

# **LEGAL GUIDE: BUSINESS IN BRAZIL**

**COORDINATED BY DURVAL DE NORONHA GOYOS, JR.**

**9<sup>TH</sup> EDITION**

**2014**

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# **LEGAL GUIDE:**

## **BUSINESS IN BRAZIL**

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Although every effort has been made to assure the accuracy of the information contained in this guide as of the date of publication, nothing herein should be construed as giving legal advice. Obviously, the law is subject to change, and it changes very often in Brazil. In addition, the application of the law to specific circumstances can present complex issues that are beyond the scope of this guide. This publication is intended to provide general legal information pertaining to investing or doing business in Brazil. NORONHAADVOGADOS will be pleased to provide more detailed information on request.

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# **I. INTRODUCTION TO THE FIRST EDITION**

As we approach the year 2000, we can be encouraged, even excited, about the promise of new opportunities. The world is changing politically and economically. Markets are expanding, and trade barriers are falling. As a result, business is becoming more competitive every day. For decision-makers, access to accurate and timely information is no longer a luxury; it is indispensable in today's business climate.

Brazil has the eighth-largest economy in the world. In the past decade, Brazil has had a continuously-sustained and significant surplus in its balance of trade in volumes only exceeded by a few other countries and, despite numerous difficulties, offers unique opportunities for success.

The Country's re-democratisation has provided the necessary institutional climate for economic activity; the democratic institutions have worked admirably well even under stress. The modernisation of the legal structure and the reduction of the presence of the State in the economy have enormous popular support and have been implemented gradually but firmly. Even more exciting for anyone doing business in or with Brazil is the Country's enormous potential for growth as it progressively reduces trade restrictions and moves toward free trade.

It is our belief that Noronha's "Legal Guide: Business in Brazil" provides relevant information to business leaders who need to plan investments in this fascinating part of the world. The Guide is designed as an introduction to doing business in or with Brazil, covering such basic areas as taxation, corporations, investments, intellectual property, informatics, finance, environment, public bids, Mercosul and others. We believe it contains valuable basic information for businessmen, lawyers, economists and anyone interested in learning more

*Legal Guide: Business in Brazil*

about Brazilian legislation affecting business. The Guide will also serve law students well as an introduction to Brazilian Business Law.

The Guide was written by some of the partners of NORONHA - ADVOGADOS, an international law firm based in São Paulo and with offices in Rio de Janeiro and Brasilia, Brazil; Miami, U.S.A.; London, U.K.; Zurich, Switzerland; and Lisbon, Portugal. We have tried to strike a balance by making the Guide concise enough to enable the reader to absorb the information quickly, but broad enough in scope to cover all the basic questions most frequently asked by businessmen and lawyers. We hope the reader will find this guide informative and helpful in making business decisions.

September, 1992

Durval de Noronha Goyos, Jr.

## **II. INTRODUCTION TO THE SECOND EDITION**

The first edition of “Business in Brazil -Legal Guide”, published in 1992, was an instant success and was completely sold out by 1994. Thus, it was only with the greatest reluctance that we did not have a second printing of the first edition, in view of the fact that a good portion of the book had become outdated as a result of the enormous transformations in the Country’ s legal structure since 1992.

In addition, there were a number of different bills underway in Congress that could have decisively affected a second edition, rendering it instantly outdated.

Therefore, we decided to wait until the major constitutional reforms passed in Congress and, as a consequence, the 2nd Edition of “Business in Brazil -Legal Guide” is not only completely updated as to the general constitutional framework but also the different legal areas it covers: taxation, company law, technology, etc. The book has a new chapter on competition law, inserted as a result of legal developments in 1994 and 1995. It also has a new more comprehensive chapter on the Brazilian financial system, following the liberalisation of the sector which took place in 1995. The chapter on international treaties addresses the latest developments of the World Trade Organisation (WTO) and MERCOSUL.

We are confident the second edition of “Business in Brazil- Legal Guide” will be of enormous assistance to all those interested in doing business in or with Brazil, as well as to law students and those who desire to become better familiarised with Brazil’s legal structures.

Cortina, 18 February 1996

Durval de Noronha Goyos, Jr.



### **III. INTRODUCTION TO THE THIRD EDITION**

The third edition of “Business in Brazil: Legal Guide” follows the success of the previous editions of 1992 and 1996, which met with remarkable success in Brazil and abroad, in both the private and public sectors, and were used not only by investors from abroad wishing to learn more about the Country’s legal structures, but by government agencies involved in international negotiations, professionals, journalists and by university students.

The third edition became necessary not only because the second had been fully sold out, but also as an update was needed in order to consider the numerous legislative innovations introduced in Brazil during Mr. Fernando Henrique Cardoso’s administration. Such new legislative initiatives have been brought about with a view to modernising the Country’s legal structure and thus to facilitate the business climate, to enhance the competitiveness of the companies established locally, and to make Brazil more attractive for investments from abroad.

Among several of the alterations brought to the Brazilian legal system, we can cite the approval of Law 9.307 in September of 1996, which deals with arbitration procedures; the enactment of Law 9.457 in May of 1997, modifying Law 6.404/76, with relation to the question of company law and the rights of minority shareholders; as well as the approval of the new Brazilian Industrial Property Code of May, 1996, which replaces the previous Code of 1971. Apart from these domestic legal innovations, this guide also describes general events which have taken place affecting Brazil’s foreign affairs. Mercosul has been enlarged, with the accession of Chile and Bolivia as associated States. International commitments, particularly those concerning the financial statements of banks, have advanced with the approval of Central

Bank Resolution n. 2.302 of July, 1996, thereby complying with the Basel Convention. The area of corporate competition policy, regulated in the Country since 1962, has become very active and the Brazilian antitrust agency, CADE, has further regulated the matter by means of Resolution 05 of August, 1996. New anti-dumping rules have been adopted in Brazil, in accordance with the Country's WTO commitments. Not only does this third edition discuss these and other legal modifications, but it also describes the recent federal level privatisation programme, which expanded throughout 1997 and is considered to be one of the largest undertakings in the world's developing economies. The programme covers the areas of telecommunications, oil and electric energy, producing policies to be implemented in each of these sectors, as defined in Laws 9.472/97, 9.478/97 and 9.427/96, respectively. This programme will also continue throughout 1998.

It gives us at Noronha Advogados great pleasure to launch the third edition of our "Business in Brazil: Legal Guide" at a moment when Brazil has become one of the world's favourite recipients of international investments and in the year we celebrate the 20th anniversary of our firm's foundation. We are confident the reader of "Business in Brazil: Legal Guide" will find the publication very practical and eminently useful.

São Paulo, January, 1998

Durval de Noronha Goyos, Jr.

## **IV. INTRODUCTION TO THE FOURTH EDITION 2000**

Our book, “Legal Guide: Business in Brazil”, has become the reference work for those interested in the Brazilian legal infra-structure. Its 1998 edition entirely sold-out within 18 months of its launch, in view of the growing international interest in Brazil. In fact, in 1998 and 1999 Brazil received foreign direct investments of approximately US\$ 59 billion, which is not only a flagrant recognition by the international community of the enormous business opportunities the Country has to offer at present but also a firm perception that the legal reforms in progress under the present Administration are a clear indication that the prospects for the medium and long terms are even better.

During 1998 and 1999, the Brazilian legal environment was further liberalised. There were changes in areas of insurance; taxation; company law; foreign exchange; competition law; energy law; labour law; social security and banking, among others.

This Fourth Edition - 2000 of the “Business in Brazil: Legal Guide” has been entirely reviewed, up-dated and expanded with the inclusion of new chapters on insurance, on account of the liberalisation of the sector, labour law and consumer protection.

We at NORONHA ADVOGADOS are delighted to launch this Fourth Edition - 2000 of our Legal Guide in the year of the celebration of the 500th anniversary of the discovery of Brazil by the Portuguese navigator, Pedro Alvarez Cabral, on 23 April 1500. To mark this event, we have changed our traditional cover in order to insert photographs of two Portulans (navigation maps) dated 1561 and 1597, which belong to the art collection of NORONHA ADVOGADOS.

São Paulo, 11 January 2000

Durval de Noronha Goyos, Jr.

Senior Partner



## **V. INTRODUCTION TO THE FIFTH EDITION 2001**

Fifth Edition - 2001 of “Business in Brazil: Legal Guide” is a complete revision of all the chapters of the fourth edition to the book, covering the areas of, inter alia, company law, banking, taxation, labour law, consumer protection, bids, competition law, insurance, intellectual property, litigation, arbitration, Mercosul, privatisation, energy, electronic commerce, anti-dumping and immigration. This effort was made to incorporate new information and to update the legislation references of the fourth edition.

We remain confident that this new edition will be of enormous assistance to all those interested in doing business in and/or with Brazil.

São Paulo, June, 2001.

Durval de Noronha Goyos, Jr.

Senior Partner



## **VI. INTRODUCTION TO THE SIXTH EDITION 2003**

The sixth edition of our “Legal Guide: Business in Brazil” has undergone important up-dating as a result of the entry into force, in January of 2003, of the new Brazilian Civil Code, which brought important alterations “inter alia” in the matter of company formation. In addition, since the fifth edition was published, a new company law was enacted in Brazil in 2001.

Similarly, the alterations in taxation occurred since the fifth edition was published have been duly incorporated into this 6<sup>th</sup> edition. In the area of intellectual property, we have expanded our coverage to include the matters of technology supply and technical and scientific assistance services. A new item on franchising has been also included.

The chapter on the Brazilian financial system has been up-dated taking into consideration the recent legal developments including Constitutional Amendment number 40, of 2003 and National Monetary Council Resolution 3,040, of 2002. Totally new chapters on entertainment, internet and e-commerce and sports law have been inserted.

It has now been 11 years since the first edition of our “Legal Guide: Business in Brazil” was originally published in September of 1992. During this period, our book became the reference work in the area. We are confident that the new sixth edition will remain indispensable for those who wish to do business in or with Brazil and delighted to release it when our firm, NORONHA ADVOGADOS, completes its 25<sup>th</sup> Anniversary.

São Paulo, 6 October, 2003.

Durval de Noronha Goyos Jr.

Senior Partner



## **VII. INTRODUCTION TO THE SEVENTH EDITION 2007**

It has been 15 years since the first edition of Business in Brazil: Legal Guide was published. During this time Brazil has taken great strides towards increasing the prosperity of its people and has made improvements as a nation despite all the political, social and economic problems it has faced. As a matter of fact, such problems reflect the Brazilian society's struggle to preserve its heritage and culture whilst improving its way of life under the rule of Law.

The introductions to the past editions of Business in Brazil: Legal Guide provide a good notion of the advances made by the nation:

- a) the introduction to the first edition (1992) noted that the country had just undergone its re-democratisation, with the enactment of the 1988 Federal Constitution, thus providing the necessary institutional climate for economic activity;
- b) the introduction to the second edition (1996) underlined the enormous transformation to the Country's legal structure, noting the enactment of a new Competition Law, the liberalisation of the Brazilian financial system and the country's inclusion in the major foreign trade issues;
- c) the introduction to the third edition (1998) showed the country immersing itself in its privatization programme as well as the enactment of other important laws such as those relating to the protection of Intellectual Property, arbitration and commercial defence;
- d) the introduction to the fourth edition (2000) describes the further liberalization of the Brazilian legal environment in many areas such as insurance, taxation, company law, foreign exchange, competition

law, energy law, labour law, consumer protection, social security and banking.

- e) due to the short period of time since the previous edition, the introduction to the fifth edition (2001) reflects on the finalisation of this liberalization in various legal areas;
- f) finally, the introduction to the sixth edition (2003) reports on a major legal change, the enactment of a new Civil Code, and gives an indication of the legal developments in new or expanding areas of business activities, such as the e-business, entertainment and sports.

It is no wonder that, after these considerable efforts, Brazil is now experiencing a period of good fortune which benefits not only its people but also those of other nations who have been interacting with and profiting from the current Brazilian business environment.

Even though the ever changing legal environment is a constant phenomenon in a democratic nation, the most important laws for modern Brazilian society had already been established before the 2003 edition of this book and it is due to this that four years have passed since the last edition. Additionally, we have expanded the range of legal matters by covering the topics of Maritime, Aviation and Agrarian Law, so as to satisfy the respective interests in these areas of an ever expanding group of businessmen and governmental agents.

We are confident that this seventh edition of *Business in Brazil: Legal Guide* will be well received by those who wish to do business in or with Brazil and we are proud that the team at NORONHA ADVOGADOS is capable of following *pari passu* the legal transformation Brazil has undergone throughout these years and that we can offer this important tool to understand the same.

São Paulo, November, 2007

Durval de Noronha Goyos Jr.

Senior Partner

## VIII. INTRODUCTION TO THE EIGHTH EDITION 2011

Once again we have the pleasure of coming to your presence, this time to introduce the expanded eighth edition of our **Legal Guide: Business In Brazil**.

Indeed, as time went by, we at Noronha Advogados can surely appreciate how steady Brazil's economic and social development has become. Now we have the proud and joy in also proclaiming the widespread news: Brazil is no longer a country of the future; Brazil is the present and future!

From the political perspective, the nations' still young democracy has been working quite well. Periodical elections of our representatives have taken place in an ideological, yet peaceful combat, and those politicians who deserved popular support have been able to run their mandates until the end of the term. No more *coupe de etat* or imposed governors and strong popular surveillance on the politicians have marked the political environment since the enacting of the prevailing Federal Constitution in 1988. We also realise that the public institutions have also being performing their duties in a correct fashion, even though there is still a lot of room for improvement.

On the social and economic side, in the last few years many signs of sustainable development can be noted. Millions of Brazilians have upgraded their lives as statistics show their inclusion in an ever increasing middle class. The way that nation handed the international 2008 financial crisis, being the last to be dragged in by its effects and the first to get release, is another sign of economic health. Therefore, it is no wonder that the eyes of the world's investors are focusing the ever increasing business opportunities the country offers in many economic segments like energy, oil & gas, communications, transport, agribusiness, banking, capital markets, ports and airports, environment and so on.

This Government that took office on 1st of January 2001 must take care of the expansion and improvement of the country's infrastructure so that it may keep the pace and rhythm with this strong and steady economic surge.

We hope you have the chance to participate in this unique moment of Brazil. In this case you can count on us by your side.

São Paulo, June 2011

Durval de Noronha Goyos Jr.

Senior Partner

## **IX. INTRODUCTION TO THE NINTH EDITION 2014**

It gives us at Noronha Advogados great pleasure to bring you the Ninth Edition - 2014 of “Business in Brazil: Legal Guide”, which offers a complete review and update of all the chapters of the previous edition of the guide, covering the areas of, inter alia, company law, banking, taxation, labour law, consumer protection, bids, competition law, insurance, intellectual property, litigation, arbitration, privatization, energy, electronic commerce, trade remedies and immigration.

The first edition of “Business in Brazil: Legal Guide” was published in 1992, when the country suffered great economic, social and financial difficulties. Brazil is now a strong and solid democracy recognized as such worldwide, with a prosperous economy which is now seeking to grow with sustainable development, re-distributing wealth to millions of Brazilian, including a predominant middle class with its strong power of consumption.

The country became the world’s top destinations of foreign direct capital investment and is a recognized leader of developing nations. Its companies have become multinational investing abroad and its development bank supports initiatives both domestically and internationally.

General elections will take place in the last quarter of this year. As was observed during several popular nationwide protests in June 2013, the new Government will need to listen and attend to a more demanding population, who, inter alia, seek more political transparency with a more efficient administration of public funds and the expansion and improvement of the country’s infrastructure system.

Besides, the expansion and improvement of the country’s basic works, the new Government will face the challenge of keeping the pace and rhythm

of Brazil's economic growth, as well as increasing demands from the business sector for greater structural reforms, including on tax, social security, corporate and labour issues.

In the international field, Brazil remains on course, gradually but firmly, expanding its markets worldwide. In July 2014, Brazil hosted the 6<sup>th</sup> BRICS summit in Fortaleza. The group made up of Brazil, Russia, India, China and South Africa, signed a deal to create the BRICS Development Bank, which will provide financing for infrastructure and development projects in BRICS countries. One of the aims of the bank is to create alternative financing opportunities compatible with a more multi-polar world.

We are confident the reader of "Business in Brazil: Legal Guide" will find the publication very practical and eminently useful and that it will remain indispensable for those who wish to do business in or with Brazil.

We hope you have the chance to take advantage of this unique moment for Brazil and its economy and you can be sure that we will be there to offer any advice and assistance that you may require.

São Paulo, August 2014

Durval de Noronha Goyos Jr.

Noronha Advogados

President

## BASIC INFORMATION

Brazil is fortunate to be located in the east-central part of South America, where it borders almost all other South American countries except Chile and Ecuador. Brazil is a large country that, with an area of 3,286,488 square miles, covers almost 48% of South America.

Brazil's eastern seaboard extends some 7,408 kilometres along the Atlantic Ocean. The Country's major ports are Santos, Rio de Janeiro, Tubarão and Paranaguá.

Brazil is comprised of 26 states plus its capital, the Federal District of Brasília. The Country is divided geographically into 5 different regions: North, Northeast, Southeast, South and West-Central.

The Southeast region is the most prosperous and most highly industrialised and is where Brazil's major cities are located, as demonstrated by the Brazilian Institute of Geography and Statistics ("*Instituto Brasileiro de Geografia e Estatística*" – IBGE) in 2013:

São Paulo	-	11.821.873 inhabitants
Rio de Janeiro	-	6.429.923 inhabitants
Belo Horizonte	-	2.479.165 inhabitants

The Northeast is the least developed region, due in part to its harsh physical characteristics. In addition, there is a lack of investment in the Northeast because the South and the Southeast have better infrastructures for industry and manufacturing and thus are more attractive for doing business. This situation is likely to change as the South and Southeast become more and

more saturated. Investments in infrastructure and tourism in the Northeast have also been increasing in a steady pace.

Brazil's soil consists mostly of settled earth, with mountainous areas higher than 900 meters representing only about 7% of the total surface area. Most of Brazil's terrain is composed of plateaus and prairies.

Both the Equator and the Tropic of Capricorn cross Brazil, making the climate primarily warm and tropical with an annual average temperature of 20°C (68°F).

The population of Brazil is currently estimated at 202.033.670 inhabitants, and this number is likely to double within the next 35 years. The population is young; 59,89% of Brazilians are under 30 years old. The country has a population density of 23 inhabitants per square mile with 85,43% of the population living in urban areas.

Brazil is a Federal Republic and has had 8 Constitutions. The first Constitution was signed in 1824, and the current one was enacted in 1988. The 1988 Federal Constitution is regarded as the most democratic in Brazilian history.

The Federal Government has 3 branches: the Executive, the Legislative and the Judiciary.

As a former Portuguese colony, the official language is Portuguese, which is spoken by 97% of the population. Amerindian languages are spoken by 2% of the population and 1% speaks other languages.

# 1. FORMS OF FOREIGN INVESTMENT

## 1.1. General Features

Foreign Capital in Brazil is governed by Law n. 4.131 (“Foreign Capital Law”) of 03 September 1962 and the respective subsequent amendments. The Foreign Capital Law is regulated by Law n. 4.390, of 29 August 1964 and by the Decree n. 55.762, of 17 February 1965, as amended.

The law defines Foreign Capital as “any goods, machines and equipment coming into Brazil with no initial foreign currency expense, for the production of goods or services, as well as financial and monetary funds coming into Brazil to be invested in economic activities, provided that in both cases these assets belong to individuals or legal entities either domiciled or headquartered abroad”<sup>1</sup>.

The local Exchange Market encompasses:

- (i) transactions involving either the purchase or the sale of foreign currency;
- (ii) transactions involving national currency between residents in Brazil and residents abroad; and
- (iii) transactions involving other exchange mechanisms, carried out through the intermediation of institutions authorized by the Central Bank of Brazil to operate in the Exchange Market.

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1 Article 1, of Law n. 4.131/62

In addition, any individual or company can purchase and/or sell foreign currency or perform international transfers of Brazilian currency, of any nature, without any limitation in amount, observing the legality of the operation, including its taxation aspects, as long as the economical basis and the respective responsibilities are set out in the documents of the respective transaction.

Accordingly, the Central Bank of Brazil enacted in 2005, the International Capital and Foreign Exchange Market Regulation (*Regulamento do Mercado de Câmbio e Capitais Internacionais - RMCCI*), currently regulated by Circular no. 3.650/2013.

With remittances from a foreign country to Brazil, remittances originating from Brazil must be processed through institutions authorized to operate with foreign exchange under the supervision of the Central Bank.

## **1.2. The Central Bank of Brazil and Foreign Capital**

The Central Bank of Brazil is responsible for maintaining a special register of all foreign capital, irrespective of the procedure used to bring it into or out of the Country. Records are kept of the following transactions:

- (a) direct investments and loans, whether in cash or goods;
- (b) remittances effected as return of capital or as earnings of such capital, profits, dividends, interest, amortization, as well as royalties for payment of technical assistance, or by means of any other title which represent the transfer of earnings to a foreign country;
- (c) reinvestment of foreign earnings; and
- (d) capital increases of companies, effected in accordance with the Law.

Foreign capital is registered in the currency received in Brazil and, in the case of financial imports and investments in the form of goods, in the currency of the location of the creditor's or investor's domicile or head-office. In special cases, foreign capital may be registered in the currency of the country of origin of the goods or financing, but only if a previous approval is granted by the Central Bank.

Once registration is complete, the foreign investor is permitted to remit profits and dividends abroad, pursuant to Law n. 4.131/62 and other norms in force.

Repatriation of foreign capital invested in Brazil is also permitted at any time up to the limit of the amount registered with the Central Bank, which may request that an assessment report be prepared in accordance with the prevailing regulation, as well as other information as it may think relevant.

For foreign investment in a financial institution or entities authorized by the Central Bank of Brazil, the registration shall require a prior opinion from the Financial System Organization Department (*Departamento de Organização do Sistema Financeiro - DEORF*) of the Central Bank of Brazil.

For foreign investment in Brazilian currency in Brazilian companies (the so called "*Transferência Internacional de Reais – TIR*"), the respective registration must also be made with the Central Bank of Brazil.

### **1.3. Foreign Direct Investment**

#### **1.3.1. Cash Investments**

No preliminary official authorization is required for remittances of funds relating to investments into Brazilian territory. Such funds can be used to subscribe for or purchase shares in Brazilian companies. The funds must be

remitted to Brazil through a banking establishment authorized to deal in foreign exchange in Brazil.

In August 2000, the Central Bank of Brazil issued the present rules on the registration of foreign investments in Brazil. According to Circular n. 3.491/2010 of Central Bank of Brazil, a Brazilian company which is the recipient of the foreign investment must obtain a number from the Electronic Declaratory Registry of Direct Foreign Investment (*Registro Declaratório Eletrônico de Investimentos Externos Diretos – RDE-IED*), corresponding to the Foreign Investor/Brazilian Company pairing, through the Information System of the Central Bank of Brazil (*Sistema de Informações do Banco Central - SISBACEN*). Such RDE-IED number must be indicated in the exchange agreement relating to the foreign direct investment.

The Brazilian company must then register the foreign direct investment before the Central Bank of Brazil through the SISBACEN and RDE-IED system within 30 days from the closing of the exchange agreement. In the case of reinvestment of profits, within 30 days from the date the capitalization of the profits is effected by the Brazilian company.

Reinvestment of earnings is allowed by the Central Bank. Reinvestment of this type is registered with the RDE-IED. Reinvestment necessarily implies that the Brazilian company must realize profits on the original investment. Such profits must be earned by the company located within Brazilian Territory and reinvested in the same company or in another company also located within Brazilian Territory.

### **1.3.2. Conversion of Foreign Credits into Direct Investment in the Corporate Capital of a Brazilian Company**

The conversion of foreign credits into direct investment in the corporate capital of a Brazilian company is regulated by Central Bank's Circular n.

3.491/2010. In order to achieve such a conversion the Central Bank of Brazil requires the following documents:

- (a) declaration by Creditor whereby the foreign creditor confirms and specifically acknowledges the respective credits which will be converted into direct investment in the corporate capital of the Brazilian company; and
- (b) declaration by Creditor whereby the foreign creditor expressly and irrevocably agrees with the conversion of the credits into direct investment in the corporate capital of the Brazilian Company.

Furthermore, the Brazilian exchange regulations require that any conversion of foreign credits into direct investment in the corporate capital of a Brazilian company must be carried out through a symbolic exchange operation. This procedure entails two separate operations, the first simulates the remittance abroad of funds to repay the foreign credits, while, simultaneously, the second simulates the immediate return of the funds in the form of foreign direct investment. These operations can only be carried out by financial institutions duly authorized by the Central Bank of Brazil and the respective exchange agreements are signed by the chosen financial institution and the Brazilian company.

### **1.3.3. Capital Contribution through the Import of Goods without Exchange Coverage.**

Capital investments made by importing goods without exchange coverage require registration with SISBACEN and the Integrated System of Foreign Trade (*Sistema Integrado de Comércio Exterior - SISCOMEX*).

Investments in the form of goods shall be registered with the Central Bank of Brazil within 90 (ninety) days from the goods entrance in the country.

The Integrated System of Foreign Trade - SISCOMEX<sup>2</sup> is a computerized system responsible for integrating the activities of recording, monitoring, and controlling foreign trade operations through a single and automated flow of information.

SISCOMEX allows the timely monitoring of the exit and entry of goods into the country. Through the system itself, the exporter (or importer) exchange information with the agencies responsible for the authorizing and monitoring import/export operations.

The system present several advantages to users, that is, harmonization of concepts and standardization of codes and classifications, increase in the number of service centers, standardization and simplification of documents, amelioration in the collection and processing of information by electronic means, reduction of administrative costs for all involved and others.

#### **1.4. Stock and Securities Market**

The markets are regulated by the stock exchanges and a governmental agency, the Securities Commission (*Comissão de Valores Mobiliários - CVM*) under the Ministry of Finance and the National Monetary Council (*Conselho Monetário Nacional - CMN*), while CMN has a regulatory function, CVM has the powers to oversee the markets; suspend participants; suspend trading of shares; authorize issues; audit public companies and exchanges; apply sanctions and promote liquidation.

There are three different categories of operations at the major Brazilian stock exchanges:

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2 Decree n. 660, of 25 September 1992

- (a) spot market;
- (b) options market; and
- (c) forward market.

Spot market, as elsewhere, securities are bought for immediate delivery against payment.

With respect to the options market, puts and calls are negotiated for a given price, on a certain date. The buyer pays a premium to the writer as soon as the transaction is made. The buyer then has the right to either buy or sell the shares at the exercise price of the option. In the event the option is a put, the exercise is only possible on the exercise date. In the event the option is a call, the exercise will be possible at any time until the exercise date. The payment of the exercise price takes place only if the option is exercised. Sellers of options are required to either deposit the shares with the stock exchange or an initial margin equal to twice the amount of the premium options or such greater amounts as the stock exchanges may establish and are required to make daily settlements of the respective positions.

Forward market operations are transactions by which a seller and buyer agree on the value of a purchase and sale of shares to be affected in the future. The seller must deposit the full value of the transaction. The buyer is obliged to deposit a marginal amount that may vary from 20% (twenty percent) for the shares of greater liquidity to 100% (one hundred percent) for those of more restricted liquidity. A variation of the stock forward operations is the so-called financial futures.

#### **1.4.1. Foreign Investors in the Stock Exchange in Brazil**

The foreign investors, ordinary and qualified, are able to invest in the same products that are available to all investors resident in Brazil.

According to CMN's Resolution 2.689/2000, the foreign investor must retain the services of an institution that will work as his legal representative before tax authorities, and also as keeper of the investor's securities.

The legal representative is responsible for providing to the Brazilian Authorities all of applicable information to register the foreign investor. If the representative is neither an individual registered with the Central Bank to operate in the financial markets nor a financial institution, the foreign investor must hire a financial institution duly authorized by the Central Bank of Brazil, to be co-responsible for the fulfillment of the investor's obligations. Many financial institutions have authorization from CVM and Central Bank of Brazil to serve as custodians for foreign investors and legal representatives.

The custodian is responsible for not only keeping the investors' securities, but also for updating documents, safekeeping securities and other assets, control the investors' assets and securities in separate bank accounts. The custodian also has to supply any information required by the Brazilian authorities or by the foreign investor.

Additionally, the foreign investor will then choose a stock-broker to represent him and to execute his orders. In Brazil there is no minimum period to keep investments in the Stock Exchange.

It is also important to mention that the foreign capital invested in the country has to be registered by the Central Bank of Brazil, as already referred to in item 1.2 above.

## **1.5. Foreign Loans**

Loans in any foreign currency are made by remittance from the foreign source to Brazil for conversion into the Brazilian currency – the *Real* (*Reais* in the plural).

Pursuant to Central Bank’s Resolution no. 3.844/2010, no previous authorization is required for a Brazilian private sector borrower to obtain a foreign loan. However, prior to the remittance of the funds, the borrower must register the parties, the financial conditions and terms, and other information relating to the transaction with the Registry of Financial Operations (*Registro de Operações Financeiras* - ROF) of SISBACEN’s RDE.

A registration number is provided by ROF (RDE-ROF number) for the given loan and any further information relating to the respective transaction.

The obtaining of the RDE-ROF number is essential for either the closing of the exchange agreement or for the international remittance of national currency relating to the inflow of resources into Brazil or remittance abroad. Each RDE-ROF number is valid for 60 days. If there was no flow of resources into Brazil during this time, the RDE-ROF number is automatically cancelled.

After the inflow of funds, the borrower must carry out the registration of the payment scheme in the ROF.

There is a withholding tax of 15% (fifteen percent) on the remittance abroad of interest and there is Financial Transaction Tax (*Imposto sobre Operações Financeiras* - IOF), at a rate of 6% (six percent) over cash loans, as of 4 June 2014, with average minimum terms of less than 180 (one hundred and eighty) days. The interest charged must be considered reasonable in the judgment of the Central Bank of Brazil. It is important to note that when the foreign loan comes from a tax haven jurisdiction, withholding tax is due at the rate of 25% (twenty five percent) on the remittance of interest.

There are two types of loans: cash loans and credit loans for importing goods. The former is reflected by the entry of cash into Brazil and the latter by credit abroad to pay for the import of machinery or equipment.

Cash loans may be contracted directly by the borrower with the foreign financing agency or through private development banks, investment banks, the National Economic and Social Development Bank (*Banco Nacional de Desenvolvimento Econômico e Social* – BNDES) and banks authorized to operate with foreign exchange in Brazil. Transactions of this nature must be effected at the prevailing interest rates practiced in the international market.

Imports of goods financed for a period of approximately 360 days are subject to prior registration with the Central Bank of Brazil.

Remittances of principal and interest may be affected by the simple presentation of the ROF number to any Brazilian commercial bank which will make the exchange contract.

## **1.6. “Contaminated Capital”**

Despite the procedures mentioned above, there are cases in Brazil in which the foreign capital, either foreign direct investment or foreign credit, has not been registered before the Central Bank of Brazil, even though it is accounted for as such in the accounting records of the respective Brazilian companies. This anomaly is the so-called “contaminated capital”.

Article 5 of Law n. 11.371/2006 proposes an alternative to clean-up contaminated capital, taking into consideration the figures duly recorded in the accounting records of the Brazilian company. This law<sup>3</sup> is, primarily, a device to solve

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<sup>3</sup> The law was later confirmed by the National Monetary Council’s Resolution n. 4.104, of 28 June 2012, and before by the Central Bank of Brazil’s Circular n. 3.344, of 7 March 2007.

the problems associated only with non-registered foreign investments into Brazilian companies, such as the impossibility of repatriating dividends, the re-payment of interests, and the sale of investments and penalties for a non-observation of the rules issued by Central Bank of Brazil such as registry of investments out of the deadline.

According to these rules, not only foreign direct investments, but also foreign credits derived from capital inflow made in Brazilian Reais, which have not been registered with the Central Bank of Brazil, must be regularized.

The referred foreign capital, duly accounted for in the Brazilian companies' records in Brazilian currency, which was not registered with the Central Bank of Brazil, as explained above, shall now be registered in the RDE-IED or in the RDE-ROF by the last day of the subsequently year of the balance sheet of the transaction.

As a consequence of the aforesaid Law, all companies which maintain any kind of foreign investments at its corporate stock are obliged to register such investments under the penalty of fine.

Therefore, given this measure, the intention of the financial authority to legalize all foreign capital brought into Brazil is noted, either as foreign investment or foreign credit, regardless of whether it was not previously registered, as long as the ownership of such capital is accounted for and the respective amounts have been duly accounted for in the Brazilian company, in accordance with the relevant legislation.

## **1.7. Foreign Capital Restrictions**

### **1.7.1. Introduction**

As seen above, the concept of foreign capital under Brazilian law is defined by Law no. 4.131/62 and its amendments. This legislation together with RMCCI<sup>4</sup> govern foreign investment and repatriation of profits abroad,

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4 Circular n. 3.280/05, Circular n. 3.491/10 and Circular n. 4.104/12

giving foreign capital invested in Brazil identical treatment and equal conditions as domestic capital.

Brazilian Federal Constitution<sup>5</sup> stipulates that a company will receive privileged treatment provided it is established under Brazilian law and is small in size. Brazilian law will, according to the national interest, regulate foreign investment, stimulate reinvestment, and regulate repatriation of profits. Nonetheless, Brazilian law sets out some restrictions to foreign capital.

## **1.7.2. Foreign Capital Restrictions Imposed by Brazilian Law**

### **1.7.2.1. Credit Restrictions**

Law n. 4.131/62<sup>6</sup> establishes that the National Treasury and the official credit entities may only guarantee the foreign lending or the financing to companies whose controlling interest are in the hands of non-residents of Brazil, if a prior Decree has been issued. Foreign-owned controlling interests, or even subsidiary companies, will not have access to such credits until their operations begin. And Law n. 4.728 of 14 July 1965, which regulates the capital market, provides that when there is a serious unbalance in the balance of payments, as determined by the National Monetary Council, the Central Bank of Brazil may limit foreign access to the Brazilian financial system. These limitations apply to companies that have access to international financial markets because of their status as foreign company subsidiaries, and companies whose capital belongs to foreign individuals.

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5 Article 170(IX), of the Brazilian Federal Constitution, amended by Constitutional Amendment n. 6, of 15 August 1995.

6 Articles 37, 38 and 39 of Law no. 4.131/62.

### **1.7.2.2. Restrictions on Financial Institutions**

Foreign banks authorized to operate in Brazil are subject to the same restrictions applicable to Brazilian banks. In summary, the National Monetary Council through decrees has the power to limit the amount of the foreign capital in Brazilian Financial Institutions.

Article 52 of the Transitory Provisions of the Federal Constitution, provides that until some conditions stipulated by the Congress are fulfilled, new agencies of financial institutions domiciled abroad are not permitted to incorporate in Brazil and, in addition, individuals and legal entities domiciled abroad are not permitted to increase their participation in the capital of the financial institution. Article 192 of the Federal Constitution, confirmed by Federal Constitution Amendment n. 40 of 29 May 2013 provides that the national financial system will be regulated by legislation determining the conditions for foreign capital participation in financial institutions through a complementary law approved by Congress, which shall consider the national interests and the international agreements. However, this restriction does not apply to authorizations to establish banks as a result of international agreements of reciprocity or governmental interest. The Central Bank of Brazil must be previously consulted on the possibility of foreign participation in transactions involving acquisition of quotas or shares of companies making up the National Financial System<sup>7</sup>.

### **1.7.2.3. Restrictions on the Acquisition of Rural Real Estate and Frontier Area Real Estate**

Foreign individuals resident in Brazil as well as foreign legal entities authorized to operate in the country who desire to invest foreign

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<sup>7</sup> Law n. 4.595 of 31 December 1964

capital in the acquisition of rural properties must follow the rules established in Law n. 5.709 of 7 October 1971 and Decree n. 74.965 of 26 November 1974. The law permits the acquisition of rural property for approved industrial, agricultural or cattle-raising projects exclusively. Further, such rural property acquisition must be approved by the National Institute of Colonization and Agrarian Reform (Instituto Nacional de Colonização e Reforma Agrária - INCRA), as well as other regulatory agencies, depending on the nature of the project. Acquisition of rural property above a certain size will also depend on the approval of the National Congress. Purchases of rural real estate for other purposes or without a recorded deed are void under Brazilian Law.

Brazilian Law also imposes certain restrictions on the purchase by foreigners of property located in border areas, which are considered essential to national security. The border area consists of a strip of land 150 km wide which runs along the Country's borders. Foreign individuals and legal entities may purchase real estate situated in essential (border) areas only after prior approval by Brazilian national security authorities.

### **1.7.3. Other Restrictions**

The Brazilian National Congress, in 2002, amended Article 222(1), of the Federal Constitution, so that although foreigners are supposed to be precluded from owning interests in the written and broadcasting media, foreigners are permitted to hold 25% of the voting capital, while 75% must be directly or indirectly held by Brazilian citizens. Nevertheless, in relation to the Brazilian Media, it is important to mention that foreigners that have adopted and held Brazilian citizenship for less than 10 years are not permitted to hold more than 30% of the social capital of media and broadcasting corporations according to the Article 6, of Law n. 10.610/02.

The final restriction is related to Nuclear Energy and the Natural Resources of the Continental Shelf and the Exclusive Economic Zone<sup>8</sup>, which is an issue reserved exclusively for development by the Brazilian Government.

**1.8. Integrated System of Foreign Trade on Services, Intangibles and Operations that Result in Variation on Assets** (*Sistema Integrado de Comércio Exterior de Serviços, Intangíveis e Outras Operações que Produzam Variações no Patrimônio - SISCOSERV*).

The SISCOSERV system works in tandem with other systems like SISCOMEX (item 1.3.3 above) and it was created to regulate the procedures relating to the provision of services between Brazilians (individuals or legal entities) and foreigner (legal entities or individuals).

This system was approved by the publication of the Joint Decree of Brazil's Federal Revenue Service n. 1.908 of 19 July 2012, and after a series of updates, the manual was published by Joint Decree of Brazil's Federal Revenue Service n. 275, 5 March 2013.

The Ministry of Development, Industry and Foreign Trade of Brazil (*Ministério do Desenvolvimento, Indústria e Comércio Exterior - MDIC*) defines SISCOSERV as:

“(...) A computerized system, developed by the Federal Government as a tool for the improvement of stimulus actions, formulation, monitoring and assessment of public policies related to services and intangibles as well as the orientation of the business strategies of foreign trade in services and intangible assets.”

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8 Article 20 of Brazilian Federal Constitution.

Article 1 of SISCOSERV's Law<sup>9</sup> defines that its program aims to record information relating to transactions between an individual or entity resident or domiciled in Brazil and an individual or entity resident or domiciled abroad. It also states that such transactions encompass services, intangibles and other operations that would result in changes to individuals' or legal entity's assets.

The definition of SISCOSERV's duties and development of applications thereto is outlined in the Technical Cooperation Agreement executed by and between the Secretariat of Commerce and Service (*Secretaria de Comércio e Serviços – SCS*) out of the Ministry of Development, Industry and Foreign Trade (*Ministério do Desenvolvimento, Indústria e Comércio Exterior - MDIC*) and the Federal Revenue (*Secretaria da Receita Federal – RFB*).

There is also a list of types of services that are defined by the Brazilian Nomenclature of Services and Intangibles (*Nomenclatura Brasileira de Serviços, Intangíveis e outras Operações que Produzam Variações no Patrimônio – NBS*)<sup>10</sup>, and its Explanatory Notes (*Notas Explicativas - NEBS*)<sup>11</sup> such studies served as basis for defining the sort of services needed to be filed into SISCOSERV.

The law also provides for those who fulfill certain specific requirements not to mandatorily comply with the filing of information into SISCOSERV.

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9 Joint Ordinance RFB/SCS n. 1.908, de 19 de julho de 2012

10 [http://www.desenvolvimento.gov.br/arquivos/dwnl\\_1333484934.pdf](http://www.desenvolvimento.gov.br/arquivos/dwnl_1333484934.pdf)

11 [http://www.desenvolvimento.gov.br/arquivos/dwnl\\_1333546557.pdf](http://www.desenvolvimento.gov.br/arquivos/dwnl_1333546557.pdf)

## **2. BUSINESS ORGANIZATION**

### **2.1. Types of Companies**

Brazilian law provides for several types of companies. The most frequently chosen corporate type are the *Sociedade Anônima* (S.A.) and the *Sociedade de Responsabilidade Limitada* (Limited Liability Company - Ltda.).

In both these corporate types their participants have limited liability. The law grants legal entity status to these companies separate from that of their participants.

### **2.2. The *Sociedade Anônima* (S.A.)**

#### **2.2.1. Incorporation**

The S.A. is governed by Law 6.404/76 and is a commercial legal entity whose corporate capital is divided into fractions named *shares*. The shares grant ownership rights and establish levels of liability to its holder. Brazilian Law states that the shares of a S.A. will be always nominative; the issue of bearer shares not being allowed.

The liability of a shareholder is limited to the issuance price of the subscribed or acquired shares. Once their subscription is paid up, the shareholder does not have any further liability to the company or to its creditors, except for the controlling shareholders upon whom the Law stipulates further obligations towards the Company, the minority shareholders and the community in which the Company is located.

The S.A.'s name must be either preceded or followed by the Portuguese expression “*Sociedade Anônima*” (or its abbreviation S.A.), or,

its name may be preceded by the term “Companhia” (or its abbreviation Cia.). The name must be composed of a fantasy name or the given name of one of its shareholders, followed by a short indication of the company’s main objectives.

Brazilian Corporate Law (Law 6.404, of 1976) acknowledges that an S.A. will either be (a) a Listed or Open Capital Company or (b) a Closed Capital Company. While the former has its securities admitted and traded in the Stock Exchange, the latter’s securities are not; it obtains its capital through private offering of shares.

There are preliminary requirements to be met before incorporating an S.A., that is:

- I. the subscription, by at least two persons, of all the shares into which the capital is divided in accordance with the Bylaws;
- II. the initial payment of at least 10% (ten per cent) of the issue price of the shares subscribed in cash;
- III. the deposit at the Banco do Brasil S.A., or at another financial institution authorized by the Brazilian Securities and Exchange Commission (CVM), of the portion of the capital paid in cash;
- IV. registration of the Minutes of Incorporation Meeting and By-laws with the State’s Board of Trade (*Junta Comercial*); and
- V. publication of the minutes of Incorporation Meeting and By-laws in the Official Gazette and in a widely circulated newspaper, within 30 days after its registration.

Listed Companies are subject to additional regulations and supervision by the CVM.

Law n. 6.385/76 instituted the CVM and established its duties as being:

- (a) to stimulate the creation of savings and their investment in securities;
- (b) to promote the expansion and the regular and efficient operation of the stock market, and stimulate permanent investments in the capital stock of publicly held companies controlled by private Brazilian capital;
- (c) to guarantee the efficient and correct operation of stock markets and over-the-counter markets;
- (d) to protect securities holders and market investors;
- (e) to avoid or prevent any kind of fraud or manipulation intended to create artificial conditions of supply, demand or price of the securities traded on the market;
- (f) to guarantee public access to information on the securities traded and the corporations issuing them;
- (g) to guarantee the observance of equitable business practice on the securities market;
- (h) to guarantee compliance with the conditions established by the National Monetary Council regarding use of credit.

CVM has the power to investigate, prosecute and punish irregularities in the stock market. With any suspicion CVM can initiate an administrative inquiry, through which it collects information, takes testimony and evidence together in order to clearly identify the person responsible for illegal practices, offering full rights of defense.

In terms of policy action, CVM pursues its objectives through self-regulation and self-discipline, intervening effectively in the activities of the market, according to Law.

The Law provides that the directors of Listed Companies must disclose relevant information on the company and its business, given that resolutions taken by the Shareholders Meetings or some facts regarding its business that can significantly affect the decision to buy or sell securities of the company.

CVM regulates the registration of the company for trading its securities in the stock market or over the counter (OTC) market. This forces the company to maintain a permanent system of disclosing regular information to the market. A long series of regulations have been enacted by CVM in order to improve the transparency of the company and its business to the market.

Some institutional and governmental initiatives have been implemented in order to ensure the improvement of corporate practices of Brazilian companies, which include:

- (a) the approval of Law n. 10.301/01, extending legal protection to the minority shareholders;
- (b) the creation of the “Novo Mercado”, Levels 1 and 2 and BOVESPA MAIS programs of corporate governance by the Stock Exchange of São Paulo - BOVESPA, and;
- (c) new rules defining the limits of application of the resources of pension funds.

To better illustrate its Corporate Governance Programs, BOVESPA has prepared the following comparative chart:

	<b>NEW MARKET</b>	<b>LEVEL 2</b>	<b>LEVEL 1</b>	<b>BOVESPA MAIS</b>	<b>TRADITIONAL</b>
<b>Characteristics of the issued shares</b>	Allows only the existence of voting shares	Allows only the existence of voting shares	Allows the existence of voting and non voting shares (according to rules)	Only voting shares can be issued and traded, but non voting are allowed to exist	Allows the existence of voting and non voting shares (according to the rules)
<b>Minimum Free Float</b>	At least 25%			25% until the 7th year of listing, or minimum conditions of liquidity	Not regulated
<b>Public offerings</b>	Efforts of share pulverization			Not regulated	
<b>Prohibitions of the statutory provisions (since 10 May 2011)</b>	Limitation of voting of less than 5% of the capital, quorum and “entrenchment clauses”		Not regulated		
<b>Composition of the Board of Directors</b>	Minimum of five members, of whom at least 20% must be independent with an unified term of up to two years		Minimum of 3 members (according to the rules)		
<b>Prohibition regarding the accumulation of positions (since 10 May 2011)</b>	Chairman of the Board and chief executive officer or chief executive by the same person (grace period of 3 years from accession)			Not regulated	
<b>Obligation of the Board of Directors (since 10 May 2011)</b>	Response to any public offering regarding company shares		Not regulated		
<b>Financial Statements</b>	Translated into English		Pursuant to the Law		
<b>Annual public meeting and calendar of corporate events</b>	Mandatory			Optional	
<b>Additional disclosure of information (since 10 May 2011)</b>	Securities trading Policy and code of conduct			Not regulated	
<b>Tag Along</b>	100% for ON shares	100% for ON and PN shares 100% for ON shares e 80% for PN shares (until 09 May 2011)	80% for ON shares (Pursuant to the Law)	100% for ON shares	80% for ON shares (Pursuant to the Law)
<b>Public offering of shares at the smallest economic value</b>	Mandatory in case of delisting or exit from the segment		Pursuant to the Law	Mandatory in case of delisting or exit from the segment	Pursuant to the Law
<b>Accession to the Market Arbitration Chamber</b>	Mandatory		Optional	Mandatory	Optional

Source: [http://www.bmfbovespa.com.br/empresas/pages/empresas\\_segmentos-de-listagem.asp](http://www.bmfbovespa.com.br/empresas/pages/empresas_segmentos-de-listagem.asp)

### **2.2.2. Capital**

The capital of an S.A. may be formed with contributions in cash or in any kind of asset susceptible of evaluation in money, as credits and goods, but never by rendering services.

An S.A. which issues shares with par value cannot issue shares at a price lower than the par value of its outstanding shares. As regards shares without par value, they also have a price: their issue price.

The issue price of shares with no par value is set by the Company's founding members at the time of its incorporation, or either by the Shareholders' Meeting or Board of Directors when deliberating upon a capital increase, observing the criteria established by the Law regarding its setting.

An S.A.'s capital may be:

- I – increased, after the payment of at least  $\frac{3}{4}$  (three quarters) of the previously established corporate capital:
  - (a) by resolution of either Shareholders General Meeting or Board of Directors, subject to the provisions set forth in the S.A.'s Bylaws; and
  - (b) by conversion of debentures or participation certificates into shares, and by the exercise of rights conferred by subscription warrants or purchase options.
  
- II - decreased:
  - (a) for the purpose of reimbursing a dissenting shareholder;
  - (b) if there are losses up to the amount of accrued losses, or if the General Meeting deem such losses excessive;

- (c) upon the forfeiture of shares where a holder has failed to meet subscription obligations; and
- (d) when the capital stock exceeds the amount necessary to achieve company objectives.

Both Listed and Closed Capital Companies may use the authorized capital system when structuring their capital. That is, the shareholders may subscribe less capital than that authorized by the Company's Bylaws and future increases of capital can be made up to the authorized amount. Additionally, the Bylaws of such company usually confer upon the Board of Directors the authority to increase the subscribed capital within an authorized limit, thus avoiding the necessity of holding a Shareholders' Meeting and accelerating the funding of the company.

### 2.2.3. Shares

Brazilian law does not permit bearer shares. Ownership of all shares must be registered in the Nominative Shares Registry Book. The transfer of shares is registered in the corporate book in accordance with the corresponding legal evidence of such transfer (agreements, succession, etc.). The law also permits the transfer of the responsibility for registration of shares to a financial institution. This is a common practice in Listed Companies which generally appoint an agent, usually a financial institution, as the responsible for the shares registration.

In principle, shares are freely transferable to third parties without any requirement that preference be given. In a Closed Capital Company, however, the Bylaws or a Shareholder Agreement can impose some restrictions on the transfer of shares, provided that they do not prohibit the transfer or require approval by a majority of the shareholders or by the Board of Directors.

Depending on the criteria used to classify a share, it will have several denominations, *i.e.*, if the criterion used is value of the share, it will be classified

as with or with no par value; or if the rights and privileges criteria: common, preferred or fruition.

Common or Ordinary Shares entitle the holder to common or essential shareholder's rights, including the right to vote in Shareholders Meetings. Unlike the Listed Companies, in Closed Capital Companies, such type of shares cannot be subdivided into classes.

Preferred shares have a higher claim on the assets and earnings than common shares. It means that it generally has a dividend that must be paid out before dividends to common shareholders. Moreover, preferred shares may be subdivided into classes and, usually, do not have voting rights.

Fruition shares are the type of shares, duly provisioned for or determined by the General Meeting, that are a result from amortization of common or preferred shares.

All shareholders are guaranteed the following essential rights notwithstanding the type of share held:

- (a) the right to a proportional share in the company's profits;
- (b) in the event of liquidation, the right to a proportional share of the company's assets remaining after debts are paid;
- (c) the right to supervise the management of the company's business;
- (d) the right of first refusal in the subscription of shares (including shares converted from founders' shares, debentures and subscription warrants); and
- (e) the right to withdraw from the company.

In addition to these essential rights, there are also special rights that are reserved for holders of certain types of shares. For example, the rights of preferred shareholders, according to Law n. 10.303 of October 2001, consist of:

- a) In a Closed Capital S.A.:
  - (i) the priority right in the distribution of fixed or minimum dividends; and/or
  - (ii) in the event of liquidation, the priority right in the return of capital, with or without premium.
  
- b) In a Listed Company:
  - (i) in the event of liquidation, the right to priority in the return of capital, with or without premium, accumulated with at least one of the rights referred to in items (ii), (iii) and (iv) below;
  - (ii) the right to receive dividends of at least 25% of the annual net profit, with a minimum priority dividend of at least 3% of the net value of the share, and the right to participate in the distribution of dividends on the same terms as the common shareholders after receiving priority dividends;
  - (iii) the right to receive dividends at least 10% greater than those granted to common shareholders; or
  - (iv) the right to be included in public offers for the sale of a controlling interest in the company, being assured of a dividend at least equal to that provided to holders of common shares (tag along).

#### **2.2.4. Shareholders Agreement**

The law expressly permits shareholders to enter into Shareholders' Agreements dealing with the transfer of shares, pre-emptive rights to purchase shares, and the exercise of voting rights or controlling powers.

The obligations set out in a Shareholders Agreement can be subject of specific performance for their compliance and the Chairman of the Shareholders' General Meeting shall not take into account any vote, given by a shareholder under a Shareholders' Agreement, that is inconsistent with the terms of said agreement.

The shareholders may, if so set forth by in the Shareholder Agreement, appoint an individual as his attorney-in-fact before the Company, with powers to provide and receive information whenever necessary.

The obligations or encumbrances arising from a Shareholder Agreement will only become enforceable before third parties, after its registration in the Book of Registry and Shares Certificates of those who signed the agreement.

Shares subject to a Shareholders' Agreement cannot be traded on the stock market.

A Shareholders Agreement is an extremely useful tool in joint-venture companies organized as S.A., as it provides the parties the opportunity to set out many covenants and details of their corporate relationship.

#### **2.2.5. Shareholders Meetings**

There are two kinds of Shareholders' Meetings: (i) the Annual, or Ordinary, which shall be held once a year in order to discuss the company's management report and financial statements and to elect members of the Board of Directors, Executive Board and Audit Committee; and (ii) the Extraordinary, which can be held at any time to deliberate on any matters which do not fall within the competence of the Ordinary Shareholders' Meeting.

Both types of meetings are summoned and conducted in the manner prescribed by Law and the Company's Bylaws. The authority to summon Shareholders' Meetings normally lies with the Executive Board or the Board of Directors, but the Law also foresees cases in which they can be summoned by the Audit Committee or one or more shareholders.

Summons of the meeting is made by the publishing of a notice at least 3 times in the Official Gazette of the Federal or State Government and in a widely circulated newspaper appointing the local, date, time and the agenda of the meeting. The publication of the first notice must be made at least eight (8) days in advance in a Closed Capital S.A. and at least fifteen (15) days in advance in an Listed Company. Notwithstanding, the absence of prior notice through the newspaper can be waived if all shareholders attend the meeting.

