



Ministry of External Relations  
Department of Trade and Investment Promotion  
Investment Division

# Legal Guide for Foreign Investors in Brazil





**Ministry of External Relations  
Department of Trade and Investment Promotion  
Investment Division**

# Legal Guide for Foreign Investors in Brazil

ISBN 85-98712-71-X

Brazil. Ministry of External Relations. *Centro de Estudos das Sociedades de Advogados (CESA)*

Legal Guide for Foreign Investors in Brazil / Ministry of External Relations.

Brasília: MRE: BrasilGlobalNet, 2012

308p.

1. Investments - Brazil 2, Foreign Investment - Brazil. I. Title

CDU 330.322

## **CREDITS**

This Legal Guide for Foreign Investors was prepared by Centro de Estudos das Sociedades de Advogados (CESA) a non-profit organization, with collaboration from member institutions. It has been ceded for publication and dissemination over the BrasilGlobalNet (<http://www.brasilglobalnet.gov.br>), through a partnership with the Department of Trade and Investment Promotion (DPR) of the Ministry of External Relations of Brazil.

## COOPERATORS

The CESA Board of Directors would like to thank the following law firms that collaborated in the preparation, updating and translation of each chapter of this **Legal Guide for Foreign Investors in Brazil**.

- ADVOCACIA PIAUHYLINO MONTEIRO
- ARAÚJO E POLICASTRO ADVOGADOS
- AZEVEDO SETTE ADVOGADOS ASSOCIADOS
- BARBOSA, MÜSSNICH & ARAGÃO ADVOGADOS
- BARROS PIMENTEL, ALCANTARA GIL, RODRIGUEZ E VARGAS ADVOGADOS
- BASTOS-TIGRE, COELHO DA ROCHA E LOPES ADVOGADOS
- CASILLO – ADVOGADOS
- DEMAREST E ALMEIDA - ALMEIDA, ROTENBERG E BOSCOLI – ADVOCACIA
- FELSBURG, PEDRETTI, MANNRICH E AIDAR ADVOGADOS E CONSULTORES LEGAIS
- GREBLER ADVOGADOS
- MACHADO, MEYER, SENDACZ E OPICE - ADVOGADOS
- MATTOS FILHO, VEIGA FILHO, MARREY JR. E QUIROGA ADVOGADOS
- MATTOS, MURIEL, KESTENER ADVOGADOS
- MELO CAMPOS ADVOGADOS ASSOCIADOS
- MOTTA, FERNANDES ROCHA E ADVOGADOS
- NEHRING E ASSOCIADOS – ADVOCACIA
- NOVAES, PLANTULLI E MANZOLI - SOCIEDADE DE ADVOGADOS
- PAULO ROBERTO MURRAY – ADVOGADOS
- PINHEIRO NETO ADVOGADOS
- TELLES PEREIRA, AZZI, FERRARI E ALMEIDA SALLES - ADVOGADOS S/C
- TESS ADVOGADOS
- TOZZINI FREIRE ADVOGADOS
- TRENCH, ROSSI E WATANABE – ADVOGADOS
- ULHÔA CANTO, REZENDE E GUERRA – ADVOGADOS
- VEIRANO ADVOGADOS
- VENTURI SOCIEDADE DE ADVOGADOS
- WALTER STUBER CONSULTORIA JURÍDICA
- XAVIER, BERNARDES, BRAGANÇA, SOCIEDADE DE ADVOGADOS
- YARSHELL, MATEUCCI E CAMARGO ADVOGADOS

## TABLE OF CONTENTS

1. THE BRAZILIAN LEGAL SYSTEM .....	13
2. ECONOMIC DEVELOPMENT INSTITUTIONS.....	17
2.1. Ministries .....	17
2.2. Chambers of Commerce.....	25
3. FOREIGN CAPITAL .....	27
3.1. General Features.....	27
3.2. Registration of Foreign Capital.....	27
3.3. Currency Investments.....	27
3.4. Investment via Conversion of Foreign Credits .....	28
3.5. Investment via Import of Goods without Exchange Cover.....	28
3.6. Capital Market Investments .....	29
3.7. Remittance of Profits .....	30
3.8. Reinvestment of Profits.....	30
3.9. Repatriation .....	31
3.10. Transfer of Foreign Investments.....	31
3.11. Restrictions on Remittances Abroad.....	31
3.12. Restrictions on Foreign Investment.....	32
4. THE BRAZILIAN FOREIGN EXCHANGE REGIME .....	35
4.1. FX Control .....	35
4.2. The Brazilian Exchange Regime and FX Market .....	36
4.3. Non-resident Account in Local Currency, and International Transfers in Brazilian Reals .....	39
5. TYPES OF BUSINESS ORGANIZATIONS .....	41
5.1. General Aspects .....	41
5.1.1. Joint-stock Company ( <i>Sociedade Anônima</i> ).....	42
5.1.2. Limited Liability Company ( <i>Sociedade Limitada</i> ).....	44
5.1.3. Rules Common to Both Joint-stock Companies and Limited Liability Companies .....	45
5.1.4. Other Types of Companies and Forms of Association .....	45
5.1.5. Individual Limited Liability Company ( <i>Empresa Individual de         Responsabilidade Limitada – EIRELI</i> ) .....	45
5.1.6. Limited Co-partnership ( <i>Sociedade em Comandita Simples</i> ) or Limited Partnership by Shares ( <i>Sociedade em Comandita por Ações</i> ) .....	47
5.1.7. General Partnership ( <i>Sociedade em Nome Coletivo</i> ) .....	47
5.1.7. Joint Venture Partnership ( <i>Sociedade em Conta de Participação - SCP</i> ) .....	47

5.1.8. Consortium ( <i>Consórcio</i> ) .....	47
5.2. Procedures for Registration .....	48
5.2.1. The Commercial Registry .....	49
5.2.2. Civil Registry of Legal Entities.....	51
6. PUBLICLY-HELD COMPANIES .....	53
6.1. General Information .....	53
6.2. Securities Market .....	54
6.3. Management .....	55
6.4. Periodic Filing Requirements and Other Information .....	57
6.5. Public Tender Offer (“OPA”).....	62
6.6. Primary and Secondary Public Offerings .....	64
6.7. Differentiated Listing on BM&FBOVESPA S.A. – Bolsa de Valores, Mercadorias e Futuros (“BM&FBOVESPA”) .....	65
7. REGULATORY FRAMEWORK OF LOCAL CAPITAL MARKETS.....	71
7.1. Relevant Laws Affecting Local Capital Markets .....	71
7.2. Local Regulatory and Supervisory Authorities.....	71
7.2.1. The National Monetary Council .....	71
7.2.2. The Brazilian Securities Commission - CVM .....	72
7.2.3. The Central Bank .....	73
7.2.4. Self-Regulation .....	74
7.2.4.1. Stock Exchanges .....	74
7.2.4.2. The Organized OTC Market .....	76
7.2.4.3. Brazilian Financial and Capital Markets Association – ANBIMA ....	76
7.3. Definition of Securities .....	78
7.4. Offer and Distribution of Securities in Brazil .....	78
7.4.1. The Concept of Public Offer and Distribution of Securities.....	78
7.4.2. Registration Process.....	80
7.4.3. Registration of the Issuer as a Publicly-Held Company .....	81
7.4.4. Requirements for Public Distributions of Securities.....	82
7.4.5. Issuance of Depositary Receipts: Access to Foreign Capital Markets ....	83
7.4.6. Access to the Brazilian Market by Foreign Companies through Security Depositary Certificate (BDR) Programs.....	84
7.5. Tender Offers for Acquisition of Shares of Brazilian Companies.....	84
7.5.1. Takeovers by Tender Offer .....	84
7.5.2. Going Private - Delisting Tender Offer .....	85
7.5.3. Voluntary Tender Offer .....	85
7.6. Investor Protection Rules .....	86
7.6.1. Disclosure by Public Companies .....	86
7.6.2. Disclosure by Shareholders of Public Companies .....	87
7.6.3. Market Manipulation and other Fraudulent Practices in the Securities Market.....	87
7.6.4. Insider Trading.....	88

7.7. Money Laundering Law.....	89
7.8. Civil Remedies.....	89
7.8.1. Securities sold in violation of the registration and/or prospectus requirements .....	89
7.8.2. Insider Trading.....	90
7.8.3. Fraudulent Brokerage Activities and Handling of Brokerage Accounts ...	90
7.8.3.1. Excessive or Unfair Profits or Commission .....	90
7.8.3.2. Operating While Insolvent or Not in Sound Financial Condition and Other Losses Caused by Intermediaries .....	90
7.8.4. Class Actions .....	91
7.8.5. Waiver of Rights .....	91
7.8.6. Procedural Requirements .....	91
7.8.6.1. Jurisdiction .....	91
7.8.6.2. Venue .....	91
7.8.6.3. Statute of Limitations .....	91
8. TAX SYSTEM.....	93
8.1. General Features .....	93
8.2. Federal Taxes.....	94
8.3. State and Federal District Taxes .....	98
8.4. Municipal Taxes.....	98
8.5. Contributions .....	99
8.6. Foreign Investors .....	101
9. ANTI-TRUST LEGISLATION.....	105
10. LABOR LAW IN BRAZIL.....	111
11. FOREIGN WORKERS IN BRAZIL.....	115
11.1. Short-term Business and Tourist Visas.....	115
11.2. Temporary Work Visas.....	117
11.3. Other Temporary Visas.....	119
11.4. Permanent Employment Visa .....	120
11.5. Registration upon Entry into Brazil.....	121
11.6. Travel in Advance of Permanent or Temporary Employment.....	122
11.7. Employment of Spouses/Offspring .....	123
12. ACQUISITION OF REAL ESTATE IN BRAZIL.....	125
12.1. Introduction .....	125
12.2. Possession and Ownership.....	126
12.3. Acquisition and Loss of Ownership .....	128
12.3.1. General Provisions .....	128
12.3.2. General Considerations and Requirements for Purchasing Real Property.....	129



12.3.3. Acquisition of Rural Land by Foreigners.....	130
12.4. Taxation.....	132
12.4.1. Inter-Vivos Transfer Tax - ITBI.....	132
12.5. Real Estate Investment Funds.....	133
<b>13. ENVIRONMENTAL LAW.....</b>	<b>135</b>
13.1. Laws.....	135
13.2. National Environmental Policy.....	136
13.3. Environmental agencies and their roles.....	137
13.4. Definitions.....	137
13.5. Environmental Licensing.....	138
13.6. Environmental Guardianship and Liability.....	140
<b>14. PUBLIC TENDERS – CONTRACTING OF CIVIL CONSTRUCTION WORKS, SERVICES, PROCUREMENT AND TRANSFERS BY THE PUBLIC ADMINISTRATION.....</b>	<b>145</b>
14.1. Introduction.....	145
14.2. Procurement Modalities.....	146
14.3. Authorization, Concession, and License to Provide Public Services.....	148
14.4. Qualification.....	149
14.5. Tender Waiver.....	150
14.6. Administrative Contract.....	151
14.7. Guarantees.....	151
14.8. Inspection and Extinction of Administrative Contract.....	152
14.9. Other Contractual Features.....	152
<b>15. PRIVATIZATION, CONCESSIONS AND PARTNERSHIPS WITH THE GOVERNMENT..</b>	<b>155</b>
15.1. The National Privatization Program (PND).....	156
15.2. Public Service Concessions.....	157
15.3. Major industries privatized or undergoing privatization.....	158
15.4. Developments and Results of the Privatization Program.....	158
15.5. Public-Private Partnerships.....	159
<b>16. TELECOMMUNICATIONS.....</b>	<b>163</b>
16.1. Telecommunications in Brazil – Brief Overview.....	163
16.2. Development of Mobile Telephony.....	165
16.3. The Telecommunications Regulatory Agency (ANATEL).....	166
16.4. General Telecommunications Law.....	167
16.5. Telecom Service Regime.....	167
16.6. Transfer of Control of Telecom Companies.....	170
16.7. Taxes on the Telecommunications Sector.....	171
16.8. Incentives.....	173
16.9. The Future of Telecommunications Services.....	173
<b>17. ELECTRIC ENERGY.....</b>	<b>175</b>

17.1. Introduction.....	175
17.2. Sector Agents .....	177
17.3. Activities and Agents of the Sector.....	180
17.4. Contracting in the Energy Sector.....	183
17.5. Planning.....	187
17.6. Conclusion.....	187
18. REGULATION OF FINANCIAL INSTITUTIONS AND LEASING IN BRAZIL .....	189
18.1. Financial Institutions .....	189
18.2. Main Financial Institutions.....	190
18.3. Main Requirements for the Operation of Financial Institutions in Brazil.....	191
18.4. Minimum Capitalization Standards .....	192
18.5. Foreign Investment in Brazilian Financial Institutions .....	194
18.6. Leasing .....	195
19. THE INTERNET AND ELECTRONIC COMMERCE.....	199
19.1. The Internet.....	199
19.2. Domain Name .....	200
19.3. Intellectual Property.....	201
19.4. General Aspects of Electronic Commerce.....	202
19.5. Legal Aspects of Electronic Commerce.....	203
19.6. Brazilian laws on virtual transactions .....	205
19.6.1. Rules applicable to contracts.....	205
19.6.2. Applicable Law and jurisdiction .....	205
19.6.3. Rules applicable to documentary evidence .....	207
19.6.4. Rules applicable to the responsibility of suppliers of goods or services.....	207
19.6.5. Spam.....	208
19.7. Tax legislation applicable to electronic commerce.....	209
19.8. Electronic Documents as Evidence in Court .....	209
19.8.1. General Theory of Evidence.....	210
19.8.2. Electronic documents among types of documentary evidence ...	212
19.8.3. Representative Support .....	212
19.8.3.1. Types of Evidence .....	213
19.8.3.2. Evidence of existence of an electronic document .....	214
19.8.3.3. Origin of declaration and electronic signature.....	215
19.8.3.4. Evidence of the content of a document .....	216
19.8.4. Legislative initiatives.....	217
19.8.4.1. Provisional Measure 2200-2, August 24, 2001, and other bills of law in Brazil .....	219
19.8.5. Conclusions .....	220
20. INFORMATION TECHNOLOGY .....	223
20.1 Information Technology in Brazil .....	223

20.2 Legal Protection .....	226
20.3 Tax Benefits.....	230
21. COMMERCIAL REPRESENTATION AND DISTRIBUTION CONTRACTS .....	235
21.1. Commercial Representation (Agency).....	235
21.2. Distribution Agreements .....	237
21.2.1. Commercial Distribution Agreements .....	237
21.2.2. Ordinary Distribution Contracts .....	242
22. INTERNATIONAL CONTRACTS – INTELLECTUAL PROPERTY .....	243
22.1. General Aspects – International Contracts.....	243
22.2. Brazil and International Intellectual Property Treaties.....	246
22.3 International Contracts on Intellectual Property.....	247
22.3.1 – International Contract for Granting Copyright to Literary Works ..	247
22.3.2 – International Agreement on Trademark Licensing.....	249
22.3.3 – International Patent Licensing Agreement.....	251
22.3.4 – International Technology Transfer Agreements.....	253
23. INTERNATIONAL TREATIES .....	257
23.1. Overview.....	257
23.2. International Trade .....	257
23.3. Intellectual Property.....	258
23.4. Taxes .....	260
23.5. Latin America.....	260
23.6. MERCOSUR .....	263
24. COMMERCIAL AND CIVIL LITIGATION .....	273
24.1. Jurisdiction in civil and commercial cases .....	273
24.2. Litigation costs.....	273
24.3. Initial Proceedings .....	274
24.4. Evidence .....	275
24.5. Court Rulings.....	276
24.6 Provisional Remedies .....	276
24.7. Appeals.....	277
24.8. Enforcement of Court Rulings.....	277
24.9. Collection Proceedings.....	279
25. DUMPING IN BRAZIL .....	281
25.1. Introduction.....	281
25.2. Concept and Core Elements of Dumping .....	281
25.3. Investigating Dumping in Brazil .....	284
25.4. Conclusion.....	287
26. CONSUMER RIGHTS IN BRAZIL – LEGAL FRAMEWORK AND ENFORCEMENT .....	289

26.1. Development of the Law .....	289
26.2. General Definition .....	289
26.3. Scope .....	291
26.4. Enforcement .....	292
26.5. Trends.....	293
<b>27. ARBITRATION AND UPHOLDING OF FOREIGN COURT RULINGS AND ARBITRATION AWARDS IN BRAZIL .....</b>	<b>295</b>
27.1. Purpose and Applicable Rules .....	295
27.2. Arbitration Proceedings .....	295
27.3. Upholding and Enforcement of Foreign Arbitration Awards.....	296
27.4. Foreign Sentences.....	297
<b>28. INTERNATIONAL ASPECTS OF BRAZILIAN JURISDICTION.....</b>	<b>301</b>
28.1 General Jurisdiction of Brazilian Courts .....	301
28.2 Choice of Forum.....	301
28.3 Judicial Cooperation .....	302
28.4 Recognition and Enforcement of Foreign Judgments in Brazil .....	305
28.5 Jurisdiction of International Arbitration Tribunals .....	307



## 1. THE BRAZILIAN LEGAL SYSTEM

The Federative Republic of Brazil is formed by the indissoluble union of its states, municipalities and the Federal District. In the Brazilian legal system, rules are created mainly by the Legislative and Executive branches and these are mainly interpreted by the Judiciary branch. Although it has a tripartite system (based on the executive, legislative and judiciary branches of government), Brazil also adopted the checks and balances system, whereby each of the branches plays roles that would be originally played by another branch.

These rules are arranged in different hierarchical levels, at the top of which is the Federal Constitution, which was discussed, voted on and promulgated by a National Constituent Assembly in 1988 with a democratic focus. Although it was passed only a few decades ago, the Federal Constitution has been amended 67 times, the last one on December 22, 2010. The Constitution addresses a wide range of topics and ensures a comprehensive list of rights and guarantees to citizens and corporations, apart from establishing

Brazil's political and administrative framework. All Brazilian states have also passed their own constitutions, which must be consistent with the Federal Constitution and must not be in conflict with it.

The entire Brazilian legal system is based on the provisions of the Federal Constitution and it comprises international treaties and conventions (which must be approved by Congress to be enforced in Brazil), as well as laws and other administrative instruments, such as decrees and administrative rules.

The Federative Republic of Brazil is made up of four political-administrative entities: the Union (federal government), the States, the Federal District and the Municipalities. All of them have three branches of government: the Legislative, Judiciary and Executive branches, except for the Municipalities, which do not have a Judiciary branch.

The Federal Legislative Branch is composed of the House of Representatives and the Senate,

which together form the National Congress, and its main role is that of legislating. The Federal Constitution provides that some matters can only be regulated by the Union and, therefore, the National Congress is in charge of legislating on matters concerning Civil, Commercial, Criminal, Procedural, Electoral, Agrarian, Maritime and Aviation laws and on matters related to water, energy, IT, telecommunications, the monetary system, insurance in general, foreign trade, the national transportation policy, port regulation, mineral resources and nuclear activities, among others.

The Legislative Branch of the States and of the Federal District is in charge of drawing up state- and district-level laws, as well as of legislating, on a supplementary basis, on Tax, Financial and Economic matters and on issues related to production, consumption, defense of the soil, natural resources and responsibility for damages caused to the environment. If there is no federal law to address such matters, the states are fully competent to legislate on them. The Legislative Branch of the

Municipalities, in turn, is only competent to regulate local matters.

The Brazilian judiciary branch consists of state-level courts, federal courts, and specialized courts. Legal cases are judged at two ordinary court levels and at an extraordinary level by the high courts of each jurisdiction, by the High Court of Justice (STJ), which is in charge of judging infra-constitutional cases, and by the Supreme Federal Court (STF), which judges constitutional matters.

Judges base their decisions on their interpretation of existing rules and, if there is a legislative gap, they can apply analogy, custom and general principles of law to a case. In recent years, however, the Supreme Federal Court was allowed to create the so-called *Súmulas Vinculantes*, which are binding precedents that can be enforced as law. In addition, appeals related to the same judicial issue can now be jointly judged by the STJ and STF. These reforms were intended to enhance the effectiveness of court decisions and reinforce an increasing reliance on judicial precedents in the Brazilian legal system, although

the civil law system continues to prevail in Brazil (as opposed to the common law system adopted in other countries).

Within duly established constitutional and legal limits, the Executive Branch has the competence to self-regulate, to apply rules to supplementary legal issues and to regulate economic activities through regulatory agencies.

The legal rules provided for in the Brazilian legal system, issued by the Union, the States, the Federal District and the Municipalities, must comply with the Constitution, or else they may be deemed unconstitutional. Acts of the public administration must comply with principles such as legality, morality and efficiency. Private acts must be in accordance with constitutional provisions, as well as the Civil Code and other specific laws. All this regulatory system provides for rights and duties and was designed to lend safety to legal relations and ensure the availability of legal instruments to guarantee such rights.





## 2 - ECONOMIC DEVELOPMENT INSTITUTIONS

Decree-Law n. 200/67 and its amendments divide the Federal Administration into Direct and Indirect administration. The former consists of all services contemplated in the administrative framework of the Presidency of the Republic and the Ministries, while the latter consists of services provided by several legal entities belonging to the Union, which can be both public (Independent Government Agencies and Foundations) or private (Joint Capital Companies, Public Companies and Foundations) entities linked to a Ministry.

The Public Federal Administration is headed by the President of the Republic, assisted by his Ministers of State.

As provided for in article 1 of Law n. 10,683 of May 28, 2003, the Presidency of the Republic is essentially made up of the Civil House (Office of the Chief of Staff), the Secretariat General, the Institutional Relations Secretariat, the Social Communication Secretariat, the President's Personal Cabinet, the Institutional Safety Cabinet, the

Secretariat for Strategic Affairs, the Secretariat for Policies for Women, the Human Rights Secretariat, the Secretariat for the Promotion of Racial Equality, the Secretariat for Ports, and the Civil Aviation Secretariat.

The Ministries are autonomous agencies of the Federal Administration ranking immediately below the Presidency of the Republic whose multiple roles were defined by the Administrative Reform of 1967 and its amendments.

The independent government agencies include the Regulatory Agencies, which are public-law legal entities set up by law with political, financial, regulating and management autonomy. The regulatory agencies are in charge of controlling and inspecting public activities carried out by private companies (ANP, ANEEL, ANATEL and others) under concession, permit or authorization.

### 2.1. MINISTRIES

MINISTRY OF JUSTICE

The Ministry of Justice is in charge of addressing issues related to: defense of the legal system, political rights and constitutional guarantees; judiciary policy; nationality, immigration and foreigners; drugs; public safety; indigenous rights; federal, highway and railway police and Federal District police activities; planning, coordination and administration of the national prison policy; defense of the national economic order and consumer rights; ombudsman activities for indigenous people and consumers; Federal Police ombudsman activities; full and free legal, judicial and extrajudicial assistance to those in need (characterized as such in the law); defense of Union assets and of its own assets and those of entities linked to the indirect Federal Public Administration; Government actions to repress undue use, illegal trafficking and unauthorized production of narcotic substances and drugs that cause physical or psychological addiction; coordination and implementation of activities designed to consolidate normative acts of the Executive branch, prevention and repression of money laundering, and international legal cooperation.

## MINISTRY OF EXTERNAL RELATIONS

The Ministry of External Relations is in charge of defining Brazil's international policy; of managing diplomatic relations and providing consular services; of implementing international cooperation programs and taking part in trade, economic, technical and cultural negotiations with foreign organizations and governments; and of supporting Brazilian delegations, entourages and representations in multilateral international agencies and bodies.

In sum, it assists the President of the Republic in drawing up Brazil's foreign policy, in ensuring its implementation, in keeping diplomatic relations with governments of foreign States, international bodies and organizations, and in promoting the interests of the Brazilian State and society abroad.

## MINISTRY OF TRANSPORTATION

The Ministry of Transportation is in charge of matters related to railway, highway and waterway transportation; merchant navy,

ports and waterways; and air and road transportation. The following agencies, among others, are linked to this ministry:

- DNIT – National Transportation Infrastructure Department;
- ANTT – National Land Transportation Agency.

## MINISTRY OF AGRICULTURE, LIVESTOCK AND SUPPLY

The Ministry of Agriculture, Livestock and Supply is in charge of the following topics: agricultural policy, comprising production, trade, supply, storage and minimum price guarantees; agribusiness development and production; agricultural/livestock market, trade and supply; agricultural information; animal and vegetal sanitary defense; inspection of inputs used in agriculture/livestock activities; classification and inspection of animal and vegetal products and by-products; soil protection, conservation and management; agriculture/livestock technological research; meteorology and climatology; rural cooperatives and associations, agro energy, technical assistance and rural extension;

policies for coffee, sugar and alcohol, planning and implementation of government actions in the sugarcane industry. The following entities, among others, are linked to this ministry:

- EMBRAPA – Brazilian Agriculture/Livestock Research Company, which is responsible for developing sustainable development solutions in rural areas and for agribusiness;
- CEAGESP – General Warehousing Company of São Paulo, which ensures most of the supply of agricultural products in the State of São Paulo through a network of warehouses.

## MINISTRY OF EDUCATION

The Minister of Education is in charge of the following matters: the national education policy; children's education; education in general, comprising basic, secondary and higher education, special education and distance education, except for military education; education for young people and adults; professional education; educational evaluation, information and research; university extension and research; ensuring teachers and financial

assistance for educational purposes to children and dependents of low-income families

## MINISTRY OF CULTURE

The Ministry of Culture is in charge of the national cultural policy; of protecting the Brazilian historical and cultural heritage; and of defining the bounds of lands occupied by quilombo communities and for demarcating them.

## MINISTRY OF LABOR AND EMPLOYMENT

The Ministry of Labor and Employment is in charge of drawing up the policy and guidelines for generating jobs and income and for supporting workers; for defining the policy and guidelines for modernizing labor relations; for labor inspection activities, including in ports, and for applying sanctions provided for in legal or collective rules; for the wage policy, for the immigration policy; for professional development and training activities; for ensuring healthy and safe working environments; and for urban cooperatives and associations.

## MINISTRY OF SOCIAL WELFARE

The Ministry of Social Welfare is responsible for caring for social security and supplementary social security, and assuring to their beneficiaries indispensable means of maintenance, for reasons of disability, old age, involuntary unemployment, family burdens and imprisonment or death of those on whom they were economically dependent.

## MINISTRY OF HEALTH

The Ministry of Health is in charge of: the national health policy; coordinating and inspecting the Unified Health System; environmental health and actions to promote, protect and recover individual and collective health, including the health of workers and indigenous people; health information; critical health care inputs; preventive actions in general, sanitary control and surveillance on borders and sea, river and air ports, health surveillance, especially with regard to drugs; food and medicines; scientific and technological research in the health area. The following entities, among others, are linked to

this ministry:

- ANVISA – National Health Surveillance Agency;
- ANS – National Health Agency.

## MINISTRY OF DEVELOPMENT, INDUSTRY AND FOREIGN TRADE

The Ministry of Development, Industry and Foreign Trade is in charge of the industrial, trade and service development policy; intellectual property and technology transfer; metrology; industrial quality and standardization; foreign trade policies, including participation in related international negotiations; trade defense; support to micro and small enterprises and handicraft; and trade registration activities. The following entities, among others, are linked to this ministry:

- INMETRO – National Metrology Institute;
- INPI – National Industrial Property Institute;
- BNDES – National Economic and Social Development Bank, a federal public company with a private law legal personality with assets of its own that supports undertakings contributing to Brazil's development. BNDES has

two wholly owned subsidiaries, namely, FINAME (Special Industrial Financing Agency) and BNDESPAR (BNDES Participations), respectively created for the purpose of financing the marketing of machines and equipment and enabling the subscription of securities in the Brazilian capital market. The three companies make up the so-called “BNDES System.”

## MINISTRY OF MINES AND ENERGY

The Ministry of Mines and Energy is in charge of matters related to geology, mineral and energy resources; hydraulic energy utilization; mining and metallurgy; oil, fuels and electricity, including nuclear energy. The following entities, among others, are linked to this ministry:

Agencies:

- ANEEL – National Electricity Regulatory Agency, which is responsible for regulating and inspecting electricity generation, transmission, distribution and marketing;
- ANP – National Petroleum Agency, which is in charge of promoting

the regulation, contracting and inspection of economic activities in the oil industry.

Linked companies:

PETROBRÁS – Petróleo Brasileiro S.A.;  
ELETROBRÁS – Centrais Elétricas Brasileiras S.A.;

## MINISTRY OF COMMUNICATIONS

The Ministry of Communications is in charge of the national telecommunications policy, including radio broadcasting; telecommunications services; radio broadcasting and postal services.

The following entities, among others, are linked to this ministry:

ANATEL – National Telecommunications Agency, which is responsible for promoting the development of telecommunications in Brazil, with the aim of providing the country with a modern and efficient telecommunications infrastructure offering suitable and diversified services to users at fair prices throughout the national territory.

## MINISTRY OF SCIENCE AND TECHNOLOGY

The Ministry of Science and

Technology is responsible for drawing up and implementing the national scientific and technological research policy; for planning, coordinating, supervising and controlling science and technology activities; for drawing up the information technology and automation development policy; for the national biosafety policy; for the space and nuclear policy, and for controlling exports of sensitive goods and services.

## MINISTRY OF ENVIRONMENT

The Ministry of Environment is responsible for drawing up policies for actions related to the environment and water resources; policies for the preservation, conservation and sustainable use of ecosystems, biodiversity and forests; policies for improving environmental quality and promoting the sustainable use of natural resources; policies for integrating environmental concerns and production needs; environmental policies and programs for the Legal Amazon region and ecological-economic zoning. The following entities, among others, are linked to this ministry:

ANA – National Water Agency;  
IBAMA – Brazilian Institute for the Environment and of Renewable Natural Resources.

## MINISTRY OF DEFENSE

The Ministry of Defense is basically in charge of the national defense policy; of the military policy and strategy; of the national maritime policy; of managing and coordinating the Armed Forces; of the aeronautical policy, etc.

## MINISTRY OF FINANCE

The Ministry of Finance is basically responsible for drawing up and implementing Brazil's economic policy. It is in charge of matters concerning currency, credit, financial institutions, capitalization, savings of the population, private insurance and private social security; for the customs and tax policy, management, inspection and collection; for public financial management and accounting; for managing domestic and foreign public debt; for economic and financial negotiations with governments, multilateral

organizations and governmental agencies; for prices in general and public and administrative tariffs; for inspecting and controlling foreign trade; for carrying out studies and research to keep track of the economy scenario and authorizations, except in areas under the competence of the National Monetary Council; for awarding prizes free of charge for publicity purposes by means of lottery; for consortium operations, retail sales of goods by means of public offerings, among other operations. The following bodies make up the organizational framework of the Ministry of Finance, among others:

CMN – NATIONAL MONETARY COUNCIL. As one of the bodies of the Ministry of Finance, the CMN was established to draw up Brazil's monetary and credit policy with the aim of promoting its economic and social progress.

The National Monetary Council is responsible for setting the general guidelines of the monetary, exchange and credit policies; for regulating conditions for the establishment, operations and inspection of financial institutions and for disciplining



monetary and exchange policy instruments.

**BACEN – The CENTRAL BANK OF BRAZIL**, which is also linked to the Ministry of Finance, is mainly in charge of complying and ensuring compliance with rules regulating the operation of the National Financial System (issued by the National Monetary Council); of providing currency-related services; of acting as the depositary of official reserves in gold and foreign currency; of controlling credit in all its forms; of controlling foreign capital according to the law; of regulating the clearing of checks and other securities; of engaging in negotiations with international and foreign financial institutions in behalf of the Brazilian Government; of inspecting and granting authorizations to financial institutions; of carrying out, as monetary policy tools, operations to buy and sell federal public securities, etc.

#### **MINISTRY OF PLANNING, BUDGET AND MANAGEMENT**

The Ministry of Planning, Budget and Management is responsible for

Brazil's national strategic planning; for evaluating the socioeconomic impacts of policies and programs of the Federal Administration, and for conducting special studies with the aim of redefining policies, etc. The following entity is linked to this Ministry, among others:  
**IBGE – Brazilian Institute for Geography and Statistics.**

#### **MINISTRY OF AGRARIAN DEVELOPMENT**

The Ministry of Agrarian Development is basically in charge of the land reform and of promoting sustainable development among families of farmers in rural areas. The following entity is linked to this Ministry, among others:  
**INCRA – National Institute for Colonization and Agrarian Reform.**

#### **MINISTRY OF NATIONAL INTEGRATION**

The Ministry of National Integration is basically responsible for: drawing up and implementing the integrated national development policy; drawing up and implementing regional development plans and programs;

establishing integration strategies for regional economies, among other responsibilities.

### MINISTRY OF SPORTS

The Ministry of Sports is in charge of the national policy for sports and social inclusion through sports.

### MINISTRY OF TOURISM

Responsible for the national tourism development policy.

### MINISTRY OF CITIES

The Ministry of Cities is in charge of the urban development policy; of sectoral housing policies; of basic and environmental sanitation; of urban transportation, traffic and water supply systems, among other responsibilities.

### MINISTRY OF SOCIAL DEVELOPMENT AND HUNGER COMBAT

Ministry in charge of coordinating national social development policies; food and nutrition security; social assistance and citizenship income initiatives.

### MINISTRY OF FISHING AND AQUACULTURE

This is the ministry in charge of providing direct advisory to the Government in drawing up policies and guidelines for developing and promoting fishing and aquicolous production.

## 2.2. CHAMBERS OF COMMERCE

With the aim of fostering closer economic relations between Brazil and other countries and enhancing trade and financial flows between them, different Chambers of Commerce have been set up in our country, including the American Chamber of Commerce; the Japanese Chamber of Commerce and Industry; the Italian-Brazilian Chamber of Commerce and Industry; the Foreign Trade Chamber (CAMEX), among others.

These Chambers of Commerce are a source of solid information for contractors of different countries to establish trade relations among them and they assist them in contacting potential interested parties and support them in their needs.

The Chambers of Commerce cooperate with the business community as strong allies of different countries by making every effort to ensure the success of their undertakings, always respecting the laws of those involved in securing their progress.

## 3 - FOREIGN CAPITAL

### 3.1. General Features

Foreign capital in Brazil is governed by Law 4.131 (the Foreign Capital Law) of 3 September, 1962, and Law 4.390 of 29 August, 1964. Both of these laws were put into effect by Decree 55.762 of 17 February, 1965 and subsequent amendments. According to the Foreign Capital Law, “foreign capital is considered to be any goods, machinery or equipment that enters Brazil with no initial foreign exchange disbursement, intended for production of goods and services, and any funds brought into the country for use in economic activities, provided that they belong to individuals or corporate entities domiciled or incorporated abroad.”

### 3.2. Registration of Foreign Capital

Foreign capital must be registered by means of an Electronic Statement of Registration – Foreign Direct Investment Module (RDE-IED), on the Central Bank Information System (SISBACEN).

For the purposes of the Electronic Statement of Registration, foreign

direct investment is defined as permanent holdings in Brazilian companies or, in accordance with common market practices, long-term ownership by non-resident investors; individuals or corporate entities residing, domiciled or incorporated abroad, through ownership of shares or stock in Brazilian companies, or investments in foreign companies authorized to operate in Brazil.

Foreign investments to be made and registered are not subject to prior review or verification by the Central Bank. The declaratory nature of the statement implies that the Brazilian company receiving the investment and/or the representative of the foreign investor are responsible for the registration.

All foreign investments must be registered with the Central Bank of Brazil. Such registration is required for remittances abroad, repatriation of capital and registration of profit reinvestment.

### 3.3. Currency Investments

No prior official authorization is

required for investment in currency. To subscribe capital or purchase stock in an existing Brazilian company, the investor must only transfer the funds by means of a banking institution authorized to operate with foreign exchange. However, authorization of the exchange contract is conditional upon presentation of a RDE-IED registration number for the foreign investor and for the Brazilian company receiving the investment.

The investment must be registered through the RDE-IED System by the Brazilian company receiving the investment and/or the representative of the foreign investor, within 30 days of closing the exchange contract.

In the event that the registration of the foreign investment is to be paid from a non-resident account in Brazil, it can be made in Brazilian currency. All transactions relating to such investments must be carried out through the non-resident account, with updating of the corresponding investment registration by means of the RDE-IED Module.

### **3.4. Investment via Conversion of Foreign Credits**

Conversion into investment of foreign credits duly registered in the RDE-IED Mode is not conditional on the Central Bank's prior authorization. Conversion into foreign direct investment is defined as "transactions whereby credits eligible for transfer abroad, under current rules, are used by non-resident creditors to purchase or pay up holdings in a Brazilian company."

In order to effect registration, however, the investor and company in which the investment is to be made must provide: (i) a statement from the creditor and committed investor, defining precisely the due dates of installments, the respective sums to be converted and, with respect to interest and other charges, the period they refer to, and the respective rates and calculations; and (ii) a binding statement from the creditor, agreeing to the conversion.

### **3.5. Investment via Import of Goods without Exchange Cover**

Investment in the form of imports

of goods without exchange cover (applicable only to tangible goods), made as a means of acquiring paid-up stock, do not require prior approval from the Central Bank.

Registration of foreign direct investments, resulting from the import of intangible assets without coverage of an exchange contract, requires prior approval from DECIC. For tangible assets, the value recorded on the Register of Financial Transactions (ROF) Module of the RDE System, linked to the Import Declaration (DI); and the currency stated on the corresponding ROF may be used.

Registration through the RDE-IED Mode requires that both tangible and intangible assets be exclusively intended for paying-up of capital.

Registration of foreign capital that enters Brazil in the form of assets must be made in the currency of the investor's country or, at the express request of the investor, in another currency, with exchange parity preserved.

Foreign capital is defined as any

goods, machinery or equipment that enter Brazil with no initial disbursement of foreign currency, intended for production or marketing of goods or provision of services. Imports of used goods are conditional on the absence of similar goods in Brazil. Used goods must be employed in projects that foster the country's economic development.

Once the tangible goods have been cleared by customs, the Brazilian company has a 90- day deadline to register the investment with the Central Bank of Brazil.

### **3.6. Capital Market Investments**

Non-resident investors, whether individuals or corporate entities, can invest in the Brazilian financial and capital markets individually or collectively.

Non-resident investors can now use the same registration to invest in the fixed- and variable-income markets and can migrate freely from one type of investment to another. To access these markets, foreign investors must appoint a representative in Brazil to register the transactions

by filling out a form attached to Resolution 2689/00 and to make the required registration with the Brazilian Securities Commission (CVM).

Bonds and securities belonging to foreign investors must be kept in custody by entities authorized by CVM or by the Central Bank or, as appropriate, registered with the Special Settlement and Custody System (SELIC) or in the registration and financial settlement system managed by the Clearing House for Custody and Financial Settlement of Securities (CETIP).

### **3.7. Remittance of Profits**

No restrictions are applied to the distribution and remittance of profits abroad. Dividends or profits distributed to shareholders or partners of companies headquartered in Brazil, even when remitted abroad, are not taxed, except those derived from profits booked before January 1, 1996.

Profit remittances must be registered as such through the RDE-IED Module, considering the stake held by the investor in the total shares

or stock as a proportion of paid-up corporate capital in the company.

### **3.8. Reinvestment of Profits**

Reinvestments are profits of companies established in Brazil and paid to persons or companies residing or domiciled abroad which are reinvested in the company that produced them or in another sector of the domestic economy.

Reinvested earnings are registered in the currency of the country to which such earnings are to be remitted, while reinvestments derived investments in Brazilian currency are registered in Brazilian currency.

Foreign investor profits to be reinvested in Brazilian companies (even if the companies in question are other than those in which the earnings were obtained) for purposes of paying up or purchasing shares and/or stock must be registered as Investment in the RDE-IED System. Such reinvestments must be registered as foreign capital (in the same manner as the original investment) and thereby increase bases for tax assessment on any

future repatriation of capital.

In cases of reinvestment of profits, interest on net equity and profit reserves, the stake of foreign investors vis-à-vis the total number of paid-up capital stock in the company in which the earnings were generated must be observed.

### **3.9. Repatriation**

Repatriation of foreign capital registered with the Central Bank of Brazil to its country of origin requires no prior authorization.

Foreign currency registered with the Central Bank of Brazil as non-resident investment may be repatriated and is not subject to withheld income tax. In this case, sums in foreign currency proportionally exceeding the original investment (capital gains), are subject to withheld income tax at the rate of 15%.

### **3.10. Transfer of Foreign Investments**

Acquirers, whether they are individuals or legal entities residing or domiciled in Brazil, or their attorney-

in-fact, in the case of acquirers residing or domiciled abroad, are responsible for withholding and paying income tax on capital gains earned by individuals or legal entities residing or domiciled abroad that transfer property located in Brazil.

Foreign purchasers are entitled to register capital in the same amount as the registration previously held by the selling company, regardless of the price paid for the investment abroad. Nonetheless, the registration number on the RDEIED Module of the Central Bank of Brazil should be changed to reflect the name of the new foreign investor, which is essential to allow the new investor to remit/reinvest profits and to repatriate capital.

### **3.11. Restrictions on Remittances Abroad**

Remittance of funds abroad is restricted when such funds are not registered on the RDE-IED System, since remittance of profits, repatriation of capital, and registration of reinvestment are all based on the amount registered as foreign investment.



### 3.12. Restrictions on Foreign Investment

The following prohibitions and limitations apply to foreign capital in the Brazilian economy.

#### (A) Prohibitions:

Foreign capital investment is prohibited in the following activities:

- activities involving nuclear energy;
- health services;
- mail and telegraph services; and
- the aerospace industry<sup>1</sup>.

#### (B) Limitations

- The acquisition, operation or lease of rural lands by a Brazilian company under foreign control, an alien residing in Brazil or a foreign-based legal entity authorized to operate in Brazil are subject to certain conditions provided for in the law, as well as to congressional authorization in certain cases.

- For national security reasons, limitations are applied to the acquisition of property alongside border areas. Acquisition of land in such areas is conditional on prior authorization from the Secretariat General of the National Security Council.

- Restrictions are also applied to the participation of foreign capital in financial institutions, although these restrictions may be waived in the national interest.

- A concession is required for operating regular public air transportation services. By law, such concession can only be granted to Brazilian legal entities (those incorporated and managed in Brazil) in which at least 80% of the voting capital is owned by Brazilians, which limitation also applies to increases in capital stock. Moreover, such companies must be exclusively managed by Brazilians. Finally, foreign capital participation cannot exceed the authorized limit of 20% of voting capital and requires approval from aeronautical authorities.

---

<sup>1</sup> *Launching and orbital positioning of satellites, spacecraft, aircraft and related activities, not including manufacture or marketing of said items or accessories.*

- Restrictions are applied to foreign ownership and management of newspapers, magazines and other periodicals, as well as of radio and television networks.
- Brazilian companies, even if under foreign control, can request and be awarded permission to operate in the mining sector.



## 4 - THE BRAZILIAN FOREIGN EXCHANGE REGIME

The foreign exchange (FX) regime consists in a means to set the exchange rate in a country. The choice of such a regime is an economic policy decision and is related to the FX market in which the exchange rate will be set, e.g. an official exchange rate market or a floating exchange rate market.

Historically, the Brazilian FX regime has been defined by the Brazilian government through exchange control measures. Exchange controls in Brazil are applied not only through FX rules and regulations, but also by means of tax and foreign trade rules and regulations, for the purpose of either encouraging or discouraging inflows of foreign capital and investments of Brazilian capital abroad.

In this context, Brazilian tax authorities made changes to tax regulations recently to increase tax rates applied to foreign capital entering Brazil with the aim of curbing the increasing appreciation of the Brazilian currency against other foreign currencies, such as the U.S. dollar.

### 4.1. FX Control

Exchange control in Brazil is closely linked to the regulation of foreign capital flows. Historically, such regulation has imposed barriers on the outflow of funds to protect the Brazilian currency. In the 1930s, following sharp reductions in the price of basics products that accounted for a high percentage of Brazilian exports, Brazilian authorities issued the first rules designed to structure an exchange market in Brazil.

For this purpose, rules were issued to establish the obligation that funds from Brazilian exports should be brought back to the country, such as Decree n. 23,258/33, which has been revoked, and the Brazilian government began to apply strict controls on exporters to avoid funds from exports from being kept abroad. Such exchange controls were justified because, back then, funds from exports constituted the main source of funds to ensure equilibrium in the Brazilian balance of payments.

It was only in the 1960s that the

two main legal instruments applied to foreign capital and FX markets were issued in Brazil, namely, Law n. 4,131/62 and Law n. 4,595/64.

Law n. 4,131/62 provides for key rules defining foreign capital in Brazil, lists categories of foreign investments and requires that foreign capital must be registered with the Central Bank upon entering Brazil.

Law n. 4,595/64 sets out general rules for the Brazilian financial system and creates the Brazilian Monetary Council (“CMN”) and the Central Bank. After this law was passed, the CMN and the Central Bank began to control and regulate the Brazilian FX market. The CMN is in charge of drawing up the general foreign exchange policy, and according to its guidelines, exchange controls, regulations affecting foreign capital, and the management of international reserves fall under the Central Bank’s jurisdiction.

Law n. 4,131/62 and Law n. 4,595/64 changed the legal environment of the FX market and foreign investments in Brazil and are fundamental legal instruments

regulating these areas that are in force to this day.

## **4.2. The Brazilian Exchange Regime and FX Market**

Up to 1988, the exchange rate regime in Brazil was one based on official exchange rates set by the Brazilian government, rather than by demand on the market. The FX market was therefore the official exchange market, fully regulated by the Central Bank.

The official exchange rate regime reflected the successive FX crises faced by Brazil, which led the Brazilian government to impose limits and bureaucratic requirements on the purchase of foreign currency.

As a result of such “official” exchange market and strict FX controls, a “parallel” FX market developed that was not provided for in any regulation or recognized by the Brazilian authorities. In this parallel FX market, foreign currencies were illegally bought and sold at rates different from the ones set in the official market.

In response to the development of this parallel FX market, the now revoked Resolution n. 1,552/88 was issued to create a floating exchange rate market known as the “tourist” exchange rate market. This was a separate market from the official market where foreign currencies could be bought and sold at prices and conditions freely agreed upon.

The floating exchange rate market was thus characterized by free-floating exchange rates that varied according to the supply of and demand for foreign currencies. These floating exchange rates marked the early stages of a more flexible Brazilian FX market.

In 1990, the CMN established the free exchange rate market through Resolution CMN n. 1,690/90, which has been revoked. This free exchange rate market put an end to the official FX market and the Brazilian FX regime took the twofold form of a floating rate regime, represented by a floating rate market, and of a free rate regime, represented by a free exchange rate market.

The first regulatory measure to

unify these markets was taken early in 1999, when the Central Bank issued rules to unify the exchange rates negotiated in both markets. Its Communiqué n. 6,565/99 informed Brazilian markets that, as of January 18, 1999, the Central Bank “*will let the interbank market (...) set the exchange rate,*” indicating, however, that the Central Bank could “*occasionally intervene in those markets to curb disorderly exchange rate movements.*”

Therefore, a floating exchange rate regime with minimal government intervention was adopted in 1999.

#### 4.2.1. Unification of Brazilian Exchange Rate Markets

Since its exchange rate markets were unified, Brazil’s exchange rate system experienced a remarkable development, particularly as a result of CMN’s Resolution n. 3,265. As mentioned above, before Resolution 3,265 was issued, FX operations were mainly carried out in the free exchange rate market – the so called commercial market - and in the floating exchange rate market. Resolution 3,265 unified

both markets. Apart from unifying the commercial and the floating exchange rate markets, the new exchange rate regulation relaxed controls on buying and selling foreign currencies and on Brazilian investments abroad for both individuals and legal entities, besides lifting limitations on the amounts involved.

Through Resolution 3,265, the commercial and the floating exchange rate markets became part of the same market.

As a result of this unification, free access to the Brazilian exchange rate market became the general rule. That resolution was revoked by the currently in force CMN's Resolution n. 3,568/08, which preserved the free market access rule and introduced even more flexible rules.

Free access to the exchange rate market is provided for in article 8 and first paragraph of the Resolution, which read as follows:

*“Article 8. Natural and legal persons may buy and sell foreign currencies or carry out international transfers of*

*any nature in the Brazilian currency, without any limitations imposed on the amounts involved, provided that the counterpart in the transaction is an agent duly authorized to operate in the exchange rate market and all legal requirements are complied with, based on the economic justification and responsibilities set out in the supporting documentation.”*

Considering the provisions of the aforementioned regulation, no obstacles are imposed on Brazilian natural persons to access the exchange rate market to remit funds deposited in Brazil abroad, provided that the transaction is carried out by an authorized agent, i.e. a financial institution authorized by the Central Bank to operate in the exchange rate market (an “Authorized Agent”) and that the remittance is in accordance with the exchange rate principles set out in article 8 of Resolution 3,568, that is, provided that all legal requirements are complied with, based on the economic justification and responsibilities set out in the supporting documentation.

In addition, as a result of Resolution

3,265, the Central Bank issued Circular Letter n. 3,280/05, through which the International Capital and Foreign Exchange Market Regulation (RMCCI) was adopted. The RMCCI, as amended from time to time, is a practical tool for implementing the Brazilian exchange rate market regulations.

The Brazilian exchange rate market is therefore much more flexible today than in the past. Exchange rate operations can now be freely carried out, provided that the above-mentioned principles are complied with. It should be noted that some institutions and investment vehicles, such as financial institutions and mutual funds, are still subject to specific rules in relation to exchange rate transactions that will not be analyzed here.

### **4.3. Non-resident Account in Local Currency, and International Transfers in Brazilian Reals**

According to the RMCCI, natural or legal persons residing or headquartered abroad can have deposit accounts in Brazil in the local currency. The holders of these

accounts must register with the Central Bank when they open them and all their operations using these accounts must consist in unilateral transfers in the Brazilian currency that must comply, as appropriate, with the same provisions applied to FX transactions.

Therefore, international transfers in the Brazilian currency constitute operations in reals in current accounts opened and kept by non-residents in banks in Brazil. Operations using these accounts are limited to regular bank transactions carried out by their holders and money orders.





## 5 - TYPES OF BUSINESS ORGANIZATIONS

### 5.1. General Aspects

The Brazilian legal system provides for types of business organizations under which parties can set up corporate entities or establish other forms of incorporation that do not imply corporate structure. The latter group includes consortia and other forms of legal businesses whose parties do not relinquish their status as individuals. Incorporation of a company, on the other hand, entails a written agreement, either private or public, in which the contracting parties express their aims either individually or as a partnership (*sociedades personificadas* – partnerships forming a legal entity - or *sociedades não personificadas* – partnerships not forming a legal entity). The latter include *sociedades em comum* (unregistered partnerships) and *sociedades em conta de participação* (joint venture partnerships).

Brazilian law provides for the following types of companies: *sociedade simples* (simple partnership), *sociedade em nome*

*coletivo* (collective partnership), *sociedade em comandita simples* (limited co-partnership), *sociedade limitada* (limited liability company), *sociedade anônima* (joint-stock company) and *sociedade em comandita por ações* (partnership limited by shares).

The law lends corporate status to such companies upon registration with the competent public registry office, turning them into legal entities with distinct liability to that of their partners.

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

It should be stressed that, except for joint-stock companies (*sociedades anônimas*), all the types of business organizations contemplated in the Brazilian Law can operate either as simple partnerships (*sociedades*

simples) or as business corporations (*sociedades empresariais*). However, their nature must be expressed in their articles of incorporation. Simple partnerships must be registered with the Civil Registry of Corporate Entities, while business corporations must be registered with the board of trade.

#### 5.1.1. Joint-stock Company (*Sociedade Anônima*)

A joint-stock company (*Sociedade Anônima* or *Companhia*), as described in article 1,088 of the Brazilian Civil Code and provided for in Law 6,404 of December 15, 1976, as partially amended by Law 9,457 of June 5, 1997, by Law 10,303, of October 31, 2001, by Law 11,638 of December 28, 2007, and by Law 11,941 of May 27, 2009, is fundamentally a legally constituted business corporation with capital stock divided into shares. The main purpose of these companies is to generate profits for distribution among its shareholders as dividends or interest on their own capital.

A *Sociedade Anônima* is identified by a name followed by the

words *Sociedade Anônima* in full or abbreviated as S/A or preceded by the word *Companhia* in full or abbreviated as Cia. A corporate name may take the form of the name of a person, e.g. of its founder or of a person one wants to pay homage to. A corporate name can describe corporate purposes or the activity carried out by the company in question, but such a description is not mandatory.

There are two kinds of *sociedades anônimas*: publicly held companies that raise capital through public offerings and subscriptions and are supervised by the Brazilian Securities Commission (CVM) and closed capital companies that raise capital with its shareholders or subscribers, whose accounting and management are simpler.

Capital stock is represented by securities known as shares. Depending on the nature of the rights or advantages conferred to their holders, they can have common, preferred or fruiting shares.

Apart from conferring special rights, common shares give their holders

the right to vote, while preferred shares, which also grant special rights to their holders, can restrict or suppress the right to vote. Fruition shares give their holders the right to continue to participate in the company's profits from ordinary or preferential shares even upon their amortization, without reduction in capital.

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

A *sociedade anônima* can be managed by a Board of Directors and Management Council or only by a Board of Directors, as determined in law or in its by-laws.

