SELECTED LEGAL ASPECTS OF DOING BUSINESS IN BRAZIL

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Brazil is a developing nation of 200 million people incorporated as a federative republic with 26 states, a federal district where the capital Brasília is located and over 5,000 municipalities, bound by a Federal Constitution dated 1988. The Brazilian economy generates over 50% of South America’s total GDP.

The federal government has a strong program of encouraging foreign investment due to finance and infrastructure development needs. The constitutional distinction between foreign and Brazilian-owned companies was abolished more than a decade ago for all but a few strategic sectors. The Federal Constitution and certain laws still impose restrictions in certain sectors such as nuclear energy, newspapers, television and the aerospace industry. There are also certain limitations on foreign investment in the financial and insurance sectors, although such limitations can be lifted by the government if doing so is in the national interest.

During the past decade, Brazil’s economic growth has been continuous and stable, and inflation has been low. Unemployment levels are at a historic low of 5% while income and consumption power have risen, enabling people to consume goods they previously could not have accessed, and thereby increasing the potential of the internal market. Brazil’s rapidly growing consumer market is reflected in the 45 million people who have moved into the middle class over recent years.

Recent economic stability may be attributed in part to governmental policies that have been focused on balancing the domestic payments account and high interest rates. Historically, Brazilian interest rates would be considered very high by global standards and personal interest rates especially are still among the highest in the world. The government basic interest rate (“SELIC”) is currently 11%.

The Real does not trade freely, being under direct control of the Central Bank of Brazil (BACEN), which authorizes financial institutions to operate as registered brokers to conduct transactions in foreign currencies. There is an exchange control system in place that although detailed and somewhat complex, works effectively and can be fairly easily navigated. Many of those procedures have been automated since 2001 and may be carried out over the Internet, and exchange controls have been made significantly more flexible in recent years.

Brazil as a civil law country has a complex set of statutes and regulations applicable to all business activities, and a very complex tax structure with over fifty different taxes applying at the local, state or federal level.

The purpose of this paper is to provide a summary of the main legal aspects to be taken into account when considering making an investment in Brazil. Due to the broad aspects of the matters covered herein, this work does not constitute legal advice and is not intended to be exhaustive. Brazil’s complex regulations make it very important to obtain specialized legal advice before engaging in business activities in Brazil.

Throughout this document monetary figures are provided in Brazilian Real (BRL). As at June 2014, the USD:BRL exchange rate is 1:2.2
There are several forms of organizing a business under Brazilian law and the decision on which form is more appropriate to a specific transaction, venture or activity must take into consideration, among other things, accounting matters, publication of financial statements and call notices, the relationship between the equity holders, and the management structure.

Although there are several company forms, the two most common forms for incorporating a Brazilian company are:

- **Limitada or Limited Liability Company** - A hybrid between a corporation and a partnership; and
- **Sociedade Anônima or S/A** - The basic corporation form in Brazil.

**LIMITADAS (LIMITED LIABILITY COMPANIES)**

Limitadas are regulated by the Brazilian Civil Code (Law 10,406, of January 10, 2002, as amended).

A Limitada is formed through the execution of Articles of Association by at least two shareholders, also known as quotaholders. The Articles of Association must set out the following:

- Quotaholders’ full identification;
- Limitada’s corporate name;
- Corporate purposes;
- Head office address;
- Corporate capital and number of quotas (shares of a Limitada are generally referred to as quotas);
- Management structure;
- Term; and
- Any other provision which the quotaholders may decide to include.

The original version of the Articles of Association, as well as any subsequent amendments made thereto, must be filed and registered with the Commercial Registry of the State where the company has its head office and branches.

As far as Brazilian law is concerned, there is no minimum corporate capital requirement or requirement for corporate capital to be paid-in upon incorporation of the Limitada. The quotas represent the amount in cash, credits, rights or assets that each quotaholder contributed when forming the Limitada. They can be increased or decreased in accordance with quotaholders’ resolution and the Brazilian Civil Code. Such quotas cannot be represented by any securities or certificates and contribution with services is not permitted.
The Articles of Association may provide that the corporate capital is to be paid-in within a certain period of time or whenever requested by management. **Limitada** quotas are of one form and class, and the Articles of Association may, for instance, provide that the distribution of dividends will not necessarily follow the same percentage of equity participation for each quotaholder.

Each quotaholder is liable to pay its quota in the corporate capital in full, but all quotaholders are jointly and severally liable for any corporate capital amount which is not paid-in within the agreed term.

With regard to the management structure, through the Articles of Association (or a separate instrument if one is used), the quotaholders may appoint one or more individuals to act as officers, whether quotaholders or not. Legal entities cannot be appointed as officers, although this was allowed in the past. Thus, in the event the company’s quotaholders are all legal entities, they must appoint a third party individual as officer, with all the necessary powers to represent the company. The quotaholders may restrict such powers through limitations in the Articles of Association. The company’s officer(s) must be resident in Brazil, whether Brazilian citizen or foreigner holding a permanent visa, and may hold this position for a definite or indefinite period of time. The Brazilian Civil Code also sets out that officers will be liable if they do not act in accordance with the provisions of the Articles of Association, for example, being personally responsible for losses and damages resulting from willful misconduct and/or that could have been reasonably avoided.

Another important aspect of a **Limitada** is that a quotaholder may be excluded from the company if a majority of quotaholders believe they are threatening the development of the company by some undeniably harmful conduct, such as lack of payment of quotas or disloyal conduct. Exclusion is effected by means of an amendment to the company’s Articles of Association, where they recognize that this may occur. Notwithstanding this, the quotaholder being excluded has the right to present a defense.

A transfer of quotas in the **Limitada** is also achieved by way of amendment to the company’s Articles of Association.

The Brazilian Civil Code sets out the terms and procedures for calling a Quotaholders’ Meeting, and the matters that are to be discussed at the meeting. Call notices are not necessary if all quotaholders are present at the Quotaholders’ Meeting or declare in writing that they are aware of the time, place and date of the meeting.

**Limitadas** must hold an Annual Quotaholders’ Meeting, within four months of the end of the company’s fiscal year. The scope of such Annual Meeting is to examine and approve the officers’ accounts and financial statements of the prior fiscal year, and, if necessary, to appoint administrators of the company.

In addition, the Brazilian Civil Code authorizes quotaholders to decide on the supplementary applicability of Law 6,404, of December 15, 1976, as amended (“Brazilian Corporations Law”) to the **Limitada**. Such supplementary applicability must be expressly stated in the **Limitada**’s Articles of Association.

Finally, quotaholders of a **Limitada** have flexibility to insert provisions into the Articles of Association that would elaborate on or modify the otherwise simplified structure of a **Limitada**. They are also free to enter into a quotaholders agreement to set out matters such as voting rights and transfer of quotas (tag along, drag along and right of first refusal procedures).
SOCIEDADES ANÔNIMAS (CORPORATIONS)

Sociedades Anônimas are the Brazilian corporate form governed by the Brazilian Corporations Law, which is more detailed than the regulations that apply to Limitadas.

The corporate capital of a Sociedade Anônima is divided into shares which can be capitalized by public or private subscription. Shareholders’ liability is limited to the payment in full of their own shares. Sociedades Anônimas capitalized by public subscription may offer their shares to the public through the stock market and for such offering must be duly registered with and approved by the Brazilian Securities and Exchange Commission (Comissão de Valores Mobiliários or CVM). Their shares can be negotiated on the Stock Exchange (Bolsa de Valores) or on the over-the-counter market.

The main requirements to incorporate a Sociedade Anônima are:

- At least two shareholders to subscribe all shares comprising the Sociedade Anônima’s initial corporate capital;
- Cash-down payment of, at least, 10% of the amount of the initial corporate capital must be paid-in by the shareholders upon the formation of the Sociedade Anônima. Such amount must be deposited into a bank account opened at Banco do Brasil S.A. or other bank authorized by CVM; and
- The registration of a General Shareholders’ Meeting with the relevant Commercial Registry evidencing: the incorporation of the corporation; the subscription by the shareholders of the shares comprising the corporate capital; proof of the payment of 10% of the initial subscribed shares; and all clauses and provisions of the By-laws agreed upon by the shareholders.

The shares of a Sociedade Anônima may be paid-in in cash and/or with any asset for which the monetary value can be evaluated. Any proposed increase or decrease of the corporate capital must be approved at a General Shareholders’ Meeting and certain specific requirements may apply under the Corporations Law. The corporate capital of a Sociedade Anônima can be divided into common, preferred or fruition shares and their rights will vary according to their respective nature and in accordance with the provisions of the company’s By-laws. The ownership of all shares must be registered by record in the corporate books, mainly the company’s Nominative Shares Registry Book and the Transfer of Nominative Shares Registry Book.

Shareholders have the following essential rights:

- Entitlement to the company’s profits in accordance with their equity holding;
- Supervise the management of the company’s businesses;
- Priority in the subscription of shares and debentures convertible into shares, and receiving subscription bonuses; and
- Withdrawal from the company.

Managers of the Sociedade Anônima perform a defined role which is distinct from its shareholders, even though those shareholders who are residents of Brazil may be appointed as managers. Directors of the corporation may be either Brazilian residents or individuals domiciled abroad, and the company may have one or more boards to establish its internal policies and rules on major corporate decisions.
The management of a *Sociedade Anônima* may be divided among the following bodies:

- General Shareholders’ Meeting (*Assembléia Geral*);
- Board of Directors (*Conselho de Administração*);
- Board of Officers (*Diretoria*); and
- Audit Committee (*Conselho Fiscal*).

The General Shareholders’ Meeting is the highest authority in a *Sociedade Anônima* and it may decide almost every corporate matters including:

- Election of directors and members of the Audit Committee;
- Final approval of the director’s accounts and financial statements of the company related to the previous year;
- Amendment to clauses and provisions of the By-laws; and
- Decision on the distribution of profits and dividends.

The Board of Directors is the collective decision-making body of a *Sociedade Anônima* and all publicly-held and authorized capital companies must have such a body. The Board of Directors is optional in privately held *Sociedades Anônimas*. The main functions of the Board of Directors include setting the company’s business, its administrative and financial policies, electing the members of the Board of Officers. The Board of Directors must be constituted by, at least, three members, Brazilian residents or not, who are elected by the shareholders. Such directors may be elected and removed, at any time, pursuant to the decision of a General Shareholders’ Meeting.

The Board of Officers is the executive body of the *Sociedade Anônima*, and its members represent the company before third parties and public authorities, and are also responsible for performing all the necessary actions for the regular operation of the company. The Board of Officers is composed of, at least, two officers who may not be shareholders but must be Brazilian residents and their term of office may not exceed three years, with one re-election term allowed.

The main purpose of the Audit Committee, when established, is to police the company’s transactions and operations and supervise its management. The Audit Committee may operate under a permanent or temporary basis or whenever requested by the shareholders. It must have three to five members and an equal number of substitutes, shareholders or not, who must be elected by General Shareholders’ Meetings.