Shareholders' Meetings may be called to order, on first summoning, only if shareholders representing at least 1/4 (one quarter) of the voting shares are present. If the purpose of the meeting is to amend the Bylaws, however, shareholders representing at least 2/3 (two thirds) of the voting shares must be present.

Shareholders can be represented in Shareholders' Meetings by an administrator of the company, another shareholder, or an attorney-in-fact holder of a power-of-attorney granted less than one year before the meeting.

With some exceptions decisions voted at Shareholders' Meetings must be approved by absolute majority (50% plus one) of all votes cast. Minutes of all meetings must be drawn up, registered in the appropriate Minutes Book and filed with the Board of Trade in order to ensure the enforceability of the decisions taken in the Meeting against third parties.

#### **2.2.6. Administration**

The administration of an S.A. is conducted by one or two corporate bodies, each with specific authority and responsibilities: the Board of Directors and the Executive Board.

However, from a managerial perspective, the Shareholders' Meeting may also be considered an administrative body as it is its legal responsibility to establish the general business, financial and administrative policies guidelines for the company.

#### **2.2.6.1. The Board of Directors (“Conselho de Administração”)**

An S.A. may have a Board of Directors or not. The Board of Directors is mandatory to Listed Companies and to those with authorized capital. However, such imposition is not applicable to Closed Capital Companies, in which case the institution of this Board is optional.

The Board of Directors must be composed of at least three members, who can reside in Brazil or abroad. Its members are elected and can be removed at any time by the Shareholders' Meeting.

The Board of Directors is responsible for (i) establishing the general business, administrative and financial policies of the company in accordance with guidelines established by the Shareholders' Meeting, (ii) electing and dismissing the members of the Executive Board, (iii) supervise the management of the Company by the Executive Board, (iv) examining the company books and papers, (v) monitoring the company's contractual relations and negotiations, (vi) and any other acts relating to the company's business.

#### **2.2.6.2. The Executive Board (“Diretoria”)**

The Executive Board is mandatory in all S.A. and shall be responsible for the routine operations of the company and for representing the Company before third parties in the ordinary course of business.

The Executive Board is composed of at least two officers, who must be resident in Brazil. Officers are appointed, and may be removed at any time, by the Board of Directors or by the Shareholders' Meeting if the Company has no Board of Directors. Members of the Executive Board are elected for a mandate of up to 3 years and may be reelected for subsequent terms.

The Law permits that up to 1/3 (one third) of the members of the Executive Board serve as members of the Board of Directors.

### **2.2.7. Audit Committee (“Conselho Fiscal”)**

The S.A. may have an Audit Committee which is created when a Shareholders' Meeting deems it necessary to maintain strict control over the company's management.

The Audit Committee shall perform its functions on a permanent or non-permanent basis as so determined by the Company's Bylaws.

Whenever the Audit Committee is organized on a non-permanent basis, it will only become active when Shareholders representing at least 10% of the common shares or 5% of the preferred shares request its installation.

The Audit Committee is elected at a Meeting of the Shareholders and must be composed of a minimum of three and a maximum of five members (with an equal number of alternates), all residing in Brazil while serving as members of the Committee, with a university degree, or who have held the position of director or member of an Audit Committee for at least three years.

Members of the Audit Committee need not be shareholders and cannot be members of the Board of Directors or Executive Board, employees of the Company nor of its subsidiaries or companies belonging to the same Economic Group, and neither be the spouse or relative up to third degree of a director or officer of the Company.

The duties of the Audit Committee comprise, *inter alia*: (i) to oversee the acts of the directors and officers; (ii) to analyze the annual management report; (iii) to give opinions on the issuance of securities by the Company; (iv) to report any misconduct by Company's officers and directors; and (v) to analyze and issue opinions about the company's balance sheet and financial statements.

### **2.2.8. Financial Statements**

In a broad sense, the financial Statements are the records that outline the business and financial activities of a Company within a certain period of time and the corresponding accounting. This period is the so called corporate year and lasts for one year regardless of coinciding or not with the calendar year, its beginning and end being determined by the Company's Bylaws.

In the case of a Listed Company, the financial statements must: (i) follow the rules established by CVM and be prepared in conformity with international accounting principles and standards adopted in the major securities markets; (ii) be audited by an independent auditor or auditing company duly registered with CVM; and (iii) be published in the Official Gazette of the Federal District or State and in a widely circulated newspaper.

In the case of Closed Capital Companies, the auditing of financial statements is optional, but the statements must always be published, except if the Company's net equity is less than R\$ 2 million on the date of its financial report.

### **2.2.9. Dissolution**

The dissolution of an S.A. may take place: (i) at the end of its term as specified in the Bylaws; (ii) by resolution of the Shareholders' Meeting; (iii)

by the existence of only one shareholder in an Annual Shareholders' Meeting, if the minimum of two is not re-established prior to the subsequent Annual Shareholders' Meeting; or (iv) by Court decision or the administrative decision of a competent public authority.

The liquidation of the company's assets in order to pay off outstanding debts precedes dissolution. Any assets remaining are distributed to shareholders in proportion to their investment (subject to any priority rights granted to preferred shareholders). The liquidation may be voluntary or imposed by judicial action.

### **2.3. The *Sociedade Limitada* (LTDA).**

#### **2.3.1. Incorporation**

The Limited Liability Company (*Sociedade Limitada* – LTDA) is established by the partners' signatures in the respective Articles of Association (*Contrato Social*) and has only a single class of partners, the limited liability quotaholders. Depending on the nature of the corporate objectives set forth in the respective Articles of Association, the LTDA may be a commercial (*sociedade empresária*) or non-commercial company (*sociedade simples*) and, accordingly, will be registered with the commercial or civil Companies Registries.

#### **2.3.2. Name**

The company name of a LTDA must always be followed by the expression "*Limitada*" (or its abbreviation Ltda.). The name must be composed by a fantasy name or a given name followed by an indication of the company's main objectives.

### **2.3.3. Quotaholders' Liability**

The capital of a LTDA is divided into quotas. The quota represents the amount (in money or other assets) that a quotaholder contributes to the formation of the company. The Law expressly forbids contribution through the rendering of services.

The quotaholders are jointly liable for the payment of the entire amount of the company's capital. After the full payment of the capital, quotaholders do not have further responsibilities towards third parties who contract with the company, but this limitation is not absolute with respect to the company's tax, labour and social security dues.

### **2.3.4. Capital**

The capital of a LTDA may be:

I - Increased:

- (a) after being fully paid up, by resolution of quotaholders representing at least 3/4 (three-quarters) of the company's capital.

II - Decreased

- (a) when the capital has been eroded by losses;
- (b) when the capital exceeds the amount necessary to achieve the company's objectives;
- (c) when a quotaholder fails to pay-up its subscribed quotas.

- (d) when the company undergoes partial spin-off, without extinguishing the divided company.

### **2.3.5. Administration**

The LTDA can be managed by one or more individuals who must necessarily be resident in Brazil. The individual appointed as manager of the Company may or may not be a quotaholders. However, before the company's capital is fully paid up, appointing a manager who is not a quotaholder requires the approval of all quotaholders. After the capital has been fully paid up, such appointment may be done by quotaholders representing 2/3 of the Company's capital.

The manager is not personally responsible for the company's liabilities. A manager can however be held personally liable before the company or third parties for any of his acts which exceeded the limits of his or her authority or practiced in violation of either the Law or the Company's Articles of Association.

The Articles of Association can also provide for the creation of an Audit Committee, in case the quotaholders deem it necessary to closely supervise the management of the company.

### **2.3.6. Amendments to the Articles of Association**

The Articles of Association may be amended by resolution of the quotaholders to, *inter alia*:

- (a) Increase or decrease the Company's capital;
- (b) Extend the term of the Company's duration;

- (c) Change the Company's name;
- (d) Change the Company's head-offices;
- (e) Admit or exclude quotaholders;
- (f) Change the Company's objectives; or
- (g) Transfer quotas from on quotaholders to another or to a third party.

Quotaholders who disagree with an amendment to the Articles of Association have the right to withdraw from the company.

Quotas are not embodied in certificates but instead their ownership is conferred by the Articles of Association. Consequently, any transfer of title over the quotas requires an amendment to the Articles of Association.

### **2.3.7. Quotaholders Meeting**

Decisions requiring the approval of quotaholders must be made in a formal meeting, convened pursuant to the terms of the Articles of Association and the Law.

In addition, at least once a year the quotaholders must hold a Quotaholders' Meeting to discuss the management report and financial statements and, if applicable, elect the managers to the Company.

Meetings are called and conducted in the manner prescribed by the Law and Articles of Association. Although Meetings are usually summoned by the Company's manager, they can also be summoned by quotaholders representing at least 1/5 (one fifth) of the Company's capital.

Prior summoning will be deemed unnecessary on the following cases:

- (a) if all quotaholders actually attend the meeting;
- (b) if all quotaholders state, in writing, that they had knowledge of the location, date, time and agenda of the Meeting; and
- (c) if all quotaholders render his/her/its decision, in writing, of the subject matter of the agenda.

### **2.3.8. Dissolution**

The dissolution of a LTDA may take place in the following cases: (i) at the end of its term as set forth in the Articles of Association; (ii) by the unanimous resolution of all quotaholders; (iii) by the resolution of quotaholders representing an absolute majority, in companies established for an undetermined term; (iv) by the existence of only one quotaholder, if the minimum of two is not re-established within 180 days; and (v) in case of bankruptcy.

The death of a quotaholder does not bring about dissolution of a LTDA if the succession by the quotaholder's heir(s) or the Company's continuity with the remaining quotaholders is provided for in the Articles of Association.

### **2.3.9. Supplementary Legal Framework**

The Brazilian Civil Code has provided for a number of corporate types and established specific legal framework for each of them. In the case of the LTDA, the legal dispositions governing companies in general will be applied to any issues not covered by either the Company's Articles of Association or the specific legal regime of the LTDA.

However, quotaholders may choose to alternatively establish in the Articles of Association that Law n. 6.406/76 (Brazilian Corporation Law), which governs the S.A., will be applicable for the issues not covered by the LTDA specific legal framework or by the Articles of Association.

All Limited liabilities Companies deemed to be a large company (*sociedade de grande porte*), that is, with assets exceeding R\$ 240,000,000.00 (two hundred and forty million Reais) and/or annual gross revenue over R\$ 300,000,000.00 (three hundred million Reais), must comply with the rules set forth in article 176, of the Brazilian Corporation Law in regards to the preparation and audit of their financial statements.

## **2.4. Rules Common to the S.A. and the LTDA.**

### **2.4.1. Corporate Transformation**

All companies may transform into another type of entity, spin-off a portion of their assets, merge into or consolidate with another legal entity.

A transformation changes the company's legal type to another without dissolving it. A merger is an operation by which one or more companies transfer all of their assets to an existing Company and cease to exist. A consolidation is the unification of two or more companies into a single new entity, which will have the combined assets, rights and obligations of the companies it succeeds. A Spin-off is an operation whereby a company transfers all or part of its assets and liabilities to one or more companies, already in existence or to be incorporated. If a company spins-off all of its assets and liabilities, it will be dissolved.

### **2.4.2. Representation of the Foreign Shareholders**

Foreign entities or individuals holding shares or quotas in Brazilian companies must maintain an attorney-in-fact resident in Brazil with powers

to receive service of process in legal actions involving its holding of shares or quotas, as well as be enrolled before the Brazilian Internal Revenue Service.

### **2.4.3. Trade Name**

Prior to registering the Articles of Association, a name search must be performed to determine the availability of the proposed trade name. Priority is given to the company that first registers a trade name, without consideration of any existing trademark registration(s) or application(s). Reservation of a trade name is not possible in Brazil.

Trade names are protected in Brazil under Law n. 8.934, of 18 November 1994 and Law n. 10.406, of 10 January 2002. This protection is granted automatically in the State where the company's head-offices will be located upon registration of the acts of incorporation with the competent Board of Trade. As Brazil is composed of 26 States plus one Federal District, to extend the name protection to any additional State after the incorporation, specific applications must be made before the Board of Trade of each State where the protection is intended.

## **2.5. Incorporation Procedures**

Incorporation of a company in Brazil requires registration with several governmental authorities. The mandatory registrations are the following:

As a first step, the Articles of Association or Bylaws must be filed with the Board of Trade or the Civil Registry (depending on the company's objectives), in the State where the company is headquartered. Subsequently, the newly incorporated company acquires legal status. However, at this stage, the company cannot yet start up its operations.

After registration of the Articles of Incorporation or Bylaws, the company must be enrolled with the Legal Entities Taxpayers Registry of the Brazilian Federal Revenue Service (“CNPJ”). To become fully operational, companies involved in commercial activities must also register with State and Municipal taxpayers’ registries, as well as, if applicable, specific agencies regulating its activities. Companies that only render services need not to register with the State Taxpayers’ Registry, except those which render transportation services. Others business licenses and permits may be required in connection of the type and place of business of the company.

Foreign shareholders or quotaholders must also register with the Brazilian Federal Taxpayers Registry (“CNPJ”) and for such registration will be required to present documents showing their regular existence abroad. In order to be enforceable before third parties in Brazil, foreign documents must first be signed before a notary public in their country of origin **and** legalized before the Brazilian Consulate with jurisdiction.

Once in Brazil, these foreign documents must be translated into Portuguese by a public sworn translator and registered at a Deeds and Documents Registry Office.

## **2.6. Additional Considerations**

Brazilian law also provides for the formation of civil associations, foundations and co-operative associations which, due to their non-profit nature or to the particular characteristics of their formation or objectives, are not commercial organizations and receive different legal treatment.

## **2.7. The Individual Limited Liability Organisation - EIRELI**

With the enactment of Law n. 12.441/2011, gave rise to a new type of business, the Individual Limited Liability Organisation (EIRELI). This type is characterized by a legal entity consisting of only one individual, and, just like

a conventional limited liability company, the individual's liability is limited to the capital allocated to the business.

### **2.7.1. Setting up an EIRELI**

The Law imposes 4 (four) key requirements to the establishment of an EIRELI:

- (a) A fully paid up capital that is not less than 100 (one hundred) times the highest minimum wage;
- (b) The word "EIRELI" must be inserted after the name or of the business.
- (c) The owner must be an individual<sup>12</sup>; and
- (d) The individual can only own one EIRELI.

The owner of such business can either be a Brazilian national or a foreigner, who may also reside and live abroad.

Individuals resident and domiciled abroad must appoint an attorney-in-fact resident in Brazil with powers to receive court summons for claims filed against the grantor in relation to the respective EIRELI.

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12 Scholars argue that the National Department of Business Registration (DNRC) exceeded its powers by determining that only restricting individuals may register an EIRELI before a Board of Trade whilst the Federal Law does not impose such restriction on registration. Hitherto, few Brazilian Courts have disregarded DNRC's edict limiting whom can register an EIRELI and instructed the local Board of Trade to approve the application filed by a legal entity. Recently, a judge from the Federal Justice Court of São Paulo stated in his decision that the Law that created the EIRELI makes no distinction of who might register such business organisation.

## **3. TAXATION**

### **3.1. The Brazilian Tax System**

The current Brazilian Tax system was established by the Federal Constitution of 1988, in force since 1 March 1989. Prior tax laws not compatible with the Constitution remain in force as long as the “complementary laws” (enabling legislation) described in the Constitution are not enacted. The Income tax regulations are set out in Decree n. 3.000 of 26 March 1999, as amended.

Among other subjects, complementary laws establish general tax norms, especially with regard to the definition of taxes, tax basis, taxpayers, tax obligations, assessments, and statutes of limitations.

The Federal, State and Municipal governments may raise revenue through the use of:

- (a) taxes;
- (b) fees; and
- (c) contributions for improvements resulting from public works.

The Constitution provides that “whenever possible” taxes should be personal and progressive.

## **3.2. Taxation of Individuals**

### **3.2.1. Taxpayers**

All individuals residing or domiciled in Brazil are liable to income tax and capital gains<sup>13</sup>. As a general rule, individuals resident or domiciled abroad are liable to tax on income and capital gains arising in Brazil.

### **3.2.2. Tax Domicile**

The tax domicile of the taxpayer is the place where the individual maintains a permanent home. As mentioned above, Brazilian law provided different tax treatment for resident individuals and non resident individuals.

### **3.2.3. Individual Taxpayer's Registry (CPF)**

The following individuals must be enrolled before the Individual Taxpayer's Registry (CPF):-

- a) individuals required to file a tax return;
- b) individuals whose income is subject to withholding tax at source;
- c) independent professionals;
- d) lessors of real estate;

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13 Pursuant to Article 2 of Decree n. 3.000/99.

- e) those who participate in real estate operations;
- f) individuals obliged to withhold tax at source;
- g) individuals who own a bank account or financial applications;
- h) individuals who operate on stock exchanges, the commodity and futures markets;
- i) individuals registered as contributors to the National Institute of Social Security (INSS);
- j) individuals who pay income to other persons who are subject to withholding tax at source; and
- k) individuals domiciled abroad who own in Brazil assets or rights subject to public registration, including: real estate; vehicles; ships; planes; shareholdings; bank accounts; and financial investments.

The individual is enrolled only once and a second enrolment is not permitted.

#### **3.2.4. Foreigners Who Transfer Their Domicile to Brazil**

The tax treatment of foreigners who transfer their domicile to Brazil varies depending on the type of Visa. There is a legal assumption that a foreigner who holds a permanent visa or temporary visa has transferred his/her domicile to Brazil.

For a holder of a permanent visa income will be taxed as any other resident in Brazil, as of the date of arrival in Brazil.

A holder of a temporary visa who enters Brazil under an employment relationship will be liable to taxation, as any other Brazilian resident, from the date of his/her arrival in the Country. Those arriving for any other reason will be considered resident for tax purposes on completion of a stay of 183 days, whether consecutive or not, within a 12-month period.

Holders of business visas (90-day visa) are not subject to taxation in Brazil on the basis of their physical presence in the Country, as such type of visa does not include a work permit and the foreigner is not entitled to earn income in Brazil.

### **3.2.5. Transfer of Residence Abroad**

Individuals domiciled or residing in Brazil who leave the country permanently must, in addition to filing a tax return, file a declaration of definitive departure and obtain a certificate from the tax authorities confirming that all taxes have been paid, likewise enabling the individuals to request Central Bank authorization to repatriate all assets held in local currency, provided these assets have been properly reported in the annual tax return. In the event that the referred declaration is not made, the individual will be considered resident in Brazil for tax purposes for the first twelve months following his departure.

#### **3.2.5.1. Employees of Foreign Governments and International Organisations**

The following individuals are exempt from tax on earned income:

- a) diplomatic personnel of foreign governments;
- b) employees of international organisations of which Brazil is a member, and with which it has agreed to grant the exemption; and

- c) non-Brazilian employees of embassies, consulates and government agencies of other countries in Brazil, as long as there is reciprocity of treatment.

### **3.2.6. Taxable Income in Brazil**

The gross income received by an individual is subject to income tax with deductions for alimonies, dependants, contributions to the social security and medical expenditures plans of the federal, state, municipal governments, and the exempt portion of the retirement and pension plan income.

Gross income includes earned income, alimony, child support and pensions received in cash, as well as income of any nature, including increases in assets that are not explained by the income declared. The following forms of income are taxable:

- a) earned income;
- b) income earned by professionals;
- c) income from rents, royalties, leases and licenses;
- d) income and capital gains received from abroad;
- e) one-quarter of the earned income received from the Brazilian government, in the case of employees of the government serving abroad;
- f) bonuses and special dividends;
- g) other income and capital gains not subject to withholding tax.

The following income is subject to withholding tax exclusively at source:

- a) lottery winnings in general paid in cash;
- b) net benefits resulting from the lottery element of capitalisation securities;
- c) short-term financial operations initiated and closed on the same day;
- d) gross income from any fixed interest financial investment;
- e) gross income from financial operations carried out in the stock market, commodities market, or futures market and any other market of a similar nature;
- f) capital gains on the alienation of rights or property which exceed R\$ 35,000.00;
- g) capital gains on the alienation of stocks negotiated in the Over-the-Counter Market (*Mercado de Balcão*) which exceed R\$ 20,000.00; and
- h) income from stock market, commodities market, or futures market operations, and any other market of a similar nature.

Individuals must present an annual income tax return which will determine additional tax payable or excess tax refundable, depending on their respective income nature as mentioned above.

Any tax due by resident individuals will be calculated by use of the following table, which shall correspond to the sum of the values listed in the 12 monthly tables for the calculation of the withholding tax that were in force during the preceding tax year.

For the year 2013 (related to the Tax Return to be presented in 2014) the prevailing marginal income tax rates are:

<i>Annual Income – R\$</i>	<i>Tax Rate</i>
0 – 20,529.36	0%
20,529.37-30,766.92	7.5%
30,766.93-41,023.08	15%
41,203.09-51,259.08	22.5%
Over 51,259,08	27.5%

### **3.3. Taxation of Legal Entities**

Brazilian tax legislation has in recent years undergone constant modifications not only at the federal level but also at the state and municipal levels.

#### **3.3.1. Income Tax**

The principal legislation regulating Income Tax in Brazil is set out in Decree n. 3.000/99 and Laws nos. 8.981/95, 9.065/95, 9.249/95, 9.430/96, 9.532/97, 9.779/99, 11.196/05 and 11.941/09.

Companies domiciled in Brazil are liable to Corporate Income Tax on profits arising both in Brazil and abroad. Brazilian branch offices, agencies or representative offices of companies domiciled abroad are subject to income tax on income arising in Brazil.

For 2013 the basic rate of Income Tax on corporate profits (including capital gains), as adjusted for tax purposes, is 15% with an additional surtax of 10% on taxable profits exceeding R\$ 240.000,00.

Article 219 of the Decree n. 3.000/99 determines that Income Tax will be payable based on either the real, presumed or imputed profits (*lucro real, presumido ou arbitrado*).

The so-called “real profit” is represented by accounting profit as adjusted for tax purposes, while the “presumed” or “imputed” profits are calculated by applying a percentage over the company’s turnover to determine the “profit” figure, upon which Income Tax is calculated at the rates indicated above. The imputed profit basis is used when a company fails to produce proper accounting or to make annual tax returns and is calculated based upon the application of certain percentages fixed by law as to the company’s turnover.

### **3.3.2. The Real Profit Basis**

Article 246 of Decree n. 3.000/99 determines that the following legal entities are required to compute their tax assessment based on real profits:

- a) those with gross revenue, including capital gains, exceeding R\$ 78 million in the calendar year 2013, calculated pro-rata when appropriate;
- b) financial institutions or their equivalent;
- c) those with profits, income or gains from abroad;
- d) those who enjoy tax exemptions and reduction;
- e) those which during the fiscal year made monthly payments on the basis of estimated profits;
- f) those who render continuous and cumulative consultation services relating to credit, marketing, credit management, risk selection, management of accounts payable and receivable, and acquisition of credit rights resulting in either credit sales or the rendering of services (factoring).

Under the “real profit” regime, a company may opt for its final tax liability to be determined either on an annual basis or on a quarterly basis. On the quarterly basis, a company is required to produce quarterly accounts and calculate and pay income tax based on the adjusted profit or loss arising within such quarter. A significant disadvantage of this regime is that it is not possible to compensate profits arising in one quarter with losses arising in a subsequent quarter, even within the same accounting year, given that each quarterly period is considered a separate and distinct period for tax purposes. Consequently, the majority of companies opt for taxation on the so-called “annual real profit” basis (*lucro real anual*).

On this annual basis, a company’s final tax liability is determined according to its financial statements drawn up at the end of the fiscal year. Income tax, however, must be paid monthly and is calculated based on estimated profits (determined as a fixed percentage of turnover) plus capital gains. The taxation rates are those set out in item 3.3.1 above with the additional surtax payable on monthly profits which exceed R\$ 20,000.00. In such a scenario, when the yearly accounts are prepared any additional tax due must be paid by 31 March of the following year, with any surplus tax paid available for set-off in the following tax year.

The fixed percentages for the determination of the monthly taxable profits depend upon the company’s activities. The prevailing regulations<sup>14</sup> determine the application of the following percentages to a company’s turnover:

- a) 8% on the sale of goods and merchandise;
- b) 1.6% in relation to the sale, for consumption, of petroleum, derivatives and natural gas;

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14 Article 15 of Law n. 9.249/95

- c) 16% on transport, except cargo services for which the rate is 8 %;
- d) 32% for other services, except hospitals for which the rate is 8%;
- e) 16% for services rendered by legal entities with gross revenue up to R\$120,000.00 except for hospitals, transports, and regulated professions; and
- f) 8% on development, construction and sale of real estate by real state companies.

Income and expenses are recognised on an accrual basis, and the general rule for the deduction of expenses is that they should be “necessary to the activity of the company and the maintenance of the respective income producing source.” Necessary expenses are considered to be those “paid or incurred and which may be considered normal or usual in the company’s transactions, operations or activities.” Certain expenses, such as medical assistance, are only considered deductible when the benefit is extended to all the company’s employees and are not permitted if only extended to, for example, the company’s directors.

According to Brazilian legislation, the losses originating in an accounting period may be carried forward for relief against future profits, without time limit, but relief is limited to a maximum of 30% of the profit of each fiscal year. No carry back of losses is allowed under Brazilian legislation.

### **3.3.3. The Presumed Profit Basis**

Companies which are not obliged to adopt the real profit basis may opt for taxation on the presumed profit basis.

On such basis, tax will be calculated and paid on a quarterly basis ending 31 March, 30 June, 30 September and 31 December. The basis for calculation of the presumed profit is the application of the percentages referred above to the quarterly turnover of the company.

#### **3.3.4. Annual Tax Return**

Whatever the basis adopted for the determination of taxable profits, every company is legally obliged to prepare and deliver a tax return covering its results for the period ending 31 December. The return (DIPJ) shall be delivered in the subsequent year by the last working day of June.

#### **3.3.5. Social Contribution on Net Profits**

In addition to the liability for income tax as referred above, the operating profit of a company is also liable to a social contribution (*Contribuição Social sobre o Lucro Líquido - CSLL*) on its income and capital gains. This social contribution is not deductible in calculating either corporate income tax or the contribution itself and, generally, the tax basis for the contribution is the same as that for corporate income tax.

Since 1<sup>st</sup> January 2003 the CSLL has been levied at the rate of 9%.

In relation to companies which opt for taxation on the basis of the “annual real profit” or “presumed profit”, the social contribution is payable monthly or quarterly as appropriate, and the basis for the calculation is generally 12% of the operating profit plus any capital gains realized in the base period, except for service providers in which case the basis for calculation is 32%.

### **3.3.6. Income from abroad**

Prior to the introduction of Law n. 9.249 of 26 December 1995, Brazilian companies were taxed on the principle of territoriality. Under this principle, Brazilian tax law was only considered applicable to activities carried out in Brazil. Hence, Brazilian companies were only liable to taxation in Brazil on their profits earned in Brazil, and profits earned abroad were therefore exempt.

Pursuant to Law n. 9.249/95 the concept was changed from territoriality to universality (“world-wide income”), thus subjecting profits and income earned abroad to taxation in Brazil as well.

Under Law n. 9.249/95, the following kinds of income are liable to taxation in Brazil:

- a) foreign-source operating income;
- b) foreign-source non-operating income, including interests, royalties and dividends; and
- c) income earned indirectly abroad through branches, subsidiaries and affiliates.

### **3.3.7. Taxation of subsidiary and affiliates**

With respect to the taxation of foreign subsidiaries’ and affiliates’ earnings, Article 25 of Law n. 9.249/95 states:

“Article 25 - The profits, income and capital gains earned abroad will be included in the determination of real profits in relation to the accounts prepared on 31 December each year...

Paragraph 2 - The profits earned abroad by branches or subsidiaries of legal entities domiciled in Brazil will be included in the determination of real profits in accordance with the following:

I.- the branches and subsidiaries will determine their profits for each fiscal year in accordance with the norms of Brazilian legislation.

II.- the profits referred to in item I above will be included in the net profit of the parent company in the proportion of its shareholding for the determination of real profits.

Paragraph 3 - the profits arising abroad from affiliates of legal entities domiciled in Brazil will be included in the determination of real profits in accordance with the following:

I.- the profits earned by the affiliate will be included in the net profits in the proportion of the shareholding held....”

In view of the controversy and legal argument that arose from such legislation was subsequently amended by determining that the profits arising abroad will only be included in the determination of the real profit (*lucro real*) for the calendar year in which such profits are “made available” (*disponibilizados*) to the Brazilian company. The profits of a subsidiary are considered “available” to the parent on the date of payment or credit. Furthermore, a rule was introduced providing that interest paid to an overseas subsidiary in respect of loans contracted with the same will not be deductible for tax purposes by the Brazilian company whilst the accounts of the subsidiary contain profits not “available” to the Brazilian company. Additionally, an increase in capital of the subsidiary through a capitalisation of reserves is also considered a “payment” for the purposes of such legislation.

Subsequently the rules were further tightened providing that in the event that a subsidiary, which has accumulated undistributed profits, makes a loan to its parent, such loan will be considered as a distribution of profits for the purposes of taxation.

Finally, in 2001, the Brazilian tax authorities endeavoured to close any loopholes in the prevailing legislation through the issue of a Provisional Measure which remains in force and states that for the purposes of calculating income tax and social contributions on profits (CSLL) the profits of overseas subsidiaries and associated companies will be considered “available” to the Brazilian company on the date of the financial statements in which such profits arise.

It is important to emphasize that the taxation of the overseas profit is under analysis by the Federal Supreme Court (STF) which, as of March 2014 has still not reached a definitive decision in relation to its constitutionality.

The aforementioned provisions however should not apply in relation to the profits arising in a country with which Brazil has signed a double taxation treaty. In such scenario said profits will generally only be taxable in Brazil if and when remitted to Brazil.

### **3.3.8. Withholding Tax on Remittances Abroad**

In addition to taxation on income and profits, certain remittances of funds from Brazil are subject to deduction of tax at source (*Imposto de Renda Retido na Fonte* - Withholding Income Tax and Contribution for Intervention in the Economic Domain - CIDE).

In principle, unless specifically exempt under prevailing legislation, all payments from sources located in Brazil to legal entities or individuals abroad are subject to withholding tax in Brazil. Until late 1998, the applicable rate of withholding tax, depending on the nature of the payment, was either 0 or 15%.

However, as a consequence of the then prevailing economic crisis affecting Brazil at that time, the Brazilian Government introduced legislation increasing the rate of withholding tax, for certain remittances, to 25%.

Pursuant to the prevailing legislation<sup>15</sup>, no tax is deductible at source on the remittance of profits and dividends by a Brazilian company to shareholders domiciled abroad or on the remittance of profits by Brazilian branches or representative offices of foreign companies. No withholding tax is applicable on the return of foreign capital up to the amount of the foreign investment registered before the Central Bank of Brazil. Capital gains, however, from investments in Brazil are subject to tax at source at 15%.

Pursuant to the current Income Tax Code<sup>16</sup> all amounts paid, credited, or remitted, from a source situated in Brazil, to individuals or legal entities resident abroad, are subject to tax at source at the rate of 25% when the payment relates to the provision of labour, with or without an employment relationship, and from the rendering of services.

Additionally such provisions<sup>17</sup> further provides that, save for certain specific exemptions, the income arising from any operation, in which the beneficiary is resident in a favourable tax jurisdiction will be subject to tax at source at the rate of 25%.

The notion of a “favourable” tax jurisdiction arose in Brazilian transfer pricing legislation and is defined as a jurisdiction which taxes income at a maximum rate lower than 20% and/or imposes secrecy on the disclosure of shareholders (“tax havens”). In this regard the Brazilian authorities have listed on 4 June 2010 the following jurisdictions: Andorra, Anguilla, Antigua and Barbados, Aruba, Ascension Island, Bahamas, Bahrain, Barbados, Belize, Bermuda, Brunei, British Virgin Islands, Campione D’Italia, Cayman Islands,

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15 Article 10 of Law n. 9.249/95

16 Article 685 of Decree n. 3.000/99

17 Article 685

Channel Islands (Alderney, Guernsey, Jersey and Sark), Cyprus, Singapore, Cook Islands, Costa Rica, Djibouti, Dominica, Dutch Antilles, Gibraltar, Granada, Hong Kong, Kiribati, Labuan, Lebanon, Liberia, Liechtenstein, Macau, Madeira Islands, Maldives Islands, Isle of Man, Marshall Islands, Mauritius, Monaco, Montserrat Islands, Nauru, Niue Island, Norfolk Island, Sultanate of Oman, Panama, Pitcairn Island, Polynesia, Queshm Island, San Marino, St. Cristovao and Nevis Federation, St Helena Islands, Saint Kitts and Nevis, St. Lucia, St Peter and Miguelão, St. Vincent and Grenadines, Seychelles, Solomon Islands, Swaziland, Tonga, Tristan da Cunha, Turks and Caicos Islands, Western Samoa, United Arab Emirates, United States Samoa, Vanuatu, and US Virgin Islands.

The list referred to above also includes countries with corporate secrecy legislation. It is also important to emphasize that the Federal Tax Bureau has also issued on 4 June 2010 its first list of so-called “privileged” tax regimes. Transactions with such “regimes” will also be subject to Brazilian transfer pricing rules.

The referred regimes are Uruguay (as regards the SAFI); Denmark (holding company with no substantial economic activity); Iceland (ITC); Hungary (KFT); USA (non-resident LLC); Spain (EVTE); and Malta (ITC and IHC).

Since 1 January 2002, the Contribution for Intervention in the Economic Domain (CIDE) is also due on the amounts paid, credited, delivered, used or remitted, on a monthly basis, to non-resident beneficiaries, for royalties and remuneration in the following types of contracts:

- a) licensing and assignment of patents;
- b) technical support (in relation to technical assistance and specialized technical services);
- c) assignment and licensing of trademarks;

- d) software supply (only when occurs the transfer of its technology);
- e) technology supply; and
- f) contracts for the supply of technical services, administrative assistance and other similar services.

This contribution is levied at rate of 10% over the amounts paid, delivered, credited, used or remitted per month as payments under the types of agreements mentioned above to beneficiaries who are resident abroad.

Due to its specific tax application, the provisions of treaties to avoid double taxation to which Brazil is a signatory cannot be used to permit any reduction or exemption in relation to this base.

In view of the above, the principal withholding tax rates applicable in Brazil, in the absence of a lower rate available under a prevailing treaty (only in relation to Income Tax), are as follows:

(i)	Dividends	Exempt
(ii)	Interest	15%;
(iii)	Royalties	25% (15% Income Tax plus 10% CIDE);
(iv)	Technical Assistance	25% (15% Income Tax plus 10% CIDE);
(v)	Tax Havens	35% (25% Income Tax plus 10% CIDE); and
(vi)	Other Services	25%.

Besides CIDE in relation to payments for royalties and technical assistance, the Brazilian Federal Government has enacted various other forms of CIDE, each with their own specific regulations and rates, as follows:

- (i) CIDE to the Telecommunications Technological Development Fund (FUNTEL);
- (ii) CIDE for the Universal Telecommunications Service Fund (FUST);
- (iii) CIDE levied on imports and marketing of oil products, natural gas, petrol, ethylic alcohol fuel, ethylic alcohol (*CIDE-Combustíveis*); and
- (iv) CIDE for the Development of the Cinematographic Industry (CONDECINE).

### **3.3.9. Social Contribution on Invoicing - COFINS**

Complementary Law n. 70 of 30 December 1991 instituted the Social Contribution on Invoicing (COFINS) to help finance the social security program. Pursuant to the current regulations<sup>18</sup>, this tax is levied on a non-cumulative basis at a general rate of 7.6% on the gross revenue from sales of merchandise and the rendering of services.

For those companies that ascertain their profits using the “presumed profit basis”, and for some kinds of revenue arising from some specific business activities, this tax is levied on a cumulative basis at a general rate of 3% on the gross revenue from sales of merchandise and the rendering of services.

Since 2004 COFINS is also levied on imports of products, equipment and services from abroad at general rate of 7.6%. In relation to services, COFINS is levied on those rendered by a foreign-base legal entity or individual even if those services are rendered directly in Brazil and for services whose results can be “verified” in the country.

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18 Article 2 of Law n. 10.833 of 29 December 2003

In both systems (cumulative and non-cumulative) gross revenues arising from exportation of goods, equipment and services shall not be taxed by COFINS as long as such exportations result in the receipt of monies from abroad.

### **3.3.10. Contribution to the Social Integration Program - PIS**

The contribution to the Social Integration Program (PIS) was instituted in 1970. All private commercial undertakings that are classified as such by the income tax regulations are liable for this tax. This contribution is generally charged on a non-cumulative at rate of 1.65% on the gross revenue from sales of merchandise and the rendering of services.

For those companies that ascertain their profits using the “presumed profit basis”, and for some kinds of revenue arising from some specific business activities, this tax is levied on a cumulative basis at a general rate of 0.65% on the gross revenue from sales of merchandise and the rendering of services.

Since 2004 PIS has also been levied on imports of products, equipment and services from abroad at general rate of 1.65%. In relation to services, PIS is levied on those rendered by a foreign-base legal entity or individual even if those services are rendered directly in Brazil and for services whose results can be “verified” in the country.

Likewise COFINS, in both systems (cumulative and non-cumulative) gross revenues arising from exportation of goods, equipment and services shall not be taxed by PIS as long as such exportations result in the receipt of monies from abroad.

### **3.3.11. Tax on Industrial Products - IPI**

Tax on industrial products (IPI) is a federal tax charged on industrialized products at selective rates varying according to the class of products in

accordance with the classification set out by IPI regulations<sup>19</sup>.

According to specific regulations<sup>20</sup>, products for export can leave the industrial establishment with suspension of the IPI when:

- a) acquired by an export trading company, with specific purpose of export; and
- b) remitted to customs deposit areas or other places where the customs brokerage takes place.

An industrialised product is considered as being a product resulting from an operation that modifies the nature, function, finish or appearance of a product. The rate varies and depends on the classification of the goods as specified by the law.

The IPI tax on the wholesale purchase price of goods is registered as a credit in the books of the purchaser and, on the sale of the finished product, the amount of tax shown in the invoice is registered as a debt. The balance which results each month is the tax to be paid to the federal authority.

IPI is also levied on the importation of goods and equipment.

### **3.3.12. Tax over Operations on the Circulation of Merchandise and Services - ICMS**

The tax over operations on the circulation of merchandise and services (ICMS) is a state tax charged on all products. In the State of São Paulo, the rate is generally 18% of the value of the merchandise or services. When materials/

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19 Law n. 4.502/64 and Decree-Law n. 34/66

20 Law n. 9.532/97

goods are purchased, the ICMS tax is already included in the price. In operations between the South of Brazil and the Southeast, the rate is 12%, and between the North, Northeast, Middle-West regions and the state of *Espírito Santo* the rate is 7% (Article 52 of State Decree n. 45.490/00). ICMS and IPI calculations are identical.

ICMS is also levied on the importation of goods and equipment.

### **3.3.13. Import tax - The Common External Tariff - CET**

Mercosur introduced the Common External Tariff – CET, created by the Protocol of Buenos Aires and in confirmed Brazil by Decree n. 1.343 of 23 December 1994 as amended.

The CET tariff applicable to trade between any signatory of Mercosur with third-party countries and varies between 0 and 35% depending upon the product.

The Brazilian Government's most recent modifications to the CET and its exception list were established by the Chamber of Foreign Trade (CAMEX)<sup>21</sup>, wherein certain products are labelled as “sensitive” and thus are not designated to compete with similar products of other countries. Each calendar year the number of products on this list is reduced.

For imports from other countries, the rates vary based on the fiscal classification of the product<sup>22</sup>.

### **3.3.14. Service Tax - ISS**

ISS is a tax charged by the municipal authorities on the rendering of services. In the city of São Paulo, according to the prevailing regulations<sup>23</sup>, the tax is generally charged at rate of 5% on the services value. For some activities

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21 Resolution n. 42, of 26 December 2001

22 Decree-Law n. 37/66

23 Municipal Law n. 13.701/03, of 24 December 2003

there are lower rates (2% and 2.5%) and there are special tax regimes for specific services such as legal, accounting, medical etc.

Since January 2004, ISS has also been levied on the purchase of foreign services. Based on that, the Brazilian beneficiary is liable for the payment of this tax. In addition, ISS is also levied on exportation of services when the results occur in Brazil (despite the fact that payment is made by a foreign resident).

### **3.3.15. Taxes over Real Estate Transfer, Inheritances and Donations**

The tax is charged in three situations: on an “*inter-vivos*” transfer of a real estate property, inheritances and donations.

In the first case, the tax is named ITBI and it is regulated by municipal law. The rate in São Paulo varies from 0.5% to 2% in the event that the real estate is financed by the Housing Finance System (SFH); in other cases, the rate is 2%.

In the other two cases, the tax is named ITCMD and the legislative competence is that of the States pursuant to Article 155, paragraph I of the Federal Constitution. This tax is levied on transfer of bank deposits, financial investments, shares (and the like) and real estate. For the year 2012, inheritances up to R\$ 87.250,00 and donations up to R\$ 43.625,00 are exempt. However, due to specific regulations in relation to its exemptions and taxable basis, it is very important to analyze the assets to be transferred individually. On the above mentioned values, this tax is levied at rate of 4%.

### **3.3.16. Tax on Urban Property**

The Tax on Urban Property (IPTU) is a municipal tax which charges the ownership, control or possession of urban land or buildings, based on the market value of such real estate and it is levied on an annual basis.

Due to the fact that it is a municipal tax, IPTU's applicable rates vary according to each city's legislation and the type of real estate involved.

### **3.3.17. Tax on Financial, Exchange and Insurance Operations (IOF)**

IOF is the tax levied on operations of Credit, Exchange, Insurance and the ones related to securities.

IOF's rates vary according to the transaction to be carried out by the taxpayers. Set out below are IOF rates in relation to certain exchange transactions:

- a) Amounts related to the import of services – 0.38 per cent
- b) Amounts related to the import of goods, products and equipment – zero per cent (exempt);
- c) Amounts related to the export of services, goods, products and equipment – zero per cent;
- d) Amounts related to cross-border loans to companies domiciled in Brazil (with the maximum term of payment in 180 days) – 6 per cent;
- e) Amounts related to cross-border loans to companies domiciled in Brazil (with the term of payment higher than 180 days) – zero per cent;
- f) Amounts related to the remittance of dividends abroad – 0.38 per cent.

The tax basis for calculation of the IOF due is the amount of the national currency received or delivered to the interested party domiciled in Brazil, which means that the Brazilian company or individual shall be liable for the payment

of this tax. In relation to exchange operations, the financial institution in charge of performing this transaction shall withhold the respective amounts of IOF.

### **3.4. Double Taxation Treaties Entered Into By Brazil**

Brazil has double taxation treaties in force with Argentina, Austria, Belgium, Canada, Chile, China, the Czech and Slovak Republics, Denmark, Ecuador, Finland, France, Hungary, India, Israel, Italy, Japan, Luxembourg, Mexico, Netherlands, Norway, Peru, Philippines, Portugal, South Africa, South Korea, Spain, Sweden and the Ukraine .

### **3.5. Transfer Pricing**

Transfer Pricing regulations are adopted worldwide to avoid the transfer of profits that should be taxable in the jurisdiction where a permanent establishment is located to a “friendlier” tax environment.

In Brazil Transfer Pricing regulations were introduced by Law n. 9.430/06 and apply to the import and export of goods and services carried out between “related parties” and between unrelated parties when the overseas party is established in a so-called “tax haven” jurisdiction or a “privileged tax regime”<sup>24</sup>.

The definition of “related parties” for the purposes of this legislation is provided by Article 23 of Law n. 9.430/96 and includes subsidiaries, associated companies, companies under common control and also situations where the foreign company has an exclusive agency or distribution agreement with the Brazilian company and vice-versa.

The legislation specifies the conditions under which a Transfer Pricing adjustment must be made and the methods to calculate the same. The result of

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24 These jurisdictions are listed in item 3.3.8 above

such calculation shall be added to the Brazilian entity's taxable profits for the period in question. The taxes to be levied on such adjustments are Income Tax (IRPJ) and the Social Contribution Levied on Net Profits (CSLL) at top rates of 25% and 9%, respectively.

The regulations<sup>25</sup> provide that a Transfer Pricing adjustment shall apply when the costs, expenses and duties of the Brazilian company's imports of goods and services from a "related party", during the period in question, is higher than the guide price determined by the use of one of the Transfer Pricing methods.

In the event that more than one of the methods are used, the lowest value shall be used for any Transfer Pricing adjustment.

The Law provides three methods to ascertain a guide price to be set in relation to imports performed by Brazilian companies:

- I - Method of Independent Prices Compared- PIC: defined as for the arithmetic average price of goods, services or rights, identical or similar, calculated in the Brazilian market or other countries, over purchase and sale operations undertaken by interested party or a third parties, in similar payment conditions;
- II - Method of Resale Price, Less Profit - PRL: defined as the arithmetic average selling prices in the country, of goods, rights or services imported under similar payment conditions and calculated according to the following methodology:
  - a) net selling price: the arithmetic average selling prices of the goods, rights or services produced, less unconditional discounts granted, taxes and contributions over the sales and commissions and brokerage fees paid;

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25 Article 18 of Law n. 9.430/96

- b) percentage of share on imported goods, rights or services, over the the total cost of the goods, rights or services sold: the ratio between the average cost of the imported goods, rights or services and the total average of the goods, rights or services sold, calculated in accordance with the cost sheets of the company;
  - c) share of the imported goods, rights or services into its own selling price: applying percentage of share of the imported goods, right or service over the total cost, determined under clause b, over the net sales price calculated in accordance with clause a;
  - d) profit margin: the application of the percentage referred to in § 12, as the economic sector of the legal entity subject to control of transfer pricing, over share of the imported goods, right or service on the sales price of the goods, rights or services sold calculated in accordance with clause c; and
  - e) standard price: the difference between the value of the imported goods, right or service's share on the sales price of the goods, rights or services sold, calculated under clause c; and the "profit margin", calculated in accordance with clause d; and
- III - Method of Production Cost Plus Profit - CPL: defined as the average cost of production of goods, rights or services identical or similar, plus taxes and fees charged on the exporting country where it has been originally produced, and of profit margins of 20% (twenty percent), calculated over the determined cost.

The importer can opt for any one of these three methods in order to ascertain the guide price. In the case of more than one method is being used, only

the highest value ascertained shall be taken into account and used throughout the assessment<sup>26</sup>.

The guide price ascertained shall be compared to the price used in the import documents. When the guide price is lower than the import price between related parties, the difference shall represent a Transfer Pricing adjustment taxable.

In relation to exports, Brazilian taxpayers are subject to adjustments whenever the average sales price in these operations is lower than 90% of the average sales price in the domestic market in the same period and under the same payment terms (“Safe Harbour”).

In case this average price performed between related parties is lower than 90% of the price practiced with non-related parties, the income arising from the exports shall be adjusted. For such adjustments, the Brazilian legislation provides four different methods as follows:

- a) Export Sales Price Method which is defined as the average of the export sales price charged by the company to other customers or other national exporter of identical or similar property, services or rights during the same tax year using similar payment terms;
- b) Wholesale Price in Country of Destination Less Profit Method which is defined as the average wholesale price of identical or similar property, services or rights in the country of destination under similar payment terms reduced by the taxes included in the price imposed by that country and a profit margin of 15% of the wholesale price.
- c) Retail Price in Country of Destination Less Profit Method which is defined as the average retail price of identical or similar property, services or rights in the country of destination under similar payment terms reduced by the taxes included in the price imposed by that country and a profit margin of 30% of the retail price.

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26 As stated by Article 18, paragraph 4 of Law n. 9.430/96.

- d) Acquisition or Production Cost Plus Taxes and Profit Method which is defined as the average cost of acquisition or production of exported property, services, increased for taxes and duties imposed by Brazil plus a profit margin of 15%, calculated based on the sum of the cost, taxes and duties.

Since the enactment of Transfer Pricing regulations, the Brazilian taxpayers and the Federal Tax Bureau have been challenging each other before the Federal Administrative Court (*Conselho de Contribuintes*) which has held several important decisions in favour of the taxpayers to compel the Government not to claim amounts without legal grounds, provided, however, that such decisions continue to be challenged by the Federal Tax Bureau in all possible ways.

Nevertheless, up to the present moment, these regulations have not been analyzed either by the Superior Court of Justice or the Federal Supreme Court (respective highest level courts of Brazil's Judicial System), which means that there remain several issues to be settled in order to allow a more balanced application of such regulations in light of the Arm's Length Principle recognized worldwide.

### **3.6. Thin Capitalization Rules**

The Brazilian government introduced thin capitalization rules through Provisional Measure no. 472, of 15 December 2009, which came into effect on 16 December 2009 and was converted into law through Law 12.249 of 11 June 2010.

These rules limit the possibility of deducting, as a necessary operational expense, interest payments made under a foreign loan to a party (legal entity or individual) located abroad, as explained below.

Under such rules interest paid or credited by a Brazilian company to a related party (individual or legal entity) resident or domiciled abroad but **not located in a tax haven** jurisdiction or privileged tax regime which has a

shareholding in the Brazilian company, can only be deducted for tax purposes if all the following circumstances occur:

- a) if the interest being paid is deemed to be a necessary expense to the corporate activity (within the meaning of the law, i.e. necessary for the realization of operations required by the corporate activity, as per article 47, paragraph 1, of Law 4506/64);
- b) if the amount of the debt granted by the related party to the Brazilian company does not exceed twice the amount of its holding in the net equity of the Brazilian company; and
- c) if the total amount of the Brazilian company's debts does not exceed twice the sums of all related parties' holdings in the net equity of the Brazilian company.

Thus, according to the above rule, for the Brazilian company to be able to deduct from its income as an operational expense, the amount paid as interest to the related party, the debt- to-equity ratio must not exceed the proportion of 2:1.

Under such rules interest paid or credited by a Brazilian company to a related party (individual or legal entity) resident or domiciled abroad which is **located in a tax haven** jurisdiction or privileged tax regime, can only be deducted for tax purposes if all the following circumstances occur:

- a) if the interest being paid is deemed to be a necessary expense to the corporate activity (within the meaning of the law, i.e. necessary for the realization of operations required by the corporate activity, as per article 47, paragraph 1, of Law 4506/64); and
- b) if the amount of the Brazilian company's debts with entities located in tax haven jurisdictions or privileged tax regimes does not exceed 30% of the net equity of the Brazilian company.

## 4. INTELLECTUAL PROPERTY

In the past few decades, industrial property, a sub-classification of the more comprehensive term “intellectual property”, has been the focus of attention of Brazilian scholars and lawmakers. Laws have been drafted and enacted aiming at the protection of this type of property right in the fields of industry and commerce, as well as in subjects relating to preventing unfair competition.

The first step for the foreign investor wishing to undertake business in Brazil is to obtain appropriate protection for the industrial property rights of its products or services. The investor also should become acquainted with the legal ramifications of entering into agreements and contracts that may affect the company’s industrial property rights.

In Brazil, the National Institute of Industrial Property (*Instituto Nacional da Propriedade Industrial* - INPI) is the agency to which all requests concerning the protection of rights relating to industrial property should be addressed, as well as requests for the registration of technology transfer contracts. This kind of contracts, once in effect, also produces taxation effects.

According to the Brazilian laws and regulations in force, technology transfer contracts are classified as:

- (a) License of exploration of patents;
- (b) License of exploration of Industrial Design;
- (c) License of use of trademarks and geographic indicators;
- (d) Technology supply;

- (e) Technical and scientific assistance services; and
- (f) Franchise.

Besides these, computer programs can also be registered at the INPI, even if the protection of the rights relating to these programs do not depend on registration. The intention is to grant more safety to copyright relating to computer programs.

The Brazilian legislation also protects copyright, another sub-classification of intellectual property. However, the protection of artistic, literary and scientific workmanship does not depend on registration, unlike other industrial property<sup>27</sup>.

#### **4.1. Patents**

A patent is a temporary privilege granted for the protection of inventions and utility models. To be patentable an invention must meet the requirements of novelty, inventive activity and industrial application. It may be patentable as utility model, objects of practical use, or part thereof, susceptible of industrial application, which presents a new form or arrangement, involving an inventive act, resulting in functional improvement in its use or manufacture.

The protection granted by a patent extends to 20 years for inventions, and 15 years for utility models, from the date the patent application is filed at the INPI.

The protection granted by a patent cannot be for a period of less than 10 years for inventions and 7 years for utility models from the date the

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<sup>27</sup> Article 18, of Law 9.610/98.

respective registration is granted by INPI, except in the event INPI is prevented to examine the request either by court order or by *force majeure*.

In Brazil there is no law specifying categories of inventions. On the other hand, those which are not subject to patent protection are described in detail as, for example, scientific inventions, games, rules, software and inventions designed to infringe laws or which are against the society's morality, health and public safety interests.

On March 2013, INPI enacted the Resolution n. 25/2013, which established the e-INPI, an Electronic System for Management of Industrial Property. Through this system, the INPI users can require services and practice acts by electronic means, using the internet. Through Resolution n. 62/2013, INPI created the e-PATENTES, a module of e-INPI intended for patents. Also, Resolution n. 75/2013 established a system meant to prioritize patent requests related to the environment and the fight against weather changes, named "*Patentes Verdes*" (Green Patents).