The Management Council is a collegiate decision-making body. Such councils are optional for

closed-capital corporations and mandatory for open-capital or authorized-capital corporations. A Management Council must have at least three members, who must be individual shareholders residing in Brazil or not.

The Board of Directors is the executive body of a *sociedade anônima*. It is responsible for representing the company and to carry out all acts required for its regular operation. It is made up of at least two directors, who may or may not be shareholders and must be individuals residing in the country elected for a maximum term of three years.

Shareholders can inspect their company through the Audit Committee (*Conselho Fiscal*).

The Audit Committee is in charge of inspecting the company's accounts and management and it can be either a permanent body or one set up for specific tasks. The Audit Committee is set up according to the desire of the shareholders to ensure more stringent control over corporate management. It must comprise no

less than three and no more than five members, each with an alternate who may be a shareholder or not elected by the General Assembly. In special cases, representatives of a specific category of shareholders can take part in the Audit Committee.

#### 5.1.2. Limited Liability Company (*Sociedade Limitada*)

Articles 1,052 to 1,087 of the Civil Code and the Corporations Act regulate the operations of limited liability companies, which may take the form of a simple company (*sociedade simples*) or of a business corporation (*sociedade empresária*), according to their corporate aims and type of business.

A *sociedade limitada* is set up through articles of association and has limited liability partners. Since the liability of its partners is limited to the value of their shares, all of them are jointly liable for its capital stock until it is completely paid up.

Under the New Civil Code, limited liability companies must have an organic structure made up of a Meeting of Shareholders, a Management Board and an

Audit Committee established by the partners in the articles of association. The meeting of shareholders is the main decision-making body of a corporate organization which meets as required by law or by the articles of association. Management is carried out by one or more individuals who may be shareholders or not assigned to this role by the company's articles of association, which also defines their term in this role.

The capital stock of a limited liability company is divided into shares. Each share represents an amount in money, credits, rights or assets which a shareholder contributes to the company's capital. Shares must be registered and are not represented by securities. As the ownership and number of shares are expressed in the Articles of Association, any transfer of such shares requires an amendment to them. At the meetings of shareholders, changes resulting in amendments to the articles of association or in the reorganization of the company require favorable votes representing at least three-fourths of the capital stock.

### 5.1.3. Rules Common to Both Joint-stock Companies and Limited Liability Companies

Both joint-stock and limited liability companies can engage in operations involving transformation, merger, consolidation or split-up in accordance with articles 1,113 to 1,122 of Law 10,406 of January 10, 2002 (Civil Code) and articles 220 to 234 of Special Law 6,404, of December 15, 1976 (the Corporations Act).

Transformation is an operation through which the corporate classification of a given company is changed without it being dissolved.

Acquisition (*incorporação*) is an operation through which one or more companies are absorbed by another one, which assumes all their rights and liabilities.

Merger ( *fusão*) is an operation through which two or more companies amalgamate to form a new one that assumes all their rights and liabilities, as the former ones cease to exist.

A split-up (*cisão*) is an operation whereby a company transfers a part or all of its net equity to one or more existing companies or to companies specifically set up for this purpose, resulting in the extinction of the parent company, if all of its net equity is transferred, or in the reduction of its capital, if only part of its net equity is transferred.

### 5.1.4. Other Types of Companies and Forms of Association

Because of their nature as partial or unlimited liability companies, other types of companies are rarely used, but they can be interesting options for certain business purposes. Brief information will be provided below on some of the most common options.

#### 5.1.5. Individual Limited Liability Company (*Empresa Individual de Responsabilidade Limitada – EIRELI*)

The newest type of company in Brazil is the individual limited liability company, which was created on July 11, 2011 by Law n. 12,441.

The Law, which introduced article 980-A and the only paragraph of

article 1,033 of the Civil Code of 2002, provides for the possibility of establishing a limited liability company in which a single person holds all the *quotas* of the capital stock, which is necessarily paid-up in an amount of no less than one hundred (100) times the highest minimum wage in effect in the Country. The rules applied to limited liability companies also apply to individual limited liability companies, as appropriate.

5.1.6. Limited Co-partnership (*Sociedade em Comandita Simples*) or Limited Partnership by Shares (*Sociedade em Comandita por Ações*)

A limited co-partnership (*sociedade em comandita simples*) or a limited partnership by shares (*sociedade em comandita por ações*) can have partners of two kinds: partners with unlimited liability, who are in charge of corporate management and representation, known as full partners (*comanditados*), and partners whose liability is limited to their participation, represented by social *quotas* in the case of limited co-partnerships and by shares in the case of limited partnerships by shares, known as silent partners (*comanditários*).

In limited co-partnerships, the participation of full partners is also represented by corporate shares, but their liability is governed by the rules applied to general partnerships (*sociedades em nome coletivo*), meaning that liability of the partners is unlimited and shared.

5.1.6.1. Limited partnerships by shares are governed by articles 1,090/1,092 of the Brazilian Civil Code and by a special chapter of the Corporations Act and the respective participation of both their types of partners consists in shares.

5.1.7. General Partnership (*Sociedade em Nome Coletivo*)

This corporate type is characterized by the unlimited and shared liability of its partners, meaning that they only have joint partners. However, these partners are only liable for the company's social obligations on a subsidiary basis, i.e. their assets can only be executed after all the company's assets have been exhausted.

Responsibility for the company's management falls on all of the partners if its articles of association

do not specifically determine a specific partner to bear this responsibility. If they do, this partner will have the exclusive right to use the firm or corporate name.

This company's corporate name is made up of the name of one, some or all of its partners, with the expression "& Cia" added to it when there is no express reference to the names of all partners.

#### 5.1.7. Joint Venture Partnership (*Sociedade em Conta de Participação - SCP*)

A joint venture partnership has two types of partners: ostensible and unidentified partners. These partnerships are unincorporated, i.e. they have no corporate status even if registered.

These partnerships are established solely for the purpose of conducting a specific undertaking for a specific period of time.

Apart from the ostensible partner, these partnerships involve a category of "hidden" partners which contribute capital or other inputs toward the undertaking. Their liability

is exclusively toward the ostensible partner, pursuant to the corresponding articles of association, which also record their status as creditors. In the event of bankruptcy of the ostensible partner, the participating partners become creditors of the former with no priority or preference rights.

Joint venture partnerships can be established with few formalities other than the registration of their articles of association, and they are acceptable under Brazilian law. They are therefore companies that exist only between their parties and not for third parties, as these deal only with the ostensible partner, who bears full responsibility for the undertaking.

Joint venture partnerships are exclusively managed by the ostensible partner, who is responsible for all its operations and must render accounts to the other partners after the joint venture is over or as provided for in their contract.

#### 5.1.8. Consortium (*Consórcio*)

Etymologically, the word *consórcio* means union, combination, association. According to the Brazilian corporate



law, however, a *consórcio* is an association of two or more companies around a specific project in which they preserve their corporate identity.

A consortium is established by means of an agreement between two or more companies under which they do not lose their autonomy, as they preserve their corporate identity while pooling efforts to achieve specific objectives.

Although this association is based on a contract, it does not have corporate standing, since the parties only bind themselves to the terms of the consortium agreement. Each party is liable for its specific obligations as set out therein, without presumption of joint liability before third parties, except with regard to labor relations, according to the Brazilian labor law (CLT).

The consortium agreement must be approved by the signatory companies at a general meeting in the case of limited liability companies or by the corresponding competent authorities in other cases.

A consortium agreement must contain the following items:

- the name of the consortium, if any;
- the objectives of the consortium;
- the duration, address and venue of the agreement;
- the obligations, responsibilities and commitments of the participants;
- rules for receipt and distribution of profits;
- management and accounting policies, shares of each of the participating companies and administrative charges, if applicable;
- rules for deliberation and the voting rights of each participant; and
- the contribution of each participant to common expenses, if applicable.

The consortium agreement and any subsequent amendments thereto must be filed before the Board of Trade in whose jurisdiction its head office is located, whose certificate must be published in the federal or state Official Gazette and in a newspaper with large circulation.

## 5.2. Procedures for Registration

There are two kinds of public registries for companies in Brazil:

a) Commercial Registry - for registering the documents of business companies (apart from the registration of individual partners and of his representatives and other agents) with trade boards, which are bodies under state jurisdiction; and, b) Civil Registry, for registering the documents of simple partnerships with the registry office for legal entities, which are bodies under the jurisdiction of their districts.

#### 5.2.1. The Commercial Registry

The Commercial Registry, whose executive bodies are the State Trade Boards (one per unit of the Federation), is compulsory for all those engaged in business activities (businesspersons and companies) entailing production or circulation of goods and services.

According to the law, all joint-stock companies are business companies. Apart from these, any general partnership (*sociedade em nome coletivo*), limited co-partnership (*sociedade em comandita simples or por ações*) or limited liability company (*sociedade limitada*) is also a business company that must

register with the trade board in the state where it operates or where it might open branches, provided that its purpose is engaging in economic activities through production or circulation of goods or services by means of a corporate structure.

According to the corporate type chosen by the company and the definition of its corporate purpose, which must be clearly and accurately stated, it will register either with a State Trade Board or with a Registry Office for Legal Entities.

The application for filing articles of association for joint-stock companies must be accompanied by the following documents:

- Articles of Incorporation or Minutes of the General Incorporation Meeting, listing the particulars of the subscribers and proof of payment of the entire capital stock;
- Bank deposit slip (from *Banco do Brasil S.A.*) confirming the deposit in cash of no less than ten percent (10%) of the company's subscribed capital for payment in cash;
- By-Laws signed by all subscribers.
- A report indicating the subscribed

capital signed by the original subscribers or by the Secretariat of the General Meeting providing the full name, nationality, marital status, profession, residence and domicile of the subscribers, in addition to the number of subscribed shares and the amount paid;

- A power-of-attorney granted by any foreign shareholder residing or headquartered abroad signed before a Public Notary in the country of origin, stamped by the Brazilian Consulate, translated by a public sworn translator in Brazil and registered with a Registry of Deeds and Documents;
- Documentary proof of the existence of partners residing abroad;
- Photocopy of the identity cards of elected directors and board members.
- Forms duly filled out with data on the company and its partners, accompanied by proof of payment of all charges due for filing.

For all business companies, the incorporation documents and any subsequent amendments thereto must be filed with the Trade Board in the jurisdiction of the company's head office accompanied by a

petition signed and dated by a partner, attorney or other duly authorized person.

The application to file articles of incorporation of a business company with the trade board must be accompanied by the following documents:

- Three original copies of the articles of association signed by all partners and two witnesses;
- A certificate that the articles of association were agreed upon in a public deed, if they were;
- A certified photocopy of the identify card of each partner;
- A power-of-attorney granted by any foreign partner residing or headquartered abroad signed before a Public Notary in the country of origin, stamped by the Brazilian Consulate, translated by a public sworn translator in Brazil and registered with a Registry of Deeds and Documents;
- Documentary proof of the existence of partners residing abroad;
- A personal declaration signed by each partner or manager of the partnership stating that he or she is

not legally prevented from engaging in business activities, which may be contained in the articles of association or submitted in a separate document;

- Forms duly filled out with data on the company and its partners, accompanied by proof of payment of all charges due for filing.

### 5.2.2. Civil Registry of Legal Entities

Simple partnerships, i.e. those that did not adopt the structure of a joint-stock company or of a company engaged in business activities, must register their articles of incorporation with a Registry Office for Legal Entities.

For registering a simple partnership, an application must be filed with a Civil Registry accompanied by the following documents:

- Articles of incorporation or respective amendments thereto duly signed by its partners;
- Certified photocopies of the identity cards of the partners;
- A power-of-attorney granted by any foreign partner residing abroad signed before a Public Notary in the

country of origin, stamped by the Brazilian Consulate, translated by a public sworn translator in Brazil and registered with a Registry of Deeds and Documents;

The articles of association of simple partnerships can only be filed with the Registry Office for Legal Entities after being duly certified by a lawyer.



## 6 - PUBLICLY-HELD COMPANIES

### 6.1 – General Information

Law 6,404/76 (also known as the Brazilian Corporations Act) makes a distinction between “closed” and “open” companies. Open (or publicly-held) companies must necessarily take the form of a corporation and their securities are admitted for trading on the securities market, allowing them to raise funds from the public.

Because publicly-held companies are permitted to raise funds through public offerings of their securities, they are subject to a series of specific obligations imposed by law and by regulations issued principally by the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários* – the “CVM”).

The CVM, which was created by Law 6,385/86, is a federal agency linked to the Treasury. The purpose of the CVM is to regulate, develop, control and supervise securities markets in Brazil. As a result of changes introduced by Law 10,303/01, the CVM’s jurisdiction was enlarged to include the Commodities and Futures Markets, the organized over-

the-counter market and securities transactions clearing and settlement entities. The CVM is an independent agency operating under a special regime. Although it is linked to the Treasury, the CVM is not subordinate to the minister. The CVM has independent administrative authority, with financial resources and budgetary powers of its own. The CVM’s commissioners have a fixed mandate and stability in their role.

One of the CVM’s purposes is to protect investors. Protection of investors, through various control and supervisory mechanisms, is ultimately aimed at stimulating investment of savings in stock and financial markets.

Thus, while in privately-held companies there is great freedom to establish rules for the operation of a company that will best serve the shareholders’ interests, because publicly-held companies can seek funds from the investing public, they are subject to a number of restrictions that reduce the flexibility of shareholders to establish such rules.

Publicly companies can register with the CVM in order to have their securities admitted for trading on the stock exchange or on the over-the-counter market, in addition to meeting the registration requirements imposed by the stock exchange or over-the-counter institutions.

Only publicly-held companies may issue depositary receipts (DRs), which are certificates representing shares in the company. DRs are traded on foreign markets, enabling the company to raise funds from foreign investors directly in their markets of origin.

In recent years, the Brazilian Corporations Act underwent a series of small corporate, tax and accounting reforms. Law 11,638/07 and Law 11,941/09 amended the Brazilian Corporations Act to introduce due accounting rules for valuation of assets and liabilities, and for the recognition of costs, expenses and revenues, in order to bring Brazilian accounting rules into line with international standards. In addition, these laws gave the CVM greater independence with respect to accounting standards, with powers

to issue accounting rules that are mandatory for publicly-traded companies and optional for privately-held companies.

Recently, Law 12,431/11 made further amendments to Brazilian Corporations Act. These amendments include (i) the possibility of remote participation in shareholders' meetings, (ii) more flexible rules for issuing debentures, and (iii) the end of the requirement that members of the board of directors be shareholders of the company.

## **6.2. Securities Market**

The sector of the Brazilian financial system referred to as the "Securities Market" includes a variety of transactions involving securities issued by publicly-held companies, such as shares, debentures, subscription bonuses and promissory notes for public distribution. Aside from these securities, Law 6,385/76 lists all the types of securities that may be traded on the Securities Market that are subject to the CVM's jurisdiction.

Transactions involving securities issued by publicly-held companies may be carried out on stock exchanges or in over-the-counter markets (organized or not), with the CVM as the main regulatory agency. Stock exchanges, which are governed by Resolution n. 2,690/00 of the National Monetary Council, can take the form of associations or corporations and, among other related obligations, they must establish a place or system that is appropriate for buying and selling bonds and/or securities in a free and open market especially organized and supervised by the stock exchange itself, its member societies, and regulatory authorities.

The organized over-the-counter market is a securities trading system where securities issued by publicly-held companies that are not registered on stock exchanges are traded. The trading system is maintained by a self-regulatory entity charged with supervising and inspecting market participants and the trades made on the market. Registration of assets for trading on the organized over-the-counter market is simpler than registration

for trading on stock exchanges and, in practice, stocks traded on the organized over-the-counter market have less liquidity than stocks traded on stock exchanges.

When publicly-held companies are not registered with either a stock exchange or on the organized over-the-counter market, their securities can be traded on the “unorganized” over-the-counter market, where trades are made directly between securities brokers, without the supervision of a self-regulating entity.

### **6.3. Management**

Publicly-held companies are required to have a two-tiered management structure composed of a board of officers and a board of directors, unlike privately-held companies, in which a board of directors is optional.

The board of directors is a deliberative body, with powers to supervise the company’s business and to establish its internal structure. The board must have at least three directors, all elected at the general annual meeting of the shareholders



of the company. Directors may be non-residents, but with the amendments recently made by Law 12.431/11, they are no longer required to hold at least one share in the company, although they are permitted to be shareholders. However it is still usual to find many By-Laws which repeat the former Law and, doing so, pursue to require that the members of the Board of Directors are shareholders of the company. Non-resident directors must appoint a representative who is resident in Brazil to receive service of process in legal proceedings based on Brazilian companies legislation. The Brazilian Corporations Acts gives holders of voting shares in a publicly-held company that represent at least 15% of the total number of voting shares the right to elect and remove one member (and alternate) of the board of directors, in a separate vote at the annual general meeting of shareholders.

The Brazilian Corporations Law also provides for a separate vote by holders of preferred shares without voting rights or with restricted voting rights that represent at least 10% of the capital of a publicly-held

company, to elect and remove one member (and alternate) of the board of directors, provided they have not exercised any right to elect a member of the board of directors provided for under the company's by-laws.

In both cases, the shareholders must show that they have held the 15% of the voting capital of the company, or the 10% of the total capital company, uninterruptedly during at least the three months prior to the general meeting for election of directors.

Furthermore, if the holders of voting shares and the holders of preferred shares without voting rights or with restricted voting rights are unable to secure the percentages required for a separate vote to elect one member (and alternate) to the board of directors, the two groups may join to elect a single member (and alternate), provided that their aggregate shareholdings represent at least 10% of the company's capital.

The board of officers is an executive body. With powers to conduct day-to-day business activities, the board of officers has exclusive authority to represent the company before

third parties. The board of officers is composed of at least two members, and all officers must be resident in Brazil, although they do not need to be shareholders of the company. The officers are elected by the board of directors. Up to one-third of the members of the board of directors may also serve as officers.

In order to have their securities traded in the stock exchanges or over-the-counter market, publicly-held companies must have, in addition to a board of directors, an investor relations officer responsible for providing information to members of the public who invested in the company, to the CVM and, if the company is registered with the stock exchanges or organized over-the-counter market, to those entities, in addition to ensuring that the company's registration is up to date, in accordance with CVM Ruling no. 480/09.

Finally, publicly-held companies must set up a fiscal council to advise them on matters related to their governance. The audit committee is the instrument available to shareholders to inspect the

management of the company. The council may function permanently or only when requested by the shareholders.

#### **6.4. Periodic Filing Requirements and Other Information**

Publicly-held companies are required to disclose and/or communicate various types of information related to their business.

On January 1, 2010, CVM Ruling n. 480/09 came into effect, replacing CVM Ruling n. 202/93. The new Ruling sets out rules for registration of issuers of securities traded on regulated markets and the filing requirements applicable to those issuers.

According to CVM Ruling 480/09, all information related to an issuer is consolidated in a single document, the Reference Form (*Formulário de Referência*), which must be updated regularly, replacing the old Annual Information Form. Thus, when making a public offering of securities, the issuer need only prepare a supplementary document on the securities being offered and

the features and conditions of the offering, and the offering document and the Reference Form will, together, provide investors with the information found in a traditional prospectus.

The CVM Ruling 480/09 classifies securities issuers according to the type of securities admitted for trading. “Category A” issuers are authorized to list any type of securities for trading on regulated markets, while “Category B” issuers are only authorized to list for trading securities other than shares, depository receipts, and securities that are convertible into, or give rights to, shares or depository receipts. The main difference between these two types of issuers is the quantity of information required by CVM to be released to the issuers’ shareholders and to the market.

Once a publicly-held company’s securities have been registered with the CVM, the registered company must provide periodic and event-related information to the CVM, by means of the electronic system available on the CVM’s webpage (CVM Ruling n. 480/09).

The information that must be submitted on a regular basis, at the times and in the form established by regulation, consists of:

- i. the issuer information form (*formulário cadastral*);
- ii. the reference form (*formulário de referência*);
- iii. financial statements;
- iv. the standardized financial statements form (*formulário de demonstrações financeiras padronizadas – DFP*);
- v. notices of call to the annual general shareholders’ meeting;
- vi. all the documents necessary for the exercise of voting rights at annual general shareholders’ meetings;
- vii. a summary of the decisions made at annual general shareholders’ meetings;
- viii. the minutes of the annual general shareholders’ meetings; and
- ix. the quarterly information form (*formulário de informações trimestrais – ITR*)

In addition to the information listed above, Category A issuers are also

required to submit information related to certain events or facts, at the times and in the form established by regulation, such as:

- i. notices of call to meetings of debenture holders and to extraordinary and special shareholders' meetings;
- ii. the minutes of meetings of debenture holders and of extraordinary and special shareholders' meetings;
- iii. the minutes of meetings of the board of directors, when the minutes contain resolutions intended to produce effects against third parties;
- iv. the minutes of meetings of the audit committee (conselho fiscal) at which opinions are approved;
- v. the evaluation reports required under art. 4 §4, art. 4-A, art. 8 §1, art. 45 §1, art. 227 §1, art. 228 §1, art. 229 §2, art. 252 §1, art. 256 §1, and art. 264 §1 of Law 6,404 of 1976 and under regulations issued by the CVM;
- vi. shareholders' agreements;
- vii. statements of material fact;
- viii. share trading policies;

ix. debenture deeds;

x. any other information that may be requested by CVM.

Items (i), (ii), (vii), and (ix) also apply to Category B issuers.

At the same moment that CVM issued its Ruling 480/09, which detailed the information to be provided by the issuers of securities, is also issued Ruling 481/09 which widened even more the amount and quality of information of mandatory release by publicly-held companies. Such additional obligation granted investors more elements to instruct their vote at shareholders' meetings.

In this regard, by means of CVM Ruling n. 481/09, the CVM started to require that publicly-held companies release detailed information about the matters that will be considered at each general shareholder's meeting, when such meetings are summoned. This information is expressly provided for in that ruling and it differs accordingly to the matter to be discussed, e.g. information related to capital reduction, capital increase, issuance of debentures, acquisition of control and withdrawal rights.

With respect to the release of the so called “Material Fact,” CVM Ruling n. 358/02 defines as relevant any act or fact related to the business of a company (including any decision by the controlling shareholder and any resolution adopted by the shareholders in a general meeting or by any of the management bodies of the company) that could influence (i) the quoted price of securities issued by the company; (ii) the decision by investors to trade in the company’s securities or to continue holding them; (iii) the decision by investors to exercise any rights attached to their ownership of the company’s securities.

CVM Ruling n. 358/02 gives examples of events that may constitute a material fact:

- i. changes in control of the company, including changes in control resulting from the signing, amendment or termination of shareholders’ agreements;
- ii. the signing, amendment or termination of shareholders’ agreements to which the company is a party or which have been entered in the company’s books;
- iii. authorization for trading securities issued by the company in any domestic or foreign market;
- iv. a decision to apply for cancellation of the company’s registration as a publicly-held company;
- v. merger, consolidation or spin-off involving the company itself or related companies;
- vi. transformation or dissolution of the company;
- vii. renegotiations of debt;
- viii. approval of stock option plans;
- ix. changes in the rights and privileges attached to securities issued by the company;
- x. share splits and reverse splits and the issue of share dividends;
- xi. acquisition of shares to be held in treasury or for cancellation, and the sale of shares so acquired;
- xii. signing or termination of agreements, or failure to close a deal, when the expectation of closing the deal is public knowledge;
- xiii. any change in the projections disclosed by the company;
- xiv. filing for judicial arrangement

with creditors, petition or confession of bankruptcy, or the bringing of any lawsuit that could affect the financial situation of the company.

The CVM may require a publicly-held company to disclose, correct, amend or republish information related to a relevant fact whenever the CVM believes that this is necessary. Likewise, both the CVM and the stock exchange or over-the-counter market on which the company's securities are admitted for trading may require the company's investor relations officer to provide further information to clarify communications and/or disclosures made in connection with a relevant fact.

Exceptionally, a publicly-held company may omit to disclose information required under periodic filing and other requirements, including relevant fact disclosure requirements, if the controlling shareholders or the management of the company conclude that disclosure of the information would put a legitimate interest of the company at risk, provided the information is not leaked and there is no unusual variation in the quoted

price or trading volume of the securities issued by the publicly-held company or related to it. In such cases, the company must submit to the CVM a statement of the reasons that led it to believe that disclosure would put a legitimate interest of the company at risk.

The basic information contained in the company's registration with the CVM must be kept up to date and the CVM must be informed of any change in that information.

The information must not only be submitted to the CVM but also be kept available to security holders at the investor relations department of the company. The CVM also makes the information available to the public, with the exception of information classified as confidential by the company.

The means of publication of required information by publicly-held companies are also regulated. The information must be published in the official gazette (*Diário Oficial*) published by the federal administration or state governments, depending on where the company

is established, and in a widely-circulated newspaper issued in the same city as that of the company's headquarters. The company must use the same newspaper for all publications, and any change in the newspaper the company uses must be notified in advance to the shareholders in the extract of the annual general meeting.

### 6.5. Public Tender Offer ("OPA")

Publicly-held companies are required to make a public tender offer (Oferta Pública para Aquisição de Ações, called an "OPA"), in accordance with the terms of the Brazilian Corporations Act and CVM regulations, in the following cases:

- i. public tender offer for cancellation of registration for listing of shares on regulated securities markets, which must be made by the controlling shareholder or by the company itself, with a view to acquiring all the shares issued by the company (art. 4 §4 of the Brazilian Corporations Law and CVM Ruling n. 361/02);
- ii. public tender offer to increase shareholdings, which must be made when the controlling shareholder's

interest reaches a percentage that, under CVM regulations, impedes the market liquidity of the remaining shares. The offer must be for all the shares of the affected class or type. (Art. 4 §6 of the Brazilian Corporations Law and CVM Ruling n. 361/02); and

- iii. public tender offer for transfer of control, which constitutes a condition for the validity of any transfer, direct or indirect, of control of a publicly-held company. The offer must be made by the shareholder who acquired control and cover all shares issued by the company that have full and permanent voting rights (art. 254-A of the Brazilian Corporations Act and CVM Ruling n. 361/02).

Late in 2010, CVM Ruling 361/02, which governs public tender offers, was amended by CVM Ruling 487/10. According to the CVM, the changes were motivated principally by the need to adapt the public tender offer rules to a scenario in which public tender offers to acquire control of publicly-traded companies are becoming more frequent. The amendments are also intended to update the provisions of CVM Ruling 361/02 in light of the experience

acquired by the CVM in public tender offers since that ruling was issued, in 2002.

The main changes made by CVM Ruling 487/10 are the following ones:

- (i) more specific rules on the offeror's confidentiality obligations prior to making the offer, and procedures to be followed if information on the offer escapes the offeror's control;
- (ii) detailing of the auction rules for public tender offers for control, prohibiting (a) third party intervention in the auction for acquisition of a smaller number of shares than sought by the offeror, and (b) any increase in the auction price by the offeror when a competing offer is made; as well as a substantial increase in the quantity and quality of information to be disclosed in the case of a public tender offer for control, by the offeror, the target company, its management and its main shareholders, especially on transactions involving shares and derivatives during the period of the public tender offer; and
- (iii) fine-tuning of the provisions on the evaluation reports to be obtained

by the offeror in some types of public tender offers, regarding the work expected and the liability of the valuers.

Generally speaking, the public tender offer is made to all holders of the same type and class of shares covered by the offer by publishing a notice at least once in the widely-circulated newspaper normally used by the company to publish its communications.

If at the end of the public tender offer for cancellation of registration procedure less than 5% of all the shares issued by the company remain in the market, the shareholders may, at a general meeting, authorize redemption of the shares for the price established in the public tender offer, and so withdraw them from circulation.

The public tender offer must be carried out by means of an auction on the stock exchange or organized over-the-counter market on which the shares covered by the offer are admitted for trading; if they are not admitted for trading, the offer may be carried out on a stock exchange



or organized over-the-counter market chosen by the offeror.

## **6.6. Primary and Secondary Public Offerings**

Publicly-held companies may make public offerings for distribution of securities in the primary and secondary markets, subject to the requirements established under applicable legislation, and particularly in CVM Ruling 400/03.

An offering is a primary offering when the issuing company offers the securities for distribution to the public with the aim of raising funds. A secondary offering occurs when one or more of the issuer's shareholders offer all or part of the securities they hold to the public. Primary and secondary offerings often occur simultaneously.

Any public offering of securities in Brazilian territory must be submitted for prior registration with the CVM. Among the registration requirements established in CVM Ruling 400/03 that deserve particular attention are those related to the prospectus,

which must contain information on the offer, the offered securities and the issuing company and its financial situation. The prospectus must be written in readily accessible language and the information contained in it must be complete, precise, accurate, current, clear, objective and necessary, so that investors can make an informed decision regarding the investment.

The use of advertising materials in connection with the offer depends on prior approval by the CVM. In no circumstances may information that is different from or inconsistent with the prospectus be disseminated to potential investors.

Depending on the specific characteristics of the offer, the CVM may waive registration of the offer, or certain registration requirements, such as publication, deadlines and other procedures established under the regulations, as the public offering set forth in CVM Ruling 476/09.

Publicly-held companies that have already carried out a public offering of their securities may file Securities

Distribution Programs with the CVM with the aim of facilitating the grant of registration for future offerings.

To carry out a public offering, the offeror must engage an underwriter to place the securities with the public. The offeror may authorize the underwriter to distribute a supplementary lot of securities, if demand is greater than expected, at the same price as the initial lot of securities. The prospectus must set out the limits for the supplementary lot, which may not be larger than 15% of the number of securities initially offered.

In addition, the offeror may, at its own discretion, increase the offering by up to 20%, without making a new application for registration or modifying the terms of the original registration.

The CVM has the power to suspend (for up to 30 days) or cancel an offering that is being carried out contrary to the law in force or to the terms of the offering's registration, or that is illegal, contrary to CVM regulations or fraudulent.

## **6.7. Differentiated Listing on BM&FBOVESPA S.A. – *Bolsa de Valores, Mercadorias e Futuros* (“BM&FBOVESPA”)**

BM&FBOVESPA's “Differentiated Levels of Corporate Governance” are a set of rules of conduct for companies, their managements and their controlling shareholders that BM&FBOVESPA considers important for increasing the value of shares and other assets issued by publicly-held companies.

There are currently four special listing segments on BM&FBOVESPA for securities issued by publicly-held companies. The listing level depends on the issuing company's adherence to the Differentiated Levels of Corporate Governance: (i) Level 1 Corporate Governance (“Nível 1”); (ii) Level 2 Corporate Governance (“Nível 2”); (iii) BM&FBOVESPA's New Market (“Novo Mercado”); and (iv) The New Entrants Market (“BOVESPA MAIS”).

Voluntary adherence by a company to these rules, and the consequent adoption of corporate governance

practices in addition to those applicable to all companies by law, allows the company to be listed on Level 1, Level 2 or the New Market, depending on the degree of its commitment to BM&FBOVESPA, or on BOVESPA MAIS, where the company is listed on the organized over-the-counter market managed by BM&FBOVESPA.

Corporate governance consists of a set of principles and practices intended to minimize potential conflicts of interest between those who supply capital to the company and those in charge of managing it. Three pillars support an efficient corporate governance: (i) the rules of conduct of the company, which may be established by law or by contract (corporate governance as such); (ii) the level of transparency in material information communicated to the public (disclosure); and (iii) the means used to ensure that these rules are effectively complied with (enforcement).

Adherence to BM&FBOVESPA's Differentiated Levels of Corporate Governance affords various benefits to all involved. For investors, it allows for (i) more accurate pricing

of shares; (ii) improvements in the process of monitoring and inspecting the company's business; (ii) greater security as to their rights in the company; and (iv) reduction of risks associated with the investment. For companies, it allows for (i) improved institutional image; (ii) increased demand for its shares; (iii) increased value of its shares; and (iv) lower cost of capital.

A publicly-held company may enter any of the BM&FBOVESPA listing levels by signing a participation contract that binds it to comply with the set of corporate governance rules for the selected level, which are set out in listing regulations issued by BM&FBOVESPA (the Level 1 Listing Regulations, the Level 2 Listing Regulations, the New Market Listing Regulations, or the BOVESPA MAIS Listing Regulations).

In 2010, BM&FBOVESPA submitted new Listing Regulations for Level 1, Level 2 and New Market to the CVM for review. The CVM gave full approval to the regulations and they came into effect on May 10, 2011. Companies that had listed securities prior to May 10, 2011 are required to amend their corporate by-laws

to bring them into compliance with the time periods set forth in new regulations.

The main practices currently required by BM&FBOVESPA for listing on each of the Differentiated Levels of Corporate Governance are described below:

In order to be listed at Level 1, companies must undertake, chiefly, to comply with a set of rules designed to improve the information made available to the public and the dispersion of shares. The main Level 1 practices are the following ones:

- i. the company must maintain a free float representing at least 25% of the company's capital;
- ii. it must adopt mechanisms that favor dispersion of the company's capital when public offerings are made;
- iii. it must meet additional requirements when preparing prospectuses for public offerings of securities;
- iv. it must not issue participation certificates;
- v. it must improve the company's

financial statements, quarterly informational filings, and reference form, particularly by including a note in the quarterly informational filings on transactions with related parties containing the information required under the accounting rules applicable to the annual financial statements and by describing the shareholdings, by kind and class of share, of all shareholders that hold 5% or more of each kind and class of the company's shares, either directly or indirectly, up to the level of individual persons (provided the company holds this information);

- vi. it must hold an annual public meeting with analysts and other interested parties to disclose information on the company's financial situation and its projects and outlook;
- vii. it must comply with disclosure rules in transactions involving assets issued by the company and held by the controlling shareholders;
- viii. it must disclose the terms of contracts between the company and related parties;
- ix. it must make available an annual calendar of corporate events;
- x. it must have a unified term of no

more than two years for all members of the board of directors;

xi. the positions of Chairman of the Board of Directors and Chief Executive Officer must not be held by the same person, except in cases of vacancy; and

xii. it must prepare and disclose its code of conduct.

To obtain a Level 2 classification, in addition to adopting the Level 1 practices, a company must adhere to a much wider set of corporate governance rules, which include the granting of additional rights to minority shareholders. The main Level 2 practices are the following ones:

i. the company must have a board of directors composed of at least five members, 20% of whom must be independent directors;

ii. it must ensure that all common and preferred shareholders are given the same price obtained by the controlling shareholders when selling control of the company, on the same terms and conditions;

iii. it must give voting rights to preferred shareholders on some

matters, such as transformation, merger, consolidation or split-up of the company and approval of contracts between the company and other members of the same group;

iv. the company's bylaws must not contain provisions that (a) limit the number of votes of any shareholder or group of shareholders to percentages below 5% of the total number of voting shares, except in the cases provided for in the regulations, (b) establish supermajorities for matters that must be submitted to the shareholders in general meeting, or (c) prevent shareholders from voting in favor of the exclusion or amendment of provisions of the by-laws or impose burdens on shareholders who vote in favor of exclusions or amendments;

v. the company's board of directors must publish a position statement on any public tender offer for shares in the company, setting out the reasons for the board's position;

vi. it must make a public tender offer for all shares in circulation, for at least their economic value, if the company cancels its registration as a publicly-traded company or leaves the Level 2 listing segment; and

vii. corporate disputes must be submitted to the Arbitration Chamber for resolution.

A company's securities may be listed on the New Market if the company adheres to the rules for Levels 1 and 2 and, in addition, undertakes to ensure that the company's capital is composed exclusively of common shares.

BM&FBOVESPA MAIS is a new segment of the organized over-the-counter market created to increase the opportunities for entering BM&FBOVESPA available to new publicly-held companies. In order to be listed on BM&FBOVESPA MAIS, the company must adhere to advanced corporate governance practices, similar to the rules applicable to the New Market, which ensure greater transparency and more shareholder rights. BM&FBOVESPA MAIS is intended to assist new entrants through a strategy of gradual access to capital markets, building up their exposure in the market and supporting their evolution in terms of transparency, shareholder base and liquidity.



## 7 - REGULATORY FRAMEWORK OF LOCAL CAPITAL MARKETS

### 7.1. Relevant Laws Affecting Local Capital Markets

The key law dealing with the securities market in Brazil is Law n. 6,385 of December 7, 1976, as amended (“Securities Law”). In addition, Law n. 6,404 of December 15, 1976, as amended (“Corporations Act”), contains important provisions for regulating the securities market in Brazil.

The Securities Law regulates the overall operation of the securities market in Brazil, including public distribution of securities, the listing of securities for trading in stock exchange and/or over-the-counter market (“OTC”), disclosure requirements, financial intermediation, brokerage, clearing, types of securities admitted for trading and types of companies whose securities can be traded in the Brazilian securities market. The Securities Law has also created the Brazilian Securities Commission (“CVM”), granting it regulatory and police powers over the Brazilian securities market.

The Securities Law is regulated

by resolutions, circular letters, rulings, opinions, deliberations and other rules issued by the National Monetary Council (“CMN”), the Central Bank of Brazil (“Central Bank”), CVM, stock exchanges and organized over-the-counter market (“Organized OTC”) entities.

### 7.2. Local Regulatory and Supervisory Authorities

#### 7.2.1. The National Monetary Council

According to the Securities Law, the CMN is, with respect to the Brazilian securities market, in charge of (1) defining the policy on the organization and operation of the securities market, (2) regulating the use of credit in the securities market, (3) setting general rules to be followed by CVM in exercising its functions, (4) defining the activities CVM has to carry out jointly with the Central Bank, (5) approving CVM’s personnel and regulation applicable to CVM’s personnel, and (6) establishing the remuneration to be paid CVM’s employees, including its president, officers and key personnel.



### 7.2.2. The Brazilian Securities Commission - CVM

CVM is an independent government body linked to the Ministry of Finance and managed by a president and four officers, who are appointed by the President of Brazil after being approved by the Brazilian Senate for a five-year mandate and are selected from individuals with a spotless reputation and solid expertise in the securities market.

CVM is in charge of regulating the Securities Law and Corporations Act in accordance with the policy defined by CMN and for inspecting, on a permanent basis, the disclosure of market-related information, their participants and values traded in the market.

CVM is also in charge of regulating and inspecting (1) the issuance and distribution of securities in the securities market, (2) negotiations and intermediations in the securities and derivatives markets, (3) the organization, operation of and transactions carried out by stock and commodity futures exchanges, (4) the management of portfolios

and custody of securities, (5) the audit of publicly-held companies and (6) the services of securities advisors and analysts, whether these services, as applicable, are carried out by participants in the securities distribution system: (a) financial institutions or other companies engaged in distributing securities, (b) companies engaged in purchasing outstanding securities for the purpose of reselling them, (c) companies and individuals that intermediate the trading of securities, whether in stock exchanges or on the over-the-counter market, (d) stock exchanges, (e) entities of the Organized OTC, (f) commodity futures brokerage firms, (g) special traders and commodity futures exchanges, and (h) securities clearing houses.

CVM can apply administrative penalties to individuals and entities that violate the Securities Law, the Corporations Act or any other law or regulation CVM is responsible for enforcing. The main penalties CVM can impose include: (1) warnings, (2) fines, (3) suspension or revocation of authorization or registration to engage in activities

CVM is responsible for regulating and inspecting, (4) temporary suspension, for up to twenty years, of officers, directors or members of the audit committee of a publicly-held company, entities of the securities distribution system or other entities that must be authorized by or registered with CVM to operate, (5) temporary prohibition, for up to twenty years, from carrying out certain activities or operations for participants in the securities distribution system or other entities that must be authorized by or registered with CVM to operate, and (6) temporary prohibition, for up to ten years, from operating, directly or indirectly, in one or more types of transactions in the securities markets.

The penalties applied by CVM do not affect in any way any the civil or criminal liability of parties found to have breached securities regulations.

CVM is a member of the Council of Securities Regulators of the Americas (Conselho de Reguladores de Valores Mobiliários das Américas, or “COSRA”), of the International Organization of Securities

Commissioners (“IOSCO”), of the Iberian American Institute for Securities Markets (Instituto Iberoamericano de Mercado de Capitais, or “IIMV”) and of the Southern Common Market - Mercosur (Mercado Comum do Sul – Mercosul).

CVM has also entered into memoranda of understanding for sharing information and legal assistance with securities regulators in the following countries: United States (the U.S. Securities and Exchange Commission and Commodity Futures Trading Commission), Argentina, Australia, Bolivia, Canada/Quebec, Cayman Islands, Chile, China, Equator, France, Germany, Greece, Hong Kong, Israel, Italy, Luxembourg, Malaysia, Mexico, Paraguay, Peru, Portugal, Romania, Russia, Singapore, South Africa, Spain, Thailand and Taiwan.

### 7.2.3. The Central Bank

Pursuant to Law N<sup>o</sup> 4,595 of December 31, 1964, as amended, the Central Bank is responsible for implementing CMN’s policies

concerning monetary policy, exchange controls, regulation of financial institutions, control of foreign capitals and any other matters related to the securities market under its competence, as determined by CMN.

The Central Bank is managed by a president and eight officers appointed by the President of Brazil after being approved by the Brazilian Senate for an indefinite mandate and are selected from individuals with a spotless reputation and solid expertise in economic-financial matters.

#### 7.2.4 . Self-Regulation

Self-regulatory entities, typically stock exchanges and Organized OTC entities, are subject to CVM's oversight. Self-regulatory entities are in charge of inspecting their members and of ensuring compliance with applicable rules and regulations. There are also purely self-regulatory entities, such as the Brazilian Financial and Capital Markets Association (*Associação Brasileira das Entidades dos Mercados Financeiro e de Capitais – ANBIMA*).

#### 7.2.4.1. Stock Exchanges

Stock exchanges are in charge of organizing, maintaining, registering and overseeing operations involving securities, among other responsibilities. For this purpose, stock exchanges can set additional rules to those issued by CVM.

The main Brazilian stock exchange is the BM&FBOVESPA S.A. – *Bolsa de Valores, Mercadorias e Futuros* (BM&FBOVESPA). A number of securities may be traded at BM&FBOVESPA – (1) securities, (2) rights, (3) indexes, (4) derivatives, (5) government bonds and (6) other negotiable bonds issued by private entities – as long as previous authorization is granted by the Central Bank and/or CVM, as appropriate.

BM&FBOVESPA offers a “home-broker” system, allowing investors to deliver their orders through the Internet to their brokers, who are in turn connected to the electronic systems of BM&FBOVESPA.

In December 2000, BM&FBOVESPA launched the New Market, Level 2 and Level 1, which are special

listing segments of the stock market designed for companies that accept to abide by stricter corporate governance rules and disclosure standards than those provided for in the Brazilian law.

The New Market is a listing segment that requires companies to comply with higher corporate governance standards than those applied to Level 2 and Level 1. Under the New Market, companies (or their controlling shareholders, as the case may be) undertake, among other things, to (1) keep their capital stock represented only by common shares with voting rights, (2) keep at least 25% of their shares in the free float, (3) offer to all shareholders the same terms and conditions as those enjoyed by the controlling shareholders in case of sale of the controlling stake (100% tag along), (4) launch a tender offer to repurchase their shares from all shareholders for at least the economic value, in case of delisting or cancellation of the agreement with BM&FBOVESPA that formalized the company's adherence to the New Market, (5) keep a board of directors made up of at least five members, 20% of whom are independent members, with a two-year mandate

at most, (6) provide annual financial reports prepared in accordance with an internationally accepted standard, (7) issue more complete financial reports, including quarterly cash-flow reports and consolidated reports reviewed by an independent auditor, and (8) disclose, on a monthly basis, the trading, by its officers, executives and controlling shareholders, in securities issued by it.

Level 2 imposes similar obligations to those of the New Market, and companies adhering to it may have their capital stocks represented by common shares with voting rights and preferred shares with restricted or no voting rights. Under certain circumstances, preferred shares are granted with voting rights, such as for approval of merger and acquisition transactions involving the company and agreements between the controlling shareholder and the company, whenever these decisions are subject to approval at a shareholders' meeting.

Level 1 requires adhering companies to, among other things, (1) keep at least 25% of their shares in the free float, (2) disseminate more

complete financial data, (3) issue annual financial reports prepared in accordance with an internationally accepted standard, and (4) disclose, on a monthly basis, the trading, by its officers, executives and controlling shareholders, in securities issued by it.

BM&FBOVESPA also created the BOVESPA MAIS, a special listing segment designed to make the stock market more readily accessible mainly to small and medium enterprises. Overall, the BOVESPA MAIS listing rules are similar to those applied to the New Market, and companies adhering to the BOVESPA MAIS can have their capital made up of preferred shares, which cannot, nevertheless, be traded.

Custody and clearance of transactions involving securities are carried out by a clearing house of BM&FBOVESPA and are carried out, as a general rule, on the 2nd and 3rd business days following the respective transaction date (financial and physical settlement, respectively).

#### 7.2.4.2 - The Organized OTC Market

The Organized OTC market is a trading environment managed by institutions authorized by and subject to the oversight of CVM that offers a trading system and establishes self-regulatory rules and mechanisms.

A number of securities may be traded at the Organized OTC market – (1) shares, (2) debentures, (3) audiovisual certificates of investment, (4) *quotas* of closed-end investment funds, including real estate funds and credit rights investment funds, (5) warrants, (6) indexes representing share portfolios, (7) put and call options over securities, (8) subscription rights, and (9) subscription receipts. CETIP S.A. (*Balcão Organizado de Ativos e Derivativos*) is an Organized OTC entity that also operates as custody and clearing house.

#### 7.2.4.3. Brazilian Financial and Capital Markets Association – ANBIMA

ANBIMA is a private regulatory agent that currently represents more than 340 institutions, including commercial, multiple and investment

banks, asset managers, brokerage firms, securities underwriters and investment advisors.

On June 1, 2011, ANBIMA approved a new self-regulatory code (“ANBIMA Code”) that sets out certain disclosure standards to be followed by its members while coordinating public offerings of securities in the Brazilian market. The ANBIMA Code establishes operational standards similar to those established in more mature countries in terms of capital markets organization.

The objective of the ANBIMA Code is to establish full disclosure standards on which the activities of financial institutions in the Brazilian capital market must be based on. Going beyond the requirements provided for in the Brazilian law, the self-regulatory regime regulated by the ANBIMA Code is similar to the ones adopted in modern self-regulatory regimes throughout the world and it created uniform rules for the public distribution of fixed and variable income securities in the primary and secondary markets. According to the ANBIMA Code, financial institutions acting as coordinators

of underwriting syndicates (underwriters) are also responsible for the contents of prospectuses and Brazilian 10-K-like forms (*formulários de referência*). They are also required to conduct independent due diligence to verify all material information concerning the issuer’s business, properties and financial status, relevant securities and other material facts that may have a bearing on an investor’s decision with regard to offered or requested investment funding.

The ANBIMA Code also establishes comprehensive rules for the minimum content of the prospectuses and Brazilian 10-K-like forms (*formulários de referência*), namely: (1) information concerning risk factors, with no mitigations, (2) description of the issuer’s main sector-related aspects, (3) description of the issuer’s business and corporate governance, environmental protection and social responsibility policies, (4) management’s discussion and analysis of the issuer’s financial condition and results of operations carried out in the three previous fiscal years, (5) information about

the issuer's existing securities and securities to be issued, (6) relevant administrative and judicial proceedings that affect the issuer, (7) description of operations with related parties and underwriters for issuance of securities, and (8) description of operations with underwriters acting as coordinators of the offering.

### 7.3. Definition of Securities

In Brazil, the concept of securities is formal and statutorily defined. According to the Securities Law, securities include (1) shares, debentures and warrants, (2) coupons, rights, subscription receipts and splitting certificates related to the securities mentioned in (1) above, (3) security certificates, (4) debenture certificates, (5) *quotas* of security investment funds or any asset investment clubs, (6) commercial papers, (7) future agreements, options and other derivatives whose underlying assets are securities, (8) other derivatives agreements, regardless of the underlying assets, and (9) if publicly offered, any negotiable instrument or collective investment agreement granting participation, partnership

or remuneration rights, including those resulting from the provision of services whose income derives from the work of an entrepreneur or third parties.

The following are expressly excluded from the category of securities and are therefore subject to the Central Bank's oversight: (1) instruments representing federal, state and local government's public debt and (2) exchange instruments issued by financial institutions, except debentures.

### 7.4. Offer and Distribution of Securities in Brazil

#### 7.4.1. The Concept of Public Offer and Distribution of Securities

Public offerings of securities in Brazil are subject to the restrictions imposed by the Securities Law. Any such offerings are subject to prior registration with CVM.

According to the Securities Law and CVM Ruling n. 400 of December 29, 2003, as amended (CVM Ruling 400), a public offering, which is therefore subject to prior

registration with CVM, consists in any sale, agreement, promise or offer to sell or subscribe for and acceptance of a sale or subscription request for securities of a publicly-held corporation that include any of the following elements: (1) the use of sale or subscription lists or receipts (*boletins de venda ou subscrição*), pamphlets, prospectuses or advertisement addressed to the public through any means, (2) solicitation of undetermined subscribers or buyers by employees, representatives, agents, individuals or legal entities, whether they take part in the Brazilian securities distribution system or not, (3) negotiations in stores, firms or establishments open to the public intended for partially or fully independent subscribers or buyers, or (4) use of oral or written publicity, including letters, announcements or notices, especially through mass or electronic communication media.

Registration with CVM is intended to ensure adequate and accurate disclosure of information about the issuer and the securities offered. However, it does not judge any risks involved in the issuance and does not

prevent securities from being sold by a poorly managed or unprofitable company, for example.

CVM Ruling 400 innovated by allowing CVM to waive registration for an offering or for some of its requirements (including publications, deadlines and procedures). For this purpose, CVM must take into consideration (1) the category of the publicly-held company, (2) the unit value of the securities or the total value of the offering, (3) the plan for distributing the securities, (4) whether the offering takes place in more than one jurisdiction, (5) the characteristics of the exchange offer, (6) the offering's target public, or (7) whether the offering is only intended for qualified investors.

In addition, CVM Ruling 400 allows publicly-held companies that have already made a public offering to file a securities distribution program with CVM according to which it can make public offerings in the future using simpler registration and analysis procedures. The distribution program remains effective for a two-year period at most and must be updated at least once a year.



CVM Ruling 400 also provides for the granting of automatic registration for public offerings of securities issued by well-known seasoned issuers. A company is considered to be a well-known seasoned issuer if it meets all of the following requirements: (1) its shares have been publicly traded for at least three years, (2) it has timely complied with its disclosure requirements in the last 12 months and (3) the market value of its outstanding shares is at least R\$5 billion based on the closing price of the last day of the quarter preceding the date on which the application for registration is submitted to CVM.

CVM Ruling No. 471 of August 8, 2009 (CVM Ruling 471) introduced a simplified procedure for registration of public offerings of securities that can be used by (1) publicly-held companies, (2) investment funds, or (3) foreign (or similar) companies sponsoring Brazilian Depositary Receipts (BDR) programs.

Applications for registration of the first public offering of shares, share certificates or BDRs cannot be submitted using this simplified procedure. Based on CVM Ruling 471, CVM and ANBIMA entered into

an agreement on August 20, 2008 authorizing ANBIMA to carry out preliminary analyses and prepare technical reports for applications for registration of public offerings using the simplified procedure.

In addition, CVM Ruling n. 476 of January 16, 2009, as amended (CVM Ruling 476), automatically waives registration with CVM for public offerings of commercial papers, banking credit instruments not issued by financial institutions, non-convertible debentures, *quotas* of closed-end investment funds, certificates of real estate or agribusiness receivables, and certificates of agribusiness credit rights, among other securities. For an issuer to enjoy this waiver, the public offering must be exclusively intended for 50 qualified investors at most and the offered securities cannot be subscribed or acquired, as the case may be, by more than 20 qualified investors.

#### 7.4.2. Registration Process

Public distribution of securities in Brazil may only be made by companies that are registered with

CVM as publicly-held companies. In addition to being registered with CVM prior to a public distribution, securities of a company must be admitted for trading on a stock exchange or non-organized or organized OTC.

#### 7.4.3. Registration of the Issuer as a Publicly-Held Company

According to CVM Ruling n. 480 of December 7, 2009, as amended (CVM Ruling 480), application for registration as a publicly-held company must be submitted to CVM with the following supporting documents: (1) copy of the minute of the shareholders' meeting approving the application for registration, (2) copy of the minute of the board of directors' or shareholders' meeting, as the case may be, appointing the investor relations officer, (3) copy of the company's by-laws, (4) the Brazilian 10-K-like form (*formulário de referência*), (5) information form (*formulário cadastral*), (6) audited financial statements for the last three fiscal years, (7) audited financial statements especially prepared for the intended registration, if a material change occurred in the issuer's

equity structure vis-à-vis the latest annual financial statements or if the issuer was incorporated in the same fiscal year that the application for registration is submitted to CVM, (8) management comments on the differences between the latest annual financial statements and those prepared in accordance with item 7 above, as the case may be, (9) copies of the minutes of all shareholders' meetings held on the last 12 months, (10) copies of the shareholders' agreements or similar agreements kept in file at the issuer's head office, (11) copy of the agreement for rendering electronic share registry services (*contrato de prestação de serviços de ações escriturais*), (12) standardized financial statement form (*formulário de demonstrações financeiras padronizadas - DFP*) for the last fiscal year, (13) policy for disclosure of information, (14) quarterly information forms (*formulário de informações trimestrais - ITR*) for the first three quarters of the ongoing fiscal year, (15) copies of the instruments formalizing the investiture of the issuer's directors and officers, (16) policy for share trading and (17) statements about

securities held by issuer's directors, officers, audit committee members and any member of any corporate body playing technical or advisory roles created by the company's by-laws.