The publicly-held *Sociedade Anônima* must publish its financial statements and the Minutes of all Shareholders’ Meetings in a major newspaper and in the Official Gazette of the State where the company is located. A privately owned *Sociedade Anônima* with a net worth below R$2 million is not required to prepare and publish its cash flow statements. In addition, a privately owned *Sociedade Anônima* with less than 20 shareholders and with a net worth below R$1 million is not required to publish its financial statements, provided that certified copies of such financials are registered with the Commercial Registry jointly with the minutes of the shareholders’ meeting that approved (or rejected) them.

Finally, the By-laws of the *Sociedade Anônima*, as well as the Articles of Association of a *Limitada*, may provide that any disputes arising between the shareholders and the company or between the controlling shareholders and the minority shareholders may be settled by arbitration.
CONCLUSION

On the one hand, by using the *Limitada* form, the investor could avoid, to the extent it desires, the management structure of a *Sociedade Anônima*, the formalities associated with its operation (call notices for Shareholders’ Meetings) and disclosure rules (publication requirements of financial statements and Minutes of Shareholders’ Meetings).

On the other hand, corporations make more sense for joint ventures and more complex arrangements, as they allow for different types of fund raising such as debentures and for more sophisticated corporate governance structures. In any event, it is always possible to transform one company form to another if so desired by the shareholders (or quotaholders) through a quite simple procedure.
REGISTRATION OF FOREIGN INVESTMENTS

Contribution to the capital of a Brazilian subsidiary can be made by means of:

- Foreign hard currency, through the official exchange market;
- Brazilian currency, through certain legitimate funding mechanisms;
- Remittance of new assets (capitalization of companies with imported used assets is subject to certain restrictions), as capital contribution by the foreign investors to the Brazilian company (the “Brazilian Subsidiary”); or
- Capitalization of certain existing credits held by the foreign investors against the Brazilian Subsidiary.

Capital contributions in foreign hard currency, assets or credits described, respectively, are eligible for registration with the Central Bank of Brazil (BACEN), the autonomous indirect public administration institution that is part of the National Financial System reporting to the Ministry of Finance. Such foreign capital registration allows the Brazilian Subsidiary to remit dividends to its foreign shareholders and to repatriate the registered capital. Such registration process is made through an electronic system known as “SISBACEN”.

In addition to the registration of any and all foreign investments with BACEN mentioned above, are also subject to the Survey on Foreign Capitals in Brazil:

- Brazilian Subsidiaries that had direct investment of non-residents in its capital stock in any amount and with a net worth equal to or higher than US$100 million on the previous fiscal year; and/or
- Brazilian Subsidiaries that were debtors of short-term commercial credits (payable within 360 days) equal to or higher than US$10 million, on the previous fiscal year.

An Annual electronic declaration containing relevant information on the mentioned investment must be submitted the BACEN and the non-presentation or the late presentation of such information to the BACEN, or even the presentation of incomplete or false information may subject the Brazilian Subsidiary to a penalty of up to R$250,000, pursuant to Resolution 4,104/2012 of the National Monetary Council (Conselho Monetário Nacional or CMN).

The first step to use the SISBACEN is to obtain an access code issued by BACEN, which allows the Brazilian Subsidiary to perform the Electronic Registration Statement/Foreign Direct Investment, known as the “RDE/IED”. The RDE/IED requires information in connection with the Brazilian Subsidiary, the foreign investor and their legal representatives. Once all the information of both parties is recorded within the SISBACEN, the software will create a RDE/IED number to each foreign investor within the Brazilian Subsidiary.
Also, capital contributions in assets require the Brazilian Subsidiary to obtain access to two other electronic systems controlled by the Brazilian Federal Revenue Department known as the “Radar” and “Siscomex” systems. Such systems will enable the Brazilian Subsidiary to comply with all Brazilian requirements for importing the assets remitted by the foreign investors and registering them, as a capital contribution, with the BACEN.

Each form of foreign capital contribution must be carried out by means of a specific procedure to be adopted by the Brazilian Subsidiary; provided, however, that all of them are subject to registration with BACEN. The procedure described below refers to the capital contribution made in foreign hard currency, which is the most common and simplest form adopted in Brazil.

Basically, this form of capital contribution is made through the remittance of funds, in foreign hard currency, by the foreign quotaholders to the Brazilian Subsidiary. As soon as such funds in foreign currency are credited to a bank in Brazil, an authorized representative of the Brazilian Subsidiary will cause them to be officially converted into Reais and credited to the account of the Brazilian Subsidiary. To convert the funds into Reais the legal representative of the Brazilian company will sign a foreign exchange agreement with the Brazilian bank, informing the RDE/IED number related to that specific foreign investor. After duly executing the foreign exchange agreement, the Articles of Association of the Brazilian Subsidiary must be amended in order to reflect that the capital is duly paid-in.

REMITTANCE OF FUNDS - PAYMENT OF DIVIDENDS AND REPATRIATION OF CAPITAL

Foreign capital registered with BACEN may be repatriated to its country of origin. Repatriation is usually accomplished after:

- Sale of shares to a third party;
- Capital reduction; or
- Company’s liquidation.

In order to enable remittance of dividends, and to ensure any repatriation of the original capital and subsequent reinvestment, foreign investors must comply with foreign capital registration rules, as described above. So far as an initial investment is concerned, the rules are fairly straightforward.

In order to be classified as foreign capital, the relevant amounts must have originated from individuals or legal entities domiciled or with a head office outside of Brazil and must be effectively brought into the country. No preliminary official authorization is required for investment in cash.

A foreign investment that is not registered with BACEN is usually referred to as “tainted capital” (capital contaminado). Any inflows and outflows of funds related to such kind of foreign investment cannot be carried out by means of foreign exchange contracts, imposing hurdles for the foreign investor to remit funds abroad. In this sense and in order to avoid remittance of funds restrictions, a non-resident must always regard registration procedures with BACEN when investing in Brazil.
Returns in excess of the registered amount (i.e. the inbound investment) will be considered capital gains for the foreign investor, and thus generally subject to 15% withholding income tax, although there may be exceptions to this. No restrictions are imposed on the amount of dividends distributable to shareholders domiciled abroad.

EXCHANGE CONTROLS

Brazil exercises certain controls on cross-border currency transactions.

The CMN is the major institution of the Brazilian National Financial System and is in charge of formulating monetary and credit policies, including exchange control policy, aiming at the preservation of Brazilian monetary stability. BACEN implements the policies established by the CMN, monitors the behavior of brokers and banks that operate in Brazil, supervises existing financial institutions and authorizes the admission of new financial companies, both in the public and private sector.

BACEN is the public authority responsible for authorizing private commercial banks to operate with foreign currency, pursuant to the rules established by the CMN. Controls are exercised on foreign-currency transactions, including payment for imports and exports, transfers of capital, repatriation of capital and payments of dividends, interest, and royalties, among others. In this sense, BACEN exercises certain control on cross-border currency transactions, regulating the inflow and outflow in Brazil of domestic and foreign currency.

All foreign exchange transactions must be made through an authorized bank with the participation of a registered broker at the commercial exchange rate, except for certain transactions which are authorized to be carried out at the tourist exchange rate. These transactions include deposits of foreign currency with recognized exchange dealers, the purchase of travellers’ checks and qualifying personal remittances.

The regulation applicable to the exchange and foreign capital markets has been recently modified by BACEN with the purpose of reducing the regulatory and operational costs currently incurred by the entities subject to normative rules. The new regulation simplified rules for certain transactions, allowing transactions to be carried out that were previously not envisaged by the regulator.

ENROLLMENT OF FOREIGN INVESTORS BEFORE BRAZILIAN TAX AUTHORITIES (RECEITA FEDERAL DO BRASIL)

In accordance with Normative Rulings 1,042/2010 and 1,183/2011 issued by the Federal Revenue Office, foreign legal entities and individuals owning corporate equity, real estate, airplanes, ships and other assets located in Brazil, which are subject to public registration with the relevant Brazilian authorities, are obliged to register themselves with the Corporate Taxpayers’ Registry of the Ministry of Finance if a legal entity, or with the Individual Taxpayers’ Registry of the Ministry of Finance if an individual. The same applies to beneficiaries of certain security such as mortgages.
The Brazilian tax system is considered complex in view of the variety of taxes levied at Federal, State and Municipal levels. A distinct characteristic of Brazil’s tax system is that the tax burden is concentrated on consumption and sales taxes rather than on income tax payable by individuals and corporations.

Following is a summary of the main taxes currently imposed on business operations in Brazil.

**CORPORATE INCOME TAX (“CIT”)**

The basic income tax rate for the calculation of CIT based on yearly or quarterly adjusted actual profits is 15%. An additional 10% rate on top of the basic 15% rate applies to taxable income that exceeds yearly R$240,000 or quarterly R$60,000.

Legal entities must advance their income tax payments on an estimated tax basis of profits or the actual profits, whichever is lower.

Entities with annual revenues up to R$78 million are allowed to opt for the deemed profits system. Under this system, the taxable basis corresponds to a percentage of the legal entity’s operational gross revenues, according to the activity being carried out:

- Industry and commerce: 8%;
- Service: from 16% to 32%;
- Oil distribution: 1.6%.

Non-operational capital gains are fully taxable under the deemed profits system, in addition to the amounts resulting from the application of the above percentage over the operational gross receipts.

**SOCIAL CONTRIBUTION ON PROFITS**

Brazilian companies are subject to another tax calculated on profits, which is the so-called Social Contribution on Profits. The applicable rate is 9% on yearly or quarterly adjusted book profits, except for financial institutions which are subject to a 15% rate. As a result, the final overall combined tax rate (CIT plus Social Contribution) on profits in Brazil is usually referred as 34%.

Similar to the income tax calculation method, taxpayers may elect an alternative payment of Social Contribution during the tax year/quarter, in which the taxable basis corresponds to 12% of the companies operational gross revenues (32% in case of service providers).
WITHHOLDING TAX ON FINANCIAL INVESTMENTS

Any gains from local financial investments earned by Brazilian non-financial entities are generally subject to the withholding income tax rate ranging from 15% to 22.5%. The income from financial investments is considered as part of the company’s revenue and taken into account in the computation of both the CIT and the Social Contribution purposes. At the year or quarter end, the tax withheld or paid may be credited against the corporate tax due. In case of financial institutions and those deemed to be financial institutions, such as insurance companies, financial leasing entities and others, this withholding does not apply.

Non-residents are subject to a special regime where income from financial investments may be subject to a reduced 10% withholding income tax rate and capital gains may be exempt.

ONE-LEVEL TAXATION ON CORPORATE PROFITS

Corporate profits are only taxed at the corporate level in Brazil. Therefore, dividends paid to shareholders residents or non-residents, corporations or individuals are exempt.

TAXATION ON WORLDWIDE INCOME

Brazilian companies are subject to tax on their worldwide income. Thus, profit, income and capital gains earned abroad – directly or indirectly – are taxable in Brazil.

Profits earned by a Brazilian company through a foreign controlled company or affiliate are taxable in Brazil by CIT and Social Contribution, regardless of any dividend distribution. Brazilian legal entities are not allowed to offset foreign losses against income and profits earned in Brazil.