## 4.2. Trademarks

Trademarks include every sign which, when connected with products, goods or services, identifies and separates them from others of an identical or similar class, certifying the rules and technic specifications applicable to each class. Brazilian law establishes four categories of trademarks eligible for protection: products, services, certifications and collective trademarks. Law n. 9.279, from 14 May 1996, puts geographic indicators into a special classification.

The registration of a trademark before the INPI creates the exclusive right to use the trademark in Brazil, in connection with the class in which it has been registered. Trademark use signifies the exclusive right to use the trademark, especially in documents and papers, to distinguish products,

services and activities which are offered. This right is exercised basically for the economic exploitation of the sign and/or registered name. Pursuant Law n. 9.279, the registration of a trademark is valid for a period of 10 (ten) years, renewable for the same period on successive basis.

Brazilian law establishes several categories in which one may apply for the registration of trademarks for services, products, certifications, and collective and geographic indicators with the INPI. Such categories are: the name (*nominative*); the design (*figurative*); and the name and design (*mixed or tri-dimensional*).

INPI adopts a classification of products and services based on the Nice Convention on International Classification: Trademarks are registered according to the products or services classes to which they are related.

On March 2013, through Resolution n. 26/2013, INPI created a module of the already existing system e-INPI intended for trademarks, called e-MARCAS.

### **4.3. Microchip Designs**

With the enactment of Law n. 11.484, on 31 May 2007, the Government established the protection of intellectual property for the design of microchips. With this law, Brazil started to consider microchips and their designs as elements of intellectual property.

A Microchip is a set of interconnected electronic components, manufactured from a semiconducting material such as silicon or germanium, used in computer circuitry to relay information via specific electrical characteristics.

The designs of these microchips are the representational figures of the position of those elements and connections in a unit.

The protection granted by Law is for the design of the microchips, that is to say, for the description of the single physical structure.

Such protection can be given to an original design as a result of the intellectual effort from its creator, and for the results that are not common to technicians, experts or manufacturers of microchips. This protection is granted for 10 years, from the date the request for protection is filed before INPI or from the date of the first exploitation, whichever takes place first.

#### **4.4. Technology Supply and Technical and Scientific Assistance Services**

The laws in force have created two categories - (a) Technology Supply and (b) Technical and Scientific Assistance Services - to cover all transfers of know-how and technical and scientific services directed towards the production of consumer goods and the manufacture of industrial equipment.

INPI regulates industrial property and technology transfer. The guidelines adopted by the INPI for its inspection of technology supply and technical assistance contracts are described in Normative Instruction n. 16/2013 and in Law n. 9.279/96, which provides that the validity of these contracts against third parties is dependent upon registration with INPI. The parties can freely negotiate the contract terms provided that Brazilian national sovereignty, public order and morality are observed. However, the registration of these contracts is dependent upon meeting several INPI requirements, which are: (a) the observance of applicable limits - as to the prevailing tax and exchange control regulations regarding deductibility for income tax purposes and the remittance in foreign currency of the contractual payments; (b) the specification of all costs and the detailed specification of the remuneration of the technicians per hour, for example; (c) the term for the performance of the services or the evidence that the service has already been performed; and (d) specification of the total cost of the services, even if estimated.

Law n. 8.383/91 permits the remittance and tax deduction of royalties paid by a Brazilian subsidiary to its controlling company abroad if the contract is registered with INPI and the Brazilian Central Bank. Besides that, Law n. 11.452/07 establishes that the Contribution for Intervention on the Economic Domain (*Contribuição de Intervenção no Domínio Econômico – CIDE*), created by Law n. 10.168/00, is not levied on contracts of technology transfer and use license of software, performed between a legal entity and a foreign company.

#### **4.5. Copyright**

The expression of human ideas, through artistic, literary and scientific workmanship, is also protected by intellectual property. Such rights are regulated by Law n. 9.610/98, which sets out that to use or explore any workmanship, the author's authorization is essential.

As referred to previously, according to Brazilian Law, copyright protection does not depend on prior registration.

#### **4.6. Software**

The Brazilian Software Act (Law n. 9609/98) defines Software as the expression of an organized set of instructions in natural or code language, contained in a physical support of any kind, necessarily employed in automatic machines for the manipulation of data, devices, tools, or peripheral equipment, based on digital or analog technique, so they will operate in the way and with the purposes determined by its creator(s).

The Law also provides that software shall be protected by copyright, and, that such protection is not conditioned to any prior registration.

In this way, the software registration is part of the software's title as it is evidence of originality and identity of the software.

Thus, by registering the software, the author ensures his exclusive rights of production, use and commercialization of his creation.

The responsibility for the software registration, in Brazil, is given to INPI.

The software ownership is susceptible of judicial questioning by third parties, cases which the ownership would be recognized in Court if presented a publication or creation evidence, for example.

However, at the owner's discretion, to confer legal protection to its exclusive rights of production, use and commercialization of the creation, the owner can require the software registration before the INPI (Brazilian Patent and Trademark Office), as it is evidence of originality and identity of the software.

It must be noted that to a Software is granted a 50-years protection, counting from January 1 of the year following its publication or, in the absence thereof, from its "Date of Creation" – which is the time that the software became capable of performing the function for which it was projected.

## 5. INTERNATIONAL TREATIES

### 5.1. Preamble

International treaties are international agreements concluded between actors in international law, “whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”<sup>28</sup>, that are legally enforceable.

To be part of the Brazilian legal system, all international treaties must go through a specific proceeding, as provided by the Brazilian Constitution of 1988. Firstly, international treaties have to be signed by the legal representative of the country<sup>29</sup>.

Subsequently, they must be approved by the Brazilian National Congress<sup>30</sup>, and, only after such approval an international treaty is formally considered as part of the Brazilian legal system.

Generally, when treaties are incorporated into the Brazilian legal system, they have the status of an ordinary law. Notwithstanding, Constitutional Amendment n. 45 of 2004 established that international agreements related to Human Rights should have constitutional status, as long as they are approved in each house of the National Congress in two rounds by 3/5 (three fifths) of the members’ votes. If they are not approved with that quorum, the treaties will still be incorporated into the Brazilian legal system, however, as ordinary law status not having Constitutional status.

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28 Article 2 of the Vienna Convention on the Law of Treaties

29 Article 84(VII) and (VIII) of the Brazilian Federal Constitution.

30 Article 49(I), of the Brazilian Federal Constitution.

Brazil is a signatory of many major international treaties, including most relevant treaties of the United Nations system, Bretton Woods's system and the General Agreement on Tariffs and Trade (GATT), as well as the World Trade Organization treaties. Brazil also plays an important role in Latin America's regional integration process. It is also a member of the Latin American Integration Association (*Associação Latino Americana de Integração* – ALADI) and the Common Market of the South (*Mercado Comum do Sul* - MERCOSUL) and it has additionally signed several bilateral agreements with various Latin American countries.

## 5.2. United Nations

The United Nations (*Organização das Nações Unidas* – ONU) was founded by 51 countries in 1945 after the Second World, to replace the League of Nations. It is an international organization that was created by the interest of the world to avoid new wars maintaining international peace and security.

According to ONU's charter, its purposes are:

- “To keep peace throughout the world;
- To develop friendly relations among nations;
- To help nations work together to improve the lives of poor people, to conquer hunger, disease and illiteracy, and to encourage respect for each other's rights and freedoms;
- To be a centre for harmonizing the actions of nations to achieve these goals”<sup>31</sup>.

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31 <http://www.un.org/en/documents/charter/chapter1.shtml>

Besides being one of ONU's founding members, Brazil participates in all of its specialized agencies, it is one of the majors contributors to ONU's regular budget<sup>32</sup>, and has participated in over 30 peacekeeping operations.<sup>33</sup>

Brazil has signed and incorporated into its legal system most of the agreements signed within the ONU, such as the Universal Declaration of Human Rights of 1948 that was subsequently ratified by Brazil in 10 December 1948, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both signed in 1966, in force since 1976 and ratified by Brazil in 24 January 1992 and many others.

The most recent treaty signed by Brazil was on 3 June 2013, addressing the issue of Arms Trading, and, pursuant to the Treaty it will “enter into force ninety days following the date of the deposit of the fiftieth instrument of ratification, acceptance or approval with the Depositary<sup>34</sup>”.

### **5.3. Bretton Woods Agreements**

In 1947, delegates from 44 nations gathered at the United Nations Monetary and Financial Conference in Bretton Woods, State of New Hampshire, United States. They met to discuss the post-war recovery of Europe as well as a number of monetary issues, such as unstable exchange rates and protectionist trade policies.

The delegates at Bretton Woods reached an agreement known as the Bretton Woods Agreement to establish a post-war international monetary system of convertible currencies, fixed exchange rates and free trade. To facilitate these objectives, the agreement created two international institutions: the

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32 [http://www.un.org/ga/search/view\\_doc.asp?symbol=ST/ADM/SER.B/853](http://www.un.org/ga/search/view_doc.asp?symbol=ST/ADM/SER.B/853)

33 <http://www.onu.org.br/conheca-a-onu/brasil-na-onu/>

34 <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXVI/XXVI-8.en.pdf>

International Monetary Fund (*Fundo Monetário Internacional* - FMI) and the International Bank for Reconstruction and Development (*Banco Internacional para a Reconstrução e Desenvolvimento* - BIRD), which is also known as the World Bank.

Brazil participated in the original meetings and it is an original signatory of the agreements.

#### **5.4. General Agreement on Tariffs and Trade and the World Trade Organization**

Since 1947, the General Agreement on Tariffs and Trade (*Acordo Geral de Tarifas e Comércio* - GATT) has been the world's primary multilateral treaty for trade, despite the fact that technically the treaty was only "provisional" in nature. GATT was established after the Second World War following other new multilateral institutions dedicated to international economic co-operation, notably the "Bretton Woods" institutions now known as the World Bank and the International Monetary Fund.

GATT's objective was the liberalization of world trade, with the consequent prosperity and development which could result there from. The treaty was originally signed by 23 countries, including Brazil, in 1947 and came into force in January 1948. Over the years, GATT was updated and had its scope broadened by way of amendments resulting from "round" negotiations.

From the most significant occurrences since GATT's creation, it is possible to ascertain that there have been 9 (nine) of such rounds, and each round with a specific subject to be discussed and different duration. Each of such round is identified by the name of the location where the meeting is held<sup>35</sup>, that is:

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35 [http://news.bbc.co.uk/2/hi/europe/country\\_profiles/2430089.stm](http://news.bbc.co.uk/2/hi/europe/country_profiles/2430089.stm)

<b>Name</b>	<b>Start</b>	<b>Subjects covered</b>
Geneva	April 1947	Tariffs
Annecy	April 1949	Tariffs
Torquay	September 1950	Tariffs
Geneva II	January 1956	Tariffs, admission of Japan
Dillon	September 1960	Tariffs
Kennedy	May 1964	Tariffs, Anti-dumping
Tokyo	September 1973	Tariffs, non-tariff measures, “framework” agreements
Uruguay	September 1986	Tariffs, non-tariff measures, rules, services, intellectual property, dispute settlement, textiles, agriculture, creation of WTO, etc.
Doha	2001 - present	Tariffs, non-tariff measures, agriculture, labour standards, environment, competition, investment, transparency, patents etc.

Source: [https://en.wikipedia.org/wiki/World\\_Trade\\_Organization#GATT\\_rounds\\_of\\_negotiations](https://en.wikipedia.org/wiki/World_Trade_Organization#GATT_rounds_of_negotiations)

Presently, there have been 9 (nine) GATT rounds, the Uruguay Round negotiations having taken place from 1986 until 1994. The Doha Round is in discussion and has not produced any results in the world trade scene.

#### **5.4.1. Other Agreements**

The OMC agreements cover goods, services and intellectual property. The agreements demonstrate that the principle of liberalization and the permitted exceptions are in the core of the OMC.

The agreements include individual countries’ commitments to lower customs tariffs and other trade barriers, as well as to open and keep open services markets. They set procedures for settling disputes. They prescribe

special treatment for developing countries. They require governments to make their trade policies transparent by notifying the OMC about laws in force and measures adopted, and through regular reports by the secretariat on countries' trade policies.

Examples of other agreements can be found below:

- (a) Uruguay Round Protocol of the General Agreement on Tariffs and Trade of 1994;
- (b) Agreement on Agriculture;
- (c) Agreement on Sanitary and Phyto-Sanitary Measures;
- (d) Agreement on Textile and Clothing;
- (e) Agreement on Technical Barriers to Trade;
- (f) Agreement on Trade-Related Investment Measures;
- (g) Agreement on the Implementation of Article VI of GATT;
- (h) Agreement on the Implementation of Article VII of GATT;
- (i) Agreement on Pre-shipment Inspection;
- (j) Agreement on Rules of Origin;
- (k) Agreement on Import Licensing Procedures;
- (l) Agreement on Subsidies and Countervailing Measures;

- (m) Agreement on Safeguard;
- (n) General Agreement on Trade in Services;
- (o) Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods;
- (p) Understandings on Rules and Proceedings Governing the Settlement of Disputes; and
- (q) Trade Policy Review Mechanism.

#### **5.4.2. OMC Secretariat report on trade policies and practices in Brazil**

In March 2009, the OMC prepared and published a report on Brazil's trade policies and practices, which demonstrated the progress that the country has made as regards to trade policies. The report stated that since its last review in 2004, Brazil has continued with the gradual modernization and streamlining of its trade regime.

The report also pointed out Brazil's favorable environment to grow, at an annual average rate of 4.5% during the period 2004-2007, and 6.3% on the 12 months to September 2008.

According with the Program of Trade Policy Reviews for the year of 2013 a new review for Brazil is scheduled to the next 25 and 27 June.

#### **5.5. ALADI**

The Latin American Integration Association, known as ALADI for its acronym in Spanish and Portuguese, was created in 1980 by the Treaty of Montevideo, replacing the ALALC regional association. The goal of ALADI is

to gradually develop a Latin American Common Market through preferential tax and duty treatment and other mechanisms encouraging free trade.

ALADI member-countries are Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Panamá, Paraguay, Peru, Uruguay, Venezuela and Cuba. Nicaragua was also accepted to be part of ALADI and is currently in progress to attend the requirements to become member of the Association, which is organised into a Political Branch and a Technical Branch.

The Political Branch is composed of the Foreign Relations Minister Council, the Evaluation and Convergence Council, and the Representatives Committee.

The Foreign Relations Minister Council is the leading body of ALADI and forms the guiding policies of the Association's economic integration process.

The duties of the Evaluation and Convergence Council include examining and monitoring the operation of the different trade mechanisms provided by the treaty, as well as promoting activities that lead to greater integration.

The Representatives Committee is ALADI's permanent political body. It is responsible for the adoption of whatever measures are necessary to accomplish the goals of the Treaty of Montevideo and to create ALADI's governing rules. Also, the Committee is responsible for representing ALADI before other countries.

The Technical Branch consists of the Secretary General, which is responsible for the evaluation and management of measures to best accomplish ALADI objectives.

Trade is governed by some basic guidelines, including a commitment by members to work toward uniformity in trade policies, to develop flexible policies of differing treatment based on the development level of member countries, and to allow for various ways of concluding commercial agreements.

Many ALADI member countries still suffer severe problems in commerce and financing. Among the main problems are the likelihood of continuing protectionism policies in the developed countries, economic instability and the slow recovery of international trade and the high cost of basic products. Flexibility in the ongoing ALADI negotiations is seen as a key element in overcoming obstacles and concluding successful short-term agreements.

The treaty provides various mechanisms to provide tariff and tax relief and stimulate trade, including several types of bilateral and multilateral agreements, such as:

- (a) **Regional Duty Preferences:** ALADI provides for reciprocity among member countries concerning tariffs and duties. Duties on goods from non-member countries are applied according to the policies in force in those countries;
- (b) **Limited Scope Agreements:** These involve trade arrangements in which only some countries may participate for the specific purpose of strengthening the regional integration process. The contracting parties are governed exclusively by the rights and liabilities established by these contracts;
- (c) **Regional Comprehension Agreements:** Because development levels vary among member countries, all members grant special non-reciprocal tax and duty concessions to lesser-developed member countries; and
- (d) **Limited Scope Commercial Agreements:** The industrial sectors of member countries may participate under the ALADI framework in commercial agreements. These agreements usually contain exclusive advantages for the signatory countries, especially for the lesser-developed countries of Bolivia, Ecuador and Paraguay.

## 5.6. MERCOSUR

### 5.6.1. Purpose

In view of the formation of large trading associations such as the European Union and the North American Free Trade Association, the southern Latin American countries have been working since July 1986 on a means to stimulate trade between the region and the rest of the world, and to encourage foreign investment.

In July 1990, a timetable for the formation of a Common Market between Brazil and Argentina was established. After December 1990, Brazil and Argentina signed a treaty incorporating all previous agreements liberating trade between the 2 countries. This agreement already reflected the characteristics and objectives of what was to become the MERCOSUR.

On 26 March 1991, Argentina, Brazil, Paraguay and Uruguay signed the Treaty of Asunción formalizing the decision to integrate the economy of these countries into a Common Market of the South (*Mercado Comum do Sul - MERCOSUL*), effective as from 01 January 1995.

MERCOSUR's main purpose is to provide the coordination of macroeconomic policies amongst its members, as well as to provide the free transit of goods, services and means of production; the establishment of joint customs duties; and the adoption of a common commercial policy towards other countries and communities.

The Treaty of Asunción of 1991 establishes the legal basis of MERCOSUR whilst the *Ouro Preto* Protocol of 1994 recognizes the legal existence of the block under international law, ascribing it with the authority to negotiate agreements with third parties on its own behalf.

Venezuela is now member of MERCOSUR and Bolivia has signed an adhesion protocol and is in accession process.

### **5.6.2. Administration**

The Treaty of *Asunción* establishes that the administration and resolutions adopted by MERCOSUL will be carried out by the Common Market Council and the Common Market Group<sup>36</sup>.

The Council is MERCOSUR's highest level decision making body. It is responsible for the political guidance of the Common Market and for assuring that the purposes and terms established for the implementation of MERCOSUR are met. It will be presided over by a turnaround plan, in alphabetical order, between the countries members, in a period of six months. It will be made up of the Ministers for Foreign Relations and the ministers of the Economy. The meetings will take place as many times as necessary or, at least, once a year.

The Common Market Group is the executive body. It is coordinated by the Ministry of Foreign Affairs of each country and is composed of 4 members and 4 substitute members per country. These members are representatives of the Ministry of Foreign Affairs, Ministry of the Economy and the head of the Central Bank of the respective member-states.

It is important to note that the mentioned group is allowed to create work subgroups, whenever necessary, to accomplish the obligations of the Common Market Group<sup>37</sup>. Each work subgroup will have a national coordinator, indicated by each signatory country, and while its commission may have the participation of members of the private sector, members of the private sector are not allowed to participate in decision making.

Also the Common Market Group's Administrative Secretary is to carry out a quarterly review of the practice and application of the Decisions of the Common Market Council and the Common Market Group<sup>38</sup>.

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36 Clause 9 of Treaty of *Asunción*.

37 Article 17 of Internal Rules of the Common Market Group.

38 Resolution n. 8/93 of Common Market Group.

The Administrative Secretariat of MERCOSUR was created in 1994 by the Protocol of *Ouro Preto*<sup>39</sup> with the main purpose of maintaining the files of all MERCOSUR Documents, to facilitate the organization's publicity, and to facilitate the direct contact of the authorities of all the MERCOSUR bodies. The Administrative Secretariat also functions as a center of communication and exchange of information related to MERCOSUR and guarantees the legal effect in each signatory country of the decisions reached by the different bodies of MERCOSUR. The Administrative Secretariat has a permanent main office in *Montevid u*.

### 5.6.3. **Legislative Procedures**

The decisions of MERCOSUR may operate as follows<sup>40</sup>:

- (a) Once a rule is approved, the signatory countries will adopt the necessary measures to internalize that rule and communicate its incorporation to the Administrative Secretariat of MERCOSUR;
- (b) When all the signatory countries have communicated the incorporation mentioned in item (a) above, the Administrative Secretariat of MERCOSUR will communicate such act to the other signatory countries; and
- (c) The approved rule will simultaneously come into force within the signatory countries 30 days after the communication described in item (b) above.

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39 Article 31 of Protocol of *Ouro Preto*.

40 Chapter VI of Protocol of *Ouro Preto*.

For the purpose of implementing and following such rules the Common Market Group, in its XII Meeting held in Montevideo on 13 and 14 January 1994, it was decided that the subgroups will report quarterly on the degree of implementation of the decisions and resolutions adopted by MERCOSUR in each signatory country.

#### **5.6.4. Dispute Resolution**

Currently, MERCOSUR's Dispute Settlement System is regulated by the Protocol of *Olivos*, which was signed in 18 February 2002 and became effective on 1 January 2004. The Protocol of *Olivos* was further amended in 19 January 2007. This Amendment, named Protocol of Amendment of the Protocol of *Olivos*, was issued to make the Protocol of *Olivos* more suitable to meet any eventual alterations in the country members of MERCOSUR.

#### **5.6.5. Protection of Competition**

In December 2010, the Member-States signed, in *Foz do Iguaçu*, the MERCOSUR's Agreement of Protection of Competition<sup>41</sup> to replace the previous Protocol of Protection of Competition of 1996. This agreement intends to promote the cooperation and coordination of the members' national competition laws and assure their mutual economic assistance, as well as prevent any practice that may be against economic competition between the members.

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41 Information available at: [http://www.mercosur.int/innovaportal/v/2377/1/secretaria/decis%C3%B5es\\_2010](http://www.mercosur.int/innovaportal/v/2377/1/secretaria/decis%C3%B5es_2010)

### **5.6.6. Safeguards**

During the *Fortaleza* Meeting, the signatory countries of MERCOSUR also determined the rules on safeguard measures before third parties. The approval of Decision 17/96 permits protection to the industries of the regional market against the increase of unfair imports from non-signatory countries. By means of a common understanding present in the Agreement of *Asunción* and in Decision 17/96, the members agreed not to apply intra-zone measures. The Committee of Commercial Defense and Safeguards was recently created with the purpose of coordinating such matters.

### **5.6.7. Dumping and Subsidies**

In August 2002, by means of Decisions nos. 13 and 14 of the Council of the Common Market of MERCOSUR (CMC), the Antidumping Agreement and the Agreement on safeguards and Compensatory Measures of the OMC were adopted in the ambit of MERCOSUR, regarding the treatment of dumping and subsidies within intra-zone trade.

Considering such decisions, the CMC disciplined the procedures and rules for antidumping investigations and subsidy solutions in the intra-zone trade, by means of Decree n. 22/02.

### **5.6.8. Common External Tariff - CET**

One of the most important instruments to motivating the signatory countries to become externally competitive is the Common External Tariff (CET) created by the Protocol of Buenos Aires and introduced in Brazil by Decree n. 1.343 of 23 December 1994, which also created the MERCOSUR Common Nomenclature (NCM), which specifies all products to be traded between the signatory countries.

In 2011, by means of the Ministers Council of the Foreign Commerce Chamber (CAMEX) Resolution n. 94/11, the NCM and the TEC were updated in order to be aligned with the Brazilian 5<sup>th</sup> Amendment to the Nomenclature of the Harmonized System of Designation and Codification of Goods, incorporating also the MERCOSUR's decisions between 2010 and 2011.

In Brazil, the prevailing regulation indicates<sup>42</sup> the exception list to the CET which contains products labeled as “sensitive” and which thus are not designated to compete with similar products of other countries. This exception list is reduced after each calendar year.

The CET represents, generally, tariff levels from 0 to 21.5%, which can in some cases rise to 35%. The main objective of the CET is to avoid deflections in trade flow between member-states, as this would cause problems on a macroeconomic level with damaging consequences to the development of MERCOSUR.

#### **5.6.9. Rules of Origin**

MERCOSUR's rules of origin, which were established by the Agreement of Economic Complementation n. 18, were replaced by the Eighth Additional Protocol of the Agreement of Economic Complementation (ACE/18), signed by the signatory countries of MERCOSUR on 30 December 1994, and updated with later modifications.

This important issue for MERCOSUL concerns rules of origin defining the proportion of domestic components (originating in MERCOSUL) which products must contain. To this end, a program had been established to achieve

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42 Resolution CAMEX n. 82, of 15 December 2009, in accordance with Decree n. 4.732, of 11 June 2003, Resolution n. 28/09 of the CMC, and Resolutions n. 30/09 and 39/09 of the GMC.

the convergence of individual country rules to be implemented on a uniform and gradual basis to reach the general norm<sup>43</sup>.

Furthermore, in compliance with the Decision 37/05 of CMC, Brazil<sup>44</sup> intends to eliminate the Double Charge of CET and the Distribution of Customs Revenue.

#### **5.6.10. International Contracts**

Decree n. 2.095 of 17 December 1996 promulgated in Brazil the text of the Protocol of Buenos Aires on International Jurisdiction in Contractual Subjects, concluded in Buenos Aires on 05 August 1994. Under this decree, the signatory countries of MERCOSUR adopted common rules concerning international jurisdiction related to contracts of a civil or commercial nature signed between individuals and legal entities.

#### **5.6.11. Banking**

Concerning the banking sector, MERCOSUR Sub Group n. 4 intends to consolidate the supervision of global banking through a convention of the Central Banks of the signatory countries, reducing the differences existing between the banks with regard to national treatment of the signatory countries or harmonization of the practice of insurance and reinsurance, etc.

Through Decision CMC n. 11/94, the signatories of MERCOSUR approved the Protocol on the Promotion and Protection of Investments of Non-

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43 39th Additional Protocol of ACE/18, incorporated in Brazil by Decree n. 4.106 of 28 January 2002.

44 Decree 5,738 of 30 March 2006.

Signatory Countries. Such Decision establishes that investors of non-signatory countries will be given the same treatment as local investors.

Also, Decision CMC n. 12/94 has adopted the Principles on the Consolidated Supervision of Banking Groups, in force in Brazil owing to Resolution of the National Monetary Council n. 2.723 of 31 May 2000.

#### **5.6.12. Environment**

As the world worries about environmental protection measures which can affect the comparative advantages of some countries, creating barriers to the access of some markets and altering their competitiveness by an increase in production costs, MERCOSUR signatory countries, by means of Work Sub Group n. 6, and, taking into account the results of the International Summit on Sustainable Development, held in Johannesburg, South Africa, in 2002 and Resolution n. 45/02 of the CMC, have agreed to:

- (i) permanently analyze the restrictions and non-tariff measures which relate to the environment;
- (ii) increase the industrial and economic competition and environmental preservation by means of a greater efficiency in the use of raw materials and in the procedures used for the production of goods and services, by the year 2005;
- (iii) permanently incorporate the environmental factor in the other sectorial policies of the MERCOSUR;
- (iv) permanently implement the “Environment Agreement of the MERCOSUR” (Decision of the CMC n. 2/01), through developing instruments which assure its execution;

- (v) create instruments and mechanisms for the improvement of the environmental management, by December 2004;
- (vi) permanently operate the “Environmental Information System”, created with the purpose of maintaining the public well informed;
- (vii) formulate initiatives of sustainable development which contribute to the economic growth, by December 2005;
- (viii) protect and administrate a base of natural resources for the economic and social development, by December 2005;
- (ix) administrate, in an adequate manner, dangerous chemical substances and products, by December 2003; and
- (x) permanently follow the International Environmental agenda.

Taking into consideration the importance of mutual cooperation during environmental emergencies, CMC has issued an Additional Protocol on Environmental Cooperation of MERCOSUR and Welfare Environmental Emergencies (Decision 14/04), by which its signees agree to provide support whenever an emergency or potential dangerous situation might affect the environment or the people within its territory or of the other Member-States.

### **5.6.13. Industry**

Concerning industry, MERCOSUR Sub Group no. 7 has as its priority the conduction of an evaluation of the competitiveness of sectors that are sensitive to the economy of the signatory countries; the identification of the opportunities

to make foreign alliances; implementation of mechanisms which will allow the continuation of the industrial incentives adopted by each signatory country for its own industry; the promotion of the cooperation of the productivity of the signatory countries; implementation of a project for the integration of small, medium and large-sized companies of the signatory countries; development and support of the regional industrial arts and the protection of intellectual property.

#### **5.6.14. Agriculture**

In order to facilitate the free circulation of combined agriculture and stock raising, as well as agricultural and industrial products, MERCOSUR Sub Group no. 8 will harmonize MERCOSUR's Health and Sanitation Agreement with OMC's rules.

To determine the basis of coordination at regional levels, the actions and instruments for the agriculture areas, MERCOSUR will analyse the agricultural policies of each signatory country, as in the example of "Negotiations Agenda" of the Sub Group n. 8, approved by Resolution n. 22/01 of the GMC.

Furthermore, through Resolution 25/07 of the GMC, MERCOSUR has set Guidelines for the Recognition and Identification of family farming.

#### **5.6.15. Labour**

MERCOSUR will also continue to follow the rules established by the International Labour Organisation. Work Sub Group n. 10 will analyze the reports prepared by the BIRD (Inter-American Development Bank) on labour costs and migration and make proposals related to these matters. It is also the intention of MERCOSUR to sign multilateral agreements on Social Security and to implement a system of technical cooperation in the area of professional education.

Thus, MERCOSUR's Multilateral Agreement on Social Security drafted in Montevideo in December of 1997, and already ratified by Brazil,<sup>45</sup> provides the free movement of workers within the bloc and demonstrates a concern of its State-Members with a guarantee of social benefits and better living conditions of workers involved.

#### **5.6.16. Automatic Payment Program**

From 01 May 1991, a transitory financing mechanism of the credits due to the multilateral compensation balances (Automatic Payment Program) was incorporated into the Agreement. This mechanism attempts to foresee the occasional liquidity difficulties that the Central Banks of member countries might face at the closing of multilateral compensation periods. This mechanism is multilateral and automatic and consists in postponing the payment of obligations derived from the situations described above for a period of 4 months.

#### **5.6.17. Accession**

Currently, Bolivia, Chile, Colombia, Ecuador and Peru hold an associate member status.

#### **5.6.18. Bilateral Relations**

MERCOSUR has several agreements with third parties, as follows:

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45 Decree n. 451/2001.

**MERCOSUR - Andean Community**

Partial Scope Agreement – Framework Agreement for the Creation of a Free Trade Area between the Andean Community and MERCOSUR

Date of Signature: 16 April 1998

**MERCOSUR - Andean Community**

Economic Complementation Agreement n. 39

Date of Signature: 12 August 1999, Entry into Force: 16 August 1999

Argentina - Colombia, Ecuador, Peru and Venezuela (as Members of the Andean Community)

Economic Complementation Agreement n. 48

Date of Signature: 29 June 2000 | Entry into Force: 01 August 2000

**MERCOSUR - Andean Community**

Economic Complementation Agreement n. 56

Date of Signature: 06 December 2002

**MERCOSUR – Bolivia**

Economic Complementation Agreement n. 36

Date of Signature: 17 December 1996 | Entry into Force: 02 March 1997

Nineteenth Additional Protocol

Date of Signature: 23 July 2004

**MERCOSUR - Colombia, Ecuador and Venezuela**

Economic Complementation Agreement n. 59

Date of Signature: 16 December 2003 | Entry into Force: Argentina: Note EMSUR C.R. n. 5/05, 01/13/05; Colombia: Dec. n. 141, 01/26/05; Uruguay: Dec. n. 663/85, 11/27/85; Venezuela: Dec. n. 3.340, 12/20/04; Ecuador: Decree n. 2675-A, 18/03/05.

**MERCOSUR – Chile**

Economic Complementation Agreement n. 35

Date of Signature: 25 June 1996 | Entry into Force: 01 October 1996

**MERCOSUR – Egypt**

Framework Agreement

Date of Signature: 07 July 2004

**MERCOSUR - European Community**

Interregional Framework Cooperation Agreement

Date of Signature: 15 December 1995 | Entry into Force: 01 July 1999

Argentina: L. 24.964, 10/03/96; Brazil: Dto. Leg. 10, 07/27/99; Paraguay: L. 976, 08/12/99; Uruguay: L. 17.053, 12/1/98

**MERCOSUR – India**

Framework Agreement

Date of Signature: 17 June 2003

**MERCOSUR – India**

Preferential Trade Agreement

Date of Signature: 25 January 2004

Additional Annexes I, II, III, IV

Date of Signature: 19 March 2005 / Entry into Force: 01 June 2009

**MERCOSUR – Israel**

Framework Agreement

Date of Signature: 08 December 2005

**MERCOSUR – Israel**

Free Trade Agreement

Date of Signature: 18 December 2007

**MERCOSUR - Jordania**

Framework Agreement

Date of Signature: 30 June 2008

**MERCOSUR – Mexico**

Economic Complementation Agreement n. 54

Date of Signature: 05 July 2002

**MERCOSUR – Mexico**

Economic Complementation Agreement n. 55 - Date of Signature: 27 September 2002

First Additional Protocol to Appendix IV - Date of Signature: 24 June 2004

First Additional Protocol to Appendix I - Date of Signature: 24 September 2003

**MERCOSUR - Pakistan**

Framework Agreement

Date of Signature: 20 July 2006

**MERCOSUR – Peru**

Economic Complementation Agreement n. 58

Date of Signature: 25 August 2003

**MERCOSUR - Southern African Customs Union (SACU)**

Preferential Trade Agreement

Date of Signature: 16 December 2004

**MERCOSUR – Israel**

Free Trade Agreement

Date of signature: 18 December 2007

**MERCOSUR - Turkey**

Framework Agreement for the establishment of a Free Trade Area

Date of Signature: 30 June 2008

**MERCOSUR – Egypt**

Free Trade Agreement

Date of signature: 8 August 2010

## **6. ENVIRONMENTAL LAW**

### **6.1. Sustainable Development and Investment - A New Market with an Increasing Demand**

The worldwide acceptance of the concept “sustainable development” must be taken into account when considering investment in Brazil.

Sustainable development is a framework for redefining progress and redirecting economies to enable all people to meet their basic needs and improve their quality of life, while ensuring that the environmental systems, resources and diversity upon which they depend are maintained and enhanced both for their benefit and that of future generations.

Environmental impact must be considered in any new investment in Brazil. Strict compliance with environmental legislation is enforced and it is no longer possible to consider development without taking into account the limitations and responsibilities imposed by environmental factors.

The principles of environmental protection and sustainable development should not, however, be viewed as hindrances to economic development, as just another cost of doing business. Incorporation of environmentally friendly practices is an opportunity for business development - waste reduction, energy efficiency, and pollution prevention make economic sense. So much so that efficiency in business has become inextricably linked with sound environmental practices.

### **6.2. Brazilian Environmental Law**

The Environmental Law is a combination of rules and principles that intend to maintain the perfect balance in the relationship between man and environment.

Due to this, it is important for foreign investors interested in Brazil to become acquainted with Brazilian Environmental Law, which is extensive.

It is also important to clarify that in Brazil, the Union, as much as the States, the Federal District and the Municipalities, as stated in articles 21 to 25 and 30 of the Federal Constitution of 1988, have competence to legislate about environment matters.

The Constitution, which devotes an entire chapter<sup>46</sup> to environmental matters, explicitly requires that the government:

- (i) ensure ecological preservation and the control of species and of the environment;
- (ii) ensure the preservation and integrity of Brazil's genetic heritage and to supervise the entities dedicated to genetic material research and manipulation;
- (iii) define, in all units of the Federation, territorial spaces and their components which are to receive special environmental protection;
- (iv) demand environmental impact studies where activities may cause significant degradation of the environment;
- (v) promote environmental education in schools, including awareness of the need to preserve the environment;

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46 The Federal Constitution provides that: "Article 225. All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations."

- (vi) protect fauna and flora, avoiding practices which can disrupt the environment, causing species extinction or any form of cruelty to animals;
- (vii) require restoration of environmental degradation caused by mining and control any production or commercialization of substances considered harmful to life and to the environment; and
- (viii) implement civil, criminal, and administrative sanctions for activities and acts considered to be damaging to the environment (“Procedures and activities considered as harmful to the environment shall subject the infractors, individuals or legal entities, to penal and administrative sanctions, without prejudice to the obligation to repair the damages caused”).

The Environmental Law<sup>47</sup> established the National Environmental Policy, the objective of which is the “preservation, improvement and recuperation of the environment quality, aimed at assuring continued social and economic development, the protection of national security, and human rights.”

The Environmental Law is a well-developed regulatory framework which emphasizes environmental improvement in addition to environmental protection.

The Environmental Law established the means for implementing environmental policy, *i.e.*, the establishment of standards for environmental quality and measurement of environmental impact; licensing and review

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<sup>47</sup> The main environmental legislation is Law n. 6.938 of 31 August 1981 (amended by Laws nos. 7.804/89, 8.028/90, 9.960/00, 9.966/00, 9.985/00, 10.165/00, 11.105/05, 11.284/06, 11.941/09, and 12.651/2012 and regulated by Decrees nos. 97.632/89, 99.274/90, and 5.975/06 - “The Environmental Law”).

of actual or potential polluting activities; and imposition of criminal or civil penalties on parties that fail to comply with environmental regulations.

The Law<sup>48</sup> also imposes strict civil liability for environmentally harmful activities (including all forms of pollution): liability requires no evidence other than how much environmental damage has been caused and who caused it. There is no need to ascertain guilt or perceive the intent of whom has caused the environmental damage. In that sense, if the damage was caused by a legal entity, the legal entity, not its owner(s), will be liable for indemnifying the damages. Should proprietorship of the legal entity change, the liability will survive the change, but the parties – the former and the new owner – can contractually provide for a right to indemnification for such liability.

The Environmental Crimes Law<sup>49</sup> provides criminal and administrative punishment for specific acts which cause damage to the environment. The acts include pollution, damage to vegetation and animal life, and damage to culturally or historically significant buildings, monuments or sites.

The Environmental Crimes Law holds legal entities administratively, civil and criminally responsible for infringement of environmental laws in instances where a violation is committed by decision of its legal or contractual representative or its collective body (shareholders, directors, etc.), in the interest, or for the benefit, of the entity. In addition, individual representatives of an infringing entity who in any way contribute to an infringement, or knew of an infringement and did nothing to prevent it, can also be held liable. Moreover, the disregard of corporate entity status is also admitted when it represents an obstacle to the indemnification for the damage caused to the environment.

The Environmental Crimes Law provides for a wide variety of criminal

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48 Brazilian Federal Constitution in its Article 225, paragraph 3, as well as Law n. 6.938/81, Article 15.

49 Environmental Crimes Legislation is n. 9.605 98, amended by the Law 12. 408/2011 and regulated by Decree n. 6.514/2008 and others.

and administrative penalties for environmental law violations, including community service, fines, confiscation, and suspension or cancellation of licenses.

Law n. 7.347/85<sup>50</sup> permits public civil actions (*Ação Civil Pública*) to be filed by the Public Attorney's Office, Public Defense Attorney's Office, by Federal Government, States, Federal District and the Municipalities, and others.

In addition to licensing requirements, potential administrative and criminal penalties, and potential civil liability, businesses in Brazil are subject to various federal, state and municipal regulations relating to: zoning, air pollution, water pollution, deforestation, use of toxic substances, and hazardous waste management.

It is incumbent upon CONAMA<sup>51</sup> to establish guidelines and technical rules, criteria and standards relating to environment protection and to the sustainable use of the environmental resources. By 2012, there was 455 Resolutions published by CONAMA, related to the most relevant and diverse environmental spheres.

### **6.3. Public Environmental Agencies**

In order to achieve the objectives of the National Environmental Policy, Environmental Law has established the National System for the Environment (*Sistema Nacional do Meio Ambiente - SISNAMA*), which is composed by all environmental bodies and entities of federal, state and local governments, as well as the public foundations responsible for the protection and improvement or environmental quality.([www.mma.gov.br/sisnama](http://www.mma.gov.br/sisnama)).

SISNAMA has the following organizational structure:

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50 Amended by Laws nos. 8.078/90, 9.494/97, 10.257/01,11.448/07, 12.288/10 and 12.529/11.

51 An Agency from the Ministry of the Environment.

- (a) Superior Body (Governing): The Government Council consults with the President of the Republic regarding the preparation of national policy and guidelines relating to the environment;
- (b) Consultative and Deliberating Body: The National Council for the Environment (*Conselho Nacional do Meio Ambiente – CONAMA*) is the federal normative agency. CONAMA conducts studies and creates proposals for environmental standards, guidelines and regulations, consulting with the Government Council on environmental policy; ([www.mma.gov.br/conama](http://www.mma.gov.br/conama));
- (c) Central Body: Executive secretary of the Ministry of the Environment (*Ministério do Meio Ambiente – MMA*) is the executive branch agency responsible for formulating national policy and government guidelines for the environment as well as planning, coordinating, and monitoring activities related to the National Environmental Policy; ([www.mma.gov.br](http://www.mma.gov.br));
- (d) Executive Agency: The Brazilian Institute for the Environment and Renewable Resources (*Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis – IBAMA*) is the body responsible for the execution and enforcement of all federal environment laws; ([www.ibama.gov.br](http://www.ibama.gov.br)); and
- (e) State and Local Agencies: State and municipal agencies regulate the use of land, water and other environmental resources, conduct inspections and grant licenses in their respective jurisdictions.

In 2007, Law no. 11.516/07 approved the creation of The Chico Mendes Institute for Biodiversity Conservation (*Instituto Chico Mendes de Conservação da Biodiversidade – ICMBio*), which is also an autonomous

governmental entity as IBAMA, to ensure the application of national policies for the Conservation Units, instituted by Law n. 9.985/00, which established the National System of Units of Conservation (*Sistema Nacional de Unidades de Conservação* - SNUC); to perform policies for the rational use of natural resources; to foment and perform several programs connected to biodiversity and environmental education, as researches, conservation, protection and preservation; among others attributions.

IBAMA, after the creation of The Chico Mendes Institute for Biodiversity Conservation, has lost some of its functions, remaining only with environmental police power, monitoring and granting environmental licenses and authorizations, control of the environmental quality and authorization and control of the use of natural resources, with supplementary power to administer and monitor the implementation of new Conservation Units,

#### **6.4. The Environmental Impact Study and Environmental License**

An Environmental Impact Study (EIA-RIMA)<sup>52</sup> is required for any project which might significantly impact the environment. This study aims to report on information concerning the modifications and the environmental impact that a given project may cause to the environment. At the end of the study, compensatory measures and environmental programs must be settled in order to restore the balance that will be affected with the development of the project. Such a study may prove beneficial to the business because it will reveal if the proposed location of the project is appropriate before all the investments are made. Also, it is necessary for the entrepreneur to obtain some Environmental Licenses.

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52 Article 225(1)(IV) of the Brazilian Federal Constitution, regulated by Laws nos. 9.985/00, and 11.105/05, and Resolution n. 001/86 of CONAMA amended by the Resolution n. 11/86, 347/2004 and 237/97.

Similarly, investments in clean technologies not only can improve productivity, but also save money over the long term by preventing environmental damage, avoiding the significant costs associated with remedial actions to restore the environment. This kind of investment can be made with the assistance of international banking institutions (such as the World Bank and the Inter-American Development Bank), also through a national institution, National Bank of Economic and Social Development (BNDES) or through the private banking sector.

Growing environmental concerns, together with public pressure and stricter regulations, are changing the way people do business across the world, including in Brazil. While the cost of compliance with environmental legislation can be significant, especially for small - and medium - size companies, far more significant liabilities associated with remediation, cleanups and penalties for breaches of legislation face businesses that fail to anticipate their potential environmental liabilities and to improve their environmental performance. The environment must be considered in any new investment in Brazil.

The Environmental License<sup>53</sup> is another relevant aspect to be considered prior to the installation of an enterprise in Brazil. Its purpose is to tie the economic development to environment preservation.

Environmental Licensing is an administrative procedure used by the competent environment bodies, SISNAMA and its agencies, federals as much as state and municipals, to permit the location, installation, enlargement and operation of enterprises and activities that use natural resources, and/or can be considered effective or potentially pollutants and/or of those that can somehow cause environmental degradation.

There are three stages of Environmental Licensing:

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53 Law n. 6.938/81, Decree n. 99.274/90 Resolution n. 237/97 of CONAMA.

- (i) **Preliminary license**, that consists in the preliminary stage of planning the enterprise or activity and under which the location and the basic project of the enterprise will be analyzed, as well as the ascertaining of the environmental viability and the establishing of the basic requirements to be completed in the next stages;
- (ii) **Installation license**, the second stage, controlling projects for unintended pollution as well as the analysis and approval of compensatory measures; and
- (iii) **Operational license** that will authorize the operation of the enterprise, after it is verified that the previous steps have been duly observed, and all requirements have been met.

It is important to emphasize that the Environmental License can be revoked or suspended, if some irregularity in the information provided to the environment body for its concession is verified, if severe environmental and health risks are detected and, also, if there is any change or innovation in the industrial process unknown to the environmental body. It is also important to watch for the expiration dates of the licenses.

The purpose of the Environmental Licensing is to guarantee that the preventive measures adopted at the enterprises are consistent with sustainable development.

However, the companies have been finding difficulty in getting the Environmental Licenses they need. Some of the reasons for this are the delay in the analysis of the applications, the high investment costs to meet with the environmental requirements, and also, the complexity of the technical criteria used. All of these arise from the requirements set out in Brazil's environmental regulations.

## **6.5. Clean Development Mechanism (CDM) and Carbon Credits**

In light of the growing concern of several countries on the matter of global warming and the emission of gas, the treaty known as Kyoto Protocol was signed in 1997 and subsequently ratified internally by signatory countries. In Brazil's case, it was ratified on 23 August 2002<sup>54</sup>.

According to the terms of the Kyoto Protocol, developed countries commit themselves to reduce the emission of pollutant gases in the atmosphere or to engage in emission trading practices.

One of these flexible mechanisms is the Clean Development Mechanism (CDM) that permits the participation of developing countries, such as Brazil, in the Protocol.

In Brazil, the CDM may be seen as a source of business, due to the extensive territorial size and as a consequence of the fact that the country has the 07 (seven) environmental necessities: water, energy, biodiversity, wood, mineral, recycling and emission control of pollutants.

Carbon Credits are certificates issued by regulatory agencies, calculated from the emission or non-emission commitments of pollutant gases made by the industries of developed countries. Thereby, the companies that do not reach the established thresholds, negotiate with others that have reached theirs, creating a sales market of Carbon Credit.

With the enactment of Law no. 12.187/2009, which relates to Carbon Credits and Emission Reductions (CER) on development of enterprises related to renewable energy supply, Brazil is ready to undertake CDM projects and to trade its Carbon Credits.

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54 Legislative Decree n. 144/02, that came into force in 2005 (Decree n. 5.445/05).

### **6.6. Certificate of Absence of Environmental Debt - CNDA**

There is also Law no. 10.650/2003 which regulates the transparency on environmental information. To achieve the objective of transparency on environmental information, the law regulates and promotes the access, by all interested people, to environmental information through the issuance of a certificate of absence of environmental debt by the IBAMA.

It also imposes upon environmental agencies the obligation of publishing in the Official Gazette (*Diário Oficial da União*) the assessment notices and environmental penalties, providing an easy access to the public, including on the Internet.

The restraint would impact on individuals or legal entities that due to an environmental law violation had received penalties or had their activities suspended, or thereby, had their permit or licenses revoked.

Therefore, environmental certificates are today the largest management tool.

### **6.7. Amazonian Law**

To protect and ensure a future of national forests, especially the Amazon Forest, the Brazilian Government enacted in March of 2006 Law no. 11.284/2006 (Amazonian Law), which aimed to provide a way for the management of public forests for sustainable production. That is, its objective is the promotion of collective action for a harmonic development of the Amazon Basin, the sustainable exploration of the forest, the conservation of water and the respect for local communities.

The region known as the Amazonian Region stretches over an area of 60% (sixty per cent) of Brazil's territory, more specifically the Western,

Northwestern and North regions plus similar areas of the neighboring countries. Due to the ever growing awareness to protect the region, notably, the 10930 km of unoccupied Amazon border line used for drug trafficking and smuggling, debates on matters ranging from preservation to security have increased exponentially.

Thus, besides benefiting the population of the Amazon region, the enactment of the Amazonian Law made possible the creation of alternative methods of production based on science and technology, and, at the same time, preserving the natural resources of the Amazon region.

## **6.8. Forest Code**

Brazilian Environmental Law reached an important mark towards the protection of the environment on 25 May 2012 with the enactment of Law no. 12.651, dubbed the *New Brazilian Forestry Code – NBFC*, which set out general rules on protecting natural vegetation, legal reservation areas and amongst others, control and prevention of forest fires.

## 7. COMPETITION LAW

### 7.1. Background

Brazil's Competition Law dates from 1939 and was enacted during the dictatorial regime of the "Estado Novo". Further legislation followed in 1945 in the form of administrative repression of cartels and trusts, but it was not until the Constitution of 1946 that an express admonition against the abuse of economic power was set out.

Article 148 of the 1946 Federal Constitution provided that the law shall repress any and all forms of abuse of economic power, including unions or groups of individual companies of whatever nature with the object of dominating the domestic market, eliminating competition or arbitrarily increasing profits. The premise behind the constitutional provision was the liberal economic principle that free availability of the means of production and free competition is the basis of a free market economy. This reasoning later became the basis of the first true competition "antitrust law", Law n. 4.137 of 10 September 1962, which followed the guidelines and the legislation of the American anti-trust system as adapted to the Brazilian legal system.

Law n. 4.137/62 created the Administrative Council for Economic Defense (CADE), an administrative agency with autonomy and independence from the Executive Branch, and defined abuse of economic power broadly as domination of domestic markets and elimination of competition by unfair means and monopolistic practices. Due to the military coup of 1964, however, Brazil experienced almost 20 years of a planned economy, under which circumstances the newly created anti-trust agency played a minor and insignificant role.

With the promulgation of the 1988 Federal Constitution and the move toward a free market structure, antitrust considerations returned to their former

place of prominence. The 1988 Federal Constitution <sup>55</sup> provided that the law shall repress the abuse of economic power aimed at the domination of markets, the elimination of competition and the arbitrary increase in profits.

Several new laws were enacted, among which was Law n. 8.137/90. This criminal law, which is still in force with some changes, provided for crimes against the Tax System and Economic Order, establishing penalties, including fines and imprisonment. Crimes punishable by 2 to 5 years' incarceration include the abuse of a market position by dominating the market, or by totally or partially eliminating competition, price fixing or discrimination, tying arrangements and exclusivity of advertising to the detriment of competition. The Consumer Protection Code <sup>56</sup> provided basic consumer protection against unfair or abusive business practices and unfair competition.

In June 1994, an antitrust law consolidated previous legislation into one simplified regulatory framework and reinforced enforcement mechanisms. It established antitrust measures in keeping with the constitutional principles of free enterprise and competition and restraint of abuse of economic power. It contained provisions detailing violations of the economic order such as abusively exercising a dominant position and unfair business practices.

Law n. 8.884 of 13 June 1994, elevated CADE to the condition of an independent Federal Agency ("*autarquia federal*"), as envisioned in earlier legislation, with the authority throughout Brazil to enforce the provisions of the Antitrust Law. It determined that certain acts and agreements considered potentially anticompetitive must be submitted to CADE for review and approval. In accordance to that law, certain acts such as mergers, acquisitions or joint ventures were submitted to CADE for approval if they exceeded certain market share or gross annual sales criteria.

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55 Article 173(4) of the Brazilian Federal Constitution.

56 Law n. 8.078, of 11 September 1990.

## 7.2. Antitrust Law

The most substantive reform of Brazil's antitrust enforcement since the framework established in 1994 was Law 12.529, that was sanctioned on 1 December 2011 and entered in force on 29 May 2012, amending several sections of the former Brazilian Antitrust Law, introducing significant changes, namely: a) restructuring of the antitrust authorities; b) new merger control review rules and criteria; and c) a new definition of anticompetitive behaviors and the penalties imposed for violation.

The previous three government bodies (SEAE, SDE, CADE) established in the past Antitrust Law (8.884/94) were replaced by one agency in charge of the enforcement of the new Law, the Administrative Council of Economic Defense (CADE). The Secretariat of Economic Law of the Ministry of Justice (SDE), that used to be the investigative body in matters related to anti-competitive practices, ceased to exist and CADE incorporated its structure. The Secretariat of Economic Monitoring of the Ministry of Finance (SEAE) continues existing parallel to CADE, but now it is solely responsible for promoting the antitrust culture to Brazilian authorities and society in general. It has no longer investigative merger control role.

The new CADE, now referred to as "super" CADE, consists of three main bureaus: the Administrative Tribunal, the Superintendent General and the Department of Economic Studies.

The Administrative Tribunal is comprised of seven duly appointed Commissioners, and it remains the decision-making body in charge of rendering final and binding administrative decisions in both merger and conduct cases.

The Superintendent General has extensive powers and is the head of the Agency. He is empowered to approve mergers that do not raise competitive concerns and to provide non-binding opinions in merger cases that could not be unconditionally cleared. Additionally, the Superintendent General is responsible for conducting investigations of anticompetitive practices.

The Department of Economic Studies, the third bureau of the new CADE, is in charge of providing non-binding economic opinions and preparing economic studies.

This unification is expected to bring more efficiency to the system by eradicating the overlap in enforcement functions of the tripartite arrangement.

### **7.3. CADE's Regulations – Mergers and Acquisitions**

Transactions considered as “*concentrations*” must be notified if the revenue thresholds are met: a) mergers; b) direct and indirect acquisitions of control of or a minority interest in an entity, or of tangible or intangible assets; and c) joint ventures and other association agreements.<sup>57</sup>

The new law gave a better guidance of the types of transactions that need to be submitted to CADE restricting the number of cases which shall be reviewed by the referred authority.