#### 7.4.4. Requirements for Public Distributions of Securities

Public offerings of securities, either on the primary or on the secondary markets, must be authorized by CVM beforehand. For this purpose, the leading underwriter and the offerors must apply for registration and submit the following documents to CVM: (1) copy of the underwriting agreement and of any amendment thereto, (2) copies of the instruments of adhesion to the underwriting agreement, (3) copy of the price stabilization agreement, (4) copy of other contracts related to the offering, (5) copy of the standard subscription bulletin (*boletim de subscrição*) or of the acquisition receipt (*recibo de aquisição*), (6) copy of the draft or final prospectus, as the case may be, (7) copy of the minute of the shareholders' or board of directors' meeting approving the offering, (8) copy of the announcement to the

market (*aviso ao mercado*) and of the announcements indicating the beginning and end of the offering (*anúncio de início and anúncio de encerramento*, respectively), (9) copy of the standard security certificate or copy of the agreement for rendering electronic share registry services (*contrato de prestação de serviços de ações escriturais*), as the case may be, (10) deed of issuance of debentures and rating reports from rating agencies, if applicable, (11) statement that the company's registration with CVM as a publicly-held company is up to date, if applicable, (12) evidence that any other legal and regulatory formalities were complied with, (13) evidence that the registration fee was paid, (14) statements of the offerors and leading underwriter that the information contained in the prospectuses are true, (15) statement of the stock exchange or organized OTC that the issuer's securities are admitted for trading therein, and (16) other information or documents as required by CVM. CVM has 20 business days as of the filing of these documents to either grant registration or comment on the application package. This 20 business-day period may be

interrupted only once if CVM requires additional information about the application for registration. Offerors have up to 40 business days to comply with the requirements from CVM, which can be extended for an additional 20 business days and/or interrupted for up to 60 business days by reasoned request from the offerors. After the offerors comply with the requirements set by CVM, it will either grant registration or comment on the new application package within 10 or 20 business days, depending on whether the application package was changed only as result of CVM's requirements or not. If CVM decides that its requirements were not completely met, it will grant 10 business days for the offerors to fully comply with them before denying registration.

#### 7.4.5. Issuance of Depositary Receipts: Access to Foreign Capital Markets

Brazilian wishing to access foreign capital markets to raise funds by issuing shares must implement a depositary receipt program for this purpose. Depositary Receipts ("DRs") are certificates of the issuance of shares or of other stock-related securities by a Brazilian

publicly-held company.

Implementation of a DR program requires the appointment of a depositary – the foreign institution that will issue the DRs abroad based on the shares under custody in its name in Brazil - and of a Brazilian custodian, which will custody the shares backed by the DRs.

The DR program can be sponsored or not by a Brazilian publicly-held corporation. The establishment and operation of a DR program requires prior approval from CVM and the Central Bank. Registration with CVM is intended to ensure the same level of disclosure between the holders of DRs and the holders of their underlying shares. Registration with the Central Bank is required to ensure the transfer of funds from and to Brazil.

After the DR program is registered with CVM and the Central Bank, shares held by Brazilians or foreigners can be deposited with the custodian at any time for issuance of the corresponding DRs abroad. To sell the investment, foreign investors can sell the DRs abroad or request

their cancellation to the depositary and sell the underlying shares in Brazil.

#### 7.4.6. Access to the Brazilian Market by Foreign Companies through Security Depositary Certificate (BDR) Programs

Foreign corporations may trade their securities in the Brazilian stock market through security certificates issued by Brazilian institutions, which will represent the securities issued by foreign publicly-held companies (BDRs). The establishment of BDR programs must be approved by CVM and the Central Bank beforehand.

BDRs may be issued either under a three-tiered sponsored program or under a non-sponsored program. In either case, the issuers of the underlying securities are subject to the supervision of a securities and exchange commission with similar functions to those of CVM that signed a cooperation agreement with CVM in their country of origin.

### 7.5. Tender Offers for Acquisition of Shares of Brazilian Companies

#### 7.5.1. Takeovers by Tender Offer

Pursuant to the Corporations Act, acquisition of the controlling stake of a Brazilian publicly-held company may be made in cash or through exchange of shares. If carried out by a share exchange transaction, the tender offer must be previously registered with CVM.

The tender offer must attract a sufficient number of voting shares to ensure control of the company and must be intermediated and guaranteed by a financial institution.

The notice of tender must inform, among other things, the identity of the acquirer, the number of shares it intends to acquire, the price and other payment conditions, the procedure and other terms and conditions of the tender offer.

While until recently the large concentration of shares with voting rights held by a controlling shareholder resulted in the fact that virtually all transfer of control was carried out through private transactions, a fact known as *pulverização do controle* (diffuse share ownership) resulted from an increase in the number of

publicly-held companies with a shareholding structure where no single shareholder or group of shareholders holds the majority of the voting capital. This fact allows for the controlling stake of a company to be purchased in the market through tender offers, with no previous negotiation with their principal shareholders.

#### 7.5.2. Going Private - Delisting Tender Offer

The controlling shareholder or a public company may, at any time, make a tender offer for acquisition of all voting and non-voting shares held by other shareholders, with the aim of delisting the corporation.

Under a delisting tender offer, shareholders are invited to (1) sell their shares to the controlling shareholder or the company or (2) express their opinion in favor of or against the delisting.

Delisting requires acceptance of the offer or agreement and cancellation of the company's registration by shareholders representing more than 2/3 of the free floating shares which,

for this purpose, are considered the shares held by those that have expressly agreed to the cancellation of the company's public registration or have qualified to participate in the bidding.

If, after the conclusion of the delisting tender offer, less than 5% of company's shares remain in the free float, its shareholders, convened in a shareholders' meeting, can approve the redemption of these shares at the value offered in the tender offer, provided that it is deposited with a banking institution authorized by CVM to receive such deposit.

#### 7.5.3. Voluntary Tender Offer

A controlling shareholder of a Brazilian publicly-held company is required to launch a tender offer if it acquires more than 1/3 of each type and class of outstanding shares.

Such a tender offer requires prior CVM approval and may be conditioned to the acceptance of a maximum or minimum number of shares. The tender notice must specify, among other things, (1) the terms and conditions of the offer, (2)

whether the tender offer constitutes a business condition for any transfer of control and, if so, the type of condition, (3) justification and goals of the offer and (4) whether the controlling shareholder intends to delist the company.

Furthermore, if the controlling shareholder makes a new purchase offer within two years at a higher price than then the one paid to those who accepted the initial offer, these earlier sellers must be reimbursed for the balance of the prices between the first and second tender offers.

If within one year of the tender offer any event leading to exercise of the withdrawal right occurs, the shareholders who sold their shares in the tender offer but would have the right to withdrawal if they had not sold their shares will be entitled to any positive difference between the withdrawal price and the price paid at the time of acceptance of the offer.

If the purpose of the offer is acquiring more than 1/3 of the free float or results in the acquisition of more than 1/3 of the free float, the established rules for delisting tender

offers must be complied with.

## 7.6 - Investor Protection Rules

### 7.6.1. Disclosure by Public Companies

Public companies must publish quarterly financial statements (*formulário de informações trimestrais – ITR*) and standardized annual financial statements (*formulário de demonstrações financeiras padronizadas - DFP*).

The ITR must be accompanied by a special review report prepared by independent auditors and the DFP must be the object of a full audit.

In addition, pursuant to CVM Ruling 480, the information form (*formulário cadastral*) must be kept up-to-date always. A public company must submit an updated version of this form to CVM within up to seven business days after the occurrence of a fact leading to a change in its information form (*formulário cadastral*). The Brazilian 10-K-like form (*formulário de referência*) must be (1) submitted within up to five months after the end of each fiscal year, (2) updated together with a registration for a public offering

or (3) updated within up to seven business days after certain situations occur, such as (a) replacement of directors, officers or member of audit committee of the issuer, (b) issuance of new securities, even if privately subscribed, (c) changes in the direct or indirect controlling shareholders, (d) variations in shareholding positions equal to or higher than 5% of the same type or class of the issuer's shares, and (e) consolidation, share consolidation, merger or spin-off involving the issuer.

Public companies must also publish announcements of events that can materially affect trading in their securities.

#### 7.6.2. Disclosure by Shareholders of Public Companies

Any shareholder, including direct or indirect controlling shareholders and shareholders with powers to elect directors and members of the audit committee, must notify a public company whenever there is a 5% increase or reduction in their holdings of any type or class of the company's shares. Such notice

must contain information about the number of shares purchased or sold, price at which the securities were acquired or sold, reasons and objectives related to the acquisition and a statement by the purchaser regarding the existence of any agreement related to the exercise of voting right or to the transfer of securities issued by the company. The investor relations officer of a public company is responsible for conveying such information to CVM and stock exchanges or organized OTC entities where the securities of the company are admitted for trading.

#### 7.6.3. Market Manipulation and other Fraudulent Practices in the Securities Market

CVM also works to prevent the following situations from occurring in the securities market: (1) market manipulation, (2) creation of artificial demand, supply or price conditions, (3) adoption of unfair practices, and (4) fraudulent transactions.

Price manipulation results from use of any process or means to, directly or indirectly, increase, maintain or



decrease security prices, inducing the market to buy or sell such securities.

Artificial demand, supply, or price conditions in the securities market are those created by transactions whose participants or brokers, by willful misconduct or omission, directly or indirectly alter the flow of purchase and sales orders.

Fraudulent transactions in the securities market are those where any mechanism or device intended to mislead third parties is used with the aim of achieving illicit economic advantages for the parties involved in the transaction or for any other party.

Unfair practices are those resulting in one party obtaining an unfair dominant position vis-à-vis other market participants in the trading with securities.

Breach of such rules is deemed to be a serious offense under CVM regulations and may result in administrative sanctions. Furthermore, an investor harmed by such unlawful conduct may claim compensation for losses and damages.

#### 7.6.4. Insider Trading

Insiders are defined as controlling shareholders, officers, directors, audit committee members and any member of any corporate body playing either technical or advisory roles created by the company's by-laws. Pursuant to CVM rules, insiders cannot use information relating to a material act or fact to which they had privileged access due to their position to secure any advantage for themselves or other persons through the trading of securities.

Although not defined as insiders, the following individuals and entities are subject to the same restrictions: brokers, dealers and other members of the distribution system and any other person who, due to his or her position or function or for any other reason, has knowledge of material information prior to its disclosure to the market. Family relationships are taken into account in determining insider status.

Insider trading is also regarded as a serious offense under CVM regulations and perpetrators are subject to severe penalties.

Furthermore, investors harmed by insider trading in the purchase or sale of securities can claim compensation for losses and damages.

## 7.7. Money Laundering Law

Law No. 9613, as of March 3, 1998, as amended (Money Laundering Law), provides for criminal offenses related to money laundering or concealment of assets, rights and valuables.

The Money Laundering Law imposes several obligations on legal entities in the securities industry, including stock and commodities exchanges, organized OTCs, banks, brokers, dealers, asset management companies, branches and representatives of foreign financial institutions.

The obligations imposed on these individuals and entities by the Money Laundering Law include those of (1) identifying all of their clients and keeping data on them, (2) keeping on file all transactions carried out by these clients that exceed certain established limits, (3) complying with all requests from the Council for the

Control of Financial Activities (COAF), as determined by the relevant courts, and (4) developing and implementing internal control systems to monitor and detect transactions that may constitute money laundering, such as operations involving amounts that are not consistent with the financial status of the parties, trades that repeatedly cause losses or profits to one of the involved parties and negotiations involving amounts substantially above market conditions.

## 7.8. Civil Remedies

7.8.1. Securities sold in violation of the registration and/or prospectus requirements

Where an investor has purchased a security sold in violation of the registration and/or prospectus requirements set out in the Securities Law, the following remedies are available (1) action for recovering damages based on Law n. 7,193 of December 7, 1989, which may be brought, *ex officio*, by the Public Prosecutor's Office or upon CVM's request, and (2) action for recovering damages based on Article 186 of the

Brazilian Civil Code, which can be brought by a person harmed by any action or inaction on the part of an individual or company.

Investors may also claim damages against anyone engaged in fraudulent transactions or those involving artificial conditions of demand, price manipulation, or other unfair practices.

Derivative action for misleading information or omissions may be brought against the managers (directors and officers) of the issuer based on Articles 155 and 157 of the Corporations Act. Any shareholder can initiate a derivative action if the board remains inactive for more than three months after a decision made by the meeting of shareholders. Shareholders representing 5% or more of the company's capital may initiate a derivative action, regardless of any decision to the contrary by the shareholders' meeting.

Any investor can also sue issuers, underwriters and intermediaries, provided that their collusion in the act which caused damage can be proven.

## 7.8.2. Insider Trading

Where an investor has been harmed by insider trading in the purchase or sale of securities, remedy is available through action based on CVM Ruling 8 and Articles 147, 182 and 186 of the Civil Code.

## 7.8.3. Fraudulent Brokerage Activities and Handling of Brokerage Accounts

### 7.8.3.1. Excessive or Unfair Profits or Commission

Where an investor has been injured by fraudulent brokerage practices in the purchase or sale of securities as a result of excessive or unfair profits or commissions, remedies available include action for injuries based on Article 186 of the Civil Code or Articles 18 et. seq. of the Brazilian Consumer Protection Code.

### 7.8.3.2. Operating While Insolvent or Not in Sound Financial Condition and Other Losses Caused by Intermediaries

If an investor is injured by a broker operating while insolvent or otherwise financially unsound, remedies available include ordinary

action under Article 186 of the Civil Code.

#### 7.8.4. Class Actions

Class actions in Brazil are restricted to environmental and certain other specific issues and do not apply to issues relating to securities. However, the Public Prosecutor's Office may bring action on behalf of and for the benefit of investors under Law n. 7,913/89 of December 7, 1989.

#### 7.8.5. Waiver of Rights

Investors acquiring a security may, in principle, waive their rights under the Securities Laws, rules, and regulations. However, such waivers may be disregarded by a judge if not duly communicated to investors or if such waiver is deemed to be in breach of fundamental investor protection principles. Consumer protection provisions are considered to be a matter of public order and, accordingly, cannot be waived. For the same reasons, private agreements do not preclude action brought by CVM or by any stock exchange.

#### 7.8.6. Procedural Requirements

##### 7.8.6.1. Jurisdiction

State courts generally have jurisdiction over civil suits and thus over remedy for securities violations.

##### 7.8.6.2. Venue

In general, courts in the domicile of the defendant are competent to hear any case based on the Securities Law.

##### 7.8.6.3. Statute of Limitations

Under Article 205 of the Brazilian Civil Code an action is subject, in general, to a 10-year statute of limitation.



## 8 - TAX SYSTEM

### 8.1. General Features

8.1.1. The Brazilian Federal Constitution, promulgated on October 5, 1988, confers powers to the Union, the States, and Municipalities to levy taxation.

8.1.2. Taxation in Brazil may take the form of taxes, fees, betterment fees, other contributions, and compulsory loans. Taxes may be levied by the three levels of government, according to their specific competence, as provided for in the Constitution.

8.1.3. Fees collected at the three levels of government are used to fund services such as law enforcement and to finance the actual or potential use of other specific and divisible public services provided or made available to taxpayers.

8.1.4. Betterment fees, which are still not very much used, are collected from owners of real estate for improvements to their assets resulting from public civil construction projects.

8.1.5. The following contributions can only be collected by the federal administration: (a) social contributions (payroll charges); (b) contributions to intervene in the economic domain, (c) contributions in the interest of professional or economic categories and (d) contributions to finance social security.

8.1.6. Compulsory loans can only be instituted by the federal administration to defray urgent public investment of relevant national interest or cover extraordinary expenses resulting from public calamity or war abroad.

8.1.7. Unless otherwise expressly provided for in the Constitution, some fundamental constitutional rules must be complied with for establishing and collecting taxes, among which the following ones deserve special mention:

- The principle of legality (according to which taxation may only be levied or increased by law passed by the National Congress);

- The rule of equality (according to which taxpayers in equivalent situations must receive identical tax treatment);
- The principle of non-retroactivity (according to which taxation cannot be levied based on facts that occurred prior to entering into force of the law that created a new tax or which increased rates or the calculation basis of an existing one);
- The principle of precedence (according to which taxes cannot be collected in the same fiscal year in which the law that created them or increased their rates was published, nor prior to ninety days of said publication. Contributions, on the other hand, can be collected in the same fiscal year, but must comply with the ninety-day deadline);
- The principle of non-confiscation (according to which taxes cannot be confiscatory).

## 8.2. Federal Taxes

8.2.1. Brazilian residents are subject to taxation on a universal basis, that is, all their income

is subject to taxation in Brazil, regardless of its source (whether in Brazil or abroad).

### 8.2.2. Personal Income Tax (IRPF)

- Income earned by resident individuals from domestic legal entities is generally subject to withholding income tax at a progressive rate ranging from 0% to 27.5%, depending on the amount of income received.
- Income received from foreign entities (and from resident or non-resident individuals) is subject to income tax under a system known as *carên-leão*, according to which the tax is calculated and paid monthly by the individuals themselves on the basis of the same progressive rates mentioned above.
- Capital gains obtained by resident individuals on the transfer or disposal of any rights and assets are generally subject to income taxation in Brazil at a 15% flat rate, regardless of whether such right or asset is located in Brazil or abroad. Gains obtained by non-resident individuals are only subject to taxation in Brazil if derived

from the transfer of rights or assets located in Brazil. If a non-resident individual acquires residency status, gains derived from rights and assets he or she acquired as a non-resident are only subject to taxation in Brazil if such rights and assets are located in Brazil, that is, gains obtained by resident individuals on the sale of rights or assets located abroad that were acquired while such individual was a non-resident are exempt from taxation in Brazil.

### 8.2.3. Corporate Income Tax (IRPJ)

- Brazilian legal entities can apply three methods to verify the calculation basis of the Corporate Income Tax, namely, real profit, presumed profit and arbitrated profit.

- The choice of the real profit or presumed profit method is discretionary, but the real profit method is mandatory for legal entities (i) whose total annual revenues in the preceding year exceed R\$48,000,000.00; (ii) which earn income or gains obtained abroad through foreign branches and/or representative offices (income derived from exports of services

or goods are not deemed to have been obtained abroad); (iii) which are financial or similar institutions; (iv) which are engaged in factoring activities; or (v) which are entitled to specific tax benefits and exemptions.

- In the real profit method, the tax is calculated on an annual or quarterly basis on profits before taxes, duly adjusted in accordance with the provisions of the applicable tax law. Any tax losses incurred in the tax period may be carried forward and offset against taxable income earned in subsequent periods, up to a limit of 30% of the taxable profit in each subsequent period.

- If the legal entity opts for payment based on yearly profits, said profits will be calculated from the profit-and-loss statement drawn up in December, covering the results for the entire calendar year, but the tax must be pre-paid monthly. The monthly pre-payment may be reduced or suspended if the taxpayer submits accounting evidence that the pre-paid value p to that month exceeds the tax value calculated on the basis of real profit.



- Entities that opt for the real profit method are subject to Corporate Income Tax at a rate of 15%, plus a 10% additional rate on income exceeding R\$20,000.00 a month.

- Under the presumed profit regime, the tax is calculated on a quarterly basis at the same rates applied under the real profit method (mentioned above) over a profit margin calculated through the application of a percentage of the gross revenue of the legal entity, without any adjustment or deduction. Such percentage varies according to the taxpayer's activities. The presumed profit percentage may range from 8% (trade/industrial operations) to 32% (service providers).

- The arbitrated profit basis is only applied in exceptional cases, such as when the tax authority detects signs of fraud or for some reason (such as fire and robbery of tax-related records or documents) the company cannot submit its income tax returns to the tax authority. According to this method, profits are arbitrated considering all information about sales, bank operations, etc., and information from other sources

that can provide an estimate of the company's profits.

#### 8.3.4. Simplified Taxation Regime – *SIMPLES*

- Under the simplified and unified taxation regime known as *SIMPLES*, the amount of all taxes is determined by applying a single rate to the entity's gross revenue. This rate varies according to the gross revenue and the nature of the entity's business activity.

- Because of its simplicity, the simple taxation regime is seen as sort of a tax incentive. For this reason, legal entities must comply with several strict requirements to qualify for it, mainly the following ones: (i) their annual gross revenue must be less than R\$2,400,000.00; (ii) they cannot be incorporated as a corporation (limited liability companies can benefit from the regime); (iii) only natural persons can hold their *quotas* (no legal entities can be quotaholders); (iv) none of their quotaholders can be domiciled abroad; (v) none of their quotaholders can hold *quotas* of another entity also benefiting from

the *SIMPLES* regime if the total revenue of both of them exceeds the R\$2,400,000.00 limit; (vi) they cannot operate interstate or intercity passenger transportation or provide services of an intellectual, scientific or artistic nature, etc.

#### 8.2.5. Tax on Industrialized Products (IPI)

- The tax on industrialized goods (Imposto sobre Produtos Industrializados – IPI) is levied on output and imports of industrialized goods and it is a non-cumulative tax, meaning that the amount of tax due may be offset by credits arising from the purchase of raw materials, intermediary products, and packaging materials. However, no credits are granted for goods that become fixed assets. Rates are assessed on the value of manufactured goods as they are imported or output from domestic plants, and they vary according to the nature of goods. The average rate is 10%, which may be raised or lowered by the tax authority. Export goods are exempted from IPI.

#### 8.2.6. Import Tax (II)

- The Import Tax is levied on imports of goods into the Brazilian territory. Its rates vary according to the nature of the goods and their classification under the Mercosur Common Nomenclature (NMC), but it usually ranges from 0% to 35%. The Import Tax is not a recoverable tax.

#### 8.2.7. Export Tax

#### 8.2.8. Tax on Financial Transactions (IOF)

- The IOF is a tax on credit, foreign exchange and insurance transactions and on transactions with securities. Its rates range from 0% to 25% and it can be waived under certain circumstances according to monetary and foreign exchange objectives and to fiscal policies.

#### 8.2.9. Rural Property Tax (ITR)

- The ITR is an annual tax levied on ownership of rural real estate property. ITR rates range from 0.03% to 20%, depending on the region and on the property's productivity.

#### 8.2.10. Tax on Large Fortunes (*Imposto sobre Grandes Fortunas – IGF*)

- The IGF) has not been instituted yet. There are great uncertainties among tax specialists around the standard that should be adopted to define the concept of large fortunes.

### **8.3. State and Federal District Taxes**

#### 8.3.1. Value-added tax (*Imposto sobre Circulação de Mercadoria e Serviços – ICMS*)

- The ICMS is the main state-level tax and it is due on operations involving circulation of goods (including manufacturing, marketing, and imports) and on interstate and inter-municipal transportation and communications services. It is non-cumulative, and thus tax due may be offset by credits arising from the purchase of raw materials, intermediary products, and packaging materials. Tax credits for goods destined to become fixed assets can be accepted, subject to certain restrictions. The ICMS is not levied on exports.

#### 8.3.2. Inheritance and Gifts Tax (*Imposto sobre Transmissão Causa Mortis e por Doação, de Quaisquer Bens e Direitos – ITCMD*)

- The ITCMD is a state-level tax levied on the assignment of real property, credits, shares, *quotas*, equity, securities and other assets of any nature, as well as of rights related thereto, by way of donation or inheritance. ITCMD rates range from 0% to 8% of the fair market value of the assigned asset or right.

#### 8.3.3. Tax on the Ownership of Automotive Vehicles (*Imposto sobre a Propriedade de Veículos Automotores – IPVA*)

- The IPVA is a tax assessed annually on the ownership of automotive vehicles and motorcycles.

### **8.4. Municipal Taxes**

#### 8.4.1. Service Tax (*Imposto sobre Serviços – ISS*)

- The ISS is a municipal tax levied on the provision of services. The services to which the ISS applies

are listed in a Complementary Law. ISS rates range from 2% to 5%, depending on the domicile of the company providing a taxable service and the type of service being provided. The ISS is usually levied by the municipality in which the company providing a service is established, but in some cases it is levied by the municipality in which the service is provided.

#### 8.4.2. Property Transfer Tax (*Imposto sobre Transmissão de Bens Imóveis* - ITBI);

- The ITBI is a municipal tax levied on transfers of ownership of Brazilian real property and rights related thereto. The basis for calculating it is the value of the transaction or the market value appraised by the Municipality, whichever is higher. Municipalities are allowed to appraise and update the real estate value through market research.

- Usually, the ITBI is not levied on transfer of property resulting from a contribution to capital or corporate reorganization. Notwithstanding, transfers of property or related rights by incorporation to capital

contribution of a legal entity is subject to the ITBI tax if the business purpose of the transferee involves purchase and sale or lease of real property.

#### 8.4.3. Urban Property Tax (*Imposto Predial e Territorial Urbano* - IPTU);

- The IPTU is levied on an annual basis. The IPTU tax basis is the market value of the real property. If the real property does not fulfill the basic requirements of having a social purpose as set forth in the Municipality's program, the tax authorities may apply a higher rate.

### **8.5. Contributions**

#### 8.5.1. Social Contribution on Net Profits (CSL)

- The CSL is levied on profits before income tax ascertained in accordance with commercial law, adjusted as set forth in the law. CSL's rate for non-financial entities is currently is 9% (15% for financial entities). Entities which opt for the presumed method are subject to a presumed basis of 12% or 32%.

### 8.5.2. Contribution for Social Security Financing (COFINS) and Contribution to the Social Integration Program (PIS)

- PIS and COFINS are contributions levied monthly on gross revenue earned by legal entities. There are two regimes for PIS and COFINS. In general, companies that chose the presumed profit method are subject to the cumulative regime of PIS and COFINS, while those opting for the real profit method are subject to the non-cumulative PIS and COFINS regime.
- With few exceptions, under the cumulative regime, PIS and COFINS are applied at a combined rate of 3.65% on revenues from sales and services, while under the non-cumulative regime, PIS and COFINS are applied at a combined rate of 9.25% on gross revenues.
- The law regulating the non-cumulative regime of PIS and COFINS is very detailed. For the purposes of this Guide, it suffices to mention that the following items can be used as credits against PIS and COFINS: (i) assets acquired for resale; (ii) assets

and services used in rendering services or in production goods and products for sale, including fuel and lubricants; (iii) electricity used by facilities of legal entities; (iv) lease of buildings, machinery and equipments paid by legal entities (lease paid by individuals do not generate PIS and COFINS credits); (v) machinery, equipment and other assets incorporated into fixed assets to be used in providing services or in production goods and products for sale; (vi) buildings and improvements on real estate owned by the taxpayer or used by third parties in the taxpayer's activities; (vii) returned goods and assets, provided that the correspondent sale revenue was taxed in previous months; (viii) storage and freight paid for sales, provided that such expenses were borne by the seller.

- PIS and COFINS are also levied on imports of goods and services at a combined rate of 9.25%, with few exceptions. The amount paid is usually recoverable as input tax credit if the taxpayer has opted for the non-cumulative regime.

### 8.5.3. Contributions on corporate payroll

- In general, the payroll of Brazilian enterprises is subject to the following contributions: Social Security Contribution (INSS) at a rate of 20%; Contribution to the Social Service of Commerce (SESC) at a rate of 1.5%, Contribution to the Brazilian Micro and Small Business Support Service (SEBRAE) at a rate of 0.2%, Contribution to the National Institute for Colonization and Agrarian Reform (INCRA) at a rate of 1%, Contribution to the National Industrial Apprenticeship Service (SENAI) at a rate of 1%, Payroll-based Contribution to Education (SE) at a rate of 2.5%, and Contribution for Work Accidents (RAT), the rates of which range from 1% to 3% (that is, payroll-based taxes are levied at a combined rate of 26.8%-28.6%).

## 8.6. Foreign Investors

8.6.1. Taxes on the income of foreign investors in Brazil depend on the regime adopted for registering their investments with BACEN.

8.6.2. Two regimes are available for

foreign investments in enterprises in Brazil, namely: (i) under Law n. 4,131/62, as Foreign Direct Investment by means of direct acquisition of equity interest (4,131 Regime); or (ii) under BACEN's Resolution n. 2,689/00, as portfolio investment.

8.6.3. In Brazil, foreign investors are usually taxed at the source of income through withholding. In general, foreign investors must comply with the following rules:

### 8.6.4. Tax Haven Jurisdiction

- Law n. 11,727/08 introduced a new concept of tax haven in the Brazilian legislation, recognizing the difference between Favorable Tax Jurisdictions and Privileged Tax Regimes.

- On June 7, 2010, the Brazilian Internal Revenue Service (*Receita Federal*) issued two separate lists: (i) the first one lists countries and dependent territories/areas that do not tax income or tax it at a rate of less than 20% at most or whose law does not grant access to information about the corporate structure of

legal entities or their ownership (also known as the “Black List”); and (ii) the second one lists regimes that are considered Privileged Tax Regimes under Brazilian law (also known as the “Grey List”).

- According to Brazilian tax rules, the following jurisdictions fall under the classification of Favorable Tax Jurisdictions: Andorra, Anguilla, Antigua and Barbuda, Dutch Antilles, Aruba, Ascension Island, Commonwealth of the Bahamas, Bahrain, Barbados, Belize, Bermuda, Brunei, Campione D’Italia, Channel Islands (Alderney, Guernsey, Jersey and Sark), Cayman Islands, Cyprus, Singapore, Cook Islands, Republic of Costa Rica, Djibouti, Dominica, United Arab Emirates, Gibraltar, Grenada, Hong Kong, Kiribati, Lebuán, Lebanon, Liberia, Liechtenstein, Macau, Madeira, Maldives, Isle of Man, Marshall Islands, Mauritius, Monaco, Montserrat Islands, Nauru, Niue Island, Norfolk Island, Panama, Pitcairn Island, French Polynesia; Queshm Island, American Samoa, Western Samoa, San Marino, Saint Helena Island, St Lucia, the Federation of Saint Kitts and Nevis, Island of Saints Peter and Miquelon;

Saint Vincent and the Grenadines, Seychelles, Solomon Islands, St. Kitts and Nevis, Swaziland, Switzerland (currently suspended from the list by ADE RFB n.11/10), Sultanate of Oman, Tonga, Tristão da Cunha, Turks and Caicos Islands, Vanuatu, American Virgin Islands, British Virgin Islands.

- According to Brazilian tax rules, the following jurisdictions fall under the classification of Privileged Tax Regimes: Holding companies incorporated under Danish law with no substantial economic activity; Holding companies incorporated under Dutch law with no substantial economic activity (currently suspended from the list by ADE RFB n.10/10); International trading companies incorporated under Icelandic law; Offshore companies incorporated under Hungarian law; LLCs settled under U.S. state law, held by non-residents and not subject to federal income tax in the U.S.; *Entidad de Tenencia de Valores Extranjeros* incorporated under Spanish law (currently suspended from the list by ADE RFB n. 22/10); International trading companies (ITC) and international holding companies (IHC) incorporated under Maltese law.

#### 8.6.5. Capital gains

- Capital gains realized by non-residents on investments registered with the Brazilian Central Bank are subject to a 15% withholding income tax rate or 25% if the beneficiary is resident or domiciled in black-listed jurisdictions.

#### 8.6.6. Dividends

- Dividends based on profits ascertained as of January 1, 1996 paid out or credited by corporations are no longer subject to income tax (either at the source or as part of the taxpayer's return), whether paid out to individuals or corporations domiciled in Brazil or abroad.

#### 8.6.7. Interest

- Interest paid to nonresidents is subject to withholding income tax at a rate of 15%, or of 25% if the beneficiary is resident or domiciled in black-listed jurisdictions.

#### 8.6.8. Interest on Net Equity (JCP)

- JCP is subject to withholding income tax at the rate of 15%, or of 25% if the beneficiary is resident or

domiciled in black-listed jurisdictions. Differently to what occurs with the amounts paid as dividends, JCP paid or credited are deductible expenses in the calculation of taxable income of the paying company.

#### 8.6.9. Treaties to Avoid Double Taxation

- Brazil is signatory of several bilateral tax conventions to avoid double taxation of income and capital which in principle follow (though with some important deviations) the Organization for Economic Co-operation and Development (OECD) model convention.

- Brazil has conventions to avoid double taxation of income and capital in force with the following countries: Argentina; Austria; Belgium; Canada; Chile; China; Czech Republic; Denmark; Ecuador; Finland; France; Hungary; India; Israel; Italy; Japan; Korea (South); Luxembourg; Mexico; Netherlands; Norway; Peru; Philippines; Portugal; Slovakia; South Africa; Spain; Sweden; and Ukraine.

#### 8.6.10. Transfer Pricing

- As of January 1, 1997 a number of rules were introduced in income



tax law to regulate transfer pricing in deals carried out by resident individuals or corporations with non-resident parties regarding importation and exportation, and payment of interest abroad. These rules apply to deals involving the following situations: (i) a domiciled corporation that carries out business with non-domiciled related parties; (ii) a domiciled corporation which carries out business with a related or unrelated party domiciled in black-listed jurisdictions or under Privileged Tax Regimes.

#### 8.6.11. Thin Capitalization

- Under Brazilian thin capitalization rules, interest paid to related parties, domiciled or incorporated abroad, may be deductible on an accrual basis for Corporate Income Tax only if (i) indebtedness does not exceed twice the amount of their participation in the net equity of the Brazilian entity, considering each debt separately or all combined; and (ii) indebtedness with individuals or legal entities resident or domiciled in favorable taxation jurisdictions or under privileged tax regime does not exceed thirty per cent of the net equity of the Brazilian entity,

considering each debt separately or all combined.

#### 8.6.12. Financial and Capital Market

- Non-residents that invest in Brazilian financial and capital market under the 2,689 Regime are subject to a more favorable tax treatment: (i) income arising from swaps, investment funds and non-deliverable forward agreements effected outside the Brazilian stock exchange are subject to taxation at a flat rate of 10%; (i) fixed income investment and income arising from financial transactions carried out outside the Brazilian stock exchange are subject to a 15% rate; and (iii) capital gains derived in stock exchanges, commodity exchanges, futures exchanges and others alike are exempt from taxation.

- Brazilian law prevents the above-mentioned more favorable tax treatment from applying to foreign investors residing or domiciled in black-listed jurisdictions.

## 9 - ANTI-TRUST LEGISLATION

Law 4,137 of September 10, 1962 introduced antitrust legislation largely based on the U.S. regulatory model. However, it can be said that owing to lack of interest on the part of the Government and of the authorities responsible for instituting and enforcing the law, for almost 30 years Brazil's antitrust system remained virtually inoperative.

Since the 1990s, however, with the passage of Law 8,002 and Law 8,158, new impetus was given to combating crimes against the economic order, to protecting free competition, and to defending consumers' rights. This renewed interest in ensuring fair market conditions led to the passage of Law 8,884 of June 11, 1994, which brought Brazil's antitrust legislation into force.

The Administrative Council for Economic Defense (CADE), established in 1962, became an independent government agency linked to the Ministry of Justice and was granted broad administrative enforcement powers under Law 9,884 to protect the public and

the constitutional order. CADE retains title to legal goods under its protection, exercised on behalf of the community, and in this role it is assisted by the Secretariat for Economic Law (SDE) and the Secretariat for Economic Monitoring (SEAE). Its jurisdiction may extend to acts performed abroad that may have consequences in Brazil. The law regards as a company domiciled in Brazil any foreign corporation with a subsidiary, branch, agency, office, representative or the like in Brazil (article 2, § 1st, as amended by Law 10,149 of December 21, 2000, which amended Law 8,884). Moreover, under § 2nd of the same article, foreign companies shall receive notification and summonses pertaining to all procedural acts, regardless of any power of attorney, contractual or statutory provisions, in the name of the person responsible for its branch, agency, subsidiary, or other establishment in Brazil.

Prior to stipulating offenses against the current economic order, Law 8,884/94 clearly provides for the authorities' jurisdiction over any and all individuals and corporate

entities, public or private companies, organizations and joint ventures, including those of a temporary nature or without legal personality. The antitrust law also specifies the individual liability of corporate officers and managers, severally or jointly with the company itself. Moreover, Section 18 specifies, under limited circumstances, conditions in which stockholders can be held personally responsible for corporate liabilities.

The acts considered breaches of the economic order prohibited by antitrust law include efforts: to limit or impair free competition; to control any relevant market for goods and services; to increase profits arbitrarily; or abusive exercise of economic power. Furthermore, also forbidden under the rules currently in force are: any price fixing agreements among competitors; market sharing covenants; imposition of obstacles to market entry; dumping; withholding of goods with a view to forcing prices up; and fixing of excessive prices. The law lists no less than twenty-four different infractions to be carefully considered. Penalties can be severe,

depending upon the gravity of the offence, the number of times it has occurred, and the economic status of the perpetrator. Penalties may be of the order of 30% of the company's total gross sales in the preceding fiscal year, and may also entail a fine to be paid by the manager as an individual, ranging from 10% to 50% of that sum which, in the event of recurrence, may be doubled. Furthermore, it provides for other penalties, such as prohibition on conducting business, contracting, or obtaining benefits from government bodies.

Unjustified failure of a defendant or third party to comply with a summons to provide oral testimony in the course of preliminary investigations or administrative proceedings may result in a fine ranging from R\$ 500.00 (five hundred reals) to R\$ 10,700.00, (ten thousand, seven hundred reals), taking into consideration his financial status (article 26, § 5, of Law 10,149/2000). Moreover, the defendant may be subject to a penalty ranging from R\$ 21,200.00 (twenty-one thousand, two hundred reals) to R\$ 425,700.00 (four

hundred and twenty-five thousand, seven hundred reais), taking into consideration his financial status, in the event that he impedes, obstructs, or in any other way hampers any investigation, be it under administrative proceedings or the preliminary phase thereof (article 26-A, Law 10,149/2000)

Under an innovation introduced by Law 10.149/2000 relating to the above-mentioned penalties, there is a possibility of plea bargain with the authorities, in the event that individuals or corporations involved in violations against the economic order decide to collaborate with investigators in the administrative proceedings, in which case they may be spared punitive action by the public authorities, or obtain a lesser penalty, ranging from one to two-thirds of the applicable fine (article 35-B).

It should also be noted that CADE, SDE and SEAE proceedings may be opened based on third-party claims. There is no appeal against CADE rulings in the administrative sphere, and any party that feels aggrieved can only seek redress in the courts.

Under Law 8.884/94 parties are obliged to seek prior CADE approval for agreements that may hinder free competition or result in market dominance. In such cases (in accordance with article 54) requests must be submitted prior to completion of the transaction, or within 15 business days thereof. As of January 1, 2001, the fee for filing such requests is R\$ 45,000.00 (forty-five thousand reais). Prior approval from CADE is usually preferable, given that the complexities and untoward consequences of an unfavorable a posteriori ruling may even invalidate the agreement or actions already implemented thereunder.

It should also be mentioned at this point that, according to article 54, acts that may damage free competition or result in market dominance, and thus require CADE approval, include: mergers of companies or groups of companies, resulting in a market share of over twenty percent, or in which any of the participants has reported annual gross billings of R\$ 400,000,000.00 (four hundred million reais) in its last balance sheet. However, CADE

Digest 1, published in the Official Gazette (DOU) on October 18, 2005, finds that the criteria established in the aforementioned article 54 apply only to annual gross billings in Brazil, of the parties involved in the operation submitted for approval. This finding is important, in that it has significantly reduced the number of submissions to CADE just based on the fact that one of the companies involved in the operation had foreign annual gross billings amounting to R\$ 400,000,000.00 (four hundred million reais) or more.

It is important to note that article 54 clearly states that mergers may be approved, provided they meet certain objectives and legal criteria (productivity, quality, and technology gains, no direct damage to current competition and, above all, clear benefits for consumers resulting from lower prices). It should also be observed that, in certain cases, CADE may condition its approval of a merger, when it is legal and possible, to the signing of a “performance commitment” by the parties for the fulfillment of certain goals, on pain of penalties for non-compliance.

For the purposes of approval processes prior to or after the transactions mentioned in article 54 are completed, on August 19, 1998 CADE issued Resolution no. 15 (which was partially revoked by Resolution n. 45, dated March 28, 2007), which details the information and documents required to be attached to an application. The list of required data is very comprehensive and may present some difficulties to the submitting party, since some documents refer to international levels.

In its final section, Law 8,884/94 even foresees circumstances in which state intervention may be imposed by means of a judicial order or of a court-appointed interventor.

A Bill drawn up to amend Law no. 8,884 (Bill no. 3,937) is being reviewed at the Brazilian Congress and it is expected to be passed before 2011 is over. It proposes provisions such as the inclusion of “commercial practices” in the list of potential violations of the economic order; elimination of the possibility of CADE changing the percentage of 20% as a criterion for presumption

of dominance in a given economic sector; adjustments in the amount of applicable fines; and prior notification of mergers (for prior analysis), replacing the currently accepted practice of reporting such operations within 15 working days of their completion.



## 10 - LABOR LAW IN BRAZIL

Labor Law in Brazil was strongly influenced by developments and trends in Europe resulting from efforts made by various countries to codify laws to protect workers and, particularly, by Brazil's commitments to the International Labour Organization. These influences, alongside significant domestic factors, including labor policies adopted by the Brazilian Government and burgeoning industrialization, triggered the establishment of a body of laws.

The Consolidated Brazilian Labor Laws (*Consolidação das Leis do Trabalho* – CLT) only came into effect in 1943, harmonizing the sparse laws that existed then and including provisions drawn up by the jurists who drafted the CLT.

The CLT is the main legal instrument governing labor relations in Brazil and it contains more than 900 articles.

The chapters of the CLT encompass the following rules:

Special Standards for Protection of Labor:

- identification of the position or role of workers;
- working hours, minimum wage and annual vacations;
- occupational safety and health;

Special Standards for Protection of Labor:

- special provisions on working hours and conditions;
- nationalization of labor;
- protection for female and child workers;

Rules for individual employment contracts;

Rules for unions:

- establishment of unions, legal framework for unions and union fees;

Rules for collective bargaining agreements;

The CLT also provides for all the rules applicable to the Brazilian labor court system and related agencies and those applicable to labor proceedings.



Although the CLT was enacted in 1943, the Brazilian legal system has been modernized over the years and several laws were passed since then to provide for important issues, such as the strike law or laws drawn up for the sole purpose of changing the wording of some CLT articles.

The Federal Constitution of 1988 introduced new labor rights and enhancements to the standards provided for in the CLT.

The labor rights provided for in the Federal Constitution, the CLT, and specific labor laws are the following ones:

- 1) minimum wage;
- 2) eight daily working hours and 44 weekly working hours at most;
- 3) 15-minute snack and rest break if daily working hours exceed 4 hours and are less than 6 hours, and at least a 1-hour and at most a 2-hour break if daily working hours exceed 6 hours.
- 4) no reduction in wages;
- 5) unemployment insurance;
- 6) 13th wage;
- 7) profit and/or result sharing;
- 8) additional pay for overtime for up to 2 overtime hours paid with an accrual of 50% on the ordinary hour or with an accrual of 100% for working on Sundays and holidays (these percentages may be even higher, if contemplated in a collective bargaining agreement);
- 9) 30-day annual vacation and accrual of one third allowance, as provided for in the Federal Constitution;
- 10) 120-day maternity leave;
- 11) 5-day paternity leave;
- 12) 30-day notice for dismissal for cause or resignation;
- 13) retirement (based on the number of years contributing to the social security system, age, disability);
- 14) recognition of application of collective rules;
- 15) severance pay (FGTS);
- 16) the right to strike;
- 17) provisional job stability for members of an Internal Accident Prevention Committee (CIPA), employees carrying a disease or who suffered an employment-related

accident, pregnant employees, etc.;

- 18) tips;
- 19) commissions;
- 20) family allowance;
- 21) transportation passes;
- 22) day-care allowance;
- 23) unhealthy working-conditions premiums of 10%, 20% or 40% of the minimum wage in force;
- 24) risk premium of 30% of the worker's wages;
- 25) reduction of night shifts and night-shift premium of 20% of the worker's wages for working from 10 p.m. to 5 a.m. on the following day;
- 26) transfer allowance at a rate of 25% of the employee's salary;
- 27) paid weekly rest;
- 28) unemployment insurance; among others

Other sources of law observed by the Brazilian Labor Courts include:

- a) Collective Bargaining and Labor Agreements;
- b) High Labor Court (TST) Jurisprudence Statements;

- c) Standards issued by the Ministry of Labor and Employment (MTE); and

- d) Certain Conventions of the International Labour Organization.

In addition to the above-listed labor rights (items 1-28), collective agreements (Collective Bargaining and Labor Agreements) may provide for other labor rights such as: medical insurance, food allowance, food stamps, etc. These collective bargaining agreements may also provide for more advantageous rights than those contemplated in the law, such as overtime pay above the additional pay set forth in the law (50% and 100%), more than 30-day notice of dismissal for cause or resignation, etc.



## 11 - FOREIGN WORKERS IN BRAZIL

According to Law 6,815 of August 19, 1980, authority to grant work permits to foreign nationals in Brazil is the exclusive competence of the Ministry of Labor's Immigration Coordination Unit (CGI)

Authorities have a considerable degree of discretionary power when dealing with issues relating to immigration, which are regarded as matters of national sovereignty. Therefore, they reflect national foreign policies and reciprocity of treatment.

Visa applications do not necessarily imply that a visa will be granted and, in themselves, do not signify that any right has been acknowledged.

There are various types of visas provided for in the Brazilian law, and eligibility depends essentially on the specific situation and purpose of travel to Brazil. Not all visas allow foreigners to work in Brazil. Generally, criteria for obtaining a visa are not influenced by the nationality of the applicant or by whether he or she has a spouse or children under 18 years of age.

The law provides for seven categories of visas:

- Transit visa
- Tourist visa
- Temporary visa
- Permanent visa
- Courtesy visa
- Official visa
- Diplomatic visa

The most common categories of visas sought by those wishing to immigrate to Brazil are the Tourist, Temporary and Permanent visas.

### 11.1. Short-term Business and Tourist Visas

Visas are required for nationals of certain countries traveling to Brazil on short-term business or as tourists. Holders of such visas may not work, perform technical assistance services, nor receive payment for services from any source in Brazil.

A Business visa may be obtained at the Brazilian Consulate in the jurisdiction of residence of the applicant. Generally, an application

for a Business visa consists of the following:

A supporting letter from either the foreign or Brazilian company requesting the business trip, stating the following:

- The purpose of the trip and the activities the foreigner will perform while in Brazil;
- Names, addresses and telephone numbers of business contacts in Brazil;
- Date of arrival and tentative departure date;
- Guarantee of financial and moral responsibility for the applicant for the duration of the visit.

A Business visa allows the foreigner to participate in meetings, conferences, fairs, and seminars, to visit potential clients, to conduct market research, and perform similar activities. As mentioned above, a foreigner holding a Business visa may not work in Brazil, and any company employing such a foreigner is subject to a fine, and the foreigner to deportation.

A Tourist visa can usually be

obtained by showing a round-trip airline ticket and proof of financial support capacity during the visit in Brazil. A Tourist visa is valid only for tourism purposes, and any company that employs foreigners holding such a visa is subject to the same penalties mentioned in the previous paragraph.

If an applicant for a Tourist visa requires a visa to enter a country he/she proposes to visit upon leaving Brazil, that visa should be stamped on the passport prior to requesting the Brazilian visa.

It generally takes only 24 hours to obtain a Tourist visa. Such visas are generally valid for a period 90 days, counting as of the first arrival in Brazil and allow multiple entries during that period. An extension for a further period up to 90 days may be obtained from immigration authorities in Brazil before the visa expires. In any case, a foreigner on a Tourist visa may remain in Brazil for no longer than 180 days within a given 365-day period (it should be noted that this is not a calendar year, but rather a period of 365 calendar days).

## 11.2. Temporary Work Visas

For individuals coming to Brazil on a temporary basis for work purposes, several types of visas may be applicable depending on the specific situation or circumstance. The categories of workers eligible for such visas are listed below:

(1) **Professionals employed by Brazilian companies.** Individuals with specialized skills or knowledge unavailable in Brazil coming to the country to work for a short period as employees of a Brazilian company are eligible for this type of visa. Such visas may initially be issued for a period of up to two years and may be renewed for an additional two-year period. Proof is required of at least one year of experience in the activity the candidate is to perform in Brazil in the case of a university graduate, or two-year experience in the case of a non-graduate. The foreign national is expected to provide proof of specialized knowledge or skills, professional experience, or management skills that are not readily available on the Brazilian domestic labor market. The Brazilian company is required

to meet the “2/3 rule”, whereby 2/3 of its employees and of those on its payroll should be Brazilian citizens. The company must also provide information regarding its corporate wage structure, and on wages to be paid to the candidate both in Brazil and abroad. The portion paid in Brazil must be approximately 25% higher than the portion paid abroad.

(2) **Technical personnel with no employment contract.** Foreign individuals coming to Brazil to provide technical services or technology transfers, under a Technical Assistance or Technology Transfer Agreement signed by a Brazilian and a foreign company. Such visas are not appropriate for foreign nationals coming to the country to perform managing, administrative, or financial activities. Except when the companies belong to the same group, such Agreements must be registered with Brazilian Patent and Trademark Office (INPI) prior to the visa application. In the latter case, the technician is not an employee of the Brazilian company and any remuneration should be paid exclusively from a source abroad. The sponsoring company

is responsible for the candidate's medical expenses and for those of his/her dependants while the candidate is working in Brazil. This type of visa may be granted for one year, with the possibility of an extension for an additional year, provided all requirements are met. In cases of emergency, such a visa may be issued by the Brazilian Consulate in the jurisdiction of the applicant's residence, for a non-extendable period of 30 days. An emergency is defined as an unforeseen situation that places in jeopardy life, the environment, or the assets and capacity of operation of a Brazilian company.

(3) **Artist and athletes.** Applications for this category of visa should be submitted to the Brazilian Ministry of Labor by the Brazilian organization sponsoring the event for which the individual's services are required. Information about the event and respective contract must be submitted along with the application.

(4) **Foreign journalists.** A foreign journalist working on a temporary basis in Brazil as correspondent of a foreign media company should

apply for this type of visa with the sponsorship of the company. The wages of such journalists may not be paid in Brazil. The visa application should be requested directly at the Brazilian Consulate abroad with jurisdiction over the individual's place of residence.

(5) **Crew of chartered vessels under contract or lease agreements.**

Such visa applications must be accompanied by authorization for the vessel to operate in Brazilian waters, a report from the Navy, and a copy of the respective contract. Part of the crew must be comprised of Brazilian nationals.

(6) **Research Scientists.** Such visas are designed for foreign professors, technicians, scientists, and researchers intending to carry out activities in Brazilian public or private schools, universities or research institutions. A letter and employment contract from the institution sponsoring the visa application are required in this case.

(7) **Social work.** A temporary visa may be granted for up to two years for a foreign volunteer wishing to

perform religious or social work services in a Brazilian institution. Such foreigners may not receive remuneration for temporary volunteer work performed in Brazil.

With the exception of foreign journalists and social workers, all applicants for these types of visa must first obtain a Work Permit from the Brazilian authorities. Such Permits are issued by the Ministry of Labor and, prior to granting a permanent or temporary visa to any person wishing to work in Brazil, Brazilian Consular Authorities are required by Brazilian law to demand that applicants obtain a work permit. When the permit is issued, a notice is published in the Federal Official Gazette (DOU), the relevant Consulate is notified, and the foreign national may be granted the visa.

### 11.3. Other Temporary Visas

Other types of visas may be issued to foreigners coming to Brazil for purposes other than work. It should be observed that the visas listed below do not entitle the bearer to work in Brazil or receive any remuneration from a Brazilian source.

Visas in this category are listed below:

(1) **Religious missions and studies:** Such a visa may be granted to clergy on specific missions in Brazil, for up to one year.

(2) **Student visas.** Student visas may be obtained at a Brazilian Consulate with jurisdiction over the applicant's place of residence. Foreign students in exchange programs are required to furnish documents from the school and exchange program.

(3) **Trainees.** Such a visa is required of foreign graduates wishing to attend a trainee program in Brazil for a 12 month period, with no employment relationship to a Brazilian entity. The visa application requires proof of graduation within the previous 12 months, and a declaration that any remuneration shall be paid exclusively from abroad.

(4) **Internships.** Such a visa is required of foreign individuals attending internship programs in Brazil, including employees of foreign companies with a Brazilian



subsidiary, that have no employment links to any Brazilian entity. Such a visa application requires a Commitment Term between the intern, the Brazilian institution and the internship program coordinators. Such a visa is valid for no more than one year.

(5) **Health Treatment.** Such a visa is required of foreign individuals intend who come to Brazil for health treatment. The visa application should be accompanied by a doctor's recommendation and proof of capacity to pay for health treatment.

#### 11.4. Permanent Employment Visa

A Permanent visa may be issued under four circumstances: (i) family ties to a Brazilian national (marriage, children); (ii) retirement; (iii) appointment to a representation and managing position in a Brazilian company (Statutory Director); or (iv) foreign investor – natural person.