FINANCIAL TRANSACTIONS TAX (“IOF”)

The IOF is levied at variable rates on certain financial transactions, such as loans, currency exchange, insurance and transactions involving securities. Thus, there are actually four taxes named IOF: IOF/Credit, IOF/Exchange, IOF/Insurance and IOF/Securities.

IOF/Credit is also imposed on companies that are not financial institutions granting loans to other companies or individuals.

The IOF/Exchange (both inflow and outflow) is generally imposed at a 0.38% rate. Foreign investments in capital and financial markets are currently subject to a 0% IOF (portfolio or 2,689 investment).

IOF/Exchange is not imposed on foreign loans with payment terms longer than 180 days. If the payment term is shorter than 360 days, the rate is 6%.
TRANSFER PRICING

Cross-border transactions involving goods, rights or services carried out between a Brazilian entity and a foreign related entity or any entity domiciled in tax havens or subject to privileged tax regimes are subject to transfer pricing rules. Such rules must be complied with in order to determine the maximum deductible amount of import costs and the minimum taxable revenue of the export transaction.

Brazil does not follow the OECD guidelines. Brazilian legislation sets out various methods which the taxpayer may freely choose in order to demonstrate compliance with the rules. Apart from the independent comparable prices, these methods involve a statutory profit margin. The legislation also provides for safe harbor situations in which these rules are not applicable, but they refer exclusively to export revenues.

Brazilian transfer pricing rules do not apply to royalties and technical, scientific and administrative assistance entailing transfer of technology, which are subject to specific rules of deductibility.

THIN CAP

The Brazilian thin capitalization rules (“thin cap”) were only introduced in 2009 through Provisional Measure 479/09, later converted into Law 12,249/10.

These rules restrict the deductibility of interest on loans paid to related parties, depending on the debt-equity ratio or to non-residents (related or not) domiciled in tax havens or subject to privileged tax regimes.

The Brazilian thin cap rules will play a role whenever:

- The beneficiary of the interests is a non-resident;
- That non-resident is a related party or is domiciled in a tax haven jurisdiction or subject to a privileged tax regime; and
- There is an excessive debt-to-equity ratio.

OTHER TAXES

Following is a list of the most significant taxes, other than income tax, likely to impact business operations in Brazil.

Social Integration Plan (“PIS”)
This is a social contribution tax levied at the rates of 0.65% or 1.65% on the company's gross revenues. The higher rate applies to companies that pay the tax on a non-cumulative basis.

COFINS
This is another social contribution levied at the rates of 3% or 7.6% on the company’s gross revenues. The higher rate applies to companies that pay the tax on a non-cumulative basis.
PIS and COFINS on Imports
These taxes are imposed on imports of services at a combined 9.25% rate and goods at a combined rate of 9.25% or 10.25%, depending on the specific product. These taxes may be recoverable by companies subject to the non-cumulative regime.

Import Tax (“II”)
Unless an exemption is available, all products imported into Brazil are taxed by II, which is imposed on the customs value pursuant to GATT rules. The customs value generally corresponds to the transaction value (CIF value). The II rate is selective and depends on the product’s tariff classification.

Federal Excise Tax (“IPI”)
The IPI is a value-added tax paid upon the importation or sale or other transfer of industrialized and certain partially industrialized products. The IPI rate varies according to the type of product.

State Sales and Services Tax (“ICMS”)
The ICMS is a value-added sales and services tax imposed on the importation or sale of goods. It is also imposed on certain transportation and telecommunication services. The rates vary from state to state and per type of transaction. The basic rates in São Paulo and Rio de Janeiro are 12% for inter-state transactions and respectively 18% and 19% for intra-state transactions. With respect specifically to the resale of imported goods, the ICMS rate was reduced to 4% for all Brazilian states. The taxpayer is entitled to credit the ICMS paid upon purchases of inputs against the ICMS imposed on its sales. Presently, tax credits in the acquisition of fixed assets are deferred.

Municipal Services Tax (“ISS”)
The ISS is charged on an individual or legal entity rendering services. Municipalities generally have a uniform tax rate for each type of service. Rates usually range from 2% to 5%.

Contribution for Economic Intervention (“CIDE”)
CIDE is levied at a 10% rate on amounts paid, credited, delivered, applied or remitted to a foreign resident, in connection with: licensing or acquisition of technology; transfer of technology; technical assistance services; royalties; and technical, administrative assistance and similar services.

NON-RESIDENT TAXATION
Dividends or profits earned as from January 1, 1996 onwards when credited or paid to a nonresident are not subject to any withholding income tax.

Services fees are subject either to a 25% withholding income tax rate or to a 15% withholding income tax and a 10% CIDE (the taxpayer of the CIDE is the Brazilian company – it is not a withholding tax). The ISS is also imposed on the import of services as a withholding tax. ISS rates vary according to the location of the importer and the type of service, ranging from 2% to 5%. A 9.25% PIS/COFINS is also imposed on imports of services.

Royalties, technology or know-how fees, software licensing fees, and compensation for administrative and technical services and technical assistance bear a 15% withholding income tax rate, plus the 10% CIDE.
Interests are subject to a 15% withholding income tax. Lower income tax rates may apply to residents of countries with which Brazil has a tax treaty.

Nonresident capital gains are subject to a 15% withholding income tax, which is increased to 25% if the beneficiary is domiciled in a tax haven.

DOUBLE TAXATION TREATIES

Brazil has signed Double Taxation Treaties ("DTTs") with more than 30 countries, including, for example, France, Italy, Netherlands and China.

Under the DTTs, the 25% or 15% withholding income tax usually paid on remittances to foreign residents generates a credit to be offset against the income tax due by the foreigner abroad.

In addition, Brazil has negotiated tax sparing clauses in many of DTTs entered into with more developed countries, such as most of the continental European nations. Under these tax sparing clauses, the foreign beneficiary of a payment that is taxable (and not necessarily taxed) in Brazil is eligible to a fictitious credit, ranging from 20% to 25%, in cases of payments of dividends, interests and royalties. In other words, although no tax at all, or a lower rate is payable in Brazil (the usual 15% withholding tax rate, for example), the beneficiary may benefit from a foreign tax credit of 20% or 25%, as if the Brazilian payer had effectively withheld such rates.

With respect to foreign individuals that become Brazilian tax residents, it is also worth mentioning that, besides the DTTs, some nations such as the United Kingdom, Germany and the United States have reciprocal arrangements with Brazil, which allow Brazilian tax residents to offset the tax paid abroad against the tax owed in Brazil over the same income.
The primary piece of legislation regulating employment relationships in Brazil is the Consolidação das Leis do Trabalho or “CLT” (Decree Law 5,452/1943). A fundamental principle underlying the CLT is that employees, as compared to employers, are considered to be the weaker party to an employment agreement.

The CLT applies to all employees and employers in Brazil and these parties cannot elect any other system or applicable law. Neither party can circumvent or waive the rights and obligations under the CLT.

Employment protection rights under the CLT are applicable, without distinction, to all types of employees – from management to unskilled workers.

The CLT defines an employee as a person who works or performs services for an employer on a regular and continuous basis, is subject to the employer’s orders and supervision, and is compensated for such work or service. As a matter of public policy, an employment relationship exists whenever the individual working or rendering services to the employer fits under this definition. Independent services agreements need a very superficial and infrequent degree of supervision.

An employment agreement does not require a written instrument, and any written contract may be tacitly amended by regular contradictory practice. Employment agreements are generally open-ended, but a probation period up to 90 days may be agreed upon in writing.

Ordinary work shifts are limited to 8 hour a day and 44 hours a week. But rotating shifts must not exceed 6 and 36 hours, respectively.

**EMPLOYEE COMPENSATION**

Once an employment agreement exists, an employee is entitled to a salary, usually paid on a monthly basis, which comprises base compensation plus amounts to cover all mandatory employment rights as follows:

- **30 day vacation and bonus** - After 12 months’ continuous employment, employees are entitled to a 30 day vacation, during which they are entitled to receive their regular monthly compensation plus a “vacation bonus” equal to one third (1/3) of the same amount;
- **Christmas bonus** (the “13th salary”) - Employees are entitled to a 13th salary, equal to their regular monthly compensation;
- **Social security contributions to the National Social Security Institute (Instituto Nacional do Seguro Social or “INSS”)** - Retirement pension and sick leave contributions; and
- **Guaranteed severance fund deposits** (Fundo de Garantia por Tempo de Serviço or “FGTS”) - Monthly deposits into a blocked bank account of the employee, equal to 8% of the individual’s monthly compensation.
In certain circumstances, employees may be entitled to additional payments for night shift, overtime, dangerous or unhealthy activities, industry benefits and the like.

Under the CLT, employers must adjust their employees’ salaries for inflation on an annual basis. The adjustment is determined in accordance with any applicable Collective Labor Agreement and/or Collective Bargaining Agreement between the applicable labor Union representatives and Industry Associations (or the employer directly).

UNIONS

Worker’s Unions, and their counterpart Industry (or trade) Associations, have statutory authority to represent the workers and companies respectively, within a given region and trade, irrespective of affiliation. For a given business type in a given region, there will be an exclusive Union and an exclusive Industry Association.

The immediate and most significant consequence of such statutory representation is that Unions and Industry Associations negotiate and implement Collective Labor Agreements (or “CLAs”) on a regular basis, usually annually. A CLA will automatically apply to all employees within the relevant business Union, irrespective of affiliation. The company may supplement the CLA, or stipulate peculiar conditions applicable to its employees, by entering into Collective Bargaining Agreements (or “CBAs”).

A CLA usually provides for general work conditions, such as overtime pay and fringe benefits (e.g. health care and life insurances, stability prior to the age of retirement etc), while a CBA usually regulates specific work conditions, such as rotating work shifts and overtime offsetting schemes.

A CLA applies by default, while a CBA must be executed by the company directly.

TERMINATION

Different procedures and entitlements apply under the CLT depending on the circumstance in which an employment agreement is terminated.

Termination for cause by the employer or without cause by the employee
The employer will not be liable for any severance indemnity payment to the employee. The employee will only receive their accrued salary.

Termination for cause by the employee, or without cause by the employer
The employee will be entitled to a severance payment which consists of:

- Accrued salaries, including the monthly base salary, overtime payments, commissions or variable compensation, night shift additional payments and others;
- Proportional 13th salary, equivalent to the number of months the employee has worked during the current calendar year (1/12 for each month of the calendar);
Accrued vacations, where the employee has not taken the last vacation. When termination occurs before a full year of employment is completed, vacation entitlements are to be calculated on a pro-rata basis. Under the CLT, vacation leave must be taken in the course of the 12 months following the anniversary date of employment. If the employee has not taken a vacation during this time, the respective compensation is paid in double. In relation to the vacation bonus in cases of pro-rata or double vacation, the bonus is calculated on the amount actually due to the employee;

Proportional accrued vacations related to the last year of work, at a rate of 1/12 per month worked during the current period of accrual;

If the termination is effective immediately, indemnification in lieu of termination notice/default notice is 30 days for one year of employment, while an additional indemnification will be due after the first year on a basis of 3 days per additional year up to a maximum aggregate indemnification equal to 90 days. The notice period is considered to be part of the employment agreement. Even if the company chooses to indemnify the employee, the corresponding period must be considered in the calculation of the two items above;

Termination fine of 50% of the total deposits into the FGTS account (40% to the employee and 10% to the government);

Statutory contribution to the INSS (the same contribution levied on salaries);

The FGTS payment corresponding to the month of termination, plus its impact on the termination payments; and

Other benefits. Before terminating the employee, the employer must check whether the employee is entitled to any other voluntary benefit plan granted by the company or through the relevant CLA.