Acquisitions of minority interests can trigger a filing and pre-closing approval obligation when the acquirer becomes the major investor in the target. Also when there is an overlap (horizontal or vertical, and the acquiring group either: (a) acquires 5% or more of the target's shares; or (b) after already holding at least 5% of the target, increases, through incremental acquisitions, its interest in the target by 5% or more. Even when there is no overlap between the parties involved, but the acquirer: (a) will hold 20% or more of the target's

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57 Article 90 of Law n. 12.529/11 states that a concentration shall be deemed to occur when:

- (i) two or more previously independent companies merge;
- (ii) one or more companies acquire, directly or indirectly, by any means, control or parts of one or more other companies, or
- (iii) two or more companies enter into an association agreement, or form a consortium or joint venture.

shares resulting from the acquisition; or (b) already holds 20% or more of the target and acquires, directly or indirectly, 20% or more of the remaining shares it does not own from a single seller. Or when there is an overlap between the acquirer and the target company, and the acquirer already controls the target and acquires, directly or indirectly, 20% or more of the remaining shares it does not own from a single seller.

The acquisition by a controlling shareholder of a further 20% interest from a single seller is also reportable.

New Law introduced the pre-merger review system in Brazil and brought through this introduction several changes in merger control.

A merger review submission, regulated by CADE's Resolution n. 2/2012, must be filed with the Brazilian antitrust authorities prior to the closing of the transaction instead of during the post-closing phase as under the previous system.

Also the current market share test, verifying that the individual or combined market share resulting from the transaction does not exceed 20% in a given affected market has been dropped by the new Antitrust Law. The market share threshold was excluded and the new Law established that filing is mandatory when the following cumulative threshold are met: a) the annual gross turnover of at least one of the economic groups involved in the transaction exceeds R\$ 750 million Brazilian Reais in Brazil in the previous financial year; b) the annual gross turnover of the other economic group involved in the transaction exceeds R\$ 75 million Brazilian Reais in Brazil in the previous financial year.

CADE is authorized to examine mergers below the threshold within one year of their completion. Failure to notify reportable transactions and consummation of a reportable merger prior to CADE's approval may result in invalidation of the transaction. Any M&A (including joint ventures) which meets the new turnover threshold will require CADE's prior approval before

its completion, under the penalty of fines varying from R\$ 60,000.00 to R\$ 60,000,000.00<sup>58</sup>.

Consortia constituted for the purpose of attending public bids are expressly exempted from mandatory pre-merger control.

The provision establishing that merger notification must be preferably filed before the super CADE after the parties signing any such binding pre-contract or Memorandum of Intentions, but always before the execution of the definitive agreements. Therefore the closing of the agreement is prohibited prior to the approval of the transaction by CADE. The competition conditions have to be preserved until CADE's reaches a final decision concerning the transaction. Transactions executed before CADE's approval will be null and parties will be fined.

Parties in a notifiable transaction must hold their respective activities (facilities, plants business and commercial practices) separate until CADE's final authorization is given. During CADE's review the parties are not allowed to transfer assets, exchange competitive sensitive information not reasonably necessary to the negotiation of the agreement or transaction, and exercise any type of decisive influence over another's business and commercial decisions.

In the context of a pre-merger review, it is important to observe that the more complete the notification form is, the greater are the chances of having the case cleared quickly. Since the new Law came into force, companies have to take extra care regarding the information that is being provided, because each request for additional information from the Authority shall result in delay in the reviewing of the process and thus in the consummation of the deal.

CADE has judged important cases under the effect of the new Law such as the merger of the aeronautic companies "Azul" and "Trip", announced

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58 Article 88 of Law n. 12.529/11 provides the conditions of the concentration that shall be subject of appreciation from CADE.

in May, 2012 and approved in March, 2013, constituting the 3<sup>rd</sup> Brazilian largest company in this segment. This merger has been approved under the condition that the new Azul-Trip company shall maintain the volume of operations in Santos Dumont Airport (situated in Rio de Janeiro), and the end of the code share (share of flights) between TAM (one of the biggest flight company in Brazil) and Trip until the end of 2014.

CADE has also approved, with restriction, the merger between the groups “Pão de Açúcar” and “Casas Bahia” and the acquisition of Ponto Frio, which produced the largest group in the retail segment. The restriction is applicable in selling actives in 54 cities around the country where problems with competition in retail of durable goods were verified.

In this context, CADE is also competent to examine mergers and acquisitions regarding foreign companies which may produce effects in Brazil. The object of this evaluation regards only to the effects that may be produced in Brazil, and is subjected to the same conditions described above. Whenever necessary, CADE shall be represented overseas by the president of the Administrative Council of Economic Defense, in or out of court.

Local effects test has been retained, such that a transaction between foreign parties is only caught if the target (or any of the parties in a joint venture) has a direct or indirect presence in Brazil; as for example through a local subsidiary or assets or export sales into the country.

#### **7.4. Reviewing Period and Time Concerns**

Law 12.529/2011 established a deadline of 240 days for authorities to appreciate economic concentration. There are only two possibilities in which such period may be extended: a) by request of the parties for a 60-day extension; or b) by a substantiated decision of CADE, in which case a 90-day extension will be granted. Thus, CADE must make a final decision up to 330 days after the filing at the most.

While there are no specific provisions yet in place establishing deadlines for a faster procedure, CADE has indicated that simple transactions that do not raise antitrust concerns may be expected to be cleared in a 40 to 60 day period.

Simple transactions include:

- a. certain joint ventures where the new company will not operate in a market horizontally or vertically related to the contributing parties;
- b. further consolidation by an acquirer already controlling the target; and
- c. transactions in which the acquirer and target have a combined market share in Brazil below 20%.

The simplified procedure will be available for those above mentioned transactions considered unlikely to give rise to competition concerns. This reduces the information required in the notification form, but does not shorten the review period.

The review period does not start until CADE deems the notification to be complete, and the rules do not specify a deadline for such determination.

Remedies may be proposed by the parties at the time of filing the application for CADE's clearance of any given transaction, or at any point during the review process.

All of CADE's final decisions may be challenged before the courts of Brazil.

### 7.5. Notification Requirements and Penalties from Pre-Closing

The new procedural rules state that it will be preferable that notification be made after the execution of a binding agreement. Based on this, it is possible now to notify on the basis of good faith information to proceed with the deal. New rules allow parties to contact CADE prior to notification to address any question they may have.

The so called *time-saving procedures* are very important in order to fulfill the information required by the notification form, which is now much greater than it usually is in other major jurisdictions. The form seeks estimates of market size in terms of both value and volume of sales for the previous 5 years, plus projected growth for the next 5 years, as well as extensive supporting documentation.

The notification filing forms provided by the new law are more complex with relation to the information requested, and, as mentioned above, it is very important to follow the requests therein as strictly as possible to have the deal cleared in a reasonable timeframe.

One additional difference is that the parties must now present any side documents prepared with the purpose of approving the transaction, including those with market data and assessment of the target company, among others.

Even the short form notification used for simple procedures is comparatively complex in its information requirements.

CADE may, upon parties' request, authorize the consummation of a notified transaction prior to approval in certain limited circumstances in which the target company will face substantial financial hardship as a result of a delay in closing.

## **7.6. Anticompetitive Practice**

The new law introduced significant changes related to the criteria for the setting of fines and to the leniency program. It brought changes in relation to administrative proceedings related to anticompetitive behavior with the aim to improve the enforcement of those wrongdoings.

An important change concerns the reduction of the penalties for anticompetitive behavior. While the old law established a fine of 1 to 30 percent of the gross revenues minus taxes of the company in the year prior to the beginning of the investigation, the new law changed the range of the fines to 0.1 to 20 percent of the gross revenues of the company, economic group or conglomerate in the year prior to the beginning of the investigation, and limited the basis for the calculation of the fines to the business segment in which the wrongdoing occurred. However, under the new law the gross turnover no longer excludes taxes.

The new provision expressly notes that the revenues to be considered should be related to the relevant market (business segment) in which the anticompetitive practices have been carried out. The fines applicable to individuals upon showing proof of willful conduct, are calculated based on the fine imposed on the company and can range from 1 to 20 percent of the company's fine. CADE's Internal Regulation state that it will use Brazil's National Classification of Economic (CNAE), as a parameter for the definition of the field of business activity.

The new law amended the non-exhaustive list of anticompetitive conducts which are considered as violation. It excluded exclusivity and excessive pricing from the list of abusive exercise or exploitation of intellectual property rights. For individuals the list of alternative penalties was expanded to include the possibility of disbarment from practicing trade on their own behalf or as a representative of a legal entity for a period of up to 5 years.

Referring to leniency program, the new Law eliminated the rule that leniency was not available to the “leader” of a cartel.

Another significant amendment was that criminal immunity granted to a leniency applicant does not extend to other possible crimes related to the cartel activity, such as fraud in public procurement.

Cartel is considered an administrative infringement and also a crime under Brazilian law. The new law introduced this important change in the criminal type of this anticompetitive practice by eliminating the possibility of alternative penalties. Individuals investigated for cartel crimes are now subjected to 2 to 5 years imprisonment and the payment of a fine. As a consequence, individuals who are being investigated for crimes against the economic order no longer have the possibility to terminate the criminal proceedings by paying an administrative fine to CADE.

Law 12.529 adopted some recommendations of the Organization for Economic Cooperation and Development (OECD – Competition Law and Policy in Brazil): a Peer Review, 2005). The law modified: a) the leniency program to eliminate exposure of leniency participants to prosecution under criminal laws other than the Economic Crimes Law, including criminal conspiracy and bid rigging; and b) decriminalized non-cartel conducts from the Economic Crimes Law, such as unilateral conduct involving price discrimination and alleged abuse of economic power.

Restrictive practices are regulated by the law on abuse of market power (arts. 20 and 21 of Law 8.884 and art. 36 of Law 12.529). Requests for clearance of restrictive practices cannot be submitted to the competition authorities. Concerning restrictive practices there are no specific rules. Under the rule of reason, many horizontal and vertical practices may be considered anticompetitive. The exclusivity practice is no longer explicitly mentioned by the new Antitrust Law, but it can be still investigated and punished under art. 36 of Law 12.529, since the practices listed by this article are merely examples.

## **7.7. Significant developments**

On March 11, 2013 the Administrative Council of Economic Defense (CADE) published Resolution n. 5, which changed the rules regarding the Cease and Desist Agreement (TCC). The new provisions created incentives for defendants in cartel cases to negotiate a TCC in the early stages of an investigation.

CADE published a proposed regulation for settling potential antitrust liability for cartel activity under Brazil's new competition law. The proposed regulation provided a settlement procedure and incentives to settle, in the form of a percentage reduction in fines for companies that have been involved in cartel activities but do not qualify for amnesty.

The new Law modernized the antitrust enforcement in Brazil and reformed several important areas. Those reforms changed the institutional design of the country's antitrust enforcement system creating the pre-merger notification regime with revised notification thresholds and new timetables for the review.

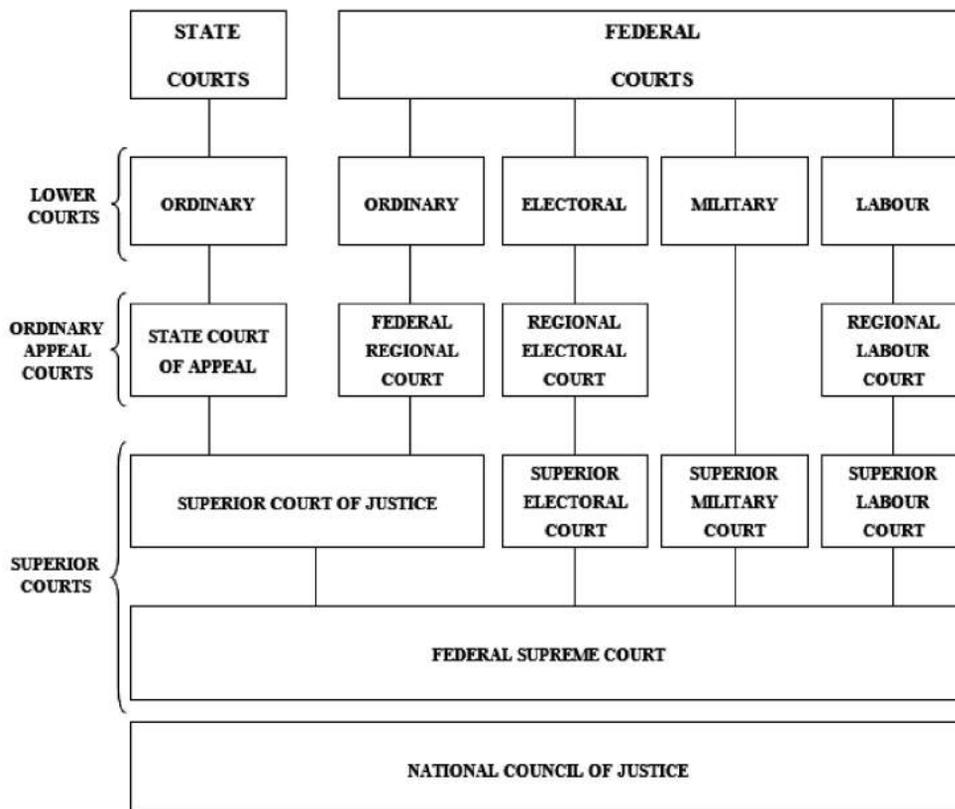
## **8. THE BRAZILIAN JUDICIARY SYSTEM**

The Brazilian Judiciary System is a civil law system, derived from Roman and Germanic laws, and, strongly influenced by provisions stated in the Napoleonic Code of 1804, and, the Germanic Code of 1896. In recent years, however, several modifications in the Federal Constitution and minor laws imported some successful initiatives from Common Law and European law, especially German and Italian, making the Brazilian law system more heterogeneous.

### **8.1. Brazilian Judiciary Structure**

The Brazilian Judiciary Structure is set out by the Federal Constitution and it is constituted by different levels of Courts, in which the Federal Supreme Court is the highest. To better comprehend the extension of each Court's jurisdictions, this chapter will address them from the Lower to the Highest Courts.

The following chart illustrates how the Judiciary system is structured.



As can be seen from the diagram above, the Brazilian Courts are divided into two different branches:

- Federal Courts; and
- State Courts.

### 8.1.1. Federal Courts

The Ordinary Federal Courts, which are divided into criminal, tax and civil courts, have jurisdiction over a considerable number of matters, all specified in the Constitution. Some of them are:

- (i) cases to which the federal government, a federal government agency or a federal public company is a party;
- (ii) cases between a foreign country and a person residing in Brazil;
- (iii) political crimes involving federal goods;
- (iv) cases related to a treaty or contract signed by and between Brazil and a foreign country or entity;
- (v) crimes against the organization of labour and, in the cases determined by law, the financial system and the economic and financial order;
- (vi) crimes committed aboard ships or airplanes;
- (vii) immigration matters;
- (viii) disputes over the rights of Indigenous people.; and
- (ix) disputes involving human rights;

All the appeals from the Ordinary Federal Courts are directed to the Federal Regional Court (*Tribunal Regional Federal*), which is composed of a minimum of seven judges. Currently, Brazil's Federal Regional Courts are divided into 5 Circuits with the following jurisdiction:

- (i) 1<sup>st</sup> Circuit, involving the following States and the Federal District: Acre, Amapá, Amazonas, Bahia, Goiás, Maranhão, Mato Grosso, Minas Gerais, Pará, Piauí, Rondônia, Roraima and Tocantins;
- (i) 2<sup>nd</sup> Circuit, involving the following States: Rio de Janeiro and Espírito Santo;

- (ii) 3<sup>rd</sup> Circuit, involving the following States: São Paulo and Mato Grosso do Sul;
- (iii) 4<sup>th</sup> Circuit, involving the following States: Santa Catarina, Paraná and Rio Grande do Sul; and
- (iv) 5<sup>th</sup> Circuit involving the following States: Alagoas, Ceará, Paraíba, Pernambuco, Rio Grande do Norte e Sergipe.

It is important to state that the Proposal for Constitutional Amendment (PEC) n. 544/2002, which proposes the creation of an additional 4 (four) circuits to the Federal Regional Courts, has already been approved and shall soon become effective. Pursuant to this Constitutional Amendment, Brazil's Federal Regional Courts shall be reorganized as follows:

- (i) 1<sup>st</sup> Circuit: Has jurisdiction over the Federal District and the States of Amapá, Goiás, Maranhão, Mato Grosso, Pará, Piauí and Tocantins;
- (ii) 2<sup>nd</sup> Circuit: Has jurisdiction over the States of Rio de Janeiro and Espírito Santo;
- (iii) 3<sup>rd</sup> Circuit: Has jurisdiction over the State of São Paulo;
- (iv) 4<sup>th</sup> Circuit: Has jurisdiction over the State of Rio Grande do Sul;
- (v) 5<sup>th</sup> Circuit: Has jurisdiction over the States of Alagoas, Ceará, Paraíba, Pernambuco and Rio Grande do Norte;
- (vi) 6<sup>th</sup> Circuit: Has jurisdiction over the States of Paraná, Santa Catarina and Mato Grosso do Sul;
- (vii) 7<sup>th</sup> Circuit: Has jurisdiction over the State of Minas Gerais;

- (viii) 8<sup>th</sup> Circuit: Has jurisdiction over the States of Bahia and Sergipe; and
- (ix) 9<sup>th</sup> Circuit: Has jurisdiction over the States of Amazonas, Acre, Rondônia and Roraima.

Besides “ordinary” Federal Courts, there are also those that deal with “specialized matters”. The Specialized Federal Courts can be divided into: Labour, Military and Electoral Courts, as follows:

#### **8.1.1.1. Federal Labour Courts**

Labour Courts have the power to conciliate and judge individual and collective disputes between employees and employers, as well as other disagreements arising from employment relationships.

Employees may use Labour Courts to defend their own interest, usually against their employers. This sort of lawsuit is called “individual dispute”, and may exist even when the type of work that is under litigation is not remunerated. Overall, the intention is to protect all rights that involve any type of work, and not only the amount received by the worker.

On the other hand, there are disputes that involve the wider interests of a given category of workers and are brought in by the respective trade unions, *e.g.*, all cases involving strikes. These are called “collective disputes”.

In general, the Federal Constitution grants the right to appeal of a decision at least once before a Court of Appeal of superior hierarchy, which is known as an “ordinary appeal”. There are also “extraordinary appeals” to the jurisdiction of the superior courts, as explained below.

The ordinary appeals of the Labour Court are conducted before the Regional Labour Courts (*Tribunal Regional do Trabalho*). There are currently 24 Regional Labour Courts in Brazil.

### **8.1.1.2. Federal Electoral Courts**

The Electoral Courts have jurisdiction over elections and the process of creation and registration of political parties. They have administrative, civil and criminal jurisdiction.

The Federal Constitution states that ordinary appeals from the decisions of the electoral Courts shall be processed before the Regional Electoral Court of Appeal (*Tribunal Regional Eleitoral*). There is a Regional Electoral Court in the capital of each state and in the Federal District.

### **8.1.1.3. Federal Military Courts**

The Military Courts have jurisdiction over military crimes. The Law divides the military crimes into two different categories: those committed in times of peace and those committed in times of war.

Military crimes are also the only sort of crimes in the entire Brazilian legislation that can be punishable by death (shooting). The death sentence can only be applied in times of war, *e.g.*, when a military commits treason.

Although it exists in the Brazilian legislation, no one has been sentenced to the death penalty since 1.876.

The Military Justice ordinary appeals are processed by the Superior Military Court (*Superior Tribunal Militar*), which is composed of 15 members with lifetime positions, appointed by the President after approval by the Senate (10 agents from the Armed Forces, three lawyers and two military judges or representatives of the Military Prosecution Service).

The jurisdiction of the Superior Military Court, also known as Superior Court, is ordinary, being able to re-judge the cause, without any restriction on appeals.

### 8.1.2. State Courts

The matters that are not included in the jurisdiction of the Federal Courts, are conducted before the State Courts, which can, initially, be divided into criminal, tax and civil courts. Military Justice also exists in state level.

In certain states, where judicial caseloads are exceptionally high, state legislatures have created specialized civil courts to hear specific types of cases. These include:

- (a) Public Finance Courts, which have jurisdiction over litigation involving state or municipal finance secretariats;
- (b) Courts of Family and Successions, which have jurisdiction over family matters, including maintenance and inheritance;
- (c) Courts of Public Registries, which have jurisdiction over cases involving public notaries and registrations made in Public Registers;
- (d) Courts for Minors, which have jurisdiction over minors; and
- (e) Courts of Recovery and Bankruptcy, which have jurisdiction over the cases involving the recovery and bankruptcy and recovery of enterprises.

There are also specialised state criminal courts, which includes:

- (a) Jury Courts, which have jurisdiction over crimes that involve a malicious intent against human life (e.g., murder); trials for such crimes are decided by public jury;
- (b) Courts to Instruct Compliance with Criminal Penalties, which oversee the application of criminal sentences and penalties, and

- (c) Police Internal Affairs and Prison Supervisory Courts, which have jurisdiction over police and prison administration actions.

The appeals of the lower Court State Courts are processed by the State Court of Appeals (*Tribunais de Justiça Estaduais*) of each state or of the Federal District.

### **8.1.3. Special Courts**

The Special Courts, also called “*Juizados Especiais*”, have jurisdiction over civil small claims under a more simplified proceeding foreseen in law. They were created by law in 1995 in order to help reduce the amount of lawsuits to be judged by the State Courts, while obeying some of the main existing principles in the Brazilian law system.

In the cases of small claims, the Plaintiff can choose either to go to a Special Court or to use the general proceedings of the Civil Procedure Code.

The same law created criminal courts for minor offences, establishing also special proceedings, more simplified in relation to the Brazilian Criminal Procedure Code.

According to the said law, ordinary appeals of sentences are not submitted to the State Court of Appeals, but are processed directly by the Special Courts referred to and judged by a body composed of three different judges of the same hierarchy.

After the creation of the Special Courts<sup>59</sup> called “*Juizado Especial*” in the State Courts, there were also created special civil and criminal courts in the Ordinary Federal Courts<sup>60</sup>.

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59 Law n. 9.099/1995.

60 Law n. 10.259/2001.

In 2009 Treasury Special Courts<sup>61</sup> were created and have jurisdiction over litigation with States, the Federal District and Cities, with some exceptions (such as writ of *mandamus*; expropriation actions, division and delineation of real estate; class actions, etc.).

#### **8.1.4. Other Tasks of the Ordinary Courts of Appeal**

All the ordinary Courts of Appeals referred to, in addition to having the jurisdiction to process appeals, have primary jurisdiction over a number of matters specified in the Federal Constitution and minor laws (e.g. claims involving certain public authorities).

#### **8.1.5. The Superior Courts**

After an appeal is processed by an ordinary Court, it is still possible to argue the matter before the Superior Courts, but only in certain cases, set out in the legislation. The Superior Courts are the following:

- (i) Superior Labour Court (*Tribunal Superior do Trabalho*);
- (ii) Superior Electoral Court (*Tribunal Superior Eleitoral*);
- (iii) Superior Court of Justice (*Superior Tribunal de Justiça*); and
- (iv) Federal Supreme Court (*Supremo Tribunal Federal*).

The jurisdiction of each of these extraordinary courts is also defined in the Federal Constitution according to the nature of the matter under consideration.

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61 Law n. 12.153.

The Superior Labour Court is composed of 27 judges, appointed by the President after the approval by the Senate (1/5 lawyers, 1/5 representatives of the Federal Prosecution Service, 3/5 from career judges of the Regional Labour Courts). Basically, the Superior Labour Court has jurisdiction to judge extraordinary appeals against decisions from the Regional Labour Courts which: (i) violate federal law (ii) violate the Federal Constitution; and/or (iii) violates jurisprudential uniformity.

The Superior Electoral Court is composed of a minimum of seven members with a 2-year term of office, that can be renewed once.

In general, the Superior Electoral Court has jurisdiction over extraordinary appeals against decisions from the Regional Electoral Courts which: (i) violate the Federal Constitution; (ii) violate jurisprudential uniformity; (iii) consider the ineligibility or issue of certificates from the federal or state elections; (iv) annuls certificates or judge the validity of elective mandates; and/or (v) denies *habeas corpus*, writ of *mandamus*, *habeas data* or writ of injunction.

The Superior Court of Justice is composed of a minimum of 33 judges, appointed by the President after approval by the Senate. It is the court of extraordinary appeal for matters relating to violation of Federal Law, uniformity of jurisprudence and also it hears appeals in other specific cases, foreseen in the Federal Constitution, including litigation between a country or an international organization against a person who resides in Brazil.

Furthermore, any decision from any ordinary or extraordinary court can be subjected to the control of the Federal Supreme Court, which is the final court of extraordinary appeals.

It is rather difficult for an appeal to be judged before the Federal Supreme Court, as it can only analyze the cases connected with violations of the Federal Constitution. Also, the case must bring uniformity of jurisprudence and involve collective interests. To meet this last requirement it is necessary to prove that the matter is of the public interest.

The Federal Supreme Court is composed of 11 Justices, appointed by the President of the Republic after approval by the Senate (any native Brazilian older than 35 and younger than 55 years old, with an excellent reputation). On this subject, it is important to clarify that although the President of the Republic has the right to choose the Justices, the Federal Supreme Court, throughout its entire history, has had a mixed composition with judges, lawyers, representatives of the Public Prosecution Service and politicians.

According to the Brazilian legal system, the Federal Supreme Court can issue a certain kind of precedent able to bind, not only the Judiciary branch for further decisions, but also the public administration. Such Binding Precedents, called “*súmulas vinculantes*”, have high importance in the Brazilian Judiciary System, since they direct and unify jurisprudence. The creation of this sort of institute shows how the Brazilian legal system is being more and more influenced by the Common Law system, and, therefore, is becoming more eclectic.

Such *stare decisis*, however, can only be created by the Federal Supreme Court with the aim of giving validity to the interpretation or effectiveness of a determined law, which may result in the unreasonable multiplication of identical suits.

It is important to point out that, in the cases included in the original jurisdiction of the “ordinary” courts, the extraordinary courts may judge ordinary appeals. Thus, the fact that an extraordinary court is involved does not necessarily mean that such court cannot be responsible for judging appeals of as ordinary nature.

Also, in very specific cases, foreseen in the Federal Constitution, the Extraordinary Courts can also judge cases with original jurisdiction. For example, the process of validation of judgments of a foreign court in Brazil is in the original jurisdiction of the Superior Court of Justice. Also, the legal proceedings against the President of Brazil, for criminal offences or litigation between Brazil and another country are in the original jurisdiction of the Federal Supreme Court.

## **8.2. National Council of Justice**

As per the determination of the Constitutional Amendment n. 45, of December 2004, the National Council of Justice was created.

This autonomous body is responsible for the supervision of the Brazilian Judiciary System, monitoring the aptitude and probity of judges, receiving complaints in relation to the members and bodies of the Judiciary and preparing half-yearly and yearly statistics to indicate the performance of the Judiciary and for the study of the measures to be taken, in order to achieve more efficient access to the Courts.

It is composed of 15 members, elected for a term of office of two years, with only one re-election being permitted.

## **8.3. Legislative Changes Seeking Improved Judicial Agility and Security in the Brazilian Judiciary System**

According to one of the first statistics report prepared by the National Council of Justice (an independent body that audits judicial activity)<sup>62</sup>, on the judicial numbers for 2005, it was indicated that the crisis in the Judicial Branch was primarily due to the increase in new cases without, on the other hand, a proportional growth in the judicial structure.

Such situation demonstrated the need to seek a swift solution that would allow the Judiciary Branch to provide effective access to the Courts, as so guaranteed by the Brazilian Federal Constitution. To this effect, since then, a series of reforms to the Civil Procedure Code have been put into place to provide a swifter resolution to judicial disputes. In 2005, this objective was

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62 <http://www.cnj.jus.br>

actually promoted to the level of constitutional guarantee. Thus, in order to speed these changes up, given that the previous project of a new Civil Code took over twenty-five years to be approved, instead of discussing the adoption of an entirely new procedural code, the legislator has chosen to apply changes through the enactment of several independent laws, with the most important of such laws having become effective in the past few years.

Around 20 relevant laws were enacted from 2005 to 2010 and several bills of laws are currently pending approval, with the objective of, for instance: creating greater jurisprudential uniformity; attaching increased value to certain precedents from the Federal Supreme Court; restricting appeals and decisions contrary to the rationale previously established by the Federal Supreme Court; making electronic filing possible; eliminating frivolous proceedings; and facilitating the means of enforcement.

Out of the above-described changes, three merit special emphasis:

- (i) the above mentioned change that established the Binding Precedent (“*súmula vinculante*”), constitutionally prescribed by the Constitutional Amendment n. 45 and regulated by the recent federal Law n. 11.417/2006, which deals with decisions that also bind public administration, shall foreclose many actions and appeals;
- (ii) the change that establishes the general decisions from the Superior Courts (“*súmula impeditiva de recurso*”) permitting the trial court to refuse submission of an appeal to the appellate court, prescribed by the Civil Procedure Code through the changes introduced by Law n. 11.276/2006, shall reduce the number of appeals relating to matters that have already been subject of judicial rulings by the appellate courts; and
- (iii) the change that establishes the legal provision making on line attachments possible through Law n. 11.382/2006, allows

the court to immediately freeze the banking accounts of the judgment debtor, including corporate debtors, in order to satisfy a judgment that was not paid voluntarily. This change eliminates the need for several judicial proceedings for enforcement, several of which currently are not concluded due to the inability to locate the judgment debtor's assets.

The main objective is to bring the Judiciary System to a state in which it will be accessible to all people, who will see justice being done quickly and effectively.

#### **8.4. The Arbitration Law**

On 23 September 1996, Law n. 9.307, the "Arbitration Law", was enacted. It provided for significant changes and made it possible for commercial disputes in Brazil to be definitively settled through arbitration rather than through recourse to the judiciary.

Prior to enactment of the Arbitration Law, an arbitration clause included in a contract did not oblige a party to submit a dispute to arbitration. Furthermore, enforceability of an arbitration award required judicial ratification.

The Arbitration Law provides that parties to a contract may refer disputes to arbitration and that the parties shall be bound by an arbitration clause. The law provides for a rapid procedure by which a party can enforce such a clause. Furthermore, the Arbitration Law establishes that an arbitration award shall have the same effect as a sentence pronounced by a judge and can be considered an execution instrument.

Since the enactment of the Arbitration Law, Brazilian business has been gradually accepting arbitration as a means of terminating disputes rather than submitting all questions to the Judiciary.

In cases of foreign arbitration, Brazilian sovereignty cannot be violated and the foreign arbitration decision must be ratified by the Superior Court of Justice to be valid and enforceable in the Brazilian territory.

## 9. THE BRAZILIAN FINANCIAL SYSTEM

### 9.1. Banking Law

Law n. 4.595 of 31 December 1964, also known as the Brazilian Banking Law, and its amendments, were enacted in order to regulate the whole of the Brazilian Financial System, and is responsible for its present structure.

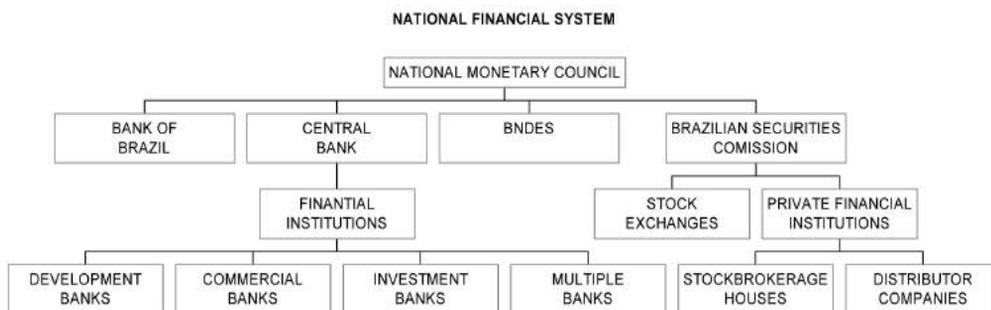
In accordance with its Article 17, any “public or private legal entities which have as their primary or accessory activity the assessment, intermediation or application of financial resources of their own or of third parties, in Brazilian or foreign currency, as well as the custody of third parties’ properties” are considered to be financial institutions. Additionally, the Banking Law establishes that individuals who regularly or occasionally perform any of the above-mentioned activities shall be treated as financial institutions.

Pursuant to the Banking Law<sup>63</sup>, the Brazilian financial system is composed of:

- (a) the National Monetary Council (“*Conselho Monetário Nacional*”);
- (b) the Central Bank of Brazil (“Banco Central do Brasil”);
- (c) the Bank of Brazil S.A. (“Banco do Brasil S.A.”);
- (d) the National Bank of Economic and Social Development (“*Banco Nacional do Desenvolvimento Econômico e Social*” - BNDES); and
- (e) other public and private financial institutions.

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63 Article 1° of the Law 4.595/64



## 9.2. The National Monetary Council

The National Monetary Council, created by Law no. 4.595/64, has the objective of establishing the Brazilian Monetary and Credit Policies aimed at the economic and social development of Brazil.

The National Monetary Council policy has as its functions<sup>64</sup>:

- (i) to adapt the volume of resources of payments to the real necessities of the national economy and its respective development process;
- (ii) to regulate the internal value of the Brazilian currency by means of preventing or correcting outbreaks of inflation or deflation of an internal or external origin, as well as preventing or correcting economic depressions and any other unsteadiness;
- (iii) to regulate the value of the Brazilian currency overseas and the equilibrium in the Brazilian balance of payments, aiming at the best use of resources in foreign currencies;
- (iv) to orientate the application of public or private financial institutions' resources, in order to help create favorable conditions for national economic development;

<sup>64</sup> Article 3 of Law n. 4.595/1964 (Brazilian Banking Law).

- (v) to help improve institutions and financial institutions, aiming at the efficiency of the payments system and at the mobilization of resources;
- (vi) to protect the liquidity and solvency of financial institutions; and
- (vii) to co-ordinate monetary, credit, budgetary and tax policies and public internal and foreign debt.

The National Monetary Council is the controller of the Brazilian currency, thus being responsible for the authorization of the issuance of paper money and for the determination of its characteristics.

It also establishes norms and guidelines concerning exchange policy, approves monetary budgets, regulates credit operations in all their forms, and is responsible for regulating financial institutions as regards to their constitution, functioning and liquidation.

In addition to the above, the National Monetary Council also issues rules and legislation concerning interest rates, discounts, commissions and charges for banking services and operations, as well as exchange operations and swaps, fixing limits, fees, terms and other conditions.

Law n. 9.069 of 29 June 1995 created the so-called Technical Commission of Currency and Credit, which is an advisory commission of the National Monetary Council.

The Technical Commission of Currency and Credit is responsible for issuing declarations relating to the activity of the National Monetary Council, as well as proposing regulations concerning specific matters such as the issuance of Brazilian currency.

The National Monetary Council is composed of<sup>65</sup>:

- (a) the Minister of the Economy, who is its Chairman;

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65 Article 8 of Law n. 9.069/95.

- (b) the Minister of Planning and Budget; and
- (c) the Chairman of the Central Bank of Brazil.

The National Monetary Council is assisted by seven Consulting Commissions, which address: the rules and organization of the Brazilian financial system; the securities market and the futures market; rural credit; industrial credit; housing credit, sanitation and urban infrastructure; public debt; and monetary and exchange policies.

### **9.3. The Central Bank of Brazil**

The Central Bank of Brazil has as its objective the performance and the enforcement of legal norms and rules issued by the National Monetary Council.

Additionally, the Central Bank of Brazil has the following exclusive functions<sup>66</sup>:

- (a) to issue paper currency and coins under the conditions and within the limits authorized by the National Monetary Council;
- (b) to perform any services relating to the money supply;
- (c) to determine the amount of compulsory deposits of financial institutions within the legal limits;
- (d) to receive compulsory payments and voluntary deposits of financial institutions;
- (e) to effect rediscounting and loan transactions with financial banking institutions;

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66 Art. 10 of the Law 4.595/64

- (f) to exercise control over all forms of credit;
- (g) to control foreign capital;
- (h) to act as custodian of the gold and foreign currency official reserves, and of special drawing rights (SDRs) and with the latter to carry out all the operations provided for in the Convention of Incorporation of the International Monetary Fund;
- (i) to inspect financial institutions and apply penalties;
- (j) to authorize financial institutions: to operate in Brazil; to establish or relocate their head offices or premises, including abroad; to be reorganized, consolidated, merged or expropriated; to carry out exchange and real credit transactions and the regular saving of federal, state or municipal bonds, shares, debentures, mortgage bills and other credit instruments or securities; to extend the periods granted for operations; and to amend their by-laws; dispose of or otherwise transfer its shareholding control;
- (k) to establish conditions for the investiture and exercise of any administrative position in private financial institutions, and also for the exercise of any position on advisory, audit or similar bodies, pursuant to the rules issued by the National Monetary Council;
- (l) to carry out transactions of purchase and sale of federal government bonds, as an instrument of the monetary policy;
- (m) to require the head offices of financial institutions to register the record of firms which have dealt with their branches for more than one year.

Other functions of the Central Bank of Brazil are:

- (i) to communicate, on behalf of the Federal Government, with foreign and international financial institutions;
- (ii) to promote, as an agent of the Federal Government, co-operation in domestic or foreign loan transactions, as well as being able to undertake such transactions itself;
- (iii) to provide for the smooth functioning of the exchange market, the relative stability of exchange rates and the equilibrium of the balance of payments, and for this purpose to buy or sell gold and foreign currency, as well as to effect credit transactions abroad, including those referring to special drawing rights, and to separate the financial and commercial exchange markets;
- (iv) to effect the purchase and sale of securities of private and public joint stock companies and State companies;
- (v) to issue its own bills, in accordance with conditions established by the National Monetary Council;
- (vi) to regulate the performance of cheque and other paper clearance services;
- (vii) to exercise vigilance in the financial and capital markets over companies which directly or indirectly interfere in such markets, and also over the operational forms or procedures used by such companies; and
- (viii) to provide the services of its Secretary's Office, under the control of the National Monetary Council.

In accordance with the law in force, the Central Bank of Brazil may only transact with public and private financial institutions. It is, therefore, precluded from conducting operations of any nature with other public or private legal entities, unless expressly permitted by law.

Law n. 4.595/64, Article 13, determines that the duties and services within the competency of the Central Bank of Brazil when not run directly by the institution, will be preferentially contracted with the Bank of Brazil (“Banco do Brasil S.A.”), or alternatively with other financial institutions, provided that such contracts are duly authorized by the National Monetary Council.

#### **9.4. “Banco do Brasil S.A.” (Bank of Brazil)**

Before the enacting of Law n. 4.595/64, the Bank of Brazil used to function as the Central Bank, besides operating as a private bank.

The Bank of Brazil is today a commercial bank, although it is also engaged in activities which are not common to commercial banks as an instrument for the administration of financial and credit policies of the Federal Government.

The Bank of Brazil is responsible for the following:

- (a) as a Financial Agent of the National Treasury, it may: (i) receive for the credit of the National Treasury proceeds from the collection of federal revenue taxes and from federal credit operations through advances of budget revenue, or any other funds, within legally authorized limits; (ii) effect payments and provisions required for the implementation of the General Budget of Brazil and supplementary laws in accordance with instruction given to it by the Ministry of Finance; (iii) grant surety ship, securities and other guarantees as expressly authorized by law; (iv) acquire and finance inventories of exportable production; (v)

execute the policy of minimum prices for agricultural products; (vi) act as paying agent and receiving agent abroad; (vii) execute the service of the consolidated public debt;

- (b) as the principal executor of banking services to the Federal Government, including its government agencies, receive on deposit, exclusively, the available funds of any federal entity, including agencies of all the civil and military ministries, social security institutions and other government agencies, commissions, departments, entities under special administrative system and any individuals or legal entities responsible for advanced payments, as expressly authorized by the National Monetary Council pursuant to a proposal of the Central Bank of Brazil;
- (c) execute cheque and other paper clearing services;
- (d) collect the voluntary deposits of financial institutions, maintaining the respective accounts;
- (e) exclusively receive the deposits relating to the subscription in cash of the capital of legal entities;
- (f) on its own account and on account of the Central Bank of Brazil, purchase and sell foreign currency, under conditions established by the National Monetary Council;
- (g) be in charge of receipts or payments or other services of interest to the Central Bank of Brazil;
- (h) finance the purchase and installation of small and medium-sized rural properties, pursuant to the pertinent legislation;
- (i) finance industrial and rural activities; and

- (j) diffuse and guide the concession of credit, including to commercial activities, supplementing the activities of the banking network in the financing of economic activities, complying with credit requirements of the different regions of the country, as well as in the financing of imports and exports.

The appointment of the chairman, according to the law, is a prerogative attributed to the President of the Republic, after the Senate's approval.

### **9.5. The National Bank of Economic and Social Development (BNDES)**

The National Bank of Economic and Social Development (BNDES) is considered by Law n. 4.595/64 as a public financial institution whose primary objective is the execution of Federal Government's investment policies. BNDES has two subsidiaries: the BNDESPAR, which objective is the development of the stock market, and FINAME, which is the administrator of the export financing operations.

### **9.6. Public Financial Institutions**

Law n. 4.595/64 defines public financial institutions as auxiliary agents in the execution of the Brazilian Federal Government credit policy.

As previously mentioned, the National Bank of Economic and Social Development is the main instrument for executing the Federal Government Investment Policy.

The first paragraph of Article 22 of the Banking Law establishes that the National Monetary Council is responsible for regulating public financial institutions.

Notwithstanding the above, the Banking Law (Article 24) determines that all non-federal public financial institutions are subject to the same rules concerning private financial institutions.

## **9.7. Private Financial Institutions**

In general, private financial institutions may only be constituted as stock companies.

The initial capital of private financial institutions shall be fully paid up in Brazilian currency. Subsequent capital increases of financial institutions may also be made by means of the incorporation of reserves or of accumulated profits within the limits established by the National Monetary Council.

At least fifty percent of the initial capital and subsequent increases in the capital of financial institutions authorized to function by the Central Bank of Brazil shall be paid in upon subscription<sup>67</sup>. The remaining amount shall be fully paid up within one year counting from the date in which the subscription occurred or counting from the approval of the increase of the capital by the Central Bank of Brazil.

Private financial institutions (with the exception of investment institutions), will only be able to participate in the capital of other companies when an authorization is duly issued by the Central Bank of Brazil; however, this authorization will not be necessary in the event such private financial institutions grant subscription guarantees, provided that such grants comply with the general requirements established by the National Monetary Council.

In general, financial institutions may engage in the following activities:

- (a) participation in loans and financing operations;
- (b) receiving deposits of any nature;

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<sup>67</sup> Article 27. Law 4.595/64

- (c) share, obligations and other security acquisition for capital market sale;
- (d) transfer of loans obtained abroad;
- (e) execution of guarantees;
- (f) distribution and placement of any issue of securities and bonds;
- (g) operating in the Stock and Commodities Exchange;
- (h) issue and/or registration of shares or obligations;
- (i) participation in exchange operations;
- (j) opening and maintaining accounts; and
- (k) participation in gold operations.

In the event of any kind of participation of a foreign financial institution in the capital of a private financial institution, it is necessary, according to Circular n. 3317/06, to file an application to the Central Bank of Brazil providing the following information: (i) the amount of foreign participation; (ii) the importance of such participation for the Brazilian economy; (iii) the description of the operations practiced by the foreign institution; (iv) the importance of such participation for the foreign institution; (v) the rating of the foreign institution and its economic group; (vi) the indication of any other financial institution, in the event of any bond with the foreign financial institution; (vii) the indication of the supervisory agency of the foreign institution abroad; and (viii) any additional information that may be requested by the Central Bank of Brazil.

## **9.8. General Rules Concerning Financial Institutions**

Law n. 4.595/64<sup>68</sup> establishes that financial institutions shall only operate in Brazil upon previous authorization of the Central Bank of Brazil or, if foreign, by the decree of the Executive Branch.

The above-mentioned Law<sup>69</sup> establishes the exclusive competence of the Central Bank of Brazil to authorize financial institutions to operate in Brazil; to install or transfer their head offices or premises, including transfer abroad; to be reorganized, consolidated, merged or expropriated; to carry out exchange and real credit transactions and the regular saving of federal, state or municipal bonds, shares, debentures, mortgage bills and other credit instruments or securities; to extend the periods granted for operations; and to amend the by-laws of financial institutions.

On 2 August 2012 the National Monetary Council enacted Resolution n. 4.122, which regulates the requirements and procedures for the incorporation, authorization, transfer of control and corporate reorganization of financial institutions in Brazil, as well as the cancellation of the authorization for such institutions.

With the enactment of Resolution n. 4.122/12, new provisions were incorporated to the already existing rules with the objective of providing the Central Bank of Brazil with more efficient means of evaluating the business objectives as well as the organizational and management structure of financial institutions in Brazil.

The main innovations introduced by Resolution n. 4.122/12 regarding the incorporation and authorization of financial institutions in Brazil include: (i) preparation of a business plan by the financial institution in formation, which

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68 Article 18 of Law n. 4.595/64.

69 Article 10 of Law n. 4.595/64.

should contain, at least, details of the financial plan, the merchandising plan and the operational plan with the strategic; (ii) the authorization of the Central Bank of Brazil to access information on all the members of the controlling group and stockholders of the financial institution being incorporated, available at the Federal Revenue and any public or private data base; (iii) identification of the source of funds that will be used, (iv) the financial capacity of the controlling shareholder or the controlling group, which should be compatible with the size, nature and objective of the business; (v) declarations and documents showing that the control members hold knowledge about the type of business and the sector in which the institution intends to operate, (vi) the definition of the standards of corporate governance to be observed, including the managerial structure.

In relation to the authorization, during the first three years of operation a financial institution must demonstrate to the Central Bank of Brazil that its operations are in compliance with the strategic objectives described in the business plan, by means of a Management Report attached to half-yearly financial statements.

If it is found that the operations are not in compliance with the strategic objectives described in the business plan, the financial institution must give explanations to the Central Bank of Brazil.

With respect to the transfer of control and corporate reorganization of financial institutions, the rules regarding the incorporation of financial institutions must be observed. However, the Central Bank of Brazil may lift certain conditions depending on the situation.

As for the corporate control structure, article 17 of the Annex of the Resolution n. 4.122/12 set out that direct ownership interests of financial institutions can only be held by: (i) individuals; (ii) financial institutions and other institutions that are authorized to operate by the Central Bank of Brazil; and (iii) financial holding companies.

Regarding the cancellation of the authorization to operate a financial institution, it is worth mentioning that it has become mandatory to publish a

statement of purpose for such cancellation. Furthermore, the Central Bank of Brazil only grants this cancellation of authorization providing that all liabilities have been met.

The granting and validity of authorizations from the Central Bank of Brazil are subject to the financial institution complying, at all times, with the minimum capital requirements<sup>70</sup>.

### **9.9. Multiple Banks**

Multiple banks are private or public financial institutions incorporated as stock companies, which shall have at least two of the following business lines, one of which must be either commercial or of investments<sup>71</sup>:

- (a) commercial;
- (b) investment and/or development, the latter being exclusive for public banks;
- (c) real estate credit;
- (d) credit, financing and investment; and
- (e) leasing.

### **9.10. Commercial Banks**

Commercial banks are private or public financial institutions incorporated as stock companies, which operate in the discounting of credit

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70 Annexes II and IV of the National Monetary Council's Resolution 4.122/12.

71 National Monetary Council's Resolution 2.099/94.

instruments, in exchange operations, in the opening of credits, in the custody of assets, in all types of collections and payments.

Commercial banks are characterized by providing services to the general public and therefore have networks of branches and banking services, offering even electronic channels for the public, such as internet banking, call centers and ATMs<sup>72</sup>.

### 9.11. Development Banks

A Development bank is a non-federal public financial institution incorporated as a stock company with head-offices in the capital of the state in which its share control is held. It is required to include in its name the term “development bank” (*banco de desenvolvimento*) followed by the name of the Brazilian State where its head-office is located<sup>73</sup>.

The primary objective of the development bank is to provide an adequate finance program and to assist projects which promote the economic and social development of the state in which it is located, favoring, especially, the private sector.

In order to comply with its objective, the development bank shall support regional or sectoral programs or projects which:

- increase the economy’s production capacity by means of the implementation, expansion or relocation of ventures;
- benefit productivity by means of reorganization, rationalization or modernization of companies and formation of inventories of raw materials and final products or by means of the formation of integrated trade companies;

<sup>72</sup> <http://www.febrabanootportunidades.com.br/oquee.asp>

<sup>73</sup> Article 1°, of the annex of the National Monetary Council’s Resolution n. 394/76.

- contribute to the improvement of the local economic environment and local companies by means of the incorporation, merger, association, acquisition and/or the liquidation or consolidation of assets or liabilities;
- improve rural production by means of investment in projects with a view to the formation of fixed or semi-fixed capital; and
- promote the creation and development of production technology, management improvement, the formation and improvement of technical staff, for this purpose being allowed to sponsor technical assistance programs through specialized companies and entities.

## **9.12. Credit, Financing and Investment Companies**

Credit, financing and investment companies were originally regulated in 1959 as private financial institutions constituted as stock companies, which have as their purpose the provision of finance for the acquisition of goods and services, as well as for the working capital<sup>74</sup>

They are required to include in their name the term “credit, financing and investment” (“*crédito, financiamento e investimento*”).

## **9.13. Investment Banks**

Investment banks are private financial institutions incorporated as stock companies, whose primary objective is to conduct investment or financing operations in medium and extended terms, aiming at the provision of capital for

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74 Central Bank of Brazil’s Resolution n. 1.092/86.

companies in the private sector, from their own resources, as well as by the collection, intermediation and application of third party resources<sup>75</sup>.

Investment banks do not have checking accounts and raise funds via deposit, transfer of external and internal resources, and sale of shares of investment funds administered by them<sup>76</sup>.

The legislation requires that investment banks include in their names the term “investment bank” (*banco de investimento*).

#### **9.14. Real Estate Credit Companies**

A real estate credit company is a financial institution incorporated as stock company with the objective of providing financial support to real estate operations relating to the incorporation, construction, sale or acquisition of housing, created by the Law 4.380 on 21 August 1964.

Its name shall contain the phrase “real estate credit” (“*crédito imobiliário*”)<sup>77</sup>.

#### **9.15. Credit Cooperatives**

Credit cooperatives are financial institutions incorporated as legal entities, with non-profit purpose, which consist of a group of individuals who engage in a certain profession or other common activities, with the objective of sharing credits and/or providing services with benefits for the associates.<sup>78</sup>

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75 National Monetary Council’s Resolution n. 2.624/99.

76 <http://www.febrabanoporportunidades.com.br/oquee.asp>

77 National Monetary Council’s Resolution n. 2.735/00.

78 Central Bank of Brazil’s Resolution n. 3.859/10.

## **9.16. Leasing Companies**

Leasing companies must be incorporated as “Sociedade Anônima” companies, and shall be subject, whenever applicable, to the same conditions set forth for financial institutions, as per Law n. 4.595, from 31 December 1964, and subsequent amendments enacted by the National Monetary Council. Additionally, leasing companies shall include in their names the term “Leasing” (“*Arrendamento Mercantil*”)<sup>79</sup>.

The principal objective of a leasing company is the practice of leasing operations dealing with movable assets produced within Brazilian territory or abroad, or with real estate properties acquired from third parties to be used by the lessee in its economic activity. In the end of the leasing contract, the lessee has three options: (i) to buy the movable asset; (ii) to renew the leasing contract; or (iii) to return the movable asset to its lessor.

## **9.17. Stock Brokerage Companies**

Stock brokerage companies, which shall be incorporated either as “sociedade anônima” or as limited liability companies, are those institutions which have the following objectives, among others<sup>80</sup>:

- (a) to operate in locations or in systems maintained by stock exchanges;
- (b) to subscribe, solely or by means of a consortium with other authorized companies, for the issuance of securities for resale;

<sup>79</sup> Central Bank of Brazil’s Resolution n. 2.309/96 and amendments.

<sup>80</sup> Laws nos. 4.728/65 and 6.385/76; National Monetary Council’s Resolution n. 1.120/86 and amendments.

- (c) to intermediate public offers and distribution of securities in the market;
- (d) to purchase and sell securities on its own or third party's account, in accordance with the legislation enacted by the Securities Commission ("*Comissão de Valores Mobiliários*" - CVM) and by the Central Bank of Brazil;
- (e) to administer securities portfolios and the custody of securities; and
- (f) to subscribe, transfer and certify endorsements, share certificates, receipt and payment of redemptions, interest and other earnings relating to securities.

For the granting, by the Central Bank of Brazil, of an authorization to operate, the company must be admitted as a member of a stock exchange and have the approval of the Securities Commission for the exercise of activities in the securities market.

The approval of the Securities Commission will also be necessary for the conducting of the following acts: relocation of the headquarters; establishment, relocation or closure of branches or offices; alteration in the corporate capital; appointment of managers and other officials, fiscal counsels and members of other corporate bodies; foreign participation in the corporate capital; any other kind of alteration of its by-laws; and liquidation.

Additionally, the Securities Commission shall also be consulted in regard to any alienation in the control of the company, as well as in regard to any kind of change of its legal type, merger, incorporation and split.