(1) **Family Ties.** If the applicant is married to a Brazilian citizen or has a Brazilian child, he or she is eligible for a permanent visa than can be

issued by a Brazilian Consulate abroad prior to arrival in Brazil or by the Ministry of Justice, if the candidate is already in Brazil. In this case, the applicant is allowed to work in Brazil.

(2) **Retirement.** Individuals who have already retired in their home country and intend to transfer their permanent residence to Brazil are also eligible for a permanent visa. They must provide evidence that they can transfer to Brazil at least a minimum amount of R\$6,000.00 (six thousand reais) monthly. Foreign retirees with more than two dependents must make an additional transfer, in foreign currency, of R\$2,000.00 (two thousand reais) for each additional dependent.

(3) **Foreign corporate officers.** An officer of a foreign company that has a branch or subsidiary in Brazil wishing to transfer residence to Brazil is eligible for this category of visa. Individuals who are to be permanently transferred to Brazil to work for a subsidiary or branch of a foreign-owned company in the capacity of director or manager may also apply for a permanent

visa with the right to work. To be eligible to apply for a permanent visa for its director or manager, the foreign company must have invested no less than R\$600,000 (six hundred thousand reais) in Brazil for each foreign officer. Alternatively, the minimum investment may be reduced to at least R\$150,000.00 (one hundred fifty thousand reais) for each officer if the foreign company takes on the commitment to generate, within the two following years, at least 10 new jobs after the company is established or its officer takes office. Moreover, the name of the officer must figure in the Brazilian Company's by-laws, conditioned to approval of the visa, and confirmed in the position once he/she is granted the visa. If this foreigner is appointed an officer in more than one company of the same group or conglomerate, the Ministry of Labor must issue prior authorization.

**(4) Individual foreign investor.** A permanent visa may be granted to an individual who invests no less than R\$150,000.00 (one hundred and fifty thousand reais) in a new or existing Brazilian company. Exceptionally, the Ministry of Labor may grant a

permanent visa to an individual who invests less than R\$ 150,000.00 (one hundred and fifty thousand reais) provided that he/she presents a detailed business plan committing the Brazilian company to create no less than ten new jobs for Brazilian nationals in the following five years, among other obligations.

Furthermore, persons who have been employed in Brazil on a temporary basis (regardless of whether the employing company is Brazilian or foreign-owned) for a period of four years may apply for permanent resident status. To obtain a permanent work permit, an individual who has worked in Brazil on a temporary basis for four years must submit an application to the Ministry of Justice no less than 30 days prior to expiry of the four-year deadline.

### **11.5. Registration upon Entry into Brazil**

Upon entering Brazil with a Temporary Work Visa or a Permanent Visa, foreigners must register with the Federal Police (Ministry of Justice) and obtain the foreigners ID card within 30 days of arrival.

This rule applies only to alien residents in Brazil, immigrants, and temporary residents with the right to work (artists, athletes, tourists, and businesspersons on short visits are not required to register).

Holders of Temporary work visas and Permanent visas must also register with the Brazilian Internal Revenue Service (SRF/MF) and their earnings are subject to taxation under Brazilian tax law.

Employees of Brazilian companies must obtain a Work Document (CTPS), in compliance with the Brazilian labor law. For its part, the Brazilian company must sign the work document and notify the Ministry of Labor within 90 days of the foreigner's arrival in Brazil.

Foreigners holding a Permanent or Temporary work visa and employed by a Brazilian organization are subject to Brazilian taxation as of the date of entry into Brazil. Holders of all other types of Temporary visas are considered residents for tax purposes as of their 183rd day in Brazil.

Work visas entail an employment link with the sponsor organization. Any change of employer is subject to prior approval by the Ministry of Justice and the Ministry of Labor.

Upon finally leaving Brazil, the foreigner must submit a "Declaration of Final Departure" to the Federal Revenue Service (SRF/MF) and request cancellation of his/her taxpayer registration and tax liability. The sponsoring company must inform the Ministry of Labor when the foreigner's employment contract is terminated, so that the visa and registration may be canceled.

### **11.6. Travel in Advance of Permanent or Temporary Employment**

Individuals traveling to Brazil on business may, prior to obtaining a work permit and appropriate visa, obtain a short-term business visa. Such a visa does not entitle them to work in Brazil or to receive payment from local sources until the work permit and visa have been issued. Such individuals should obtain a Permanent or Temporary visa at the Brazilian Consulate with jurisdiction

over the individual's residence.

### **11.7. Employment of Spouses/ Offspring**

Accompanying spouses and offspring may remain in Brazil as dependents of the visa holder for as long as the visa is valid. However, such dependants are not permitted to engage in employment or any paid activity while residing temporarily in Brazil without first converting their visa into resident status.



## 12 - ACQUISITION OF REAL ESTATE IN BRAZIL

### 12.1 - Introduction

Under Brazilian law, issues relating to property are subject to the law of the country where such property is located (*lex rei sitae*). Essentially, issues relating to real estate property in Brazil are governed by the Brazilian Civil Code (CCB).

The CCB classifies assets by physical criteria, whereby they can be divided into two broad categories: movable assets and immovable assets. Movable assets are those that can be removed by external forces or by themselves without causing their own destruction or devaluation.

Immovable assets (land and buildings) are, by nature, immobile or fixed to the soil, naturally or artificially, and cannot be partially or totally removed without causing their own destruction or devaluation, i.e., without substantially altering or destroying them. Immovable property encompasses land, and anything that has been naturally or artificially incorporated thereto.

Brazilian law further confers certain rights with the status of immovable assets for legal purposes. This is the case with deeds to immovable property, government stock incorporating an inalienability clause, and inheritance right to property through succession, even when inheritance is comprised only of movable assets.

As a general rule, owners of land also own the subsoil. Therefore, a landowner may excavate to a reasonable depth for construction of basements or subterranean garages. The landowner cannot, however, prevent third parties from engaging in activities at depths that do not put his property at risk, provided that such activities are carried out in the public interest (*e.g.*, excavation of subway lines, passages for conduits, etc.).

Land ownership rights, according to the Brazilian Civil Code, do not encompass mineral deposits, mines and mineral resources, potential hydroelectric power sources, archeological sites, or other assets referred to in specific laws. It thus makes a clear distinction between

land ownership and rights to such elements of the subsoil (mineral and hydroelectric resources), which are considered Federal Government property. Thus, federal authorization or a license is required for exploitation of mineral and hydroelectric resources.

Air space is subject to similar rules. A landowner may build vertically on his land, provided he observes limitations foreseen in law (*e.g.*, zoning rules). He may refuse construction by third parties on his land, or block the building of structures that may place him in jeopardy. He may not, however, interfere with activities taking place above a certain height, and that pose no risk (aircraft routes, installation of power lines at a safe height, etc.).

Foreign individuals or foreign-owned companies may acquire real estate in Brazil under the same conditions as Brazilian individuals or companies. However, according to Internal Revenue Service Order (*Instrução Normativa*) 200, non-resident individuals or organizations must be registered with the General Register of Corporate or Individual Taxpayers

(CNPJ or CPF) prior to purchasing any real estate in Brazil. Furthermore, special conditions apply to ownership by foreign individuals or companies of property located in coastal or frontier zones, as well as in certain specifically designated national security areas.

Foreign individuals or foreign-owned companies may acquire rights *in rem* relating to immovable property. Rural areas can also be acquired, as well as rights *in rem* related to them, provided that certain restrictions, discussed in 12.3.3, are observed.

## 12.2 - Possession and Ownership

The two most significant concepts relating to real estate are the right of possession and the right of ownership:

(i) **Right of possession:** The right of possession stems from use of the land by an agent as if he were its owner. When said agent acting on his own behalf behaves as if he were the owner, he assumes the right of possession. Possession thus implies the right to exercise certain powers typical of ownership, such as: the

right to claim, maintain, or recover the possession of property, the right to its fruits (including rents and other incomes therefrom), the right to be compensated for necessary improvements effected, and the right to retain possession.

Possession ceases when, by voluntary or involuntary means, power is no longer exercised over the asset. This may occur when the property is forfeited by abandonment, by transference, by loss or destruction; if it becomes ineligible for purchase or sale, if possession is lost to third party, in the event of failure to maintain a claim or reinstate possession, or when the party legitimately in possession transfers his right to another, maintaining the asset in his power in the name of the acquirer (*constituto possessório*).

(ii) The right of ownership is most relevant of all property rights and it is defined by the Civil Code as the right of an individual to use, enjoy, and dispose of his goods, and to recover them from whoever may unlawfully have taken possession of them. It is an absolute and exclusive right.

Full right of ownership implies that all the legal powers (to use, enjoy, dispose of the asset and to recover it from whoever unlawfully possesses it) are concentrated in the same hands. Limited right of ownership implies that some such powers are in the hands of, and may be exercised by, another person. It should be noted, however, that in cases of joint ownership, or condominium, in principle, full ownership rights, rather than limited ownership, applies. Under a condominium, each co-owner has rights to an undivided fraction of the asset. As a rule, powers deriving from the ownership can be exercised simultaneously by all co-owners.

The right of ownership may be restricted due to public interest or in respect for the property rights of third parties, as in the following situations:

i. expropriation of real estate properties by the government (ownership of private property is transferred to the expropriating authority upon payment of fair compensation);



ii. restrictions on urban land use or zoning, including building codes, limitations on the location of industrial plants, established by a municipal master plan;

iii. restrictions imposed in the interests of national security, including limitations on the sale of private land in coast areas or within 150 kilometers of national borders; and

iv. restrictions to the right of the proprietor to freely dispose of his goods, arising from insolvency, bankruptcy, or composition with creditors, with a view to protecting creditor's rights.

## **12.3 - Acquisition and Loss of Ownership**

### 12.3.1 - General Provisions

Under Brazilian law, ownership of real estate property is constituted upon the registration of the public or private instrument (deed) whereby the sale was accomplished at a Real Estate Registry in the jurisdiction where the property is located.

However, an instrument involving real estate property that has not been duly registered at the respective Real Estate Registry is only binding only between the parties to the purchase/sale agreement and, thus, is not be enforceable against third parties.

Real estate property is acquired upon registration of the deed of transfer, which may be: (i) by the sale agreement signed by the parties; (ii) by accession (i.e., expansion of a property as a result, for example, of a displacement of a land strip caused by natural forces); (iii) squatters rights (i.e., acquisition of ownership rights by occupation and possession over a certain period of time, in law); and (iv) by inheritance.

One of the principles that govern the real estate registration system is the principle of priority, whereby the person who first registers a real estate property or presents deeds for registration has priority.

Likewise, any action which modifies, extinguishes, transmits or creates rights relating immovable properties must be registered with the competent Real Estate Registry.

These include: (i) court decisions enabling undivided land to be divided among various owners; (ii) court orders winding-up the estate of a deceased person or division of property for composition with creditors; (iii) public auctions or adjudications; and (iv) rulings on separation, divorce, and annulment of marriage, when settlement of rights *in rem* to immovable properties is involved.

The main grounds for extinguishing real estate ownership are:

- (i) Expropriation, i.e., a unilateral act of public law whereby individual ownership is transferred to a government authority, upon prior payment of fair and compensation, in the public interest;
- (ii) transfer, meaning transmission to a third party, by an *inter vivos* transaction or as a legacy, for a payment or free of charge;
- (iii) Waiver (for example, when an heir renounces rights of inheritance); and
- (iv) Neglect or destruction of the property.

### 12.3.2. - General Considerations and Requirements for Purchasing Real Property

The most usual way of acquiring real property in Brazil is by *inter vivos* transaction of real estate property, which entails a formal sales agreement between the purchaser and the seller.

If said property is acquired by an individual purchaser, as opposed to a condominium, then he/she has absolute title thereto. In cases of multiple ownership, i.e., a condominium, each owner can exercise any rights of ownership not compromised by the indivisibility of the property (i.e., one party to the condominium cannot sell the property without consent of all the other owners, and any revenues from sale of the property must be divided among them).

Prior to promulgation of the New Brazilian Civil Code, Law 4,591/64 provided for condominiums of apartments and/or offices, being an autonomous and independent unit of property, on a single piece of land. In this case, the indivisibility

mentioned in the previous paragraph does not apply. Significant changes to Law 4,591/64 were introduced by the New Civil Code, including the introduction of fines on co-owners who fail to comply with their duties (i.e., paying condominium fees, not effecting construction work that might jeopardize the safety of the property, not to use the property in a manner that disturbs the peace, etc.)

Aside from specific requirements relating to the transfer of immovable property, Brazilian law requires, for all types of contract, that parties to a sale agreement be capable of fulfilling the transaction. They must be of full legal age, in sound mental health, or duly represented.

It is also advisable that any real property acquisition is preceded by an analysis of the situation of the real estate and of its current owners, in order to avoid that facts not acknowledged by the purchaser jeopardize the transaction and even result in annulment or ineffectiveness of the juridical transaction. Therefore, it is advisable to obtain and analyze the: (i) copy of the updated real estate record and 20-year clearance

certificate and clearance certificate regarding liens and claims; (ii) fiscal clearance certificates relating to the real estate (IPTU tax, for example); (iii) fiscal clearance certificates relating to the owners of the real estate; (iv) clearance certificates issued by the local courts to verify the existence of lawsuits involving disputes on the real estate that could compromise the owner's assets (hindering, as a result, the alienation of the real estate or resulting in the reversal of the transaction).

### 12.3.3. Acquisition of Rural Land by Foreigners

Under Brazilian law (Law No. 4,504/64), rural property ranges from rustic buildings to continuous areas, regardless of location, devoted to extractive activities, farming, cattle-raising or agro-industry, whether by the private sector or under public land tenure policies.

A foreign individual residing abroad cannot acquire rural property in Brazil. This restriction is not applied only in the case of legitimate succession (i.e., if the foreigner is called upon to acquire the rural

property as a legal heir of the previous owner).

According to the laws currently in force, foreigners who have permanent residence in Brazil:

(i) Are free to acquire or lease one (1) rural property not exceeding three (3) modules for indefinite exploitation (MEI). The MEI is a unit of rural land established by the National Institute for Colonization and Agrarian Reform – INCRA for geographic areas sharing the same socioeconomic and ecological characteristics, according to the type of rural exploitation they are best suited for; and

(ii) Cannot acquire or lease rural real estate exceeding fifty (50) MEIs.

Similar restrictions to those applicable to foreign individuals with permanent residence in Brazil are applied to foreign legal entities.

The law provides that:

(i) Foreigners who have permanent residence in Brazil can only acquire or lease rural property for the purpose of implementing agricultural,

cattle-raising, industrial or settlement projects. In addition, in the case of foreign entities, such projects must be contemplated in their articles of association. These projects must be approved by the Brazilian Ministry of Agriculture, Livestock and Supply (MAPA) and, depending on the type of project (industrial, colonization, agricultural project, etc.), other federal government bodies in charge of the respective activities may be called upon to review the application as well; and

(ii) Congress must authorize the acquisition or lease of areas exceeding one hundred (100) MEIs.

Additionally, the total area acquired or leased by foreign entities or individuals must not exceed 25% of the total area of any given municipality. Also, foreigners of the same nationality (including foreigners who control Brazilian entities) cannot hold more than 40% of those 25% of the area of the municipality.

All the restrictions described above also apply to transfers of rural real estate as a result of transactions involving corporate restructuring

(such as mergers, spin-offs, acquisitions, changes in corporate control, etc.).

Any transaction made in violation of the foregoing restrictions is null and void.

The President of Brazil may, by specific decree, authorize the acquisition of rural land beyond the provisions of the current law, in cases in which such property contributes toward priority projects under national development plans.

Acquisition of rural property by Brazilian companies with foreign equity control is a subject that has given rise to heated debates since mid-2010.

The 6th Constitutional Amendment of 1995 revoked article 171 of the Brazilian Federal Constitution, which provided for differential treatment to companies incorporated under Brazilian Law if they were Brazilian companies with Brazilian capital directly or indirectly controlled by individuals residing in Brazil or not, that is, with direct or indirect equity control held by foreigners. Since

then, there has been no debate on the legality of Brazilian companies with foreign equity control acquiring rural property in Brazil.

However, the Federal Attorney General's Office issued an opinion in August 2010 arguing that article 1 of Law n. 5,709/71, which subjects Brazilian companies with foreign equity control to the same regime imposed on foreign companies, is consistent with the Constitution. After being approved by the President of Brazil, this opinion became mandatory for all agencies of the Federal Administration, which must comply with it strictly.

In this new scenario, Brazilian companies with foreign equity control are subject to the same regulatory framework as that imposed on foreign companies.

## 12.4. Taxation

### 12.4.1. *Inter-Vivos* Transfer Tax - ITBI

The *Inter-Vivos* Transfer Tax (ITBI) is a tax assessed by the municipalities which is due when real property or rights *in rem* to

any real property (except those in guarantee) and assignment of rights for the acquisition of property are transferred for remuneration. The rate established for the municipality of São Paulo, for example, ranges from two to 0.5 to 2 percent, depending on the value of the transfer.

The ITBI tax is not assessed when the transfer of real property or rights to any such property takes place to pay up the capital of a company or when resulting from merger, consolidation, spin-off or liquidation of the legal entity, unless the acquirer's chief activity is the purchase and sale of such assets and rights.

The ITBI tax is not assessed when the transfer of real property or rights to any such property takes place to pay up the capital of a company or when resulting from merger, consolidation, spin-off or liquidation of the legal entity, unless if, in any of the above mentioned cases, the legal entity's predominant activity is the purchase and sale of such assets and rights, the lease of real property or the commercial lease of real estate property, in compliance

with the applicable provisions of the municipal law.

## **12.5. Real Estate Investment Funds**

Real Estate Investment Funds were created to provide funds for developing real estate ventures for subsequent sale, letting or leasing. They began to be regulated by Brazilian law in the 1990's, more specifically by Law 8,668/93, which was updated by Law 9,779/99. Ruling n. 472/2008 of the Brazilian Securities and Exchange Commission (CVM), with the wording given by Ruling n. 498/2011, regulates the establishment, management, operation, public offer of *quotas* and disclosure of information for Real Estate Investment Funds.

Real Estate Investment Funds are currently being used for raising funds for building several shopping centers and implementing large-scale infrastructure projects throughout Brazil. Previously, pension funds were the main source of direct investments in real estate projects, but they are currently investing in this market indirectly, through the

purchase of shares in real estate investment funds.

Both individuals and corporations residing or domiciled abroad are entitled to acquire such shares, provided that the funds resulting from the investment are duly registered with the Central Bank of Brazil, allowing for the investment and respective gains to be remitted abroad. According to the law in force, capital gains resulting from such investments are subject to income tax (IR) at a rate of up to 20%, assessed upon disposal or withdrawing of Real Estate Investment Fund *quotas*.

## 13 - ENVIRONMENTAL LAW

### 13.1. Law:

The Brazilian environmental LAW is one of the most advanced in the world. The Federal Constitution devotes Chapter VI to this matter, providing that all Brazilians have the right to an ecologically balanced environment for general and integral use and that the Brazilian Government and society have the duty to protect and conserve it.

The states and municipalities are also competent to legislate on environmental matters. The federal legislator lent a regional character to this subject in the Federal Constitution.

The Federal Government, however, has exclusive authority to legislate on matters related to water, energy, mining, biotechnology, and nuclear activities.

According to the Federal Constitution, it is the duty of the State to:

- Preserve and recover species and ecosystems;
- Care for the variety and integrity

of the country's genetic heritage, overseeing the entities acting in genetic research and manipulation;

- Provide environmental education at all schooling levels, offering guidance with respect to the need to conserve the environment;
- Define territorial areas to be protected;
- Request an environmental impact study before any activity that could cause significant environmental degradation is implemented.

In addition to the Federal Constitution, the following rules deserve special mention:

#### A) Federal Legislation

- The 1940 Criminal Code (Decree Law n. 2,848 of December 7, 1940);
- The Forestry Code (Law n. 4,771 of 1965)
- The Law on Environmental Crimes (Law nº 9,605 of 1998), which provides for administrative and criminal penalties applicable



to conduct and activities that are harmful to the environment, such as deforestation, operations without proper environmental permits, emission of pollutants above the limits permitted by law, etc.;

- Law n. 6,938 of 1981, which provides for compensation to be paid to parties adversely affected by actions that are harmful to the environment;
- Law n. 7,347 of 1985, which established the Public Civil Suit for damages to the environment, consumers, property and rights of artistic, historical, aesthetic, tourist and scenic value;
- Decree n<sup>o</sup>. 99,274 of June 6, 1990, which provides for Environmental Protection Areas (APA) and the National Environmental Policy;
- Decree n. 3,179 of 1999, which regulates the Law on Environmental Crimes;
- Law n. 9,960 of 2000, which sets out prices to be charged by IBAMA and creates the Environmental Inspection Fee – TFA;
- Law n. 11,105 of 2005, known as the Biodiversity Law, which

regulates article 255 of the Federal Constitution, provides for rules for supervising activities involving Genetically Modified Organisms (OGM) and creates the National Biosafety Council (CNBS).

b) State Law  
State Constitutions

c) Municipal Law  
Organic Law of the Municipalities and of the Federal District

In case of divergence between environmental laws, the one affording environmental protection at the highest level, that is, the one imposing the most restrictive measures, should prevail.

### **13.2. National Environmental Policy**

Created in 1981, the National Environmental Policy recognizes that legal protection of the environment requires decentralized actions by the states and municipalities.

### 13.3. Environmental agencies and their roles:

The following agencies, which together make up the National Environmental System – SISNAMA, are in charge of protecting the environment at federal level:

**National Environmental Council – CONAMA:** a normative, consultative and decision-making agency.

**Ministry of Environment:** in charge of coordinating, supervising and controlling the National Environmental Policy.

**Brazilian Institute for the Environment and Renewable Natural Resources – IBAMA:** Executive agency in charge of inspecting corporate activities nationally.

Apart from other federal public agencies, foundations and other local agencies such as CETESB (*Companhia de Tecnologia em Saneamento Ambiental*) in the state of São Paulo and INEA (*Instituto Estadual de Meio Ambiente*) in the state of Rio de Janeiro.

### 13.4. Definitions:

#### (a) Environmental Damage:

Damage to environmental resources and its resulting degradation, adverse alteration or harm to the ecological balance.

#### (b) Environmental Impact Study and Report (EIA/RIMA):

A study and respective report designed to evaluate changes in the physical, chemical and biological characteristics of the environment caused by any form of matter or energy resulting from human activities that could directly or indirectly affect the health, welfare and safety of the population.

**(c) Pollution:** Degradation in environmental quality resulting from activities that directly or indirectly affect the health, welfare and safety of the population. Any activity that can potentially pollute the environment or which use environmental resources must be registered with the Federal Technical Registry managed by IBAMA.

**(d) Environmental Protection Area (APA):** Usually a large area sparsely

populated by humans with abiotic, biotic, esthetic or cultural features that are particularly important to the quality of life and welfare of human populations. Its basic purpose is to protect biological diversity, control occupation processes and ensure sustainable use of natural resources. It can be established in a publicly- or privately-owned area by the Federal Government, states or municipalities without the need to expropriate land.

### **13.5. Environmental Licensing**

An environmental license is an administrative tool in which the competent environmental agency (at the federal, state or municipal level) sets out environmental control conditions, restrictions and measures to be complied with by enterprises and their partners in setting up, expanding and operating enterprises or activities that use natural resources and can actually or potentially pollute the environment or cause environmental degradation in any way.

Because of their actual or potential environmental impact, a Pre-Licensing (*Licença Prévia* - LP)

procedure is required for some activities.

IBAMA is the agency in charge of issuing an environmental license when an undertaking has a regional or national impact that causes undesired changes in the physical, chemical and biological characteristics of the environment. However, the state-level environmental agency has the competence to grant environmental licenses to undertakings and activities implemented in more than one municipality or whose environmental impact goes beyond the territorial limits of one or more municipalities.

If an undertaking or activity has only a local environmental impact, that is, an impact restricted to municipal limits, it is up to the municipal agencies to grant an environmental license to it or not. Because of their weak administrative structure, some municipalities transfer the authority to grant environmental licenses to the state-level agency.

CONAMA's Resolution 237 of 1997 lists the activities and undertakings

for which an environmental license is required:

1. Extraction and handling of minerals;
2. Non-metallic mineral industry;
3. Metallurgical industry;
4. Mechanical industry;
5. Transportation material industry;
6. Lumber industry;
7. Paper and cellulose industry;
8. Rubber industry;
9. Leather and fur industry;
10. Chemical industry;
11. Plastic material industry;
12. Textile, clothing, shoe and fabric industry;
13. Food and beverage industry;
14. Tobacco industry;
15. Miscellaneous industries;
16. Civil construction projects;
17. Public utility services (power and waste);
18. Transportation, terminals and warehouses;
19. Tourism;
20. Agricultural and cattle raising activities;
21. Use of natural resources.

The administrative procedure to be granted an environmental license involves obtaining the following licenses:

**(a) Pre-Licensing (LP):** License issued during the planning phase of an activity, setting out basic requirements to be met by a project in terms of location, establishment and operation based on rules for soil use, industrial zoning and city planning laws.

**(b) Installation License (LI):** Document issued after the executive project of an undertaking is analyzed and documents are submitted to confirm that the requirements set out in the pre-licensing were met, that solutions were adopted to neutralize, mitigate or offset environmental impacts, and that environmental control procedures were established. This license authorizes the implementation of approved projects.

**(c) Operational License (LO):** Document authorizing the start of the activities of an industrial enterprise or undertaking, after the correct operation of pollution control equipment is checked.

CONAMA may also require specific licenses according to the nature of the activity or undertaking, such as the following ones:

1. Authorization for removal of vegetation;
2. Authorization for use of Permanent Conservation Areas – APP;
3. Concession for use of water resources;
4. Exploitation of mineral resources;
5. Production and use of nuclear minerals and nuclear energy;
6. Electricity generation and transmission projects;
7. Petroleum prospecting, exploitation and refining projects;
8. Use of areas belonging to the Federal Administration;
9. National historical and artistic heritage;
10. Indigenous populations and areas;
11. Afro-Brazilian culture;
12. General coordination of conservation units; and
13. Prior evaluation and recommendation from the

National Health Foundation – FUNASA.

In accordance with Law 9,960 of 2000, all the costs of licensing services, environmental analysis and preparation of EIA-RIMA (Environmental Impact Study and Environmental Impact Report) are to be borne by the applicant, even when the license is not granted in the end. The amounts involved can be paid in installments and they are intended to cover the costs of services provided by the competent government agency and are proportional to the environmental impact caused by the activity.

\*For more information, kindly visit: [www.ibama.gov.br](http://www.ibama.gov.br), [www.inea.gov.br](http://www.inea.gov.br) or [www.cetesb.sp.gov.br](http://www.cetesb.sp.gov.br).

### **13.6. Environmental Guardianship and Liability**

Actions by citizens and companies that are harmful to the environment generate administrative, civil and criminal liability, as provided for in the Law on Environmental Crimes. All conduct causing damage must be compensated for, even when it is

tolerated by legal standards, as is the case of emission of polluting wastes.

### **a) Civil sanctions:**

Civil liability for environmental damages is extra-contractual, objective and of a joint nature, according to the Federal Constitution (article 225), Law n. 6,938/81 (article 14) and the Civil Code (article 942).

- It is extra-contractual because it does not depend on any link between the parties;
- It is objective because it does not depend on the guilt of the agent; and
- It is of a joint nature because it can involve more than one person, whether natural or legal.

### **b) Administrative sanctions:**

Based on the duty of the Government to preserve the environment, whether by means of law enforcement powers (inspection) or by means of regulatory powers (creating and revoking laws and rules), various administrative measures can be adopted, such as officially

recognizing public or private assets as heritage; requiring the submission of an environmental impact report; imposing restrictions and limitations on the right to build, among others.

When a violation is identified, a formal notice of environmental infraction is issued mentioning the legal rule that was violated and starting an administrative proceeding.

The Law on Environmental Crimes, regulated by Decree n. 3,179 of September 21, 1999, provides for administrative penalties applicable to conduct and activities that are harmful to the environment:

1. Warning;
2. One-time or daily fine of up to R\$ 50 million;
3. Seizing, destruction or suspension of the sale of the products used in the violation;
4. Prohibition, suspension or demolition of the illegal building or activities;
5. Obligation to pay compensation for damages;
6. Restriction of rights;

7. Suspension or cancelation of registration;
8. Denial of license, permit or authorization for irregular companies;
9. Loss, restriction or suspension of tax incentives and benefits, as well as of financing from official credit institutions; and
10. Prohibition to enter into contracts with the Public Administration for a period of 3 years.

**c) Penal sanctions:**

Conduct and activities that are harmful to the environment subject violators, whether individuals or companies (with personal involvement of the partners, administrators, directors, council members, agents, proxies, managers or auditors) to criminal and administrative sanctions, in addition to the obligation to provide compensation for the damage caused.

Contractors are advised to specify the civil liability for material damages in their contracts with subcontracted companies, so as to hold them liable

for any damaging conduct.

The Law on Environmental Crimes provides for environmental crimes and their respective sanctions. Individuals are subject to deprivation of freedom, penalties restricting rights and fines, while companies are subject to penalties restricting rights, fines and community service.

**d) Jurisdictional sanctions:**

Through a public civil suit, provided for in Law n. 7,347 of 1985, it is possible to ensure protection to the environment by holding violators liable for damages caused to the environment and to property of artistic, aesthetic, historical, tourist and scenic value.

The Public Prosecutor's Office, the Public Defender's Office, the Federal Administration, States, Municipalities, Independent Government Agencies, Public Companies and Foundations and Non-Governmental Organizations (NGOs) are parties that can bring this kind of suit.

Section 6 of article 5 of Law n. 7,347/85, which governs public

civil suits involving liability for environmental damages, provides that public agencies can sign a commitment with interested parties for adjusting their conduct in the light of legal requirements, establishing penalties under an extrajudicial executive document called Conduct Adjustment Commitment (*Termo de Ajustamento de Conduta - TAC*).

Violations of the environmental law can usually be negotiated with the Public Prosecutor's Office, the agency in charge of protecting the environment and applying criminal penalties in this area. However, certain conditions related to the seriousness of the violation must be considered for this purpose.

Other lawsuits may also be brought to protect the environment and ensure sustainable activities and projects, such as citizen lawsuits, individual or collective injunctions and direct unconstitutionality suits.





## 14 - PUBLIC TENDERS - Contracting of Civil Construction Works, Services, Procurement and Transfers by the Public Administration

### 14.1. Introduction

Public tenders are the formal procedure whereby the State selects the best contractor for providing services, implementing civil construction projects, or supplying or buying goods. Their purpose is to ensure that the Public Administration selects the most advantageous proposal for contracts in the public interest.

Public managers are under the obligation to abide by tender procedures. The 1988 Constitution, in its article 37, clause XXI, provides that civil construction works, services, purchases and transfers may be contracted by the direct and indirect public administration of any of the Branches of the Union, the States, the Federal District and the Municipalities by means of public bidding, taking into account legal exceptions provided for in specific laws, when contracts may be entered into directly with a vendor.

Article 175 of the Constitution of 1988 requires tenders for concession

and licenses to provide public services, which are regulated by Law 8,987/95 with the amendments made thereto by Law 9,648/98. Prior to the new standards introduced by the 1988 Constitution, licenses were granted and revoked at the discretion of the administration and were not subject to tenders. For this reason, Law 8,987/95 requires formal licensing by means of a contract, while maintaining the unilateral revocability by the granting authority.

Law n. 8,666 of 6/21/93, with the amendments made thereto by Law n. 12,349 of 12/15/10, regulates the above-mentioned clause XXI of article 37 and provides for general rules for tenders and contracts with the Public Administration.

There are various modalities of public tender that may be used in accordance with criteria defined by law. The main factor to be considered in choosing the modality of tender is the estimated value of the contract to be signed. There are, however, situations in which the object of a tender leads to other

considerations prevailing over the contracting value. Regardless of the modality of tender selected, the supremacy of the public interest must always prevail. The procedure must always seek to secure the most efficient result for the Public Administration and preserve of its economical-financial balance by preserving the initially-agreed relationship between the parties, ensuring fulfillment of the contractor's obligations and fair remuneration by the Public Administration for the contracted work or service.

## 14.2. Procurement Modalities

Tender modalities are provided for in art. 22 of Law 8,666 of June 21, 1993 and no other modalities or combination thereof is allowed. These are call for bids (*concorrência*); price consultations (*tomada de preços*); letter of invitation (*convite*); contests (*concurso*); and public auction (*leilão*). In addition to these modalities, the federal legislator created the procurement auction (*pregão*), disciplined by Law 10,502 of July 17, 2002.

Call for bids (*concorrência*) is used for procurement or transfer of fixed assets, concessions for use and provision of services or public civil construction works, when the amounts involved exceed R\$1,500,000.00 (one million and five hundred thousand reals), and for engineering works and services valued at over R\$650,000.00 (six hundred and fifty thousand reals).

This is the modality of tender used in international tenders, when the procuring agency does not have short list of international suppliers that would enable price consultations.

Call for bids is the most complex modality of tender procedure and entails proof of capacity to fulfill minimum requisites called for the call for proposal and a so-called prequalification phase, when the commercial proposals will have already been received.

Price consultation (*tomada de preços*) is quite similar to the call for bids and is a modality whereby evaluation of bids takes place beforehand, since they must be

registered before the commercial proposals are received. The limit for contracting is R\$1,500,000.00 (one million, five hundred thousand reais) for engineering works and services and R\$650,000.00 (six hundred and fifty thousand reais) for procurement and miscellaneous engineering services.

Letter of invitation (*convite*) is a procurement modality in which bids are requested from interested parties, whether registered or not, and a minimum number of three are chosen. Other registered parties may request to participate in the proceedings. Of the modalities of tender, letter of invitation is the one used for services of lower value, worth no more than R\$150,000.00 (one hundred and fifty thousand reais) for engineering works and R\$80,000.00 (eighty thousand reais) for other items.

Contests are the method used to select technical and artistic works from among any parties, and payment is effected by award or remuneration to the winners. Auction is a modality reserved for the sale of assets of no use to the public

authorities, seized assets, pledges, assets delivered to courts or given in payment. These are sold to the highest bidder, above a minimum floor value.

Finally, the procurement auction (*pregão*) was instituted to select contractors or procure common goods or services, occasionally or routinely, with no limitation of value. Such contracts are awarded in a public session based on written proposals or verbal bids, with the aim of obtaining the most economic, safe, and efficient purchase. Procurement auctions are often conducted using information technology (electronic bidding). However, this modality is not appropriate for contracting engineering works and services, or for lease or transfer of real property.

Whatever the modality of tender employed, public sector procurement must always be guided by principles of legality, neutrality, morality, transparency and efficiency, with the objective of selecting the proposal that is the most advantageous to the Public Administration, while ensuring equality of conditions to all

participants prior to announcement of the winner, establishing technical and economic qualification standards, and preserving the conditions effectively expressed in the proposal.

### **14.3. Authorization, Concession, and License to Provide Public Services**

In article 21, insets XI and XII, the Federal Constitution provides that the following services are to be exploited by the Federal Administration: (i) telecommunications and radio broadcasting; (ii) services relating to electricity and exploitation of waterways for electricity production; (iii) air, aerospace and airport infrastructure; (iv) railway and waterway transportation services between Brazilian ports and borders; (v) interstate and international highway passenger transportation services; and (vi) services related to sea, river and lake ports.

The execution of these services can be carried out directly or by means of authorization, concession or license. The Union is authorized to delegate provision of these services, mainly through concessions or licenses, to

Corporate Entities of private law with competence to provide them.

Authorization is a unilateral, discretionary administrative act whereby the Public Authorities delegate public services provision to the private sector, and which may be revoked at any time.

A concession entails a formal administrative contract, awarded by means of a tender procedure under the call for bids modality, upon which the delegation of responsibility for providing the service is legally transferred by the Public Authorities to a company or a consortium that, for its part, assumes the risks inherent to the business for the duration of the contract and is remunerated by rates charged from users of the services. The aforementioned contract is also intended to fulfill conditions of regularity, continuity, efficiency and moderate rates in the provision of services.

Standards for public service concessions are provided for in by Law 8,987/95, with the amendments made thereto by Law 9,648/98, whereas Law 9,472/97, with the

amendments introduced by Law 9,986/00, provides for concessions of telecommunication services. Permission to provide a public service, as previously emphasized, is a simple, discretionary and ephemeral act of unilateral delegation by public authorities through a contract of adhesion that can be revoked at any time or to which the public authorities can add new conditions to be observed by the grantee.

#### **14.4. Qualification**

To institute a public tender, the Public Authorities must publish a justification for the licensing procedure defining the objective, scope and duration of the contract prior to a call for proposals. The tender procedure is constituted upon publication of call for proposals, which serves as the by-laws of the tender and must be observed by both the Administration and the bidders. The principle of binding the tender procedure to the terms of the call for proposals is provided for in article 3 of the Tender and Contracts Law (Law 8,666/93).

Any party interested in participating in the tender must fulfill the requirements stated in the call for proposals and specific registry requirements for each modality and submit legally-required documentation demonstrating legal, technical, economic and financial capacity and that it is current on taxes.

If the call for proposals permits formation of consortia, each component company must submit all the above-mentioned documentation as if it were an individual bidder.

Having fulfilled these requirements, bidders are qualified to present their proposals in compliance with the requirements set forth in the call for proposals. At this point, any person can view the documentation, including certificates, decisions, contracts, or opinions relating to the tender and to the concession or permission in question.

It should be stressed that article 34 of the Tender and Contracts Law provides for the possibility of maintaining a record for qualification purposes, valid for a maximum of

one year, containing documents pertaining to participants in public tenders.

Companies included in this record receive a Certificate of Registration, enabling them to participate in price consultations, which according to paragraph 2 of article 36 of that Law replaces the documentation required for other modalities of tender.

Criteria for appraisal of proposals are: (i) lowest price, when the selection criteria specified in the call for proposals is that the winning proposal will be the one which presents the lowest price; (ii) the best technical proposal; (iii) a combination of the best technical proposal and price; or (iv) highest offer, in cases of sale of assets or concession of *in rem* right to use assets.

In case of deadlock between two or more contenders, after analyzing compliance with all specified conditions in the call for proposals, selection is by lot in a public session to which all bidders are summoned, registered in the minutes.

Law n. 12,349 of December 15, 2010 created a margin of preference for manufactured goods and services that meet the Brazilian technical standards, in other words, preference for products and services of national origin.

Preference margins are up to 25% and they are determined, by decree, by the Interministerial Commission for Public Procurement established by Decree n. 7,546 of August 2, 2011, which regulated the application of preference margins.

#### **14.5. Tender Waiver**

The law provides for three situations in which the requirement to tender may be waived: (i) low value of the bidding object; (ii) emergency or public disaster situations, war or serious disorder; or (iii) purchase or lease of real estate, which for specific reasons (*e.g.* geographic location of the property) make competitive bidding unfeasible. These and twenty-one other exceptions that justify direct contracting are listed in article 24 of Law 8,666/93.

Article 25 of the same law states that waivers may be justified by

the impossibility of tendering in view of the unfeasibility of holding a competition among competitors as a consequence of only one supplier being able to fulfill the tender requirements (though brand preference is forbidden) or in cases of renowned expertise on the part of professionals or companies providing specialized technical services or of a publicly acclaimed professional.

#### **14.6. Administrative Contracts**

A contract is mandatory under the call for bids and price consultation modalities and when a tender is waived because the amounts involved are within the limits set for these two modalities of tender. Such contracts must contain clauses defining: (i) the parties; (ii) the object; (iii) scope and duration; (iv) form and conditions for the provision of services; (v) parameters for the quality of the services to be provided; (vi) price; (vii) criteria for adjustment of contract prices; (viii) rights, guarantees and obligations of users; (ix) projections for expansion and modernization; (x) inspection and supervision; and (xi) penalty clauses.

Physical-financial schedules for the execution of works may be included, as well as guarantees for fulfillment of obligations, in cases of contracts relating to public service concessions after execution of engineering works.

The concession holder may contract third parties to carry out inherent, accessory or complementary activities under private law. Contracting of third parties does not release the concession holder from responsibility for damages caused to the granting authority, users, or third parties. Provided that it is contemplated in the contract, authorized by the granting authority and preceded by competitive bidding, subcontracting may be accepted.

#### **14.7. Guarantees**

Guarantees are a common requirement in services, works or procurement contracts. Although they are not mandatory, to be legitimate and binding guarantees must be foreseen in the call for proposals. Except in situations contemplated in article 56 of the Tender and Contracts Law,



guarantees tend to take the form of bond, insurance or bank guarantees, at the discretion of the contractee, providing that the corresponding insurance value does not exceed five per cent (5%) of the total value of the contract.

#### **14.8. Inspection and Extinction of Administrative Contract**

In defense of the consumer's interest, the granting authority bears responsibility for supervision of contract execution, and to this end it may set up inspection committees entitled to access all administrative, accounting, technical, economic, and financial information and with powers to intervene in the concession.

Contracts for procurement and public works aim to ensure delivery of goods and investments, and likewise concessions or licenses aim to ensure adequate provision of a service to the full satisfaction of customers, in compliance with principles of continuity, efficiency and safety. Thus, default or non-compliance with such principles may result in penalties and termination of contract.

Other circumstances that might warrant termination of contract include: end of the contract duration; expropriation (in the public interest); forfeiture for total or partial failure to provide a service; termination; annulment; bankruptcy or dissolution of the company; death or incapacity of the contractor in the case of individual companies.

In the event of breach of contract by the contractee, sanctions foreseen in the contract clauses, in the Tender and Contracts Law, and in the call for proposals shall apply. If the breach of contract is on the part of the granting authority, the private party may move special court action to terminate the contract and seek fair compensation.

#### **14.9. Other Contractual Features**

With the aim of optimizing public resources and streamlining administrative contractual procedures, Decree 45,085/2000 of the Government of São Paulo authorized electronic contracting and on-line procurement in that State.

Electronic auctions are a procurement modality under which best price is the criterion for

selection of suppliers. These can be used for contracts whose value does not exceed R\$8,000.00 (eight thousand reais), a situation in which art. 24 of Law 8,666/93 waives the requirement of tender. Any company with prior registration in the system can participate in electronic auctions.

Management contracts, introduced by Constitutional Amendment 19/98 in article 37, paragraph 8 of the Federal Constitution, are used as a means to promote decentralization and set goals and objectives to be achieved under contracts whose execution is subject to inspection and authorization by the Public Administration.

Leasing contracts provide a means whereby the Public Administration can transfer responsibility for management of public services to a private entity, at the latter's expense and risk, placing public property at its disposal. Finally, a Partnership Commitment can be signed between the Public Administration and entities qualified as public-interest civil society organizations according to the provisions of law 9,790 of 03/23/99.

Such an instrument is intended to establish a cooperative link between the parties for the execution of activities of public interest. Public resources may be transferred to an entity thus qualified. When such activities imply delegation of services under the responsibility of the Public Administration, the so-called public-private partnerships (PPP) may be established.

Law 11,079 of December 30, 2004, subsequently regulated by Decree 5,385/2005, set out general standards for tendering and contracting of public-private partnerships by the Public Administration. Law no. 12,409/2011 set the limit for federal financing of such PPPs at R\$ 6,000,000,000 (six billion reais).

This law defines PPPs as two modalities of concession contracts, which may be either sponsored or administrative.

There are generally four models of PPP financing : (I) a traditional model for sub-contracting and procurement by the public sector; (II) a model in which the public sector finances

the project but the actual work is carried out by a private partner; (III) a model in which design, construction, operation, exploitation and financing are all carried out through concession, which is the most common model; and (IV) a model in which everything is owned and operated by the private sector.

These models provide a spectrum ranging from the first one, in which the public sector assumes all responsibilities and liabilities, to the fourth one, in which the private sector assumes full responsibility and liability. Most PPPs are established under models II or III, whereby responsibilities and liabilities are shared based on the unique strengths and weaknesses of the parties. These models allow for projects to be implemented with minimum support from public funding programs and government resources. This aspect also allows for projects that do not depend on approval of governmental budget oversight to be more swiftly implemented.

It should be noted, finally, that the mere contracting of a public civil

construction work and a common concession, i.e. delegation of public services or engineering works, do not constitute a PPP, meaning that the provisions of the Tender and Contracts Law (8.666/93) and of concession laws (laws 8,987/95 and 9,074/95) apply to such concession.

## 15 - PRIVATIZATION, CONCESSIONS AND PARTNERSHIPS WITH THE GOVERNMENT

This section addresses means whereby the private sector is becoming increasingly involved in activities previously performed exclusively by Government and examines privatization, concession of public services and other forms of partnership between governmental and private entities.

**Privatization** is generally defined as the act by means of which the government transfers, to a private entity, the control of state-owned companies. This is usually achieved through a public bidding process where interested parties may bid for the acquisition of the offered government shares. A privatization may involve simultaneous transfer of equity control and delegation of public services to be rendered by the relevant company (in which case the delegation is made under a concession agreement).

**Concession** is the act by means of which the government transfers, to a private entity, the rendering of a public service and the private entity accepts to undertake it on behalf

of the State but at its own risk. The concessionaire (the entity to which the concession is granted) is remunerated by charging a tariff from the users of the services. A concession also requires a previous public bidding process.

A **partnership**, in turn, is a broad term used to designate an association between the government and private entities to pursue a specific goal of public interest, such as the construction of a public building, the rendering of public services, or both. Partnerships differ from concessions essentially in how the private entities are remunerated, since under partnerships they can be remunerated by both rates charged for the services and by direct payments from the government, or by a combination of the two, while under concessions they are only remunerated by the rates charged for the services.

Thus, concessions are operated under a free enterprise system, i.e., at the risk of the concessionaire, whose profitability depends

exclusively on efficiency. Partnerships, on the other hand, cannot operate on a free enterprise model, since the private partner is (either partially or fully) remunerated by the State, and therefore enjoys a higher degree of security.

### 15.1. The National Privatization Program (PND)

Brazil's National Privatization Program was established by Law n. 8,031 of April 12, 1990, as regulated by Law n. 9,491 of September 9, 1997 and its respective Decree n. 2,594 of May 15, 1998. This is the legal basis for the sale of companies, including financial institutions, directly or indirectly controlled by the Federal Government, as well as for the transfer, to private initiative, of public services provided by the Federal Government either directly or through its controlled entities.

The National Privatization Board (*Conselho Nacional de Desestatização – CND*), whose members are Ministers of State, reports directly to the President of the Republic and is the body in charge of conducting the privatization process.

The National Economic and Social Development Bank (BNDES) is the manager of the National Privatization Fund and provides administrative and operational support to CND by contracting consultants and specialists in supporting privatization initiatives and coordinating the distribution of securities through stock exchanges, etc.

So far, most privatizations were carried out by means of public auctions held in Brazilian stock exchanges. These auctions must comply with the requirements of Law n. 8,666 of June 21, 1993, which regulates Article 37, XXI, of the Federal Constitution and sets out rules for public tenders. This federal act was successively amended to include new requirements for, *inter alia*, bid invitations and methods, payments and guarantees. These amendments were mainly made by Law n. 8,883 of June 8, 1994, by Law n. 9,648 of May 27, 1998, by Law n. 11,196 of November 21, 2005, and by Law n. 12,349 of December, 2010. This legislation is constantly changing and there is already another Bill being reviewed by Congress to improve the

provisions applied to public tender procedures.

An important development for the Brazilian Privatization Program was the passage of the General Telecommunications Act (Law n. 9,472 of July 16, 1997), which regulates Constitutional Amendment n. 8 of August 15, 1995 and allows the private sector to provide telecommunications services. Before that, the Brazilian Congress had adopted Law n. 9,295 of July 19, 1996, according to which concessions for mobile telephony, classified as a “restricted public service,” are to be granted by means of a public tender to Brazilian companies with at least 51% of their voting capital controlled, directly or indirectly, by Brazilian nationals.

Apart from allowing for the transfer of companies under Federal Government control, the Privatization Program also enabled the transfer of companies controlled by states and municipalities to private management. Each state and municipality has the competence to set rules for their program, meaning that privatization at these

levels is subject to specific local laws. The State of São Paulo has carried out one of the most successful privatization programs in Brazil. Since the São Paulo State Privatization Law was passed, the State has transferred companies to the private sector in the fields of: piped gas distribution services (both in metropolitan areas (COMGÁS) and in rural areas (Gas Brasileiro and Gas Natural); electricity generation (from plants on the Paranapanema and Tietê rivers belonging to CESP); and distribution of electricity (CPFL and Eletropaulo, two of Brazil’s largest distribution companies).

## **15.2. Public Service Concessions**

Law n. 8,987 of February 13, 1995 (Concessions Act) regulates Article 175 of the Federal Constitution and sets out requirements for the concession of all public services, except for radio and TV broadcasting services. This statute was later amended by Law n. 9,074 of July 7, 1995 and by Law n. 11,196 of November 21, 2005. The most important provisions of the Concession Act are regulated by Decree n. 2003 of September

10, 1996 and by Decree n. 1,717 of November 24, 1995, which established new rules for the approval and extension of public service concessions, including electricity-related concessions. The Concessions Act expressly requires a public tender process for a concession to be granted to a private entity.

### **15.3. Major industries privatized or undergoing privatization**

Among the principal industries privatized to date or currently undergoing privatization in Brazil, the following are included:

- electricity and gas generation, transmission and distribution;
- petrochemicals;
- highway, railroad, waterway and air transportation;
- telecommunications;
- ports, airports, aerospace infrastructure, road construction, dams, canal locks, dry docks and containers;
- financial institutions;
- sanitation, water treatment and supply, waste treatment; and
- mining and metallurgy

### **15.4. Developments and Results of the Privatization Program**

According to the 2009 BNDS Activity Report<sup>2</sup>, between 1990 and 2009 the Government was able to conclude 71 privatizations, totaling more than US\$ 105.8 billion in revenues from these deals. This amount was raised not only by selling state-owned companies, but also by transferring their previous debts to the acquiring private parties.

Privatized companies include CSN (a national steel mill); CVRD (Brazil's largest mining company); Mafersa (a manufacturer of railroad equipment); Escelsa, Light, CERJ, CEEE (partially privatized), CPFL, Eletropaulo, Gerasul, COELBA, CESP (also partially privatized) (electrical utilities); the TELEBRÁS System (virtually all telephone companies); COMGÁS and CEG (gas distribution companies); RFFSA (the national railway line); Usiminas, Cosipa, Acesita and CST (steel plants), Polietelinas (petrochemicals); Ultrafertil (fertilizers), Embraer

---

[http://www.bndes.gov.br/SiteBNDES/export/sites/default/bndes\\_pt/Galerias/Arquivos/conhecimento/pnd/PND\\_2009.pdf](http://www.bndes.gov.br/SiteBNDES/export/sites/default/bndes_pt/Galerias/Arquivos/conhecimento/pnd/PND_2009.pdf) - accessed on July 21, 2011.

(the world's fourth largest aircraft manufacturer), and Banespa and Meridional (banks).

Despite inevitable delays and obstacles, the National Privatization Program implemented in the 1990's resulted in considerable gains for the Public Administration. Between 1997 and 2000, the privatization of companies in the electricity and telecommunications industries brought in revenues of approximately US\$ 70 billion for the Federal Government alone, and foreign capital investment in these sectors has risen to about 40% of that amount.

Two of the largest privatizations ever held in Latin America, of CVRD, the mining and transportation giant, and of TELEBRAS, the holding company for the telecommunications system, attracted worldwide interest and greatly increased foreign investment in Brazil.

In 2010, the exclusion of VALEC from the PND was one of the main developments in the privatization sector in Brazil, as the state-owned company is responsible for

considerable investments in the north-south railway construction project. In 2011, the Brazilian government intends to continue to implement the national privatization program, with a focus on expanding and improving the country's electricity grid and on continuing to privatize stretches of Brazilian highways.

### **15.5. Public-Private Partnerships**

Law 11,079 of December 31, 2004 set out rules for Public-Private Partnerships (PPPs). The PPP Act was further amended by Law n. 12,024 of August 27, 2009 and by Law n. 12,409 of May 25, 2011. Under these new rules, the Government aims to attract local and foreign private investment of roughly US\$ 13 billion for basic infrastructure projects, particularly in the fields of transportation and sanitation.

These new rules enable the transfer of responsibility for execution of public works and delivery of public services to the private sector, and may be applied by all executive-branch agencies, special funds,



government agencies, foundations, state-owned companies and other entities controlled by the Federal Government, States and Municipalities.

Furthermore, common public service concessions (described in the previous section and governed by Public Service Concession Law – Law 8,987/95), two new modalities of public service concessions were created. The first of these is the sponsored concession (*concessão patrocinada*), whereby the private concessionaire is remunerated not only by rates paid by users of the services, but also by transfers of funding from the public partner. The second is the administrative concession (*concessão administrativa*), undertaken by means of a service provision contract, when the Public Administration is the direct or indirect beneficiary of the service (as in the case of construction and management of public buildings), even if it involves execution of works or supply and installation of goods.

The difference between the new modalities of concession and the common concession, which is

still effective as described above, consists exactly in the remuneration of the private entity by the Public Administration. Therefore, when the concession does not involve any remuneration from the Public Administration, it will not be a PPP contract, but rather a common concession.