The first five payments listed above are made directly to the employee. The termination fine, the FGTS and the contributions to the social security system are paid through relevant forms. A company must also observe withholding income tax levied on any termination fees.

NON-EMPLOYEE WORKFORCE

Alternative workforces are only available in specific circumstances where an employee/employer relationship under the CLT is not established. A non-employee workforce may involve outsourcing, services agreements, temporary workers, trainees, independent contractors or consultants.

In these cases:

A company can only hire a workforce through an outsourcing or service agreement to perform services that are not essential to the company’s core business or main activity;

A company can only hire temporary workers for a limited period of time through a workforce supplier company that has a special license granted by the Labor Ministry, either to replace individuals on vacation or leave of absence (e.g. a pregnancy leave), or to catch up with a transitory production increase which is unusual compared to the company’s regular activity;

The company can only hire independent contractors and consultants where there is no subordination between them.
Case law, which is non-binding in Brazil, but provides highly persuasive authority, provides that a services taker is liable for labor and tax obligations related to outsourcing and temporary workers. When outsourcing is undertaken in accordance with the law, the services taker is secondarily responsible for all the obligations that arise from the employment agreement between the services provider and the individual (the worker). If such agreements are not in accordance with the law, both the services taker and the services provider are jointly and severally liable for those obligations.

**RISKS AND SANCTIONS**

The Labor Ministry and Social Security Authorities may inspect a company at any time. If an irregularity is found, the inspectors may impose a fine for the infraction and have the company pay any mandatory employment rights due and corresponding late fees. Matters of collective interest are also subject to the scrutiny of the Public Attorney’s Office, Labor Branch, whose findings may constitute a basis for a class action.

Most cases brought before Labor Courts in Brazil are individual labor claims which may have a declaratory nature (a common example is dispute for recognition of an employment relationship between the parties) or a pecuniary nature (disputing on unpaid mandatory employment rights for example). Labor Courts tend to be protective of employees.
CAPITAL MARKETS AND PRIVATE EQUITY

CAPITAL MARKETS

PUBLICLY HELD CORPORATIONS

Generally, only publicly held corporations may raise funds by means of public offerings of securities and have securities traded on the stock exchange or on the over-the-counter market, provided that they comply with certain rules and requirements mandated by statute, issued by the securities regulator (Comissão de Valores Mobiliários or CVM) or the stock exchange.

Among such rules and requirements are disclosure rules, quarterly financials and other periodic data. Regarding disclosure, publicly-held corporations must provide information on a regular basis to CVM and to the stock exchange such as facts that may materially influence the market price of securities of investors’ decisions in general.

The São Paulo stock exchange offers four special corporate governance levels for publicly held corporations: Novo Mercado, Level 1, Level 2 and Bovespa Mais. The Novo Mercado segment is designed for shares issued by companies that voluntarily undertake to abide by the highest corporate governance practices and transparency requirements besides those set forth in Brazilian law and the CVM regulations. As a practical matter, most new IPOs take place in the Novo Mercado.

PORTFOLIO INVESTMENTS

Foreign investors are entitled to invest in Brazilian capital markets and may enjoy tax benefits such as an exemption on capital gains if their investment is made through the ‘portfolio’ or ‘2689’ regime, whose name is taken from the governing Central Bank of Brazil (BACEN) resolution.

Before any 2689 investment is made, the foreign investor must do the following, all in compliance with the foreign investment rules set out by the BACEN:

- Appoint one or more legal and tax representative/s in Brazil;
- Fill in an identification form; and
- Register itself with CVM.

Investments through the portfolio regime are freely traded within the stock exchanges and other market mechanisms. However, transfers made outside of the stock exchange or other market mechanisms or assignments of such assets are generally not permitted and require the express approval of CVM, which will typically only grant them in cases of corporate reorganizations and hereditary successions.
DEPOSITARY RECEIPTS

Publicly held corporations may use depositary receipts (“DRs”) to represent their shares and trade in foreign markets that have entered into conventions with a Brazilian stock exchange, subject to CVM rules. DR programmes must be previously approved by CVM. Provided that CVM has approved such programme, the Brazilian company issuing the DRs shall entitle a Brazilian custodian to keep its shares in custody on behalf of a foreign depository. The depository shall then issue DRs representing the Brazilian company’s shares that can be traded in the currency of the country in which they are traded.

PRIVATE EQUITY

In past years, the private equity industry has taken notice of Brazil’s growth and has been increasingly active in the country. Most of the large international houses (Carlyle, Blackstone, TPG, Advent, KKR etc) alongside with regional specialists (GP Investments, Southern Cross etc) and Brazilian funds (BTG, Kinea etc) have and continue to deploy significant amounts of capital dedicated to Brazil.

According to PricewaterhouseCoopers, in 2012 the private equity industry was present in around 40% of announced deals in Brazil, while it represented only 15% five years before. In the same year, private equity investors had US$ 18 billion available for investment in the country and represented about 45% of committed capital (totaling US$ 40 billion), a growth of 31% in comparison to 2011.

Local private equity funds will undertake raises through investment funds supervised and controlled by the CVM and by the Brazilian Association of Financial and Capital Markets Entities (ANBIMA), which basically institutes benchmarks for this market through best practices guidelines.

A great variety of types of investment funds are recognized in CVM regulation, such as the equity investment fund (“FIP”), real estate fund (“FII”) and credit assignment investment fund (“FDIC”), among many others. Each of these types has particular features and some enjoy special tax incentives.

The main participants in the Brazilian investment fund market are:

- **Administrator** - Responsible for the operations of an investment fund and normally represents it towards third parties, such as accountants, lawyers, auditors and others;
- **Manager** - Trades securities by applying the investment policies established in the investment fund’s bylaws;
- **Custodian** - Responsible for safeguarding the investment fund’s financial assets and securities, and also provides the administrator and manager with information on the performance of the fund’s investments;
- **Distributor** - Sells/distributes shares issued by the investment fund, and this role is usually performed by the administrator.
Project finance became a relevant tool as public services and infrastructure facilities began to be privatized in the mid-1990s. Due to Brazil’s then-perceived political risk, the most successful project finance transactions done in Brazil at that time had the participation of at least one multilateral organization or export development agency, such as the Inter-American Development Bank (IDB) and the International Finance Corporation (IFC).

Nowadays, project finance as a financing mechanism has become increasingly popular, and the Brazilian Bank of Economic and Social Development (BNDES) has been the main source to providing financing to such projects in Brazil, although not in a completely “non-recourse” fashion.

Banco do Nordeste do Brasil (BNB, a development bank for the Brazilian Northeast), state-owned banks and funds, such as Banco do Brasil, Caixa Econômica Federal and FI-FGTS (an investment fund of the employees severance fund FGTS), as well as some Brazilian and international commercial and investment banks, such as Itaú BBA, Bradesco BBI, BTG Pactual, Santander, HSBC and others, have also been very active in the financing of projects in Brazil.

Diverse loan structures have been put in place for project finance in Brazil, some very similar to international practice, including direct loans and syndicated loans (especially between BNDES and commercial banks), with administrative and security agents, intercreditor agreements and guarantee share agreements.

Project bonds are also increasingly popular in Brazil as a financing mechanism and depending on the sector they may benefit from tax incentives.

TYPICAL SECURITY PACKAGE

The granting of guarantees by project companies in Brazil must often observe industry specific regulations (e.g. energy, telecommunications, oil and gas, rail etc) when the project is within the public utility sector. Across these regulations, a standard security package would typically comprise the following elements:

- Sponsor guarantees (sometimes replaced by bank guarantees such as stand-by letters of credit), especially in the pre-operational stage;
- Pledge or fiduciary transfer of title to shares or quotas in the special purpose vehicle (SPV) established for The project;
- Security over a SPV’s trade receivables, bank accounts and financial assets, formalized by pledge or fiduciary assignment structures;
- Real guarantees over a SPV’s assets; and
- Security over specific rights emerging from government authorizations issued for the project, also formalized by pledge or fiduciary assignment structures.
The creation or enforcement of liens over assets directly involved in the provision of public utilities, such as energy transmission and distribution, may not be allowed or may be restricted by the applicable regulations.

There are differences in the legal consequences deriving from electing pledges or fiduciary assignment structures for the security package. The advantage of the fiduciary transfer of title vis-à-vis the pledge is the treatment for fiduciary transfer of title in insolvency proceedings: whilst the claim secured by a pledge can be ultimately modified under a judicial reorganization (recuperação judicial) plan and be novated thereunder, and must be paid within the scope of the winding up proceedings in case of liquidation of the debtor, in the case of fiduciary transfer of title the enforcement rights of the creditor cannot be modified in reorganization proceedings and are not affected by a winding up procedure.

While it can be possible to structure fiduciary assignments for certain types of assets under Brazilian civil code provisions and, in the case of fiduciary transfer of title to real property, under Las 9514/1997, certain types of fiduciary assignments are provided for exclusively under the Brazilian Capital Markets Law (Federal Law 4,728/1965), such as fiduciary assignments of fungible assets.

Even though there is some controversy on this point, some commentators understand that fiduciary assignments granted under the Brazilian Capital Markets Law can only be created within the scope of Brazilian financial and debt capital markets as regulated by the Brazilian Central Bank and/or by the Brazilian Securities Commission (Comissão de Valores Mobiliários or CVM). Therefore, fiduciary assignments over certain types of assets would only be available to Brazilian banks or foreign banks with Central Bank authorization to operate in the country. Alternative structures for security packages may be put in place to mitigate the (yet untested) risk that fiduciary assignments of certain types of assets in favor of international financial institutions may be challenged.

**SPONSOR GUARANTEES**

Although limited liability is the prevailing rule in Brazilian corporate law, the principle is conversely mitigated by the banking practice of requesting personal or corporate guarantees of the controlling shareholder and any parents and affiliates thereof to debts undertaken by the borrower.

Sponsor guarantees may be granted by individuals or corporations for the performance of a given obligation. Brazilian law contains different rules for specific types of personal guarantees, these being called the *aval* or the *fiança*.