## **9.18. Exchange Brokerage Companies**

The name of an exchange brokerage company must expressly contain the expression “exchange brokerage” (“*corretora de câmbio*”)<sup>81</sup>.

The main objectives of an exchange brokerage company are to intermediate exchange operations and the negotiation of the respective bills of exchange (the latter being exclusively conducted by business individuals organized by official brokers of public funds and brokerage companies), the exchange company provided that is not a member of an exchange shall comply with all rules applying to exchange members companies.

It is important to notice that as of 2006<sup>82</sup>, exchange brokerage companies are permitted to operate in exchange operations for their own account.

## **9.19. Securities Distribution Companies**

A Securities distribution company, whose name must contain the term “securities distribution” (in Portuguese, “*distribuidora de títulos e valores mobiliários*”), shall be incorporated either as a “sociedade anônima” company or as a limited liability company, with the following objectives, among others<sup>83</sup>:

- (a) to subscribe, solely or by means of a consortium with other authorized companies, for the issuance of securities for resale;

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81 According to National Monetary Council’s Resolution n. 1.770/90.

82 National Monetary Council’s Resolution n. 3.356/06, that was revoked by the National Monetary Council’s Resolution 3.568/08.

83 National Monetary Council’s Resolution n. 1.120/86, amended for the National Monetary Council’s Resolution n. 1.653/89 and others Resolutions.

- (b) to intermediate public offers and distribution of securities in the market;
- (c) to purchase and sell securities on its own or a third party's account, in accordance with the legislation enacted by the Securities Commission (CVM) and by the Central Bank of Brazil;
- (d) to administer securities portfolios and the custody of securities; and
- (e) to subscribe, transfer and certify endorsements, share certificates, receipt and payment of redemption, interest and other earnings relating to securities.

In addition to the necessary authorization granted by the Central Bank of Brazil for their functioning, securities distribution companies shall also apply for the issuance of a previous and express authorization before the Securities Commission (CVM).

The Securities Commission shall also be consulted with regard to any change in the control of the company, as well as with regard to any kind of transformation of its legal type, merger, incorporation and split.

## **9.20. Mortgage Companies**

Mortgage companies shall be incorporated as “sociedade anônima” companies and must contain the term “mortgage company” (in Portuguese, “*companhia hipotecária*”) in their names<sup>84</sup>.

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84 Law n. 6.404/76 and National Monetary Council's Resolutions nos. 2.122/94 and 3.425/06,.

Mortgage companies have the following objectives:

- (a) to provide finance for the acquisition, production, reorganization or trade of residential or commercial real estate properties and urban lots;
- (b) to purchase, sell, refinance and manage mortgaged credit of their own or of third parties;
- (c) to manage real estate property investment funds, provided that the necessary authorization is obtained from the Securities Commission;
- (d) to transfer resources for the financing of the production or acquisition of residential or commercial real properties;
- (e) to provide loans and finance for mortgage credit with other objectives as described in item (a) above; and
- (f) to manage investment funds<sup>85</sup>.

The establishment and operation of mortgage companies are dependent of authorization from the Central Bank of Brazil, however, they are not subject to the rules set forth by the Housing Financial System (“Sistema Financeiro de Habitação – SFH”).

## **9.21. Foreign Financial Institutions**

For foreign financial institutions to be able to operate in Brazil, they shall obtain prior authorization<sup>86</sup>.

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85 <http://www.bcb.gov.br/pre/composicao/ch.asp>

86 Article 18 of Law n. 4.595/64.

Any opening of new branches of foreign institutions and any increase in foreign ownership of the capital of existing Brazilian financial institutions<sup>87</sup> shall be vetoed pending the enactment of a Complementary Law, in accordance with Complementary Law n. 192.<sup>88</sup> However, such restriction is not applicable in cases where it is in the best interest of the Brazilian government for authorization to be granted, or in cases of authorization deriving from an international treaty.

Nowadays, in order to setup a branch of a foreign financial institution in Brazil, firstly it is necessary to fill out an application to be submitted to the Central Bank of Brazil's analysis<sup>89</sup>. Central Bank's recommendation and all the additional information requested by the National Monetary Consul's<sup>90</sup>, will be submitted for deliberation of the National Monetary Council and, subsequently, subject to the approval of the President of the Republic, who shall, in turn, issue an Executive Decree<sup>91</sup>.

## **9.22. “Money Laundering”**

On 3 March 1998, the Federal Government approved Law n. 9.613, created, under the Ministry of Finance, the Council for Financial Activities Control (COAF) an agency whose function is to accept, examine and identify suspected occurrences of unlawful activities and to discipline and impose administrative penalties.

The purpose of this law is to combat crimes relating to “money laundering” (such as the hiding or camouflaging of the nature, origin, disposition, movement or ownership of assets, rights or amounts) and to

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87 Article 52 of Transitory Provisions of the Constitution.

88 This wording was brought by Constitutional Amendment n. 40, issued in June 2003.

89 Circular n. 3.317/06

90 “Communiqué” n. 10.844/03, modified by Circular n. 3.317/06.

91 Article 52 of Transitory Provisions of the Constitution.

detect and punish any and all attempts to legalize the assets generated by such crimes. The law makes it possible to have greater control over these kinds of operations and to enable the Central Bank to maintain a closer view of financial transactions.

The groups subject to the law are those companies or other legal entities whose primary or secondary activity is the acquisition, intermediation or administration of financial resources of third parties in Brazilian or foreign currency; the buying or selling of foreign currency or gold as a financial activity or exchange instrument; and real estate activities.

Also included under the money laundering laws are insurance companies and brokers, banks, stock exchanges and futures markets; users of magnetic cards, or their equivalent, which permit the transfer of funds; companies that deal with foreign exchange, leasing, and factoring; individuals or companies dealing in commercial jewels, gemstones and precious metals, objects of art and antiquities; companies that distribute money, goods, services or their respective discounts by lottery and such like; companies that promote the purchase and/or sale of real estate; individuals or companies that deal with luxury and very expensive merchandise; branches or representative offices of a foreign institution that operates with any of the above-mentioned; and any company or institution that depends on authorization of any financial, exchange, securities or insurance markets' government entities .

All of the above groups are required to identify their clients, maintaining an up-to-date client list, and, for a minimum of five years, maintain records of all transactions in Brazilian or foreign currency as well as document of all operations having a value which exceeds a certain level as determined by a qualified authority.

In addition to the loss of their illegally acquired assets to the State, with the exception to the rights of bona fide third parties or others who may have suffered injury, there are several degrees of penalties to which offenders will be subject to, such as:

- (a) warnings for irregularities concerning the identification of the clients and the maintenance of the registry of financial transactions;
- (b) fines which shall not exceed: (a) the double of the value of the illegal operation; (b) the double of the actual profit obtained or which could have been obtained with the operation; or (c) the amount of R\$ 20,000,000.00 (twenty million Brazilian Reais)
- (c) suspension from exercising corporate administrative responsibilities (suspension results from cases of severe, verified infractions of the law, or specific and recurring transgressions previously penalized by fines) for a period no longer than 10 (ten) years; and
- (d) suspension or cancellation of the permit allowing the exercise of activities.

In the event that the crime of “money laundering” is committed abroad, any assets resulting from the breach of a treaty or convention enacted by the competent foreign authority will be seized and apportioned between the country and Brazil, again with exception to the rights of bona fide third parties similar to the above.

## 10. INSURANCE AND REINSURANCE

Decree-Law n. 73, of 21 November 1966 and Decree n. 60.459, of 13 March 1967, govern the National System of Private Insurance and thus regulate insurance and reinsurance transactions. The National System of Private Insurance is composed of:

- (i) the National Council of Private Insurance (*Conselho Nacional de Seguros Privados* - CNSP);
- (ii) the Superintendence of Private Insurance (*Superintendência de Seguros Privados* - SUSEP);
- (iii) Brazilian Institute of Reinsurance (*Instituto de Resseguros do Brasil* - IRB);
- (iv) companies duly authorized to operate with private insurances;  
and
- (v) admitted insurance brokers.

CNSP is responsible for: (i) the issue of guidelines and rules governing private insurance and reinsurance policies; (ii) regulating the establishment, organization, operation and monitoring of those operating under the National Private Insurance System, as well as the enforcement of penalties; (iii) establishing the general characteristics of insurance agreements, private pension and capitalization; (iv) establish general guidelines for reinsurance operations; (v) prescribing the criteria for the incorporation of insurance companies, open-

ended private pension companies and capitalization companies, setting up their legal and technical operations limits; and also (vi) to discipline the brokerage market and broker profession.<sup>92</sup>

SUSEP is a quasi-governmental agency under the Ministry of Industry and Commerce. Its headquarters are located in the city of Rio de Janeiro. SUSEP is authorized<sup>93</sup> to act as a regulatory agency monitoring and executing the policies set forth by CNSP, and, overseeing the incorporation, organization and operation of insurance companies. SUSEP is also authorized to issue rules and guidelines on insurance transactions based on the policies set by CNSP and to apply penalties, regulate bonds and oversee extra-judicial liquidation of insurance companies.

The Brazilian Institute of Reinsurance (IRB-Re) is a mixed public and private corporation<sup>94</sup>. It was granted a monopoly in the reinsurance market when it was created in 1939. Nevertheless, in August 1996, Constitutional Amendment no. 13/96 provided for the lifting of IRB's reinsurance monopoly. However, the Brazilian monopoly on reinsurance only extinguished with the enactment of Complementary Law no. 126, of 15 January 2007, thus taking more than ten years since the initial steps were taken for the actual opening of the market.

Additionally, Law no. 126/2007 grants considerable regulatory power to CNSP and SUSEP as to determine and supervise the new framework/regulation of the market. The provisions of Complementary Law no. 126/07 are as follows:

- (a) All of the original regulatory and monitoring attributions initially vested to the IRB are now transferred to CNSP and SUSEP.

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92 <http://www.fazenda.gov.br/portugues/orgaos/cnsp/cnspatri.asp>

93 Article 36, of Decree-Law no. 73/66.

94 Article 41, of the Decree law n. 73/66

- (b) Reinsurance (which is defined as the assignment of risks from one assignor to a reinsurer) and retrocession (the assignment of reinsurance risks from reinsurers to other reinsurers or insurance companies established in Brazil) may take place with the following kinds of reinsurers<sup>95</sup>:
- (i) a “local reinsurer”, is defined as being a reinsurance company incorporated and organized in Brazil as a company by shares, with the exclusive purpose of operating with reinsurance and retrocession;
  - (ii) an “admitted reinsurer”, defined as being a company headquartered overseas; with a representative offices in Brazil; complying with the applicable rules and registered with SUSEP for operating with reinsurance and retrocession; or
  - (iii) an “occasional reinsurer”, defined as being a company headquartered overseas (provided that they are not located in jurisdictions which tax income at a rate lower than 20% or in jurisdictions imposing secrecy as to the identity of their shareholders); without a representative offices in Brazil; complying with the applicable rules and registered with SUSEP for operating with reinsurance and retrocession.
- (c) IRB is a local reinsurer. The Brazilian government may offer to acquire the participation of preferential shareholders of IRB (holding approximately forty percent of the capital of IRB) provided that such shareholders use the totality of the resulting proceeds to acquire shares of other reinsurers located in Brazil.

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95 Article 4, of the Complementary Law no. 126/07

- (d) Local reinsurers are subject, “*mutatis mutandi*”, to the rules applicable to local insurance companies.
- (e) For a reinsurer to be authorized as “admitted reinsurer” or “occasional reinsurer”, requirements to be met include:
  - (i) it must be duly authorized, in accordance with the rules applicable within its home jurisdiction, to underwrite domestic and international reinsurance in the sectors it intends to operate in Brazil and it must have commenced those operations more than five years prior to their application in Brazil;
  - (ii) its financial and economic capacity must not be lower than the minimum requirement established by CNSP/SUSEP;
  - (iii) it shall maintain, at least, the minimum rating established by CNSP/SUSEP relative to its capacity to pay risk on claims, such rating to be granted by rating agencies; and
  - (iv) it shall maintain an attorney-in-fact resident in Brazil with powers to receive service of process and notifications in Brazil.
  - (v) to maintain as collateral to its operations in Brazil, a minimum deposit in an amount of US\$ 5,000,000.00 (five million dollars), or equivalent, for reinsurers operating with all line of businesses and US\$ 1,000,000.00 (one million dollars) or equivalent, only for reinsurance companies operating with personal insurance, in a bank account (linked to SUSEP), with a bank authorized to deal with exchange operations in Brazil<sup>96</sup>; and

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96 Circular SUSEP n. 359/08.

- (vi) to provide SUSEP with copies of its balance sheets and financial statements periodically.
- (f) Reinsurance relating to life and private pension shall be exclusively carried out through local reinsurers.
- (g) Since 16 January 2013, “local (authorized) reinsurers” have preference over foreign reinsurers offering the same conditions in relation to forty percent of reinsurance amounts transacted in Brazil.
- (h) Insurance, reinsurance and/or retrocession may be contracted in foreign currency in Brazil, subject to the rules enacted by the National Monetary Council (*Conselho Monetário Nacional* - CMN) and by CNSP.
- (i) CMN shall regulate bank accounts maintained in foreign currency to be kept by local insurance and reinsurance companies, by foreign reinsurers registered with SUSEP and by insurance brokers.
- (j) Mandatory insurance, as well as non-mandatory insurance contracted by individuals resident in Brazil, or by legal entities located in Brazil, insuring risks located in Brazil, must be contracted in Brazil.
- (k) Contracting insurance abroad by Brazilian residents or legal entities headquartered in Brazil are only authorized in the following situations:
  - (i) when the insurance in question is not available in Brazil and not contrary to the Brazilian legislation;

*10. Insurance and Reinsurance*

- (ii) when the insurance in question covers risks located abroad for individuals, provided that the insurance is valid only during the period of their stay abroad;
- (iii) when the insurance in question is the object of an international agreement ratified by the Brazilian Congress;
- (iv) when the insurance was legally contracted prior to 16 January 2007 (enactment of Complementary Law n. 126);  
and
- (v) when the insurance covers the risk located overseas of legal entities located in Brazil.

## **11. THE OIL AND GAS INDUSTRY**

### **11.1. Oil and Gas Activities in Brazil**

In the 1990s, a privatisation process conducted by the Government promoted the relaxation of economic rules and the deregulation of certain sectors in Brazil.

Under the prevailing model at that time, the State-owned company *Petróleo Brasileiro S/A* (“Petrobras”), created in 1953, was the sole player in the petroleum industry, with exclusive rights to explore and produce oil and natural gas.

In this context, Constitutional Amendment n. 9, of 9 November 1995, was enacted, allowing the Government to hire state and private companies to exercise exploration and production activities in the oil and gas segment. The oil monopoly of the Government was thus relaxed and, whilst the ownership of natural resources was retained by the State, Petrobras would no longer be the exclusive producer of oil and natural gas in Brazil or to undertake risks in these activities on its own.

Constitutional Amendment n. 9/95 was followed by Law n. 9.478, of 6 August 1997 (the so-called “Petroleum Law”), enacted with the objective of regulating the national energy policy and activities related to the oil industry.

In 2010, Law n. 12.351, of 22 December 2010 was passed with the purpose of amending the Petroleum Law and setting forth specific guidelines for the exploration of oil located in the pre-salt layer and other areas defined as strategic and where exploration risks are considered to be substantially lower.

## **11.2. Law n. 9.478/97 - The Petroleum Law**

Law n. 9.478/97 regulates the national energy policy and activities related to the State's monopoly in the oil and gas industry, pursuant to the principle established by Constitutional Amendment no. 9/95.

As above mentioned, Constitutional Amendment n. 9/95 relaxed the State monopoly on oil and gas activities, but did not completely eliminate it. In any case, the new constitutional provision meant that state-owned and private companies would now be able to enter into invitation to bids and compete for services in the oil industry.

Despite the fact Constitutional Amendment n. 9/95 took place in 1995, it was only with the approval of the Petroleum Law in 1997 that the legal framework for the licensing for the exploration and production of oil and gas by state-owned and private companies was created, with the concession regime being chosen for the granting of the respective rights.

The authorized activities under the Petroleum Law are, amongst others, the exploration and production of oil and natural gas and other fluid hydrocarbons; the refinery of national or foreign oil; the import and export of oil and gas and its derivatives; and the transport and commercialization of such products. Under the concession system adopted by the Petroleum Law, the concessionaire is granted the right to explore the deposit for the term foreseen in the concession agreement (normally, between 20 and 30 years) and is entitled to ownership of all oil produced during that period, subject to payment of taxes and Government remuneration as established by the Petroleum Law (please see paragraph 11.5 below). The implementation of an exploratory programme by the concessionaire is subject to the presentation of guarantees which will be detailed in the agreement, including as regards the investment programme for each phase of the exploration and production.

The Petroleum Law also created the National Council for Energy Policy ("CNPE") and the National Agency of Petroleum, Natural Gas and Biofuels ("ANP").

CNPE is an advisory body presided by the State Minister of Mines and Energy (“MME”) and subordinated to the President of the Republic, with the purpose of proposing to the President national policies and specific measures, including the blocks that will be offered under the concession or the production sharing regime<sup>97</sup>, pursuant to studies undertaken by ANP in this respect.<sup>98</sup>

ANP is a special autarchy and indirect member of the Federal Administration linked to the MME and its main purpose is to regulate, contract and inspect economic activities in the oil, gas and biofuel industry.

Amid other responsibilities, ANP is in charge of promoting bidding rounds whose winners will execute the concession agreement or production sharing agreement with the Government.<sup>99</sup> The autarchy has wide discretion to regulate the bidding notices and the respective contracts; issue general or specific rules; and edit technical regulations, amongst other activities. Such discretion is inherent to its regulatory function and is essential to generate legal and political security in the national oil and gas industry.

The Petroleum Law was amended, with the enactment of Law n. 12.351 in 2010, to also allow the exercise of oil exploration and production activities under a production sharing regime.

### **11.3. Law n. 12.351/10 - The Pre-Salt Law**

On 8 November 2007, CNPE announced that great quantities of oil and gas had been discovered in the offshore Santos Basin. The area in which the discoveries were made became to be known as the “pre-salt” region and oil found there as the “pre-salt” reserves. These reserves are located under a layer of salt which lies at approximately seven thousand metres deep in the sea.

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97 Article 2, VII of Law n. 9.478/97.

98 Article 8, IV of Law n. 9.478/97.

99 Article 8, IV of Law n. 9.478/97.

The discovery of the pre-salt layer in 2007 led to studies and debates in relation to the exploration of the new-found reserves. As a result of discussions held by various sectors of Brazilian society, Congress approved Law n. 12.351/10 (the “Pre-Salt Law”) which amended the Petroleum Law and introduced the legal framework for the exploration and production of oil and gas in the pre-salt and other strategic areas.

The most important change brought by Law n. 12.351/10 was the adoption of the Production Sharing Agreement (“PSA”) system for the exploration of oil and gas in the pre-salt layer and specific areas determined by the Pre-Salt Law.

The Pre-Salt Law has also determined the creation of a new public entity – Pré-Sal Petróleo S.A. (“PPSA”)<sup>100</sup> – which is responsible for managing the production sharing contracts entered into by the MME, in representation of the Federative Republic of Brazil (as the Contracting Party), ANP (as Regulating and Supervising Agency) and PPSA itself (as the PSA Manager) , on the one side, and Petrobras and the bid winner companies, through their Brazilian companies (as the Contracted Parties), on the other side, as well as the contracts for the commercialisation of oil, natural gas and other fluid hydrocarbons.

Another important provision set forth by Law n. 12.351/10 is related to the mandatory consortium to be formed by the bid winner(s) (either a company or joint venture), Petrobras and PPSA<sup>101</sup>, where Petrobras must hold a minimum participation of 30% .<sup>102</sup> The consortium agreement must contain a provision indicating that Petrobras, being the operator, will be responsible for the execution of the contract, without prejudice to the joint liability of the other

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100 Law n. 12.304/10.

101 Article 20 of Law n. 12.351/10.

102 Article 10, item III, paragraph “c” of Law n. 12.351/10.

parties of the consortium or third parties.<sup>103</sup> The PPSA is expressly exempted from all risks and costs associated with the operations under the agreement<sup>104, 105</sup>

Unlike under the concession regime, the Brazilian Government has a direct participation on the activities contracted through the PPSA and its profits will depend on the success of the operation. Thus, once a viable commercial discovery is made, companies participating in the exploration process and which are a party to the PSA will retain, on a monthly basis, an amount corresponding to the State reimbursement for the exploration, development and production costs incurred by them (cost oil). Then, the remaining part of the oil production – called “profit oil” – will be shared between the Brazilian Government and the contracted party(ies) pursuant to the criteria defined in the agreement.

The First Pre-Salt Oil and Gas Bidding Round was held in Rio de Janeiro on 21 October 2013. On offer, under the new PSA regime, was the offshore Libra field, located in the Santos Basin, in an area extending over 1,547.76 km<sup>2</sup> – which according to ANP has an estimated recoverable volume of between 8 to 12 billion oil barrels and will demand between 12 and 18 platforms.

Even though 11 companies were accredited to participate in the bidding round, only one consortium made an offer to the Brazilian Government. This consortium is formed by five oil companies: Petrobras with 40% participation in the consortium, the English-Dutch company Shell with 20%, the French company Total with 20% and the Chinese State companies China National Petroleum Corporation (CNPC) and CNOOC International Limited with 10% each.

The contract awarded in the First Round will be valid for 35 years. The sole consortium interested in the bidding offered the minimum percentage of profit oil – 41.65%, besides agreeing to pay a R\$ 15 billion (US\$ 6.88 billion on 21 October 2013) signature bonus to the Government.

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103 Article 20, paragraph 3 of Law n. 12.351/10.

104 Article 8, paragraph 2 of Law n. 12.351/10.

105 Article 23 of Law n. 9.478/97, as amended by Law n. 12351/10.

Under prevailing rules in Brazil, the contracted party must observe a minimum percentage of participation of Brazilian companies in the supply of equipment and services under a PSA or a concession agreement. Accordingly, winners of the first pre-salt round have made an undertaking as regards the so-called “local content” indexes, which was foreseen in the invitation to bid as follows:

- (i) **Exploration Phase, with a duration of four years:**  
Deep waters/Super deep waters: minimum of 37%;
- (ii) **Development Stage (Modules with first oil until 2021):**  
Deep waters/Super deep waters: minimum of 55%; and
- (iii) **Development Stage (Modules with first oil from 2022):**  
Deep waters/Super deep waters: minimum of 59%.

The technical challenges involved in the exploration of the pre-salt reserves cannot be underestimated and since the discoveries, Petrobras has been working towards the development of its own exploration technology and in partnership with research centres and universities. Presently, Petrobras is highly involved in the hiring of the equipment necessary for the exploration activities – including drilling rigs, platforms, vessels, etc. –, thus offering very attractive opportunities for oil and gas companies and their services providers from around the world.

#### **11.4. Consortia in the Petroleum Industry**

The relaxation of the Government’s monopoly provided by Constitutional Amendment n. 09/95 has encouraged the appearance of new players for the exploration and production of hydrocarbons, and turned Brazil into an attractive place for foreign and national investors.

Consortia have emerged as an important commercial strategy since the specific legislation foresees the formation of consortia in the national oil-producing industry, as it is possible for a foreign or national company to submit bids in the ANP Bidding Rounds in consortia with other companies. Companies that qualify as a non-operator may only submit bids if the Operator indicated in the consortium is a company which has obtained the minimum qualification required to operate in the sector in which the targeted bid block is located.

Both the Petroleum<sup>106</sup> and Pre-Salt<sup>107</sup> Laws, permit national and foreign private companies to jointly participate in the petroleum bidding rounds and set the requirements that must be met by such companies and that will be included in the respective invitations to bid by the consortium, including the obligation of foreign companies to set up a Brazilian company should it become the winner (or to use an existing Brazilian subsidiary for that purpose).

Individually, each company involved in a consortium are obliged to present the documents required by the invitation bid in order to evaluate the technical, economic and financial qualifications of the consortium<sup>108</sup>.

Foreign companies willing to participate of a bidding round, alone or in consortia, are required to present specific documents<sup>109</sup>, such as: (i) proof of technical capability, financial integrity and legal and tax good standing; (ii) copy of By-laws and proof that it is duly organised and active according to laws of the country where it is established; (iii) appointment of a legal representative before ANP with special powers to act and assume liabilities in relation to the bidding and the presented propose; and (iv) commitment to incorporate a company with headquarters and administration in Brazil and in accordance with Brazilian law, in the event of being the winner of the bidding.

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106 Article 38 of Law n. 9.478/97.

107 Article 16 of Law n. 12.351/10.

108 Article 38, III of Law n. 9.478/97 and Article 16, III of Law n. 12.351/10.

109 Article 39 of Law n. 9.478/97 and Article 17 of Law n. 12.351/10.

The granting of a concession or execution of the PSA, as the case may be, is conditional to the registration of the consortium agreement at the Board of Trade of the State where its headquarters are located.<sup>110</sup>

Either in the concession or in the PSA regime, Petrobras is authorized to form consortia with national and foreign companies, which is aimed at expanding capabilities, uniting technologies and boosting investments in the oil-producing industry. However, in the case of the PSA, it should be noted that the participation of the Brazilian State company is mandatory and, as already mentioned, it will be entitled to hold a minimum 30% participation in the consortium<sup>111</sup>.

### **11.5. Government remuneration on the Exploration of Oil and Gas**

According to article 45 of Petroleum Law, the governmental remuneration on the exploration, development and production of oil and gas will derive from: *(i)* signature bonus; *(ii)* royalties; *(iii)* special participation; and *(iv)* percentages for occupying a particular area.

The definitions and criteria applied by to the calculation of payments to be made are contained in the Petroleum Law and in Decree n. 2705/98, of 3 August 1998.

The signature bonus is the amount offered by the bidders to the State to obtain the rights to explore a certain field or block which is being auctioned, and shall be paid upon the signing of the concession contract or the PSA. The minimum amount for signature bonus will be established in the bidding notice.

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110 Article 38, V of Law n. 9.478/97 and Article 26 of Law n. 12.351/10.

111 Article 10, item III, paragraph “c”, and 20 of Law n. 12.351/10.

Royalties are the financial compensation due to the Federation, the States, the Federal District and the Municipalities in relation to each field, and are payable on a monthly basis in national currency, from the date the commercial production begins, no deductions being allowed. When exploration takes place under a concession agreement, royalties shall correspond to 10% of the production volume of oil or gas<sup>112</sup> and ANP may, in the invitation to bid to a given block, reduce this percentage to a minimum of 5% depending on the perceived geological risks, expected production and other relevant factors. Under the PSA regime the oil companies must pay 15%<sup>113</sup> of the production. Law n. 12.734, of 30 November 2012, established the new rules applying to the distribution of royalties between the Federal Government, States and others as above mentioned due by virtue of oil and gas exploration.

Special participation is only payable by the concessionaire in case of large production volume and high profitability, and is not applicable under a PSA<sup>114</sup>.

Percentages for occupying a particular area, relates to an annual payment to the State and are established by squared kilometers or fraction over the surface of the occupied block. In case of a PSA, 1% of the oil and gas production will be due to the owners of the land, whenever the block is located onshore.

The criteria applying to the calculation and collection of the sums due to the Government by the concessionaires are regulated by Decree n. 2.705/98 and should be set out in the bidding notice and in the concession contract or PSA.

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112 Article 47 of Law n. 9.478/97.

113 Article 42, §1º, of Law n. 12.351/10.

114 Article 44 of Law n. 12.351/10.

### **11.6. Alternative sources of fuel – Biofuel**

The rising of petroleum prices, as well as its scarcity, has led the world to seek alternative sources of energy. In this context, alcohol has emerged as one of the main alternative sources.

Alcohol is capable of reducing two significant problems: the greenhouse effect and the scarcity of petroleum.

Brazil has a key role in the production of renewable fuels thanks to a perfect combination of climate, territorial size and plenty of water. However, the Government must, in the coming years, encourage investment in technology, science and infrastructure to guarantee an efficient production of alcohol.

It is important to note, finally, that the Petroleum Law establishes, as an objective of the National Energy Policy, the increase of the part played by biofuels in the national energy matrix, in accordance with established environmental, social and economic principles<sup>115</sup>.

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115 Article 1, XII of Law n. 9.478/97.

## **12. LABOUR LEGISLATION**

### **12.1. General Considerations**

The Brazilian Federal Constitution guarantees to all workers rendering services in Brazil a number of specific labour rights, including: protection against arbitrary dismissal, a nationally uniform minimum wage, unemployment insurance, maternity and paternity leave, and occupational accident insurance. In addition, the Constitution prohibits employment discrimination on the basis of sex, age, race or marital status.

The primary Labour legislation enforcing these rights is Decree Law n. 5.452 of 01 May 1943, the Consolidated Employment Laws (*Consolidação das Leis do Trabalho* - CLT). As it was enacted during a period when the Government strictly regulated employment relationships, the CLT took some autonomy away from the parties involved in employment relations.

### **12.2. Formation of Labour Agreements**

Labour Agreements (employment contracts) can either be in writing or implied from the relationship between the parties. Under Articles 2 and 3 of the CLT, an employer-employee relationship exists (and a Labour agreement will be implied if a written agreement does not exist) where one party, who must be a natural person, habitually renders services for payment, and is subordinate to and otherwise under the direction of the other party.

All employees in Brazil must have an employee work and social security booklet (*Carteira de Trabalho e Previdência Social* - CTPS) in which employers are required to register the main characteristics of the employment

relationship (including information about the employer, as well as about the employee, for instance: name, position, wages, date of hiring, and responsible Union for the professional category).

### **12.3. The Labour Agreement**

Once the employee has been hired, the employer is legally required to follow labour regulations providing for certain basic employee rights and employer obligations; these cannot be negotiated between the parties. They include rules relating to minimum wage, holidays, maximum working hours, and the “13<sup>th</sup> salary”.

#### **12.3.1. Minimum Wage**

The minimum wage in Brazil from 1 January 2014 is R\$ 724.00 (approximately \$ 307.00 US dollars<sup>116</sup>) per month. However, the minimum wage can vary depending on the professional category of the employee, as established in Collective Bargaining Agreement or Convention (the so-called *Convenção Coletiva de Trabalho - CCT*)

#### **12.3.2. Working Hours**

The Constitution provides for “normal working hours not exceeding eight hours per day and 44 hours per week”. For certain categories of employees, however, the normal working hours may be reduced (for example, the regular

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116 1 USD = R\$ 2.3604 (January 21, 2014).

working period of bank employees may not exceed 6 hours per day). The Constitution also provides that the “rate of pay for overtime [must be] at least 50% higher than that of normal work.” Employees are also entitled to a weekly rest of at least 24 hours (generally taken on Sunday).

### **12.3.3. Holidays**

For every 12 months of employment, an employee is entitled to paid holiday “with remuneration at least one third higher than the normal salary”, which is a constitutional right granted to all employees. Where an employer fails to grant an annual holiday, the employee must be remunerated in an amount double that of the holiday payment owed.

### **12.3.4. Thirteenth Salary**

Employers are required to pay an annual year-end bonus, equal to one month’s salary, which is known as the “13<sup>th</sup> salary”. This amount must be paid every year by 20 December.

### **12.3.5. Mandatory Fund for Employment Benefit**

Each month, the employer shall deposit an amount corresponding to 8% of the employee’s gross salary in a bank account, in the name of the employee (Employee Dismissal Fund - *Fundo de Garantia por Tempo de Serviço* - FGTS). During the employment period, the amounts deposited remain blocked and may only be withdrawn by the employee under circumstances defined by law (including dismissal without cause, retirement, death, expiration of the employment agreement, etc).

### **12.3.6. Protective Measures for Expectant Mothers**

The law grants expectant mothers employment stability from the moment the employer is notified until 6 months after childbirth. The employee also has the right to a remunerated maternity leave of 120 days to be granted during the period closest to childbirth (normally 28 days before childbirth and 92 days after childbirth), extendable to 180 days according to Law n.º 11,770 of 9 September 2008. The employee's remuneration during the pregnancy period is funded by the National Social Security Institute (Instituto Nacional de Seguridade Social - INSS), and in case the extension is applicable, the 60 additional days are paid by the Employer. The law also provides for a five-day paid paternity leave.

### **12.3.7. Profit Sharing**

Profit sharing is constitutionally prescribed in Brazil and is regulated by Law n. 10.101 of 19 December 2000, which provides that collective Labour agreements are to define the terms of profit sharing plans.

### **12.3.8. Social Security (INSS)**

Employers are required to contribute 20% of gross salary to the INSS, an additional 5.8% to cover other social security payments (SESC, SENAC, SESI, SESC, etc.), as well as paying an additional variable tax of between 1% and 3% for occupational accident insurance. In 2009, Decree n. 6.957 allowed the increase or reduction of the rate of such insurance (up to 100%), depending on the company's activities.

The employee must also contribute a variable percentage (between 8% and 11%) of his or her gross monthly salary to the INSS. As of 2013, this contribution applies only to the first R\$ 4.159,00 of an employee's monthly salary.

### **12.3.9. Other rights established under Collective Labour Agreements**

Additionally, there may be additional obligations to employers arising from any Collective Labour Agreement (ACT) entered into with the employee's trade union. Such Agreements can create additional rights but cannot restrict rights otherwise legally assured. Each professional category in each region has a different ACT.

Employees have a period of one month stability before the execution of ACT's. If an employee is dismissed during this period, the employer will have to pay the severance package considering the new values established on the ACT.

### **12.4. Labour Agreement Termination**

Employment agreements may be terminated for a number of reasons: termination by the employer with or without cause, resignation by the employee, expiration of the employment agreement, death of one of the parties, extinction of the employer or by mutual consent.

Brazilian Labour legislation also stipulates that the termination of Labour contracts in excess of one year must be ratified by the relevant Trade Union or Labour Agency (*Delegacia Regional do Trabalho – DRT*), pursuant to Article 477 of the CLT.

The Trade Union, after analyzing the payments being effected, notes the termination of the Labour contract in the employee's work and social security booklet (CTPS). If the rescission payments are not made within the stipulated time-frame the employee will be entitled to one month's salary as compensation<sup>117</sup>.

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117 Article 477. "The payment of the installments shall be made within: a) one working day immediately after the termination of the labour contract; or b) ten days from the dismissal notice, if there was no previous notice; indemnification or its waiver."

Pursuant to this matter, article 447 provides for two different situations: a) when the employee works during the period of the advance notice - the payment of the indemnities and past due obligations must be done immediately after the termination of the Labour contract, thus, after the period of the advance notice; and b) when the employee does not work during the advance notice - the law determines that the payments shall be made within ten days after the dismissal notice (by the employer or employee). If the employee resigns, the employer may require him to work for one month. In this case, the payment must be done in accordance with item “a” above. Notwithstanding, if the employer waives this right, the payment must be made within 10 days.

#### 12.4.1. Prior Notice

For agreements of an indeterminate term, a party wishing to terminate a Labour agreement without just cause must provide the other no less than 30<sup>118</sup> days prior notice. During the notice term, the employee may request to work or he may be immediately released by the employer.

The law provides that if the employer does not provide at least 30 days advance notice, the employee must be paid his or her salary in an amount corresponding to the period of the required notice. Where an employee does not provide such sufficient notice, the employer is entitled to retain an amount corresponding to the period of insufficient notice.

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118 According to the Law 12.506/11, after the first year in the same company, will be added 3 (three) days per each year of service in this same company, up to a maximum of 60 (sixty) days, for a total of 90 (ninety) days of advance notice.

### **12.4.2. Indemnities for Dismissal**

When an employee is terminated without just cause, the employer is required to pay a fine equivalent to 50% of the amount deposited in the FGTS accumulated during the entire employment relationship. 40% will be subsequently released to the employee, whilst the remaining 10% will be retained as taxes. In addition, the employee is entitled to receive any salary owed for work performed; remuneration for unused holiday proportionate to the number of months worked in the prior year; with a remuneration which is at least one third higher than the normal salary, and a “pro rata” share of the 13<sup>th</sup> salary corresponding to the actual period the employee worked that year. In the above mentioned scenario the employee will be entitled to withdraw the amounts deposited with FGTS and to receive unemployment insurance.

Where an employee resigns or an employment contract expires, the employee is entitled to any salary owed for work performed; pay for unused holiday; and a “pro rata” share of the 13<sup>th</sup> salary, and of the holidays of the year of the termination, in addition to any other past due right.

If the employee resigns, in which the employee unilaterally submit his/her resignation, which may or may not be accepted by the employer, he/she is required to work for one month as advance notice. If the employee refuses to work during this period, he must pay the employer the amount equivalent to one month of his salary as indemnification of the advance notice. It is also possible for the employer to waive this right. Thus, in any case of resignation by the employee, the employer is not required to pay the advance notice.

In the above scenario, the employee will not receive the 40% penalty over FGTS and will not have the right to withdraw the amounts deposited in his/her FGTS or to receive unemployment insurance. In such case, the employee will be able to withdraw the deposits of the FGTS account plus interest after 3 years from the termination of the employment contract if during this period he/she is not formally hired as an employee.

Where an employee is terminated with just cause, the employee is only entitled to any salary owed for work performed and pay for unused holiday; the employee is not entitled to the 40% fine of the amount deposited as FGTS, and cannot withdraw the balance of the FGTS deposits. Brazilian law establishes a certain number of cases (employee's grave misconduct) in which it is possible to terminate a Labour relationship with just cause.

If an employee who has stability of employment is dismissed without just cause, the employer shall pay, in addition to all these rights, all the salary and rights relating to the whole stability period and, depending on the individual case, the Court may order that the employee be reemployed.

### **12.5. General Labour Procedural considerations**

Prior to the Constitutional Amendment n. 24/99, courts were presided over by panels of judges at all levels, including the courts of first instance. These Courts were comprised of panels of conciliation and judgment, the regional Labour Courts, and the Superior Labour Court.

Nowadays, however, Courts of first instance are presided over by only one judge and no longer by a panel of judges. Apart from this, they have jurisdiction over collective and individual Labour disputes. Individual disputes are those that relate to questions concerning the interests of individuals, brought before the courts by the employees themselves even if not remunerated against their employers in any nature of questions arising from an individual's professional activity.

On the other hand, collective disputes are those that involve wider interests of a given category of workers and are brought by the respective trade unions in, for example, cases involving strikes. From the enactment of the new Constitution, these (collective) disputes may now be able to be resolved by judgments at arbitration.

Whenever these collective disputes refer to the interpretation of Labour rules, they can only be resolved by the judicial branch if both parties agreed to it; otherwise, it shall be resolved by judgments of arbitration<sup>119</sup>. However, it shall be pointed out that there are authors and judicial decisions considering such exigency unconstitutional.

The CLT<sup>120</sup> establishes that Commissions of Prior Settlement (*Comissões de Conciliação Prévia*) would be in charge of trying to settle disagreements between employees and employers in order to avoid litigation concerning disputes arising from the employment relationship. Although the aforementioned legal dispositions do not impose the creation of these commissions, there are scholars and judicial decisions stating that this creation is an obligation and that lawsuits may not be brought without a prior attempt to reach a settlement agreement before these commissions.

On the other hand, jurisprudence universally accepts that after the opening of a Commission by an employee, there is no penalty for employers who do not make themselves present at the Commission or do not reply to it.

## **12.6. Brazilian Labour law for hiring employees to work abroad**

Law n. 7.064, from 1982, was created to regulate the hiring, in Brazil, of employees to work abroad, as well as the transfer of these employees for rendering any services in another country in the field of engineering services and related activities. (Article 1)<sup>121</sup>.

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119 According to the amendment to the Brazilian Federal Constitution number 45, published on 30 December 2004.

120 Articles 625-A to 625-H, inserted in Compilation of Labour Laws by Law 9.958/2000, published on 13 January 2000.

121 Article 1 This Law regulates the situation of employees hired in Brazil, or transferred by companies such as engineering services, consultants, works and projects, erections, management and related, to render services abroad.

Since then, this law may be applied for any activities and all situations whereby an individual is hired in Brazil to work abroad or is transferred from Brazil to another country.

The law<sup>122</sup> foresees 3 scenarios in which it should be applied: I) if the employee whose employment contract was executed in Brazil is transferred abroad; II) if an employee maintains his employment contract with a Brazilian company and is assigned to work abroad; III) if an employee is hired by a Brazilian company to work abroad.

Moreover, the law provides that the most favorable law shall be applied to the employment contract of employees hired in Brazil to work abroad or employees who were transferred from Brazil to another country.

In order to apply the most favorable law, each right must be analyzed separately (e.g. holidays, advanced notice, etc.) and the employee must be entitled to receive the best between both Brazilian and foreign legislation, as determined in article 3 of referred law, which states:

“Art. 3. The company responsible for the employment contract of the transferred employee, notwithstanding the compliance with the laws of the place where the work is being carried out, shall guarantee the employee:  
I- the rights set out in this Law.  
II- the application of the Brazilian Labour protection legislation, when not incompatible with this Law and more favorable than the legislation of the other jurisdiction considered as a whole and in relation to the individual rights.”

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122 Article 2 - For the purposes of this Law, transferred shall include: I - the employee who moves abroad, in a situation in which the employment agreement was being carried in Brazilian territory; II - the employee is assigned to a company with head offices abroad; and, III - those employees which are hired by a Brazilian company to render services abroad.

This provision was established in order to avoid the employee suffering harm by the relocation.

The Law also provides that the employer is responsible for the relocation expenses, social security contributions, Mandatory Fund for Employment Benefit (FGTS), annual paid vacations in Brazil (after a period of two years), the expenses to repatriate the employee to Brazil upon the termination of the respective employment contract and for providing medical and social assistance to the employee.

Additionally, it establishes that the advantages granted to the employee by reason of his relocation may be terminated upon his return to Brazil<sup>123</sup>.

Finally, the Law stipulates that an authorization from the Ministry of Labour, via its Immigration Department, must be obtained prior to the hiring of any Brazilian workers in Brazil by foreign companies. Such authorization will only be granted if:

- a) the foreign company holds at least 5% of a Brazilian company;
- b) the foreign company must guarantee all rights foreseen under Brazilian Labour legislation;
- c) all expenses related to the relocation must be fully paid by the employer;
- d) the period abroad shall not exceed 3 (three) years, except when annual vacation in Brazil is provided;
- e) the employer must repatriate the employee under the termination of the employment contract or under exceptional circumstances regarding his health condition and grave family crisis;

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123 Article 10. Transfer additional, “*in natura*” payments, as well as any other advantages that the employee may be entitled of during the period worked abroad shall not be due after returning to Brazil.

- f) the foreign employer must have a legal representative in Brazil with the powers to sue and be sued in Brazil;
- g) the foreign and the Brazilian companies shall be jointly responsible for compliance with the obligations under the employment contract.

Labour regulations<sup>124</sup> determine that the abovementioned authorization must be filed in Portuguese, together with the appropriate documents proving the legal existence of the foreign employer; that the foreign company holds a participation of five percent in a Brazilian company; that a representative in Brazil has been appointed; and an individual employment contract in Portuguese, observing the Law number 7.064 of 1982. Documents in a foreign language must be translated into Portuguese by a sworn translator in Brazil.

Moreover, in the event the employee remains abroad for more than three years, or in cases of renewal of the employment contract, the employer will have to request an extension of the authorization, submitting various documents demonstrating that the Law has been observed.

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124 Administrative Rule n. 21/2006, from the Ministry of Labour and Employment.

## 13. CONSUMER PROTECTION LEGISLATION

### 13.1. General Considerations

The Federal Constitution<sup>125</sup> sets out that the Government shall provide “for the defense of the consumer.” As a consequence, the Consumer Defense Code<sup>126</sup> (*Código de Defesa do Consumidor – CDC*), was enacted to govern consumer protection. The CDC articulates a national consumer protection policy that is based on the recognition of the vulnerability of the consumer in the consumer market, and seeks to restrict abusive practices in the consumer market and at the same time, improve the quality of products and services while not prejudicing the economic and technological development of the country. By virtue of the same reasoning<sup>127</sup>, consumers are entitled to:

- (i) life and health protection, regarding consumer relations;
- (ii) acknowledgement on products and services;
- (iii) protection against misleading or abusive advertisements;
- (iv) contractual guarantees;
- (v) compensation on damages;
- (vi) access to justice and administrative specialized entities;
- (vii) facilitated defense of their rights; and
- (viii) public services of good quality.

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125 Article 5º, section XXXII.

126 Law n. 8.078, of 11 September 1990, as regulated by Decree n. 861, of 09 July 1993.

127 Please see Article 6 of CDC.

The CDC protects consumers by defining basic consumer rights, the obligations of commercial suppliers, by providing for supplier liability and other appropriate sanctions.

Some important concepts are given by the CDC, such as “consumer” which is defined<sup>128</sup> as “the natural person or legal entity that buys or uses products or services as the final user”. The expression “final user” means that the product or service must be used exclusively by the consumer and not replaced in the production chain. The consumer concept could also be matched to a whole affected by a product or service.

Furthermore, CDC defines<sup>129</sup> “supplier” as “the person or legal entity, private or public, domestic or foreign, as well as unincorporated organization, which perform the activities of production, assembly, creation, construction, transformation, importation, exportation, distribution or commercialization of products or provision of services”. This law also defines “product” as “any asset, movable or immovable, material or immaterial” and “service” as “any activity provided in the consumer market, by remuneration, including those of a banking, financial, credit and insurance nature, with the exception of Labour relations”.

The concepts of consumer and supplier are broadly defined in order to ensure that the CDC is applicable whenever there is a transaction with an apparent supplier on one side and a consumer on the other.

In this sense, after a long litigation, the Brazilian Supreme Court<sup>130</sup> defined that the CDC is applicable to banks and financial institutions.

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128 Article 2, of CDC.

129 Article 3, of CDC.

130 See judgment of the Direct Unconstitutionality Action (*Ação Direta de Inconstitucionalidade – ADIN*) n. 2591.

### **13.2. Main Aspects of the CDC**

In order to provide the consumer protection envisaged by the Law, the CDC established norms already foreseen by Brazilian Courts in the adjudication of cases involving consumer relations. Among such norms it is important to note:

- a. **Reversal of the burden of proof** - by the criteria of the Courts, whenever the consumer is deemed the weaker party, or has shown its allegations to be reasonable, the Courts may invert the burden of proof, transferring to the supplier the obligation to prove that the facts alleged by consumer did not occur, or occurred differently than claimed;
- b. **Strict liability of the supplier** – it consists in the liability of the product or service supplier on repairing the damages caused to its consumers, regardless of fault.<sup>131</sup> The only defenses available are the non-introduction of the product or service into the market, the non-existence of the defect claimed or the complete fault of the consumer;
- c. **Subsidiary liability of the seller** – it consists in the possibility of holding the seller directly liable whenever the identification of the product supplier is not possible; whenever the product is sold without precise identification of the supplier; or whenever the merchant does not keep perishable products adequately stored. The seller, in exceptional situations, may be held jointly liable with the supplier.

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131 An exception should be considered: for the self-employed personal liability, fault must be verified..

- d. **Disregard of legal entity** – it consists in the possibility of holding the administrators and shareholders directly responsible by ignoring the legal personality of the relevant company, whenever damages are caused due to abuse of rights, illicit acts or facts, or violation of the bylaws of the company whose legal entity may be disregarded;
- e. **Contractual protection** – it is both prohibition and restriction of clauses or contractual practices considered to be abusive to consumers. Abusive clauses or practices are deemed null by the CDC, including the prohibition of any clause which prejudices consumers. In this sense, Law n. 11.785, of 22 September 2008, amended article 54(3) to establish a minimum font-size to the text of the contracts and thus improve the reading and comprehension of its terms by the consumer;
- f. **Access to data bases and credit reports** – it grants to consumers access to their own data bases and credit reports for the purpose of analyzing and revising their personal or credit data. If wrong information is held, the consumer has the right to request its amendment;
- g. **Protection from false or misleading advertising** - the CDC prohibits false or misleading advertising and provides for fines imprisonment and corrective advertising in the same media used by the transgressor; and
- h. **Broad liability for infractions** - administrative and criminal liability for determined infractions as foreseen in the CDC, without prejudice to the applicable civil liability.

### **13.3. Consumer Defense Organizations**

Supplemental to the possibility of individual claims before the Courts, legislation envisaged and established class actions that may be brought concurrently by the Public Ministry, the Federative Union, the States, Federal District and Municipalities, by public agencies and civil associations created for consumer defense.

The consumer defense agencies include the:

- a. Consumer Protection and Defense Department reporting to Ministry of Justice (*Departamento de Proteção e Defesa do Consumidor – DPDC*);
- b. Consumer Protection (*Defesa do Consumidor - DECON*);
- c. Consumer Protection Agency (*Proteção e Defesa do Consumidor - PROCON*); and
- d. Institute of Weights and Measures (*Instituto de Pesos e Medidas - IPEM*).

Furthermore, it is necessary to emphasize that the protective measures adopted by the entities above-mentioned include steep fines and indemnities against suppliers that do not comply with the norms set out in the CDC.

Finally, every law or regulation regarding consumer defense has the same purpose, which is to prohibit or limit certain market practices or else to balance consumer relations.

## 14. SPORTS LAW IN BRAZIL

### 14.1. Introduction

Sport is an area of great popularity and importance in Brazil. Among all Sports categories, football is the country's most popular sport and Brazilian players are recognized and admired worldwide.<sup>132</sup> Nevertheless, the importance of Sports to Brazil goes beyond football and its popularity.

During this decade, the sports industry in Brazil has grown consistently at the average rate of 7.4% per year, which is a figure much higher than Brazil's GDP yearly growth in the same period.<sup>133</sup> Such industry encompasses not just the athletes and clubs, but also the vast range of private and public sponsors, telecommunications, broadcast and advertising companies, sports equipment and merchandise, leagues, agents, attorneys, concessionaires of stadiums and arenas – all aimed at, and fuelled by, the millions of devoted fans.

The proximity of the 2014 World Cup and 2016 Olympic Games is promoting the acceleration of investments in Sports sector, which results in considerable revenue growth, as mentioned above. There are still many places available for such growth. In fact, as a contradiction, only 1.6% of Brazilian GDP corresponds to the Sports industry, which means that this is a sector of great revenue potential and will continue to have increasing investment growth for the next years.<sup>134</sup>

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132 Indeed, Brazil is the only country that was present in all World Cup events, and is the one with the highest number of titles (five) so far.

133 KASZNAR, ISTVAN K. and GRAÇA FILHO, ARY S. *in: A Indústria do Esporte no Brasil,- Economia, PIB –Produto Interno Bruto, Empregos e Evolução Dinâmica*, Publishing Company M. Books Editora, 2012.

134 CAMPOS, CIRO and LEITE, ALMIR *in: PIB do Esporte cresce 20% acima da média nacional*. *Jornal Estado de São Paulo* (estadão.com.br), September 17th, 2012.

In this context, Brazilian sports Law is in constant change and development in view of regulating the exploration and management of sports as an economic activity, as well as promoting social rights, welfare, health, education and security for all individuals, athletes, companies and entities which are involved in this sector.

The scope of this article is, therefore, to provide a context of the current legislation on Sports in Brazil.

## **14.2. Federal Constitution of 1988**

The Brazilian Federal Constitution of 1988 sets forth important social principles applicable to the Sport, such as:

- (i) Freedom of association for lawful purposes,<sup>135</sup> except paramilitary;<sup>136</sup>
- (ii) Creation of sports entities (professional leagues, confederations, federations, clubs) without governmental approval or authorization, and prohibition of Governmental interference in the management of associations, provided that they are solely engaged in lawful activities;<sup>137</sup>
- (iii) Protection of the human image and voice in Sports activities;<sup>138</sup>
- (iv) The Federal Government, States and Federal District share legislative mandate on sports;<sup>139</sup>

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135 In Brazil the majority of clubs are still non-profit associations (as opposed to most European Union countries, where clubs are private, for-profit companies).

136 Article 5(XVII), of Brazilian Federal Constitution.

137 Article 5(XVIII), of Brazilian Federal Constitution.

138 Article 5(XXVIII), of Brazilian Federal Constitution.

139 Article 24(IX), of Brazilian Federal Constitution.

- (v) Governmental obligation to foster the practice of formal and informal Sports, with due regard for: (a) the autonomy of sports entities in their management, organization and operation; (b) a priority in the allocation of public funds to educational sports and, in specific cases, to high profit sports; (c) the different treatment to be accorded to professional and non-professional Sports; and (d) the protection and support of national Sports activities;<sup>140</sup>
- (vi) The Judiciary Branch will only judge sports related lawsuits only after the exhaustion of appeals before the Brazilian Sports Courts;<sup>141</sup>
- (vii) Brazilian sports Courts will have a maximum of 60 (sixty) days after the filing of a suit to issue a final decision;<sup>142</sup> and
- (viii) The Government must encourage leisure for the social welfare.<sup>143</sup>

### 14.3. Brazilian Code of Sporting Justice (CBJD)

The Brazilian Code of Sporting Justice (*Código Brasileiro de Justiça Desportiva* - CBJD) was enacted by the Sports Minister and the National Sports Council (*Conselho Nacional do Esporte* - CNE) through the Resolution CNE n. 1, of 24 December 2003,<sup>144</sup> last amended by Resolution CNE n. 29, of 10 December 2009.<sup>145</sup>

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140 Article 217, of Brazilian Federal Constitution.