The PPP law also sets limits for Public-Private Partnerships. For instance, it forbids contracts (i) under the amount of R\$ 20 million; (ii) with a duration shorter than 5 years; or (iii) for the sole purpose of labor supply, supply and installation of equipments, or execution of public construction works.

Administrative contracts under the rules established by the PPP Law contemplate periods for return of capital compatible with that of investments in the private sector: never less than five or more than thirty-five years, including any possible extensions. For a PPP contract to be entered into, establishing a Specific Purpose Company is required for the sole purpose of implementing and managing the PPP project.

A highly significant innovation introduced under the PPP law was the creation of an up six-billion dollar Guarantee Fund (comprised of shares of state-owned companies, real estate properties, liquid assets, etc.). This fund underwrites financial obligations of the public-sector partner assumed under contract to the private partner, and its assets serve as collateral against any possible claims filed against the Public Partner.

The law also innovates by contemplating the possibility of arbitration in disputes arising under a PPP contract. Previously, the law did not allow the Public Administration to participate in arbitration procedures.

Because the government's principal aim in introducing the framework for PPPs was to streamline procedures for timely execution of infrastructure works to enhance and sustain development, it was necessary to introduce new mechanisms in public tender procedures to speed them up.

In addition to Federal Legislation, the Brazilian states, within their

jurisdictional sphere, also enacted laws to facilitate implementation of local projects (without interference of the Federal Administration) that provide for new forms of guarantees, including the establishment of new state-owned companies responsible for signing and management PPP contracts. São Paulo, Minas Gerais, Santa Catarina, Bahia and Rio Grande do Sul are the main that have passed laws for PPPs.

It is interesting to note that, according to recent estimates, Brazil will need investments of more than R\$ 100 billion to comply with the commitments involved in hosting the 2014 World Cup and the 2016 Olympic Games. This initial appraisal included improvements in the transportation sector, in electricity generation and distribution, in basic sanitation systems, and in ports and airports, among others. PPPs are expected to play a decisive role in ensuring the feasibility of major infrastructure projects, for which purpose quick action on the part of the government to formalize these partnerships is a must.



## 16 - TELECOMMUNICATIONS

### 16.1. Telecommunications in Brazil – Brief Overview

For over 35 years, Law 4.117/62 of August 27, 1962, known as the Brazilian Telecommunication Code (*Código Brasileiro de Telecomunicações – CBT*), governed the provision of telecommunications services in Brazil. This law authorized the establishment of the Brazilian Telecommunications Company (*Empresa Brasileira de Telecomunicações S.A.-EMBRATEL*).

Law 5792 of July 11, 1972 authorized the creation of the public/private joint stock company TELEBRAS (*Telecomunicações Brasileiras S.A*) to promote, through subsidiaries and associate companies, public telecommunications services in Brazil and abroad. TELEBRÁS, its subsidiaries and associate companies comprised the TELEBRÁS System, which ultimately also incorporated EMBRATEL.

Liberalization of the Brazilian telecommunications market started with the promulgation

of Constitutional Amendment 08/95 of August 15, 1995, which enabled the Federal Government to transfer the right to provide telecommunications services to privately owned companies by means of authorization, concession or permission.

Shortly thereafter, Law 9265/96 of July 19, 1996 (the Minimum Law) fully deregulated and liberalized the provision of value-added services, relaxed requirements for the provision of satellite communication and non-public telecommunications services, and defined the process for the tendering and licensing of B-Band mobile cellular services.

In 1997, Law 9472/97 of July 16, 1997, known as the General Telecommunications Law (*Lei Geral de Telecomunicações -LGT*), created the Brazilian National Telecommunications Agency (*Agência Nacional de Telecomunicações – ANATEL*) and established the criteria for the privatization of state telephone companies as well as other rules concerning liberalization and

competition in telecommunications markets.

The General Telecommunications Law determined that networks be organized to promote free circulation along integrated routes, and provided for mandatory interconnection between all networks and support services of collective interest. Furthermore, it guaranteed integrated operation and made property rights over the networks conditional on the fulfillment of their respective social role. In this respect, interconnection is a major instrument for ensuring convergence.

The General Telecommunications Law also provided a legal definition of value added services, clearly stating that these are not telecommunications services, and classifying providers of value added services as users of the underlying telecommunications service or network.

Therefore, except for data transmission services, general internet services are outside ANATEL's jurisdiction, and may be provided without regulatory constraints.

In mid-1998 the TELEBRÁS System underwent a complete restructuring process, which included privatizing its subsidiaries and ensuring significant investments to expand telecommunications services in view of new technologies.

For the purpose of introducing competition into the fixed telephony market, fixed switched telephone services were separated into three different service levels, which were subjected to distinct licensing requirements. Brazil was divided into four Regions, and the number of competitors in each service level for the period between privatization and December 31, 2001 was limited to two companies per Region: the concessionaire and its mirror-company (General Licensing Plan approved by Decree 2534/98 of April 2, 1998).

Provision of local telephone services was entrusted to a concessionaire and a mirror-company (under a duopoly system) in each service area in Regions I, II and III. Provision of national long-distance services was assigned to two "regional" companies (the concessionaire and

the mirror-company) in Regions I, II and III, and to two “national” companies (the incumbent and the mirror-company) in operation all over the Brazilian territory, i.e. Region IV. International long distance licenses were granted to the two “national” companies, which were authorized to originate calls anywhere in Brazil (Region IV).

The objective of the duopoly system, a striking feature of this first phase of liberalization of the telecommunications sector, was to allow companies enough time to establish and consolidate themselves in the market before the introduction of free competition in 2002. During the transition period between privatization of companies within the TELEBRÁS System and the full liberalization of the fixed and mobile telephony markets, competition was limited to the dispute between incumbents and mirror-companies in the fixed telephony market, and between Band A and Band B mobile telephony concessionaires.

The second phase of liberalization of the Brazilian telecommunications market started in 2002, eliminating

any limits on the number of service operators. Nevertheless, ANATEL still reserves the right to set limits and other legal-administrative restrictions in exceptional cases, on grounds of technical unfeasibility or when an excessive number of competitors might negatively affect the provision of a service of collective interest.

## **16.2. Development of Mobile Telephony**

Mobile telephone services in Brazil were initially provided by companies within the TELEBRÁS System (in a frequency sub-level known as Band A). Following approval of Constitutional Amendment 8/95, regulations were issued in 1996 governing the provision of mobile cellular services (Serviço Móvel Celular – SMC) in preparation for the private provision of Band B services.

Initially exploited through concessions, since the entry into force of the General Telecommunications Law (LGT) mobile cellular services have been provided exclusively by private companies upon previous authorization.

The General Telecommunications Law replaced all preexisting regulations, standards and rules on mobile communications with the new rules issued by ANATEL, which have been gradually implemented since 2000 and are known as Personal Mobile Services (*Serviço Móvel Pessoal* -PMS).

Between 2001 and 2003, up to three additional mobile licenses per region corresponding to Bands C, D and E were auctioned. Interested companies were allowed to bid for PMS authorizations in each of the three regions as well as to acquire licenses for all three regions. However, they were forbidden to acquire more than one authorization within each region.

Any company organized under Brazilian laws and controlled by a Brazilian holding company may hold a PMS license, even if under foreign control.

The new rules increasing service areas have led to mergers and acquisitions between operators. In Brazil, mobile telephony has grown rapidly, with an emphasis on pre-

paid mobile services. Currently, the technology most widely used is GSM, followed by CDMA and TDMA.

### **16.3. The Telecommunications Regulatory Agency (ANATEL)**

Brazil's telecom regulator, the National Telecommunications Agency (ANATEL) enjoys administrative independence and financial autonomy and is under no hierarchical subordination.

Basically, ANATEL is empowered to: (i) issue rules on the licensing, provision and use of public telecommunications services under the public regime (universal services); (ii) establish, control and supervise tariff structures for each level of service provided under the public regime; (iii) sign and manage concession contracts; (iv) issue rules concerning the provision of telecommunications services under the private regime; (v) control, prevent and enforce sanctions in the event of violation of the economic order in the field of telecommunications, without prejudice to the competences of the Administrative Council for Economic

Defense (*Conselho Administrativo de Defesa Econômica* - CADE); (vi) manage the radio-frequency spectrum and the use of satellite orbits; (vii) define service levels based on their objectives, scope, form, means of transmission, technology used, and other attributes; (viii) supervise the provision of services and impose administrative sanctions on service providers that fail to comply with telecommunications rules.

#### **16.4. General Telecommunications Law**

Except for certain provisions relating to criminal offenses and broadcasting provisions, the Brazilian Telecommunications Code was revoked with the coming into force of the General Telecommunications Law.

This Law provides a framework for the provision of telecommunications services, the establishment and operation of a regulatory agency, and sets certain fundamental principles of the Telecommunications Law in Brazil.

This framework ensures free, unencumbered and fair

competition among providers of telecommunications services, while establishing general standards for protecting the economic order. Any acts of service providers that might hamper free competition in any way or form are prohibited by law.

Interconnection is defined by the General Telecommunications Law (article 146, sole paragraph) as “the connection between functionally compatible telecommunications networks, allowing users of one network to communicate with users of another network or access the services available within it”. Interconnection is to be ensured through contracts freely negotiated between operating companies. In the absence of an agreement, ANATEL may only intervene if called upon to do so by one of the parties.

#### **16.5. Telecom Service Regime**

The organizational framework of the telecommunications sector established by the General Telecommunications Law is based on a system of limits and restrictions applicable to service operators. Exploitation of any



telecommunications services or network is conditional on prior licensing by ANATEL, except in certain specific situations, when mere notification to ANATEL will suffice. Licenses are also granted according to different service levels, as defined by ANATEL.

Thus, exploitation of telecommunications services is conditional on (i) prior concession or permission; (ii) authorization; or (iii) notification to ANATEL.

The General Telecommunications Law classifies services under two different criteria. The first criterion relates to the scope of the commercial provision of services classified as (i) services of collective interest; and (ii) services of restricted interest.

Services of collective interest are those which must be available to all interested persons under non-discriminatory conditions. Services of restricted interest, in turn, are those intended for service providers or offered to selected classes of users at the operating company's discretion.

The second criterion set by the General Telecommunications Law classifies services according to the legal rules under which they are provided, i.e., public services or private services.

Telecommunications services provided under the public regime are those which the Federal Government has either the obligation or competence to provide on a permanent, universal and continuous basis. The fixed switched telephony service (FSTS) provided commercially to the general public is the only telecommunications service that the General Telecommunications Law establishes as a legal duty of the Federal Government. Thus, the only public telecommunications service subject to being universal and continuous is the FSTS aimed at end users. This duty is to be fulfilled through delegation, by means of concession contracts.

Telecommunications services under the private regime are those provided under a free enterprise system by the private sector, through simple authorization by ANATEL and conditional on fulfillment of

expansion and service-provision requirements.

Concessions to provide services entail an administrative contract with ANATEL, awarded by means of a public tender procedure, without exclusivity. Concessionaires whose revenues come from billings are subject to business risks. The maximum term of a concession is 20 years, with the possibility of a one-time-only renewal or extension for an equal period. In January 2006, current concession contracts were renewed and will be reviewed by ANATEL every five years, with a view to establishing new conditions, new universal service obligations, and quality parameters.

Retail prices for fixed switched telephony services under the public regime are subject to price caps. ANATEL may grant concessionaires an unrestricted tariff system, provided there is general and effective competition among service providers.

Fixed switched telephony services may also be provided by companies other than concessionaires, under

a private regime, and therefore are not subject to universal service obligations.

Exploitation of FSTS under a private regime is based on the constitutional principle of “economic activity”, and should be guided by principles of free and unfettered competition among service providers, consumer rights, and incentive to the technological and industrial development of the sector.

Prices charged by service providers under the private system are not subject to regulation. Nevertheless, any anticompetitive behavior or abuse of economic power may be punished.

Exploitation of services under a private regime requires prior authorization from ANATEL and entails the right to use the associated radio frequency. No limits exist on the number of authorizations that may be granted by ANATEL for exploitation of services under a private regime, except when technical limitations or excessive numbers of competitors may be detrimental to the provision of services in the collective interest.

In such exceptional situations where it proves necessary to limit the number of authorizations, granting of an authorization may be preceded by a public tender procedure, similar to those for granting PMS licenses.

The right to use the radio-frequency spectrum, exclusively or otherwise, requires prior authorization from ANATEL, linked specifically to the concession or authorization for the exploitation of telecommunications service. Authorization for the use of a radio frequency in connection with the provision of a service under the public regime is for the same term as that of the concession to which it is associated. Although authorization for the exploitation of services under a private regime is independent of the term, the right to use radio frequencies associated thereto is for a term of up to 20 years, with the possibility of a one-time-only extension for an equal period.

Transfer of the right to use a radio frequency is conditional on the transfer of the concession or authorization to which it is linked.

Basic consumer rights have been

reinforced through the regulation of Fixed Switched Telephony Services recently introduced by ANATEL and applicable to all FSTS providers, whether concessionaires or not. For PMS users, basic consumer rights are reinforced through the new rules recently announced by ANATEL.

## **16.6. Transfer of Control of Telecom Companies**

The rules for transferring the controlling interest in a telecommunications service provider in Brazil are provided for in the General Telecommunications Law. ANATEL, in its role of fostering effective competition and preventing economic concentration, has the legal power to set restrictions, limits or conditions as regards obtaining and transferring service concessions and authorizations.

One of the most important “ex ante” merger control rules is ANATEL Resolution 101/99, which establishes criteria and concepts to oversee both control and transfer of control that might lead to economic concentration.

Under the terms of this Resolution, the controller is an individual or corporate entity that directly or indirectly: (i) participates in or appoints a person or member of the Board of Directors, the Governing Body or other board with similar duties, of another company or its controller; (ii) holds statutory or contractual veto over any matter or decision of the other; (iii) is sufficiently empowered to prevent a qualified forum or decision required by force of statutory or contractual provision, with regard to the decisions of the other; (iv) holds shares of the other, of a class which grants separate voting right.

Also according to this Resolution, a company is deemed to be an affiliate of another if it holds, directly or indirectly, at least 20% of the other company's voting stock, or if at least 20% of the voting stock of both companies is held, directly or indirectly, by the same individual or corporate entity.

The Resolution further establishes that any legal transaction which results in partial or total transfer by the controller of a controlling interest

in the service provider represents a transfer of control.

Finally, any changes to the corporate structure of a company that could represent a transfer of control require prior approval by ANATEL, especially when: (i) the controlling entity or one of its members withdraws or when its participation in the voting capital of the service provider or its controlling entity drops below five percent; (ii) the controlling entity ceases to hold a majority of the company's voting stock; or (iii) the controlling entity, through any form of agreement, totally or partially assigns to a third party powers to manage the company's corporate activities or business operations.

## **16.7. Taxes on the Telecommunications Sector**

Law 9998 of August 17, 2000 created the Universal Telecommunication Services Fund (*Fundo de Universalização de Serviços de Telecomunicações* - FUST) to defray fulfillment of universal service targets unrecoverable through efficient service provision. As of 2001,

operators have been paying 1% of gross pre-tax (ICMS, PIS and COFINS) revenues from the provision of telecommunications services into the fund.

To avoid a cascade effect of FUST charges on the production chain of telecommunications services, Law 9998 applied the tax to revenues from retail services provided to end users, exempting wholesale minutes to other carriers (interconnection) and leased lines fees. However, a recent interpretation by ANATEL (the agency managing FUST) challenged this exemption, and the FUST charge is now applied to all services. This administrative change to the law is being challenged in both administrative and judicial spheres, and the outcome will certainly impact all telecommunications service providers.

The purpose of the Telecommunications Supervision Fund (*Fundo de Fiscalização das Telecomunicações - FISTEL*) created by Law 5070/66 of July 7, 1966 and ratified by the General Telecommunications Law is to defray ANATEL's expenses incurred in the

supervision of telecommunications services. All concessionaires and authorized companies are liable for an Installation Inspection Fee (*Taxa de Fiscalização de Instalação—TFI*) upon licensing of their telecommunications stations. The TFI fee is determined based on a table prepared by ANATEL, and varies according to the number of antennas and equipment in use. These companies are also liable for the annual payment of an Operation Inspection Fee (*Taxa de Fiscalização de Funcionamento – TFF*), which is calculated at on the basis of 50% the TFI fee.

Law 10052 of November 28, 2000 established the Fund for Technological Development of Telecommunications (*Fundo para o Desenvolvimento Tecnológico das Telecomunicações - FUNTTEL*), which received an endowment of R\$100 million from the Telecommunications Supervision Fund (FISTEL). FUNTTEL receives 0.5% of gross revenues from telecommunications services plus 1% of income generated from telephony based events by authorized institutions. The aim of FUNTTEL is to fund technological research

conducted by small and medium-size companies, thereby increasing the competitiveness of the Brazilian telecommunication industry. Furthermore, telecommunications services are also subject to ICMS tax (state VAT), which is provided for in the Federal Constitution.

### **16.8. Incentives**

Brazilian law offers providers of telecommunications services incentives for developing telecommunications products through specific credit, tax, and customs policy instruments.

Thus, although the Brazilian Government has practically eliminated ex-tariff special importation regulations, significant exceptions remain in effect for certain components used in telecommunications, which had formerly been liable to import duties of up to 16%.

Law 10176 of January 11, 2001 extended the exemption of the IPI tax (Tax on Industrialized Products) through December 31, 2000 on items specified in the

Law. Since then, exemptions have been converted into reductions of applicable IPI rates. The percentage reduction is due to be gradually reduced until December 31, 2009, when full rates are to be applied.

### **16.9. The Future of Telecommunications Services**

The major development anticipated in the telecommunications industry regards the choice of the Digital TV standard to be adopted in Brazil. No decision as to the standard to be adopted has been made to date. The criteria for choosing the digital television standard will still be set by Congress and this choice is a government priority. The model to be chosen must support mobile reception, portability, multimedia and interactivity, with a view to promoting digital inclusion, updating and revitalizing the broadcasting sector and the national industry, optimizing the use of radiofrequency spectrum, and contributing to the convergence of telecommunications services.

With the aim of fostering competition,

ANATEL has issued new rules for switched fixed telephony services, the provision of leased lines and a mandatory cost accounting system, by introducing into the Brazilian regulatory framework the European concept of significant market power (“SMP”). Other anticipated ex-ante obligations to be imposed on concessionaires include developing networks where concessionaires have no available capacity. The Agency has also announced measures to regulate the numbering, portability, resale and the possibility of using technologies such as WLL (Wireless Local Loop), cable TV and Power Line Networks (PLN) in new service delivery models.

Another government priority is to settle legal issues that hinder the use of FUST funds, which entails an anticipated amendment to the General Telecommunications Law.

A package of bills aimed at harmonizing paid TV and broadcasting legislation with a view to digital inclusion is also anticipated.

The transmission of content by providers of telecommunications

services vis-à-vis the scope of the constitutional restriction on foreign capital applicable to broadcasters has led to a heated debate, especially following the inclusion in newly renovated concession contracts of a clause (in force since January 1st, 2006), according to which content-related services should comply with foreign capital restrictions provided for in the Constitution for broadcasting.

A bill on the powers of Brazilian regulatory agencies currently under discussion at the National Congress may significantly alter the status of ANATEL, its powers to grant telecommunications licenses, and its role of controlling and preventing violations of the economic order and ensuring fair competition.

## 17 - ELETRIC ENERGY

### 17.1. Introduction

The energy sector in Brazil underwent extensive and significant changes in the 1990s under the Fernando Henrique Cardoso Administration<sup>3</sup>. These entailed a redefinition of the role of the State, the gradual implementation of an economic model based on free competition, and a massive increase of private investment in the sector.

Constitutional Amendment 6 of 1995 set the stage for these changes by removing the requirement that only Brazilian companies of national capital could participate in the electricity sector, thereby enabling the participation of foreign capital, including ownership of concessionaires. In the same year, Laws 8987 and 9074 defined the rules for concession to explore electricity, provided a framework for new concessions and the privatization of public-service concessionaires, and defined rules governing new

entrants into the sector.<sup>4</sup>

In 1996, Law 9427 provided for the creation of the Brazilian Electricity Regulatory Agency (*Agência Nacional de Energia Elétrica* - ANEEL), an independent agency, to regulate the electricity sector. Subsequently, Law 9648 introduced important elements for the implementation of a new model for the Brazilian electricity sector. Essentially, this new model sought to gradually liberalize the electric energy sector by introducing concessions or authorizations for the provision of electricity generation and distribution services by private companies and the privatization of concessionaires under the supervision of an independent regulatory agency, thus opening

---

<sup>3</sup> President Fernando Henrique Cardoso served two presidential terms, from 1995 to 1998 and from 1999 to 2002. Significant changes in the energy sector took place during his first term in office.

---

<sup>4</sup> The Brazilian privatization process was based on Law 8031/90, which created the National Privatization Program; Law 8666/93 (Tenders Law), which defined applicable bidding procedures; Laws 8987 and 9074/95, which established the general rules for concessions; Law 9427/97, which created ANEEL and established the guidelines for the concession of public electricity services; Law 9648/98, which, *inter alia*, provides for the restructuring of the energy sector and the privatization of ELETROBRÁS and its subsidiaries (ELETROSUL, ELETRONORTE, CHESF and FURNAS).



up the sector to private investment while introducing competition among service providers.

However, the model was only partially implemented, for although many new generation concessions were granted between 1995 and 2002, only some 70% of distribution companies and 20% of generation companies were privatized.

In 2001, the country experienced an electricity supply crisis, which led the government to take a host of measures to curtail electricity use, foster investments in electricity generation, and enact Law 10438/2002 introducing new regulations. At the time, problems inherent in the sector were broadly discussed by civil society, making it clear that the model, despite its merits, required some adjustments.

After President Luiz Inácio Lula da Silva took office in January 2003, a new policy with new guidelines and regulatory standards for the electricity sector was announced in July 2003 by the Ministry of Mines and Energy (MME). On December 11, 2003, Executive Orders (MP) 144

and 145, subsequently transformed into Laws 10848<sup>5</sup> and 10847 of March 15, 2004 went into effect, providing the present regulatory model.

The most significant changes introduced under the present model include increased powers to the MME and the curtailing of ANEEL's responsibilities. Moreover, two new distinct trade environments for contracting electricity were formally introduced: the Free Trade Environment and the Regulated Trade Environment or Pool, in which all generation and distribution concession holders are obliged to participate. The Electric Power Trading Chamber (*Câmara de Comercialização de Energia Elétrica* - CCEE) was created to replace the Electric Power Wholesale Market (*Mercado Atacadista de Energia Elétrica* - MAE) established in the previous Administration, and is entrusted with the tasks of accounting for and settling operations not covered by bilateral contracts. The new

---

<sup>5</sup> Law 10848 was regulated by Decree 5,163/04, which was subsequently amended by Decrees 5249/04, 5271/04 and 5499/05.

model is characterized by strong sector planning instruments to be implemented the Ministry of Mines and Energy with the support of the Energy Research Company (*Empresa de Pesquisa Energética* – EPE, created by Law 10847/2004) and centralized control of electricity-related activities by the Ministry.

## 17.2. Sector Agents

The stimulus to competition, however, reinforced the need for deep restructuring of the electricity sector, which was done in two steps, as explained above, comprising the definition of (i) the agents responsible for the regulation and operation of the new Brazilian electric system; (ii) the basic features that such a system should have to enable the implementation of an efficient and competitive model; and (iii) the contractual models applicable to the sector.

The National Energy Policy Council (*Conselho Nacional de Política Energética* - CNPE)<sup>6</sup>, an advisory

body to the President, was created with the aim of proposing to the President national policies and specific measures to promote the rational use of energy resources, ensure the supply of inputs in more remote areas or areas of difficult access, periodically review the energy matrices and establish guidelines for specific programs, among other goals.

Special mention should be made of the establishment, by Law 9427/96, of the specific electricity regulatory agency, ANEEL<sup>7</sup> - an autarchy linked to the Ministry of Mines and Energy<sup>8</sup>, but endowed with powers and revenues of its own - and of the National Electric System Operator (*Operador Nacional do Sistema* – ONS), a private, nonprofit entity established by Law 9648/98 and integrated by agents of the electricity sector and

<sup>7</sup> Created by Law 9247/1996, its duties were subsequently altered by Laws 9648/1998, 9649/1998, 9986/2000, 10438/2002 and 10848/2004.

<sup>8</sup> Law 10683/2003 defined the subjects within the MME's jurisdiction. For example: geology, mineral and energy resources, hydraulic energy use, mining and metallurgy, oil, fuel and electric energy, including nuclear. Also, rural energizing and agro energy, including rural electricity, when based on resources related to the National Electric System.

<sup>6</sup> The CNPE was created by Law 9478/1997.

free consumers, according to relevant legislation.

In summary, ANEEL is responsible for “regulating and supervising the production, transmission, distribution and sale of electricity” (Law 9427, art. 2)<sup>9</sup>, while the ONS is basically responsible for “coordinating and controlling activities related to the operation of electricity generation and transmission in the interconnected systems” (Decree 2655/98, art. 25).

In 2004 ANEEL and the Ministry of Mines and Energy had their duties changed. The Ministry<sup>10</sup> was granted significant powers to decide on relevant issues in the sector. ANEEL is now responsible for promoting bidding-related activities,

but has kept its authority as regards reviewing concessions and regulating electricity tariffs and sales.

Coordination and control of generation and transmission of the interconnected system continued to be carried out by the ONS, a private legal entity which, however, is no longer authorized by ANEEL but by the Government, although supervised and regulated by ANEEL.<sup>11</sup>

The Brazilian electricity sector is, for the most part, *interconnected*. Its main agents operate in a coordinated manner to maximize the efficiency of the production process. This coordinated operation, which was implemented back in the 1970s and for a long time led by the Coordinating Group for Interconnected Operation (*Grupo Coordenador para Operação Interligada - GCOI*), is currently carried out by the ONS through generation dispatches.

The Government also established the

<sup>9</sup> State Agencies. Law 9,427/1996 authorized ANEEL to decentralize its activities to the Brazilian States. Decentralization has occurred by means of cooperation agreements with state regulatory agencies created by law. The activities delegated are supervision, ombudsman and mediation between consumers and concession holders, with the aim to streamline their respective processes. ANEEL transfers part of the proceeds from the collection of supervision fees to state agencies.

<sup>10</sup> The MME was responsible for drafting concession plans, establishing guidelines for bidding processes and promoting concession bids.

<sup>11</sup> Law 10484/04 amended articles 13 and 14 of Law 9648/98. Of the 5 ONS directors, 3 are appointed by the Ministry of Mines and Energy, including the Director General.

Energy Research Company (*Empresa de Pesquisa Energética – EPE*)<sup>12</sup> and the Electric Energy Trading Chamber (*Câmara de Comercialização de Energia Elétrica - CCEE*).<sup>13</sup> EPE was created as a public research and planning company linked to the MME. The studies and research conducted by the entity will serve as input for the formulation, planning and implementation of MME actions. CCEE was created to replace MAE<sup>14</sup>(which was abolished by the current model), as a nonprofit private legal entity under Government authorization, regulated and supervised by ANEEL, in order to facilitate the sale of electricity. CCEE is necessarily

formed by industry players, including free consumers. ANEEL was responsible for developing the Trading Convention that set the conditions for the sale of electricity and the basis for the organization, operation and duties of CCEE, as well as trading rules and procedures.<sup>15</sup>

The Electricity Sector Monitoring Committee (*Comitê de Monitoramento do Sector Elétrico – CMSE*)<sup>16</sup> was also established within the MME, with the task of permanently monitoring and evaluating the continuity and safety of the electricity supply across the country.

Finally, mention should be made of ELETROBRÁS (*Brazilian Electricity Companies S.A.*) - a publicly traded company with 52.45% of shares owned by the Brazilian Government, 12.3%

---

<sup>12</sup> The creation of EPE was authorized by Law 10847/2004.

<sup>13</sup> The creation of CCEE was authorized by Law 10848/2008 and Decree 5177/2004.

<sup>14</sup> MAE was created (Law 9648/98) and initially based on the so-called Market Agreement (*Acordo do Mercado*), a multilateral adhesion agreement executed by agents of the energy sector (voluntary or mandatory participants in MAE, according to the provisions of Decree 2655/98 and applicable ANEEL Resolutions), for processing the free purchase and sale operations of electricity, with emphasis on short-term operations (“spot market”). Subsequently, the creation of MAE was authorized according to Law 10433/2002, as a private legal entity submitted to ANEEL’s authorization, regulation and supervision. MAE, therefore, used to establish the commercial and financial rules for electricity purchase and sale transactions. On the other hand, the dispatch and delivery of the contracted energy were mostly coordinated and carried by the ONS.

---

<sup>15</sup> The Trading Convention was regulated by Decree 5177/04 and ANEEL Regulatory Resolution 109 of 10/26/04.

<sup>16</sup> Created by Decree 5175/2004, the CMSE’s main purpose is to avoid the lack of supply in the electric energy market. Therefore, it must follow the consumer market’s evolution, the development of civil works programs, including by identifying difficulties of technical, environmental, commercial and institutional nature that may affect the regularity and security of supply.

by BNDESPar, 4.2% by the FND and more than 30% of shares traded on the stock exchanges of São Paulo, Madrid and New York - which acts as an agent of the Brazilian Government. It is the holding company of electric energy concessionaires under federal control (CHESF, Furnas, ELETRONORTE, ELETROSUL, etc.); a shareholder in Itaipu Binacional with 50% of the shares; a minority shareholder in some state-owned electricity companies controlled by the states; manages “funds” made up of resources from RGR, CCC, and CDE, as well as purchase and sale operations of PROINFA; finances public and private ventures in the energy sector; and sells in Brazil the electricity produced at Itaipu Binacional.

### 17.3. Activities and Agents of the Sector

As the first step toward reorganizing traditional generation, transmission, and distribution activities, in 1995 concessions were redefined with the aim of launching a process

of liberalization of the Brazilian electricity sector.

As the model was aimed at fostering competition, new agents entered the sector with a view to making offer and demand more flexible:

- (i) Electricity Traders and Importers;
- (ii) *Independent Producers*, i.e., corporate entities or consortia holding concessions or authorization to produce electricity for their own use or for sale, at their expense and risk (i.e., without captive markets that electricity concessionaires usually enjoy and without the right to set tariffs);
- (iii) The so-called ‘*free consumers*’, who are free to choose their electricity supplier, a group that is likely to experience progressive increases in the coming years.

Under this model, competition has been introduced into generation and trading activities, with only a minimum level of regulation, whereas transmission and distribution, regarded as natural monopolies, are strictly regulated.

In 2004, new rules redefined the trading of energy between these agents, especially as regards the generation and distribution system.

Brazil's Federal Constitution empowers the Federal Government, as holder of potential hydraulic energy resources, to exploit "electric power services, plants, and energy from water courses"<sup>17</sup> either directly or through concession, permission, or authorization.

Thus, within the Brazilian energy sector, activities related to generation, transmission, distribution and trading are considered separately, including for the purpose of licensing and contracting services. The rules for each of these segments are summarized below:

### **Generation**

Generation is defined as the transformation of any other form of energy into electricity. Differently from other countries, hydroelectric plants account for 93% of the Brazilian electricity generation capacity.

---

<sup>17</sup> Art. 21, XII, "b" of the Federal Constitution.

Rules for licensing hydroelectric and thermoelectric plants take into account the type of exploitation (provision of public utility services, Independent Producer, or Self-Producer<sup>18</sup>) and the potential capacity of hydroelectric or thermoelectric resources.

### **Transmission**

Transmission is defined as a public service for transporting high-voltage electric power produced at generating plants to consumer centers. Since most of Brazil's electricity is produced at hydroelectric plants, generation often takes place at a considerable distance from consumer markets. Brazil has thus developed one of the most modern transmission networks in the world, with a number of regional connections that comprise the Interconnected Electrical System Network, also known as the National Interconnected System (Sistema

---

<sup>18</sup> Law 9074/95 and subsequent amendments thereto, and Decree 2003/96 established rules for the activities of Independent Producers and Self-Producers of electricity. Self-Producer is an individual, legal entity, or consortium of corporations that are granted a concession or authorization to produce electricity for their own use, and are entitled, through specific permission, to trade any surplus electricity.

Interligado Nacional – SIN). Other transmission lines not connected to this system comprise the so-called Isolated Systems.

From a structural standpoint, it is the Interconnected System that enables contracting the electricity supplier by ensuring all agents and consumers in the sector, free access to the concessionaires (or permit holders) of public transmission and distribution systems against payment of the corresponding transport fees.

It should finally be pointed out that transmission services are exploited only under the public service concession regime, and this is undoubtedly one of the most regulated segments in the sector.

It is worth mentioning that according to Law 12111 of December 9, 2009, regulated by Decree 7246 of July 28, 2010, transmission facilities for international interconnections, connected to the Basic Network have become, as of January 1st, 2011, the object of public service concession thorough auction preceded by an

International Treaty.

## **Distribution**

Distribution is a public utility service for the transport of low-voltage electric power by means of a multi-lined network, from transmission-line terminals (where high voltage is transformed into low voltage) to end consumers.

Distribution service concession contracts ensure distributors a constant supply of power to meet the needs of captive consumers located in their concession areas. These so-called captive consumers are not allowed to purchase electric power from another supplier. Free consumers, on the other hand, depending upon their consumption and voltage requirements (at present, those whose requirements are in excess of 69 KV and higher than or equal to 3 MW), although located in a concession area of a given distributor, may choose to receive their electric power from another supplier, by means of a specific contract. In such cases, the distributor is obliged to provide free access to its distribution facilities,

upon reimbursement of transport costs.

## Trading

Since the enactment of Law 9648/98, electricity trading has been carried out separately from other electricity sector activities by means of an authorization. Thus, aside from marketing activities carried out by producers and distributors, there are the suppliers, i.e., companies that, without holding physical assets can purchase electricity and sell it to free consumers and for distribution companies, as well as import and export electricity.

## Unbundling

Law 10848/2004 forbids the control or association of generation concessionaires and other parties authorized to use the interconnected system with companies engaged in distribution activities. Likewise, distribution companies may no longer engage in generation and transmission activities; sell energy to free consumers, except for consumers located in their concession areas; perform

activities beyond the scope of the concession; or hold direct or indirect interests in other companies (with a few exceptions). Generation and transmission activities may continue to be vertically integrated. The law also sets a deadline for companies to implement the separation of activities.

## 17.4. Contracts in the Energy Sector

The current model has substantially changed the rules for contracting energy by establishing two environments for energy trading - the Free Trade Environment (*Ambiente de Livre Contratação* - ALC) and the Regulated Trade Environment (*Ambiente de Contratação Regulada* - Pool). All agents have to sell the energy of the interconnected system either in the ALC or the Pool.

The purchase of electricity by concession and permit holders and authorized entities of the public service of electricity distribution within the Interconnected System, as well as the supply of electricity to



the regulated market must be made in the Pool. Therefore, all energy sales to distributors must be made in the Pool and through auctions, and distributors must fully guarantee its market through regulated trade.

In this system, purchase and sale are carried out through bilateral contracts known as Energy Trading Contract in the Regulated Environment (*Contrato de Comercialização de Energia no Ambiente Regulado* – “CCEAR”), concluded between each concession holder or authorized party of generation and all distribution companies. The contracts may be in the form of electricity quantity or availability. Distributors are required to provide guarantees and contracting will be done through an auction held by ANEEL either directly or through a CCEE. Additionally, supply tariffs in this environment will be strictly regulated and must be ratified by ANEEL.

Electricity purchase and sale contracts concluded in the Pool will necessarily involve long-term supplies to businesses that already hold a license or authorization (called “old energy”),

with a supply period of at least three and no more than 15 years, and to new ventures (called “new energy”), with a supply of at least 15 and no more than 35 years. According to the Ministry of Mines and Energy, this will ensure investors a stable flow of return and help to finance expansion works in the electricity sector.

*Independent Producers* (hydro and thermal) and *Self-Producers* selling their surplus may participate in the Pool, in the ALC of in both simultaneously. Those participating in the Pool that start to contract energy in such an environment will be subject to all rules applicable thereto and their activities in the ALC will be carried out at their own expense and risk.

The only operations allowed to be held in the ALC will be the purchase and sale of electricity involving generation concessionaires and authorized agents, traders, electricity importers and *free consumers*.

Trading in the ALC should be formalized through bilateral contracts freely negotiated by

the parties, pursuant to specific rules and procedures, and the CCEE will only be responsible for registration and settlement of contracts. The CCEE will be charged with registering all energy sale contracts between trading agents, generators, distributors and *free consumers*, including the Itaipu contract and initial contracts, among others. All energy purchases in the short term market (not covered by bilateral contracts) should be settled in the CCEE, which will set the difference settlement price applicable to these transactions.

*Free consumers* may purchase energy only from public service concession holders, independent producers, self-producers with excess energy, suppliers, importers and distributors in their concession area. Therefore, distributors are no longer allowed to sell energy to free consumers, with the exception of those located within their concession areas.

Contracts registered with the CCEE do not entail the actual delivery of electricity, and energy

sales by any agent in the sector must be guaranteed by its own generation or by energy purchase and sale agreements. Under the new model, any conflicts between CCEE participants will be settled by arbitration.

Under the present model, concessions and authorizations for the expansion of generation are awarded through auctions carried out by the Ministry of Mines and Energy (except for small facilities). In these auctions the full sale (or almost all of it) of the energy to be produced is ensured.

As provided for in Law 12111/2009, the purchase of electricity by distributors within the Isolated Systems must be necessarily preceded by an auction, as it already happens in the National Interconnected System.

### **Transmission and Distribution**

As transmission and distribution are different activities, mention should now be made of specific contracts.

As regards transmission, the lines

comprising the Interconnected Electric System Network are made available to the ONS by transmission concession holders through Contracts of Provision of Transmission Services, and the ONS then enters with the respective interested parties into Contracts For Use of Transmission Systems as the representative of such concession holders. The other transmission installations that do not comprise the Basic Network are available directly to the users by the transmission concession holders and the respective contracts are entered into with the ONS' intervention. In both cases, it is still necessary to execute the Connection Contract with the respective transmission concession holder, so as to establish responsibility for the implementation, operation e maintenance of the connection installations.

Regarding transmission, the lines comprising the Basic Interconnected Electric System Network are made available to the ONS by transmission concessionaires through Contracts for the Provision of Transmission Services and the ONS then signs

contracts with the respective stakeholders, as the representative of these concession holders. Other transmission installations that are not included in the Basic Network are made available directly to users by transmission concessionaires and the respective contracts are signed with the intervention of the ONS. In both cases, a Connection Contract still needs to be concluded with the respective transmission concessionaire, with a view to establishing responsibility for the implementation, operation and maintenance of connection installations.

As for the distribution segment, a Contract for Use of the Distribution Systems (*Contrato de Uso do Sistema de Distribuição - CUSD*) must be signed with the local distribution concession or permit holder. ANEEL sets the tariffs for the use of transmission installations and the rates for the use of electricity distribution systems, pursuant to relevant resolutions.

It is worth noting that one of the great merits of the previous model (kept in the current

model), was the guarantee of free access to transmission and distribution lines by industry players and the regulation of this access.

### **17.5. Planning**

Planning and control activities are central to the present model, and the EPE will conduct studies and research that will serve as input for the development, planning, and implementation of the Ministry's actions within the scope of the national energy policy.

The Ministry will prepare a list of the new ventures that may be put up for tender and approve the amount of electricity to be contracted for meeting the needs of the Brazilian market, as well as the list of new generation ventures to be tendered. For their part, it is incumbent upon generation and distribution companies, traders, and free consumers to inform the Ministry of the amount of energy required to meet the needs of their respective markets or loads.

### **17.6. Conclusion**

The current framework was designed by the Government as the best institutional arrangement for achieving the following objectives: (i) lower tariffs; (ii) increased quality of services; (iii) guarantee of continuous supply; (iv) fair return on investment, so as to encourage the expansion of services; and (v) universal access.

With public funding in short supply, attracting private investment to the Brazilian electricity sector to ensure the country's economic and social development will be a major challenge for the present model.



## 18 - REGULATION OF FINANCIAL INSTITUTIONS AND LEASING IN BRAZIL

### 18.1. Financial Institutions

The legal basis for the regulation of Brazil's financial and banking sectors is provided for in Article 192 of the Federal Constitution; in Law 4595 of December 31, 1964, that sets rules for financial institutions; and in related legislation (e.g. Law 4728 of July 14, 1965, which regulates capital markets and their development; Law 6385 of December 7, 1976, which provides for the securities market and establishes the Securities Commission (*Comissão de Valores Mobiliários* - CVM); and Law 4131 of September 3, 1962, which regulates foreign investment in Brazil and remittances of funds abroad). In addition to these laws, Brazilian monetary authorities issue normative rules in the form of Resolutions of the National Monetary Council, and Central Bank Circulars and Circular-Letters.

The national financial system is comprised of: the National Monetary Council (*Conselho Monetário Nacional* - CMN); the Central

Bank of Brazil (*Banco Central do Brasil* - BACEN); *Banco do Brasil* S.A.; the National Bank for Economic and Social Development (*Banco Nacional de Desenvolvimento Econômico e Social* - BNDES), and other private and public financial institutions. The CMN is the highest monetary authority, responsible for establishing monetary and credit policies, including matters relating to foreign exchange, and regulation of the overall operations of financial institutions.

BACEN, in turn, is responsible for complying and enforcing compliance with the normative rules issued by the CMN, and for implementing all provisions set by law, including: exercising credit control in all its forms; controlling foreign capital; effecting rediscounts and loan transactions to financial and banking institutions; acting as depository for the Government's gold and foreign currency reserves and special drawing rights; supervising all financial institutions; imposing all penalties prescribed by law; issuing operating licenses to financial

institutions; and setting standards for the instatement into office and holding of management positions in private financial institutions.

## 18.2. Main Financial Institutions

### Public Sector

In Brazil, some commercial banks and financial institutions are controlled by the Federal and State Governments, for the primary purpose of fostering economic development, especially in the agriculture and industry sectors. In addition to performing commercial banking activities, state banks also act as independent regional development agencies.

Among the banks controlled by the Brazilian Federal Government are *Banco do Brasil*, BNDES and other public sector development, commercial, and multiple-service banks. *Banco do Brasil* provides a full range of banking products to both public and private sector customers, and is Brazil's largest commercial bank. BNDES is primarily engaged in the provision of medium and long-term financing -either directly or through other public and

private sector financial institutions - to the private sector, mainly for pursuing industrial activities. Other federal public-sector development, commercial and multiple-service banks include *Banco da Amazônia* and *Banco do Nordeste do Brasil S.A.*, in addition to commercial and multiple-service banks under State Government control.

### Private Sector

The private financial sector includes commercial banks, multiple-service banks, investment, finance and credit companies, investment banks, brokerage firms, credit cooperatives, leasing companies, insurance companies, and others. The largest participants in Brazil's financial market are financial conglomerates involved in commercial banking, investment banking, financing, leasing, securities dealing, brokerage, and insurance activities. There are a variety of different types of private-sector financial institutions in Brazil, including:

(a) **Multiple-Service Banks:** private or public financial institutions that conduct banking and ancillary

transactions through commercial, investment and/or development, real estate credit, leasing and credit, financing and investment portfolios. Such transactions are subject to the same laws and regulations that are applicable to institutions operating with each of the above mentioned portfolios (a development portfolio may only be transacted by a public bank). A Multiple-Service Bank must operate with at least two of such portfolios, including one commercial or investment portfolio, and must be organized as Brazilian corporations (*Sociedade Anônima*). Institutions with commercial portfolios may raise funds by means of at sight deposits. Their corporate name must include the word “Banco” (CMN Resolution 2099/94).

(b) **Commercial Banks:** private or public financial institutions primarily engaged in short and medium-term funding for commerce, industry, service-supplier companies, individuals, and third parties in general. Fundraising by means of freely-transferable at sight deposits is a typical activity of commercial banks, which may also raise funds by means of time deposits.

These banks must be organized as Brazilian corporations (S.A.) and their corporate name must include the word “Banco” (CMN Resolution 2099/94).

(c) **Investment Banks:** private banks specialized in temporary equity interest transactions and production financing, providing fixed and working capital, and management of third party assets. They do not manage bank accounts, but raise funds by means of time deposits, on-lending of national or foreign funds, and sale of participation (*quotas*) in funds managed by them. These banks must be organized as Brazilian corporations and include the expression “*Banco de Investimento*” in their corporate name, pursuant to CMN Resolution CMN 2624/99.

### 18.3. Main Requirements for the Operation of Financial Institutions in Brazil

Law 4595/64 and applicable normative regulations provide for the operation of financial institutions in Brazil. Under such regulations, financial institutions are required:



(a) To obtain prior approval from the Central Bank of Brazil. Foreign institutions must obtain approval in the form of an Executive Branch Decree.

(b) Private financial institutions (excepting investment companies) may only hold an equity interest in another company with prior authorization of the Central Bank of Brazil. Applications for such authorization must include a justification and is granted on an express basis, excepting cases relating to underwriting of subscription guarantees, under general conditions established by the CMN.

(c) If they own real estate, to use such property exclusively for purposes directly related to their business. In the event that a real estate property is received in payment of a debt, the financial institution must dispose of such property within one year, extendable for an additional two identical periods at the Central Bank's discretion.

(d) To limit exposure to a single client to 25% of Reference Equity, in credit and leasing transactions and provision of guarantees, including

credits arising from derivatives transactions (CMN resolution No. 2,844, of July 29, 2001).

(e) Not to grant loans to any company holding over 10% of their capital stock, save in exceptional circumstances subject to the prior approval of the Central Bank.

(f) Not to grant loans to any company in which they hold more than 10% of their capital stock, except for acquisition of debt securities issued by their leasing subsidiaries.

(g) Not to grant loans to their executive officers, members of their advisory, administrative and fiscal boards or the like, or to their respective spouses or relatives up to the 2nd degree.

#### **18.4. Minimum Capitalization Standards**

CMN Resolution 2099 of August 17, 1994 (as amended), introduced some changes in the Brazilian banking regulations, with a view to adjusting it to the risk-weighted capital adequacy standards of the Basel Accord. It also set minimum capital requirements for financial

institutions, based upon the types of activities performed. Subsequently, supervening regulations instated more rigorous solvency standards which are generally more stringent than the provisions of the Basel Accord. CMN Resolution 2099/94 set the following minimum capitalization indices:

I – Seventeen million five hundred thousand reais (R\$17,500,000.00): commercial banks with Multiple-Service Bank commercial portfolios;

II – Twelve million five hundred thousand reais (R\$12,500,000.00): investment banks; development banks with corresponding Multiple-Service Bank portfolios; and savings banks;

III – Seven million reais (R\$7,000,000.00): credit, financing and investment companies; real estate credit companies; leasing companies; and corresponding Multiple-Service Bank portfolios;

IV - Four million reais (R\$4,000,000.00): development agencies;

V – Three million reais (R\$3,000,000.00): mortgage companies;

VI – One million five hundred thousand reais (R\$1,500,000.00): securities brokerage companies and securities dealership companies managing investment funds regulated by the Central Bank (BACEN) (excepting mutual funds) or investment companies authorized to carry out matched transactions, firm commitment underwriting of securities for resale, margin account and/or swap transactions, through assumption of counterparty rights and liabilities;

VII – Five hundred and fifty thousand reais (R\$550,000.00): securities brokerage companies and dealerships engaged in activities not mentioned in the previous item;

VIII – Three hundred and fifty thousand reais (R\$350,000.00): foreign exchange brokerage companies; and

IX - Two hundred thousand reais (R\$200,000.00): institutions providing credits for small business owners and small enterprises.

For institutions with a branch, principal place of business or headquarters, and at least ninety percent (90%) of operating facilities

located outside the States of Rio de Janeiro and/or São Paulo, the paid-up capital and net equity requirement is reduced by thirty percent (30%), except for foster agencies and institutions providing credits for small business owners and small enterprises.

In the case of institutions operating in the foreign-exchange market, an additional six million and five hundred thousand reals (R\$6,500,000.00) should be added to the paid-up capital and net equity requirements. Aside from minimum capital and net equity requirements, financial institutions must maintain adjusted net equity values that are compatible with the degree of risk inherent in their asset structure, in accordance with risk classification standards established in CMN Resolution 2099. CMN Resolution 3398 of August 29, 2006 states that, in the event of noncompliance with minimum capital requirements and operating limits, the Central Bank will require the legal representatives of the financial institution and, if necessary, their controlling partners, to report on the measures to be adopted to correct the situation. The financial institution must submit to the Central

Bank a settlement plan containing the adjustment measures to be adopted and the timetable for implementation, which shall not exceed six months, renewable at the Central Bank's discretion for an additional two identical periods.

### **18.5. Foreign Investment in Brazilian Financial Institutions**

Article 52 of the Temporary Constitutional Provisions Act of Brazil's Federal Constitution states that "...the establishment of new branches of financial institutions headquartered abroad and increases in the equity interest of financial institutions headquartered in the country by individuals and legal entities resident or domiciled abroad" is forbidden except when the respective investment to be made "results from international or reciprocity agreements or agreements of interest to the Brazilian Government". Such foreign investments are subject to registration with the Central Bank, in the same manner as foreign investments in other sectors of the economy, under the provisions of Law 4131/62.

Furthermore, authorization for the establishment of foreign financial institutions in Brazil can only be granted by Executive Branch Decree, and such institutions are subject to the same limitations and restrictions applicable to Brazilian banks currently (or prospectively) established in the host country of said foreign financial institutions

## 18.6. Leasing

Leasing transactions are governed by Law 6099 of September 12, 1974, as amended by CMN Resolution 2309 of August 28, 1996.

**Brazilian leasing companies.** Only leasing companies authorized to operate by the Central Bank may operate in the Brazilian market. For foreign investment in leasing companies the applicable regulations are the same as those applicable to financial institutions in general. To be eligible to perform leasing transactions, a company must be organized as a corporation (*Sociedade Anônima*). It must meet the minimum capital requirements set by the National Monetary Council. Such companies must limit their

activities exclusively to leasing, and the corporate name must include the words “*Arrendamento Mercantil*” (leasing).

Under current legislation, in Brazil the minimum term for financial leasing transactions varies between two and three years, depending on the usable life of the asset. The value of installments must be stipulated in Brazilian currency, and may be adjusted by floating interest rates or changes in internal-market funding costs or, in the case of operations with funding originating abroad, the U.S. dollar (or other currency) exchange rate.

The aforementioned regulations regarding minimum term and adjustments to lease consideration and other lease payments do not apply to operational leasing transactions, which are restricted to Multiple-Service Banks with a leasing portfolio, or by leasing companies, and are governed by CMN Resolution No. 2,309/96 and the Brazilian Civil Code.

**International Leasing.** Cross-border leasing transactions, both financial

and operational, are currently governed by Central Bank Resolution 3844 of March 24, 2010 and Circular 3491 of March 24, 2010. According to said regulations (i) cross-border financial leasing transactions between a lessor domiciled abroad and a lessee in Brazil, with a payment term longer than 360 days, and (ii) cross-border operational leasing transactions between a person or legal entity resident, domiciled or headquartered abroad and a person or legal entity resident, domiciled or headquartered in Brazil, with a term longer than 360 days are subject to registration with the Central Bank.

Contracts for financial or cross-border operational leases may provide for capital assets, real property and assets, new or secondhand, owned by foreigners, pursuant to the rules governing imports at the time the goods enter Brazil.

For purposes of registration with the Central Bank, cross-border operational leases must comply with the following rules: (i) lease payment shall consider the leasing cost of the asset/good and services inherent in their provision to the lessee, and the aggregate total amount of the

lease payments shall exceed 90% of the price of the asset/good; (ii) the contractual term shall not exceed 75% of the useful life of the asset/good; (iii) the price for exercising the purchase option shall be equivalent to the market price of the asset/good; and (iv) the contract shall not provide for the payment of a guaranteed residual value.

With regard to cross-border financial leases, the following rules shall apply: (i) the total term of the transaction shall be limited to the useful life of the asset/good; (ii) the consideration shall be compatible with international market prices; (iii) the fixed payment installments shall be distributed over the contractual term, so as to guarantee that the proportion between the amount already paid abroad and the total amount of the lease payments does not exceed the proportion between the elapsed term and the total term of the transaction; and (iv) the contract shall contain a clause providing for the purchase option or renewal of the contractual term.

In accordance with Central Bank Resolution 3844/2010 and Circular

3491/2010, for purposes of registration of cross-border leasing transactions, the Central Bank of Brazil considers the usable life of the asset informed, as appropriate: (i) by the manufacturer in the case of new assets/ goods; (ii) by the manufacturer or a specialized Brazilian or foreign organization, in the case of used assets/goods; or (iii) by a specialized company in the case of real estate property.



## 19 - THE INTERNET AND ELETRONIC COMMERCE

### 19.1. The Internet

The Brazilian Internet Steering Committee (*Comitê Gestor da Internet no Brasil* - CGI.br) was established in 1995 by Inter-ministerial Ordinance 147 issued by the Ministry of Communications and the Ministry of Science and Technology. Based on its design, the main responsibilities of the Committee included:

I - monitoring the availability of Internet services in the country;

II - coordinating the allocation of IP (Internet Protocol) addresses and the registration of domain names; and

III - establishing strategic, technical and operational recommendations for the Internet in Brazil.