**AVAL**

*Aval* is a guarantee undertaken to specifically secure the performance of credit instruments, which is independent and autonomous from the main obligation – meaning that the *aval* may remain effective even if the main obligation is considered null or void. The Uniform Law of Geneva, which in turn was incorporated by Brazilian legal system, the Brazilian Civil Code and the Brazilian Commercial Code together form the basic legal framework that govern *aval* relationships. By giving an *aval* guarantee, the guarantor ranks equally to debtor in terms of liability towards the secured obligation. In addition, the *aval* must secure the entire obligation, since Brazilian law prohibits the use of the *aval* guarantees to partially secure a given obligation.
FIANÇA

As a second type of personal guaranty foreseen under Brazilian law, the fiança is often used in project financings as a parent company guarantee or a bank guarantee, especially to secure debt repayment obligations prior to project completion. The fiança basically stands for a subsidiary obligation of the guarantor, and, due to its ancillary nature, is only effective when the principal obligation is deemed valid. Also, the guarantor shall only be held liable once the main debtor’s assets have been foreclosed for the settlement of the obligation, unless the guarantor specifically waives this right.

Bank guarantees are also commonly drafted as fianças and may be seen in project financings in Brazil when the lender requires a more stringent security package, or in lieu of a full security package, which would then be negotiated directly with the bank issuing the fiança as counter-guarantees.

Although not expressly recognized by the Brazilian legal framework, contractual structures are likewise adopted in security packages for project financings in Brazil. An example that may be given is equity support undertakings given by sponsors in the context of project financings, which have been very popular in project finance transactions in Brazil. In addition, to the extent the debt has not been repaid in full and the guarantee is still effective, provisions limiting the ability of the guarantors to enforce payment obligations against other guarantors and the borrower and other subordination agreements (such as in relation to intercompany loans) are common practice.

PLEDGE OR FIDUCIARY OWNERSHIP OF SHARES OR QUOTAS IN THE SPV

Another frequent type of security in projects is the pledge (penhor) or fiduciary transfer of title (alienação fiduciária or cessão de propriedade fiduciária) of the shares or quotas in the SPV, which carries the hard assets, contracts and governmental authorizations that comprise the project.

The property rights remain with the debtor, in case of pledged shares or quotas, and the title over the secured shares or quotas is transferred to the creditor which restitution is subject to the satisfaction of the secured obligation, in case of fiduciary assignment of shares or quotas.

Just like all forms of pledges and fiduciary transfer of title, for purposes of perfection, it must be in written form, contain references to the secured amount, describe the shares/quotas granted as security and be registered with the relevant Registry of Titles and Deeds of the debtors’ corporate seat, as a condition of effectiveness for pledges and validity for the fiduciary property.

Further, in order to be enforceable against third parties, the pledge must be registered, as the case may be, in the shares registry book of the SPV, if the SPV is a Sociedade Anônima. Court enforcement is possible, but out-of-court enforcement is the prevailing rule for security over shares and it is generally authorized under the contract and performed, in case of pledges, through an irrevocable power-of-attorney executed by the guarantor granting to the relevant lender the necessary powers to conduct the out-of-court sale.
In addition to the creation of liens over shares/quotas, provisions restraining shareholders’ ability to take certain actions, such as the implementation of corporate transactions, capital increase or reduction and filing for insolvency proceedings, are important mechanisms of control by the relevant financial institution.

Taking security over the quotas or shares of the SPV is the main mechanism adopted to allow lender step-in rights in Brazilian project financings, as the step-in concept is not yet fully developed in Brazil.

SECURITY OVER TRADE RECEIVABLES, BANK ACCOUNTS AND FINANCIAL ASSETS

The security over a SPV’s receivables, bank accounts and financial assets is very usual in project finance and can be formalized under Brazilian Law by pledge or fiduciary assignment structures.

IN REM GUARANTEES

In rem guarantees over a given property must follow the forms that are expressly prescribed under Brazilian law, under the penalty of being rendered ineffective. The security interest created over the asset, irrespective of who holds its title, binds the asset until the secured obligation has been fully satisfied.

Another underlying principle of in rem guarantees, which further validate their use in project financing structures, is that the secured assets remain under the possession of the borrower thereby allowing the project to develop and generate revenues.

The most common types of real guarantees are mortgages, pledges and fiduciary assignments of title to real property. Please refer to the chapter on Real Estate for further information on security over real estate property.

PLEDGE

As a general rule, pledges may be created over movable assets, such as rights, shares, instruments, letter of credits and other negotiable documents. The custody of the pledged assets, subject to certain exceptions expressly indicated in the Brazilian Civil Code, is generally transferred to the lender, who must in turn preserve its integrity as a depositary, providing for damages thereto and being subject to criminal charges in case it fails to return the asset to the owner.

Pledges are created through the registration of the security with the competent public registry of the place where the asset is located and the creation of more than one pledge over a given asset is controversial, as Brazilian law does not expressly allow for second priority pledges in most cases but first tier Brazilian scholars understand that it is generally possible.
MORTGAGES

Mortgages are generally created over immovable properties, although some movable properties may be secured by mortgages, such as aircraft and vessels, which are also regarded as special mortgages (hipoteca especial) and governed by specific federal laws. The title and possession over the assets remain with the borrower.

Mortgages are created through the registration of the security with the competent public registry of the place where the asset is located and more than one mortgage may be created over a given asset. In case of more than one mortgage of a certain asset, the date of filing of the security interest for registration shall determine the priority of the mortgage. The first priority mortgage must be enforced so that the mortgagees that rank lower may enforce their security.

SECURITY OVER THE RIGHTS EMERGING FROM THE AUTHORIZATION OR CONCESSION AGREEMENT

In project finance transactions, all other forms of security concerning the project only make economic sense if coupled with the rights connected to the governmental authorization or concession for the project, such as compensation or renewal rights the concessionaire may have against government, etc, which can also be structured under pledge or a conditional assignment of fiduciary property. Not all of these are enforceable against the government, and where consent is sought from the government it is sometimes the case that consent will be denied, but it is standard practice to request such conditional assignments.
The Brazilian Patent and Trademark Office (BPTO, in Brazil known by the acronym INPI) is the government body responsible for the registration of industrial property rights, as well as for the formal examination of applications for patents and trademarks.

The Brazilian Industrial Property Law (Law 9,279/96) provides for crimes against industrial property, unfair competition, protection of inventions, utility models, industrial designs, and trademarks.

Internationally, Brazil is a signatory of the Stockholm Convention (1967), which established the goals of the World Intellectual Property Organization (WIPO). Brazil has been a member of the WIPO since 1975. It is also a signatory of the Paris Convention for the protection of industrial property, including The Hague (1935) and Stockholm revisions (1967). Brazil is also a signatory of the Strasbourg Agreement (1971) on International Patent Classification and the Berne Convention for the Protection of Literary and Artistic Works. Brazil is a member country of the Patent Cooperation Treaty (PCT) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).

COPYRIGHTS

In Brazil, copyright is regulated by Law 9,610/98 (Copyright Law). The Copyright Law was inspired by the Berne Convention and follows most of the principles adopted by civil law countries.

Therefore, there is more emphasis on moral rights of the authors as opposed to the American and British approaches. The Copyright Law protects economic rights, but also ensures great recognition to the authors themselves by listing their moral rights, which should be respected. Copyright can be exercised in Brazil regardless of registration and the Copyright Law expressly states that ideas are not entitled to protection, but rather, protection is provided in relation to how ideas are expressed; therefore, originality is an important requirement to secure protection.

The assignment or license of copyrights will be interpreted restrictively in Brazil. Therefore, the assignment document, or license agreement, must provide clear and complete information in relation to the authorized uses, term, and any conditions.

Although not mandatory, copyrights can be registered, depending on the type, with the following entities:

- National Library;
- National Agency of Cinema;
- National Council of Engineering, Architecture and Agronomy; and
- National School of Fine Arts of the Federal University of Rio de Janeiro.
PATENTS

According to Brazilian Industrial Property Law, the following are patentable:

- An invention that meets the requirements of novelty, inventive activity and industrial application; and
- A utility model – an object of practical use, or part of it, with potential industrial application, which presents a new shape or arrangement and involves an inventive act that results in functional improvement in its use or manufacture.

A patent of invention is valid for 20 years and a utility model patent is valid for 15 years, counted from the date of filing with the INPI, subject to a minimum of 10 years from the date of grant of a patent of invention and 7 years from the date of grant with respect to utility model.

The applicant for a patent of invention or utility model in Brazil has the right to claim priority over an international application according to the Paris Convention. The priority established by the Convention must be proven by an authenticated document of origin, which contains the number, date, title, specification, claims and, where appropriate, drawings, and must be accompanied by a simple translation of the certificate requesting registration (or equivalent document with data that identifies the content). Failure to provide the supporting documents within 180 days from the date of filing will result in a loss of priority. It is also possible to apply in Brazil for an international patent under the PCT, provided that there is national processing.

Amendments have been introduced to the Brazilian Industrial Property Law to protect chemicals and pharmaceuticals and their manufacturing processes.

In the biotechnology field, all or part of natural living beings and biological materials found in nature are not patentable, but organisms created in a laboratory are entitled to protection, provided they are novel, an inventive step, and capable of industrial application. Although Brazilian law does not allow patent protection for plants or animals, some specific processes for the production of transgenic organisms may be subject to patent protection.

Another important innovation established by the new patent law was the “grace period”, which states that any public disclosure of an invention or utility model during the twelve months preceding the date of filing or priority of the patent application will not be considered as part of the state of the art.

REGISTRATION OF INDUSTRIAL DESIGNS

An industrial design is considered to be an ornamental plastic form of an object or an ornamental arrangement of lines and colors which may be applied to a product, providing a new and original visual result in its external configuration and that may serve as a model for industrial manufacture.

There is no examination of the merits of the request before granting a registration of industrial designs. In other words, compliance with legal requirements of novelty, originality and industrial application will be considered exclusively only upon the establishment of a legal, administrative repeal process by a third party or by the INPI, by their own initiative.
An Industrial Design Registration will be valid for 10 years from the date of filing, renewable for 3 successive periods of 5 years each. The extension request must be made during the last year of the term, along with proof of payment of the associated fee.

TRADEMARKS

Any person – whether an individual or a corporate entity under public or private law, Brazilian or foreign – can apply for registration of a trademark in Brazil, according to the provisions of the Industrial Property Law. In the case of individual persons, it is only possible to apply for trademark registration with respect to the activity they are engaged in an effective and lawful manner.

Before filing a trademark application with the INPI, it is advisable to carry out a prior trademark search on its database to determine whether there is a previously filed or registered mark identifying products or services that might be identical or similar.

The marks filed in Brazil with a priority claim under the Paris Convention must be filed within six months from the date of filing in the country of origin. During this period, the owner may make an application to register its trademark in other countries that are signatories of the Convention, but if the foreign owner does not claim the priority, the benefit of priority provided in the Convention will not be granted.

Based on Brazilian laws and regulations, royalties are not payable for license agreements of trademarks and patents in the following cases:

- The mark is not duly registered in Brazil;
- The patent has not been granted in Brazil;
- The trademark registration is not renewed; and
- The trademark registration has been extinguished or is in the process of revocation or cancellation.