141 Article 217(1), of Brazilian Federal Constitution.

142 Article 217(2), of Brazilian Federal Constitution.

143 Article 217(3), of Brazilian Federal Constitution.

144 Resolution ME/CNE 1, of 23 December 2003, published in the Federal Gazette on 24 December 2003.

145 Resolution ME/CNE 29, of 10 December 2009, published in the Federal Gazette on 31 December 2009.

According to the CBJD, any conflicts arising from sports competitions shall not be judged by Common Courts, but rather by the Sports Justice Court (*Tribunais de Justiça Desportiva* - TJD) and/or the Superior Court of Sport Justice (*Superior Tribunal de Justiça Desportiva* - STJD), where the Judges have special knowledge about Sports Law. However, all decisions issued by Brazilian Sports Courts may also be subject to the appreciation of a Brazilian Common Court, due to a Constitutional provision.

All entities related to the practice of sports in Brazil are required to comply with the CBJD, including athletes, referees, clubs etc. The CBJD establishes specific rules regarding the organization, attributions and procedures of the Brazilian Sports Judiciary system, as well as the special rules for cases submitted to the appreciation of Brazilian Sports Courts, whose jurisdiction is limited to sports competitions and disciplinary infractions.

#### **14.4. Current Sports Law**

The sports-related provisions of the Constitution led to the enactment of laws governing professional sports. In 1993, Law n. 8.672, known as the Zico Law, was enacted to rule the general provisions for sports in Brazil. This law was in force for just a short period, since it was revoked in 1998 by Law n. 9.615, known as the Pelé Law.

The Pelé Law is, therefore, the current law which rules the general provisions for sports in Brazil. From the time of its enactment until the present date, the Pelé Law has been amended by several Laws, such as: Law n. 9.981 of 14 July 14 2000; Law n. 10.672, of 15 May 2003; Law n. 11.118 of 19 May 2005 and Law n. 12.395 of 16 March 2011.

The most important provisions of this law, currently in force, are:

- (i) Definition of Sport as an individual right and establishment of basilar principles of sports, such as, without prejudice to others: autonomy and freedom of organization for the practice of Sports; no discrimination; Government's obligation to foster the practice of formal and informal sports, differentiation between professional and non-professional Sports practice; provision of public resources for the development of educational Sport; security in Sports; among others.
- (ii) The exploration of professional sports is considered an economic activity and must follow the following principles: management and financial transparency; morality in sports management; social liability of managers; differential treatment between professional and non-professional sport; participation on sports organization in Brazil.
- (iii) Considering its finality, sports are separated into three different categories: Educational Sports, Integration Sports and Performance Sports. This last category is divided into professional or non-professional Sports.
- (iv) Brazilian Sports Governmental System comprises the Ministry of Sports and the National Sports Council, who are entitled to propose the National Sports Plan, which is the directive for the revenue keeping, spending, division and accountability provisions.
- (v) The National Sports System has the goal of fostering and developing Revenue Sports practices, and is formed by several Committees, entities, Sports leagues and Confederations, such as the Olympic and Paralympic Committees and the Brazilian Clubs Confederation.

- (vi) Professional leagues, federations and clubs (regardless of their legal structure) are considered as business entities for financial and administrative purposes (including tax, social security and accounting purposes).
- (vii) All leagues, federations and clubs involved in professional Sports competitions (regardless of their legal structure), are required to publish independently audited financial statements (for the annual period ending on the last business day of April);
- (viii) Companies which obtain the concession, permission or authorization to broadcast (including by cable television) the sounds and images of a Sports competition are forbidden from exhibiting its own trademarks, logos or other brands on the athletes' uniforms used in any competition
- (ix) The contracts executed between athletes and a sporting entity, association or club must not intervene on the athletes' freedom to transfer to another association or club nor on the athlete's performance and its provisions must not: contain abusive provisions; manage the career of underage athletes; among others.
- (x) The Sports work contracts must contain a penalty or indemnity provision in case of transfer of the athlete to other entity during the term of the Sports work contract. The parties to the contract can freely negotiate the value of this penalty clause, provided that such value is limited to 2000 (two thousand) times the average contractual wage for national transfers; and international transfers have no limitation imposed on the penalty's amount.

- (xi) In case of termination of the contract without cause by the entity, the athlete is entitled to receive an indemnity, whose value is freely agreed between the parties to the contract, but such value must not be lower than the total monthly salary that the athlete would have the right to until the end of the referred contract and must not be higher than 400 (four hundred) times the monthly salary due at the termination date.
- (xii) Brazilian Labour and Social Security laws are applicable to the Sports work contract, except for some special provisions, related to the peculiarity of Sports activities, such as the right for paid weekly rest of 24 (twenty-four) hours after the participation in a competition; among others.
- (xiii) Sports entities have the so-called Arena Rights (*Direito de Arena*), which consists of an exclusive right to negotiate, authorize or prohibit the emission, transmission or reproduction of images of a sports competition, by any means of communication.
- (xiv) The athlete's image rights may be licensed to sporting entities or third parties by the execution of an agreement, which must be independent and separated from the Sports work contract.
- (xv) General provisions on organization of Sports Justice and penalties applicable in case of violation of Sports rules.
- (xvi) General provisions on resources to be used for fostering the practice of Sports and the allotment of such resources to each Sports Committee and Confederations, under the supervision of the Federal Accountancy Council. All expenditures must be annually reported by the Ministry of Sports and approved by the National Sports Counsel.

Moreover, Law n. 9.615/98 has been regulated by a number of decrees. Under Brazilian Law, decrees are infra-law rules aimed at regulating specific details for other laws. A very recent decree has been enacted to regulate Law n. 9.615/98: the Decree n. 7.984 of 8 April 2013, which entered into force on 9 May 2013 and instituted general rules regarding:

- (i) Brazilian Sports System and the division of functions between the Federal Government, States and Municipalities;
- (ii) National Sports Council's goals and organization;
- (iii) Sports Leagues' goals and organization;
- (iv) The National Sports Plan and the allotment of resources to foster the practice of Sports, as well as the function of monitoring the use of such resources;
- (v) Contracts executed between Sports Ministry and entities of Sports administration;
- (vi) Sports Justice tenets, goals and organization;
- (vii) Professional Sports practice: professional activities and competitions; athletes' rights, including right of image; arena rights; Sports agreements for development of athletes; social and educational assistance to athletes; among others.

#### **14.5. Fans' Statute**

Law n. 10.671/2003 was enacted with the goal to provide for the protection of the fans' consumers rights, to assure the transparency of competitions and to prevent violence in Sports events.

Leagues, federations and clubs must abide by legal regulations and established rules. In order to ensure this, Sports entities are obliged to disclose in the media, for each competition: the rules of the games and its schedule; the list of referees, the name and contact information of an ombudsman for the competition; the name and contact information for the competition's ombudsman; a list of fans prohibited from attending local sports events; and a written report of the match.

Fans also have the right of security in the stadiums and arenas where sporting events take place, whether before, during and after the competitions. On 13 March 2009, Decree n. 6795 was enacted in order to regulate the presentation of safety technical reports regarding the use of arenas or stadiums on competitions. Additionally, recent safety rules for stadiums were introduced by Law n. 12.299 of 27 July 2010, which amended Law n. 10.671/03.

Federations or leagues (and their management) shall be jointly responsible with the clubs involved (and their management), regardless of fault, for any losses caused to a fan because of a security failure in a stadium or arena.

#### **14.6. Athlete's Scholarships**

To encourage the practice of sports and training of Brazilian athletes, Brazilian government enacted Law n. 10.891 of 9 July 2004, which created the Athlete's Scholarships, as well as Decree n. 5.342/05, which regulated the specific rules of such Law. These scholarships are granted to athletes that take part in the Olympic or Paralympics games.

To be the recipient of such grant, the athlete must meet strict requirements regarding the age, modality of sport and ranking or medals reached in individual or group competitions. Additionally, they must be recipient of no other source of sponsorship nor of any pecuniary amount from third parties. They shall be in a full time sport activity routine and bound to a sport practice entity.

In this manner, Brazilian Sports Law seeks to favour the athletes' access to competitions, by providing scholarships and creating educational and athlete-development programs.

#### **14.7. National Commission for the Prevention of Violence and Security of Sports Events**

Decree n. 4.960 of 19 January 2004 created the National Commission for the Prevention of Violence and Safety in Sports Events (*Comissão Nacional de Prevenção da Violência e Segurança nos Espetáculos Esportivos - CONSEGUE*), to improve the safety and security in sporting environments, and also to focus on promoting the modernization of sporting events in general in Brazil. With this objective, and pursuant to provisions of the Fans' Statute, this Commission seeks to create a national policy for the prevention of violence and safety in Sports events, establishing partnerships and covenants with several public and private organizations.

Law n. 12.299 of 27 July 2010, which amended Law n. 10.671/2003, was also enacted with the goal to prevent violence in competitions, by regulating the prohibition of selling tickets for stadium over its public capacity, in addition to set several other safety rules for stadiums during the competitions.

#### **14.8. Tax Benefits**

In order to support individuals and legal entities in sponsoring or donating money to sporting projects, the Brazilian Government enacted on 26

December 2006, Law n. 11.438, which regulates tax incentives to encourage sporting activities for the period from 2007 to 2015, allowing the deduction of income tax for individuals, up to 6% (six per cent) per period of assessment, and companies to the legal limit of 1% (one per cent) per period, of the amounts spent with sponsorship or donation, to support the projects which are approved by the Sports Ministry. However, funds from the tax incentive may not be used to pay professional athletes.

#### **14.9. 2016 Olympic and Paralympic Games in Rio de Janeiro**

Rio de Janeiro city, the capital of Rio de Janeiro State, has been elected to host the 2016 Olympics and Paralympics Games. Besides the host city, the games will also be held in the cities of Salvador/BA, Brasília/DF, Belo Horizonte/MG and São Paulo/SP.

On 12 May 2010, the Brazilian Government created the Olympic Public Authority (*Autoridade Pública Olímpica - APO*), which is a public consortium formed by the Federal Government, the State of Rio de Janeiro and the Municipality of Rio de Janeiro with the purpose of coordinating public services, implementation and the delivery of the necessary infrastructure for the 2016 Olympic Games. On the other hand, an Organizing Committee was established to carry out all management activities necessary for such Sports event (*Comitê Rio 2016*).

In order to secure Rio de Janeiro application as host city of the 2016 Olympic Games, Law n. 12.035/2009 was enacted, establishing the Olympic Act and special rules regarding the 2016 Olympics Games. As per such Law, foreigners who come to work in Rio 2016 Games are not required to apply for visas. Their entrance in the country will be permitted through the presentation of a valid passport, an identity card and their Olympics credentials.

Under the mentioned Law, the Organizing Committee may require the suspension of agreements regarding advertising spaces at airports or in

federal interest areas, during the period from 5 July to 26 September 2016, for its exclusive use, or for companies or sponsoring entities or even for the official Organizing Committee's employees or International Olympic Committee's employees, if related to the Olympic Games.

Law n. 12.035/2009 further assures the availability of the entire frequency spectrum of radio and television signals necessary for the Olympic Games, in benefit of institutions and individuals who work for the Games, whose use is exempt from payment of fees, during the period mentioned above.

Decree n. 7033/2009 was enacted on 15 December 2009 to regulate the publishing of all data and information related to the Olympic Games on the Full Disclosure Website of the Federal Government. Therefore, agencies and organizations that manage resources and properties regarding the Olympic Games, including the sponsorship, tax incentives, subsidies, grants and loans, must provide full disclosure of all data and information.

As regards tax issues, the Olympic Games will also be benefited from the special tax regime set forth by the above mentioned Federal Law n. 11.438/2006.

Most recently, Law n. 12.395/2011 provided for the destination of a part of the net revenue of the Federal Sports Lottery to the Olympic Committee, in order to foster the training and preparatory competitions of national Olympic athletes. This Law has amended the Pelé Act and introduced important provisions on the organization of the National Sports System, to which the Olympic and Paralympic Committees are part of.

Additionally, Law n. 12.395/2011 has instituted the Athlete Podium Program, which has the goal to improve the results of Brazilian athletes in international competitions. To be able to join this Program, the athlete must be linked to a sporting entity and must be ranked between the 20<sup>th</sup> (twentieth) first places in the international ranking of that discipline. The athletes who join the Athlete Podium Program will be benefited for the whole Olympic period of four (4) years, but such concession will be reviewed annually.

Law n. 12.395/2011 has also created the Sports City Program, which has the goal to recognize and support the development of local public initiatives towards the Olympic and Paralympic Games.

Finally, this same law instituted the National Training Network, which is a high performance training centre, linked to Brazilian Ministry of Sports, aiming at fostering the development of local young talented athletes.

## **15. TRADE REMEDIES**

### **15.1. Introduction**

The World Trade Organization (WTO) is an international organization established in 1995 to deal with the global trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible.

In order to maintain the smooth flow of trade in goods, the WTO agreements seek to bind tariffs and apply them equally to all trading partners (a principle also known as most-favored-nation treatment, or MFN).

Although the WTO agreements uphold such principle, they also grant some exemptions, in specific circumstances, as the so-called “trade remedies”.

Trade remedies are official policy tools used by the Government to perform remedial actions against imports which are causing current or imminent material injury to a domestic industry. Such remedies are divided broadly into measures of: (i) Anti-dumping; (ii) Countervailing; and (iii) Safeguard.

Three different WTO agreements regulate the main types of import cost increase or volume restrictions allowed to be used as trade remedies: *the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*; *the Agreement on Subsidies and Countervailing Measures*; and *the Agreement on Safeguards*.

Each measure regulates a different situation: (i) the anti-dumping rules aim to prevent or remedy the domestic industry from suffering injury caused by dumped prices imports; (ii) the Agreement on Subsidies and Countervailing Measures are used to compensate subsidies that were directly or indirectly granted by the exporter country; and (iii) the Agreement on Safeguards aim to temporarily increase the domestic industry protection, until they are ready to compete with the foreign companies.

However, anti-dumping is the most frequently remedy imposed, followed by countervailing, with the safeguard a measure rarely used nowadays.

The WTO's multilateral agreements were first incorporated into the Brazilian Legal System by: (i) Legislative Decree no. 30/94, which approved the Final Act signed in Marrakesh in 1994 and the results of the Uruguay Round of multilateral trade negotiations; and (ii) Executive Decree n. 1.355/1994, which enacted such Act.

After establishing the multilateral framework in 1994, the main provisions of *the Anti-dumping Agreement and the Subsidies and Countervailing Measures of the General Agreement on Tariffs and Trade (GATT-1994)* were incorporated into Brazilian legal system by Brazilian Law n° 9.019/95.

The administrative procedures towards trade remedies investigations in Brazil are current regulated by Decree n°8.058/13 (anti-dumping measures); Decree n° 1.751/95 (subsidies and countervailing measures); and Decree n° 1.488/95 (safeguard measures).

Brazilian government agencies directly involved with Trade Remedies procedures are: The Chamber of Foreign Trade (CAMEX), the Secretariat of Foreign Trade (SECEX), and the Trade Remedies Department (DECOM). SECEX and DECOM are part of the Ministry of Development, Industry and Foreign Trade (MDIC).

In short, SECEX is responsible for processing the trade remedies instruments through DECOM, which includes the establishment of a criteria to launch new investigations and CAMEX is responsible for taking main decisions; imposition of anti-dumping and countervailing duties, provisional or definitive, as well as safeguards measures.

It is important to mention that DECOM is responsible for the whole investigation and to present its conclusions to CAMEX which will decide whether to impose the measure.

CAMEX is chaired by the Minister of Development, Industry and Foreign Trade and includes as its members the Ministries of Finance, Civil Affairs, Foreign Affairs, Agriculture, Planning and Land Development.

Specifically regarding trade remedies, CAMEX is in charge of imposing anti-dumping and countervailing measures, provisional or definitive, safeguards, as well as decide to not impose, modify or suspend a measure imposed, based on the national interest.

Since February 2012, CAMEX established the Technical Public Interest Evaluation Group – GTIP through its Resolution no. 13/2012 with the objective of analyze the necessity to suspend or amend the final anti-dumping or countervailing measures, as well as its non-imposition, based on the public/national interest.

## **15.2. Anti-dumping Administrative Procedures**

In order to request an anti-dumping investigation to be launched, the domestic industry – representing or supported by more than 50% of the whole Brazilian production – needs to present its arguments to the Brazilian Trade Remedy Department (DECOM).

The application must present information regarding the like product and evidences of dumping, injury and the causality link between those.

This formal request should follow SECEX's standard procedure established by the SECEX Ordinance 41/2013; otherwise the complaint will be rejected.

Once the investigation is launched by SECEX through an Ordinance published in the Federal Official Gazette, it must be concluded within 10 months, however, exceptionally, this term may be extended for up to 18 months.

The first stage of the procedure is to notify all known interested parties as well as the exporting country's Government and send questionnaires to the interested parties, who will have 30 days to return them, which period may be extended for a further 30 days upon request.

In order to confirm the data/answers presented by the interested parties, DECOM shall conduct on-the-spot verifications. All verified and accepted information will form the basis for the dumping, injury and causality determination.

If the interested parties deny access to the necessary information, provide it after the deadline or create obstacles during the investigation, the decisions will be prepared based on the best information available.

Following the procedure, DECOM will release an preliminary determination within 120 days from the launching of the investigation (extendable for a further 80 days) which will be used to determine the necessity of imposition of provisional measures for a period of 4 to 9 months, as well as to base any price undertaking proposed by the exporters. In the event of the provisional anti-dumping measures were imposed in value lesser than the dumping margin, it terms shall be six and nine months, respectively.

After the preliminary determination, the interested parties will have up to 120 days to present all the necessary documents and arguments for final analysis. Then, the evidential phase ends and all parties will be granted a 20 day deadline to present their comments regarding all the information on the case file.

Further, DECOM will issue the Technical Note, informing the interest parties on the essential facts under judgment, which shall be the basis for the Final Determination.

At this stage, the interested parties will have 20 days to present their closing arguments and then DECOM will prepare the final determination and send it for CAMEX's decision if the dumping practice; the injury to the domestic industry; and the causality were identified.

The definitive measures shall be imposed for a five year period, to be collected either by an *ad valorem* aliquot over the product's customs value (CIF) or by a specific rate, set in United States dollars and converted into the national currency, to be added to the product's entry value; both before the product is cleared.

The amounts will be charged, independent of any other tax obligation, on all imports of the investigated product.

No definitive measure will proceed for a period longer than five years after its initial imposition. However, the measure may be reviewed, suspended, and even revoked by various different reviews or procedures, as presented below:

<b>Procedure</b>	<b>Applicant</b>	<b>Objective</b>	<b>Requirement</b>	<b>Term (Months)</b>
Review due to a circumstance change	Any Interested Party	Modify or extinguish the existing anti-dumping measure.	A significant and permanent change of circumstances.	10+2
Sunset Review	Domestic Industry	Extend the anti-dumping measure for more 5 years.	The measure extinguishment must probably result in the maintenance or resumption of dumping and injury to the Brazilian Domestic Industry.	10+2
New Shipper Review	New Exporter	Obtain an individual dumping margin.	The new exporter must not have effected sales to Brazil during the investigated period; and must have no association or relation with the producers or exporters that had sold to Brazil during the investigated period.	7
Anti-circumvention Review	Any Interested Party	Extend the measure for the same product simply modified; its parts and components; or to products sold by another country.	Specific commercial practice from the exporters and producers in order to frustrate the anti-dumping measure effectiveness.	6+3
Restitution Review	Importer	Receive a restitution of the amount paid due to the anti-dumping duty.	The anti-dumping measure imposed no longer matches the Exporters practice, and, therefore, the anti-dumping duty is higher than the individual margin to be determined during the review period.	10
Scope Evaluation	Any Interested Party	Determine whether a specific product is classified under the antidumping measure.	Only formal requirements.	2 +2
Redetermination	Domestic Industry	Determine whether the anti-dumping measure imposed in value lesser than the dumping margin is still effective.	The anti-dumping duty is not effective anymore due to its form or to the price performance.  The Redetermination can only be opened once in each 5 (five) years. Also, it can only be requested at least 9 (nine) months after the measure imposition or its last change.	3

Another alternative to modify or suspend the duty imposed is to apply for a public interest evaluation before GTIP, in a procedure chaired by the Secretariat for Economic Monitoring (part of the Ministry of Finance) which will analyze and request information from all Brazilian interested parties and then present its findings to CAMEX.

As presented before, the other two trade remedies measures (countervailing and safeguard) are not commonly used, but a brief introduction on each procedure is presented below.

### **15.3. The Administrative Procedure of Countervailing Measures**

In order to request a countervailing measure imposition, the whole domestic industry or a significant portion of the industry must apply for the investigation, presenting evidence on the imports of subsidized products; the injury suffered by the Brazilian domestic industry; and the causality link between them.

The countervailing measure procedure is determined by Decree nº 1.751/95 and the standard form was established by SECEX Ordinance n. 20/96.

After the petition is accepted by DECOM and before the investigation is launched, the exporting Government is invited to take part in a consultation aiming to clarify the legal situation explaining the supposed subsidy, its levels and effects, all seeking a mutually satisfactory solution for the conflict.

If a satisfactory solution is not reached, the Brazilian Government shall launch the investigation through an Ordinance published in the Federal Official Gazette and all known interested parties as well as the exporting country's government are notified.

Throughout the investigation, DECOM will send questionnaires to the interested parties, who will have 40 days to return them. Only one extension of 30 additional days can be granted.

In order to confirm the data presented by the interested parties, DECOM shall conduct on-the-spot verifications. All verified and accepted information will be the basis for the dumping, injury and causality determination.

Provisional measures may be established for a period up to 4 months if a preliminary determination shown its necessity to avoid the domestic industry injury.

At any time the procedure can be suspended without any measure imposition if the injury is eliminated by: (i) the exporter Government's agreement to remove or reduce the subsidy or adopt measures to control its effects; or (ii) the exporter's presentation of an acceptable price undertaking.

If the investigation continues, a compulsory hearing will be held and the interested parties will be informed on the essential facts under judgment, which shall be the basis for the Final Determination.

The investigation should be completed by DECOM within 12 months, however, this term may extended to 18 months if necessary.

Definitive measures may be imposed for a five year period as an *ad valorem* aliquot over the product's customs value (CIF) or a specific rate, set in Unites States dollars and converted into the national currency, to be added to the product's entry value.

However, the measure may be reviewed, suspended, and even revoked, since at least one year has passed from the definitive imposition or from the most recent review. After the review is over and in case the duties are increased or reduced, it will also be enforced for a new five years period.

#### **15.4. The Administrative Procedure of Safeguard Measures**

Different from the other trade remedies, the safeguard is not imposed against an unfair trade practice but aims to protect a specific domestic industry from an increase in imports of any product which is causing, or which is threatening to cause, serious injury to the industry.

Such measure intends to increase the domestic industry competitiveness throughout its duration by imposing a duty or imposing volume restrictions.

The trade remedy application must be made by the whole or a significant portion of the domestic industry and show sufficient evidence, such as demonstrations of imports increase, serious injury or threat to domestic industry and causal link between these two circumstances. The formal request should also contain a restructure program proposal.

Such program shall determine investments to be made by the domestic industry in different areas like productivity; research and development; product qualification and any other deemed necessary to guarantee the domestic industry an international competitive edge.

Also, since the measure is not based on a unfair practice, the Brazilian Government shall compensate the measure by granting benefits to the WTO's Members, such as decreasing some import taxes.

The safeguard measure procedure is determined by the Decree n° 1.488/95 and the standard form was established by SECEX Ordinance n. 19/96.

The investigation should confirm the existence of a serious injury or a threat of injury caused by the imports increase level, analyzing objective and quantified factors, regarding the affected domestic industry situation.

It is important to note that a provisional safeguard measure can be imposed after a preliminary determination of injury or its threat on critical circumstances where any delay could cause irreparable injury to the Brazilian industry.

In this case, WTO's Committee on Safeguards will be notified before the provisional safeguard measure is imposed and consults with any government involved will be held immediately after such imposition.

The provisional safeguard measure will be enforced for up to 200 (two hundred) days, and may be suspended before the determined due date.

In case a serious injury or its threat is detected, a safeguard measure is imposed as an *ad valorem* aliquot over the product's customs value (CIF); a specific rate, set in Unites States dollars and converted into the national currency, to be added to the product's entry value; or an quantity restrictive measure establishing imports quotas.

Once the measure is imposed, the Ministry of Foreign Affairs will notify WTO's Committee on Safeguards on the Brazilian government's decision and willingness to hold prior consultations with any government with substantial interest as an exporting country of the product concerned.

At this time, the available information will be examined in order to analyze the possible compensation that the Brazilian government would provide in consequence of the definitive safeguard measure imposition, respecting the terms agreed with the WTO.

The safeguard measures imposition observes the most favored nation clause and will be imposed on against the product concern regardless of its origin. However, Brazilian Law foresees special dispensation to developing countries.

The Law also determines that safeguard measures will be imposed during the period the domestic industry needs to prevent or repair the serious injury and to facilitate its adjustment.

If the domestic industry fails to accomplish the restructuring program, the safeguard measure shall be revoked.

The safeguard imposition period of up to 4 years can be extended through an investigation conducted by SECEX which will determine whether the measure is still necessary to prevent or repair the serious injury, and whether the adjustment undertake was properly executed and the WTO obligations were followed.

However, taking into consideration the initial imposition period, any safeguard measure cannot exceed a 10-year period.

When imposing safeguards measures or extending its term of effectiveness, the Brazilian Government will try to balance the tariff concessions and other obligations assumed by GATT 1994.

Finally, it is important to note that the Exporter Government has the right to request compensation if a safeguard is imposed. Such compensation is justified since the safeguard represents a temporary disruption on the tariff concessions balance and other obligations.

## 16. E-BUSINESS

As in any transaction, there are certain kind of rules and regulations that are applicable to electronic business and its contracts. Electronic business in Brazil is already protected by general legislation such as Law n. 10.406/2002 (*Código Civil Brasileiro - CC*), Law Decree n. 4.657/1942 (*Lei de Introdução às normas do Direito Brasileiro - LIND*), Law n. 8.078/1990 (*Código de Defesa do Consumidor - CDC*), Law n. 9.279/1996 (*Lei da Propriedade Intelectual - LPI*), Law n. 9.610/1998 (*Lei do Direito Autoral - LDA*) and Decree n. 3.505/2000 that institutes the Information Security Policy before the federal government agencies.

All the Laws mentioned above shall be observed so the practice of E-Business may be in conformity with the general standards in Brazil related to this subject.

### 16.1. The Validity of Electronic Contracts

The Brazilian Congress has issued Law n. 11.077/2004, which provides legal recognition to digital signatures, electronic contracts and provides for the capacity, competitiveness of the computer industry and automation.

Furthermore, all contracts in which one of the parties is Brazilian shall have to comply with the legal provisions on the general requirements for the validity of a contract, *e.g.*, contractual capacity, legality and proper form.

Insofar as international contracts are concerned, unless any disposition within an agreement is deemed abusive by a Brazilian Court, the LIND determines that the law of the country where the obligations are contracted shall govern disputes arising thereof. On the matter of consumer protection in

connection with the obligations arising from an E-Business agreement, we will expand below on how the Brazilian Courts treat such cases.

The Law foresees the possibility that a contract may be entered into by absent parties and it also determines that, contracts between absent parties shall be considered formalized when the proposal is accepted, except in three cases:

- 1) if the acceptance is non-existent because the party receives the retraction before or on the same time of acceptance;
- 2) if the party who sends the proposal agrees to wait for the answer and/or;
- 3) if the person who sends the proposal does not receive an answer within the agreed term.

In this day and age, the negotiation and establishment of terms of a contract through e-mail communication is a very common practice. Legally, such chain of correspondences can be construed as basis of a binding contract between parties, more specifically it is classified as a contract executed between absent parties. However, if the parties communicate via private chat rooms, such communication will be considered as though they were present at the same location.

## **16.2. Consumer Protection**

Another important aspect of electronic contracts in Brazil is that they are subject to the CDC like all other contracts, as long as they can be classified as a consumption relation.

Decree n. 7962, of 2013 states that the person or entity providing services or products via e-commerce shall supply the recipients with clear information thereof, good and acceptable customer services and abide by the legal disposition on buyer's remorse.

Although the CDC is an important asset to the enforcement of consumers' rights, a controversy as to its application when the providers of goods/services are domiciled abroad still lingers.

Nonetheless, it is largely accepted that international electronic contracts are subjected to the mandatory laws (laws that cannot be derogated from by contract) of the countries in question. Accordingly, the CDC, as a mandatory law, applies to international electronic contracts provided that they involve Brazilian consumers.

### **16.3. Privacy in E- Business**

The protection of personal data has been fully discussed in Brazil. The issues concerning privacy online are guaranteed by the Brazilian Federal Constitution (*Constituição Federal* – CF) of 1988 the CDC and the CC.

Actually, there is also Law 12.737 of 2012, which typifies as criminal some acts practiced in electronic media. The acts punishable as a crime are: invasion of computing device, interruption or disruption of telecommunication services or public information and; falsification of private document or of any bank card.

The privacy matters are also foreseen in CF, CDC, CC, that protect the right to have privacy in general, as well as in other laws, such as Decree n. 7845 of 2012, that adopts provisions concerning the protection of secret data, information, documents and materials for the security of society and of the State; Law n. 9.296/96, regarding the interception of the communication in computer systems, being necessary the Court authorization to this interception (this Law is also in article 5(XII), of the CF) and Law n. 9.610/98, which modifies, updates and unifies the legislation on Copyright and provides other resolutions, prohibiting the copy of protected information.

All of them essentially determine that anyone who violates the privacy, private life, honor or image of others, shall indemnify the injured party for material and moral damages.

#### **16.4. Security in E- Business**

Noting that online information are easily transmitted and invaded in computer networks, it is necessary to ensure the security and the reliability of such information.

It shall be noted that currently, the worldwide transmission of data – private and commercial – are made through the internet and optic cables.

The exponential growth of e-commerce combined with the almost limitless reach of the internet has made people's life somewhat easier on a fast paced ever changing society. At the same time, the threat to private information held by financial institutions, or transmitted via “secure” computer networks has been constantly challenged by criminals.

Therefore, the Brazilian Public Key Infrastructure (*Infraestrutura de Chaves Públicas Brasileira - ICP-Brasil*), was created by the Federal Government with the enactment of Law n. 11.280/06 and the Provisional Measure n. 2.200-2/01, to ensure the authenticity, integrity and legal validity of electronic documents and signatures. This new regulation sets out the framework for electronic authentication, which is based on the Model Law on Electronic Signatures (*Lei Modelo sobre Assinatura Eletrônica*) enacted by the United Nations Commission on International Trade Law (*Comissão das Nações Unidas para o Direito Comercial Internacional - CNUDCI*).

The above-mentioned regulation also amended provisions of both Civil and Civil Procedure Code, to ensure the validity of digital certification and its protection.

## **16.5. Domain Names**

### **16.5.1. Registration of Domain Names**

There has been a growing interest in the registration of a domain name with a “registro.br” top domain level, and, until recently, only companies established in Brazil could register such a domain name. Nevertheless, the Foundation for Research Support of the State of São Paulo (*Fundação de Amparo à Pesquisa do Estado de São Paulo – FAPESP*), which is the agency responsible for the registration of Internet domain names in Brazil, has issued rules that also allow foreign entities without a CNPJ number to register a domain name with a “registro.br” address.

Under these rules, a foreign entity aiming to register a domain name must appoint an attorney-in-fact who is both legally established in Brazil and registered with FAPESP. Furthermore, the foreign entity must provide its attorney-in-fact with the required documents which shall be delivered to FAPESP.

During the registration of the domain name with FAPESP, the attorney-in-fact, on behalf of the foreign entity, must identify who will be liaison between the foreign entity and FAPESP, also referred to as the ‘IDs’. Such ‘IDs’ include the administrative ID<sup>146</sup>; the technical ID (used for posting or deleting content from the Web Site at that address) and the institutional ID (used to represent the company in proceedings with FAPESP).

FAPESP’s main objective through these rules is to allow foreign entities to be able to register a domain name with a “.com.br” address. The registration process is still somewhat bureaucratic, but it is the first step towards spreading such domain names around the globe.

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146 It’s common acronym for “Identification”.

### 16.5.2. Trademarks versus Domain Names

Third party registration of domain names that reproduce or imitate well-known trademarks with the aim of obtaining profits from the sale of these domain names for the respective trademark owner (cyber squatting) is becoming, unfortunately, a very common practice.

This practice is increasing in Brazil due to the criteria adopted to confer a domain name, which is based on the principle that the first applicant who meets, at the time of the request, the registration requirements foreseen by Resolution CGI.br/RES/2008/008/P of the Brazilian Internet Steering Committee (*Comitê Gestor da Internet no Brasil* - CGI.br), will be the domain name titleholder. This criteria is known world-wide as “first come, first served”.

The “first come, first served” criteria is inefficient as to the protection of consumer relations and well-known trademark holder’s intellectual property rights, especially due to the lack of an obligation to prove that the trademark was registered before the competent government body, the Brazilian National Industrial Property Institute (*Instituto Nacional da Propriedade Industrial* - INPI).

Currently, there is no specific legislation that guarantees trademark holders ownership of domain names, and this creates disputes between the parties involved. As a result, trademark holders resort to the Judiciary or to Arbitration Courts to resolve the issue.

### 16.6. Internet Banking

In relation to Internet banking, currently, there is no specific law or regulation in Brazil concerning this subject. Thus, the same regulations and controls that are applicable to traditional banking operations are currently applicable to banking products and services offered through the Internet.

Resolutions n. 2.817/01 and n. 2.953/02 of the National Monetary Council (*Conselho Monetário Nacional* – CMN), established the rules regarding the opening of new current accounts by electronic means (including the Internet).

According to such rules, financial institutions, when opening a new bank account through the Internet, do not need to examine original counterparts of the relevant documentation. These new bank accounts can only be opened by individuals and/or legal entities that are resident and domiciled in Brazil and that already have a bank account opened in the original institution or in any other Brazilian financial institution. Despite the exceptions to the formalities for opening a new account through the Internet, the financial institution's manager and its director are not discharged from their responsibility to certify the true identity of the account holders. Furthermore, the director of the financial institution must still comply with all regulations in force, including the responsibility to carry on the applicable proceedings regarding the prevention of money laundering crimes.

As for the liability the bank is deemed to be objectively responsible for any damages or losses that the client may suffer from the normal performance of its banking operations (including Internet banking). This liability still applies even if the bank was neither negligent nor imprudent and not responsible for the specific event that caused the damage to the client. Thus, banking institutions in Brazil are bound to the so called "strict liability", *i.e.*, banks are liable whether the event is their fault or not.

## **16.7. Purchase and Sale of Securities through the Internet**

On 23 December 2002, the Brazilian Securities Commission (*Comissão de Valores Mobiliários – CVM*) enacted Instruction n. 380, which improved the rules to be followed by electronic brokers when purchasing and selling securities through the Internet.

Instruction n. 380 defines electronic brokers as security and commodity brokers authorized by CVM to deal with securities within self-regulatory organizations that are able to receive orders from their clients through the Internet.

Pursuant to this Instruction, self-regulatory organizations are defined as stock exchanges, commodities and future exchanges and over-the-

counter markets, which operate trading systems that receive orders through the Internet.

Moreover, pursuant to Instruction n. 380, electronic brokers' Web Sites must contain: (i) details on how to place an order to purchase or sell securities through the Internet; (ii) the prices of the securities, including the 10 (ten) best available prices, as well as the time when such prices were released; (iii) the costs and fees charged for each operation, including fees charged by self-regulatory organizations or by settlement systems and clearings houses; (iv) the procedures to be followed by the electronic broker when placing its client's orders received via the Internet; (v) details concerning the way in which the electronic broker issues an advice of execution to its clients; (vi) details on the security of the Information Technology "IT" systems, including the use of password and electronic signatures; (vii) the amount of time a client may be connected to the trading system without placing orders; and (viii) a direct link to the CVM Web Site.

Additionally, it was established that electronic brokers' Web Sites must inform their clients of, including, but not limited to: (i) the structure and function of the security markets and their operational risks; and (ii) the power of self-regulatory organizations to cancel trade in view of any breach of law and/or regulations.

Furthermore, Instruction n. 380 determines that electronic brokers must periodically audit their IT systems with the objective of certifying their capacity when processing client's orders. All orders, whether executed or not, must be electronically recorded for a period of 5 (five) years. In addition, those brokers must have contingency plans for peak time periods.

A final point to note is that Instruction n. 380 is in accordance with the recommendations of the International Organisation of Securities Commissions (*Organização Internacional das Comissões de Valores Mobiliários – OICV*). Accordingly, the new rules aim to show foreign investors that the commitment of the Brazilian regulator is to follow international market trends.

## 17. ENTERTAINMENT LAW IN BRAZIL

### 17.1. General considerations

The culture of a people reflects its ideas, wishes, hopes and it is an intangible form of expression, and, as such, must be preserved and treasured. The Brazilian Federal Constitution has acknowledged those values and assets by including Culture among citizen's fundamental rights. In a section dedicated to Culture only, it states that it is the right of all people to exercise their cultural traditions, with protection of the State, and to access all national cultural sources. It is also guaranteed that the State shall incentive the appreciation and diffusion of Brazilian Culture.<sup>147</sup>

Brazil is internationally known for its rich culture and for having all kinds of artistic expressions. Such worldwide recognition generated the need to create means to promote cultural events and increase the appreciation for arts in general, and, to accomplish this, laws granting tax incentives for those who would help promoting culture were enacted.

The Constitution defines "cultural assets" as those that refer to the identity, action and memory of the different groups that form the Brazilian society, such as:

- I – forms of expression;
- II – ways of creating, making and living;

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147 Art. 215, CF.

- III – scientific, artistic and technological creations;
- IV – works, objects, documents, buildings and other spaces intended for artistic and cultural expressions;
- V – urban complexes and sites of historical, natural, artistic, archaeological, paleontological, ecological and scientific value.<sup>148</sup>

## 17.2. National Culture Plan

The National Culture Plan is foreseen in the Federal Constitution. It consists in a Law, passed by the National Congress and sanctioned by the President. Once created its effects last for ten years. It is structured over three concepts of culture: the first one theorizes that it is a symbolic expression – because every human relation is based on symbols –, the second states that culture is a citizenship right and, finally, the third defend the idea that culture is a path to economic development with social-environmental sustainability.

Taking all this under consideration, the Plan establishes a certain number of goals to be accomplished within those 10 years in which it remains effective. The current Plan, created in December 2010<sup>149</sup>, contains 275 goals, divided into 36 strategies.

From the National Culture Plan arises the National Culture System, also foreseen in the Federal Constitution.

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148 Art. 216.

149 Law n. 12.434/10.

### **17.3. National Culture System**

The National Culture System (SNC) was created by the Constitutional Amendment n. 71, of 2012<sup>150</sup>. It involves bodies, commissions, financing systems and plans, all directed to provide human, social and economic development, while supporting the full exercise of people's cultural rights.

Through the SNC it is expected that the public policies related to culture of Municipalities, States and the Federal District may be integrated, strengthening the cultural sector and thus permitting an exchange of information and improving the administration of this system.

The system has to operate under several principles, such as:

- (i) The diversity of cultural expressions;
- (ii) Universalization of the access to cultural assets and services;
- (iii) Incentive to production, diffusion and circulation of knowledge regarding cultural assets;
- (iv) Cooperation between federative, public and private agents active in the cultural area;
- (v) Transparency and information sharing
- (vi) Democratization of the decision process, with the inclusion of social participation and control

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150 Art. 216-A.

- (vii) Decentralization of the management, resources and actions;
- (viii) Progressive increase in resources contained in the public budgets for culture;

The Constitution has left to a Federal Law to organize the National Culture System, which, regrettably, has not yet been done. States, Municipalities and the Federal District must organize their own systems.

In the meantime, federal entities are starting to join the SNC program. So far, 31.5% of all Municipalities in Brazil have agreed to cooperate with the Ministry of Culture and create basis so the SNC can work effectively with their limits<sup>151</sup>.

To reinforce the constitutional principle that all people must have access to culture, laws were enacted to incentive cultural production. Among all of the incentives, one sets itself up as the key incentive brought by those laws: tax reduction.

The greatest example of all is Federal Law n. 8.313/91, also known as Rouanet Act (Lei Rouanet).

#### **17.4. Rouanet Act**

Rouanet Act (Federal Law n. 8.313/91) gave individuals and corporations a tax credit for investments in the cultural area. It also created the National Program of Support to Culture (*Programa Nacional de Apoio à Cultura* - PRONAC). PRONAC's objective is to obtain and canalize resources to the cultural area. To implement this support Program, the law created three other institutes: the National Cultural Fund (FNC), Fund of Cultural and Artistic Investments (Ficart) and fiscal incentive to cultural projects.

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151 <http://blogs.cultura.gov.br/snc/2012/10/08/acordo-cooperacao-federativa/>

According to the law, only cultural projects effecting equal treatment to all attendants will be benefited.

It is in the National Congress' agenda to debate a new project to amend the Rouanet Act.

#### **17.4.1. National Cultural Fund**

The National Cultural Fund (FNC) has replaced the former Cultural Promotion Fund, which was created by law n. 7.505/86, and, consists of resources devoted exclusively to the execution of cultural programs, projects or other activities. Rouanet Act changed its names and stipulated its purposes.

The FNC is administrated directly by the Ministry of Culture. Its resources originate from various sources. Among them, there are donations, resources from the National Treasury, the National Lottery, Regional Development Funds, subventions or assistance from entities of any nature, including international organizations, etc.

After the project is approved by the Ministry of Culture, the FNC may finance up until 80% of the project's cost. The proponent of the project shall prove, in order to receive this benefit, that he/she can afford the remaining 20% or is able to obtain financial support for it.

Once the approval is given, the project will be followed up and evaluated by supervised entities, such as the National Library Foundation, National Arts Foundation, the Institute of Historic and Artistic National Patrimony, the Palmares Cultural Foundation and the Rui Barbosa House Foundation<sup>152</sup>. They will compare the expected results with the results achieved and forward their evaluation to the Ministry of Culture, who in turn shall issue an opinion judging the resources expenses.

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152 All of which will be briefly mentioned in item 17.7.

FNC funds may also be used to exchange programs. The Ministry of culture gives financial support to artists, technicians, cultural agents and researchers in the cultural area, so they can participate in cultural projects promoted by national or international institutions.

In 2013, 38 projects were selected by the FNC to be financed. In total, R\$ 9.7 million Brazilian Reais were allocated to these projects.

#### **17.4.2. Fund of Cultural and Artistic Investments**

The Fund of Cultural and Artistic Investments (Ficart) takes its resources from private initiative. It is an Investment Fund, which means it consists in a considerable amount of resources, under the form of condominium, destined to be applied in securities and equities portfolios as well as in any other actives available within the financial.

The Ficart is not operational now-a-days. In order to cause investors to be more interested in this form of investment, the Bill that is being prepared to reform the Rouanet Act is increasing, as an example, the fiscal deductions for those who invest in this fund.

#### **17.4.3. Fiscal incentives**

The law provides for an income tax reduction of up to 4% for companies (based on the taxable income) and 6% for individuals that either sponsor or make a donation to a Brazilian cultural production.

The donation or sponsorship must comply with the National Program of Cultural Support and the production must have received prior approval from Ministry of Culture (or ANCINE for short length movies). Considering the limits mentioned above, the reduction is based on the following criteria:

- a) All amount invested in the cultural program will be deducted from the income tax. This incentive is only worth for the following types of projects<sup>153</sup>:
- Scenic arts;
  - Books that have artistic, literary or humanistic values;
  - Classical or instrumental music;
  - Visual arts exhibitions;
  - Donation of collections to public libraries, museums, public archives and movie collections, as well as staff training and acquisition of maintenance equipment for these collections;
  - Short and long cinematographic and videophonographic productions, preservation and diffusion of audiovisual collections;
  - Preservation of material and immaterial cultural heritage; and
  - Construction and maintenance of cinema and theater rooms, which may also function as Cultural Centers for the Community, in Municipalities with less than 100.000 (one hundred thousand) inhabitants.
- b) Individuals can get a deduction up to 80% of donated value up until 60% of sponsored values. Legal entities can have a 40%

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153 Article 18, Rouanet Act

deduction of donated values or 30% of sponsored amounts. It is important to state that if the legal entity is taxed based on its taxable income, it may deduct the values donated or sponsored as operational costs. This sort of deduction is only possible for projects related to the areas listed below<sup>154</sup>:

- Theater, dance, circus, opera, mimic and similar;
- Cinematographic, video graphic, photographic, discographic productions (and similar);
- Literature, including reference works;
- Music;
- Plastic arts, graphic arts, engraving, posters, stamps and similar;
- Folklore and crafts;
- Cultural heritage, including historic, architectonic, archeological, libraries, museum, archives and other collections;
- Humanities; and
- Radio and television, educative and cultural, non-commercial programs.

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154 Article 25, Rouanet Act.

There are many cultural projects brought to Brazil by foreign companies that benefited from Rouanet Act. As an example, it is possible to quote “the Phantom of the Opera” and the “Cirque du Soleil” spectacles, both brought by a Mexican company, called CIE (Interamerican Company of Entertainment), which has a branch in Brazil and has benefited from fiscal incentives many times. Cirque du Soleil’s show “Saltimbanco”, of the Cirque du Soleil, performed in 2006, received from the Ministry of Culture 9.4 million Brazilian Reais to be performed. In the end, it raised up to 60 million Brazilian Reais.

## **17.5. Film industry**

### **17.5.1. The evolution of Brazil’s film industry**

Brazil’s cultural diversity has been reflected in its film industry, which began to attract international attention with the “*cinema novo*” (new cinema) movement of the mid-1950’s. Since that time, Brazilian films, such as Fábio Barreto’s “*O Quatrilho*” (1996), Walter Salles’ “*Central do Brasil*” (Central Station) (1998), Fernando Meirelles’ acclaimed “*Cidade de Deus*” (2002), Hector Babenco’s *Carandiru* (2003), Breno Silveira’s “*2 Filhos de Francisco*” (2005), Cao Hamburger’s “*O ano que meus pais saíram de férias*” (2006), José Padilha’s *Tropa de Elite 1* (2007), *Tropa de Elite 2* (2010) and Selton Mello’s *O Palhaço* (2011) have been recognised for the quality and originality of their production. This recognition has included a number of highly successful short-length movies and documentaries.

The Brazilian film industry has become a frequent participant in many renowned international festivals, including the Oscars, Cannes Film Festival, the Sundance Film Festival, and the International Film Festival in Berlin.

For more than fifteen years Brazil has implemented two tax policies, known as the Audiovisual and Rouanet Acts which provide financial incentives

for film production. In addition, the government has entered into several international agreements and treaties intended to foster international cooperation in the production of films.

In 2001 the National Movie Agency – ANCINE – was created, and it is the official body to develop, regulate and inspect cinematographic and videophonographic industries, whose objective is to develop the production, the distribution and the exhibition of cinematographic and videophonographic works in diverse segments of the market, so as to transform the film national industry in a self-sustainable institution.

The producer needs to be properly registered before ANCINE in order to produce a film in Brazil.

### **17.5.2. Production of cinematographic and videographic foreign work in Brazil**

The filming, recording, collection of images, with or without sound, for partial or integral production, and, for the adaptation of foreign audiovisual work within Brazilian territory, is regulated by ANCINE's Normative Instruction n. 79/2008, which establishes that these acts should be done under the responsibility and in partnership with a Brazilian production company duly registered before ANCINE, such permission is granted by a contract signed with the foreign production company or whoever is lawfully responsible for the operation.

Regarding the productions of foreign audiovisual works that are strictly journalistic-news they should be communicated to the foreign representatives of the Ministry of Foreign Affairs, which will be the responsible for giving the pertinent authorizations.

ANCINE is responsible for the control and monitoring of foreign productions made in Brazilian territory.

### **17.5.3. Establishing a production company in Brazil**

Whenever a foreign production company intends to film a large-scale production involving a sizable cast and crew or to produce a number of films in Brazil over an extended period of time, this foreign company usually establishes an independent legal entity in Brazil.<sup>155</sup>

### **17.5.4. Registration at ANCINE**

The production company established in Brazil must be properly registered in ANCINE in order to be able to film and record, as already mentioned.

There are three ways to file for a register before ANCINE:

- a) Through internet, at [www.ancine.gov.br](http://www.ancine.gov.br)
- b) Through postal correspondence, by sending a form requesting the register and required documentation;
- c) Directly at ANCINE's headquarter in Rio de Janeiro.

### **17.5.5. Investment in Brazil: foreign capital and the exchange market**

Whether a foreign entity is filming a production in Brazil or investing money in (or providing other assets to a Brazilian production company), the foreign capital invested in the project will be governed by Brazilian law.

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155 For more information on Company formation in Brazil see chapter 2 of this book.

### **17.5.6. Tax system**

The information related to the federal, state and municipal taxes and to social contributions may be found in the Tax Chapter of this legal guide.

### **17.5.7. Financial incentives for producing films in Brazil**

Two tax initiatives implemented by the Brazilian government have stimulated the development of the country's film industry by creating incentives that make investments in film productions more attractive to the private sector. International co-productions allow foreign entities to participate in Brazilian films, television and video projects and to receive the benefits of these tax policies.

#### **17.5.7.1. Audiovisual law**

The Audiovisual Law (Federal Law n. 8.685/93 and modifications) allows individuals and corporations to invest a portion of their income tax, classifying it as deductible expenses, in Brazilian independently produced cinematographic audiovisual work, through the acquisition of representative quotas of commercialization rights over the referred works, thus, offering the possibility of making a profit with no risk.

In other words, individuals and corporations have the option of paying their taxes to Brazil's Ministry of Finance or investing a percentage of these taxes in a film. In order to qualify for investments under the Audiovisual Law, the project must have received prior approval from the Brazilian National Agency of Cinema (ANCINE).

Such deduction is limited to 3%, for individuals, and to 1%, for legal entities.

Additionally, until the year 2016, the contributors may deduct the income tax due on the amounts dedicated to sponsoring the production of cinematographic works that are independently produced. The income tax deduction is limited to 4%, for legal entities, and 6%, for individuals.

In addition, Article 3 of the Audiovisual Law allows foreign film distributors in Brazil to invest up to 70% of any tax due on earnings, profits or other payments in Brazilian film productions (the subsequent production(s) must have received prior approval from ANCINE), limited to R\$3 million.

We emphasize that the deductions through the purchase of quotas and through the sponsorship of the visual works are limited to R\$ 4 million at any one time.

The Audiovisual regulations also provide for a total exemption from the Contribution for the Development of the Cinematographic Industry (*Contribuição para o Desenvolvimento do Indústria Cinematográfica - CONDECINE*). CONDECINE is an 11% tax on all royalty payments (including copyright) remitted abroad. The exemption applies only if the foreign entity has invested at least 3% of its total investment in Brazilian film projects. In May 2003, this benefit was extended to cable television companies for international programs produced in Brazil and to international co-productions involving a Brazilian company.

#### **17.5.8. International treaties and agreements**

Brazil has film co-production treaties with Argentina, Canada, Chile, Colombia, France, Germany, Italy, Portugal, Spain e Venezuela. In addition, on November 11, 1989, Brazil, Argentina, Colombia, Cuba,

Ecuador, Nicaragua, Panama, Venezuela, Peru, Mexico, the Dominican Republic and the United States signed the *Acuerdo Latinoamericano de Coproducción Cinematográfica* (the Latin American Agreement on Film Coproduction).

Furthermore, the Iberian-American cinematographic integration agreement and the Agreement for the Creation of the Latin-American common market of cinematography were signed.

These treaties establish terms which, enable international co-productions to qualify for various types of governmental support, and allow co-produced material to be eligible for investor tax credits.

### **17.5.9. Legal requirements for film production in Brazil**

In order to produce films, videos or television programs in Brazil, certain legal requirements must be met: work visas must be obtained for any foreign cast or crew members, permissions to film must be obtained from the proper authorities, and provisions must be made to import any required production equipment.

#### **17.5.9.1. Visas for foreign production crews**

Foreign citizens are permitted to engage in paid activities in Brazil provided that a work visa has been issued by the Ministry of Labour. The visa may be temporary or permanent, and the duration will depend on the type of visa and on the activities.

Foreign production companies unaffiliated with a Brazilian production company must apply directly to the Ministry of Labour for visas for members

of their production crew and cast. Unfortunately, the procedure is bureaucratic and takes some time.

When a foreign production company is affiliated with a Brazilian production company the visas for any foreign production crew or cast members can be obtained by the Brazilian company through ANCINE.

After the necessary information is provided, ANCINE will give authorization to film in Brazil and will forward all necessary information to the Ministry of Foreign Affairs, which will authorize the consulate(s) to issue the visas. The consulate will issue temporary work visas, whose validity usually coincides with the film production schedule.

#### **17.5.9.2. Permission to film**

As noted above, when a foreign production company is associated with a Brazilian film company, ANCINE provides both visas and an authorization to film in Brazil.

#### **17.5.9.3. Temporary importation of production equipment**

While production equipment (cameras, lights, etc.) can be rented or purchased in Brazil, Brazilian law also authorizes the importation of foreign equipment for a limited period.

### **17.6. Music industry**

When thinking of Brazilian culture it is almost impossible not to remember great musicians, international successes and strong rhythms. To illustrate how important music is to Brazilians, in 2008 it became an obligatory subject to be taught in schools.

To monitor and assist musicians, Brazil has created bodies connected to the Government that deal with the musical activity directly.