In 2003, Presidential Decree 4829 modified CGI.br's duties and created new operating rules for the Committee. As a result of this legislative change, CGI.br's main roles and responsibilities currently include:

I - establishing strategic guidelines related to the use and development of the Internet in Brazil;

II - establishing guidelines for the organization and management of Domain Name registration and assignment of IP addresses;

III - sponsoring studies, proposing R&D programs related to the Internet and recommending procedures as well as technical and operational standards for network security and Internet services;

IV - coordinating actions related to the proposal of policy and procedures to regulate Internet activities.

In order to carry out its activities, CGI.br established a civil nonprofit entity called "Dot BR Information and Coordination Center" (*Núcleo de Informação e Coordenação do Ponto BR* - NIC.br). The creation of this legal entity has ensured CGI.br greater autonomy, thus facilitating the implementation of its activities such as collecting fees on domain name registrations.



Currently, the Civil Regulatory Framework (*Marco Civil*) is the main legislative initiative in Brazil for the Internet. This Framework seeks to establish the rights and obligations of users, service providers, portals and other Internet players. The principles of this initiative include:

I - maintaining records and other connection data to enable tracking criminal acts committed on the Internet;

II - ensuring network neutrality;

III - ensuring the privacy of users' data;

IV - assessing liability for offences committed online as well as for contents posted on the Internet.

## 19.2. Domain Name

The domain name is used to identify and locate computers on the Internet. Domain name registration in Brazil is carried out by NIC.br, by delegation of CGI.br (CGI.br Resolution 01/05). The registration of domain names is governed by the provisions of CGI.br Resolution 08/08.

Pursuant to the above mentioned resolutions, domain names will be assigned on a first-come first-serve basis (provided that the applicant meets the relevant requirements). Unacceptable domain names include those containing swear words, names on the reserved lists of the Steering Committee and NIC.br, any name which might be misleading, or well-known trademarks (except when requested by the lawful owner).

Domain names must respect third-party industrial property rights. Thus the holder of a trademark registered with INPI may bar its use by third parties as a domain name. Unlike trademark registration before INPI, domain name registration at NIC.br does not entail intellectual property rights. The purpose of registering a domain name is merely to avoid duplication and to enable the technical procedures that make the address accessible over the Internet.

Registration of a domain name may be canceled in the event of violation of the rules established by the Steering Committee, or by a court order (Item 5 of the Regulation for Internet Domain Names in Brazil).

There have been various lawsuits seeking the cancellation, injunction, or suspension of a domain name, or assignment thereof to a plaintiff along with prohibition of use by the defendant. In most such lawsuits, when sufficient grounds are demonstrated, plaintiffs have been granted provisional remedies. Neither NIC.br nor the Steering Committee offers the public an administrative procedure for reviewing or requesting cancellation of domain names that have been assigned.

Brazil is implementing an administrative mechanism to settle disputes related to domain names “.br”, called the Administrative System of Internet Conflicts (*Sistema Administrativo de Conflitos de Internet* - SACI-Adm). The purpose of the system is to settle disputes between the holder of a domain name “.br” and any third party over the legitimacy of that registration. SACI-Adm’s scope is limited to determining whether the registration status should be maintained, transferred or canceled. The holder of the domain name accepts to submit a dispute to SACI-Adm through the contract governing the

registration of domain names “.br”.

### 19.3. Intellectual Property

Provisions of the Copyright Law (Law 9610 of February 19, 1998) and of the Software Law (Law 9609 of February 19, 1998) apply to authorship of works traded in the electronic commerce environment (texts, songs, drawings, photographs, computer programs, etc). At least four types of intellectual property may apply to media currently used for electronic commerce: (i) computer programs; (ii) multimedia works; (iii) websites; and (iv) databases.

Computer programs are protected under the Software Law and Copyright Law. Multimedia works, which encompass several forms of expression, are also protected under the Copyright Law through provisions relating specifically to each form of expression. Websites are also protected under said law to the same extent as the different protected works they comprise (graphics, sounds, computer programs, etc.). Electronic databases are protected under the Copyright Law when, by

virtue of the disposition, selection or format of its contents, they constitute a work of authorship; however, when such requirements fail to be met they are not protected. Issues related to whether or not extra protection is needed to cover other forms of creative work incorporated into websites (*e.g.*, structure and business methods), aside from database contents (data considered *per se*) have been the subject of discussions among specialists, and have not yet been adequately provided for by law in Brazil.

#### **19.4. General Aspects of Electronic Commerce**

Electronic commerce consists of the sale of products or the provision of services over electronic systems such as the Internet and other computer networks. It is based upon electronic exchanges of information among three basic groups of participants: businesses, governments and individuals.

M-Commerce and T-Commerce stand among the most recent forms of electronic commerce. M-Commerce entails commercial

operations performed through mobile devices (cellular phones, palmtops, among others), whereas T-Commerce is a form of E-Commerce conducted by means of digital television connected to the web, working as a communication device for the purchase and sale of any product by simple remote control commands.

To respond to developments in electronic commerce, in May 2001 the Brazilian Electronic Commerce Chamber (*Câmara Brasileira de Comércio Eletrônico*) was founded, with the aim of promoting, representing and defending the collective rights of companies, entities and users engaged in e-commerce transactions.

In response to this trend, governmental electronic services have assumed increasing importance and entailed considerable investment and planning. In October 2000, the Electronic Commerce Executive Committee was founded, for the purpose of drawing up guidelines, coordinating and promoting activities for implementation of Electronic Government services, focused on

providing services and information to citizens.

Electronic Government Service (E-Gov) entails the use of information technology for use in government-to-government (G2G), government-to-business (G2B), and government-to-citizens (G2C) applications, and ushers in important changes in relations between government and society. Implementation of E-Gov systems demands investment in technological infrastructure, so as to provide the minimum necessary security to guarantee citizens privacy and promote Government transparency. Examples of online programs offered in these sites are: federal electronic auctions and public tenders, *Rede Governo* (Government Network), *Portal Minas*; Dutch auctions and *Comprasnet*, among other services provided by state and municipal governments.

### **19.5. Legal Aspects of Electronic Commerce**

Currently, there is no specific law in Brazil controlling e-commerce and industry experts and Government authorities are discussing the scope

of legislation required. They concur, however, on the need for specific legislation to ensure the legality of business carried out in a virtual environment.

At present, several bills providing for electronic commerce are under review in Congress. These include Bill 1589/99 (that is being examined jointly with Bill 1483/99), and Bill 3303/00 (that is being examined jointly with Bill 3016/2000), which are currently before the Chamber of Deputies, and Bills 672/99 and 4906/01 introduced by the Federal Senate.

Bill 1589/99, drafted by the Special Committee on Computer Law of the São Paulo chapter of the Brazilian Bar Association, takes its inspiration from a European Community Draft Directive (1999/93/CE) and proposals set out in the Model Law on Electronic Commerce (1996) by the United Nations Commission on International Trade Law (UNCITRAL). Bill 1589/99, in short, addresses the following topics: (i) waiver of special prior authorization for displaying goods or services in an electronic environment; (ii) requirement of

proper identification of the seller, the host, the access provider, and the security systems used for recording the electronic agreement; (iii) rules for using private information; (iv) transaction security and certification; (v) liability of information intermediaries, carriers, and hosts; (vi) applicability of consumer protection laws to e-commerce; (vii) legal validity of electronic signatures and electronic documents; (viii) publicly-issued and privately-issued electronic certificates; (ix) liability of notaries public in connection with electronic certification; (x) electronic records; (xi) powers of the courts to authorize, regulate and oversee the practice of business certification; (xii) powers of the Ministry of Science and Technology to regulate the technical aspects of certification; and (xiii) administrative and criminal penalties.

Bill 3303/00 proposes regulations for operation and use of the Internet in Brazil, and proposes rules on issues such as: (i) classification of the service provider as seller of a value-added service to the telecommunications service; (ii) creation of security mechanisms,

user databases with service providers, and proper means for identifying illegal activities on the internet; (iii) registration and coordination of domain names by the Brazil Internet Steering Committee (*Comitê Gestor da Internet do Brasil*); and (iv) creation of the Internet Ethics Council (*Conselho de Ética da Internet*).

Bill 672/99 was introduced just a few months after Bill 1589/99, and features nearly all of the provisions of the UNCITRAL Model Law. More concise than the former, it deals with: (i) legal effect of data messages; (ii) equal validity of electronic and printed messages; (iii) equal validity of authentication methods and signatures; (iv) authentication of information in the electronic environment; (v) obligations related to the retaining of electronic messages; (vi) lawfulness of binding statements and contracts made by electronic messages; (vii) principles applicable to identification of the sender and the addressee, and to determining the time and venue of messages.

Finally, Bill 4906/01 introduces rules

to govern electronic commerce within Brazil, in view of the need to standardize rules relating to the electronic commerce at the international level, setting out provisions for application of legal validity to electronic messages and electronic messages, including execution and validity of contracts signed within a virtual environment.

### **19.6. Brazilian laws on virtual transactions**

In view of the lack of specific legislation on virtual transactions, electronic commerce is governed by existing rules of law applicable to traditional commerce, either by direct application or by analogy. Relevant parts of the Brazilian Law for Introduction of the (New) Civil Code also apply, in view of the international nature of electronic commerce.

#### 19.6.1 Rules applicable to contracts

Just as with any other legally binding commitment (applicability of which requires that a capable party has entered into a legal obligation, with a lawful objective, through a format recognized in law) under the Brazilian

Civil Code legal obligations assumed in an electronic environment are also valid, provided such requirements are met.

Consequently, electronic contracting between parties in direct contact is considered to have been effected when proposals and acceptance are effected immediately (online), in which case article 428, I, of the new Civil Code shall apply. Conversely, electronic contracting between parties may be deemed to have been effected when proposal and acceptance are effected by e-mail between parties not directly connected online, in which case article 434 of the new Civil Code shall apply.

#### 19.6.2 Applicable Law and jurisdiction

Under article 435 of the new Brazilian Civil Code, contracts are deemed to go into effect at the place where the proposal is presented. Article 9 of the Law for Introduction to the Civil Code states that obligations arising out of a contract shall be governed by the laws of the country in which it was entered into, and that said obligations shall be deemed entered into in the

domicile of the proponent. Thus, an electronic commercial agreement between parties located in different countries shall be governed by the laws of the country of residence of the proponent. In other words, if an offer is made by a company or individual resident abroad, and is accepted by a company or individual resident in Brazil, the governing law shall be that of the foreign country and, conversely, if the offer is made by a company or individual resident in Brazil, and is accepted by a company or individual resident abroad, the governing law shall be the Brazilian law.

The matter of jurisdiction for settling disputes arising from electronic contracts has not been addressed by any law in Brazil. The absence of boundaries or physical references on Internet trade makes it difficult to identify the competent court for settlement of such disputes. Bill 672/99 adopts the basic provisions of the UNCITRAL Model Law which, with regard to jurisdiction, proposes that the place of remittance or receipt of an electronic message shall be deemed the physical location of the parties, unless (i) the sender and

addressee have no physical venue which (for purposes of jurisdiction) can be considered their domicile; or (ii) the contracting parties have more than one address, in which case the venue most closely related to the transaction shall be considered.

General international jurisdiction of Brazilian courts, when a contract is entered into by parties located in different countries, is governed by articles 88, 89 and 90 of the Code of Civil Procedure, which states that the Brazilian courts shall be competent when: (i) the defendant, regardless of nationality, is domiciled in Brazil (including corporate entities that maintain branches, affiliates or agencies in Brazil); (ii) the obligation is to be performed in Brazil; and (iii) the lawsuit arises in connection with an event that occurred or an act performed in Brazil.

Thus, electronic contracts executed between two companies located in different countries, where the proponent is headquartered in a foreign country and does not have offices or branches in Brazil, shall be governed by the law of the foreign country. If, on the other hand, the

obligation arising out of the contract is to be performed in Brazil, Brazilian courts shall be competent to adjudicate the dispute.

#### 19.6.3 Rules applicable to documentary evidence

According to the Brazilian Code of Civil Procedure, all morally and legally acceptable means may be used to prove the truth of facts.

Under the Brazilian Code of Civil Procedure, all morally and legally acceptable means may be pursued to uphold the truth.

Under article 225 of the new Civil Code, any electronic reproduction of facts or things are acceptable as evidence, provided the other party does not claim a lack of accuracy. Therefore, should the other party dispute the veracity of electronic evidence, expert examination of said evidence may be required. Nonetheless, no specific legal rules govern matters relating to alteration of content of electronic documents or uncertainty of authorship.

#### 19.6.4 Rules applicable to the responsibility of suppliers of goods or services

Liability in connection with goods and services sold by electronic means is subject to the same rules as other forms of commerce.

Electronic transactions involving sales to consumers are subject to the Consumer Protection Code (Law 8078/90). The Code applies to all transactions involving a consumer (individual or corporate entity that acquires products or services as end user) or the supplier of goods or services (individual, corporate entity or unincorporated entity, whether national or foreign, engaged in manufacturing, assembly, creation, construction, transformation, import, export, distribution or trade of products, or provision of services) in a business transaction.

Provisions of the Consumer Protection Code apply to consumer transactions conducted over the Internet, especially in connection with: (i) the right to information about the seller and features of the offered good or service; (ii) protection



against unfair business practices and misleading advertising; (iii) databases and consumer records; (iv) the right to return a purchase; and (v) the binding nature of the offer.

Provisions of the Consumer Protection Code do not apply to business-to-business transactions, whether performed through the Internet or by electronic mail (electronic data interchange), given that the company is not considered the end consumer.

Under article 9, paragraph 2 of the Law for Introduction of the Civil Code, obligations arising in connection with a contract shall be deemed to arise in the domicile of the proponent, and this applies also to cross-border consumer transactions. Thus, in the event that the proponent company is domiciled abroad and has no branches or offices in Brazil, the consumer is not entitled to protection under the Brazilian Consumer Protection Code, and the governing law shall be that of the proponent's venue.

Some controversy still surrounds this matter, as there have been cases on international consumer transactions where the supplier has a branch in Brazil, and claims based on the Brazilian Consumer Protection Code have been filed against said branch, in view of the joint and several liability applicable to consumer transactions.

#### 19.6.5. Spam

Sending unsolicited e-mails is forbidden under the Brazilian Consumer Protection Code, which establishes that the supplier may only deliver or send products upon request. Suppliers that send spams are liable to penalties under articles 6-V and 84 of the Brazilian Consumer Protection Code. Presently, bills addressing the problem of spam are under discussion in Congress: Bills 21/04 and 36/04 (to be examined jointly with Bill 367/03), Bills 2766/03 and 757/03 (spamming by cell telephone) and Bill 2186/03 (to be examined jointly with Bills 1483/99, 2423/00, 3731/04, 3872/04 and 2423/03).

## 19.7. Tax legislation applicable to electronic commerce

Electronic commerce implies a variety of transactions with tax implications that are a matter of worldwide concern.

The ICMS tax (state VAT) is applicable to goods supplied by means of electronic commerce, even where the products are imported, under the provisions of article 155, § 2, IX of the Federal Constitution.

With respect to the provision of Internet access (though some controversy exists as to whether or not ICMS or ISSQN should be applied) recent court rulings have stated that ICMS does not apply to Internet access services, which are not deemed a communication service under Supreme Federal Court (STF) resolution 456650/PR of 6/24/2003.<sup>19</sup> The matter is of some importance, in view of rates that vary by as much as 20%: for electronic transactions ICMS may be as high as

25%, whereas the maximum ISSQN rate is 5%.

The Federal Constitution grants to Municipalities powers to levy taxes on certain services (ISSQN) outside the scope of ICMS. However, Internet access services are not included in the list attached to Complementary Law 116/03, which defines the services subject to ISSQN. Thus, besides not being liable for ICMS, Internet access services are not deemed taxable events for purposes of ISSQN.

Bill 3303 currently under review in the Coordination Standing Committee of the Chamber of Deputies proposes classifying Internet providers as service providers, under the terms of the Consumer Protection Code.

## 19.8. Electronic Documents as Evidence in Court

The purpose of this document is to briefly evaluate people's ability to use technological developments as evidence in a court of law. Does the constitutional principle of Right to Defense allow the party to use the newly created contractual techniques

---

<sup>19</sup> Confirmed by subsequent decisions (MC 10388/SP, Justice Luiz Fux, DJ 20/02/06, Resp 736607/PR, Justice Francisco Falcão, j. 25/10/2005; Resp 511390/MG, Justice Luiz Fux, j. 19/05/2005).

deriving from telematics? The answer to this question will be the main concern of this paper.

### 19.8.1. General Theory of Evidence

Evidence is a means whereby litigants seek to convince a Judge of the justness of their claims. Judgments in most litigation depend upon clarification of questions of fact. Generally, the court's determination of the facts depends upon the evidence. Theoretically, the probability of obtaining a favorable decision is proportional to the strength of the evidence presented.

The purpose of evidence is to convince the Judge. Article 128 of the Code of Civil Procedure states that rulings are based upon evidence presented to the court. A judge's decision is based on the truth reflected in the record and not on natural truth. This limitation is justified in that it reduces the scope for arbitrary decisions.

During the fact-finding phase, a judge must be extremely cautious while seeking ample access to all the necessary means for appraising

and examining all evidence brought to his attention. Unwarranted dismissal of evidence by a judge constitutes curtailment of the right to defense (article 5, LV, of the Federal Constitution). A Judge, based on criteria established in Law (rational persuasion), must attempt to reconstruct the facts on record to determine how they occurred. He is free to examine the facts. Such freedom cannot, naturally, extend to judicial arbitrariness.

Article 332 of the Code of Civil Procedure does not specifically list types of evidence, but rather accepts "all legal and morally legitimate means, even if not specified herein." It even accepts, "atypical" or "unnamed" types of evidence, but repudiates "illegitimate" evidence, i.e., evidence that violates Procedural Law, having been illicitly or improperly obtained.

Documentary evidence is that which represents and serves to reproduce a manifestation of thought. Since events and ideas are held in court to be "facts", a document is the representation of a fact and, as such, a document has no natural

existence of its own, but forms a part of an action, and is thus a form or medium.

Documents may be written or non-written, public or private. Some scholars further classify documents according to authenticity, origin, signature, form of preparation (direct, indirect; written or graphic), content (narrative or constructive), form (formal or otherwise) etc. A document is “*ad solemnitatem*”, when indispensable to the very substance (nature, form and constitution) of the act; and “*ad probationem*” when it constitutes mere evidence of an act or of its effects. Public documents, if signed by a public official (authority) are presumed to be authentic (*juris tantum*) excepting when evidence exists as to their forgery or misrepresentation.

With respect to private documents, the question of their value as evidence is controversial, given the diversity of forms in which they may be presented. For example, in the case of a private document that has been written and signed, or merely signed, there is a legal

presumption that any declarations contained therein are true. According to article 388, I, of the Code of Civil Procedure, a private document ceases to merit credence when the signature is contested and when its veracity cannot be attested. To refute the veracity of any public or private document, the interested party needs only to argue that it is false, (“*principaliter*” or “*incidenter tantum*”) with the aim of having it declared so in court. A private document must necessarily be written by one of the parties, or by a third party or it may even be unsigned. Under traditional doctrine, the author of a private document is the person who signed it, such signature being unnecessary only in cases where such documents are not usually signed, i.e., commercial records.

A number of questions about “electronic documents” and their enforceability as evidence arise from this analysis. The use of electronic media in the commission of juridical acts is a reflection of the progressive replacement of writing and printing by electronic impulses or transmissions. The signature

of the author does not necessarily accompany the document, in view of its replacement with individual passwords and codes.

#### 19.8.2. Electronic documents among types of documentary evidence

Legal doctrine had to abandon traditional notions of documentary evidence to take into account a new form of expression which is neither oral nor written, but rather digital<sup>20</sup>. All documents serve as a declaration or representation of a present or past event. The same applies to digital documents, the only difference being that the sensorial perception of the receiver/observer is not immediate. Moreover, to put said representation into an accessible and intelligible form, an appropriate (intermediary) electronic device (hardware) is needed.<sup>21</sup> Within a broad classification of documents, digital documents are categorized as indirectly representative documents. Therefore, the category of digital documents encompasses all and any

information which, when processed through the appropriate electronic device is capable of transmitting a representation of a present or past event.<sup>22</sup>

#### 19.8.3. Representative Support

In view of the immaterial nature of electronic documents, their content must necessarily rest upon a medium (i.e., a floppy disk, magnetic tape, compact disk, etc.). This invokes issues relating to legal standards for the preservation of documents.

Legal doctrine, in principle, regards the magnetic medium (representative) as the original of the document<sup>23</sup> rather than the information contained therein in digital form. This position is now considered outmoded, and the medium is today regarded merely as the means of storage of the document, the importance whereof resides solely in its content.

<sup>20</sup> Graziosi, Andrea, "Premesse ad una teoria probatoria del documento informatico", in *Rivista Trimestrale di Diritto e Procedura Civile*, Anno LII, n. 2, jun/98, Milano, Giuffrè, p. 487.

<sup>21</sup> Graziosi, Andrea, op. cit., p. 491.

<sup>22</sup> Graziosi, Andrea, op. cit., pp. 491 and 492.

<sup>23</sup> Amory, Bernard e Poulet, Yves, "Le droit de la preuve face a l'informatique et a la télématique", in *Revue Internationale de Droit Comparé*, n. 2, apr/jun/ 1.985, pp. 340/341.

In the 1980s<sup>24</sup>, in some Western European countries like Belgium and France, any transcription of the contents of an electronic document onto paper was always considered a copy. Nonetheless, this does not imply that copies (meaning in this context print-outs of an electronic document onto paper) could not be produced in court. An interpretation provided under French legislation (art. 1348, line “a”, of the French Civil Code) allows the use of “a faithful and durable copy”, provided the original is either nonexistent or irrecoverable.

Since the 1980s the doctrinal position of European legislation has undergone considerable change. The medium is no longer regarded as the original of a document. Directive 97/7 of the European Parliament for Distance Selling provides rules for contracts between consumers and suppliers using communications media and without the physical presence of either of the parties.<sup>25</sup>

<sup>24</sup> Amory, Bernard e Poulet, Yves, op. cit., p. 341.

<sup>25</sup> Silva, Ricardo Barretto Ferreira da e Paulino, Valéria in “Relevant issues in conducting commerce on the Internet”, paper presented on the 10<sup>th</sup> Annual Conference on Legal Aspects of Doing Business in Latin America, 1.998, pp.10/11.

Article 5 of this Directive, foreseeing the insecurity posed by data stored on magnetic media, and with the aim of affording protection to contracting parties, provides that declarations in distance selling contracts should be confirmed in writing or any other durable medium. This new EC legislation distills a doctrine with regard to means for preserving electronic documents. In 1998, the European Union’s Prospective Uniform Commercial Code (UCC), in article 2B, uses the term “record” rather than “writing” since, for the purposes of the UCC, “record” is equivalent to information on a tangible medium or filed on electronic media, or in any other intelligible recoverable form<sup>26</sup>.

#### 19.8.3.1. Types of Evidence

Analysis of the value of an electronic document as evidence in court rests upon three principal aspects:

<sup>26</sup> Selected Provisions and Comments from Proposed Article 2B – September, 1997, p. 14, apud Silva, Ricardo Barretto Ferreira da e Paulino, Valéria, op. cit., p. 15. Other new EU directives on the issue: Directive 21/2002 – institutes a common network and services framework for electronic communications; Directive 65/2002 provides for distance selling and banking services; Directive 58/2002 - preservation of privacy in the electronic communications sector.

evidence of the existence of the document; evidence of origin of declarations contained therein; and evidence of the content of the document.

#### 19.8.3.2. Evidence of existence of an electronic document

If, on the one hand, telematics has the advantage of being swift, its drawback lies in its ephemeral nature. This may raise difficulties for presentation in court of proof of the very existence of documentary evidence. Thus, under archaic features of the Brazilian legal system (such as article 333, I and II of the Code of Civil Procedure) the burden of proof of the existence of documentary evidence lies with the party claiming its existence. As a rule, Brazilian law ensures great freedom to use various forms of evidence, whether or not provided for by law (article 332, II of the Code of Civil Procedure). However, exceptions to this rule include certain juridical acts (*e.g.*, contracts with a value higher than that established by law).

Italian doctrine, in practice and for

purposes of evidence, holds that a declarative document (a category that includes electronic documents) is equivalent to a private document under the terms of article 2702 of the Italian Civil Code.<sup>27</sup> This article also provides hypotheses in which a private document acquires the status of evidence.

Common law systems acknowledge two basic rules that could pose obstacles to proof of the existence of an electronic document, namely, the hearsay rule, and the best evidence rule.<sup>28</sup> Examination of these two rules provides a general view of how these issues are dealt with.

As a consequence of the hearsay rule, testimony of a witness (one of the most important forms of evidence under the Anglo-Saxon legal systems) is allowed only if the witness has direct and personal knowledge of the facts of his testimony. When this rule is applied to written documents it is held that a document can not be considered a trustworthy source of evidence if its author (issuer) is not present

<sup>27</sup> Graziosi, Andrea, *op. cit.*, p. 501.

<sup>28</sup> Amory, Bernard e Poulet, Yves, *op. cit.*, p. 335.

to testify to it. Since in the case of an electronic document the original information may involve various people, then clearly the hearsay rule poses an obstacle to proof of the existence of the document.

According to the best evidence rule, in principle, a document is only valid as evidence if presented in its original version. In its original form, an electronic document requires support of a digital electronic device in order to materialize. Thus, in principle, the best evidence rule poses an obstacle to the use of electronic documents as evidence.

There are, nonetheless, numerous exceptions to the hearsay rule and the best evidence rule. The British Civil Evidence Act of 1968 and the United States Business Records Exception are two such exceptions to be further analyzed.

#### 19.8.3.3. Origin of declaration and electronic signature

Another relevant theme arises when doubt exists as to the identity of the declarant. This theme is closely linked to the issue of electronic

signatures, also discussed herein. Clearly, a name simply typed at the bottom of a document does not have the same value as a conventional signature. A conventional signature has features (and reflects the handwriting of the signatory) that inhibit or preclude forgery.

Commercial practice has come up with some solutions to these problems. A secret user code of access to the electronic system provides one means of identification often used in electronic transactions. A weakness of this means of identification lies in that it does not enable physical identification of the individual making the declaration. To this end, it is necessary that techniques for verifying the physical characteristics of the individual at a distance, such as finger-printing or voice recognition, be developed. Advances in IT have been accompanied by modern techniques for identifying the “author” of an electronic document. What are commonly referred to today as “electronic signatures” are in effect special computerized procedures for controlling the origin of electronic documents. This entails addition of



a cryptographic system, the value of which as evidence is comparable to a traditional signature.<sup>29</sup> The user of the electronic system is provided with a couple of asymmetric keys - one is private, and the other is public. Both have an alphanumeric code, but the private key has a secret code known only by the user. The code corresponding to the other key is of public domain and is part of a list accessible to other users. The two keys are reciprocally compatible and identifiable, which enables their use as digital signature or electronic signature.<sup>30</sup>

For the purpose of evidence, electronic signatures are quite different from conventional signatures, since the latter constitutes documentary proof, thereby enabling a judge to move on to direct examination of the evidence. In the case of a digital signature, other necessary steps include verification of the origin the declaration, which depends upon the availability of an electronic device,

<sup>29</sup> Graziosi, op. cit., “l’apposizione della firma digitale integra un atto di volontà, giuridicamente rilevante, di assunzione di paternità della dichiarazione cui si riferisce”.

<sup>30</sup> Graziosi, Andrea, op. cit., p. 507.

so that the above-described method of control can be verified. Thus, an electronic signature is not directly representative evidence. This results in a curious conundrum: evidence of a declaration in an electronic document is documental, whereas proof of provenience is *constituenda*.<sup>31</sup>

#### 19.8.3.4. Evidence of the content of a document

The crucial issue relates to the credibility of the document content. As it is well known, electronic documents can be easily manipulated without leaving any trace.

There are two types of risk to which electronic documents are subject: errors and fraud. Errors may be of various types: human, technical or external. A major portion of human errors results from flaws in manipulation of the data. External errors are generally due to environmental factors (*e.g.*, adverse weather conditions). Technical errors are usually a result of software flaws, or failure of the electronic device

<sup>31</sup> Graziosi, Andrea, op. cit., p. 510.

on which they are being run. Fraud is different from errors in that it is maliciously intentional.

There is no easy solution to fraud-related problems involving electronic commerce. Proposals for typifying new crimes and stiffer sentences have been suggested. In Brazil, an example of this is Bill 84/99 (proposed by Congressman Luiz Piauhyllino) which has now been approved in the Chamber of Deputies, and its counterpart Bill 89/03 currently before the Federal Senate, and Bill 407/2005 providing for penalties for 'hackers' and 'crackers'.

#### 19.8.4 Legislative initiatives

The British Civil Evidence Act of 1968 was the first law to provide for electronic evidence and its validity in courts. It foresaw certification of a document to be signed by the person responsible, attesting to the veracity of its content, for use in court.

In the United States, the Uniform Business Records as Evidence Act and the Uniform Rules of Evidence, both of which date from the 1960s,

contain exceptions to hearsay and best evidence rules, under which electronic evidence is admissible in cases where the content is of a commercial nature. Moreover, under the Business Records Exception, documents of electronic origin are admissible without accompanying testimony of the author.

In France, a law of July 12, 1980 ratified the case-law understanding that not only "written" documents were acceptable as evidence.

One of the most complete and modern approaches to the issue is the Italian Law 59 of 1997, which provides detailed rules on conditions of admissibility of an electronic document as evidence, and express provisions on cryptographic signatures, digital copies, etc.

In Brazil, examples of recent regulations characterized by advances in relation to electronic documents include: Law 9800 of May 26, 1999, which authorizes the parties to submit electronic documents and send petitions for certain procedural purposes by fax; Federal Revenue Secretariat

Normative Instruction 1077 of October 29, 1999, regulating the IRS Virtual Call Center (e-CAC); Law 10259/2001, which authorizes the courts to send and receive electronic documents; Supreme Court Resolution 1, regulating electronic procedures on law suits at that Court; Supreme Court Procedural Amendment 6, which authorizes the parties to incorporate into their appeals a high-court sentence published on the internet.

The following Bills are under discussion in the Brazilian legislature: Bill 5732/2005 and Bill 1692/2003 on the use of e-mail; and Bill 7316/2002 on the use of electronic signatures. Law 11.419, 2006 regulates the electronic procedure on law suits.

Brazilian courts, for their part, have been adapting to such new legislative standards. In July 2003, the Regional Federal Court (TRF) of the 4th region adopted electronic records in four specialized federal courts, including paperless records and distance dispatch of petitions and documents by e-mail. Certain Courts, however, still discourage the

use of electronic documents. The Superior Court of Justice (STJ), for example, acknowledges the validity of electronic documents only: (i) if the electronic file has been correctly received by the Court; and (ii) if the originals have been duly filed in accordance with the terms of Law 9800/99.<sup>32</sup>

The first standards for electronic communications were set by Decree 3505 of June 13, 2000, which also established an Information Security Policy for bodies of the Federal Public Administration. Subsequently, Decree 3587 of September 5, 2000 (revoked by article 6 of Decree 3996 of October 31, 2001) set the standards for the Key Public Infrastructure for the Federal Executive Branch (ICP-Gov), with the aim of creating and using digital signatures through asymmetric cryptography.

In the private sphere, Executive Order (MP) 2200-2 of August 24, 2001 established a Key Public Infrastructure (ICP-Brasil) to

<sup>32</sup> Resp 594352/SP, Resp 594.352/SP, REsp. 525067/ES, j. 19.02.2004. In opposite sense: Appeal nº 11.960/RJ, from the Superior Court of Justice.

ensure the authenticity, integrity, and legal validity of documents in electronic formats, support applications, applications using digital certification, and the conduct of secure electronic transactions.

19.8.4.1. Provisional Measure 2200-2, August 24, 2001, and other bills of law in Brazil

Under the terms of Executive Order (MP) 2200-2 of August 24, 2001, ICP-Brasil is an organization made up of a Policy Steering Committee (linked to the Office of the President's Chief of Staff) and certification authorities (i.e., entities responsible for issuing electronic certificates and establishing the identities of persons and organizations requesting certification).

Although Executive Order (MP) 2200-2/01 does not require digital certification for the validation of electronic documents, its article 10, §1 attributes “presumption of relative authenticity for digital signatures on documents electronically certified by a Certification Authority (AC) accredited by the ICP-Brasil Steering Committee”.

If the parties choose to use another Certification Authority (not accredited by the Steering Committee) to authenticate their electronic documents, in order to ensure their juridical validity before third parties, article 10 § 2 of the aforementioned Executive Order recommends that there be a contract stipulating that the parties accept that AC for authentication purposes. This procedure is important to ensure the juridical validity of a document if, for example, it is required as evidence in court.

This Executive Order was issued three times before assuming its present form as MP 2200-2/2001. It overrode various Bills circulating in the National Congress. Such Bills addressed the same issues, and some were even more comprehensive. Bill 4906/2001, for example, aside from providing for digital signatures and electronic certification, deals in a more comprehensive manner with relationships and responsibilities stemming from Electronic Commerce.

In the same context, Bill 7316/2002

(proposed by the Secretariat for Parliamentary Affairs of the Presidency of the Republic), inspired by European Parliament Directive 1999/93/EC, fills gaps in Executive Order (MP) 2200 by providing for the civil liability of certified service providers, procedures to be observed in the event of failure of a certification authority, and the juridical value of certificates issued abroad.

The aforementioned Bill distinguishes between the categories “electronic signatures” and “qualified electronic signatures” (the latter having the same juridical and evidence value as a traditional signature, provided requirements of the standard are met), and between “certification” and “qualified certification”.

#### 19.8.5. Conclusions

Brazilian law has sought to introduce adequate instruments for settling new issues stemming from the rapid adoption of new technologies. Executive Order (MP) 2200 provides standards for two aspects of juridical and evidence value of electronic signatures. On the one hand, advanced electronic signatures

can produce the same effects as conventional signatures; on the other, the juridical and evidence value of electronic signatures cannot be refuted, provided that the parties have previously agreed to accept their validity. In the latter case, the validity of an electronic signature derives from the express will of the contracting parties.

While much still remains to be done, the progress in overcoming the barrier of legislation and court decisions deserves to be stressed. There is truth in the saying that Law is always left behind by advances in Science. This justifies the approach whereby legislative regulations on issues of a scientific nature must always be sufficiently generic to encompass the greatest possible number of hypotheses while leaving room for further developments.

An electronic document is thus fully admissible as evidence (the rule established in article 332 of the Brazilian Code of Civil Procedure being no exception), provided that guarantees of individual freedom, foreseen in the Federal Constitution, and the principles of public order are observed.

Furthermore, through the Key Public Infrastructure (ICP-Brasil) initiative, established under Executive Order (MP) 2200-2/01, Brazilian legislation has, to a great degree, adopted a system capable of providing security and validity to operations conducted by electronic means.



## 20 - INFORMATION TECHNOLOGY

### 20.1. Information Technology in Brazil

The traditional configuration of hardware and software is no longer sufficient to define the industry. The concept of information technology (IT) includes, in addition to hardware and software elements, networks, multimedia and specialized labor. For purposes of this Section, the expression “information technology - IT” will encompass all these meanings.

From a technical standpoint, hardware comprises the physical elements of the computer, while software comprises the logical ones. Under Brazilian Law, software is protected by Law 9609/1998, the Software Law, and may be protected by Law 9279/1996, the Industrial Property Law, or by Law 11484/2007, which provides for the protection of original layout-designs of integrated circuits, when such hardware or integrated circuit topography meets the legal requirements to be protected.

The first government initiatives in the IT industry date back to the early 1970s. In April 1972, Presidential Decree 70370 created the Commission for the Coordination of Electronic Processing Activities (*Comissão de Coordenação das Atividades de Processamento Eletrônico*) – CAPRE. The Commission was linked to the then Ministry of Planning and General Coordination and its main duties included controlling government and private computers, advising the government on the purchase and lease of equipment, coordinating training programs and the proposing measures to finance data processing businesses.

CAPRE was replaced by the Special Secretariat of Information Technology (*Secretaria Especial de Informática - SEI*)<sup>33</sup>, whose main objective was to develop an IT policy for Brazil. This transition also marks a significant administrative change in the objectives of state intervention in the IT industry. When CAPRE was created, the government’s

<sup>33</sup> Created by Decree 84067 of October 8, 1979.



main concern was to control and learn how to use IT resources. SEI's main objective, on the other hand, was to promote the development of domestic technology.

In this context of change, Law 7232 was enacted in 1984 to regulate the national IT policy. At the time, restrictions on imports, production, operation and trade of IT goods and services were the means for the country to achieve expertise in IT. And this expertise was expected to boost Brazil's development.

By enforcing the Law, the government imposed the aforementioned restrictions and created tax and financial incentives to favor Brazilian companies of national capital<sup>34</sup>, especially for the manufacture of hardware products. The result of this policy was an IT market restricted to Brazilian companies of national capital that had no interest in investing in technology development, offering customers obsolete goods and services.

---

<sup>34</sup> Companies exclusively, permanently, effectively and unconditionally under the control of individuals resident and domiciled in Brazil.

This scenario changed dramatically with the enactment of Laws 8191/1991 and 8248/1991, which reduced substantially the restrictions on imports, production, operation and trade of IT goods and services. In 1995, Constitutional Amendment 6 suspended the privileges to Brazilian companies of national capital. A new order for the development of the IT industry in Brazil was then set.

Under the new policy, the federal government created tax incentives for the production of IT and automation goods in Brazil, especially in the Manaus Free Trade Zone (*Zona Franca de Manaus*).<sup>35</sup> To be eligible to benefit from these incentives, manufacturers should add value to their goods locally and follow basic production processes approved by the Ministry of Science and Technology (MCT), in addition to investing in the research and development of IT-related activities.

Also in the 1990s, the development of the IT industry in Brazil led

---

<sup>35</sup> Later amendments of the Laws and their regulation extended the incentives to companies established in the Amazon area, and the Northeast and Central-West regions of Brazil.

to the creation of governmental programs to promote the export of software. The National Software Program (*Programa Nacional de Software - SOFTEX*) was created and implemented under the coordination of the Council for Technological Development (*Conselho Nacional de Desenvolvimento Tecnológico - CNPq*). In 1994, SOFTEX was considered a priority by MCT's Ordinance 200/1994. The Brazilian Society for the Promotion of Software Export (*Sociedade Brasileira para Promoção da Exportação de Software*) was established as a non-governmental entity to perform, promote, encourage and support innovation activities and scientific and technological development in the creation and transfer of technologies for software products targeting foreign markets.

In addition to tax benefits, the IT industry is eligible to receive funds from the federal government. The Information Technology Sectoral Fund (*Fundo Setorial de Tecnologia da Informação - CT-INFO/CATI*), which was established as a branch of the National Fund for Scientific

and Technological Development (*Fundo Nacional de Desenvolvimento Científico e Tecnológico – FNDCT*), is one of Brazil's most important funds in the sector. Managers of this fund are the Brazilian Innovation Agency (*Financiadora de Estudos e Projetos – FINEP*) and CNPq. CT-INFO/CATI funds come from the transfer of a percentage of gross revenues by companies that benefit from tax incentives established by Law 8248/1991. As other industry funds in Brazil, CT-INFO/CATI funds are invested in IT companies whose projects are qualified in public tenders.

Laws 10973/2004 and 11196/2005 were enacted to promote technological innovation in Brazil and have been widely used by IT companies. Law 10973/2004, also known as the Innovation Law, establishes incentives for innovation and scientific and technological research. The Innovation Law intends to link academic research and market demands through cooperation agreements entered by academic research centers (*e.g.* university research centers) and corporations. Law 11196/2005, known as "Law

of Good” (“*Lei do Bem*”), provides for tax incentives for technological innovation.

## 20.2. Legal Protection

Brazil is a signatory of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).<sup>36</sup> As such, the provisions of TRIPS are enforced as minimum standards for intellectual property protection and have guided the formulation of intellectual property laws.

In terms of intellectual property protection and trade secret, the most important Brazilian legislation for the IT industry includes the Software Law, the Industrial Property Law and Law 11484/2007. For purposes of this section, only some of the provisions of the Industrial Property Law prohibiting unfair competition practices will be reviewed.

Software

According to TRIPS and the Berne Convention,<sup>37</sup> computer programs

are protected under copyrights laws. In Brazil, Law 9610/1998 (Copyright Law) will apply to software in the absence of specific provision in the Software Law.

Under the Software Law,<sup>38</sup> a computer program is protected for a period of 50 years from the 1st of January of the year following its release, or from the date of its creation, whichever occurs first. The legal protection of computer programs in Brazil does not require previous registration and is also granted to foreigners domiciled abroad, provided that the country of origin of the software grants equivalent rights to Brazilian citizens and foreigners domiciled in Brazil.

Unless otherwise provided for in an agreement, the copyright of software developed by employees, service providers or public servants as a consequence of their respective contracts will be the property of their employers, customers or government entity. On the other hand, the respective authors will own the copyright of software developed without connection to the respective

<sup>36</sup> Legislative Decree 1355/1994.

<sup>37</sup> Legislative Decree 75699/1975.

<sup>38</sup> Complemented by Decree 2556/1998.

employment and service contracts, and without use of resources, technical information, trade and industrial secrets, materials, premises or equipment of their employers, customers or government entity, as the case may be.

Software registration in Brazil is not mandatory for it to enjoy legal protection. However, the owner of the software's rights may register its code with the National Institute of Industrial Property (*Instituto Nacional da Propriedade Industrial*– INPI).<sup>39</sup> According to article 3, paragraph 1 of Law 9609/1998, the registration application must identify the software's author and owner, if different, and provide a description of the program's features and other data considered sufficient to identify the software (i.e., portions of its source code). All data provided to INPI for the registration will be kept confidential and disclosed only when required by a court order or if requested by the registry holder.

Articles 7 and 8 of the Brazilian Software Law establish that the

---

<sup>39</sup> The INPI Resolution 58/1998 establishes the specific procedures for software registration.

company licensing the software in Brazil must establish a technical validity term for each version of the software. During such term the licensor shall make available to end users all services that such version of the software may require (support and maintenance, consulting, etc.). Technical validity is not a product warranty but rather a statement of the software version's lifetime. Such term must be clearly stated in the software license agreement, tax invoice, media or package.

With regard to resale, distribution and other agreements granting Brazilian citizens or companies domiciled in Brazil the rights to resell, distribute or to sublicense software developed abroad, article 10 of the Software Law states that will be null and void contractual provisions (i) establishing limits for the production, distribution or marketing of the software in violation of current regulations, or (ii) exempt either contracting party from liability in connection with software defects and flaws, or violation of third party's copyrights.

In addition to civil law violations, most software violations are also

criminal offenses under Brazilian Law, subjecting offenders to imprisonment terms ranging from six months to two years, or a fine. In the event of violations consisting in the reproduction of software in violation of third party's copyrights for sale or display for sale, acquisition, concealing or keeping in deposit for purposes of trade, violators will be subject to imprisonment terms ranging from one to four years and a fine.

Law 9609/1998 also establishes relevant rules in connection with the collection of taxes levied in software-related transactions, the period of time during which evidence of payments made to software owners outside Brazil must be kept on file, and the registration of software technology transfer agreements.

### Layout-Design of Integrated Circuits

The protection of integrated circuits' (IC) layout-designs (topographies) under Brazilian Law is also based on the principles contained in international treaties, especially the TRIPS Agreement.

According to Law 11484/2007, the protection of IC layout-designs<sup>40</sup> depends on prior registration with INPI, and will be granted to an original topography that is unknown to technicians, experts or manufacturers of ICs at the time of its development. IC layout-designs will be protected for 10 years from the date of filing<sup>41</sup> or from the date of the first commercial exploitation anywhere in world, whichever occurs first.

The registration of a layout-design grants its rights holder the exclusive right to its exploitation as well as the right to prevent third parties from (i) reproducing, fully or in part, the layout-design, including by incorporating it in an IC; (ii) importing, selling or otherwise distributing for commercial purposes

---

<sup>40</sup> For purposes of Law 11484/2007, integrated circuit means a product in final or intermediate form, of which at least one element is active and with some or all of the interconnections on a fully formed piece of material or in its interior and whose purpose is to perform an electronic function. The topography of integrated circuits is defined as a series of related images, built or coded in any form or manner, representing the three-dimensional configuration of the layers of an integrated circuit, and in which each image represents, fully or in part, the geometric arrangement or arrangements of the surface of the integrated circuit at any stage of its design or manufacturing.

<sup>41</sup> The date when the application was filed with INPI.

a protected topography or an article incorporating such an IC only in so far as it continues to contain an unlawfully reproduced layout-design.

For purposes of Law 11484/2007, the following actions will not be deemed violation of the rights to the layout-design granted under such Law: (i) acts carried out by unauthorized third parties for purposes of analysis, evaluation, education and research; (ii) acts for the creation or exploitation of a layout-design resulting from the analysis, evaluation and research of a protected layout-design, provided that the resulting layout-design is not substantially identical to the protected one; (iii) acts consisting in the import, sale or distribution for commercial or private purposes of ICs or products incorporating such an IC made available in the market by the rights holder of such IC layout-design or with its consent; and (iv) acts described in (ii) of the preceding paragraph, where the person performing or ordering such acts did not know and had no reasonable ground to know, when acquiring the IC or article incorporating such an IC, that it incorporated an unlawfully reproduced layout-design.

Violation of layout-design rights is also considered a crime under Brazilian Law and perpetrators will be subject to imprisonment from one to four years and a fine, in the event of reproduction, import, sale, keeping in stock or distribution for commercial purposes of a protected layout-design or of an IC incorporating such layout-design.

Law 11484/2007 establishes the Support Program for Technological Development of the Semiconductor Industry (*Programa de Apoio ao Desenvolvimento Tecnológico da Indústria de Semicondutores* - PADIS) and the Support Program for the Development of Technological Equipment Industry for Digital TV (*Programa de Apoio ao Desenvolvimento Tecnológico da Indústria de Equipamentos para a TV Digital* - PATVD). Both programs consist of tax benefits for the development of layout-designs and the production of ICs in Brazil.

#### Protection of Undisclosed Information

The protection of confidential information in Brazil follows the principles set forth in article 39 of the TRIPS Agreement. As such,

any person shall have the right to prevent information lawfully within its control from being disclosed to, acquired or used by others without his consent in a manner contrary to honest commercial practices, provided that such information: “(i) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known by or readily accessible to persons within the circles that normally deal with the kind of information in question; (ii) has commercial value due to its confidential nature; and (iii) has been the object of reasonable precaution by the person lawfully in control of the information, under the circumstances, to keep it secret.”

In addition to a contractual breach (when confidential information is disclosed in violation of the terms of a confidentiality agreement), the following violations of secret are also deemed unfair competition practices and a crime under the Brazilian Industrial Property Law: (i) unauthorized disclosure, exploitation or use of confidential knowledge, information or data for use in manufacturing, trading or provision of services, except those of public

knowledge or known to an expert on the subject, to which the perpetrator had access to during a contractual or labor relationship, even after termination of such contract; (ii) unauthorized disclosure, exploitation or use of knowledge or information mentioned in (i) obtained through unlawful means or accessed through fraudulent means; (iii) unauthorized disclosure, exploitation or use of test results or other undisclosed data obtained through considerable efforts and that were presented to government entities as a condition for having the marketing of a product approved. These crimes subject the perpetrator to imprisonment from three months to one year, or a fine.

### **20.3. Tax Benefits**

The IT industry enjoys several tax benefits throughout the country. These vary from simple services tax reduction for software development and licensing, to complex, production-based benefits for the manufacturer of hardware products. For purposes of this section, however, the focus will be on tax benefits originally established by Law 8248/1991.

The most important federal tax benefits currently applicable to local manufactures of IT goods are:<sup>42</sup>(i) accelerated depreciation of new machines, equipment and instruments used in the manufacturing process; and (ii) reduction of the excise tax (*Imposto sobre Produtos Industrializados - "IPI"*) for companies developing or producing IT goods and services that invest in research and development (R&D). The reduction of IPI for these companies is the following:

IPI Reduction	Period
80%	From January 1st 2004 through December 31st 2014
75%	From January 1st 2015 through December 31st 2015
70%	From January 1st 2016 through December 31st 2019

The reduction of IPI for companies located in the Amazon area (subjected to

<sup>42</sup> Law 8248 also provides for a non-tax benefit consisting of preference in procurement by agencies and entities of the federal government, foundations established and maintained by the government and other organizations under the direct or indirect control of the federal government. This preference is granted, in order, to goods and services incorporating Brazilian-developed technologies, or to goods and services produced according to a basic production process.

SUDAM – *Superintendência de Desenvolvimento da Amazônia*), Northeast region (subjected to SUDENE – *Superintendência de Desenvolvimento do Nordeste*) and Central-West region<sup>43</sup> is the following:

IPI Reduction	Period
95%	From January 1st 2004 through December 31st 2014
90%	From January 1st 2015 through December 31st 2015
85%	From January 1st 2016 through December 31st 2019

In addition to IPI reduction in final products, the law allows companies to use IPI credits obtained in the purchase of raw materials, intermediary products, and packaging materials used in the manufacturing of IT goods.

The list of products and services eligible for these benefits has changed several times over the past 20 years. The current list encompasses the following

<sup>43</sup> Companies based in the SUDAM, SUDENE and Central-West areas are subject to specific regulations, usually more favorable than those applicable in other parts of Brazil.



products and services: (i) electronic components for semiconductors, optical-electronics, as well as respective raw materials that are electronic in nature; (ii) machinery, equipment and devices based on digital technology for the collection, processing, structuring, storage, switching, transmission, recovery or presentation of information, their respective electronic raw materials, parts, components and media for operation thereof; (iii) software, machines, equipment and devices that process information and respective technical documentation; and (iv) technical services related to the goods and services described above.

Also, portable computers (including tablets), low capacity digital processing units and products developed in Brazil are subject to specific tax regulations and IPI benefits.

With respect to software, it should be clarified that IPI benefits are only applicable to software embedded in hardware and that are not separately licensed.

To enjoy these benefits the company must submit a basic production plan (“PPB”) to the approval of the Minister of Science and Technology, in addition to other legal and financial information. In short, the PPB must clearly state the manufacturing process and establish a quality control program and a profit sharing program for employees. The applicant company cannot have outstanding and undisputed debts related to federal taxes and social contributions and the employee’s severance fund (*Fundo de Garantia por Tempo de Serviço* - FGTS).

In addition to the above requirements, the company applying for the benefits must invest in its own R&D program in Brazil at least 5% per year of the company’s gross revenues from the sale of IT goods and services in the domestic market, less the taxes levied on such sales and the acquisition cost of products benefited by such incentives. A portion of the R&D funds must be invested in projects with:

Investment Amount	Beneficiaries
no less than 1%	Research centers or institutes, or Brazilian educational entities certified by the Information Technology Committee ( <i>Comitê da Área de Tecnologia da Informação - CATI</i> ).
no less than 0.8%	Research centers or institutes, or Brazilian educational entities certified by CATI, with head offices or main campuses located within the SUDAM area, the SUDENE area and the Central-West region, excepting the Manaus Free Trade Zone.
no less than 0.5%	FNDCT.

R&D investment percentages will decrease as IPI benefits decrease. Investment in R&D is not required from companies with gross annual revenues below R\$15 million.



## 21 - COMMERCIAL REPRESENTATION AND DISTRIBUTION CONTRACTS

Among the types of contracts provided for in Brazilian Law, two play a key role for foreign businesses and investors: commercial representation and distribution.

In these contracts, the contracted party undertakes to promote business transactions at the expense of the contracting party.

In general, a Commercial Representation contract (also an Agency Contract) exists when the relationship between the parties involves intermediation by the Distributor on behalf of the Contracting Party's products, without the obligation to buy such products for resale. Commercial Representation contracts are governed by Law 4886.<sup>44</sup> However, where the Distributor keeps the merchandise in storage, the contract may be deemed to be a Distribution contract, which is regulated by the Brazilian Civil Code.

Nevertheless, it is important to notice that if the parties' distribution relationship is linked to products considered as "Automotive Vehicles" under Law 6729, these parties are forbidden to regulate their contract by any Law other than this one, being null and void any provisions in contrary.

The specific aspects of these types of contract are described below.

### 21.1. Commercial Representation (AGENCY)

Law 8420 of May 8, 1992 governs Commercial Representation in Brazil. Under this law, Commercial Representation is defined as an intermediation activity performed on a permanent basis by any person or company<sup>45</sup> contracted to operate in the market for goods or services on the behalf of a company or of several companies.<sup>46</sup> Nevertheless,

---

<sup>44</sup> On the other hand, there are some eminent Brazilian Scholars, such as José Alexandre Tavares Guerreiro, who accept the possibility of Law 6729 governing Distribution Contracts, in addition to those dealing with automotive vehicles as defined by that specific Law.

<sup>45</sup> Referred to in Brazilian Law as "*Representante Comercial*" (Commercial Representative) or "*Agente*" (Agent)

<sup>46</sup> Representation of just one company would depend on whether an "exclusivity provision" exists in the contract signed by the parties.

the recently enacted Brazilian Civil Code (Law 10406 of January 10, 2002) ruling on the matter refers to Commercial Representation as “Agency”.