The mark must begin to be used within five years of the date of the grant. The effective use of a trademark is compulsory for it to remain in force and cannot be interrupted for more than five consecutive years. Therefore, it is necessary to prove use of the mark, which can either be done by the holder in Brazil, or by a licensee.

TECHNOLOGY TRANSFER

The transfer of technology to Brazilian companies is governed by Normative Instruction 16/2013. Any agreement related to technology transfer, patent or trademark licensing, supply of technical and scientific assistance or franchise agreement is governed by this normative act. All acts or agreements involving technology transfer must be registered with the INPI in order to be binding vis-à-vis third parties, in addition to being necessary for exchange controls and tax deductibility reasons.

To be valid, the technology transfer agreement must clearly specify its subject matter, remuneration, periods of application and method of execution, and any other industrial property rights involved.
Agreements for technical and scientific assistance must specify the number of specialists who will be required to perform the services, the program, remuneration and time required. The request for approval must be submitted to the INPI in the proper format, accompanied by the necessary documentation.

FRANCHISING

The franchise system in Brazil is regulated by Law 8,955/94, which regulates the relationship between franchisor and franchisee from the beginning to the end of the process, apart from providing sanctions in cases of non-compliance with the agreed points. In addition to the legislation, the Brazilian Franchising Association (ABF) has created a self-regulating code, which serves as a guide to franchise implementation.

It is worth noting that franchise agreements are not required to be registered with government agencies for their validity and enforceability unless the parties wish it to be recognized vis-à-vis third parties. In this case, the agreement must be registered with the INPI, according to the terms of the INPI Normative Instruction 16/2013. When the franchisor is a foreign company, it is essential to register with the Central Bank of Brazil to allow the remittance of payments provided for in the contract.
ANTITRUST AND COMPETITION

The Competition Law (Law 12,529/2011) is the main statute governing merger control, investigation and repression of anticompetitive conduct in Brazil. The Competition Law is enforced by the Brazilian Competition Defense System (Sistema Brasileiro de Defesa da Concorrência or SBDC), which comprises the Brazilian competition agency (Conselho Administrativo de Defesa Econômica or CADE), an independent agency linked to the Ministry of Justice, and the Secretariat of Economic Monitoring (SEAE) of the Ministry of Finance.

The SEAE is responsible for competition advocacy in Brazil, particularly before governmental authorities, and CADE is responsible for enforcing merger control requirements and investigating and repressing anticompetitive conduct. The following bodies form CADE:

- **Administrative Tribunal** - Composed by six commissioners and a President, it is the decision-making body in charge of rendering final and binding decisions following the investigation of anticompetitive conduct;
- **Superintendent General Office (SG)** - Headed by CADE’s Superintendent General, this is the investigative body in charge of carrying out investigations of anticompetitive conduct, which the Administrative Tribunal will ultimately decide;
- **Department of Economic Studies** - Headed by CADE’s Chief Economist, this is a consulting body responsible for rendering non-binding economic opinions and preparing economic studies at the request of the Superintendent General and the commissioners of the Administrative Tribunal.

MERGER CONTROL

The Competition Law establishes a pre-merger review system, whereby parties to transactions that require submission to CADE will only be able to close such transactions after obtaining antitrust clearance. This means that CADE’s decision is effectively a condition precedent to closure.

Parties to transactions that require notification to CADE should be careful in taking any steps that could constitute gun-jumping or pre-merger coordination, as they may be subject to fines and investigations for anticompetitive conduct.

Under the Competition Law, CADE has jurisdiction to analyze and decide transactions taking place both inside and outside Brazil, provided, in the second case, that they may produce effects in Brazilian territory. The approach usually adopted to define whether an overseas transaction has the potential to produce effects in Brazil is to check if the target company has a subsidiary in Brazil or, in the absence of such a subsidiary, if it makes sales to Brazil.

If a transaction has jurisdictional nexus with Brazil, one should examine whether the transaction is reportable to CADE or, in other words, whether the transaction constitutes a “concentration act”, as defined by the Competition Law.
The Competition Law sets out transactions that are considered concentration acts, namely:

- Merger of two or more previously independent companies;
- Direct or indirect acquisition of the control or minority stake in a given company or group of company, including the purchase or exchange of shares, quotas, bonds or securities convertible into shares, or tangible or intangible assets, by means of contractual instruments or any other mean or form;
- Merger of a company into another one; and
- Execution of an associative agreement, consortium or joint venture among two or more companies.

Some exemptions are available to these concentration acts, including for associative agreements, consortia or joint ventures when their purpose is to participate in tenders held by the direct and indirect public administration and/or the contracts arising from them.

Assuming that there is jurisdictional nexus with Brazil and that the transaction is a concentration act, as listed above, one should examine whether the transaction reaches the legal notification thresholds. Under the Competition Law, a concentration act requires notification if:

- One company has, or a group of companies have, registered gross sales revenue or a total volume of business of R$750 million or more in Brazil, in the year preceding the transaction; and
- At least one other company or group of companies involved in the transaction has registered gross sales revenue or total volume of business of R$75 million or more in Brazil, in the year preceding the transaction.

In the assessment of whether a transaction would meet the revenue thresholds, one must take into account not only the revenues registered by the companies directly involved in the transaction, but also the revenues registered by their respective economic groups.

CADE Resolution 1/2012 (article 108) states that transactions should be notified, preferably, after signing the formal agreement that binds the parties and, in all cases, before any act related to the transaction is implemented. There is no deadline for filing a notification, but the parties may not close a transaction before CADE’s approval.

For public offerings, CADE Resolution 1/2012 (article 109) states that the acquisition of shares that require notification may be submitted to CADE from the date of their announcement, and do not depend on CADE’s approval for completion. Nevertheless, the acquirer is not allowed to exercise the political rights related to the interest acquired from the public offering until final approval by CADE.

If parties take any action that may constitute a step or a form of implementation of a transaction before CADE’s approval (“gun jumping”), they may be subject to a fine ranging from R$60,000 to R$60 million (roughly US$25,000 to US$25 million).

In addition, CADE may consider all acts which pursue implementation or closing of the transaction void. In addition, the competition authorities may initiate an administrative proceeding in order to investigate any anticompetitive behavior possibly derived from the transaction.
ANTICOMPETITIVE CONDUCT

GENERAL

The Competition Law provides that any act that has as its object or that may produce the following effects (even if such effects are not achieved) will be deemed an antitrust violation, regardless of guilt:

- Limit, restrain, or in any way harm open competition or freedom of enterprise;
- Dominate relevant markets of goods and services;
- Arbitrarily increase profits; and
- Abusively exercise a dominant position.

Such a violation is an administration violation. Conduct that may constitute a violation is set out in the Competition Law and includes cartels, price discrimination, tie-in sales, refusals to deal, bid riggings, predatory pricing, and resale price maintenance.

As a rule, CADE analyzes potential anticompetitive conduct on a case-by-case basis, taking into account the context in which the conduct was carried out.

PENALTIES

Companies that violate the Competition Law may be subject to fines that may vary from 0.1% to 20% of the gross revenue registered in Brazil by the company, group or conglomerate in the field of business in which the violation has occurred, in the financial year preceding the start of the investigation. Whenever the anticompetitive conduct affects more than one field of business, CADE will consider the sum of the annual gross revenue obtained in all affected areas. Please note that the fine may not be lower than the advantage obtained from the underlying violation, if assessable.

Fines applicable to individuals may vary from 1% to 20% of the amount of the fine imposed on the company. In case of other public or private entities, such as associations of entities or persons which do not carry out business activities, if it is not possible to use the above criteria, the fine may vary between R$50,000 and R$2 billion.

For repeat violations, CADE may double the fines imposed to the company, entity or individual. In addition to fines, CADE has the power to impose the following penalties under the Competition Law:

- Publication of the summary sentence in a court-appointed newspaper (at violator’s expense);
- Prohibition to contract with official financing or to participate in bidding processes, for a period of five years or more;
- Annotation of the violator on the Brazilian Consumer Protector List;
- Recommendation that other public agencies: grant compulsory licenses for patents held by the violator; deny the violator’s installment payment of federal overdue debts or order total or partial cancellation of tax incentives or public subsidies; and
- Require the company to transfer corporate control to another entity, sell assets, partially discontinue activities, or any other antitrust measure required for such purposes, among others.
LENIENCY

Companies and individuals that have violated the economic order may apply for leniency with CADE under the Competition Law in order to report a violation and assist with the investigations in exchange for full immunity or a reduced fine, depending on the case.

Through the execution of a leniency agreement, the administrative penalty can be set aside or reduced from one to two thirds, provided that the individuals and companies cooperate with investigations and their collaboration results in:

- Identification of other parties involved in the reported violation; and
- Information and documents that demonstrate the violation.

Leniency agreements may only be executed if:

- Superintendent General Office does not have sufficient evidence to secure the conviction of the investigated companies and individuals;
- Applicant is the first to qualify in relation to the violation reported or under investigation (other than in the case of individuals, who can propose leniency agreements even if not the first in line);
- Applicant agrees to cease its involvement in the violation from the date the agreement is executed; and
- Applicant agrees to confess its participation in the conduct and to fully and permanently cooperate with the investigations.

The effects of the leniency agreement extend to companies of the same group, de facto or de jure, and to their directors, administrators or employees involved in the violation, if they also execute the agreement and comply with its terms.

Finally, any company or individual that does not obtain, during the investigation, qualification to execute a leniency agreement, may apply for a leniency plus agreement and report a different antitrust violation, of which CADE is not aware of, benefiting from full immunity in the second investigation and from a reduced fine in the first investigation.

EXTRATERRITORIALITY AND INTERNATIONAL CONDUCT

CADE has jurisdiction under the Competition Law to investigate conduct carried out abroad, as long as it has the potential to have effects in Brazil. In the last few years, the Brazilian competition authorities have opened a series of investigations on conduct that took place outside the Brazilian territory, but that may have had effects in the Brazilian territory.

SETTLEMENTS

Defendants may enter into settlement agreements in order to cease investigations into anticompetitive practices. The procedure to apply for and negotiate a settlement is governed by CADE’s Internal Regulations. Once the settlement agreement is executed, the investigation will be suspended with respect to the settling party until the date of fulfillment of all conditions provided for in the agreement.
The settlement suspends solely the administrative proceeding on that settler’s behalf and not on behalf of any other defendants. Also, the mere filing of a settlement proposal does not suspend the course of the investigation, nor does it imply a confession or an acknowledgement of the illegality of the conduct.

A settlement agreement must establish:

- Which obligations must be undertaken in order to cease the anticompetitive conduct, as well as any other obligations that may be necessary;
- Fine to be imposed in case of noncompliance; and
- Financial compensation to be paid to the Fund for Defense of Diffuse Rights (Fundo de Defesa de Direitos Difusos or FDD), when applicable.

In cases of cartel investigations, CADE’s Internal Regulations provide that a settlement agreement must contain three mandatory commitments from the settling party:

- Acknowledgement of participation in the violation;
- Payment of a financial contribution that cannot be lower than the minimum fine provided by the Competition Law; and
- Agreement to cooperate with the investigation.