### **17.6.1. The order of Brazilian musicians**

The Order of Brazilian Musicians (Ordem dos Músicos Brasileiros - OMB) is a federal entity created in 1.960, by the enactment of Law n. 3.857 to support Brazilian musicians and monitor the activity throughout the entire country, with prerogative to sanction those who do not act according to the organizations principles. It is composed by Federal and Regional Boards.

Overall, musicians should only work professionally if they have been registered before the OMB. According to the Order's tenets, it shall organize and provide to all of its members:

- professional courses;
- contests;
- prizes, *i.e.*, trips within the national territory and abroad;
- scholarships
- copies of dramatic symphonic music sheets, also as a prize.

The Brazilian leg of a foreign musician's tour cannot exceed 90 (ninety) days.

To be considered a professional musician, one must fit in at least one of the following categories:

- composers of classic or popular music;
- conductors of symphonic orchestras, operas, *bailados*<sup>156</sup>, operettas, mixed orchestras, of ballroom dancing, gypsies, jazz, symphonic-jazz, chorals and music bands;
- directors of orchestras or popular ensembles;
- instrumentals of all genres and specialties;
- singers of all genres and specialties;
- private music teachers;
- directors of lyric scenes;
- arrangers and orchestrators;
- music copyist.

### **17.6.2. Fiscal incentives**

As mentioned above, Rouanet Act allows people and companies that invest in music to reduce their income tax. However, the law makes a division regarding the type of fiscal incentive based on the type of musical production that will be accomplished.

If the project involves instrumental and classic music, 100% of the invested is deducted from the income tax. If it comes to any other kind of music

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156 A certain type of dance presentation.

production, *e.g.*, involving human voice, the tax reduction for individuals goes up until 80% of donated value and up until 60% of sponsored amount and for companies up until 40% deduction of donated values or 30% of sponsored amounts.

It is important to remember that these fiscal incentives must respect the limits previously mentioned in item 17.4.3 of this Chapter.

### **17.6.3. Taxation over musical instruments.**

Bill n. 3.623, of 2008, foresees the possibility of tax reduction when it comes to import, export and sale within national territory of musical instruments. Also the materials used to fabricate musical instruments will receive the same benefits.

There's no prediction, however, of when it will be approved.

### **17.6.4. Contracts with foreign musicians**

Law n. 3.851 stipulates that when a contract is celebrated with a foreign musician, a 10% fee of its value must be paid to Banco do Brasil, under OMB and local syndicates' names, in order for it to be registered in the Ministry of Labour.

### **17.6.5. Visa for foreign musicians**

All artists are allowed to enter Brazil with a special visa, granted to artists and sportsman, which allows them to remain in Brazilian soil for 90 days. However, upon authorization from the Federal Police Department, this period can be extended for another 90 days.

## **17.7. Other cultural forms of expression**

Brazil is filled with artistic expressions. In addition to the ones mentioned above, there are many others that deserve protection and support from the Government. It is also noteworthy, that there are a number of other institutions that were created to encourage, disseminate and protect cultural productions.

### **17.7.1. National Arts Foundation - FUNARTE**

FUNARTE – National Arts Foundation is a governmental institution created by Law n. 6.312/1975 to deal with different cultural expressions. It is involved with visual arts (such as photography), the circus, dance, literature, theater and music.

Its main objectives are production supporting, training and development of artists, research development and memory preservation and to provide the means to enrich the population's cultural awareness of Brazilian arts.

To fulfill its purposes, it gives away prizes and scholarships, publishes books, promotes workshops, recovers and makes collections available to public, gives technical opinions and organizes programs that encourage and promote the circulation of people and artistic goods.

### **17.7.2. Brazilian Institute Of Museums - IBRAM**

The Brazilian Institute of Museums (*Instituto Brasileiro de Museus* – IBRAM) was created rather recently (Law n. 11.906/2009), with the task of providing aid and support to all activities related to Museology.

It obeys the principles and goals established by the National Museum Policy, issued in 2003 by the Ministry of Culture, with the scope of integrating and enhancing the museum related activities in Brazil. The Policy has six pillars to guide the actions towards promoting museum activity development:

- managing and configuring the museology field of action;
- democratization and access to cultural assets;
- education and training of human resources;
- modernization of museum's infrastructure;
- financing and support to museums; and
- acquisition and management of museum collections

### **17.7.3. National Institute Of Historic And Artistic Heritage - IPHAN**

The National Institute of Historic and Artistic Heritage (*Instituto do Patrimônio Histórico e Artístico Nacional - IPHAN*) was created back in 1937, which makes it one of the oldest institutes created to protect and preserve Brazil's cultural heritage.

To illustrate the importance of institutions such as IPHAN, the Constitution states that the Government shall ensure to all the full exercise of the cultural rights and access to the sources of culture. It must also support and foster the appreciation and diffusion of cultural expressions.

Further, its Article 216 echoes UNESCO<sup>157</sup>'s understanding of what can be classified as heritage when it states that the Brazilian cultural heritage is consisted of assets of a material and immaterial/intangible nature, taken individually or as a whole, which bear reference to the identity, action and memory of the various groups that form the Brazilian society.

#### **17.7.4. National Library Foundation - FBN**

UNESCO has considered it one of the 10 biggest national libraries in the world. It is also the biggest Library in Latin America. Its history goes back to 1808, when the Portuguese Royal Family came to Brazil running from Napoleon and brought with them a collection numbering around 60 thousand pieces.

The Foundation's key objectives are to maintain, acquire and preserve intellectual national assets. Nowadays, it holds millions of priceless literary works.

#### **17.7.5. Palmares Cultural Foundation - FCRB**

Founded in 1988, by Law n. 1.668/1988, the Palmares Cultural Foundation, named after Zumbi dos Palmares (1655-1695), is a public institution created by the Ministry for Culture for protection of African-Brazilian values and culture.

Alike its namesake, which is one of the most famous references in the fight against slavery in Colonial Brazil and the preservation of African culture, the Foundation formulates and implements policies aimed to enhance the participation of black people in the civic and cultural processes of national development.

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157 According to UNESCO, intangible cultural heritage are “the practices, representations, expressions, knowledge and techniques and also the instruments, objects, artefacts and places associated with them and the communities, groups and, in some cases, individuals who recognize themselves as part of their cultural heritage.”

### **17.7.6. House of Rui Barbosa Foundation - FCRB**

House of Rui Barbosa (Casa de Rui Barbosa) was created in 1928, in the form of a library-museum, by former president Washington Luis in honor to one of the most important intellectuals in Brazil. It was granted legal entity status in 1966 and last modified in 2004.

Its scope is to maintain and preserve research, as well as encourage debates about Brazilian culture.

## **17.8. Legal means to protect The Cultural Heritage**

### **17.8.1. Public civil action**

Created by law n. 7.347, of 1985, it can be filed by the State's Prosecution Office, Public Defender's Office, by the Union, States, Municipalities or Federal District, state bodies (such as foundations), and specific types of associations.

Among the subjects that can be dealt with through this sort of lawsuit, the legislator included goods and right of artistic, aesthetic, historical, touristic and landscape values.

### **17.8.2. Class action**

This sort of lawsuit, created by Law n. 4717/1965, can be filed by any citizen who wishes that a damaging act to public heritage - which includes assets and rights of cultural nature - be declared null and void or suffer annulment.

This Law allows the citizens to stand up against those who approve or allow the hazardous act to happen directly, without intermediates (such as the District Attorney's Office). Therefore, it is of no importance that the act was committed by individuals, institutions or even public bodies, including authorities and public servers.

## 18. ADMIRALTY LAW

### 18.1. Introduction

Brazil and Admiralty Law have been interrelated since the country was discovered on 22 April 1500 and had in the sea its only means of communication with the world.

During the colonial period in Brazil, the legislation in force, owing to the bonds with Portugal, was the Portuguese Crown Ruling, the *Ordenações Filipinas*. Such law remained in force until Brazil's independence from Portugal in 1822, following which, it was important for the country to regulate commercial issues.

In 1850, the Brazilian Commercial Code was enacted and became the main source of Admiralty Law in the Brazilian legislation. With the advent of Law n. 10.406 of 10 January 2002 (current Civil Code), the Commercial Code was revoked except for the Chapter on Admiralty Law which remains in force.

The secondary legal sources are not codified and consist in Brazilian legislation and ratified International Conventions and case Law.

Therefore the Brazilian Admiralty Law consists in a complex system of legislation, extremely specific, being regulated by public and private International Law of different periods and hierarchies. It requires a great effort from those who work or study this field of the Law in terms of legal interpretation.

The Commercial Code deals with the following matters on Admiralty Law:

- a) vessels, their ownership, joint owners;
- b) rights and duties of the Capitan and crew;

- c) maritime contracts such as charter-parties and bills of lading, liabilities arising from these contracts;
- d) passengers;
- e) ship mortgages and preferred credits over ships;
- f) marine insurance;
- g) damages caused by collision;
- h) abandonment;
- i) averages (particular and gross); and,
- j) damages in general.

## 18.2. Conventions

Along with the evolution of internal legislation, many International Treaties regarding Admiralty Law have been ratified by Brazil, in particular, those relating to Maritime Safety Traffic, Maritime Pollution and to the Law of the Sea. Some of them were signed in relation to the International Maritime Organization (*Organização Marítima Internacional* - OMI) and International Labour Organization (*Organização Internacional do Trabalho* - OIT).

Among those treaties, the following should be mentioned:

- a) The Brussels Convention of 1910 concerning the unification of certain rules of law relating to collision between vessels, enacted by Decree n. 10.773/14;

- b) The Brussels Convention of 1924 referring to several rules concerning limitation of liability of owners of sea-going vessels, enacted by Decree n. 350/35;
- c) The Brussels Convention of 1969 referring to Civil Liability - CLC, particularly concerning civil liability for damage and pollution caused by oil at sea, enacted by the Decree n. 79.437 of 1977;
- d) The International Convention for the Safety of Life at Sea (SOLAS), 1974, enacted by the Decree n. 92.610 of 1986. The Convention was updated and, nowadays, is called SOLAS 77/88. SOLAS is the most important Convention on regulation of safety of merchant vessels.
- e) The International Convention for the Prevention of Pollution from Ships of 1973 - MARPOL, which was modified by the Protocol of 1978, enacted by the Decree n. 2.508/98. The Convention was created after the accident with the vessel Torrey Canyon; and
- f) The United Nations Convention on Laws of the Sea of 1982, enacted by the Decree n. 1530 of 1995.

In turn, it should also be emphasized that Brazil is not a signatory to many important International Treaties, specifically those regarding the Carriage of Goods by the Sea, which normally provides for limitations and exceptions of liability of the ship-owners in maritime disputes such as cargo claims. That is due to the fact that Brazil is keener to protect the interests of the cargo owners, given the country's incipient fleet.

Some of these Conventions are listed below, as follows:

- a) the Hague Rules drafted by the International Law Association – ILA and signed in 1921, considered the first global initiative for the unification of certain rules related to the ship-owners’ liability. The Hague Rules were later modified by the Hague-Visby Rules;
- b) the International Convention for the Unification of Certain Rules related to Bills of Lading, signed at Brussels in 1924, based on the Hague Rules of 1921, which turned to keep its original name (Hague Rules), only now, dated from 1924;
- c) the Hague-Visby Rules of 1968, which was latter modified in 1979, being the most important mark of regulation in the field, since it is a final version of the Hague Rules (1924), being adopted in a global scale;
- d) the Hamburg Rules of 1978 (“United Nations Convention on the Carriage of Goods by the Sea”), signed by Brazil in 1978, though it was not ratified by the country. The Hamburg Convention has provisions ‘pro’ cargo owners, given the presumption of guilt of the owners; and.
- e) the Rotterdam Rules, adopted by the General Assembly of the United Nations in December 2008 (“United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea”), which aim to update and unify the abovementioned International Conventions.

### **18.3. Types of Navigation**

In Brazil, maritime traffic, including its limits, is mainly regulated by means of Law n. 9.537/97 and Decree n. 2.596/98, which provide the following classification:

1. **Open Sea:** Navigation through maritime waters which can be divided up as follows:
  - (a) Long Course Navigation: Navigation between Brazilian and Foreign Ports;
  - (b) Coastal Trade Navigation: Navigation between Ports, by means of Maritime transportation or the Coastal Trade navigation and internal waterway; and
  - (c) Pilot Navigation: Navigation for purposes of logistic support to boats and installations in national territorial waters, in relation to activities and exploitation of minerals and hydrocarbons.
2. **Internal Navigation:** Navigation on internal waterways, such as rivers, lakes, canal, ponds, bays, coves, inlets and maritime areas considered sheltered; and
3. **Internal Port Navigation:** Navigation at ports and water terminals, for assistance in vessels and port installation.

#### **18.4. Maritime Court**

The Maritime Court (*Tribunal Marítimo*) is an independent administrative body from the Executive Power, which is ancillary to the Judiciary Power and bound to the Ministry of the Navy. Pursuant to Article 10 of Law n. 2.180/54, the Court has jurisdiction over the facts and accidents of maritime navigation (including in rivers and lakes), in addition to other matters related to marine activities.

Thus, for instance, the Maritime Court will exercise its jurisdiction over merchants' ships of any flag of nationality that are in Brazilian territorial waters; over Brazilian merchants' ships at high sea or in territorial waters; and over

foreign merchants' ships at high sea, if involved with any incident or maritime accident in which Brazilian citizens or vessels are in danger or involved.

It is worth noting that the decisions of the Maritime Court do not have jurisdictional force, since it is subject to the re-examination of the Judicial Courts, if any of the parties involved in the dispute applies for it. However, notwithstanding its legal nature as an administrative body, the Maritime Court does not only exercise administrative functions. On the contrary, it exercises legal activities while settling disputes involving incidents or accidents of navigation, imposing penalties on the defaulting party. Thus, it is consolidated in Brazilian Law that the legal nature of the Maritime Courts' jurisdiction is *sui generis*.

### **18.5. National Agency of Water Transportation - ANTAQ**

The National Agency of Water Transportation (*Agência Nacional de Transportes Aquaviários – ANTAQ*) is a public legal entity associated with the Ministry of Transportation. It is based in the Federal District with power for setting up branches all over Brazil. The purposes of the Agency are stated in Law n. 10.233 of 2001.

It is an independent regulatory agency responsible for regulating the maritime field by drafting norms and regulations, the supervision and arbitration on related matters, the elaboration of studies, the granting of concessions, and the integration of the several entities and bodies that composes the Brazilian waterway sector.

Thus, ANTAQ is qualified to proceed under Merchant Navy's direction on matters relating, among others, to national defense, security of navigation and safeguarding of human beings at the sea. Hence, ANTAQ's sphere of responsibilities involves regulating, supervising and managing activities developed by Public Ports, Private Docks and Port Administrations, among others.

## **18.6. Brazilian Navy**

The Brazilian Navy is - alongside with the Army and the Air Force - part of the Brazilian Armed Forces. It is responsible for conducting naval operations and to guarantee the defense of the Brazilian territorial sea.

As in accordance to article 17 of Law 97/99, the Brazilian Navy is also in charge to subsidiary assignments such as to: (i) guide the Merchant Navy and its respective activities as in concern to the national defense; (ii) provide security of water navigation; (iii) contribute to the formulation and conduction of national policies relating to the sea; (iv) implement and monitor compliance with relevant legislation; and (v) cooperate with other federal bodies in specific situations;

The responsibility to execute such activities provided the Brazilian Navy the label of “Coast Guard”.

## **18.7. Maritime Transportations and Economic Data**

According to ANTAQ’s annual report for the year 2013, the movement of cargo in the Brazilian ports was of 903.8<sup>158</sup> million tons. Taking economic aspects into account, this figure indicates that almost all of the Brazilian foreign commerce is transported by sea. Therefore, maritime transportation is vital to the development and sovereignty of Brazil. The capacity to build vessels and have its own fleet is considered a strategic need, mainly due to the country’s geographic position. Furthermore, Brazil has got 42,000 km of navigable rivers, 8,000 km of coastline and 65% of the country’s population living in an almost 100-kilometre strip from the coast.

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158 <http://www.antaq.gov.br/portal/pdf/BoletimPortuario/BoletimPortuarioQuartoTrimestre2012.pdf>

### **18.8. Brazilian Fleet**

In relation to the Brazilian fleet, according to ANTAQ, there are 313 registered companies with authorization to perform maritime navigation, being either Long Course navigation or Coastal Shipping navigation. Out of these 313, 18 involve Long Course navigation.

### **18.9. Ports**

The Brazilian port system has considerably improved in the last few years. Currently, Brazil has, approximately, 50 ports. The most important one is the Port of Santos, in the State of São Paulo, which has 12 kilometers of quay, and it is predicted that it will triple its capacity by 2022. Also, it is estimated that over 60 million tons of cargo pass through it each year.

Pursuant to Law n. 8.630 of 1993 also called the “Law of Ports Modernization”, Brazilian ports have been reorganized in order to make them more competitive and modern in relation to the international market, allowing the lease of areas and installations to the private sector through public bids.

Furthermore, the Decree n. 6620 was passed in October 2008, with a view to enhancing and developing the Brazilian ports. Besides having provisions regulating concessions and authorizations for the creation of new ports, the Decree foresees that all activities performed in the Brazilian ports shall be in accordance with the national environmental legislation, which demonstrates the national concern regarding the protection of the environment.

In December 2012, Law n. 8630 of 1993 was repealed by Provisional Measure n. 595, which, among other provisions, establishes new rules for the operation of Brazilian ports.

Just recently, the President of Republic has enacted the Provisional Measure 595 – converted to Law 12.815/13 - which gives new provisions in concern to regulation of the Brazilian ports.

The new legislation foresees a range of provisions to stimulate the modernization of Brazilian ports infrastructure and management – especially through expansion of private investment - in order to reduce costs and increase ports efficiency.

Perhaps the most relevant provision brought by Law 12.815 was the elimination of the distinction between “own loads” and “loads of third parties”, which prevented almost entirely the exploration of the so-called Terminals of Private Use (*Terminais de Uso Privado* - TUP)<sup>159</sup>.

TUP’s can now be freely explored by the private initiative, after authorization<sup>160</sup> granted by the government. The potential of this change is really significant, since it now allows the creation of true private ports, bringing competition to the so-called Organized Ports<sup>161</sup>.

It is important to highlight that the public authorities are already planning to hold bidding rounds to hire the private initiative to indirectly explore the Organized Ports and Port Facilities<sup>162</sup>, through concession and lease contracts.

Aside from the above mentioned laws, there are others that equally contribute, directly or indirectly, to turn Brazilian ports into ever more efficient ports. Some of these are as follows:

- (a) Bidding Law – Law nos. 8.666/93 and 8.883/94;
- (b) Concession of Law – Law nos. 8987/95 and 9074/95;

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159 Law 12.815, article 2(IV)

160 Law 12.815, article 8(I)

161 Law 12.815, article 2(I): Organized Port: Public property duly built and equipped, in order to meet the needs for shipping, receiving passengers and handling and storage of goods.

162 Law 12.815, article 2(III): Port Facilities: facility located inside or outside the area of the Organized Port with the purpose of facilitating the move of passengers and goods traffic in handling or storage of goods, to or by water transport.

- (c) Delegation Law - Law n. 9277/96;
- (d) Privatization Law - Law n. 9491/97 and Law n. 9635/98;
- (e) Defense and Competition Law – Law n. 12529/11; and
- (f) Consumer Defense Code, Law n. 8078/90.

### **18.10. Maritime Transport: Restrictions to Foreign Companies**

The activity of carriage of goods by the sea in Brazil is mainly regulated by the Law no. 9.432, of January 1997, which establishes the national legal regime for maritime transport, and regulated by Decree no. 2256/97.

In general, Law no. 9.432/97, whilst regulating the shipping activity within the Brazilian territory, preserved the protective measures that have been in force in the country for decades. The purpose of such measures is to augment the national shipping industry, especially with regards to restrictions concerning foreign vessels operating in Brazilian territorial waters<sup>163</sup>.

Thus, according to the Brazilian Law, the international carriage of goods by the sea is an activity allowed to be carried out by Shipping Companies, ship-owners and vessels from foreign countries. Pursuant to the same rule, such activity – the international carriage of goods by sea – may also be performed by Shipping Companies and vessels from foreign countries<sup>164</sup>, in the country’s inland waters.

Nevertheless, in coastal navigation, domestic inland navigation and port and maritime support navigation, goods may only be carried by foreign vessels if chartered by Brazilian Shipping Companies<sup>165</sup>.

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163 Articles 8 to 10, of Law n. 9.432/97.

164 Article 5 and 6, of Law n. 9.432/97.

165 Article 7 of Law n. 9.432/97.

In this context, the chartering of foreign vessels, either under time, voyage or bareboat charter-parties, by Brazilian Shipping Companies, in order to explore maritime transport under the hypothesis described above, is subject to the authorization of the competent Government authority and to the following requirements<sup>166</sup>:

- a) In the event of the absence or unavailability of vessels with Brazilian flag with the same characteristics for the shipping activity intended;
- b) In case of public interest; and
- c) When in replacement of a vessel being built in a Brazilian shipyard (for no more than 36 months).

On 19 June 2012, ANTAQ issued Resolution no. 2510, approving a rule granting authorization to legal entities that has maritime transport as its main object to operate in international maritime transport (from Brazilian ports to foreign ports), in cabotage, in maritime support navigation and port support navigation, if the company is duly constituted in accordance to Brazilian law, having also its headquarter in the country.

Lastly, the above mentioned Resolution determines that the authorization granted is not transferable<sup>167</sup> and, that the Company must begin its operations within 180 days after the Authorization Term is published in the Federal Official Gazette, under the penalty of having its authorization cancelled<sup>168</sup>.

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166 Article 9 and 10 of Law n. 9.432/97.

167 Article 3(2) of ANTAQ's Resolution n. 2510/12.

168 Article 14 of ANTAQ's Resolution n. 2510/12.

## **19. AGRARIAN LAW**

### **19.1. The Brazilian Agribusiness**

The agricultural sector has been of a great importance to Brazilian economy since the beginning of its history and has greatly expanded since the 1990's, with successive records in production and exportation, all of this stimulated by production of commodities such as soy, paper, cellulose, ethanol, coffee, beef, pork and chicken, generating millions of jobs and growing the Brazilian economy.

The green revolution and the continued efforts to modernize production have changed the face of Brazilian agribusiness, making it competitive internationally, with extraordinary results for the rural economy and the country as a whole.

Brazilian agribusiness historically plays an important role in wealth decentralization, by leading economic development towards the countryside and generating revenues and opportunities to a population historically forgotten by the State.

Agribusiness is traditionally responsible for around 30% of the Gross Domestic Product (R\$ 2,9 trillion in 2008, according to the figures of the Brazilian Institute of Geography and Statistics – IBGE), around 40% of total exports (US\$ 72 billion in 2008) and for 37% of employment force in Brazil (17.7 million workers).

### **19.2. Scope**

Agrarian Law appears as a set of laws and administrative rules that regulate all activities connected with agricultural production, and seeks to

protect the natural resources, develop production and secure the welfare of the rural community within a legal environment. These are closely linked to a number of other areas of Law, such as commercial, constitutional, insurance, tax, environmental, labour, among others.

This legal area can also be described as Rural Law, or Agriculture Law and, currently, Agribusiness Law.

### **19.3. Legislation and Sources**

The Federal Constitution, in its Article 22(I), establishes exclusive jurisdiction to the Federal Union over Agrarian Law matters, which differs from other Nations that give the jurisdiction to their States and/or Municipalities.

Accordingly, the main law governing rural activities is the Land Statute (*Estatuto da Terra*), Law n. 4.504, of 3 November 1964, followed by a number of laws on specific subjects.

There are six legal principles that provide the basis of the Agrarian Law: a) Principle of Social Function of Property; b) Principle of Environmental Preservation; c) Principle of the Reformulation of Rural Structure; d) Principle of the Economic and Social Progress; e) Principle of the Social Justice and of Increase in Productivity; and, f) Principle of the Prevailing of the Collective Interest over the Individual Interest.

### **19.4. Representative Entities and Agencies**

In Brazil there are several representative entities and agencies of the Agrarian sector and related fields. We shall consider only the most important ones here.

**19.4.1. Ministry of Agriculture, Livestock and Food Supply (*Ministério da Agricultura, Pecuária e Abastecimento*)**

The Ministry of Agriculture, Livestock and Food Supply ([www.agricultura.gov.br](http://www.agricultura.gov.br)) has the mission to promote the sustainable development and the competitiveness of agribusiness for the benefit of Brazilian society.

There are Federal Police Stations for Agriculture and entities tied to the Ministry that also execute the policies relating to agribusiness, and the Brazilian Company for Agribusiness Research (*Empresa Brasileira de Pesquisa Agropecuária* - EMBRAPA) is the best known in this area.

EMBRAPA ([www.embrapa.br](http://www.embrapa.br)) was created in 26 April 1973, and is an state owned company tied to the Ministry of Agriculture, Livestock and Food Supply. Its purpose is to provide solutions for the sustainable development of the rural area, focusing on agribusiness, through generation, adaptation and transference of knowledge and technologies, for the benefit of several areas of Brazilian society.

**19.4.2. Ministry of Agrarian Development (“*Ministério do Desenvolvimento Agrário*” – MDA)**

MDA's<sup>169</sup> ([www.mda.gov.br](http://www.mda.gov.br)) main objective is to create opportunities for the rural population, through the development of activities connected to the land. The Ministry has jurisdiction over the following subjects: agrarian reform; promoting sustainable development in the rural areas; and identification, recognition, delimitation, landmark and registration of the land occupied by the remainder of “*Quilombo*” communities (settlement of slave's descendents).

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169 MDA's structure is regulated by Decree n. 5.033, of 5 April 2004.

Its main agency is the National Institute of Colonization and Agrarian Reform (INCRA - [www.incra.gov.br](http://www.incra.gov.br))<sup>170</sup>. Nowadays, INCRA is the governmental agency responsible for implementing and managing agrarian policies, including the promotion of agrarian reform in Brazil.

The mission of this institution is to implement the agrarian reform policy and to perform the national agrarian system, contributing to sustainable rural development.

#### **19.4.3. Brazilian Agriculture Confederation (“*Confederação da Agricultura e Pecuária do Brasil*” – CNA)**

The Confederation of Agriculture of Brazil ([www.cna.org.br](http://www.cna.org.br))<sup>171</sup>, is constituted by the economic groups of agriculture, cattle, rural extractives, fishing, Indian culture and the agribusiness field.

CNA’s mission is to represent, organize and strengthen Brazilian rural producers it also studies and seeks solutions on matters relating to rural activities, as well as coordinates and promotes the development, the defense and the protection of the interests of the economic groups referred to in the paragraph above.

### **19.5. Purchasing Rural Properties**

The Brazilian Civil Code foresees that no business involving real estate rights can be performed without a public deed, except if established

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170 INCRA was created by Decree-law n.1.110, of 9 July 1970, whose structure was approved by Decree n. 5.735, of 27 March 2006, (modified by Decree n. 5.928, of 13 October 2006) and Decree 6.812/09.

171 CNA was recognized by Decree n. 53.516, of 31 January 1964.

otherwise by special law or if the real estate property value is lower than thirty times the minimum wage in Brazil (R\$ 678,00 in 2013). Notwithstanding, the transference of the ownership of real estate property will only be considered as concluded after the registration of the respective deed before the Land Registry with jurisdiction over the location of the property. Rural properties are also subject to these requirements.

However, when the rural property is to be acquired by a foreign person or entity, special legal provisions must be respected regarding limitations to the area of the land and its use. Article 190 of the Federal Constitution imposed restrictions on the acquisition or possession of rural properties located in Brazil by foreign individuals or legal entities.

The purchasing restrictions mentioned above are also referred in Law no. 5.709, of 07 October 1971, regulated by Decree no. 74.965/74. Moreover, Article 23 of the Law no. 8.629, of 23 February 1993, extends the restrictions to the leasing of rural properties to foreigners. More information on the acquisition and lease of rural properties by foreigners can be found in Chapter 24 below.

## **19.6. Taxes applied over Agricultural Activities**

Several taxes can attach to agricultural activities, such as: the Rural Land Tax (*Imposto sobre Propriedade Territorial Rural – ITR*); Rural Social Security Contribution; Income Tax (Individual or Legal Entities); Value-Added Tax on Sales and Services (*Imposto sobre Circulação de Mercadorias e Serviços – ICMS*); Social Contribution on Net Profits (*Contribuição Social sobre o Lucro Líquido – CSLL*); Social Contribution for Finance of Social Security (*Contribuição Social para Financiamento da Seguridade Social – COFINS*); Contribution to the Social Integration Program (*Contribuição para o Programa de Integração Social – PIS*); Contribution to the Formation of the Public Employee Assets (*Contribuição de Formação do Patrimônio do*

*Servidor Público – PASEP*); Contribution of Rural Union and National Service of Rural Apprenticeship (*Contribuição ao Serviço Nacional de Aprendizado Rural – SENAR*); Contribution to the Found of Rural Employee Assistance (*Contribuição ao FUNRURAL*); Contribution to the National Institute of Colonization and Agrarian Reform (*Contribuição ao INCRA*); Fee for Classification, Inspection and Control of animal and vegetable products (*Taxa de Classificação, Inspeção e Fiscalização de produtos animais e vegetais*); and, Fee for Environmental Control (*Taxa de Controle e Fiscalização Ambiental*).

### **19.7. Agrarian Contracts**

The legal support for business relationships entered into between rural producers, rural landlords, financial institutions, industries, and others can be found in Commercial, Civil, Banking and others legislations, but the Land Statute, Law no. 4.504, of 30 November 1964, as amended, and the Decree no. 59.566, of 14 November 1966, set out dispositions on agrarian contracts in a more extensive fashion.

### **19.8. Rural Credit**

Law no. 8.171, of 17 January 1991, that establishes Agricultural Policy, deals with the main objectives of Rural Credit. Rural Credit guarantees the financial aid necessary for Rural Producers, Associations, Cooperatives of Rural Producers and physical or legal entities devoted to rural activities, during the stages of rural production: a) financing expenses with production for one or more periods; b) investment – with the purpose of financing the formation of fixed assets, or semi-fixed, that will last for several harvests; c) commercialization – with the purpose of financing the necessary elements after the harvest, which involves warehousing, transportation, taxation, among others; and, d) industrialization – for transforming the raw-material into rural products.

### **19.9. Rural Credit Instrument**

The Credit Instruments in agribusiness represent credits which result from a loan or a purchase and sale on account, transacted between: a) rural producers; b) rural producers and rural cooperatives; or, c) by one of these and a third party. In all cases, at least one of the parties involved must be a rural producer or a rural cooperative, and in some of the cases must be both parties.

There are several kinds of Credit Instruments, such as: Rural Bond, Rural Credit Bill; Rural Promissory Note; Rural Duplicate; Note of Rural Product; Note of Rural Product with Financial Liquidation; Certificate of Agribusiness Deposit and Agribusiness Warrant; Certificate of Agribusiness Credit Rights, Agribusiness Credit Note; Certificate of Agribusiness Receivables; and Agribusiness Commercial Note.

A major objective of the Rural Credit Instruments is to facilitate the transference and circulation of the credits with a future due date. A common characteristic is that those instruments can be transferred by endorsement.

The specific legislation for Credit Instrument matters includes Decree-law no. 167, of 14 February 1967, Law no. 8.929, of 22 August 1994 and Law no. 11.076, of 30 December 2004.

The public offer of these credit instruments must be registered at the Securities Commission (CVM) ([www.cvm.gov.br](http://www.cvm.gov.br)) and the transactions must be operated at the Securities, Commodities and Futures Exchange ("*Bolsa de Valores, Mercadorias e Futuros*" – BM&FBovespa - [www.bmfbovespa.com.br](http://www.bmfbovespa.com.br)).

### **19.10. Rural Insurance**

Rural Insurance is an important instrument of agricultural policy, in view of the protection provided to the Rural Producer, especially relating to

the risks resulting from the climate. The major objective of the Rural Insurance is to offer coverage, which assists the producer, its production, its family, the generation of guarantees to its financier, investor, business partners, and all the people interested in decreasing the risks of rural activities.

Rural Insurance is characterized by the involvement of the producers and private insurance companies. It can cover agricultural, cattle activities, assets of rural producers, products, commercialization of the credit products and, also, the life insurance of the producers. Part of the risk premium is paid by the government, which every year establish a subsidy limitation for rural insurance.

#### **19.11. Environmental Issues related to Agrarian Law**

Rural activities are naturally aggressive to the environment and constant attention is needed for the preservation of the ciliar bushes throughout the river systems, the protection of the springs, and reasonable use of the water, observation of the rules on land use and to the products cultivated.

The Principle of Environmental Preservation aims at inducing society to conciliate economic exploitation with the conservation of natural resources. In this sense, Law no. 12.651 of 25 May 2012, establishes important regulation to land use, such as vegetation protection, Permanent Protection Area – APP, Legal Reserve areas, forest exploration, forest's raw material supplying, control of the origin of forest's products, control and prevention of forest fire and, finally, provides financial and economic instruments to reach its objectives.

For example, Permanent Protection Areas must be preserved by its owner, possessor or occupant, individual or legal entity, private or public. In these areas any human intervention depends on a prior approval by the public authorities, otherwise it may typify environmental crime.

Also, owners of lands shall preserve natural vegetation in a minimum percentage of their lands (80% in the Amazon forest region, 35% in the Amazon

“cerrado” areas (Savannah) and 20% in the other regions), excluding the area of the APP’s. Administrative and pecuniary penalties are also regulated in Decree no. 6.514 of 22 July 2008.

The “Código Florestal” (The Forest Code), Law no. 4.771, of September 15, 1965, is another legal source of protection to the Brazilian forests against predatory exploitation. It must be pointed out that this Code is currently under review by the Brazilian Congress.

Moreover, there is Law no. 12.651 of May 25, 2012, which sets forth the legal protection to native vegetation, establishes permanent preservation areas, the supply of forestal raw-material, the origin control of forestal raw-materials, the origin control of forestal products and the preventive control of fire in the forest and woods.

### **19.12. Labour Law in the Rural Field**

Convention n. 141 of 1975, of the International Labour Organization, defines a Rural worker as an individual who works in the rural area, agriculture or handcraft tasks or on similar or connected services.

Rural workers in Brazil have the same rights granted to urban workers, but are subject to specific legislation and to a special Social Security regime. The basic rules for the rural workers are set forth by Law n. 5.889, of 08 June 1973.

## **20. AVIATION LAW**

### **20.1. Aviation**

It is well-known that Brazil is a country with a tradition in aviation. The most famous Brazilian in this area was Alberto Santos-Dumont, who, in 1906 flew his plane 14 Bis, in Paris. This exploit gave him the reputation as the “Father of Aviation”. Without going into historical controversies, it is important to remember that 14 Bis was the first plane to take off, fly, and land without the use of catapults, high winds, launch rails or other external assistance.

In keeping with this tradition, in 1969, the Brazilian aeronautical and avionics company – EMBRAER, was founded. The initial objective was to produce small planes by assembly lines. The company is now one of largest aeronautical companies in the world, producing state-of-art executive and commercial airplanes, which only in the year 2012 delivered 205 aircrafts.

Nowadays in Brazil there are 3,500 aerodromes in operation. Out of these, 2,758 are private and 742 public. Furthermore, there are now more than 30 international airports in Brazil and 25 Air Companies.

The Brazilian civil fleet consists of more than 15,000 airplanes, according to the Brazilian Air Registry (*Registro Aéreo Brasileiro – RAB*).

### **20.2. Regulation of Aviation Law**

Aviation Law is responsible for the regulation, organization and delimitation of the air navigation system in Brazil. Aviation Law deals with national and international aspects of military and civil aviation, air freight, transport of passengers and airplanes.

Airplanes can be military or civilian. The military ones belong to the Brazilian Air Force (*Força Aérea Brasileira – FAB*) that has the principal objective of guaranteeing security in national air space. All other airplanes are civilian, independently of whether they are private or public property.

The Brazilian Constitution<sup>172</sup> sets forth that Federal Union has the exclusive jurisdiction to legislate on aviation matters. Law n. 7.565, of 19 December 1986, the Brazilian Aeronautical Code, is the most important law in this field. There are many other resolutions, norms, rules or procedures, in the midst of which we should highlight Decree 6.780, of 18 February 2009, which established the National Policy to Civil Aviation (*Política Nacional de Aviação Civil – PNAC*), aiming the development of the Brazilian civil aviation.

Moreover, there is a strong relationship between these Laws and regulations and the international conventions on flight. The key international conventions on aircrafts, flights and air transport, of which Brazil is a signatory country, are: The Warsaw Convention (on air transport), The Chicago Convention (on civil aviation), the Geneva Convention (on the law of airplanes), the Tokyo Convention (on infractions inside airplanes) and the Montréal Convention (on air transport).

The Montréal Convention, created the International Organization of Aviation (*Organização da Aviação Civil Internacional – OACI*), as an agency of United Nations, with the objective of developing the international civil aviation, promoting security on flights, helping the development of airways, airports, as well as assisting in air travel and creating models and recommending methods.

In Brazil, the Ministry of Defense is responsible for coordinating civil aviation, including the coordination of the airport infrastructure company, which is INFRAERO, one of the largest in the world.

Law n. 11.182, of 27 December 2005, created the National Agency

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172 Brazilian Federal Constitution, Article 22(I).

of Civil Aviation (*Agência Nacional de Aviação Civil – ANAC*), an agency linked to the Ministry of Defense, with authority over civil aviation matters. This agency has administrative independence and financial autonomy.

### **20.3. The Delimitation of Air Space and its Regulation**

Air space overlaps national territory, including territorial or jurisdictional waters. According to the national law, Brazil has the supreme right to regulate the use of the air space over its national territory. Using this prerogative, Brazil established that all airplanes coming from abroad need to first land at and can only take off from an international airport, whatever the nationality of the airplane.

### **20.4. Aircraft Ownership Registry and Air Travel Conditions**

The ownership of an aircraft is acquired either by construction or by contract (purchase, donation, inheritance, and other means) and all Brazilian civil airplanes must be registered at ANAC, through the RAB, which will provide the nationality and license badge that will identify the airplane. Moreover, it is essential to have a certificate for air travel to be authorized to fly in Brazil, as this certificate indicates that the aircraft is in good order to fly safely.

### **20.5. Taxes of the Aeronautical Sector**

National air space and airport areas are public assets and it is for this reason Federal Government is competent to regulate their use.

The most important taxes in the sector are:

- a) tax to issue the certificate of air travel;
- b) tax to register airplanes for instrumental flight;
- c) taxes for maintenance inspections;
- d) airport maintenance taxes to INFRAERO; and,
- e) taxes for aeronautical communication.

## 20.6. Aircrafts Contracts

Airplanes can be owned by individuals or legal entities. We list below some of the contracts that involve aircrafts:

- a) **Aircraft Rental:** the owner transfers to the tenant the use of the aircraft, for a determined period of time;
- b) **Charter:** one of the parties carries out one or more preset trips, during a determined time, in consideration of a payment;
- c) **Leasing agreement:** it is similar to a rental of an aircraft, but in this contract an option to purchase the good or for the renewal of the contract can be included, in favour of the lessee;
- d) **Mortgage:** Brazilian law ensures that an aircraft can be mortgaged to guarantee the debts of its owner; and,
- e) **Chattel Mortgage:** another kind of guarantee by which the ownership or the possession of the aircraft is transferred to the creditor until the outstanding credit is liquidated.

## **20.7. Air Carrier Contract**

For a cash consideration, the carrier transports people or things from one place to another.

In case the contract relates to the transportation of people, the transporter is obliged to: deliver the respective individual ticket or collective ticket; transport the passenger with safety to the destination; refund him if the transportation has been cancelled; board the passenger at the latest four hours after the agreed schedule or refund the price of the ticket; pay all costs of passengers in case of interruption or delay in a journey; and be responsible for the loss and the damage arising from the non-performance of the service.

With regards to contracts of cargo transportation, the loads must be carried with the respective air bill, in which all the information relating to the object should be specified, such as the origin and destination, name and address of the sender and of the transporter, the nature of the load and the weight, quantity and value, among others. The transportation by the carrier starts with the receiving of products to be carried by the transporter and persists during the whole period that the same are under its responsibility.

The transporter's responsibility for damages is regulated by the rules of Brazilian Aeronautical Code and by agreements or international conventions on the subject. Thus, any attempt to discharge or restrict this responsibility will be invalid.

For example, in Brazil the transporter is responsible for the damages resulting from the death or injury of the passenger, caused by crash during the transportation, on board the airplane or during the shipping or unloading. Also, it is responsible for the damages caused by the delay of the transportation and for the damages to the luggage, including all the personal objects of the passengers.

## **20.8. Insurance of Aircraft**

The Brazilian Aeronautical Code determines that all aircrafts, including those that are not operated or used, must have the civil liability insurance. Moreover, the aircraft can be insured against any damage, through specific contracts with insurance companies.

## **20.9. The Concession for the Rendering of Air Services**

Air services can be private or public. Private services are those rendered without remuneration, to the benefit of the operator or the owner of the aircraft. In their turn, public services are those that are available to all citizens and are regulated and supervised by the Government. So, the services of transporting passengers, cargo or mail, sightseeing and all other that imply remuneration to the service provider are public services.

Before rendering public air service the companies must apply for an authorization or a concession. Nowadays, the Ministry of Defense has jurisdiction to regulate the rendering of public air services.

Authorization is the administrative act that permits: the exercise of an activity; the practice of a legal act or the use of a public asset. The authorization permits these activities, but it does not oblige the authorized person to do it.

Concession is a temporary or precarious transfer of an activity from a public authority to another person (that can be an individual or a legal entity), to be exploited at its own responsibility and risk, but to the benefit of all citizens and obtained through a bidding process. Even if the service is rendered by a private party, it remains public in nature and, because of that, the organization and the regulation are undertaken by the Government.

Concessions can be granted to air transport companies: with headquarters in Brazil; in which at least 4/5 (four fifths) of the capital with voting

rights belong to Brazilian citizens; and whose management is exclusively under the charge of Brazilians. There are several Bills under analysis of the House of Representatives, with the objective of change and/or eliminate the restriction to foreign capital in air transport companies.

## **20.10. The Concession of Airports**

The concession for the exploration and administration of airports is allowed by Brazilian Aeronautical Code, but most of the airports are administrated by INFRAERO or by covenants between States and Municipalities. The concession is obtained through a bidding process.

There is no legal restriction for the construction and/or administration of airports by foreign companies or Brazilian companies controlled by foreigners but restrictions may be imposed by the notices with invitation to the bids.

In the year of 2011, the Federal Government – in light of the World Cup in 2014 and Olympic Games in 2016, besides the rising of some economic sectors – issued Decree no. 7.531/11, which includes in the Brazilian national program of destatization (also called PND). The first phase of the program resulted in the privatization of the airports of Guarulhos and Viracopos (both located in the State of São Paulo) and the International Airport of Brasília, Federal District. Furthering the program, Galeão Airport (RJ) and Confins Airport (MG) were privatized in November 2013.

It was a very important measure – never implemented in the history of Brazil – and allows the country to accommodate the growing demand and to develop these airports' capacity.

## ***21. PUBLIC BIDS***

### **21.1. Legal Framework**

Public bidding in Brazil has a long and distinguished history. In 1592, the Philippine Ordinance proclaimed that no public works could be awarded without first holding a bid to determine the best technique and price. At the beginning of the 19<sup>th</sup> century, a Law dated 29 August 1828 provided that a tender should be made to the private sector to ascertain the best offer for public works. Law n. 4.401 of 10 November 1964 established the first norms for public bidding as indicative of the procedural format for procurement of goods and services.

Decree-Law n. 2.300 of 21 November 1986 became the principal legal text regulating federal public bidding and contracts. The 1988 Federal Constitution provided for the extension of Decree-Law n. 2.300/86 to the state and municipal levels.

The enactment of Federal Law n. 8.666 of 22 June 1993 (“Public Bid and Administrative Agreements”) was a landmark in four centuries of Brazilian procurement legislation and a considerable political institutional advance. Soon after it was amended by Law n. 8.883 of 08 June 1994, a further bill was issued on 19 February 1997 purporting to substitute Law n. 8.666/93, without doing so however. Law n. 8.666/93, as amended, is still in force.

### **21.2. International Competitive Bidding**

International competitive bidding is the formal bidding procedure whereby Brazilian and foreign companies bid for government procurement. Law n. 8.666/93, as amended, determines that the Central Bank of Brazil and

the Ministry of Finance are responsible for formulating its rules. In addition to that, the bidding procedure must comply with the principles<sup>173</sup> of legality, impersonality, morality, equality, publicity, administrative probity, conformity to bid notice requirements and others.

Foreign companies, *i.e.*, those not operating in Brazil, are in principle allowed to participate in the competitive bidding process under the same conditions as Brazilian companies and also in certain instances, in association with Brazilian companies. A foreign company involved in the bidding process must demonstrate that its activities conform to the rules of its own country. It must also demonstrate that its status as a technical, manufacturing or commercial company meets the necessary technical and financial requirements, as well as the other conditions established in the official bid notice publication.

Generally, documentary proof must be submitted evidencing legal, technical, economic and financial eligibility, as well as good standing with the relevant tax authorities. Such proof must be submitted through original documents, certified by a notary, the bidding agency, or be officially published. A waiver of such requirements is possible in cases of *inter alia*, invitation to bid and contest bidding. Further to maintaining a legal representative in Brazil with express powers to receive service of process, foreign companies<sup>174</sup> must also meet the same requirements “as fully as possible” by submitting equivalent documentation, translated by a sworn public translator and certified at a Brazilian consulate with jurisdiction.

Regarding specific compliance factors, the parties to the bidding process must: produce evidence of, if the case, a consortium agreement, executed by means of a private instrument or public deed; indicate the leader company of the association, which shall meet the conditions to the bid invitation; and present evidence of the following: (i) legal capacity; (ii) technical capacity; (iii)

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173 Article 37 of the 1988 Federal Constitution.

174 Article 32(4), of Law n. 8.666/93.

financial standing; and (iv) tax situation. For those foreign companies that do not operate in Brazil, they must associate with a Brazilian company which shall be appointed as the leading company for the bidding purposes. No associated company can participate in the same bidding individually or with other non-associated companies. In an association between Brazilian and foreign companies, the leadership shall always be vested in the Brazilian company<sup>175</sup>.

On international bidding processes, bids<sup>176</sup> tendered by foreign bidders shall be increased by the amounts corresponding to the taxes exclusively payable by Brazilian bidders on the final sale transaction.

The Law on Public Bid and Administrative Agreements states that if there is a tie between bids under equal conditions to provide goods and services, the award shall be given Brazilian companies<sup>177</sup> or to companies that invest on research and development on Brazil.

For the bidding particulars that need to be provided under Public Bid and Contracts Law, a formal request for quotation is made in relation appropriate qualification within 3 (three) days of the scheduled bid receipt date.

Invitation to bid is a type of bidding carried out among interested parties operating in the field pertinent to the object thereof, and no less than 3 (three) in whether or not registered with the administrative unit, and chosen and invited thereby in a number of at least 3 (three) invitees. The administrative unit shall post a copy of the invitation document in an appropriate place, and shall extend this invitation to the other companies registered therewith in the corresponding specialty, which shall express their interest at least 24 (twenty-four) hours prior to the scheduled submission of bids.

The invitation to bid calls for at least three interested parties, must be at a designated place and be valid for other potential bidders provided they make their intended participation known at least 24 hours before placement of the bids.

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175 Article 33(1), of Law n. 8.666/93.

176 Article 42(4), of Law n. 8.666/93.

177 Article 3(2) and (5), of Law n. 8.666/93.

Should an auction take place, the sale of assets no longer used by the Administration or products legally seized are sold to the highest bidder.

Under the Law of Public Bid and Administrative Agreements, bids may be waived in cases of war, turmoil, emergency or other public calamity; whenever the bids are placed at a price clearly exceeding that of the domestic market or inconsistent with the official established prices; for the acquisition by a domestic government-owned company of goods or services performed by a body or agency from the Public Administration and which has been created for this specific purpose; or for national security reasons<sup>178</sup>.

Bids are deemed unenforceable whenever competition is unfeasible, such is the case to: (a) acquire materials, equipment, or products that can only be provided by one and only supplier; (b) contract unique technical services from professionals or companies reputedly specialized; and (c) contract professionals of any artistic area, either directly or through an agent, provided that the artist is recognized as such by either the specialized critics or by public opinion.

### **21.3. Import Procedures Related to International Competitive Bidding**

The Department of Foreign Trade (*Departamento de Comércio Exterior* - DECEX) is the Brazilian agency responsible for regulating import and export, including those transactions of governmental interest, as well as for issuing import and export licenses.

In case of international bidding, the imports can be done using the normal rules for importation (by the bidding company) or using the Drawback – a special rule for importation in which the payment of taxes is suspended. Both methods are regulated by Ordinance SECEX<sup>179</sup> no. 35, of 24 November 2006, and its amendments.

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178 Article 24(IX), of Law n. 8.666/93

179 SECEX is the Foreign Traded Secretariat (*Secretaria de Comércio Exterior*), under the Department of Foreign Trade.

The Drawback method as set out in Annex D of the above mentioned Ordinance, is used whenever the import involves raw material, intermediary products and components for manufacturing machines and equipment in Brazil, to supply the domestic market in connection with an international bidding.

Furthermore, such types of imports will have to be carried against payment in convertible currency, proceeding either from financing granted by international financial institutions, of which Brazil is a part of, or by a foreign governmental entity, or by the National Bank for Economic and Social Development (*Banco Nacional de Desenvolvimento Econômico e Social – BNDES*).<sup>180</sup>

In this case, for the concession of the related benefits, the following documents must be presented to DECEX:

- (a) Copy of the notice with invitation to the international bid;
- (b) Copy of the proposal or the contract for supply, in Portuguese, or by sworn translation;
- (c) Technical catalogues and/or specifications and details of the material to be imported;
- (d) Declaration of the company bidder certifying that the company won the bidding and that the Regime of Drawback was considered in the formation of the price presented in the proposal; and
- (e) Copy of the financing contract (sworn translated if in foreign language).

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180 In accordance with Article 5, of Law n. 8.032/1990, amended by Law n. 10.184/2001.

After the presentation of the relevant documents, DECEX will either approve or deny the import request through drawback.

#### **21.4. Electronic Procurement**

Electronic procurement is also emerging as a means of connecting Government to suppliers. The Unified System of Registration of Suppliers (*Sistema de Cadastramento Unificado de Fornecedores – SICAF*) is an on-line data bank created by the Ministry of Planning, Budget and Administration to de-regulate and simplify the registration of suppliers.

The primary purpose of SICAF is to register individuals and legal entities to participate in public bids held by agencies at all levels of the Public Administration. The benefits of SICAF to suppliers include the following:

- (a) sole registration within the Federal Public Administration nation-wide;
- (b) de-regulating the registration and qualification process;
- (c) reduction in the amount of documents to be presented for each bid; and
- (d) reduction in the costs of maintaining the registration of the company before the entities of the Federal Government.

Suppliers interested in supplying goods or services to the Federal Government should register with the General System of Services (*Sistema de Serviços Gerais - SISG*). Registration is valid for 1 (one) year and proof of registration is provided by publication in the Federal Official Gazette.

The Federal Government on-line buying system (ComprasNet) was developed and is managed by the Logistics and General Services Department (*Departamento de Logística e Serviços Gerais – DLSG*). Parties may obtain on-line information concerning all bids anywhere within the Federal Government including the following:

- (a) Bids - consultation on-line of all items that make up the bid and quantities;
- (b) New Bid Notices - download of all bid notices in progress;
- (c) Preferential Lists - of information concerning bids by material/service or location;
- (d) Classified Lists - guides for buying options;
- (e) Consult Supplier List Data - follow-up on the status of suppliers registered with SICAF; and
- (f) Download of Lines of Material and Service Supply - complete copies obtained on-line.

The ComprasNet web site also contains information on the suppliers registered with the System of General Services (*Sistema Integrado de Administração de Serviços Gerais - SIASG*).

Policies relating to the administration of material, works and services of the Federal Government are formulated, promoted and implemented, through the Secretariat of Logistics and General Services. Included in these activities are directives on public bidding and administrative contracts with the Federal Government.

## **21.5. The Special Public Procurement Regime**

On 5 August, 2011 Brazilian Government enacted Law n. 12.462 which established a new modality of public procurement named Special Public Procurement Regime (*Regime Diferenciado de Contratações Públicas* - RDC) which is a different regime of public procurement with more flexible rules than those set forth in the Law of Public Bid and Administrative Agreements (Law n. 8.666, of 22 June 1993).

The RDC<sup>181</sup> was created exclusively for the procurement of goods, services and projects in connection with the following Government's development plans<sup>182</sup>:

- (i) The 2016 Olympic and Para-Olympic Games, included in the Olympics Projects Portfolio to be defined by the Olympic Public Authority (APO);
- (ii) The 2013 Confederations Cup and the 2014 World Cup, restricted to, in the case of public projects, those contained in the responsibilities matrix signed by the Union, States, Federal District and municipalities;
- (iii) Infrastructure and services projects for airports of capitals of States of the Federation that are over 350 km from the cities that will host the aforementioned events;
- (iv) The acts connected to the Growth Acceleration Program (*Programa de Aceleração de Crescimento* – PAC); and

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181 Regulated by Decree n. 7.581, of 11 October 2011.