Commercial Representatives (or Agents) gather buying proposals from prospective customers and submit them to the approval of the represented company. When a proposal is accepted, the Commercial Representative is entitled to a previously and contractually agreed percentage of the transaction (commission), conditional on the effecting of payment by the purchaser, unless the contract stipulates that the commission shall be paid independently of the payment by the purchaser. Moreover, the Agent is entitled to a commission for all sales in a contractually defined area of intermediation activities, unless otherwise specified in the agency contract.

The above mentioned laws also specify that every Agent must be registered with the Council of Commercial Representatives of the respective Brazilian State where activities take place, bearing in mind

that these Councils have regulatory powers over the profession. Moreover, companies that provide Agency services must register their articles of incorporation with the Board of Trade, where freelance Agents must also register.

Furthermore, under section 27 of Law 8420, Agency contracts must be in writing and, in addition to the specific provisions agreed upon by the parties, contain the following topics: (i) general conditions of Representation; (ii) indication and features of products; (iii) duration of the contract; (iv) indication of the area, or areas where the representation is to be performed and permission (or otherwise) for the represented company to perform direct sales in the indicated area or areas; (v) total or partial exclusivity in the sales area; (vi) commissions owed to the Commercial Representative and payment schedules, conditional (or not) on effective receipt of the purchaser’s payments; (vii) exclusivity (or not) of the represented company’s products; (viii) compensation for the Commercial Representative in the event of unjustified contract

termination, which shall be less than the equivalent to 1/12 of total remuneration paid to the Commercial Representative throughout the contractual relationship.

It is very important to emphasize that, despite the provision of article 1 of Law 4886<sup>47</sup> the scope of the Brazilian Labor Law is such that the represented company might have to bear the costs of labor claims from former Commercial Representatives<sup>48</sup> - except where the representative is a company.

Thus, to avoid such claims and its liabilities, it is of crucial importance that the represented company include the following restrictions in all Commercial Representation Contracts: (i) the Commercial Representative must always be established as a company formed by at least two partners; (ii) the represented company must avoid issuing orders directly to staff of the representative company, and such

---

<sup>47</sup> Provides for the non-existence of labor relations between the contracting parties.

<sup>48</sup> Based, among other allegations, on the legal presumption of a labor relationship, which requires the concomitance of personality, salary dependence, habitualness and subordination.

orders must be limited to fulfillment of the representative's obligations.<sup>49</sup>

## 21.2. Distribution Agreements

Distribution Agreements in Brazil may be divided into two similar but not identical categories:

- (A) Commercial Distribution Agreements
- (B) Ordinary Distribution AGREEMENTS

### 21.2.1. Commercial Distribution Agreements

Commercial distribution agreements are governed by Law 6729 of November 28, 1979 (amended by Law 8132 of December 26, 1990) and its scope is limited to relations between Producers of Automobiles and Spare Parts (Auto Makers) and their Distributors (Dealers).

Under article 2 of Law 6729, only automobiles, trucks, busses, agricultural tractors and motorcycles are subject to these provisions,

---

<sup>49</sup> As provided for in the contract, in Law 4886 and in the Brazilian Civil Code.

leading to the conclusion that any other sort of automotive vehicle, such as boats or non-agricultural tractors are not encompassed, and thus fit into the second category, i.e., Ordinary Distribution Contracts.

Under article 3 of Law 6729, the Dealer's role in Commercial Distribution Agreements encompasses: (i) sales the automotive vehicles described in section 2; (ii) spare parts thereof manufactured or supplied by the respective makers; (ii) technical assistance to consumers; (iii) concession for the use of the Maker's trademark.

Pursuant to the provisions of article 3 of Law 6729, a Commercial Distribution Agreement may forbid the sale of new automobiles produced by other makers.<sup>50</sup> On the other hand, Dealers have the right to trade in new spare parts manufactured or supplied by third parties, while abiding by the so-called loyalty levels.<sup>51</sup> Moreover,

---

<sup>50</sup> In Brazil, it is common to find such prohibitions in this type of contract.

<sup>51</sup> Loyalty level is defined in Section 8 of Law 6729 as the minimum amount of the maker's spare parts which the Dealer is obliged to acquire, according to provisions

Dealers are entitled to trade in second-hand automobiles and original spare parts produced by other makers, as well as other goods and services compatible with the Contract.

Article 5 of Law 6729 specifies basic provisions which must be present in all Commercial Distribution Contracts, namely: (i) definition of the Dealer's area;<sup>52</sup> (ii) minimum distances between different Dealers.<sup>53</sup>

Also, the Dealer is committed to trade the maker's automobiles and spare parts and provide technical assistance to customers, in compliance with the respective Commercial Distribution Contract. Nevertheless, the Dealer is forbidden, personally or through third parties, from performing such activities outside its area.<sup>54</sup>

---

foreseen in the "Dealers' Convention".

<sup>52</sup> The operational area may be reserved for more than one Dealer, except when exclusivity is granted to a specific Dealer.

<sup>53</sup> These distances are established in accordance with marketing potential criteria.

<sup>54</sup> In any case, consumers are always entitled to choose any Dealer in order to purchase goods produced by the maker, whereas, on the other hand, a Dealer has the right to be reimbursed for any technical assistance given to a customer who purchased the product from another

Despite the fact that the area is defined in the Commercial Distribution Contract, article 6 of Law 6729 allows the maker to contract a new Dealer, provided that the market in the operational area proves able to sustain it, or in the event of a vacancy or termination of an agreement.<sup>55</sup>

Under article 7 of Law 6729, the Commercial Distribution Contract must also encompass a binding quota of automobiles to be acquired by the Dealer, defined in accordance with the following items: (i) estimates of the maker's production;<sup>56</sup> (ii) the quota must correspond to a part of the estimated production;<sup>57</sup> (iii) mutual agreement as to the Dealer's quota;<sup>58</sup> (iv) definition of the quota must not take into account

---

Dealer.

<sup>55</sup> However, in any such event, Law 6729 prohibits any new contracting which may jeopardize Dealers who are already contracted, although it grants no preference to a Dealer already established in that particular operational area, once the new contracting has proven feasible in terms of market prospects within that operational area.

<sup>56</sup> This estimate is calculated per product and limited to the domestic market in the subsequent fiscal year, and in accordance with market prospects.

<sup>57</sup> The part of estimated production is comprised of a diversity of different and independent products.

<sup>58</sup> The quota may correspond to the Dealer's business capacity and trading performance, the operational area, and sales prospects.

the Dealer's inventory<sup>59</sup> and must be revised annually.<sup>60</sup>

Article 10 of Law 6729 allows the contracting parties to include in the Commercial Distribution Contract the obligation, on the part of the Dealer, to maintain in its inventory a previously stipulated amount of products, which should be proportional to its turnover of new products.<sup>61</sup>

---

<sup>59</sup> As provided for in section 10 of Law 6729.

<sup>60</sup> In case no adjustment has been made before then due to discrepancies between the maker's present production and previous estimates.

<sup>61</sup> Nevertheless, whenever a Commercial Distribution Contract establishes such a minimum inventory obligation, the dealer is entitled to set the following limits:

- (a) For Automotive Vehicles in general: 65% of the corresponding monthly portion of the annual quota foreseen in section 7 of Law 6729, commented above;
- (b) For Trucks: 30% of the corresponding monthly portion of the annual quota;
- (c) For Tractors: 4% of the total annual quota;
- (d) For Spare parts:
  - (d.1) 5% of all sales in the past 12 months for Implements;
  - (d.2) any agreed value which cannot exceed the purchase price from the maker relating to the Dealer's previous 3 months retail sales, for other components.

Where the Commercial Distribution Contract contains a minimum inventory provision, besides the Dealer's right to the above mentioned limits, Law 6729 also provides that :

- (1) For Automotive Vehicles, Trucks and Tractors: every six months there must be a comparison between the above mentioned "Automotive Vehicles Quota", foreseen in section 7 of Law 6729, and the Dealer's actual market conditions



Article 12 of Law 6729 forbids Dealers from selling new automobiles to other dealers (for resale) rather than to final consumers. This is due to the fact that the law does not countenance sales for purposes of resale, except in the following cases: (i) trades between Dealers linked to the same Maker limited to 15% and 10% of the quota of trucks and of other automobiles, respectively; (ii) international trading.

Furthermore, under Law 6729 the Maker is bound to preserve the equality of prices and conditions of payment among all Dealers which, for their part, are free to set their own consumer prices.

Although Makers are bound to respect the Dealer's operational area, they may perform direct sales in the following cases:

### **(1) Independently of the Dealer's**

---

at that time and his trade performance for the purpose of reducing minimum inventory limits; (2) For products' being altered or breaches of delivery conditions, the maker is obliged, in a period of no more than one year from the event, to buy back the Dealer's inventory of auto parts (except for tools) at the current price offered to all Dealers or, alternatively, replace it with new products at the Dealer's discretion.

**performance or request:** (i) to the Public Administration or the Diplomatic Corps; (ii) to consumers considered as "Special Buyers" by the Dealers' Convention.

**(2) Through Dealers:** (i) to the Public Administrations or the Diplomatic Corps; (ii) to owners of automobile fleets; (iii) to consumers considered as "Special Buyers" by the Dealers' Convention, when so requested by a specific Dealer.

Anyway, the level of direct sales and its impact on the Dealerships' quota must be always present in the Dealers' Convention and any act which may lead to a Dealer's subordination or to interference in its business management is expressly forbidden.

In accordance with articles 17 and 18 of Law 6729, the Dealers' Convention is inherent in the Commercial Distribution Agreement and may be defined as a General Agreement, which must be concluded between the civil entities representing the Makers and the National Representatives of the Dealers. Likewise, in accordance with Law 6729, this Dealers'

Convention is legally binding upon signatory parties, and serves to regulate their relationship.

Furthermore, pursuant to Law 6729 all Commercial Distribution Contracts must observe a standard written form and their content, according to articles 20 and 21, must contain provisions on: (i) product specification; (ii) definition of the operational area; (iii) minimum distances between dealers; (iv) dealers' *quotas*; (v) standards for the financial status, management, equipment, specialized personnel, facilities, and technical capacity of dealers; (vi) indeterminate duration of the contract, which can only be terminated in accordance with the provisions of Law 6729, after an initial duration of no less than five years.<sup>62</sup>

Finally, the Commercial Distribution Contract may be terminated in the following circumstances: (i) by agreement between the parties; (ii) by written notice (mentioned above) during the course of an initial

---

<sup>62</sup> After the five-year period the agreement will automatically become one of undetermined duration, unless a written termination notice is sent to the other party within the 180 days prior to termination.

five-year contract; (iii) by initiative of the aggrieved party, in the event of breach of contract, violation of the Dealers' Convention, or of Law 6729.<sup>63</sup>

Moreover, if the Maker provides the Dealer with a written notice to terminate the initial five-year contract under articles 23 to 25 of Law 6729, the Maker is bound to: (i) buy back the Dealer's entire inventory of automotive vehicles and spare parts at a price offered to Dealers on the day of payment of such compensation; (ii) buy all the Dealer's equipment, machinery, tools and plant (except real estate) at market prices, provided that their acquisition has been determined or not contested by the Maker upon receipt of written notice from the Dealer informing of such acquisitions. On the other hand, if the Dealer provides the termination notice foreseen in section 21 of Law 6729, according to section 23

---

<sup>63</sup> Also foreseen in section 22 of Law 6.729, termination based on events described in this item must always be preceded by gradual penalties. Also, in case of termination, the parties must be granted a minimum period of 120 days after termination to fulfill any pending operations. On the other hand, if Dealer issues termination notice as foreseen in section 21 of Law 6.729, according to section 23 of the same Law, the Maker will not have right to any compensation whatsoever.

of the same Law the Maker will not be entitled to any compensation whatsoever.

The consequences of termination of a Commercial Distribution Contract of indeterminate duration, set forth in articles 24 to 27 of Law 6729, are as follows:

**(1) Termination caused by the**

**Maker:** (i) the Maker must buy back the Dealer's entire inventory of new automotive vehicles and new spare parts, at the price offered to consumers on the day of termination of the contract; (ii) the Maker must buy all Dealer's equipment, machinery, tools and plant (except real estate) at market prices; (iii) the Maker must also pay the Dealer compensation for the next 18 months corresponding to 4% of its latest gross billings of goods and services, plus three months for each five years of the contract's duration, based on the two years prior to termination.<sup>64</sup>

**(2) Termination caused by the**

**Dealer:** the Dealer must pay a compensation corresponding

to 5% of the total amount of all merchandise purchases in the four months prior to termination.

Regardless of which party caused the agreement to terminate, all sums owed to the aggrieved party must be paid no later than 60 days as of termination of the agreement.

21.2.2. Ordinary Distribution Contracts

Unlike Commercial Distribution Contracts, under Ordinary Distribution Contracts no specific law governs the relationship between the parties and such contracts are therefore governed by the general provisions of the New Civil Code.<sup>65</sup>

Thus, contracting parties may define their relationship almost exclusively by contract, provided they comply with the general provisions and obligations specified in the Civil Code.<sup>66</sup>

---

<sup>65</sup> Sections 710 to 721.

<sup>66</sup> If the contract has no provision on its respective duration, this is legally assumed to be undetermined, and termination thereof may occur at any time by means of a simple 90-day notice.

---

<sup>64</sup> The Maker must also pay the Dealer an additional compensation if so provided for in the Commercial Distribution Contract of the Dealers' Convention.

## 22 - INTERNATIONAL CONTRACTS INTELLECTUAL PROPERTY

### 22.1. General Aspects – International Contracts

With the advances of economic globalization and the rapid development of communications and logistics experienced in recent decades, the market integration process and the internationalization of companies has become a clear, complex and irreversible phenomenon in the 21st Century. As a result of Latin America's, and most specifically Brazil's recovery, the volume of international contracts, in general, signed in our country has increased significantly every year. In this sense, it immediately becomes necessary to underscore the essential particularities of an international contract and what distinguishes it from a national contract. Indeed, a contract will always be considered to be international in as much as one of its elements is subject to or connected with another legal framework. In other words, it is precisely the presence of these multi-connected international elements commonly known as connection or cross-border elements that will imply the

possibility of applying more than one legal framework to govern the relationship in a specific legal contract. This element may be, for example, depending on the case, the domicile of the contracting parties in different countries, or the location where the contract obligation is to be complied with, or even the location of the asset that is the object of the commercial transaction.

Therefore, in essence an international contract requires more than one competent State with the possibility of applying its own domestic law to the same contract, due to the presence of one or more elements of connection. Thus the need for contracting parties in any contract relationship of an international nature to define at the outset which of the two or more legal frameworks connected to that specific contract will govern the contract relationship. As a result, the choice of a country's law applicable to an international contract starts with the principle of autonomy of the parties' will, which ensures them freedom to determine the applicable law as well as the terms and conditions that will govern

the international contract, as long as the limits of public order, good customs and sovereignty of each State are respected.

If the contracting parties fail to choose a specific law to govern the international contract they've entered into, and should a dispute between them emerge in the future, this will be settled in accordance with the applicable law resulting from the application of internal norms of Private International Law (PIL) of the country qualified to judge the dispute and settle the dispute. It is worth observing that in face of the lack of choice of an applicable law for the international contract, in Brazil the domestic and indirect norms of Private International Law are stipulated in the Law of Introduction to the Civil Code – LICC (Decree-Law 4657 of September 4, 1942).

However, pursuant to the Brazilian legislation, there are two different rules: (i) the first applicable to the situation where the parties are present at the location where the international contract is concluded. Thus, the head of Art. 9 of the LICC determines that *“to qualify and*

*govern the obligations, the law of the country in which they are constituted will apply”* thereby establishing the principle of ***lex loci celebrationis***; and (ii) the second rule applies to the case of an international contract entered into in the absence of the parties, for example, by letter, telephone, or over the Internet. In this case, the applicable law, in accordance with Paragraph 2, art. 9 of the LICC will be the law of country of residence of the offering or proposing party, regardless of where the contract was signed: *“The obligation resulting from the contract shall be deemed established at the place of residence of the proposing party.”*

In general, these rules apply to all international contracts, regardless of their nature, including, as a result, international intellectual property protection contracts. This represents an element of great economic value for both the companies and states that do not stop discussing and entering into agreements aimed at further increasing the protection of intellectual property rights, including industrial property, which encompasses trademarks, inventions

(patents) and industrial designs, as well as copyrights more related to the protection of literary, scientific or artistic works in different forms such as: books, photos, paintings, music, choreography, drawings (including technical drawings), maps, sculptures, films and audiovisual material, etc.

Copyright protection basically guarantees two different objectives, namely: (i) the exercise of the so-called “moral right of the author”, that is, a right inherent in the author to claim authorship of their work and guarantee its integrity against any attempt to change or deform the original work; and (ii) the exercise of the so-called “economic right” to the commercial exploitation of their work upon express authorization to guarantee the legitimate use by third parties of all or part of the work in reproductions of the author’s work intended for sale to the general public through the publication of books, recording of songs, transmission of images, etc.

On the other hand, the legal protection of industrial property aims to ensure that the trademark, for example, that identifies a product

or a service provided by a particular company, after its due registration with the competent body will no longer be used by another person or company, making it illegal to copy or reproduce it without the prior permission of its owner, and no unauthorized - and therefore illegal - copy can be sold. The same applies to patents and industrial designs. In Brazil, intellectual property is provided for in our Constitution, which protects these assets in accordance with Art. 5, paragraphs XXVII and XXIX, which read, respectively:

*“XXVII – the authors have the exclusive right of use, publication or reproduction of their works, which can be transferred to heirs for the period of time stipulated by law;”*

*“XXIX – the law will ensure the authors of industrial inventions the temporary privilege of their use, as well as the protection of industrial creations, of trademark ownership, of company names and of other distinguishing signs, considering the country’s social interest and technological and economic development.”*

## 22.2. Brazil and International Intellectual Property Treaties

Concern about international legal protection of intellectual property rights is not recent. For some time, the States have been trying to ensure that these rights are respected by prohibiting and curbing the illegal trade of unauthorized copies, in order to encourage the regular, legal and productive licensing of trademarks, patents and, more recently, software. The first efforts for the international protection of intellectual property date back to the 19th Century, with the 1883 Paris Convention on Intellectual Property Protection, and then the 1886 Berne Convention on the Protection of Artistic and Literary Works, with the former having been revised and subsequently updated.

Brazil ratified the 1883 Paris Convention the following year through Decree 9233 of June 28, 1884. Later on, through Decree 19056 of December 31, 1929, it incorporated the amendments introduced by the first review of the Paris Convention held in The Hague, Holland, in 1925. In the second half of the 20th Century a new review

was organized, resulting in the Stockholm Convention of 1967, ratified by Brazil through Decree 75572 of April 8, 1975. Later on, through Decree 635 of August 21, 1992, Brazil incorporated articles 1 to 12 and art. 28, item 1, of the Stockholm text. One of Stockholm's great contributions lies in that it established the foundation for the creation of the World Intellectual Property Organization (WIPO), of which Brazil is a member. Its fundamental objective is to promote and stimulate intellectual creation, ensuring the protection of its rights and repressing unfair competition through cooperation between States and the formulation of new treaties on the matter and inspiring the modernization of the domestic legislation of different countries. WIPO has become a specialized UN agency.

Brazil also ratified another important treaty related to the legal protection of intellectual property, the so-called "TRIPS" Agreement - *Trade Related Intellectual Property Rights*), signed in 1994 at the end of the Uruguay Round started in 1986, within the scope of the General Agreement

on Tariffs and Trade (GATT) that culminated in the creation of the World Trade Organization (WTO), of which said agreement is an integral part. The TRIPS Agreement regulates, *inter alia*, the protection of intellectual property rights in terms of patents, copyrights, trademarks, geographic indications and industrial designs. The TRIPS also establishes that WTO members must ensure the protection of intellectual property pursuant to the provisions of the Paris Convention and other international agreements on the matter. In Brazil, the TRIPS Agreement (Annex 1C of the Treaty of Marrakech) was ratified through Decree 1355 of December 30, 1994, which incorporated the final Minutes of the GATT Agreement's Uruguay Rounds for Multilateral Trade negotiations. Brazil also ratified other important international treaties on the protection of intellectual property such as: (a) the Strasbourg Agreement on International Patent Classification; and (b) the Patent Cooperation Treaty.

Law 9279 (the new Industrial Property Code) in effect since May 14, 1997, encompasses inventions,

utility models, industrial designs, manufacturers' brands, trademarks, and service marks that are distinctive and indicate the origin and source of the relevant products. The new law also contains provisions on crimes against industrial property. Law 10196, of February 14, 2001, introduced changes and extended the scope of Law 9279/96.

### **22.3. International Contracts on Intellectual Property**

#### 22.3.1. International Contract for Granting Copyright to Literary Works

In Brazil, copyrights are governed by Law 9610/98 of February 19, 1998, which regulates copyrights in the country and guarantees foreigners domiciled abroad the protection of their copyrights ensured by the agreements, conventions and treaties in effect in Brazil. Several aspects are addressed in said law, such as rules related to reproduction, protection of the author's rights, as well as their extinction. In this regard, it is worth pointing out that in accordance with the rules adopted by most countries, a literary work, for example, becomes of public



domain seventy years after the year of the author's death. In consonance with this international tendency, Brazil currently adopts the same criteria, that is, the heirs of the author of a literary work lose their acquired copyrights seventy years after said author's death, as provided for in article 41, Law 9610 of February 19, 1998.

The International Treaty on the Protection of Copyright of Literary Works is a private instrument through which the author (owner of the copyright, assignor) grants a third party, generally a publisher (assignee) the right to: promote the publication of literary works in any form and authorizes it to publish, distribute and sell said works throughout the country or even in third countries as specified in the contract. Usually, this type of contract will also contain a statement by the assignor attesting to the originality of the works and to the non-existence of disputes of any nature related to any violation of third party rights, or any onus or rights that could prevent the assignment. Obligations agreed upon by the contracting parties within

the scope of this type of agreement are also binding on their heirs and/or successors. Furthermore, the contract must also establish that no subsequent change should be made to the literary work without the prior and expressed consent of the author or his or her successors, as the case may be.

The author will reserve in contract the right to review, prior to publication of the work abroad, any translations made in order to guarantee the integrity and originality of the content of his creation. Another important provision to be included in the contract is the author's fee, which in most cases is calculated over a sum corresponding to a percentage of each book's cover price. This fee is paid based on actual sales of the work, numbered by the publisher in periodic account rendering reports that may be audited by the assignor. It is also necessary to define whether the assignee will be granted exclusive rights over the work or not, actionable against third parties and against the author, who, depending on the extension of said exclusivity, may not reproduce it in any way.

### 22.3.2. International Agreement on Trademark Licensing

Under Brazilian legislation, a trademark is any distinctive sign that identifies and distinguishes companies, products and services from those sold or provided by others. Registration of the trademark with the competent body is fundamental since only the registration (the “registered trademark”) guarantees the owner the exclusive right of use throughout the country in its respective line of economic activity. Likewise, its identification by consumers can add more value to the products and services it identifies. In Brazil, the competent authority for registering a trademark is the National Institute of Industrial Property (INPI), a quasi-governmental entity linked to the Ministry of Development, Industry and Foreign Trade, in accordance with the Industrial Property Law (Law 9279/96), the Software Law (Law 9609/98) and Law 11484/07. INPE is charged with: (i) registering trademarks; (ii) granting patents; (iii) endorsing contracts for the transfer of technology and for franchises; (iv) registering computer programs; (v)

registering industrial designs; (vi) registering geographic indications; and (vii) registering integrated circuit topography.

Regulations for registering trademarks are provided for mainly in the Industrial Property Law (Law 9279/96), which stipulates trademark related rights and obligations, as well as all aspects of the trademark law, including everything that can and cannot be registered as trademark under article 124. Since trademarks are intangible assets susceptible to registration and the object of ownership, they can also be assigned or transferred. According to article 134 of Law 9279/96, the assignment of a trademark can cover the registration application as well as the registration itself, as long as the assignee also meets the legal requirements for requiring said registry. This assignment takes effect from entry into the records, which is made upon formal request to INPI, which has the authority to do so under article 136, paragraph I of said Law. Likewise, the assignment will only enter into effect before third parties after publication of the entry as approved by INPI.

Pursuant to Law 9279/96, the Brazilian legislator has chosen the criterion of universality of trademark assignment, according to which, in case of transfer all registrations and applications for equal or similar trademarks referring to the same activity should be transferred en bloc.

Trademark licensing is a procedure through which the rights to use a specific trademark are assigned to third parties in order to add value to the product or service of the licensed company, through immediate recognition by consumers of a brand in evidence, and is an essential element for attracting consumers and ensuring their loyalty. According to article 140 of Law 9279/96, trademark licensing should be the object of a specific contract that *“will be registered with INPI in order to become effective before third parties”*. Therefore, licensing contracts must be registered with INPI in order to become effective before third parties. If the licensing contract is not registered with INPI, the licensee could face various problems such as obsolescence of the trademark as a result of the

impossibility of the licensee to demonstrate its use since only the owner of the trademark could do so as a result of the failure to register said mark with INPI.

Besides the usual provisions of all international agreements, such as applicable laws and courts, or the possibility of settling possible disputes through alternative methods such as mediation and international commercial arbitration, the international trademark licensing contract should also contain: information that clearly and unequivocally defines the trademark to be licensed and the criteria for use thereof; a declaration by the licensee that it has the technical and industrial conditions to produce the licensed products in accordance with the licensor’s models and specifications; the quantities of licensed products to be produced; confidentiality criteria; the deadline for licensing the use of the trademark; the financial consideration, expressed in percentages of the sales amounts related to the use of the licensed trademark, as the case may be, when the product design is developed by the licensee or the licensor, the

payment method and currency, rendering of accounts and possible audits, as well as contractual fines in case of violation of the criteria for using the licensed trademark.

Finally, in Brazil trademark applicants may request registration of a foreign or a Brazilian trademark. Foreign trademarks are registered under the terms of the Paris Convention, which establishes an exclusive priority term of six months, from the date of the application in the country of origin, for its holder to apply for registration of this same trademark in other countries which are signatories to the Convention. Therefore, in order to file this application in Brazil, a certified copy of the trademark application in the country of origin or a certificate of registration must be submitted to INPI.

### 22.3.3. International Patent Licensing Agreement

Patents are granted for the protection of inventions, utility models, and industrial designs, granted by the State to inventors or other individuals or legal entities who are the legitimate holders of the rights to the

invention, ensuring owners exclusive rights to commercially explore their creation. In return for patent protection, the inventor undertakes to provide a detailed description of all the technical contents of the invention protected by the patent. The exclusive rights guaranteed by the patent refer to the right to prevent others from manufacturing, using, selling or importing the protected invention during the patent validity period.

Patent holders can economically explore and market the patent *per se*. However, since the patent is property, it can be the object of sale or transfer through licensing to third parties to explore the object of the patent in question. This license can be granted by patent holders, or by their heirs or successors. The license in question can be exclusive - when its holder loses the right to commercially exploit the patent, or non-exclusive - when the license holder can grant several licenses to different individuals or legal entities, or even exploit the invention himself. Granting of the license is the object of a specific licensing contract which, as per article 62 of Law

9279/96, is subject to registration with INPI.

Under Law 9279/96 there are different types of licenses, namely: (a) voluntary license, which guarantees the patent holder the right to authorize others to manufacture and sell the product which is the object of protection; and (b) compulsory license, established to avoid any abuses of the right to exclusive commercial exploitation of the patent, such as the lack of actual use of the invention. The aforementioned law specifically provides for cases of compulsory licenses, namely: (i) insufficient exploitation; (ii) overuse; (iii) situations involving the abuse of economic power; (iv) dependence on patents; or (v) public interest or national emergency. This last provision became particularly important after the creation of the World Trade Organization and the discussion, in 2001, that led to the Doha Declaration, which in cases of extreme urgency such as epidemics representing risk for human lives, allows a country to permit use of the patent without prior authorization from the patent holder. However,

according to the same law, the compulsory license may be denied if, upon request thereof the patent holder presents a justification for non-use of the patent for legitimate reasons; or clearly demonstrates that serious preparations are underway to begin exploiting the object of the patent; or justifies the failure to market the patent due to an obstacle of legal nature.

The international patent licensing agreement to be registered with INPI and aimed at authorizing third parties, with or without exclusivity, to exploit a granted or requested patent should include provisions related to: the number and name of the patent granted or the registration number when the patent has been requested but not yet granted; the transfer of know-how; the term of the contract; remuneration conditions and royalty payment regime, including currency; technical assistance and training of licensee's technicians; the country where the license will be exploited; confidentiality rules; patent use rules, through the actual use of the licensed patent, manufacturing and selling the products uninterruptedly in certain quantities; possibility of

conducting audits on the part of the licensor; possibility of technical improvements of the product; fine in case of breach of contract provisions, as well as the applicable law and competent jurisdiction, or even an arbitration clause establishing the commitment of the parties to submit possible disputes to the alternative dispute settling mechanism of the international commercial arbitration body. The holder of a foreign patent may file an application for a corresponding patent in Brazil within the timelines and under the provisions of the Paris Convention: 12 months for patents of invention and utility models, and 6 months for industrial designs, starting from the date of application in the country of origin. As there is no international patent, each patent will be valid in the respective country of registration and protected according to the principle of patent independence. Thus, an international patent licensing agreement should, as appropriate, refer to each of these national patents registered in different countries.

#### 22.3.4. International Technology Transfer Agreements

Technology transfer operations aim at ensuring that scientific and technological developments are accessible to individuals, companies or governments so that they can exploit the technology of new products, applications, materials and services. Technology transfers involving Brazilian parties or industrial property rights registered in Brazil are governed by the provisions of INPI Normative Act 135, of May 15, 1997, which aims to regulate annotation and registration of contracts containing provisions relating to: (i) trademark licensing; (ii) patent licensing; (iii) exploitation of industrial design; (iv) supply of technology; (v) technical and scientific assistance; and (vi) franchise agreements.

Such contracts must be registered with INPI, including licensing contracts for exploitation rights (use of patents, industrial design and trademark), contracts for acquiring technological knowledge (supply of technology and provision of technical and scientific assistance

services) and franchise contracts, so as to generate effects between contracting parties or be binding upon third parties. Registration with INPI is important for fiscal purposes, in addition to enabling the future transfer of royalties abroad.

International technology transfer agreements include certain clauses depending on the type of technology transfer operation they involve. In practice, each of the different types of technology transfer agreements has its own structure and specific objectives, although there are some similarities among them, such as the definition of strict confidentiality rules and the possibility of establishing the remuneration of the rights holder abroad through the payment of royalties, in percentages that may be fixed or variable, depending on the case. On the other hand, the characteristics of each of these agreements differ according to their specific legal nature. For example, in terms of validity period, duration can vary considerably from one type to another; for example, the duration of a patent licensing agreement cannot exceed the duration of the patent registration period. Thus, technology

transfer agreement models should respect these different specificities according to each type of technology transfer involved. The previously mentioned licensing agreements for trademarks and patents stand out among the most used types of technology transfer in Brazil. However, mention should also be made of another type of technology transfer which has gained more and more ground in Brazil: the business franchise agreement.

In Brazil, the franchise system is governed by Law 8955 of December 15, 1994. Aside from defining the franchise system, this also sets rules for the relationship between franchisers and franchisees, ranging from preliminary negotiations to formalization of a franchise agreement, and sets penalties for non-compliance with certain conditions. This contract is characterized by the franchisee's legal and financial independence in relation to the franchiser, the absence of labor relations, except, of course, where there is clear dissimulation of an employment contract. On the other hand, franchisers can establish a true distribution network

of products or services through contract terms and provisions, with little burden on them.

In general, the international franchise agreement will introduce specific clauses from this business segment, such as: definition of the intended franchise (product, service, industrial franchise...); its object; license for using the franchise trademark and/or patents inherent in the franchise; the franchisee manual containing all the rules for using the franchise, commercial practices, human resource policies and criteria for accounting procedures, customer service and the promotion and use of the franchise trademark; rules for training the franchisee and its employees; rules concerning the advertising and marketing of products and/or services; confidentiality clause; franchise and advertising fees; definition of royalty payments calculated as a percentage of the franchisee's revenues, as well as its currency and payment terms; preparation of periodic reports on sales, consumer behavior and market and competition evolution; restrictions regarding the use of the trademark; insurance; non-fulfillment

of contract obligations, as well as fines and forms of compensation for violation of intellectual property rights; besides, of course, clauses involving applicable laws, courts and arbitration as an alternative dispute settling mechanism.





## 23 - INTERNATIONAL TREATIES

### 23.1. Overview

Treaties are international agreements concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments. Treaties may be entered into by States, between States and international organizations, or between international organizations themselves, provided the parties are represented by qualified agents, and seek to regulate legal relations that are freely entered into, for legal and feasible purposes, to assure that contracting parties fulfill and respect the provisions contained therein. Under the rule of International Law, treaties are negotiated and concluded, so that the contracting parties are bound to fulfill and enforce their provisions.

Negotiated and signed by the Head of the Executive Branch, the President of the Republic, prior to being ratified at the international level, international treaties and conventions should first be submitted to the approval of the National Congress, pursuant to Art. 49, I, of the Brazilian Federal Constitution of 1988: first by the

Chamber of Deputies and then by the Federal Senate, the President of which issues a formal Legislative Decree, thus imbuing the treaties with efficacy and ranking them in the domestic legal system, followed by promulgation and publication. These stages are requisites for treaties to be enforceable within the domestic legal system.

In parallel to Congress decision to approve the treaty, the Head of Executive Branch or Ministry of External Relations informs the depositary authority of the ratification. Treaties are then registered with the UN Secretary General, whereupon they are acknowledged by other countries, i.e. by International Law.

### 23.2. International Trade

With regard to the multilateral trade system, Brazil is a member of the World Trade Organization (WTO), which replaced the 1947 General Agreement on Tariffs and Trade (GATT), according to the organization established by the Marrakesh Treaty of 1994.

Apart from its membership in institutions of the modern international trade system, Brazil is one of the original signatories of the 1944 Bretton Woods agreement, which established the International Monetary Fund (IMF) and the World Bank (IBRD). Brazil is also a founding member of and shareholder in the Inter-American Development Bank (IDB), and has the status of Observer State in the European Economic Community, maintaining a permanent diplomatic representation in Brussels.

In connection with its trade agenda in the last decades, Brazil signed bilateral trade treaties with Austria, on March 13, 1993; with the European Union, on January 31, 1994; with Turkey on April 10, 1995; with Uruguay, on June 6, 1997, as well as supplementary arrangements with Peru, on July 21, 1999 and with Costa Rica, on April 4, 2000, and a protocol with Argentina, on October 29, 1999. Other bilateral agreements that deserve to be mentioned in this context include: the Economic Cooperation Agreement with Hungary (May 05, 2006); the Trade and Economic Cooperation Agreement

with Kazakhstan (September 27, 2007); the Economic and Industrial Cooperation Agreement with the Czech Republic (April 12, 2008); the Cooperation on Economic, Scientific and Technological Matters and Innovation with Greece (April 03, 2009); and the Trade and Economic Cooperation Agreement with Jordan (October 23, 2008); and Memorandums of Understandings for Cooperation in Trade and Investments Promotion signed with Bolivia (November 11, 2003); Chile (August 23, 2004); and Colombia (June 27, 2005).

### **23.3. Intellectual Property**

With regard to the international protection of intellectual property rights (patent, trademarks, industrial designs, copyright and related rights and further IPRs), Brazil is a founding member of the Paris Union for the Protection of Industrial Property established in 1883, having joined the 1886 Berne Union for the Protection of Literary and Artistic Works on February 09, 1922. Brazil has been a member of the World Intellectual Property Organization (WIPO) since 1975

and is also a signatory of the Paris Union Convention for the Protection of Industrial Property, including the Hague Revisions of 1935 and the Stockholm revisions of 1967, and the 1886 Berne Convention for the Protection of Literary and Artistic Works, including the Paris Revision (1971).

In 1970, in Washington, Brazil signed the Patent Cooperation Treaty (PCT), which was subsequently ratified by Congress and incorporated into Brazilian domestic legislation. Other international intellectual property treaties adopted under the auspices of WIPO or administered by the Organization were signed by Brazil, such as the 1896 Madrid Agreement on Indications of Source; the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations; the Strasbourg Agreement of 1971 on International Patent Classification; the 1971 Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms; and the 1981 Nairobi Treaty on the Protection of the Olympic Symbol.

Since 1994, when the World Trade Organization was established, Brazil has been a member of the TRIPS Agreement (Annex IC of the 1994 WTO Agreement), which was incorporated into Brazilian domestic legislation by Decree 1355/94. Under the provisions of the TRIPS and WTO Agreements, any international IP related disputes involving Brazil and WTO Members can be brought to the WTO Dispute Settlement Body (DSB), which has jurisdiction over disputes on matters related to international trade, including the trade in goods, subsidies, dumping, non-tariff barriers, trade in services and intellectual property.

Within the field of bilateral relations involving intellectual property, Brazil has signed several international treaties and agreements with different countries, including: Sweden (1955), to protect both industrial and commercial brands; France (1983), concerning industrial property; the former USSR (1982), for scientific and technological cooperation; the United States (1957) and Italy (1963), concerning copyrights.

### 23.4. Taxes

In the field of tax-related international trade issues, Brazil has signed, ratified and incorporated into its domestic legislation a variety of international double-taxation agreements with such countries as: Argentina (1982); Austria (1976); Belgium (1973); Canada (1986); Chile (2003); China (1993); Germany (2006); Israel (2005); Mexico (2006); South Korea (1991); Denmark (1974); Ecuador (1988); Spain (1976); Finland (1998); Peru (2009); the Philippines (1991); France (1972); Hungary (1991); India (1992); Italy (1981); Japan (1967 and 1978); Luxembourg (1980); Norway (1981); Portugal (2001); the Netherlands (1991); South Africa (2006); Sweden (1976 and 1996); Slovakia; the Czech Republic (1991); and Ukraine (2006).

Brazil has also signed international income-tax exemption treaties for maritime and air transport companies with the following countries: South Africa, Chile, France, Italy, England, Ireland, Switzerland, and Venezuela. Under these double-taxation agreements, Brazil overrides the

withholding tax rates established in Brazilian domestic legislation for anticipated earnings, including interest on acquisition of goods purchased through long-term financing. Such tax rebates are also allowed when responsibility for the tax has been assumed by the payee under contracts signed in Brazil or abroad, with resident or non-resident parties.

Furthermore, with the aim of promoting technical cooperation projects and actions in the fields of tax and customs administration, on May 27, 1998 Brazil signed a supplementary accord with Cuba, which placed priority on tax collection, procedures and systems to enhance ties between the tax administration and banking networks; the adaptation or development of a revenue classification system; and the adaptation of IT systems to manage tax collection through network technology and systems development .

### 23.5. Latin America

After World War II Brazil played a major role in efforts to establish a free trade zone in Latin America,

and was one of the founders of the Latin American Free Trade Association (LAFTA), created under the Montevideo Treaty of February 16, 1960 signed by Brazil, Argentina, Bolivia, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela. The main goals of LAFTA were the gradual establishment of a Latin American common market and the promotion of integration efforts at regional level.

With the signing of the Montevideo Treaty in August 12, 1980, those same states founded the Latin American Integration Association (LAIA), “in order to advance the integration process and promote economic and social development, harmony, and balance throughout the region”. The 1980 Montevideo Treaty sets forth important principles regarding the integration process: i) pluralism; ii) convergence; iii) flexibility; iv) differentiated treatment; and v) multiplicity. Those principles significantly differ from the main contours of the trade liberalization scheme set forth by the 1960 Montevideo Treaty which established LAFTA.

Within the scope of limited trade

agreements (enabled under the LAIA Treaty of 1980) Brazil and Argentina have signed important bilateral treaties, laying the groundwork for a fast growing bilateral common market area. These included: the Integration Development and Cooperation Treaty, signed in Buenos Aires on November 29, 1988; twenty-four Protocols, followed by other bilateral agreements on specific topics, including a Treaty for the Establishment of a Statute for Brazilian-Argentine Bi-national Companies, signed on June 6, 1990. As described in Section 24.6, further efforts on regional integration process led to the establishment of MERCOSUR in 1991, according to the provisions of the Asunción Treaty, which was concluded between Argentina, Brazil, Uruguay and Paraguay on March 26, 1991.

The main legal framework of LAIA specifies three mechanisms for the establishment of preferential trade areas in Latin America, namely: i) regional tariff preferences for products originating in a LAIA Contracting Party, regarding tariffs applicable to exports to third countries; ii) regional scope agreements to be negotiated and

concluded among Contracting Parties; and iii) partial scope agreements between two or more LAIA Contracting Parties (see for instance Resolution No. 2 of the Foreign Ministers Council of August 12 1980, on partial scope agreements concluded under the LAIA umbrella). Regional or partial scope agreements are designed to cover tariff relief and trade promotion, as well as other policy aspects concerning regional integration, such as economic complementation; agricultural trade; cooperation in financial, tax, customs and health matters; scientific and technological cooperation; environmental protection; pharmaceutical goods in transit; tourism promotion; technical standards and other areas. Under the framework of LAIA, Brazil has also signed multilateral economic agreements with Argentina, Chile, Mexico, Uruguay and Venezuela in 1995, and, bilaterally, Economic Assistance Agreements with Chile (1996, 2006), Bolivia (1997, 2005) and Mexico (2002) and a Limited Economic Assistance Agreement with Suriname (2005).

Particularly with regard to limited agreements, Contracting Parties may negotiate several matters related to the regional integration process, such as (ii) rules on trade conduct: subsidies and countervailing duties; unfair trade practices; licenses and import procedures; and (ii) other rules on non-tariff matters: payments; financial cooperation; tax cooperation; cooperation in animal and plant health; customs cooperation; transport facilitation; and government procurement.

In addition, within the context of LAIA Contracting Parties have implemented several preferential systems comprised of market liberalization lists and cooperation programs, such as in the fields of business, investment strategies, financing and technological support. LAIA Contracting Parties have also accorded preferential treatment to certain landlocked countries in the region (such as Bolivia, and Paraguay), by means of countervailing measures aimed at favoring their full participation in regional integration.

Since the Montevideo Treaty of

1980 is a “framework treaty”, the institutional and normative development of the integration process between Latin American countries is further complemented and shaped by other multilateral regional agreements, treaties and organizations, such as the Andean Community, MERCOSUR, the G-3 Free Trade Agreement and UNASUL. In this sense, LAIA has established a consensus as to the flexibility and convergence of principles guiding the regional integration processes in Latin America, for the purpose of deepening and expanding a common economic area. This initiative was based on a market- oriented approach, but also on a gradual and open development of the integration process.

### **23.6. MERCOSUR**

The Asunción Treaty signed in Paraguay on March 26, 1991 announced the creation of the Common Market of the South – MERCOSUR, with the aim of establishing a common market between Brazil, Argentina, Uruguay, and Paraguay (the primary MERCOSUR State Parties), wherein

the following objectives were established:

- (a) Free circulation of goods, services, and production factors among member countries, by means of elimination of tariff and non-tariff barriers to trade among such countries;
- (b) Establishment of a common external tariff and adoption of a common trade policy at the regional and international levels;
- (c) Coordination of macroeconomic sectoral policies among member countries, in such areas as foreign trade, agriculture, industry, tax issues, foreign exchange, capital, services, customs policy, transport and communications, and any other items that might subsequently be agreed upon;
- (d) Commitment on the part of member states to harmonize their laws, with a view to achieving full integration.

Associate members of MERCOSUR include Chile and Bolivia (both since 1996), Peru (since 2003), Colombia,



and Ecuador (since 2004). By signing Economic Complementation Agreements, a free trade zone in which special tariff conditions are to prevail will be established between MERCOSUR and each of these countries, upon which special tariff conditions will be applied. Some of these countries, like Chile and Venezuela, are currently negotiating their adhesion to MERCOSUR and may become full members in the near future.

Five Annexes have been added to the Asunción Treaty under the terms of article 3 thereof, namely: I) Trade Liberalization Program; II) General Rules of Origin; III) Settlement of Disputes; IV) Safeguard Clauses; and V) Working Groups of the Common Market Group. Annexes provisions are enforced in connection with Article 3 of the Asunción Treaty. In this sense, it is important to note that the 1991 Treaty was further bolstered by the adoption of specific Protocols on the aforementioned matters.

The institutional framework of MERCOSUR is based on rules established under the Asunción

Treaty and the Ouro Preto Protocol (Additional Protocol to the Asunción Treaty on the Institutional Framework of MERCOSUR of 1994), which stresses the objectives and principles of the organization, particularly the implementation of a Custom Union as one of the stages for consolidating a Common Market.

According to Art. 1 of the 1994 Ouro Preto Protocol, the institutional bodies of MERCOSUR are structured as follows:

**(a) Common Market Council (CMC)** – made up of Ministers of Foreign Relations and Ministers of Economy (or the equivalent thereof) of the Member States. As the highest institutional body with decision-making power within MERCOSUR, the CMC is responsible for ensuring compliance with rules established under the Asunción Treaty. Moreover, the CMC is the body that represents MERCOSUR in negotiations, and that is authorized to sign agreements with non-member states, international institutions, and other nations in general;

**(b) Common Market Group (GMC)**

- made up of four permanent members and four alternate members appointed by each of the Member States, representing the following bodies: I) Ministry of External Relations; II) Ministry of the Economy (or the equivalent thereof); and the Central Bank. It is the executive body of MERCOSUR, responsible for implementing decisions made by the CMC. Other GMC duties include: (i) supervising activities of the MERCOSUR Trade Commission (CCM) and administrative bodies; (ii) proposing measures for implementing a trade liberalization program; (iii) coordinating a macroeconomic policy; (iv) participating in negotiations with international agencies and non-member States with regard to the signing of agreements and, if necessary, the settlement of disputes within the scope of MERCOSUR; and (v) organizing and coordinating Working Groups.

**(c) MERCOSUR Trade Commission (CCM)**

- made up of four permanent members and four alternate members appointed by each of the

Member States and coordinated by the Minister of External Relations of each of these countries. The CCM is responsible for ensuring deployment of instruments relating to implementation of the common trade policy. It is also the body authorized to speak on behalf of Member States on any issue relating to the Common External Tariff or objections raised by the private sector;

**(d) Joint Parliamentary Commission (“CPC”)**

– made up of 64 permanent members and 64 alternate members. Each member States appoints 16 members, who should be members of their own respective National Congresses. In this sense, the CPC represents the legislative bodies of the State Parties of MERCOSUR. Within the scope of MERCOSUR’s institutional framework, the CPC plays the role of advisory and decision-making body;

**(e) Administrative Secretariat of MERCOSUR (SAM) and Consultative Economic and Social Forum (FCES).**

The SM is responsible for publishing the MERCOSUR Official Newsletter and safekeeping relevant documents. It is also responsible for disclosing

activities of the GMC. For its part, the FCES is an advisory body representing the economic and social areas of Member States; and

**(f) Working Groups (SGTs)**, linked to the GMC. Their tasks include commissioning studies on specific issues of interest to MERCOSUR and drafting decisions and resolutions to be submitted to the CMC. There are currently fifteen (15) working groups on the following issues:

- SGT N<sup>o</sup>. 1 - Communications;
- SGT N<sup>o</sup>. 2 – Institutional Aspects;
- SGT N<sup>o</sup>. 3 – Technical Rules and Conformity Assessment;
- SGT N<sup>o</sup>. 4 - Financial Matters;
- SGT N<sup>o</sup>. 5 - Transportation;
- SGT N<sup>o</sup>. 6 - Environment
- SGT N<sup>o</sup>. 7 - Industry;
- SGT N<sup>o</sup>. 8 - Agriculture;
- SGT N<sup>o</sup>. 9 - Energy;
- SGT N<sup>o</sup>. 10 – Labor Relations, Employment, and Social Security;
- SGT N<sup>o</sup>. 11 – Health;
- SGT N<sup>o</sup>. 12 – Investments;
- SGT N<sup>o</sup>. 13 – Electronic Commerce;
- SGT N<sup>o</sup>. 14 – Follow-up of the Economic and Trade Contexts; and
- SGT N<sup>o</sup>. 15 – Mining.

Through CMC Decision 23/05, the Common Market Council adopted the Protocol establishing the MERCOSUR Parliament (“*Protocolo Constitutivo del Parlamento del MERCOSUR*”). Headquartered in Montevideo, the Parliament will act as a new body of the organization, representing the citizens of the region in an independent and autonomous manner. Thus, the Parliament represents MERCOSUR citizens rather than the Member States themselves. The first stage of implementation started on December 31, 2006; in its second and last stage, starting from January 2014, the MERCOSUR Parliament will be fully integrated by representatives elected by direct universal suffrage and secret ballot, on the same day, by citizens of all the Member States.

*Proposed Evolving Reforms in MERCOSUR.* CMC Decision 56/07 of the Common Market Council established the main guidelines for an institutional reform of the organization: i) restructuring the decision-making bodies of MERCOSUR and their affiliate bodies, including their competences; ii) enhancing MERCOSUR’s dispute

settlement system, as well as strengthening its institutional bodies; iii) improving mechanisms related to transposition, entry into force and enforcement of MERCOSUR rules and regulations; iv) establishing a budgetary framework to encompass budget requests submitted by the MERCOSUR Secretariat and the Permanent Review Court Secretariat.

In addition, through GMC Resolution 06/10, the Common Market Group approved the creation of the High Level Meeting for the Institutional Analysis of MERCOSUR (RANAIM - "*Reunión de Alto Nivel para el Análisis Institucional del MERCOSUR*"). The objectives of the High Level Meeting are focused on the analysis of the main institutional aspects related to MERCOSUR and policy-making oriented proposals which are conducive to the enhancement of the integration process and the strengthening of MERCOSUR institutions.

*Tariffs and Trade within MERCOSUR.* Since January 1st, 1995, there have been no tariff barriers between member countries. The vast majority of products traded between the

four countries (though there are still some exceptions) pay no customs duties. Moreover, a Customs Union has been in effect since January 1st, 1995. A Common External Tariff (CET) has been introduced with a view to fostering the competitiveness of member countries' products in external markets.

Any request for amendment to current CET rates are analyzed, at the technical level, by Technical Committee No. 1 of the MERCOSUR Trade Commission (CCM); following an internal public consultation phase, the CCM conducts a comprehensive analysis of CET related rates and submits them to the Common Market Group for approval. Within the Brazilian regulatory framework, the analysis of said requests is carried out by the Foreign Trade Division (*Câmara de Comércio Exterior* - CAMEX) of the Ministry of Industry, Development and Foreign Trade. CAMEX is the national entity in charge of embedding CET related amendments approved by the Common Market Group into the Brazilian legal system, by means of specific Regulations.

As in the European Union, the CET is one of the cornerstones of the MERCOSUR integration process. The tariff covers a majority of products imported into MERCOSUR from non-member countries, with the exception of products regarded as “sensitive” in each country which, in the case of Brazil, include capital goods, and information and telecommunications technology.

With a view to avoiding diversions of trade flows, the common external tariff has been set at a level ranging from 0% to 20%, based on 11 different rates. Under CMC Decision 22/94, a CET level of fourteen percent (14%) for capital goods was set forth for Brazil and Argentina, starting from January 1, 2011. In 2010, through Decision 60 of the Common Market Group (“CMG”), members of the Productive Integration Group had their status before MERCOSUR updated and became part of the Common Market Group. This decision affected the status of implementation of CET related provisions by Paraguay and Uruguay. After that, according to Decisions 28/09 and 61/10, Uruguay and Paraguay, respectively,

have agreed to implement the CET definitely by December 31, 2011. CMC Decision 34/2003 introduced the “Common Import Requirements for Capital Goods not Produced in MERCOSUR”. The aim of importing such goods is to foster modernization of productive sectors in Member States and stimulate investment within the region. With this in mind, two types of product lists have been drawn up: the Common List, on which the duty is zero percent (0%); and National Lists, on which the temporary duty is two percent (2%) for products not on the Common List.

Goods on these lists will remain under import protection for a period varying from a minimum of twenty-one (21) months to a maximum of twenty-seven (27) months, counted as of their inclusion on the List, extendable for an equal period upon request to the CMC. CMC Decision 40/2005 extended the initial period for the entering into force of these rules from January 1st, 2006, to January 1st, 2009. Until then, Member States are free to maintain their national rules on imports of new capital goods.

Similar regulations altering CET rates for capital goods produced in the region are awaited, and were due to be presented by the Member States to the Trade Commission before June 30, 2001. After several delays, CMC Decision 37/06 set the last GMC meeting of 2007 as the deadline for the High Level Group to review the consistency and dispersion of the current common external tariff and submit a proposal for changes in the CET on capital goods.

With respect to Telecommunication and Information Technology, CMC Decision 07/1994 established that, as of January 1st, 2006, the maximum tariff would be sixteen percent (16%). However, CMC Decision 33/03 provided that the Trade Commission should negotiate Common IT and Telecommunications Regulations, to be approved by the Common Market Group by December 31, 2005. Subsequently, CMC Decision 39/2005 not only extended this deadline through December 31, 2006, but also agreed to establish another High Level Group to examine the consistency and dispersion of the common external tariff. This High Level Group was equally mandated

to prepare, by June 30, 2006, a proposal for a comprehensive review of CET rates applicable to information technology and telecommunication goods. These planned changes are supposed to follow a schedule for convergence due to go into effect on January 1st, 2007. Until then, Member States are free to apply duties different than the prevailing CET or even a zero percent (0%) rate, provided they have carried out four-party consultations.

