwC Auditores Independentes

16. INSURANCE & REINSURANCE

Insurance
Written by: De Luca, Derenusson, Schuttoff e Azevedo Advogados
Updated by: JLT Brasil

Reinsurance
Written by: JLT Brasil

17. INTELLECTUAL PROPERTY

Patents
Written by: Kasznar Leonardos Advogados

Trademarks
Written by: Demarest Advogados

Well-known Trademarks
Written by: Daniel Advogados
Updated by: Demarest Advogados

Law for Innovation in Technology
Written by: Correia da Silva Advogados

Domain Names
Written by: Montgomery & Associados

IP and the Internet
Written by: Montgomery & Associados

Biotechnology
Written by: Kasznar Leonardos Advogados

Copyright and Software
Written by: Montgomery & Associados

Piracy
Written by: Kasznar Leonardos Advogados

18. CONSUMER RIGHTS

Written by: TozziniFreire Advogados

19. AVIATION

Written by: Machado Meyer Advogados

20. SPORTS LAW IN BRAZIL

Written by: Demarest Advogados

21. INTERNATIONAL TRADE

Brazilian International Relations
Written by: TozziniFreire Advogados

International Trade and Customs Regulations
Written by: TozziniFreire Advogados

Trade Remedies
Written by: TozziniFreire Advogados

Customs Regime
Written by: Primos e Primos Advogados

22. DISPUTE RESOLUTION

Traditional Dispute Resolution
Written by: Correia da Silva Advogados

Alternative Dispute Resolution
Written by: Graça Couto Advogados

23. Compliance

Written by: Ulhôa Canto Advogados