According to CADE’s Internal Rules, the settling party may benefit from reductions in the amount of the financial contribution, which may vary according to the moment of the investigation and the submission of the proposal to settle. When the proposal to settle is submitted while the case is still under investigation by the SG, the amount of the contribution should take into consideration the degree of cooperation with the investigations and the moment in which the proposal has been presented, as following:

- Reduction from 30% to 50% of the expected fine for the first defendant that proposes a settlement agreement;
- Reduction from 25% to 40% of the expected fine for the second defendant that proposes a settlement agreement;
- Reduction up to 25% of the expected fine for the other defendants that propose a settlement agreement.

If the proposal is submitted when the case is already within CADE’s Administrative Tribunal, the amount of the contribution should take into consideration the status of the investigation and the maximum discount applicable should be 15% of the expected fine.

A percentage discount agreed in a settlement agreement cannot be higher than the percentage granted to other defendants who have previously settled the same investigation.

**ANTITRUST DAWN RAIDS**

CADE may carry out administrative inspections at the premises of the companies under investigation, and seek court orders to carry out dawn raids at such premises and even at the residence of individuals under investigation. During a dawn raid, authorities may analyze and seize inventories, objects, papers of any nature, as well as commercial books, computers and electronic files.
ECONOMIC CRIMES LAW

Under the Economic Crimes Law (8,137/90), cartel behavior may also subject individuals to criminal prosecution before the courts of law. For such crimes, penalties may vary from two to five years’ imprisonment plus the payment of a fine. The penalties for economic crimes are only applicable to individuals and not to legal entities.

The Competition Law has amended the Economic Crimes Law, so that non-cartel behaviors no longer constitute crimes. The Competition Law has also increased the maximum term of imprisonment from four to five years and has established that violators will be subject to penalties of both imprisonment and fine, which prevent violators from applying for a conditional suspension of the criminal sentence.

The crimes described in the Economic Crimes Law may be reported by any person to the Public Prosecutor’s Offices at the federal and state levels, who are responsible for enforcing the Economic Crimes Law before courts of law.

ACTION FOR DAMAGES AND PUBLIC CIVIL LAWSUITS

Although not yet common in Brazil, third parties may bring civil claims for damages caused by anticompetitive conduct before civil courts. Under the Competition Law, parties that have been harmed by competition violations may file claims for damages before Brazilian courts of law and seek compensation for losses and damages. Public civil lawsuits may also be filed by Public Prosecutors and other entities empowered by law to pursue these lawsuits on behalf of a group of individuals who may have been harmed by anticompetitive conducts, under the Law 7,345/85 (Public Civil Lawsuit Law).
Brazil’s first Anticorruption Law (Law 12,846/2013) came into effect in January 2014. Similar to the USA’s Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act, the Anticorruption Law provides a rigorous regime for penalizing corrupt conduct in Brazil.

Prior to the enactment of the Anticorruption Law, Brazil relied on provisions in its Criminal Code (Decree 2,848/40, as amended by Law 7,209/84), Administrative Misconduct Law (8,429/92) and Public Bidding Law (8,666/93) to combat corrupt conduct. These provisions continue to be applied in conjunction with the Anticorruption Law, and together they demonstrate the significant progress that has been made to address actual and perceived corruption in Brazil.

CORRUPT CONDUCT

The Anticorruption Law imposes administrative and strict civil liability for conduct which is considered harmful to national or foreign public administration, including:

- Bribery and attempted bribery of local and foreign officials;
- Fraud in public bids and in the procurement or performance of government contracts; and
- Hampering government investigations and inspections.

Consistent with the approach taken in the UK, facilitation payments are prohibited under the Anticorruption Law. This differs to the USA approach, where such payments are not prohibited under the FCPA.

LIABILITY AND EXTRATERRITORIAL APPLICATION

The Anticorruption Law imposes liability on both individuals, within the limits of their own actions, and legal entities, regardless of their corporate form.

Liability is strict, meaning that it is not necessary to show that the legal entity had the intention or even knowledge of the corrupt conduct undertaken by any of its representatives or employees.

The Anticorruption Law has broad reaching application as liability applies to acts against national and foreign public administration. Foreign legal entities will be liable if they have headquarters, affiliates or any type of representation in Brazil, even on a temporary basis; while Brazilian legal entities will be liable for acts against a foreign public administration even if it is performed outside of Brazilian territory.
Joint and several liabilities apply to all controlling, controlled or related companies, and to all companies forming a consortium. In the case of mergers and acquisitions, liability applies to successors only to the extent of the amount of assets transferred and only for the payment of a monetary fine and compensatory damages. However, these limitations do not apply in the case of misrepresentation or fraud.

In addition to the Anticorruption Law, the Brazilian Criminal Code imposes liability on individuals involved in the bribery of local and foreign officials.

**PENALTIES**

Under the Anticorruption Law, a liable legal entity will be required to fully compensate damages caused by the corrupt acts and may be subject to the following administrative penalties:

- Fines up to 20% of the company’s gross revenues from the previous year. The fine will not be lower than the advantage obtained from the corrupt conduct, where it can be assessed. If it is not possible to assess the entity’s gross revenue, the fine may range from R$6,000 to R$60 million (approximately US$3,000 to US$30,000); and
- Publication of the conviction decision in a widely circulating newspaper.

In judicial proceedings, the following penalties may also be imposed:

- Forfeiture of assets that represent the advantage and/or benefit obtained, directly or indirectly, through the violation;
- Full or partial suspension of the legal entity’s activities;
- Mandatory dissolution of the legal entity; and
- Prohibition on receiving incentives, subsidies, grants, donations and/or leases from public entities, public financial institutions, or entities controlled by public powers for up to five years.

All penalties may be applied cumulatively or independently, having regard to the specific features of the case and the seriousness and nature of the violations.

**COMPLIANCE INCENTIVES**

The existence of internal procedures relating to corporate integrity, audits and incentives for reporting irregularities, and the effective application of codes of ethics may help reduce a legal entity’s liability under the Anticorruption Law, for example, by way of reduced fines.

For corporate violators, reduced penalties may also be available when a “leniency agreement” is entered into with the relevant authority. Under such an agreement, the entity must be the first to admit to the illegal conduct, cooperate with investigations and administrative proceedings, and the cooperation must result in the identification of other entities involved in the illegal conduct.
ENFORCEMENT

Multiple bodies have jurisdiction to take enforcement action under the Anticorruption Law.

The highest authority of each government body or entity of the Executive, Legislative and Judicial branches has jurisdiction to initiate investigations. This jurisdiction may be delegated to other entities.

The Brazilian Office of the Controller General also has jurisdiction over certain investigations and procedures (particularly for conduct against a foreign public administration) and public prosecutors can also initiate civil liability proceedings.

In practice, different enforcement approaches and interpretations of the Anticorruption Law may be applied by these bodies which makes compliance auditing and due diligence difficult. Regardless of this, companies and individuals operating in Brazil, or which intend to enter the Brazilian market, need to be extra cautious in undertaking compliance due diligence and in monitoring their business activities locally to ensure that they comply with local antibribery regulations.
Over recent years, the use of commercial arbitration has grown worldwide as a means of dispute resolution which avoids court litigation.

The growth in Brazil has been particularly significant over the past 15 years due to the enactment of the Brazilian Arbitration Law (Law 9,307) in 1996 and the ratification of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards by Brazil in 2002.

Arbitration clauses are strongly recommended for commercial contracts in Brazil to avoid lengthy court litigation.

**AGREEMENT TO ARBITRATE**

Arbitration is not mandatory for resolving disputes in Brazil, subject to one exception noted below. Rather, parties are free to elect to arbitrate by one of two means, both of which must be in writing to be enforceable:

- **Arbitration clause** (*cláusula compromissória*) - Clause in a contract or a related document by which parties agree to resolve future disputes by arbitration. Specifically in relation to “take-it-or-leave-it contracts”, an arbitration clause can only be inserted if the party that “took the contract” agrees expressly, specifically and separately to the clause;

- **Submission agreement** (*compromisso arbitral*) - Agreement by which parties agree to submit an existing dispute to arbitration. Such an agreement must include the mandatory formal requirements set out in the Brazilian Arbitration Law including name, profession, civil status and domicile of the parties and the arbitrator(s), the subject matter to be arbitrated and the place in which the award will be issued.

The only situation in which arbitration could be considered mandatory is for corporations listed on the Brazilian Stock Exchange (BOVESPA) that want to participate in a listing segment for corporations with higher standards of corporate governance (called Novo Mercado). In this case, an arbitration agreement binds the corporation, its controlling shareholder, senior managers and fiscal council members in relation to disputes regarding the listing rules.

**ARBITRATION INSTITUTIONS AND COURTS**

The oldest arbitration institution in Brazil is the Arbitration Centre of the Brazil-Canada Chamber of Commerce in São Paulo, established in 1979.
After the enactment of the Brazilian Arbitration law in 1996, many arbitration centers were created including:

- Centre of Industries of the State of São Paulo (CIESP)
- Getulio Vargas Foundation in Rio de Janeiro;
- Brazilian Enterprise Arbitration Chamber (CAMARB);
- American Chamber of Commerce in São Paulo; and
- Rio de Janeiro Arbitration Chamber (CAMARJ).

The Brazilian Arbitration Law provides a legal framework for cooperation between arbitral tribunals and Brazilian courts. This cooperation appears, for example, in cases where conservatory or provisional measures are required, such as to preserve evidence or even gather evidence and instruct witnesses that have been called to appear and refuse to attend a hearing.

Brazilian judges are generally likely to dismiss a case without analyzing the merits when learning that the contract in question includes an arbitration clause.

**ARBITRATORS**

Under the Brazilian Arbitration Law, any capable person having the trust of the parties may be an arbitrator. The parties appoint arbitrator(s) in accordance with the terms of their agreement to arbitrate. Often, this involves appointing arbitrators from one of the institutions listed above. Where the parties cannot agree, for example, because the method for appointment under the arbitration agreement is vague, the election can be determined by a court.

The Brazilian Arbitration Law requires the number of arbitrators appointed to be odd.

During the arbitration, the arbitrators must proceed with impartiality, independence, competence, diligence and discretion in accordance with the Brazilian Arbitration Law. No distinction is made between domestic and foreign arbitrators and the same standards apply to both.

**ARBITRATION PROCEDURE**

Arbitral proceedings in Brazil are very flexible as no specific procedures for the conduct of arbitration are set out in the Brazilian Civil Law. Parties are free to determine the rules applicable to the proceeding. Failing agreement, the arbitral tribunal is authorized to determine the rules. Such rules must reflect the principles of due process, equality of the parties and impartiality and independence of the arbitrators.

The arbitral tribunal may request any evidence it deems necessary for its findings, including documents, experts and witnesses.