However, with the creation of the Ad Hoc Group for the sectors of Capital Goods and Information Technology and Telecommunications Goods (GAH BK/BIT), through CMC Decision 58/08, those obligations were admitted into this new group. As a result, the Parties should propose a Common System for Information Technology and Telecommunications Goods Not Produced in MERCOSUR by December 31, 2015. New deadlines have therefore been established for the application of domestic rates on imports of Information Technology goods. As defined by Decision CMC 57/10, Brazil and Argentina may apply a distinct rate, including 0%,

until December 31, 2015. Uruguay and Paraguay may apply 0%, as well, for IT goods originated in third countries, i.e., outside MERCOSUR, and 2% for the other cases, by December 31, 2018 and December 31, 2019, respectively.

Member States, in line with CMC Decisions 69/2000 and 33/2005 have agreed to eliminate completely, by December 31, 2007, the special customs regulations for imports adopted unilaterally by each. This commitment does not encompass Special Customs Areas, but only systems and benefits that imply total or partial exemption of customs duties on temporary or permanent imports of goods that are not intended for processing or subsequent export to other countries. Products made using such imports will benefit from free trade within MERCOSUR until December 31, 2007, provided they comply with the MERCOSUR Rules of Origin.

The CMC has also established that goods intended for the performance, coordination, or fostering of scientific or technological research shall be recognized as such by the competent authorities in each country since,

under the terms of CMC Decision 36/2003, they are not subject to the CET.

Under CMC Decision 68/00, MERCOSUR Member States may establish and maintain a list of one hundred (100) items of the MERCOSUR Common Nomenclature (NCM) as exceptions to the CET, up until December 31, 2002. Member States may change up to twenty percent (20%) of the products on their lists of exceptions every six months, provided they have secured prior authorization from the GMC. According to the most recent decision on the matter, CMC Decision 58/2010, until December 31, 2011 Brazil and Argentina may maintain the list of 100 (one hundred) items as exceptions to the CET; Uruguay, a list of 225 (two hundred and twenty five) items; and Paraguay, a list of 149 (one hundred and forty nine) items.

MERCOSUL has recently approved Decision 56/2010, by which Member States approved the Customs Union Program. This is the most important macroeconomic coordination project within the Organization to date, which

includes, for example, a Common Automotive Policy, Trade Economic Incentives, a Common Trade Defense Strategy; Productive Integration and Simplification and Harmonization of Customs Procedures intra-zone.

The Common Market Council recently approved rules for the elimination of double taxation and distribution of customs revenues (CMC Decisions 54/2004 and 37/2005). Thus, goods imported from a third-party state into the territory of a MERCOSUR Member State since January 1, 2006 shall receive the same treatment as local products when crossing borders between MERCOSUR countries, provided they are subject to: ((i) a CET of zero percent (0%); or (ii) a one hundred percent (100%) tariff preference in the four countries and the same rules of origin within the scope of agreements signed by MERCOSUR, without *quotas* or temporary requirements of origin, if such goods originate in a country or group of countries to which the preference has been extended. A list of such products can be found in Annexes I and II of the aforementioned CMC Decision, and

will be periodically updated by the Common Market Council. Elimination of multiple CET charges will provide a solution to most of the problems associated with the MERCOSUR customs regime.

The most recent decision on the matter is CMC Decision 10/10, according to which double taxation and distribution of customs revenues will end on December 31, 2016, following three periods of changes. This process, as previously mentioned, is characterized by the gradual elimination of the domestic tariff and regulatory constraints.

Advances in the consolidation mechanisms of MERCOSUR are proof that the integration process in Latin America, or at any rate in the Southern Cone are no longer merely theoretical, but an important step towards regional integration and cooperation. After 20 years of existence, MERCOSUR has proven that its Member States and Associate Members have actually achieved positive and concrete results.





## 24 - COMMERCIAL AND CIVIL LITIGATION

### 24.1. Jurisdiction in civil and commercial cases

The new Civil Code, enacted on January 10, 2002 (which revoked the previous Civil Code of 1916 and the first part of the Commercial Code of 1859) provides the basis for judicial decisions on commercial and civil matters. The Commercial Code is now relevant only to matters relating to maritime trade.

Civil and commercial litigation must be filed with State Courts, which have general jurisdiction, presided by a single judge, and are always subject to appeal, if the aggrieved party so wishes, by a State Court of Appeals. Brazilian Constitution does not provide for jury trial in commercial and civil cases.

Procedural rules are provided for in the Code of Civil Procedure, a federal statute. Under Brazil's federative system, the courts system and specific venue rules are governed by State legislation. In general, State Courts are not specialized, and have jurisdiction over civil, commercial, criminal, and family cases.

As a general rule applicable to both to individuals and corporations, the venue for lawsuit depends upon the domicile of the defendant. Consent of the parties for a different jurisdiction, when stated in a contract, is also accepted when establishing venue, provided this is not barred by a specific ruling or the choice of venue is not harmful to the weakest party in the contract.

All court proceedings in civil and commercial cases are deemed non-confidential and open to the public, except when they involve family matters.

### 24.2. Litigation costs

Litigants must pay court fees, which vary from State to State. As a general rule, an initial payment, usually calculated as a percentage of the amount in dispute, must be made by the plaintiff. In the event of appeals, subsequent payments must be made by the party filing the appeal.

Lawyers' fees for services provided to clients are usually established on the basis of a percentage of

the amount in dispute or to be recovered. This percentage is set in an agreement between the lawyer and his client, and is calculated taking into consideration a number of factors, such as the amount of the expected recovery, the complexity of the work to be executed, the length of the lawsuit, the capacity of the client to pay, and the competence and reputation of the lawyer. In most cases a retainer is negotiated and, in case of success, it is offset against the final fees.

The Code of Civil Procedure provides that all court costs and attorney's fees incurred by a winning party be paid by the loser. This includes reimbursement of fees charged for the court costs experts witness fees, and lawyers' fees. Such costs are set by the court, according to the statutory rules, and transferred to the lawyer, independently of the compensation agreed between the lawyer and his client.

### **24.3. Initial Proceedings**

Though a variety of proceedings exist, only the most common (*processo ordinário*) used in contract

or tort cases will be described here. This is the appropriate type of proceedings for cases valued at not less than 60 minimum wages, when no other specific proceeding is indicated by law.

Civil or commercial action starts when the plaintiff's lawyer files a petition with a court with jurisdiction over such cases, under the terms of the State legislation. Next, the defendant receives a summons, which may be served by mail or by a court official. In either case a copy of the complaint is delivered to the defendant, who must respond to the summons within a short period of time (generally 15 days). In the event the defendant cannot be located, the summons may be served by publication on a local newspaper. The defendant is advised to seek the services of an attorney, who will then submit to the court a petition contesting the allegations of the plaintiff. This petition may confirm, deny or offer a different interpretation for the allegations, or argue against the legal premises of the plaintiff's claims. The plaintiff then files another petition, known as a Reply, responding to the defendant's factual

and legal points. The judge will then ask the parties to list evidence they wish to produce before the court. The next step is a reconciliation hearing, at which the judge asks if the parties are willing to settle their differences.

Should the reconciliation prove unsuccessful, the judge will proceed to make an interlocutory ruling on all procedural formalities and issues raised by the parties, except the merits of the case *per se*. The judge may, at this point, dismiss the case should he find that the plaintiff lacks grounds, or in the absence of statutory prerequisites (legitimacy, interest, and cause). Otherwise, the judge determines the kind of evidence to be produced by the parties.

#### **24.4. Evidence**

The entire proceeding, and specifically the production of evidence, is conducted by the presiding judge. In principle, documentary evidence should be presented to the court together with the complaint. Likewise, the defendant should present

documentary evidence together with his response. As a general rule, other documents which may prove relevant can be presented by the parties at any time, provided the other party is given the opportunity to comment upon them.

All non-documentary evidence should be accompanied by expert witness reports, signed by an accountant, engineer, MD, appraiser or other specialized professional. The judge appoints the court's experts, and questions to and replies from the parties must be in writing. The parties may also appoint assistant experts of their own choice, to answer questions and comment on the court experts report.

The next step is the examining trial, at a place and date to be determined by the presiding judge, after the parties have had the opportunity to discuss the documentary evidence and review the expert reports.

The parties previously submit to the judge a list of the witnesses they want examined. During the trial, the judge first examines the witnesses and then the lawyers of the parties have the right to pose questions.

Such questions are not addressed directly to the witness, but rather to the judge, who may repeat, restate or reject such questions. Either party may give testimony but, in this case, the party is not considered a witness. Only witnesses are under oath. A written record is transcribed of the entire trial.

The court's decision may be issued immediately, unless the parties submit a brief comment on the testimonies and the evidence produced, in which case the presiding judge re-examines the record prior to delivering his ruling.

Under the Brazilian system of *processo ordinário*, there is no one trial at which all evidence is produced. Indeed, evidence is produced step by step and is progressively incorporated with the aim of instructing the judge's decision.

## 24.5. Court Rulings

The judge's decision is delivered in writing and contains a brief description of the parties and issues involved, a summary of claims and

counterclaims, a brief description of the facts, and the judge's opinion on each of the issues. The decision may award a party compensation, may order a party to take certain measures, or may provide a precise interpretation of a contractual clause.

## 24.6. Provisional Remedies

When a plaintiff's lawyer files a petition, he may, in specific cases, ask for a summary judgment (*tutela antecipada*) to bring the final decision into immediate effect. For this the plaintiff must demonstrate in his claim that irreparable damages may result from a delay. Furthermore, the plaintiff may also request such summary judgment in the course of the proceedings, when one or more of his claims are uncontested.

The Brazilian legal system also foresees a writ of prevention (*medida cautelar*), which can be filed before or after the main lawsuit. In either case, the plaintiff seeks to protect a right that would be jeopardy if a provisional measure were not granted. The judge may

grant a preliminary injunction if he deems that both *fumus boni iuris* and *periculum in mora* are present.

## 24.7. Appeals

The Brazilian system allows an assortment of appeals, both to final and interlocutory decisions (i.e., those that do not dismiss the case). Recently, an alteration to the Code of Civil Procedure was enacted limiting the scope of interlocutory appeals. Now, a party can appeal to an interlocutory decision only if serious jeopardy or threat of irreparable damage exists (i.e., inadmissibility of appeal to a final decision).

Nevertheless, in such instances the appeal is not forwarded immediately to the court, but is placed on the record to be examined in the event that the final decision is appealed.

When the decision is not final the appeal, in general, does not suspend the process. The same lawyer may proceed with the case in all superior courts.

Appeals are submitted to a panel in the State Court, composed of an

even number of judges. They may review the decision in the light of their interpretation of the law and the facts.

The parties may appeal further to the federal high courts, i.e. the Superior Court of Justice (STJ) and the Federal Supreme Court (STF). A party claiming violation of a treaty, a federal law, or an interpretation in conflict with federal law by the State Courts may appeal to the STJ. Should the claim involve a violation of the Federal Constitution, an appeal may be referred to the Supreme Court. Both types of appeals may be filed, but admission is highly restricted.

Such appeals do not entail any discussion of the facts, and only the legal principles are subject to review in the federal high courts whose hearings are before a panel. Appeal to a high federal court does not suspend the proceedings, and the winning party can initiate the enforcement proceedings.

## 24.8. Enforcement of Court Rulings

Once the winning party has secured

a final decision, it has the right to start the executory action to enforce the ruling in its favor. Executory action is launched when a petition is filed before the same court that issued the ruling.

A recent change in the Code of Civil Procedure has sped up the enforcement of rulings.

The plaintiff should state the amount of his claim; however, in many cases the ruling merely states that damages must to be paid and provides a basis for calculation thereof. Thus, prior to actual recovery, there may be need of a discussion between the parties as to calculation of the values. The debtor then receives notification through his attorney. At this time, the defendant may file any objections he deems necessary, but must nonetheless deposit the full amount in escrow, or give assets to be attached as guaranty for execution of the ruling.

In the event of an award with adjudication that a certain or uncertain asset must be delivered by the defendant, the judge determines measures that assure a practical result equivalent to payment. In the

event that it refers to positive or negative covenant, the judge sets a deadline for the defeated party to comply with the sentence. In either instance, no impugnation is admissible and the debtor may defend himself only incidentally.

In the event of an executory action when a debtor fails to pay the debt and does not appeal within 15 days of notification to his attorney, the compensation award is increased by 10% (ten per cent). In this case, the creditor is allowed the opportunity to appoint assets owned by the debtor that he wishes to be attached in guaranty.

Once the record and evaluation of the attachment has been carried out, the debtor is once again notified through his attorney, and may, if he so desires, submit an impugnation.

Such impugnation does not affect the enforcement proceedings, unless the judge determines otherwise.

Even in cases where suspensive effect is granted, enforcement may temporarily proceed if the creditor presents a guaranty in the amount of the debt.

Finally, if the defendant is unable or unwilling to pay the award or to perform the action required by court, the attached property shall be appraised and sold in a public auction, and the proceeds used to pay the winning party.

The Brazilian legal system does not provide for criminal sanction against debtors, in view of the provisions on personal liberty enshrined in the Federal Constitution. Only alimony debtors or a negligent bailee may be imprisoned if they fail to pay their debts.

## 24.9. Collection Proceedings

Collection of bills of exchange, promissory notes, debentures, checks, and other documents defined in law as extra-judicial executable securities (*título executivo extrajudicial*) may be executed under action against a solvent debtor.

Such proceedings seek expropriation of the debtor assets to pay the creditor. To this end the debtor is summoned to deposit the sum in escrow, or present assets to be attached in guaranty, prior to

discussion of collection of the debt.

When a creditor has a credit represented by a document which does not fulfill all legal formalities, he may file a monitory action (*ação monitória*) requesting a declaration that this document is an executable security (*título executivo judicial*).





## 25 - DUMPING IN BRAZIL

### 25.1. Introduction

Burgeoning globalization has increasingly resulted in recourse to antidumping measures in recent years, as national companies demand protection for their domestic markets. Leaving aside the economic implications of dumping and antidumping, this text addresses the issue from the perspective of current Brazilian laws and regulations (notably Law 9019 and Decree 1602 of August 23, 1995), and the provisions of Article VI of the General Agreement on Tariffs and Trade (GATT).

With respect to the legal concept of dumping and its core elements, it is important to underscore that antidumping rules may be used by companies to mitigate or counteract the effects of dumping; however, duties imposed must never exceed the calculated dumping margin. Since some confusion exists with regard to dumping vis-à-vis other forms of protection of the economy such as subsidies and countervailing measures, it is necessary to distinguish between them.

A description will be provided of antidumping procedures and of their termination or suspension, including termination requested by third-party petitioners, at the government's behest in the national interest, and of price agreements with a company accused of dumping.

### 25.2. Concept and Core Elements of Dumping

Legally speaking, dumping is the export and sale of products at prices lower than usually practiced by the exporting company for similar products in its domestic market. However, although the price difference alone may be regarded as an unfair business practice, in order for the price difference to be deemed unacceptable it must be demonstrably harmful or a threat to the domestic industry.

Thus, the core elements of dumping are:

*a) Export price lower than that practiced in the exporter's domestic market.* Export prices that are lower than those practiced in the

exporter's domestic market are an intrinsic element of dumping, and in themselves sufficiently characterize dumping without, however, providing grounds for declaring it unacceptable. When assessing prices for calculation of the dumping margin, the *ex works* price (i.e., free of taxes) and cash price are considered.

The dumping margin is determined by comparing the export price and the price practiced on the domestic market of the exporting company. The difference in the marketing conditions of the same product must be eliminated by means of the corresponding price adjustments.

*b) Like products.* The definition of like products found in applicable laws and regulations is somewhat subjective and unclear, which makes an accurate discussion rather difficult. A like product, as defined in Brazilian laws and regulations is an "identical product, a product equal in all respects to the product of reference or, in the absence of such product, another product that might not be exactly the same in all respects but which has similar

characteristics to those of the product of reference". This rather subjective and unclear definition affords authorities investigating dumping practices broad discretionary powers in determining which products can be considered like within the scope of antidumping proceedings.

*c) Damage to the national industry.* Under Brazilian law, grounds for damages may include both material damage and any threat of material damage to the domestic industry, including delaying implementation. Under Brazilian law certain tangible parameters can be used to determine damage, including: (i) volume of dumped imports; (ii) effects of said imports on the price of like products in Brazil; and (iii) resulting impact on the domestic industry. The law also provides for an objective analysis of the following: volume of dumped imports; (ii) market share of dumped product imports as a proportion of overall import volumes and consumption; (iii) price. To be deemed a threat, the following aspects are taken into account: (i) significant growth of imports; (ii) sufficient idle capacity or imminent

substantial increase in the foreign producer's productive capacity; (iii) imports at prices that cause a drop in domestic prices or prevent price increases; (iv) stocks.

*d) Causal connection between damage and dumping.* In a dumping investigation, authorities seek to determine whether and to what extent dumped imports are responsible for damages to the domestic industry, while taking into account other factors that may have caused damages within the same timeframe.

To this end, a distinction needs to be established between dumping and other trade protection mechanisms, especially safeguard measures and subsidies.

Safeguard measures, as foreseen in Article 19 of GATT, are emergency tools used to protect the domestic industry and avoid damages resulting from increases in import volumes. Unlike antidumping, safeguard measures aim to protect national industries, irrespective of any unfair business practices, and are usually taken when a domestic industry lacks competitiveness in face of

foreign products. It should be pointed out that antidumping and safeguard measures are two different things, including as far as imports of a certain product by the complaining State are concerned.

Subsidies consist of advantages granted by a State to specific companies or industries, which end up artificially reducing their production costs.

Another common misperception is to confuse dumping with underselling and predatory pricing. Underselling consists of sale for less than the cost price, which does not necessarily mean dumping. Dumping implies export for sale at a lower price than practiced in country of origin, whether or not such prices are higher or lower than the cost prices. For its part, predatory pricing consists of sale of products at low prices with the aim of eliminating competition; an intention that does not need to be proven to characterize dumping. Another basic difference between dumping and the other two practices is that whereas defense against underselling and predatory pricing is generally foreseen in domestic

antitrust laws, dumping is a foreign trade issue.

### **25.3. Investigating Dumping in Brazil**

In Brazil, a dumping investigation is initiated when a Brazilian producer or their business associations file a written petition with allegations of dumping on the part of a certain company or companies in their exports into Brazil.

This petition must contain sufficient evidence of dumping, damage, and causal connection between them. Should the accusation not be clearly substantiated, the petition will not be accepted.

For a petition to qualify for review, it must also contain the following information:

(i) identification of the petitioner, indication of volume and production value of the corresponding domestic industry; (ii) estimated volume and value of domestic production of the like product; (iii) a list of known domestic producers of like products, who are not represented in the petition and, if available, estimates

of the volume and value of their overall production and a statement of support for the petition; (iv) a full description of the product allegedly imported at dumping prices, name of country of origin or exporting country or countries, identification of each known exporter or foreign producer and a list of product importers; (v) full description of the product manufactured in Brazil; (vi) information on the sales price in the exporting country (regular price); (vii) information on the representative export price or, if unavailable, the representative price at which the product is first sold to independent buyers located within the Brazilian territory; (viii) information on the development of volume of allegedly dumped imports, and the effect of such imports on like product prices on the domestic market, and negative impact of imports on the Brazilian industry.

Once the petition has been accepted, questions of merit are reviewed and an investigation is initiated.

The petition may be rejected and the investigation cancelled in the event that:

(i) dumping or damage caused thereby is insufficiently substantiated or no reasonable justification for investigation is presented; (ii) the petition is not prepared by or on behalf of domestic industries;<sup>67</sup> or (iii) domestic producers, that expressly support the petition, represent less than 25% of national overall production of the similar product.

Investigations must be completed within one year from the starting date, an additional 6-month extension being permitted under exceptional circumstances. The dumping period shall be the nearest 12-month period prior to the starting date of investigation and may, under special circumstances, extend more than 12 months, but never less than 6 months. On the other hand, the period for determining damages shall be sufficiently long as to allow adequate assessment, but never less than 3 years, and must encompass the dumping investigation period. During the initial hearings, when the facts are being determined, the

interested parties<sup>68</sup> shall be given the opportunity to submit, in writing, any evidence that might be relevant to the investigation. For that purpose, additional or complementary information may be requested or accepted, in writing, and hearings may be scheduled. However, attendance at such hearings is not compulsory.

Should the required information fail to be presented to the Brazilian authorities by any of the parties concerned, a preliminary or final opinion may be issued on the basis of the best available information. Furthermore, the parties may request special treatment for information classified as confidential, provided that the request is substantiated, and such information shall be kept separately.

As an important part of a dumping investigation, a questionnaire is forwarded to all interested parties, who have 40 days (subject to an

---

<sup>67</sup> Any petition supported by producers whose aggregate production volume represents over 50% of the domestic production of a similar product will be deemed to have been filed by the national industry or on its behalf. These elements are critical to the commencement of an investigation.

---

<sup>68</sup> Interested parties are: (i) domestic producers and any association representing them; (ii) importers and any association representing them; (iii) exporters and any association representing them; (iv) the exporting country's Government.

additional 30-day extension) to return them duly completed. Questionnaires should be accompanied by a defense petition contesting the initial petition and the Opinion issued by the Department of Commercial Defense (*Departamento de Defesa Comercial* - DECOM) informing the starting date of an investigation.

Prior to completion of the initial hearings, but no less than 60 days after the start of the investigation, Brazilian authorities may impose temporary measures on imports under investigation, provided that all parties have been heard, that dumping and damage to the domestic industry have been characterized on a preliminary basis, and that the authorities decide that such measures are necessary to prevent damage during the course of the investigation.

Following publication by the Brazilian authorities of preliminary findings of damage and dumping, the exporter may undertake voluntarily to adjust prices or cease to import at dumping prices. Should the Secretariat for Foreign Trade (*Secretaria de Comércio Exterior* - SECEX) accept

and the Chamber of Foreign Trade (*Câmara de Comércio Exterior* - CAMEX) approve this undertaking, the dumping proceeding may be terminated or suspended with no penalties imposed. The investigation may, however, continue if the exporter or any authority deems it desirable.

Brazilian authorities may accept or reject any price agreement at their discretion, but the generally justify a rejection. Moreover, although the domestic industry is not required to express formal views on the issue, SECEX generally requests that it do so.

Prior to issuing a final opinion, SECEX holds a hearing to inform the parties of the essential facts in support of its opinion, and the parties then have 15 days to register their views. Upon expiry of the 15-day period, the initial facts finding phase of the investigation ends and no further information may be received.

Upon closing of the investigation, antidumping duties may or may not be imposed. Such duties are defined as “a charge imposed on imports

at dumping prices, with a view to counteracting their deleterious impact on the Brazilian industry”.<sup>69</sup> Accordingly, an investigation may be closed without imposition of antidumping measures in the event that: (i) no sufficient evidence exists of dumping or damage resulting therefrom; (ii) the dumping margin is minimal; (iii) the volume of imports that characterize actual or potential dumping is insignificant. Alternatively, investigation shall be closed and antidumping measures imposed in the event SECEX finds evidence of dumping, damage, and the causal connection between them. National authorities may impose antidumping duties and stipulate the amount, which will never exceed the dumping margin. Under Brazilian law, antidumping duties may be levied on goods shipped for consumption no earlier than 90 days prior to application of provisional antidumping measures, provided there is: (i) a history of damage caused by dumping, or if the importer was or should have been aware that the producer or exporter was engaged in potentially-damaging

dumping behavior; or (ii) damage has been caused by large volumes of imports of a given product at dumping prices within a relatively short period of time.

Antidumping duties and price agreements proposed by exporters remain in full force only so long as they are necessary to mitigate damages resulting from dumping. However, such duties shall elapse within 5 years of imposition, and their extension shall only be authorized if evidence shows that their extinction could result in renewed dumping and consequent damages to national industry. An antidumping investigation may be suspended either by the petitioner or by the Brazilian authorities. Indeed, the petitioner may, at any time, request suspension of the investigation. However, SECEX may determine the continuation of an investigation or, under special circumstances, in the national interest, call for suspension of duties.

#### **25.4. Conclusion**

Based on the foregoing, it is clear that antidumping is a relatively new

---

<sup>69</sup>Trade Protection Manual prepared by SECEX, page 24.



process that has been increasingly used in Brazil.

Brazilian antidumping regulations, based on GATT and WTO agreements, go into considerable detail to allow all parties in antidumping proceedings to contest allegations and submit evidence. However, the novelty of the theme brings about many surprises to authorities and professionals dealing with the matter.

## 26 - CONSUMER RIGHTS IN BRAZIL - LEGAL FRAMEWORK AND ENFORCEMENT

### 26.1. Development of the Law

Under the Brazilian Constitution of 1988, consumer protection is a fundamental right of every citizen (art. 5, XXXII). A fundamental right is that essential to the human being, without which one cannot achieve anything, live or fully develop. Other fundamental rights are life, freedom, equality, etc.

Because it is a fundamental right, consumer protection is unalienable (cannot be sold or transferred), and is not subject to waiver (one cannot previously waive such right).

The Brazilian Federal Constitution of 1988 also establishes that consumer protection is a principle of the economic system (art. 170, V).

In compliance with a constitutional provision according to which a “Consumer Code” should be developed, the Consumer Protection and Defense Code (*Código de Proteção e Defesa do Consumidor*) was finally released on September 11, 1990.

The Brazilian Consumer Code is a federal law (Law 8078 of 09/11/1990) of mandatory enforcement and compliance all over the country.

### 26.2. General Definition

The definition of a consumer and his protection in Brazil is much broader than it might seem in a first analysis. The idea of consumer protection involves many elements, to which often there is no legal definition. Finding such a definition is something that Courts and Judges are charged with.

Therefore, some basic concepts are important:

**Consumer:** every individual or corporation that purchases or uses some commodity, product or service as a final recipient (art. 2, Consumer Code). Therefore, a consumer is not only the individual who buys a refrigerator at a department store, but also the company that buys groceries for its employees.

However, the definition of consumer also implies the idea of “final recipient”. The understanding of what a “final recipient” is resulted from many cases brought to Courts. It has been decided that a final recipient is the consumer who is not a professional, who purchases or uses some commodity, product or service for his own use or his family’s, i.e., one who purchases something in order to use it, and not one who uses such service or product as a raw material in order to turn it into a new product and sell it in the market.

It is important to recall that the Brazilian Consumer Protection and Defense Code also provides for three cases of consumer equivalent, i.e., people who are not included in the legal definition of a consumer but are considered as such by law: a) the community of people, even where undetermined, when they are a party in a consumer relationship; b) all the victims of an accident within a consumer relationship, in case of liability for a defective product or service; and c) all the people, whether determined or not, who are subject to commercial practices in a

consumer relationship.

**Supplier/ Manufacturer:** every individual or corporation, public or private entity, national or foreign, as well as other entities that develop activities of production, assembly, creation, construction, transformation, import, export, distribution or trade of products, commodities, or service provision. As explained, the idea is the broadest possible so as to encompass all possibilities of service or product supply.

It is important to add that “Supplier” is a genus of which producers, assemblers, creators, manufacturers, builders, transforms, importers, exporters, distributors, traders or service providers are species. When the Consumer Code uses the word “Supplier”, it refers to all the species. On the other hand, when it refers to a specific species, all others are excluded.

**Product/ Commodity:** any asset, whether fixed or not, material or immaterial.

**Service:** any activity supplied in the

consumer market in exchange for payment, including banking activities, financing, credit and insurance, except activities derived from a labor relationship. To be considered a product, no payment is required. Services, on the other hand, require some form of payment, even if indirectly.

### **26.3. Scope**

Considering that we currently live in a “consumer community”, the consumer legislation is becoming increasingly important and now covers a wide range of everyday relations. Due to easy access to credit, increased marketing efficiency and difficult access to the Court, consumer relations have become more litigious. As a result, the “Consumer Code” should be deeply studied and widely disseminated.

The Brazilian Consumer Rights Code is very broad and governs the offer and advertisement of products and services; contractual steps and phases; collection of debts; consumer defense in Court; crimes against consumer relations; as well as the quality of services and

products and the prevention and recovery of damages.

Offer and advertisement bind the supplier in that everything that is promised and advertised must be delivered. The Consumer Rights Code does not forbid advertisement, but it does establish cases in which advertisement is considered harmful to consumers and also provides for cases in which advertisement is considered abusive and therefore subject to punishment, since it is considered a crime.

Contractual protection towards consumers is a great concern of the Code. In order to avoid any harm to consumers, the Statute establishes that contracts and agreements regarding consumer relations cannot be drafted and written in a way that hinders comprehension thereof. There is also a provision determining that contractual clauses must be interpreted in the most favorable way to consumers.

Suppliers may offer a contractual warranty to consumers, besides the legal warranty. In order to do so, the warranty term must be in written

and make it clear what the warranty consists of, the term and where it can be claimed. It is important to have in mind that contractual warranty enters into effect upon expiration of the legal warranty.

The contractual phase is strictly ruled by the Code, which forbids abusive clauses and practices.

Debts must be collected in a respectful way, avoiding situations that could be embarrassing to consumers.

The judicial protocol in favor of consumers offers the possibility of “reversing the burden of proof”. This means that the manufacturer has to produce evidence that the consumer is not right.

The Consumer Code also provides for and defines some crimes, with penalties ranging from detention to fines. Such crimes may be committed by an individual or a corporation. In the case of a corporation, the liable party will be its Director, Manager or legal representative who promotes, allows or otherwise approves the supply, offer, sale, or maintenance

of goods or services in any way that is prohibited by the Consumer Code. The constitutional principle of “due process of law” applies in all cases.

Consumer protection should not be seen as a restraint to business, but as a need of the modern world. Also, someone can be a supplier in a certain relationship and a consumer in another, thus attesting to the universal nature of the Consumer Defense Code.

#### **26.4. Enforcement**

Interpreting and enforcing the Brazilian Consumer Law can be a most demanding task and is subject to many academic and legal discussions. However, the code is in effect and must be complied with and violators may be subject to civil, administrative and even criminal sanctions.

As a result, manufacturers and service providers must be very careful with their product/ work output, in order to avoid conflicts and constraints to their commercial activities.

As seen, legal protection is present from the pre-plant phase to shelf exhibition, and there is no step in the industrial process that is not subject to this code.

## **26.5. Trends**

The Brazilian consumer protection code is in tune with the world's most modern legislations. Still, the local legislator was careful enough to issue a law that takes into account the Brazilian reality, which has problems and specificities of its own.

Many amendments have been made to the original code, showing great concern with the most current issues.

Understanding consumer rights in different jurisdictions will help business people to integrate themselves better, faster and in a more profitable way.



## 27 - ARBITRATION AND UPHOLDING OF FOREIGN COURT RULINGS AND ARBITRATION AWARDS IN BRAZIL

### 27.1. Purpose and Applicable Rules      27.2. Arbitration Proceedings

Law 9307/96 (the Brazilian Arbitration Law) entitles individuals and entities legally qualified to enter into agreements to resort to arbitration for the settlement of disputes concerning property rights. In other words, disputes involving private property rights may be submitted to arbitration if the parties agree to do so.

Legal rules applying to arbitration may be freely established by the parties, and may include general principles of law, custom and usage, or international trade rules.

An arbitration clause included in an agreement, i.e., a provision stating that any and all disputes arising under said agreement shall be resolved by arbitration, is legally binding upon the parties. The Brazilian Arbitration Law establishes that a party may judicially demand arbitration, in case the other party fails to comply with the arbitration clause.

The parties may, by mutual agreement, define a procedure for selecting arbitrators. Alternatively, the specific rules of an institutional arbitrator or specialized entity may be adopted. The arbitrator is competent to rule on matters of fact and of law. Arbitration awards are not subject to appeal or validation by the Judiciary.

Arbitration is deemed to have been established when an arbitrator (or arbitrators) accepts his appointment. The parties may put forward their claims through their attorneys, but are at liberty to designate other persons to represent or assist them in arbitration proceedings.

An arbitration award produces the same binding effect upon the parties and their successors as a court decision, and such an award has the same effect as an executable deed. An arbitration award must include:

- I. A report containing the names of the parties and a brief summary of the dispute;



II. The grounds for the decision, describing the questions of fact and of law involved, and expressly indicate whether the arbitrators ruled on equity (if applicable);

III. The ruling, when arbitrators decide on the issues submitted to them, and a deadline for compliance (if applicable); and

IV. The date and place of the award.

### **27.3. Upholding and Enforcement of Foreign Arbitration Awards**

Brazil ratified the Geneva Protocol on Arbitration Clauses of 1923, and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards United of June 10, 1958.

The Brazilian Arbitration Law establishes that for a foreign arbitration award to be upheld and enforced in Brazil it needs only to be ratified by the Superior Court of Justice (STJ).

A request for ratification should be filed by the interested party, accompanied by (i) the original arbitration award or a certified

copy thereof, duly notarized by the Brazilian Consulate and translated into Portuguese by a sworn translator in Brazil; and (ii) the original agreement to arbitrate or a certified copy thereof duly translated into Portuguese by a sworn translator.

Under the Brazilian Arbitration Law, ratification of a foreign arbitration award follows the rules of the Code of Civil Procedure and the House Rules of the STJ on ratification of foreign judicial awards.

According to STJ Resolution 9, ratification of a foreign arbitration award shall not be subject to retrial or re-examination of the merits of the original arbitration proceedings.

In order to be ratified by the STJ, a foreign arbitration award must meet the following requirements:

I. The parties to the arbitration agreement must have legal capacity;

II. The arbitration agreement must be valid under the laws of the jurisdiction chosen by the parties or, if tacit, under the laws of the

jurisdiction where the award was issued;

III. The defendant must have been given proper notice of the appointment of arbitrators or of the arbitration procedure, or full opportunity to defend its case;

IV. The arbitration award must not have exceeded the terms of the arbitration agreement, and separation the portion within the scope of the arbitration Agreement must be ensured;

V. Commencement of arbitration proceedings must have been in accordance with the arbitration agreement;

VI. The arbitration award must be binding upon the parties, or its effects must not have been annulled or suspended by a court in the jurisdiction in which it was issued;

VII. Under Brazilian law, the matters submitted to arbitration must be eligible for arbitration;

VIII. The arbitration award must not run contrary to the Brazilian public

order, national sovereignty or good morals.

When confirmed by the STJ, the arbitration award is eligible for enforcement by court order.

## **27.4. Foreign Sentences**

Foreign sentences may be upheld and enforced in Brazil, irrespective of reciprocity on the part of the country where it originated or of any specific international treaty or convention between said country and Brazil. To be enforceable in Brazil, however, a court sentence issued in another country must be ratified by the Brazilian Judiciary.

Under article 105 (i) of the 1988 Federal Constitution, the STJ is responsible for analyzing and deciding on the ratification of foreign sentences. This question is addressed by provisions of the Introductory Law to the Civil Code which contains rules for the interpretation of international private law, by the Code of Civil Procedure, and by STJ Resolution 9.

When ruling on the ratification of

a foreign court sentence, the STJ verifies whether all formal procedural requirements have been fully met, in all instances up until final ruling. Under Brazilian Law, a sentence (be it on a civil, commercial, or criminal matter) issued by a judge or a court, in compliance with the due process of law, is not subject to any further appeal.

Provided that these basic conditions have been fulfilled, the STJ verifies whether the foreign sentence is in compliance with the following requirements, according to Section 5 of STJ Resolution 9, based on the provisions of Article 15 of the Introductory Law to the Civil Code:

- *The foreign sentence must have been issued by a competent judge:*

STJ does not check whether the foreign judge had jurisdiction over the matter, as this could be construed as undue interference in a sovereign matter of a foreign country.

What is examined by STJ is whether the case, from the standpoint of Brazilian law, falls

within the exclusive jurisdiction of Brazilian courts. By way of example, ratification of a ruling regarding a real estate property located in the Brazilian territory would not be admissible, since Article 12, § 1 of the Introductory Law to the Civil Code provides that “only courts of Brazil” have jurisdiction over such matters.

- *The parties must have been served proper notice of process, or a default sentence has been legally issued:*

Service of process is the act whereby a party is summoned to respond to a legal suit filed against it. It ensures the right of full defense and the summons must be delivered in accordance with guidelines set forth in laws of the place in which the ruling was issued. Should the defendant be domiciled in Brazil, the summons should be delivered by means of letters rogatory.

- *The sentence must be final and in proper form for its execution at the place where it was issued:*

For the purposes of expediting enforcement proceedings, insofar as possible it is advisable that evidence be produced to show that the decision is final, by certification by the competent judge, stating that no further appeal is admissible in any jurisdiction.

- *The foreign sentence must be authenticated by the nearest Brazilian Consulate and must be submitted to STJ with a sworn translation.*
- The foreign ruling will not be ratified in the event that it is deemed contrary to national sovereignty or public order, in accordance with Section 6 of STJ Resolution 9.

This is the only aspect concerning the essence/merits of the foreign ruling which is subject to assessment by the STJ.

Ratification is obtained by means of action started by the foreign plaintiff before the STJ, which shall then issue a summons upon the defendant, who is entitled to challenge the request for ratification.

The STJ shall only acknowledge challenges by the defendant if they relate to: (i) the authenticity of the documents produced by the plaintiff; (ii) interpretation of the foreign sentence; or (iii) compliance with the statutory requirements regarding the ratification or filing of the request, in accordance with Section 9 of STJ Resolution 9.

Once the foreign sentence has been ratified, it becomes eligible for enforcement through the competent Brazilian federal court.



## 28 - INTERNATIONAL ASPECTS OF BRAZILIAN JURISDICTION

### 28.1. General Jurisdiction of Brazilian Courts

According to Article 2 of the Brazilian Federal Constitution “the Legislative, the Executive, and the Judicial Branches are independent and harmonious among themselves, and are powers of the Union”. Moreover, article 5 of the Federal Constitution states that “the law shall not exclude any injury or threat to a right from appreciation by the Judicial Branch”. Jurisdiction to adjudicate is, therefore, deemed a matter of sovereignty.

In view of the federative structure of the Brazilian State, the jurisdictional powers of the Federative States also emanate from their respective State Constitutions. For its part, article 1 of the Code of Civil Procedure states that that civil jurisdiction is exercised by judges throughout the national territory. Furthermore, article 86 of the Code of Civil Procedure states that civil cases shall be adjudicated by judicial courts, according to their respective competence, without prejudice to the right of parties to submit disputes to arbitration.

The limits of Brazilian jurisdiction in relation to other jurisdictions are established by Brazilian laws, whenever cases are brought in a Brazilian venue. In other words, Brazilian courts abide by *lex fori*, embodied in the Code of Civil Procedure. In that respect, the Code of Civil Procedure draws a clear distinction between concurrent jurisdiction (article 88) and exclusive jurisdiction (article 89). In the case of concurrent jurisdiction, the Brazilian Judiciary may exercise its jurisdictional power whenever (i) the defendant is domiciled in Brazil, regardless of his/her nationality; or (ii) the obligation was contracted in Brazil; or (iii) the law suit results from an event or act in Brazil. In the cases of exclusive jurisdiction, only Brazilian courts may exercise jurisdiction (i) over law suits relating to real estate property; or (ii) related to probate and succession of assets located in Brazil, whether or not the deceased was a foreigner and had lived outside Brazil.

### 28.2. Choice of Forum

Brazilian case law is generally

hesitant on the autonomy of the parties to select a foreign venue. Rulings of the Superior Court of Justice (STJ) have swung both ways. Some justices sustain that the parties declaration of intent may not remove Brazilian jurisdiction, given that the rules of court jurisdiction are based upon national sovereignty, and therefore are not subject to the parties' autonomy. Thus, the parties are free to modify the internal territorial competence, but they may not modify the extension of national jurisdiction.<sup>70</sup> Other justices, however, understand that there is no prohibition to select the forum in an international contract.<sup>71</sup>

In view of the yet undefined position of Brazil's highest court for infra-constitutional cases on this matter, a clause establishing choice of a foreign forum in an international contract entered into parties domiciled in Brazil, or having an obligation to be performed in Brazil,

or under which an act or a fact may be performed in Brazil should be carefully negotiated and written.

### 28.3. Judicial Cooperation

Brazilian laws are generally favorable towards cooperation with the courts of other countries. Article 12, § 2 of the Introductory Law to the Civil Code (ILCC) provides that Brazilian courts shall proceed with the judicial acts requested through a letter rogatory issued by a competent foreign court, provided that an *exequatur* has been granted to same (article 12, paragraph 2 of the ILCC).

Under article 105, I, "i" of the Brazilian Federal Constitution, an *exequatur* of the letter rogatory is required in order to determine the serving of a summons on a defendant resident in Brazil as well as for obtaining evidence, by a Brazilian first-level court. Constitutional Amendment 45, of 2004, has shifted competence for granting of an *exequatur* from the Federal Supreme Court (STF) to the Superior Court of Justice (STJ), and new procedural rules for such proceedings were recently

<sup>70</sup> Resp 804306/SP, 3ª T., Rapporteur Justice Nancy Andrighi, DJ 3/9/08; Resp 498835/SP, 3ª T., Rapporteur Justice Nancy Andrighi, DJ 29/5/05; Resp 251438/RJ, 4ª T., Rapporteur Justice Barros Monteiro, DJ 8/8/00.

<sup>71</sup> REsp 1177915/RJ, 3ª T., Rapporteur Justice Vasco Della Giustina, DJ 13/4/10; Resp 242383/SP, 3ª T., Rapporteur Justice Humberto Gomes de Barros, DJ 21/3/05; Resp 505208/AM, 3ª T., Rapporteur Justice Carlos Alberto Menezes Direito, DJ 13/10/03.

established.<sup>72</sup> The President of the STJ shall notify the defendant of the request contained in the letter rogatory, and the defendant may seek to impugn the request if an offense to Brazilian public policy is found, or if formalities have not been properly fulfilled.

Besides statutory rules on judicial cooperation, which apply to any foreign State, there are also bilateral treaties signed between Brazil and such States as France (1985), Spain (1991), Italy (1995), Argentina (1995) and Uruguay (1995). Such treaties are not identical, but most contain provisions that expedite, to a certain extent, measures for obtaining and *exequatur* from STJ<sup>73</sup>.

Multilateral treaties signed by Brazil on judicial cooperation with countries that have special political or economic ties with Brazil. This is the case of countries in the American continent - South, Central and North America, joined under the Organization of American

States (OAS), and the countries of the Common Market of the South (MERCOSUR).

OAS member-States have signed a series of agreements on private international law (known as CIDIP's), some of which deal with judicial cooperation. This is the case of the Inter-American Convention on Letters Rogatory (CIDIP-I Panama, 1975)<sup>74</sup> and the Additional Protocol thereof (CIDIP-II, Montevideo, 1979)<sup>75</sup>, both ratified by Brazil in 1996.

Under these treaties, notifications and service of summonses may be processed by initiative of the parties through the court system, consular or diplomatic agents, and central authorities of the requesting and requested States.

The main innovation introduced by the Convention on Letters Rogatory was the use of central authorities as

<sup>72</sup> Resolution 9 of May 4, 2005, of the Presidency of the Superior Court of Justice at <http://bdjur.stj.gov.br/dspace/handle/2011/368>.

<sup>73</sup> See <http://portal.mj.gov.br/data/Pages/MJ4824E353I-TEMID2D7208F92A0D4C76BE42D6CF48034A17PTBR-NN.htm>

<sup>74</sup> See <http://portal.mj.gov.br/services/DocumentManagement/FileDownload.EZTSvc.asp?DocumentID={B3528D72-25A3-40D8-A60D-AFA08757DA8}&ServiceInstUID={D4906592-A493-4930-B247-738AF43D4931}>.

<sup>75</sup> See <http://portal.mj.gov.br/services/DocumentManagement/FileDownload.EZTSvc.asp?DocumentID={A31FDE64-540B-4850-B3BE-DE29A5C87BDA}&ServiceInstUID={D4906592-A493-4930-B247-738AF43D4931}>



intermediaries between the courts of the countries involved, making it possible to convey requests for cooperation through a less formal procedure than is normally used by national courts and diplomatic channels. A certain degree of uniformity of procedural rules has also been achieved under the Convention, so that requirements for processing letters rogatory may be approximately the same in the countries where it is in force.

However, some of its provisions have been deemed unenforceable, such as the one providing for direct communication between the courts of neighboring countries, which cannot be applied in Brazil due to the constitutional rules that require granting of an *exequatur* by the STJ as a condition for letters rogatory.

The issuing of an *exequatur* to a letter rogatory does not imply automatic recognition of the jurisdiction of the requesting court neither does it imply an obligation to recognize or to enforce a foreign sentence that may be issued by the foreign court.

The procedures for fulfillment of a request contained in letters

rogatory must follow the rules of the requested State, but may follow any special request made by the requesting State, provided that it is not incompatible with the public policy of the requested State. In any event, the requested State may refuse to execute the letter rogatory where it deems that the request is in clear violation to its own notions of public policy.

Within the framework of MERCOSUR, a multilateral treaty on judicial cooperation – the Las Leñas Protocol of 1992<sup>76</sup> contains rules to facilitate the serving of letters rogatory among MERCOSUR Member States. The Las Leñas Protocol deals with the serving of summons, notifications, and similar acts, as well as evidence. It provides that the letter rogatory must be served *ex officio* by the requested authority, except when a public policy issue is at stake. It also states that serving does not imply automatic recognition of the jurisdiction of the requesting court. The procedures are those of the requested State,

<sup>76</sup> For the full text of the of the Las Leñas Protocol, see <http://portal.mj.gov.br/services/DocumentManagement/FileDownload.EZTSvc.asp?DocumentID={5634D9E8-ADA4-4E2E-8496-2F9D9A5EDB64}&ServiceInstUID={D4906592-A493-4930-B247-738AF43D4931}>

and central authorities are the preferred intermediaries within the Judiciaries involved.

The Las Leñas Protocol waives the obligation to post a bond in guaranty for court costs and attorneys fees, normally required from a foreign party litigating in Brazil.

#### **28.4. Recognition and Enforcement of Foreign Judgments in Brazil**

Recognition and enforcement of foreign judgments has long been a feature of Brazilian law. In the present legal framework, it is contemplated by the 1988 Federal Constitution as amended (article 105, I “i”); by article 15 of the Introductory Law to the Civil Code; by articles 483 and 484 of the Code of Civil Procedure, and by STJ Resolution 9.<sup>77</sup>

The applicable rules stipulate that, in order for a foreign judgment to be enforced in Brazil, it must: (i) have been issued by a competent court; (ii) the defendant must have been served notice of process; (iii) be res *judicata* and ready for execution in the State of origin; (iv) have been

translated by a Brazilian sworn public translator; and (v) have been recognized by the Superior Court of Justice.

The procedure for recognition by the STJ of a foreign judgment requires that the interested party file a petition requesting such recognition, together with a copy of the foreign judgment and other documents necessary for understanding of the request, all duly translated and authenticated.

When a foreign judgment is incompatible with Brazilian public policy, it shall not be recognized; however, if incompatibility is only partial it may be partially recognized. Anticipatory or interim measures may also be granted in proceedings for recognition of a foreign judgment, so that the defendant may not frustrate the purpose of recognition during the period in which the process is underway.

If a defendant wishes to challenge a request for recognition of a foreign judgment, the only admissible arguments are based upon: authenticity of documents, interpretation of the judgment, and compliance with requisites of STJ Resolution 9. No discussion

---

<sup>77</sup> See note 3 above.

of merits is allowed, excepting on public policy matters.

Once it is recognized by the STJ, the foreign judgment may be executed by a first-level federal court.

Various bilateral and multilateral treaties have attempted to harmonize legal standards with the aim of reducing uncertainties generated by the various national laws that may apply to recognition and enforcement of foreign judgments. Within the scope of both the OAS and MERCOSUR, Brazil has signed a number of international treaties relating to recognition and enforcement of foreign judgments and arbitral awards.

The Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards, signed in Montevideo in 1979 and ratified by Brazil in 1997<sup>78</sup> provides extraterritorial validity to any foreign judgment or award in civil, commercial and labor cases, issued by judicial authority in the signatory States, provided that (i)

the judgment/award is considered authentic in the State of origin; (ii) the judgment and accompanying documents have been duly translated to the language of the State of recognition; (iii) it has been duly certified as required by the laws of the State of recognition; (iv) it was issued by a competent court in the international sphere, according to the laws of the State of recognition; (v) the defendant has been served notice of process in a form substantially equivalent to that accepted under the laws of the State of recognition; (vi) the parties have had the opportunity to submit a defense; (vii) the judgment is final or has the effect of *res judicata* in the State of origin; and (viii) the judgment is not clearly against public policy principles and rules of the State of recognition.

Though the Convention on Extraterritorial Validity goes into considerable detail on bureaucratic requirements, it fails to define how international jurisdiction of the State of origin is to be ascertained. To fill this gap, another convention – the Inter-American Convention on Jurisdiction in the International Sphere for the Validity of Foreign

<sup>78</sup> For the full text of the Convention, see <http://www2.mre.gov.br/dai/arbitral.htm>.

Judgments<sup>79</sup> – was signed in 1984, but has not yet been ratified by Brazil. This convention has been criticized for its extremely narrow focus, and to date only two States in the region (Mexico and Uruguay) have ratified it.

To address disparities in inter-American conventions on recognition of foreign judgments, the Member States of MERCOSUR signed the Las Leñas Protocol of 1992. With regard to the recognition of foreign judgments, the Protocol allows a request to be served by letter rogatory, rather than by a petition filed in Brazil by the party requesting the recognition. This, in turn, makes it possible for proceedings filed in one country to be transferred to another through the respective central authorities. Ratification by the Superior Court of Justice (STJ) is nonetheless required.

Although Brazilian law (article 90 of the Code of Civil Procedure) does not consider *lis pendens* in a foreign jurisdiction preclusive of jurisdiction to adjudicate of Brazilian courts, *lis pendens* is deemed an

impediment for the recognition of a foreign judgment under the Lás Leñas Protocol, if the pending action law suit brought in the State of recognition prior to the law suit in which the foreign judgment was proffered (article 22).

As a complement to the Las Leñas Protocol, MERCOSUR Member States have defined conditions for international jurisdiction in contractual matters, through the Buenos Aires Protocol on International Jurisdiction in Contractual Matters signed in 1994 and ratified by Brazil in 1996.<sup>80</sup>

## 28.5. Jurisdiction of International Arbitration Tribunals

The Brazilian Arbitration Law (Law 9307 of 1996)<sup>81</sup> accepts and endorses international arbitration as an effective means of resolving disputes involving patrimonial rights and parties capable to freely dispose of such rights. It places no restriction on the use of arbitration rules of foreign or international arbitral

<sup>79</sup> For the full text of the Convention, see <http://www.oas.org/juridico/portuguese/treaties/B-50.htm>

<sup>80</sup> For the full text of the Protocol, see <http://www2.mre.gov.br/dai/matcontratual.htm>

<sup>81</sup> For full text, see [http://www.planalto.gov.br/ccivil\\_03/leis/19307.htm](http://www.planalto.gov.br/ccivil_03/leis/19307.htm)

institutions, which is left to the discretion of the parties entering into an arbitration agreement.

Though parties are free to sign international agreements establishing the dispute resolution mechanism of their choice, a foreign arbitral award or judgment issued by a foreign court is only valid in Brazil once it has been recognized by the Superior Court of Justice (STJ). The procedures for recognition of a foreign arbitral award or a foreign court judgment are practically identical, and are governed by STJ Resolution 9 of 2005.<sup>82</sup>

In addition to the provisions of the Brazilian Arbitration Law, the United Nations New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, ratified by Brazil in 2002<sup>83</sup>, also applies to recognition of foreign arbitral awards in Brazil.

Recent case law of the Federal Supreme Court (formerly the competent court for such

recognition) has generally been favorable to recognition of foreign arbitral awards, especially after the enactment of the Arbitration Law of 1996, which waived the requirement of *double homologation*.<sup>84</sup> Since STJ became competent to issue recognition of foreign arbitral awards in 2004, it has been ruling in favor of international arbitration involving parties domiciled in Brazil,<sup>85</sup> pursuant to the New York Convention.

<sup>82</sup> See Note 3 above.

<sup>83</sup> For the full text, see [http://www.planalto.gov.br/ccivil\\_03/decreto/2002/D4311.htm](http://www.planalto.gov.br/ccivil_03/decreto/2002/D4311.htm)

<sup>84</sup> See SE 5206 AgR/EP – SPAIN, Rapporteur Justice Sepúlveda Pertence, Full Court, 12/12/2001; SEC-5828/NO, Rapporteur Justice Ilmar Galvão, Full Court, 12/06/2000; SEC-5847/IN, Rapporteur Justice Maurício Corrêa, Full Court, 12/01/1999

<sup>85</sup> See SEC 802 / EX, 2005/0032132-9, Rapporteur Justice José Delgado, CE – Special Court, 08/17/2005; SEC 856 / EX, 2005/0031430-2 Rapporteur Justice Carlos Alberto Menezes Direito, CE – Special Court, 05/18/2005