182 Article 1, of Law 12.462.

- (v) Engineering projects and services connected the Unified Healthcare System (*Sistema Único de Saúde – SUS*).

Such regime was created to increase the efficiency and competitiveness on public biddings, to promote the exchange of experiences and technology as well as to foster technological innovation.

The RDC sets forth important policies<sup>183</sup> regarding standardization of the purpose of procurement and procedures for tenders with the scope of seeking greater advantage for the Public Administration.

Moreover, it also establishes that variable remuneration<sup>184</sup> may be established based on targets, quality standards, environmental sustainability and delivery date defined in the notice of bid and the agreement. Such variable remuneration it is limited by the budget for the procurement set forth by the Public Administration.

Unlike the Law of Public Bid and Administrative Agreements, Law no. 12.462/2011 brought about an important and innovative provision, that is, that the bidding shall preferably be conducted electronically. Moreover, they also differ on the matter of disclosing the budget for the government purchase, whereas the former do disclose the figures, the latter does not<sup>185</sup>. The purpose of such provision on the RDC it is also to increase competition between the bidders.

Further, the Public Administration may determine validity and effectiveness conditions of the actions related to the bidding procedure. And, it will specify in the notice of bid what will be the criteria<sup>186</sup> used to award the procurement, *e.g.*, lower price, best technique, greatest economical benefic and others.

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183 Article 4 of Law no. 12.462/2011

184 Articles 4(IV) and 10 of Law no. 12.462/2011.

185 Article 6 of Law no. 12.642/2011.

186 Article 18 of Law no. 12.462/2011.

## 22. IMMIGRATION

### 22.1. Legal Framework

The legal framework for the foreigner's entry and stay in Brazil are set out in Law no. 6815, of 19 August 1980, the so called "Foreigners Statute", regulated by Decree no. 86.715, of 10 December 1981 and several resolutions issued by the Brazilian immigration authorities.

An entrance visa in Brazil is defined as a consular authorization registered in the passport of foreigners and which allows them to enter and remain in Brazil, if immigration law requirements have been met. Brazilian law provides for the granting of several types of visas, depending on the nature of the trip. In this regard, the most important types of visas for foreigners doing businesses in Brazil are the (i) Temporary Visa and (ii) the Permanent Visa.

The Ministry of Labour is in charge of granting the necessary authorization the issue of visas by the Brazilian Embassies and Consulates for foreign individuals to work in Brazil (including the Permanent Visa for a company's administrators; and the Temporary Visa for foreign employees). Within the Ministry of Labour, the competence to regulate over visa matters are assigned to the the National Immigration Council (*Conselho Nacional de Imigração*).

### 22.2. Permanent Visa

A foreigner who wishes to reside in Brazil may obtain a permanent visa<sup>187</sup>. However, such an application will be closely scrutinised by the immigration authorities to determine whether such immigration is desirable for the Country.

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187 Article 16, of Law n. 6.815/80.

Under the “convenience policy”, the authorities will consider whether the immigrant will bring in specialised manpower, as defined by National Development Policy, whether he may provide the Country with an increase in productivity or with the transfer of new technologies, as well as whether such immigration will stimulate investment in specific areas.

The primary purpose of this convenience policy is to protect the national labour force, and to restrict immigration to only those foreigners who can contribute to the Country’s development.

Brazilian immigration authorities implement this policy by filtering the applications for permanent visa and selecting only those foreigners who, through their expertise, may contribute to the development of the Country, and at the same time, will not deprive a Brazilian worker from a job.

Brazilian authorities favor applications related to inter-company management transfers, provided the link between the Brazilian company and the foreign company (the employee’s company) can be confirmed, however, any company in Brazil may offer employment to a foreigner applying for residence in the Country.

The personal qualifications and skills of the foreigner applying for the permanent visa must be closely related to the business scope of the Brazilian company intending to bring in the manpower.

In order to apply for a permanent visa for a company’s director or administrator, the foreign partner of the Brazilian company must (i) make a minimum foreign equity investment in the amount equivalent to R\$ 600,000.00 (six hundred thousand Brazilian Reais) for each foreign director or foreign administrator, requiring proof of full payment of the investment in the Brazilian’s company or (ii) a foreign equity investment equal or superior to the equivalent to R\$ 150.000,00 (one hundred and fifty thousand Brazilian Reais) for each foreign director or foreign administrator, being necessary to prove the full payment of the investment in the Brazilian’s company, plus

the promise of generating at least 10 new local jobs during the first two years after the installation of the company or of the entrance of the director or the administrator<sup>188</sup>.

Foreign individuals intending to come to Brazil to invest in production activities may also apply for a permanent visa. The issue of this type of visa is conditional on the proof of an investment of a sum equal or superior to R\$ 150,000.00 (one hundred and fifty thousand Brazilian Reais), and the investment may be made in a new company or in an already existing one.

Exceptionally, even if the total investment is less than R\$ 150,000.00 (one hundred and fifty thousand Brazilian Reais), the National Immigration Council may grant a permanent visa to a foreigner with an investment project as long as such investment is considered relevant from a social perspective. In this case, a detailed business project containing a plan of investment to employ Brazilian workers must be prepared.

### **22.3. Temporary Visa for foreign employees**

A temporary visa may be granted to foreigners who wish to work in Brazil under a Labour agreement with a Brazilian company<sup>189</sup>. The granting of this type of visa is also subject to the prior issue of a work permit by the Brazilian Ministry of Labour, which will be responsible for examining and deciding upon the need for foreign manpower for the development of the proposed activities and whether the foreigner indicated for the position in the Brazilian company has any special abilities that cannot be fulfilled by Brazilian manpower.

Under the terms of the prevailing regulations, the candidate for the Temporary Visa for work in Brazil needs to present proof of his professional qualification

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188 Resolution CNI no. 95 of 10 August 2011.

189 Article 13 of Law no. 6.815.

and experience compatible with the activity to be exercised in Brazil through the submission of diplomas, certificates and declarations, at least demonstrating:

- a) two- years of experience in a medium level profession, with a school term of minimum nine years;
- b) one-year experience in a superior level profession, including the period from the conclusion of the respective graduation course;
- c) conclusion of post graduate course with at least 360 hours, or master's degree or higher degree than this last one, compatible with the activity that will perform.; or
- d) three-year experience in exercising a profession, of artistic or cultural nature that does not receive formal education.

The aforesaid requirements shall not be applied in case of application for visas for workers native of South American countries or, exceptionally, when the compatibility of the professional profile of the foreign person in the function to be performed in Brazil can be demonstrated by other means.<sup>190</sup>

The Brazilian company interested in hiring the foreign employee must observe the ratio of 2 Brazilian employees for each foreigner hired. The same ratio will also apply in relation to the total payroll of the Brazilian Company.

The term of the Temporary Visa for foreign employees is established in the Labour agreement and cannot exceed two years. Subject to the prior approval of the Brazilian Ministry of Labour such term can be extended for an additional period of two years.

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190 Article 3, of Resolution CIMIG n.99/12.

## 23. CONTRACT LAW

### 23.1. Introduction

Contracts in Brazil are mainly subject to the rules set forth by the Brazilian Civil Code. Depending on the features of a given transaction, a contract may also be subject to the *Consumers' Protection Code*, which sets a further legal protection to the end user of a product. Due to the mutant character of these agreements and its constant evolution, although many types of contracts are covered by the Civil Code, a diversity of contracts is governed by sparse legislation. It is also important to mention the contracts formed through the Internet.

However, before examining some relevant contracts under the scope of Brazilian Law, it is worth remarking upon some specific features and peculiarities of Brazilian Contracts Law in general.

Differently from other jurisdictions which do not have a codified law, in Brazil, one of the main peculiarities regarding this subject is the fact that some principles ruling the contracts are provided expressly in the legislation and, under certain circumstances, the contracting parties cannot even waive rights. Notwithstanding, the main principles regarding private contracts in Brazil are: the principle of freedom of will, the principle of *pacta sunt servanda*, the principle of good faith, the principle of relativity of contracts and the social function of the contract.

The *pacta sunt servanda* is the principle that stipulates that the terms of the contract which are agreed by the parties has the status of Law, as if it were written legislation and, therefore, shall be complied with unconditionally by the parties. This general principle, tied to the principle of good faith, brings efficiency to the contract and legal safety for the parties to the agreement. The unconditional compliance, however, is not absolute and has its limits in other principles such as the principle of legality and equality, among others.

On the other hand, the principle of relativity of contracts establishes that the contract is binding exclusively upon its parties, and not third parties, due to the principle that no party can be compelled without prior consent. Through this theory, although the effects of the contract are restricted only to the parties of the agreement, by way of exception, it can affect third parties in some particular situations foreseen by the legislation<sup>191</sup>.

With respect to the principle of good faith<sup>192</sup> it proclaims that the agreement must comply with the values of loyalty and respect. In the same vein, according to the principle of social function of contract, the contract is a mechanism for achieving the common good and the pursuit of social interest<sup>193</sup>.

Finally, it is worth observing the theory of exception of changed circumstances (*rebus sic stantibus*) under which Brazilian Contracts Law allows the review of the contract in order to be fit to new circumstances which arise from unforeseen events. Such events should be supervening and significantly alter the financial balance of the contract; affecting it in such a way that the performance once envisaged by the time of the signing of the agreement was jeopardized.

## **23.2. Brazilian Law on International Contracts**

### **23.2.1. Governing Law - the Principle of Freedom of Will in Brazilian Legislation**

International contracts can establish different governing laws, such as the Law of the exporter's country, the importer's country, the Law of a

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191 For example, Article 436 until 438 of the Civil Code, that cater exceptions to the principle in the event of a contract made in the benefit of third parties.

192 Articles 187 and 422 of Brazilian Civil Code.

193 Article 5(XXII) and (XXIII) of the Brazilian Federal Constitution and Article 421 of the Brazilian Civil Code.

third country chosen by the parties, among others. Thus, the subject of an international contract's governing law is crucial to establish the extent of the rights and liabilities undertaken by the parties through the Agreement.

However, the definition of the governing law of an international contract will depend upon the interpretation of the Choice of Law clauses or by the domestic rules of the jurisdictions involved in the transaction.

Intricacies can be faced by the parties on this matter if the Agreement involves Brazilian Law. Besides the inherent complexity of the subject, Brazilian legislation on governing law and principle of freedom of will applied to international contracts can raise controversy regarding the interpretation of its rules and is somewhat different to the Laws of other countries.

In order to avoid conflicts of applicable Law on disputes that are very likely to arise from international contracts, most of the countries allow freedom of will with regards to the possibility of the parties to choose whatever regulation of whatever country that they want to rule their agreement. The same assertion cannot be stated about Brazilian Law.

In Brazil, there are restrictions concerning the application of the doctrine of freedom of will (in Portuguese, *principio da autonomia da vontade*) in the choice of the governing law of international contracts.

Brazilian domestic rules of international law regarding the above-mentioned subject are mainly provided by Article 9 of the Law of Introduction to the norms of the Brazilian Law (*Lei de Introdução às normas do Direito Brasileiro – LINDB*).

In general lines, such Article states that the obligations arising from an international contract will be classified and governed by the Law of the country in which such obligations were created. That is because the legal analysis of paragraphs 1 and 2 of Article 9 of the LINDB evidences that Brazilian legislation adopts two rules to establish the governing law of international contracts.

The first rule states that when the contract is executed between physically present parties, the applicable Law will be that of the country in which the contract was signed. The second rule provides that when the contract is fixed between parties which are not physically present, the applicable Law will be that of the contractor's country.

Therefore, when the parties are silent with regards to the choice of law in their international contract, the definition of the governing Law of such contract will be subject to the provisions above-mentioned under Article 9 of the LINDB. However, such Article does not make any recognition to the principle of freedom of will. Thus, Brazilian case law has determined the interpretation of the Article in the sense of not accepting the principle of freedom of will to the parties for electing the applicable Law in international contracts.

Accordingly, regardless of the agreement of the parties to an international contract regarding choice of Law, when Brazilian Law is considered in the transaction, the governing Law of such contract will be subject to the provisions of Article 9 of the LINDB. That is, the applicable Law will generally be the Law of the country in which the contract was signed. The exception to the rule is the parties' election of a commercial arbitration in order to solve any disputes arising from the contract, given that Brazilian legislation on arbitration accepts freedom of will.

### **23.2.2. Jurisdiction**

Firstly, it must be noted that pursuant to the Arbitration Law<sup>194</sup>, commercial disputes can be definitively settled through arbitration rather than through recourse to the Judiciary, if the parties to the agreement insert an arbitration clause. In this case, the parties are bound to solve the commercial

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194 Law n. 9.307, of 23 September 1996

disputes through arbitration, refraining from resorting to the Judiciary. Furthermore, any arbitration decision shall have the same effect as an award granted by a State Court and shall be enforceable according to its terms.

Considering that the parties were silent regarding the Arbitration, the choice of the competent jurisdiction (Choice of Forum Clause) of the international contract must be considered, and must not be confused with the choice of the governing law of the contract. That is because the choice of forum is the agreement of the parties to the international contract electing which State Court is competent to decide upon any dispute arising from their commercial relation.

According to Brazilian Case Law (consolidated in *Súmula* n. 335 of the Supreme Court), the parties have the freedom of will to decide the forum for dispute resolutions arising from their international contract. Thus, the appointment of a foreign jurisdiction as the forum of an international contract involving Brazilian parties is generally accepted by Brazilian Case Law. The exception is the “adhesion” contract, in which one of the parties is not considered as free to choose but merely imposed and bound by the rules of the agreement.

Parties to international contracts involving Brazilian Law should be wary that problems may arise to identify the rule on choice of forum which is set in the complex combination of several legal dispositions<sup>195</sup>.

The LINDB sets out that Brazilian authorities will have jurisdiction when the defendant is domiciled in Brazil or when the obligation has to be performed here<sup>196</sup>.

The Brazilian Civil Procedure Code (*Código de Processo Civil – CPC*)<sup>197</sup> regulates Brazilian international competence, the former determining when Brazilian Courts will have concurrent jurisdiction, whilst the latter,

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195 Article 12 of the LINDB, Article 88 of the Brazilian Procedure Civil Code (CPC) together with Article 9 of the LINDB.

196 Article 12, of the LINDB.

197 Articles 88 and 89

determining when Brazilian Courts will have exclusive jurisdiction to rule (*i.e.*, disputes over real estate located in Brazil).

The CPC states that Brazilian Courts will have concurrent jurisdiction with foreign jurisdictions when: (i) the defendant, regardless of its nationality, is domiciled in Brazil; (ii) the obligation is to be complied with in Brazil; or (iii) the lawsuit was originated from a fact or act that took place in Brazil.

It is also important to remark that parties to international contracts must be alert that Brazil has concurrent jurisdiction in relation to foreign courts even if a lawsuit of equal content is filed abroad, Brazilian authorities being also competent to judge the same claim in the country<sup>198</sup>.

In conclusion, whenever an agreement shall be executed in Brazil, the competence of the Brazilian Courts is concurrent with that of any other foreign Court. This shall be the case when the parties to an international agreement appoint a foreign Court as having jurisdiction to settle a dispute arising from such agreement. Besides the fact that Brazilian Courts would recognize the jurisdiction of a foreign Court to settle the dispute, Brazilian Courts would also find themselves as having concurrent jurisdiction to settle the same dispute. In other words, Brazilian Courts shall remain with jurisdiction, but not solely, they shall compete with the jurisdiction of the foreign Courts appointed by the parties in the international agreement.

### **23.2.3. Public Order**

In general, Brazilian public order can prevent the application of a foreign legal system, the ratification of foreign awards and the enforcement of foreign judgments.

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198 Article 90 of the CPC.

Brazilian scholars and Case Law state that the concept of public order modifies in place and time. Therefore, one situation that nowadays is considered as a matter of public order, in the future it may not be so. In a way, public order can be considered as formed by the mandatory rules of the Brazilian system.

Thus, when construing an agreement under Brazilian Contracts Law, it is relevant to determine which rules could be considered as part of the Brazilian public order.

### **23.3. Types of Contracts**

#### **23.3.1. Contract of Purchase and Sale**

In general, the contract of sale is the form of contract whereas a seller has to transfer the ownership and possession of the goods sold and the buyer has the duty to pay the price of the goods in return. The contract of sale is regulated by the Brazilian Civil Code in Articles 481 until 532. This type of contract will be considered mandatory and binding on the parties if they agree on its object and price<sup>199</sup>.

Although the contract of sale is valid right after the parties agree on the object and price, the ownership of the good will only be transferred after its effective delivery to the buyer<sup>200</sup>. If the object of this transaction is a real estate property, its ownership will only be transferred upon the registration of the relevant public deed before the Real Estate Registry Office<sup>201</sup>.

When the parties to the contract of sale are traders as seller and buyer, the agreement takes form of a mercantile contract of sale, the commercial

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199 Articles 482 of Brazilian Civil Code.

200 Article 1.267 of Brazilian Civil Code.

201 Article 108 of Brazilian Civil Code.

aspect being considered due to the succession of contracts of sale (string sales) involved in these agreements. Thus, the importer buys the goods from a foreign seller and re-sells in Brazil to the wholesaler (*atacadista*) that subsequently sells the goods to the retailer (*varejista*) and so on.

The mercantile contract of sale is subject to the Civil Code and to specific legislation. This agreement may also be subject to the *Consumers' Protection Code*, for instance, if the buyer is the final consumer of the goods.

Since the date of the signature of the mercantile contract of sale, the buyer undertakes the obligation of timely paying the price for the goods as agreed in the contract and the seller undertakes to transfer the ownership of the goods sold to the buyer, that is, to deliver the goods in the agreed place and time for delivery. If the seller fails to comply with his delivery duty, the buyer can opt for terminating the contract or to demand its specific performance by the seller, having the right to sue for damages recovery in both cases<sup>202</sup>.

If nothing was agreed by the parties, the liability to arrange the transportation of the goods sold lies with the seller, as much as the payment for the costs of delivery<sup>203</sup>. The exceptions are the real estate properties, that are transferred with the registration of the contract before de Real Estate Registry Office, the costs of which lie with the buyer.

The aforementioned rule derives from the rule of Article 493 of the Civil Code that provides that, if nothing different is agreed, the place of delivery of the goods sold is the place where the goods were located by the time of the sale, normally with the seller.

Also, with regards to the time for the delivery of the goods, the buyer may demand immediate delivery of the goods to the seller, as soon as the sale is

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202 Article 475 of Brazilian Civil Code.

203 Article 490 of Brazilian Civil Code

concluded and the payment is made<sup>204</sup>. Until the effective delivery of the good to the buyer, the liability for its loss lies with the seller<sup>205</sup>.

With regards to the place of payment of the price for the goods, it shall be deemed to be the place of the buyer's domicile<sup>206</sup>. Finally, still regarding the payment of the goods, when the sale occurs *inter vivos*, the obligations of the seller (delivery of the sold goods) and of the buyer (payment of the price) are simultaneous and immediately enforceable<sup>207</sup>.

However, the seller cannot demand immediate payment from the buyer as soon he places the goods at his disposal. That is because when the mercantile sale's transaction is made through documentary sales, whereby payment is made against the tender of documents that represents the goods, even before delivery, Article 530 of the Civil Code provides that payment will be performed on the date and at the place of delivery set in the documents. Therefore, it is up to the seller, to ensure that the document against which payment is to be made reaches the buyer.

Following international standard practice for the increase of the dynamism that is inherent to commercial sale transactions, the International Commercial Terms (INCOTERMS) from the International Chamber of Commerce (ICC) is commonly adopted in Brazilian agreements of commercial sale, in order to determine the duties of the parties, the transfer of risk and the interpretation of commercial terms. In short, the INCOTERMS determine a party's duties in the international agreement. Accordingly, the INCOTERMS will be applied to the contracting parties in Brazil when expressly adopted in the respective agreement. It is also important for the parties to note the version to be adopted, as the INCOTERMS are amended from time to time.

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204 Article 482 and 491 of Brazilian Civil Code.

205 Article 492 of Brazilian Civil Code

206 Article 327 of Brazilian Civil Code.

207 Article 134 of Brazilian Civil Code.

### 23.3.2. Franchise Contract

The franchise contract, is subject to Law n. 8.955/94 (Brazilian Franchise Law).

A franchise is a business agreement between two parties, by which the franchisor – the party who owns the business - gives to the franchisee the rights to use the trademark or patent associated with the right to distribute, exclusively or not, products and services and, eventually, the right to use the technology of the operating methods of the franchisor, in exchange for compensation, however, without creating an employment relationship between the parties<sup>208</sup>.

A diversity of requirements and procedures must be followed by the franchisor, in order to make full disclosure to potential franchisees of his intentions to prospect a business<sup>209</sup>. Thus, the franchisee is able to make a sounder decision regarding the acquisition of the franchise offered. Accordingly, franchisors are required to provide prospective franchisees with a Franchise Offer, prior to the execution of the franchise agreement, containing general information on the franchisor, the franchise business and the terms of the franchise relationship, including a profile of the ideal franchisee.

The offer must be delivered to the prospective franchisee at least 10 days prior to the execution of the franchise agreement or pre-agreement. In the event of the franchisor's failure to comply with this requirement, the franchisee may argue there has been a violation of the agreement and require the reimbursement of all amounts already paid to the franchisor or third parties indicated by same, as franchise fees or royalties, plus damages and losses.

The law further provides that the offer must state whether the franchisee is entitled to exclusivity for a certain territory and under what conditions. It must

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208 Article 2, of Franchise Law.

209 Article 3, of Franchise Law.

clearly define the franchisee's obligations with regard to the acquisition of real estate, goods, services etc., as well as what is being effectively offered by the franchisor in terms of training and know-how. Finally, the offer must contain provisions concerning surviving obligations and non-competition clauses after termination of the agreement.

A draft of the standard franchise agreement utilized by the franchisor must also be submitted, together with the offer, for preliminary examination prior to entering into any definitive franchise agreement.

Therefore, it is clear that the franchisee must receive complete details of the business organization of the franchisor, prior to entering into the agreement. Furthermore, in the event the information within the offer is distorted, false or missing, the franchisor is liable in terms of Civil and Criminal Law vis-à-vis the franchisee<sup>210</sup>. Equally, the franchisee becomes bind to the strict compliance of the franchisor's standards and rules, given that both parties must ensure the excellence of the trademark under agreement in the market.

### **23.3.3. Commercial Representation Contracts**

A common contract in Brazil, the commercial representation contract is governed by Law n. 4.886, of 9 December 1965 ("Commercial Representation Law" or "CRL"), amended by Law n. 8.420 of 1992. In the commercial representation contract, one party (Representative) undertakes to obtain purchase orders of products manufactured or sold by the other party (Principal). Requests submitted by the sales representative are not binding on the principal, which can refuse them.

For the Representative to be entitled of a financial compensation, two conditions must be verified: a) the acceptance of the purchase orders by the

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210 Article 7 of Franchise Law.

Principal (it means the conclusion of the sales contract); b) the effective receipt of the payment by the Principal (the fulfillment of the sales contract by the buyer).

The representation agreement must foresee (i) the general conditions and requirements of the representation; (ii) a generic or specific indication of the products which are object of the agreement; (iii) the term of the agreement; (iv) the territory where the representation will be carried out; (v) the indication – or not - of the exclusivity of the Representative’s action in the territory, whether partial, total or by term; (vi) the remuneration and payment conditions; (vii) the obligations and liabilities of the contracting parties; (viii) the exclusivity in favor of the Principal, if existing; (ix) the indemnification amounts to be paid to the Representative due to the termination of the agreement without just cause, which cannot be less than 1/12 of all commissions earned during the term of the agreement<sup>211</sup>.

The commercial representation is a profession regulated by CRL. The Representative of a commercial representation agreement must be enrolled with the State Commercial Representatives Council with jurisdiction to be entitled to practice its profession and perceive remuneration<sup>212</sup>.

The Principal shall give the Representative 30 (thirty) days prior notice for termination without cause, if the agreement has no term and it has been in force for more than 6 (six) months<sup>213</sup>. If Principal fails to give prior notice, it shall pay an indemnification amount correspondent to 1/3 (one third) of the commissions earned by the Representative during the last three months of the agreement. This is a mandatory rule which cannot be surpassed by contractual provisions.

Just causes for termination of the agreement by the Representative are the following events: (i) reduction of the Representative’s activities against

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211 Article 27 of Commercial Representation Law (CRL).

212 According to Articles 2 and 5 of the CRL.

213 Article 34 of the CRL.

the contractual terms; (ii) breach of the exclusivity, if the case; (iii) the abusive pricing for the products in the territory of the agreement, aiming to reduce the Representative's activities; (iv) the non-payment of Representative's remuneration, and (v) *force majeure*<sup>214</sup>.

A minimum compensation to the representative correspondent to 1/12 (one twelfth) of the total amount of commissions earned during the term of the agreement is due when the agreement is terminated without just cause<sup>215</sup>. This is a mandatory rule, part of Brazilian public order, which can neither be altered by the parties' will nor ignored by a foreign decision or award.

#### **23.3.4. Agency and Distribution Contracts**

Provided for in Article 710 of the Civil Code, the agency contract is an agreement by which one party undertakes, against a financial compensation, to frequently execute certain commercial operations within a determined area, on behalf of another party, without hierarchical subordination.

Agency Contracts are very similar to the Commercial Representative Contracts, existing just a few differences that are ignored by most legal scholars, among which the exclusivity clause in the representation agreement. It means that, if nothing was agreed by the parties, in Commercial Representation Contract, the representative is allowed to work for different competitors at the same time, what is not allowed in the agency contract.

The Distribution Contract has the same definition in law as the Agency Contract, but in the first contract, the distributor has at its own disposal the physical possession of the goods for its commercialization in the market, at his

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214 Article 36 of the CRL.

215 Article 27(j), of the CRL.

own account and risk, from another party, named the contractor, which is the owner of the business, in exchange for compensation or an amount over the value of the re-sale.

There is no hierarchical subordination between the contractor and the agent or distributor, in terms of what is understood by Brazilian Law as such<sup>216</sup>, although it comes close to an employment relationship bond.

### **23.3.5. Banking Contracts - Leasing and Factoring**

The denomination Banking Contracts is applied to every contract the object of which is the exercise of intermediation, investment of financial assets or any other function duly authorized by the government to a financial institution. Thus, Brazilian Law recognizes as valid several forms of banking contracts, such as the factoring and leasing contracts, which are described below.

Institutions that wish to be a party either in the factoring contract or in the leasing contract must maintain secrecy in its operations, likewise any other financial institution<sup>217</sup>. Thus, that characteristic enforces the nature of these contracts as Banking Contracts under the Brazilian legal system.

The factoring contract is a contract which stipulates that a financial institution, which in the contract is denominated as the factor (*faturizadora*), agrees to charge the debtors of another institution or corporation of the other party (*faturizado*), providing this institution with a credit management service.

Thus, in the factoring contract, a bank provides an institution or corporation the services of managing credit, guaranteeing the payment of all the invoices issued by that institution to its debtors.

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216 Article 3 of Labour Code (CLT).

217 Article 1(2) of the Complementary Law n. 105/2001.

It is possible to divide the factoring contract on conventional factoring, where the service rendered is the management of credit, insurance and financing; and, maturity factoring, which is the form of contract where the services rendered are the management of credit and insurance only.

Turning to the other Banking Contract denominated as leasing contract, pursuant to Brazilian Law, strictly, there is no law covering the general concept of this contract, but only legal doctrine, case law, and the clauses agreed in the contract by the parties.

In general terms, the leasing contract is defined by the power granted to the lessee, at the end of the term of the contract, to opt for the purchase of the leased asset. If the lessee decides to do so, he may subtract the amount paid as rent during the term of the agreement from the purchase price. Given the lack of legal provision, the leasing contract is governed exclusively by the clauses stipulated by the parties.

A special tax treatment for leasing contracts is provided by Law no. 6.099/74, which defines what a leasing operation for a specific tax treatment is. Those which do not fit the legal definition, as far as the obligations between the parties are concerned, will be considered for tax purposes merely as a contract of sale with pre determined term. In general terms, this special tax regime allows that the payment made by the lessee to the lessor can be deducted for tax purposes as “operational expenses”.

## 24. REAL ESTATE LAW

### 24.1. Legal aspects on the acquisition of real estate property in Brazil

Real estate properties in Brazil are divided into 3 (three) major categories in accordance to its location: (i) urban; (ii) rural; or (iii) coastal and frontier property.

Foreign individuals and companies can acquire real estate property in Brazil, but it depends on the type of the property chosen.

Urban properties can be freely acquired by foreigners under the same conditions applicable to Brazilian nationals; however, there are certain limitations applicable to the acquisition of rural, coastal and frontier properties, which are considered of national security.

### 24.2. Rural property

The acquisition of rural properties<sup>218</sup> by foreigners, whether individuals or legal entities, is regulated by Article 190 of the Brazilian Constitution and Law no. 5709/71. Both rules impose the same legal restrictions on the basis of national security.

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218 Brazilian authorities are currently discussing the establishment of further restrictions on the acquisition of rural land by foreign individuals and/or foreign legal entities. If approved those restrictions, Law 5.709/71 will be amended in order to reduce from 50 to 15 modules the maximum land permitted to be owned by foreigners within the so called *Amazônia Legal*, which corresponds to approximately 61% of the country's area and is spread over the States of Acre, Amapá, Amazonas, Mato Grosso, Rondônia, Roraima, Tocantins, Pará and the western part of Maranhão.

In this regard, the Law 5.709/71 establishes that a foreigner cannot acquire in Brazil more than 50 modules (module size may vary, but normally one module corresponds to 3 hectares – which is an unit of land measuring 10,000 square meters) as determined by the National Institute of Colonization and Agrarian Reformation (*Instituto Nacional de Colonização e Reforma Agrária - INCRA*), in a continuous or discontinuous area.

According to Law n. 5.709/71, foreign companies can only acquire rural properties for the implementation of agricultural, cattle-raising, industrialization or colonization projects, which must be related to their respective By-Laws/Articles of Association, and always upon authorization of the Brazilian Agrarian authority – INCRA.

Brazilian Law also establishes limits regarding nationality. Individuals and/or legal entities with the same nationality cannot acquire more than 40% of the properties within the same rural area, for reasons of national security, unless otherwise authorized by the President or by the Secretary of the Treasury.

There are 02 (two) new requirements to all rural properties established by Brazilian law which are: geo-referencing and registry of the legal forest reservation.

Pursuant to Decree 5.570/05, all rural properties must be geo-referenced, according to a schedule based on the size of the area, prior to November 2011. Geo-referencing is mandatory in case of selling the property and for land insurance purposes.

### **24.3. Coastal and boundary property**

Brazilian law provides for severe restrictions on the acquisition of properties within coastal and frontier areas, for national security reasons.

The acquisition of frontier properties by foreigners is also restricted, being subject to prior consent by the National Security Council<sup>219</sup>.

Brazilian Law<sup>220</sup> defines a coastal zone as a national heritage – the geographic space of interaction of air, sea and land formed by the counties directly influenced but not necessarily by those located in the coastline. The definition includes the United Nation’s definition of territorial waters, which is a belt of coastal waters extending at most 12 nautical miles (nm)<sup>221</sup> from the low-water mark of a coastal estate.

All properties located in a coastal area are subject to the payment of specific taxes called *foro* and *laudemio*.

*Foro* is an annual tax related to the use of the property and is levied on the rate of 0.6% (point six per cent) over the value of the right of use.

The *laudemio* is paid when the right of use of the property is transferred and is levied a rate ranging from 2.5% to 5% (five per cent) over the value of the property’s buildings and improvements.

#### **24.4. The acquisition of property – practical aspects**

As a condition precedent for the acquisition of a real estate property in Brazil, the prospective foreign buyer must apply for registration with the Brazilian Taxpayers’ Registry (the so-called CPF for individuals and CNPJ for legal entities). Without this registration the final acquisition agreement cannot be executed. Additionally, foreigners must also appoint a resident attorney in Brazil to represent them before the tax authorities with powers to receive service of process.

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219 Article 2(V) and (VI), of Law 6.634/79

220 Decreto n. 5.300/04

221 Article 3(I), of Decree n.5300/04.

Brazilian Law requires, as for any other type of contract, that the parties of a sale and purchase agreement be legally authorized to perform such transaction. In the case of individuals, the parties must be of legal age (18 years old) and be mentally healthy; otherwise, the party's legal representative must act on its behalf in order to make the transaction possible. In case of legal entities, the parties must be duly incorporated and regularly represented pursuant to the dispositions of their respective corporate documents.

The Brazilian practice in this field shows that ordinary transactions begin with the execution of a first private pre-contract, by which the buyer binds himself to purchase the property for certain price and conditions, provided that the seller can make evidence within a period of time, usually 30 days, of its good ownership and absence of legal hindrances to complete the proposed transaction. A down payment for an amount equivalent to 10-20% of the agreed price is usually required by the seller in order to take the property out of the market. If the seller is unable to provide evidence of its ownership over the property within the time set for the fulfillment of his obligation, he must return the down payment in addition to the payment of a fine, which is usually provided in the agreement and which amount may be up to the down payment amount.

According to Brazilian law, an ordinary transaction of purchase and sale of a real estate property requires at least two additional steps: (a) the execution before a Notary Public (*Tabelião de Notas*) of a public deed, which reflects the purchase and sale agreement; and (b) the registration of such public deed with the Real Estate Registry Office with jurisdiction over the property. Only after these two steps have been taken, the buyer will have legally acquired the ownership of the property.

Therefore, in case in a given transaction where the parties have signed a pre-contract and the seller has subsequently produced evidence of its good ownership title and its unrestricted freedom to sell the property, the parties shall sign the public deed of purchase and sale and the buyer simultaneously makes the payment of the balance of the price. Subsequently, the buyer carries out the registration of the acquisition deed before the applicable Real Estate Registry Office.

In an ordinary purchase and sale agreement, the seller must present the buyer with the documents attesting his good ownership and absence of hindrances to the proposed transaction. The acquisition of a property in Brazil is subject to the buyer's due diligence on the documents of both the property itself and the seller. Therefore it is highly advisable to proceed with such a due diligence to ensure that the property to be transferred is free of any burdens, claims, debts, litigation, attachments and mortgages of any nature.

Acquisition of lots, houses and apartments in a new condominium will require the purchaser's attention as to whether all registrations and licenses regarding the formation of the condominium have been properly made by the construction company.

A very important aspect in these transactions is the structuring of wiring of funds into Brazil and repatriation of foreign funds from a future sale. It is important to keep in mind that escrow agreements and accounts are alien institutes in the Brazilian legal system. So, the closing of the transaction may present more difficulties than those foreseen in the other countries or *vis à vis* domestic transactions. Furthermore, the prospective foreign buyer may only repatriate the funds from a future sale of the acquired property if funds used in the purchase have been remitted through Brazilian banks authorized to operate in the exchange market.

#### **24.5. Legal Aspects on the rental of real estate properties in Brazil**

Urban real estate rental agreements in Brazil are governed by Law 8.245, dated of 18 October 1991 and amended by Law 12.112, dated of 9 December 2009.

Brazilian law provides for 4 (four) major types of rental agreements in Brazil depending on the use of the property: (i) residential; (ii) non-residential; (iii) temporary; and (iv) built to suit.

Despite the type of rental agreement there are some common points. First of all, the tenant must provide the landlord with some guarantee on the compliance of its obligations, that may be a personal guarantee – usually surety or collateral – or via insurance, on a bank guarantee. In “built to suit” agreements, the guarantee becomes even more important as the rent amount will be based on the investment made by the owner in the property.

Another common point is related to the index rate used to update the rent value. The most frequently index rate used is the IGPM (Medium Price Index), nevertheless, the parties may agree any other official inflation index.

The residential lease is entered solely for personal residence purposes and prevents the performance of any commercial/industrial activities in the property. The same rule applies for nonresidential lease agreements, which are used for the renting of commercial/industrial facilities.

In light of any given municipality’s zoning rules, the tenant to be must, prior to entering the lease, check if the property is suitable for the intended use. For example, a commercial company must be located in an area that supports commercial business activities; otherwise it might not obtain all of the necessary licenses and permits to operate in the rented premises.

Recently in Brazil, commercial/industrial lease agreements have also been drafted pursuant to the built-to-suit model. In such agreements the future landlord builds or adjusts the facilities according to the future tenant’s instructions and specifications, hence, such agreements are entered for long periods so the landlord is compensated.

Usually beach properties are rented on a temporary basis, such as summer vacations or holidays. In this case it is important to make an inspection prior to signing any documents so as to not be liable for any pre-existing damages.

The lease of rural properties is subject to specific rules referred in the Agrarian Law Chapter herein.

## **25. OVERVIEW OF BRAZILIAN ENERGY SECTOR**

### **25.1. Introduction**

The expansion of the Energy Sector is an important and highly strategic issue to foster the economic development of Brazil.

For this reason, this article provides an overview of the Energy Sector in Brazil, starting from the Brazilian Government strategies in the Energy Sector, analysis of the applicable law, as well as the potential for each of the Energy sources used in Brazil.

### **25.2. Strategies of the Brazilian Government in the Energy Sector**

In the 1990's the National Privatization Program (PND) was developed by the Brazilian Government with the goal of transforming the Electricity Sector, transferring to the private sector the responsibility of the investment required for the expansion of the sector, by means of an indicative planning implemented by the State.

The measures were focused on meeting the urgent needs of the Electricity Sector, i.e., increased investments, efficiency and productivity in order to monitor the country's economic development and its integration into the global market, bearing in mind the peculiarities of the Brazilian Energy System, such as:

- (i) A complex ownership structure of the Electricity Sector, where the Federal Government owns the generation and transmission

assets, and State Governments control the distribution assets, while some companies, fully vertically integrated, *i.e.*, owning generation, transmission and distribution assets;

- (ii) Intense Hydroelectric Energy generation, with a centralized dispatch system and interconnected network transmission;
- (iii) The urgent need of investments in new generation assets, to supply the increase in Electrical Energy demand resulting from the economic stabilization of the country in the mid-90s.

Given that reality and the needs outlined above, Brazilian Government has begun to implement the necessary measures to renew the Energy sector, through laws and regulatory instruments, which will be discussed in subsequent items of this chapter, beginning with the Federal Constitution.<sup>222</sup>

### **25.3. Energy in the Federal Constitution**

The Federal Constitution of Brazil explicitly states in its Article 20(VII) that the potential for Hydraulic Energy belongs to the Federal Government. Ownership of Hydraulic Energy potential has no relation to ownership of the land. The concessionaire has ownership of the Electrical Energy production, the owner of the land participates in the revenue from the economic exploitation of said production.<sup>223</sup>

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222 CAMPOS, CLEVER *in: Curso Básico de Direito de Energia Elétrica*, Synergia Editora, Rio de Janeiro, 2010, p. 21-22.

223 art. 176 of the Federal Constitution.

The Federal Government is responsible for the direct or indirect exploitation of energy, as well as the use of Hydroelectric Energy, negotiating with the Member State in whose territory the source of Energy is located.<sup>224</sup> Its indirect exploitation occurs by ways of granting authorizations, concessions or permissions to provide services and installing of electricity by private companies. The concession of public service of Electric Energy must be made by public bid, pursuant to the public administration principles of legality, impersonality, morality, publicity and efficiency.

To encourage the exploitation of reduced capacity renewable Energy, the Constitution exempts this activity from requesting any authorization or concession, however, it did not establish the *quantum* of power, under which a potential Hydraulic Energy can be defined as reduced capacity, thus leaving that this criterion to be determined by local law.

The Constitution restricted the tax incidence in operations relating to Electrical Energy, to the Tax on Circulation of Goods and Services (ICMS) and the Taxes on Importation and Exportation.<sup>225</sup>

Considering that the provision of Electrical Energy is essential for the development of economic activity, it is constitutionally granted to the consumer ample protection and defense against unlawful acts of concessionaires and to prevent the interruption of essential services. Consumer defense is, besides a fundamental guarantee, one of the pillars of the national economy, and therefore should always be observed and incorporated by the law and acts of administrative regulation, mostly enacted by ANEEL.<sup>226 227</sup>

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224 Article 21(XII)(b), of the Federal Constitution.

225 Article 155(3), of the Federal Constitution.

226 Article 5(XXXII) and article 170(V) of the Federal Constitution.

227 CAMPOS, CLEVER in: Curso Básico de Direito de Energia Elétrica, Synergia Editora, Rio de Janeiro, 2010, p. 15-19.

## **25.4. Brazilian Legislation on Energy**

Federal Law 8.631/93 was the Brazilian Government's first step towards restructuring the Electricity Sector. The law eliminated the geographical averaging of prices and revoked the right, previously granted to Government Electricity companies, of a 10% (ten percent) guaranteed return on their assets by the National Reserve on Compensation and Remuneration (RENCOR) and Compensable Results Account (CRC) systems.

The second step towards the privatization of the Electricity Sector was the enactment of Law 8.987/95, which established the regime of concession and permission for the rendering of public services, set forth in article 175 of Brazilian Constitution. The law stated the bidding of concessions for the various infrastructure sectors, among which the electricity sector is included, and, it also established rights and obligations of concessionaires, ensuring the economic and financial equilibrium in the contract based on a rate system and administrative regulation.

The third step in the implementation of free competition in the Electricity Sector was marked by the enactment of Law 9.074/95, which established specific standards for the granting and renewal of permits and concessions of public Electricity services. The law enabled the existing concessions to be extended and the new concessions to be granted with the division of the generation, transmission and distribution activities.

The rates started to be structured on the basis of individual costs of each segment of the Electricity Sector (generation, transmission and distribution), so the original supply rate was split into two: generation and transmission rate fees.

In 1996, Law 9.427/96 created the National Agency for Electrical Energy (ANEEL), an independent regulatory agency under the Ministry of Mines and Energy (MME),<sup>228</sup> which has the goal of regulating and inspecting

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228 Article 1 of Law 9.427/96.

the production, transmission, distribution and sale of Electrical Energy, in accordance with the policies and guidelines of the Federal Government.<sup>229</sup>

Subsequently, Law 9.648/98 was enacted, providing the restructuring of Eletrobras and the creation of the National System Operator (ONS), as well as the establishment of the Wholesale Energy Market (MAE) and the Wholesale Electricity Market Services Administrator (ASMAE) and the System Expansion Plan's Coordinating Committee. In practice, this model was not successful. Thus, Decree 3789 of 18 April 2001 was enacted and established emergency measures rules for rationalization of Electrical Energy, since the Energy supply has become inadequate to meet the national demand.

In 2004, Federal Laws 10.848/04 and 10.847/04 were enacted to adjust the incomplete changes of the Electricity Sector's model. The new legislation gave back to the Government the function to push the expansion of the Electricity Sector up and, at the same time, kept, although partially, some concepts from the free competition implementation process. Law 10.847/04 has created the Energy Research Company (EPE). On the other hand, Law 10.848/04 has provided for the trading procedure of Electrical Energy in Brazil, i.e. the flow between energy Energy produced by Power Plants, to be sold in the market and the Energy to be bought by distributors and concessionaires, to be supplied to the consumers.

In addition to regulate the trade of Electrical Energy in Brazil, Law 10.848/04 has also changed ANEEL's mandate, although ANEEL still remains as the primary Agency for regulating, managing and supervising the Electricity Sector in Brazil.<sup>230</sup>

Besides ANEEL, there are other entities that operate the Brazilian Energy System, such as:

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229 Article 2 of Law 9.427/96.

230 CAMPOS, CLEVER in: *Curso Básico de Direito de Energia Elétrica*, Synergia Editora, Rio de Janeiro, 2010, p. 21-25.

- (i) The National System Operator (ONS), which is a private legal entity, regulated and supervised by ANEEL, whose activities are the coordination and control of Electricity generation and transmission operations, which have to be carried out within the integrated procedure of the National Interconnected System (SIN).<sup>231</sup>
- (ii) The Electrical Energy Trade Chamber (CCEE), a private legal entity, regulated and supervised by ANEEL, with the function of facilitating the trade of Electrical Energy pursuant to the new legislation.<sup>232</sup> CCEE is the successor of the above mentioned MAE.
- (iii) The Ministry of Mines and Energy (MME) is the highest body in the Government hierarchy and has the duty of establishing and implementing the policies of the Brazilian Energy System. The MME has the support of the National Energy Policy Council (CNPE), the Committee for Monitoring of the Electricity Sector (CMSE) and the Energy Research Company (EPE).
- (iv) The National Energy Policy Council (CNPE) has the duty to establish national policies for the rational use of energy sources.
- (v) The Committee for Monitoring of the Electricity Sector (CMSE) aims to ensure the continuity and security of supply of Electrical Energy public service.
- (vi) The Energy Research Company (EPE) aims to provide studies and researches to support the Energy Sector's planning.

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231 Article 13 of Law 9.648/98.

232 Article 4 of Law 10.848/04.

## 25.5. Overview of Brazilian Energy potential

The generation of Electrical Energy in Brazil has its production predominantly originating from the Hydroelectric System. Nonetheless, the generation of Energy from other sources, such as fossil fuels, biomass, wind and nuclear power, has been increasing over the years in Brazilian Energy market.

### 25.5.1. Hydroelectric Energy in Brazil

Brazil can be cited as an example in the matter of sustainable production of Electrical Energy based on Hydroelectric power. The 929 Hydroelectric plants in operation are scattered throughout the country and account for 70% to 85% of all installed capacity in Brazil, currently producing about 115 megawatt (MW) of energy.

The technical potential of use of Hydroelectric Energy in Brazil is among the five largest in the world. The country has 12% of the planet's fresh surface water and adequate conditions for its exploitation. The Hydroelectric potential is estimated at about 260 gigawatt (GW), 40.5% of which are located in the Amazon Hydrographic Basin. The Paraná Basin accounts for 23%; the Tocantins Basin accounts for 10.6% and the Sao Francisco Basin accounts for 10%. However, only 63% of the potential has been measured and listed. The Northern Region, in particular, has a large exploitation potential, not yet fully explored.

Some Brazilian plants in operation are among the world largest, such as: Itaipu (14,000 MW, or 16.4% of the Energy consumed in Brazil), Tucuruí (8,730 MW), Ilha Solteira (3,444 MW), Xingó (3,162 MW) and Paulo Afonso IV (2462 MW). Some other plants that are currently in the bidding process or under works will join the list of the ten largest in Brazil: Belo Monte (which will have an installed capacity of 11,233 megawatts), São Luiz do Tapajós (8,381 MW), Jirau (3,750 MW) and Santo Antonio (3.150MW).<sup>233</sup>

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233 Source: [www.brasil.gov.br](http://www.brasil.gov.br).

### **25.5.2. Thermoelectric Energy in Brazil**

The second largest source of Energy in Brazil is the Thermoelectric power, which is responsible for 28.2% of the installed capacity, while 11.4% represents Gas Thermals, 7.3% Biomass Thermals, 1.7% Nuclear Thermals and 1.7% Coal Thermals.

According to EPE and ANEEL's data, there are 81 Thermal power plants designed to be operational by 2017. To mention two examples of their potential, such projects would make the whole Gas Thermal generating responsible for 8% of the matrix (currently it represents 7%), whereas the generation of fuel oil would go from 1% to 5.7%. On the other hand, Hydroelectric Energy generation as a whole would fall, proportionally.

#### **25.5.2.1. Biomass**

Biomass is one of the Energy sources with greater growth potential in the coming years. Both in domestic and in the international market, it is considered one of the main alternatives for diversification of Energy matrix sources and the consequent reduction of the dependency on fossil fuels. From Biomass it is possible to obtain Electrical Energy and Biofuels, such as Biodiesel and Ethanol, whose consumption is growing to replace petroleum-based products such as diesel and gasoline.

Accounting for 31.1% of the Brazilian Energy matrix, Biomass was the second main source of energy in the year 2007, surpassed only by oil and oil products. By numbering 3.7% of the supply, Biomass has held the same position among the Electrical Energy sources from internal origin. It was only surpassed by Hydroelectrical Energy, which was responsible for producing 77.4% of the total supply, according to the National Energy Balance (BEN) of 2008.

Moreover, in the international market, Brazil stands as the second largest producer of Ethanol, obtained from sugar cane, which has similar potential Energy and much lower costs than the Ethanol produced in other countries, such as the United States and European Union. According to BEN, Brazilian production reached 8.612 million “toe” (tons of oil equivalent) in 2007, while in 2006 the production was of 6.395 million “toe”, which represents an increase of 34.7%.

Biodiesel production is also increasing in Brazil. A portion of it is consumed domestically and the other portion is destined to exportation. In 2007, Brazil produced 402,154 cubic meters (m<sup>3</sup>) of pure fuel (B100), while it produced 69,002 m<sup>3</sup> in the year 2006.<sup>234 235</sup>

#### **25.5.2.2. Nuclear Energy**

The expansion of Nuclear power stations is part of Brazilian Ten Year Plan for Expansion of Electrical Energy (2006/2015). Brazil has two competitive advantages in this segment: (i) it has large reserves of Uranium, which is the ore used in these plants, due to its radiation capacity; and (ii) it has the know-how of Uranium enrichment technology.

Nuclear power station Angra I started commercial operation in 1985 and has an installed capacity of 657 MW. Angra II power station started commercial operation in 2000, with installed capacity of 1,350 MW. In 2007, Angra I and Angra II accounted for 2.5% of the total production of Electrical Energy in the country, accounting for 12.3 terawatt hours (TWh).

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234 According to data from the National Agency of Petroleum, Natural Gas and Biofuels (ANP).

235 Source: [http://www.aneel.gov.br/arquivos/pdf/atlas\\_par2\\_cap4.pdf](http://www.aneel.gov.br/arquivos/pdf/atlas_par2_cap4.pdf).

There is a third power station in Brazil, called Angra III, which is still being installed, with a 1,350 MW capacity, and it is included in the Ten Year Plan for Expansion of Electrical Energy (2006/2015). The construction of Angra III was halted for a number of reasons for many years, but the resuming of its construction was announced by the MME in September 2008, after the issuance of a preliminary license authorizing the resuming of works by the Brazilian Institute of Environment and Natural Resources (IBAMA) in July 2008. Angra III is expected to begin operating in May 2018. After its inauguration and effective operation, the share of installed Nuclear capacity in Brazil should change from 1.98% (2,007 GW) to 2.5% (3,357 GW).

### **25.5.3. Solar Energy in Brazil**

Among the various process of Solar Energy applicability, the most used in Brazil are the photovoltaic Electrical Energy generation and water heating. Photovoltaic Electrical Energy is most commonly found in isolated communities, in the North and Northeast regions of Brazil. Water heating is most commonly found in the South and Southeast of Brazil, due to the colder climate of these regions.

#### **25.5.3.1. Photovoltaic Systems**

There are several projects underway or in operation in Brazil, for the utilization of solar energy through Photovoltaic Electrical generation, aiming to supply Electrical Energy to enhance regional development, especially for isolated communities that have no access to the network of Electrical Energy from other sources.

A significant portion of the existing Photovoltaic Systems in the country was installed under the States and Municipalities Program for

Energy Development - PRODEEM established in December 1994 by the Federal Government, under the MME's Energy Department. Since its installment, US\$ 37.25 million were allocated to 8,956 projects and 5,112 kWp (kilowatt peak) power. These projects include water pumping, public lighting and collective Energy Systems. Most PRODEEM Energy systems are installed in rural schools.<sup>236</sup>

### **25.5.3.2. Water Solar Heating**

The Solar Energy usage for water heating in Brazil has approximately 140 manufacturers and has an historical annual growth rate of approximately 35%. In 2001, the sector's growth surpassed 50%. In 2002, the country produced 310,000 m<sup>2</sup> of solar collectors for water heating.<sup>237</sup>

### **25.5.4. Wind Energy in Brazil**

The Wind is other Energy source that participates in the Brazilian Electricity matrix, although still very modestly, compared to other Energy sources, accounting for only 0.97% of the installed capacity.

In the early 1990s, the first computerized anemographs and special sensors for Wind Energy were installed in Ceará State and in Fernando de Noronha Island. The results of these measurements allowed the determination of the local wind potential and the installation of the first wind turbines in Brazil.

Although there is still disagreement among experts and institutions in regards to the Brazilian Wind Energy potential, several studies indicate

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236 Source: [http://www.aneel.gov.br/aplicacoes/atlas/pdf/03-Energia\\_Solar\(3\).pdf](http://www.aneel.gov.br/aplicacoes/atlas/pdf/03-Energia_Solar(3).pdf)

237 Source: [http://www.aneel.gov.br/aplicacoes/atlas/pdf/03-Energia\\_Solar\(3\).pdf](http://www.aneel.gov.br/aplicacoes/atlas/pdf/03-Energia_Solar(3).pdf)

reasonable values. Some years ago, the estimates were about 20,000 MW. Nowadays, most studies indicate values greater than 60,000 MW. These differences arise mainly from the lack of information (surface data) and from the different methodologies that were used.<sup>238</sup>

## **25.6. Conclusion**

Based on this overview with respect to: (i) the Brazilian Government's strategy in the Energy Sector (ii) the applicable law and (iii) the potential of Energy in Brazil, it may be concluded that the expansion of the Energy Sector, mainly the Electricity Sector, should be a major concern of Brazilian society, especially the business entrepreneurs, as this Energy is an essential tool for the country's economic development, which, in turn, is an indispensable condition for reducing the country's social inequality.

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238 Source: [http://www.aneel.gov.br/aplicacoes/atlas/pdf/06-energia\\_eolica\(3\).pdf](http://www.aneel.gov.br/aplicacoes/atlas/pdf/06-energia_eolica(3).pdf).