No qualification requirements are specified under the Brazilian Arbitration Law for parties or their representatives appearing in the jurisdiction. Parties may therefore be represented by lawyers or non-lawyers, provided they are duly authorized by way of a power of attorney. Parties generally opt for legal representation.
The Brazilian Arbitration Law does not specify any requirements regarding confidentiality of the arbitration proceeding. Nonetheless, parties’ agreements or applicable rules that provide for confidentiality have to be respected and can be enforced.

Brazilian courts generally accept that arbitrators have power to grant interim and preliminary relief, despite their being no specific rules regarding this under the Brazilian Arbitration Law. In order for such measures to be enforced, the arbitrator will have to send a notice to court to that effect.

**ARBITRAL AWARD**

To be effective in Brazil, an arbitral award must be in writing and must present a report of the case, the grounds on which the arbitrator has taken the decision, the decision itself (*dispositivo*) and the place and date on which it was issued.

Remedies are determined by the law applicable to the dispute. The Brazilian Arbitration Law leaves the choice of applicable law to the parties or to the arbitrators if the parties have not made the choice.

If the applicable law is Brazilian law, there can be no punitive or exemplary damages, as Brazilian law does not provide for this sort of remedy. However, if the applicable law provides for such remedies, then the arbitrator may have such powers, even if the arbitration proceeding is being conducted in Brazil.

The arbitral tribunal has power to order a losing party to pay the other party’s costs or part of the costs in the proportion the tribunal deems reasonable. Where there is a prior agreement between the parties regarding costs, the arbitral tribunal is bound to respect it.

An arbitral award cannot be appealed, but it can be set aside by courts where:

- Arbitral agreement is null;
- Award was issued by someone other than the arbitrator;
- Award does not comply with the necessary formal requirements (e.g. report, grounds and decision);
- Award is issued outside the limits of the arbitration agreement;
- Award does not render a decision regarding the entire subject matter;
- Award was a product of corruption;
- Award was rendered after the due date; and
- Award does not comply with the requirements for due process, arbitrator’s impartiality and free persuasion.

The party requesting the setting aside must file an action before the court within 90 days of being aware of the issued award.
ENFORCEMENT OF AN ARBITRAL AWARD

The place in which the award is rendered determines if it is domestic (in the Brazilian territory) or foreign (outside the Brazilian territory) as provided for in the Brazilian Arbitration Law. There is a difference between domestic and foreign awards. A domestic award has the same effect as an award issued by a Brazilian court and is enforceable as such. For a foreign arbitration award, a judgment (homologação) procedure before the Superior Court of Justice is necessary to gain enforceability in Brazil.
The primary piece of legislation regulating corporate bankruptcy matters in Brazil is Federal Law 11,101/2005 (the “Bankruptcy Law”). The insolvency of financial institutions and certain other entities is governed by a separate body of legislation.

In order to encourage economic activity and financial transactions, the Bankruptcy Law regulates the reorganization of viable enterprises and the efficient liquidation of enterprises which are in financial distress in order to preserve jobs and creditors’ rights.

The Bankruptcy Law contemplates three different proceedings: judicial reorganization, extrajudicial reorganization and liquidation.

**JUDICIAL REORGANIZATION**

Judicial Reorganization (Recuperação Judicial) is a debtor-in-possession reorganization proceeding.

**REQUEST FOR JUDICIAL REORGANIZATION**

An application for Judicial Reorganization is voluntary only. The debtor lodges an application before the state court of its principal place of business (the “Bankruptcy Court”), supported with the information and documentation required under the Bankruptcy Law (the “Required Documentation”), which includes a statement about the causes of insolvency, accounting statements, balance sheets, accrued income statements and the like.

**ACCEPTANCE OF THE CASE BY THE BANKRUPTCY COURT**

If the Required Documentation is in good standing, the Bankruptcy Court will accept the case and issue a decision under which it will:

- Appoint the insolvency Administrator, who has no managerial powers over the debtor and acts solely as an assistant of the Bankruptcy Court;
- Order the immediate stay of certain actions and executions filed against the debtor for a 180 day period; and
- Order the issuance of a public notice containing the summary of the mentioned decision and the list of creditors (“List of Creditors”) as attached to the request for Judicial Reorganization (the “Acceptance Decision”).
The Acceptance Decision triggers the occurrence of three concomitant events:

- 180 day stay period for certain actions and executions;
- 60-day legal term for the presentation of the reorganization plan (the “Plan”), which is followed by the voting on the plan; and
- 15 day legal term to file proofs of claims and/or challenges to the List of Creditors before the Administrator.

**STAY PERIOD**

All actions and executions filed against the debtor are stayed for 180 days following the Acceptance Decision, with a few exceptions.

If the Plan is not approved within the stay period and unless it is not extended for an additional period of time at the court’s discretion, the creditors should be able to resume actions and executions, irrespectively of the stage of the negotiations concerning the Plan.

**PRESENTATION OF AND VOTING ON THE PLAN**

Following the Acceptance Decision, the debtor will have up to 60 days to file with the Bankruptcy Court a reorganization Plan consisting of the means of reorganization, such as a change in the company’s control or a partial sale of its assets, a debt for equity swap, mergers or leases of commercial establishments.

If any creditor files an objection to the plan, it will be submitted to the “General Meeting of Creditors” (“GMC”), where creditors are divided in three classes:

- Holders of labor-related credits and credits resulting from on-the-job accidents;
- Holders of credits with *in rem* guarantees (namely *penhor* and *hipoteca*); and
- Unsecured creditors. The plan must be approved by all classes.

Despite this, the Bankruptcy Court has discretionary powers to “cram down” the Plan and grant the Reorganization in certain cases.

Once approved, the Reorganization is granted and court-supervised for at least two years. Non-performance of the Plan within this period will result in debtor’s liquidation, as a general rule.

**FILING OF PROOFS OF CLAIMS**

The Acceptance Decision triggers the commencement of a 15 day term for the creditors that are subject to the Judicial Reorganization to either file proofs of claims or dispute the List of Creditors. The proofs of claims and challenges are presented to the Administrator, who is responsible for analyzing creditor’s claims and preparing a second list of creditors. The second list may be disputed by creditors before the Bankruptcy Court.

It is very common for the final list of creditors to only be known after the Plan is voted.
CREDITORS NOT SUBJECT TO THE PROCEEDINGS

The Judicial Reorganization encompasses all creditors, except for:

- Creditor guaranteed with fiduciary ownership of real estate property or movable assets (alienação fiduciária);
- Lessor under a commercial leasing agreement (arrendamento mercantil);
- Owner or committed seller of real estate whose respective agreements include an irrevocability or irreversibility clause (promessa de compra e venda irrevogável de imóvel);
- Owner under a sale agreement with retention title (venda com reserve de domínio); and
- Creditor under an advance on export contract (adiantamento a contrato de câmbio or “ACC”).

SALE OF ASSETS

Article 60 of the Bankruptcy Law provides for the conditions under which “separate productive units and branches” can be sold without succession liability by the debtor. This has been a hot topic under Brazilian Bankruptcy Law as the concept of “separate productive unit” is not determined.

Notwithstanding this, Article 60 sales have proven to be a valuable mean to obtain financing for insolvent entities in Brazil and courts have been granting protection to such sales.

FINANCING IN JUDICIAL REORGANIZATION

The Bankruptcy Law does not treat the “Debtor in Possession Financing” or “Exit Financing” the way they are treated in the United States. In Brazil, the financing provided to the reorganizing entity are considered post-petition claims in a contingent liquidation, but equally with other types of post-petition claims, even ranking below creditors holding fiduciary liens and ACCs. As a result, unsecured post-filing financing is rare.

Also, there is no preferential treatment for the post-filing financing provided by statutory law during Reorganization, although this is usually done contractually and generally approved by the Bankruptcy Court and pre-petition creditors.

Regardless of this, post-petition financiers may profit out of converting their debt into equity if the company succeeds at negotiating attractive rates from the outset, as a condition precedent for the disbursement. This strategy has become more frequent and a market is developing for this.

BUYING CLAIMS

Another developing market is the purchase and sale of claims in Reorganization proceedings. Importantly, the assignee of a claim should follow the regular proceedings for the filing of proofs of claims in order to be able to vote a Plan and appear in the list of creditors.
RIGHTS OF HOLDERS OF NOTES AND INDENTURE TRUSTEES

This is another hot topic in Brazilian Bankruptcy Law. As a matter of practice, the indenture trustees appear in the list of creditors as the holders for full amount of the notes, and the ultimate holders or their agents lodge requests to segregate voting rights from one trustee’s claims. This process has been widely accepted by Brazilian courts, with few exceptions.

Also, one trustee’s right to vote on behalf of the bondholders is generally accepted, but this is still a matter of controversy as courts are unfamiliar with the terms and conditions of trust indentures and the laws applicable to them.

EXTRAJUDICIAL REORGANIZATION

The second mechanism granted to debtors by the Bankruptcy Law to pursue reorganization, the Extrajudicial Reorganization (Recuperação Extrajudicial), is a pre-pack type of arrangement which is brought before the Bankruptcy Court for confirmation.

The creditors that are not subject to a plan under a Judicial Reorganization, the holders of labor related credits, credits arising out of on-the-job accidents and tax credits are excluded from the Extrajudicial Reorganization.

The Extrajudicial Reorganization may precede a Judicial Reorganization and may enclose all categories of credits other than those that are excluded, some categories of creditors or even a group of certain categories. In order to include all creditors of a certain category, approval by the holders of more than 3/5 of the amount of the credits is necessary.

LIQUIDATION

Pursuant to the Bankruptcy Law, the Liquidation (Falência) is the remedy for enterprises which are not economically or financially viable, and their assets and productive resources will be preserved and sold so as to optimize their efficient use by the subsequent owner.

In Liquidation, the debtor loses control of the assets, which are managed and sold by the insolvency Administrator in favor of the creditors, under the supervision of the Bankruptcy Court and the Public Attorney.

The order of payment as provided for in the Bankruptcy Law, after the payment of the indispensable expenses to the administration of the bankruptcy with cash availabilities, is the following:

1. Salary-related claims matured at most 3 months prior to liquidation decree, limited to five times the minimum wage per worker, paid off as soon as there is available cash;
2. Payment of the restitutions in cash (including ACC);
3. Post-petition credits;
   ▪ Administrator’s fees and post-petition labor claims (*pari passu*);
   ▪ Amounts advances post-liquidation decree; Liquidation expenses;
   ▪ Legal fees;
   ▪ Post-reorganization financing, post-reorganization and post-liquidation obligations and post-
     reorganization and post-liquidation tax claims (*pari passu*);
4. Labor-related (150 minimum wages, minus 5 minimum wages already paid) and credits resulting from on-
   the-job accidents;
5. Secured claims (*penhor* and *hipoteca*);
6. Claims listed as Public Collectible Debts;
7. Special privileged claims;
8. General privileged claims;
9. Unsecured claims;
10. Claims related to contractual penalties and fines for breach of criminal or administrative law, including tax-
    related fines;
11. Subordinated claims, as follows: those so provided for by law or contract, as well as the credits of partners
    and officers without an employment bond.

**SUMMING UP**

The Bankruptcy Law provides companies in financial distress with a proper legal framework for reorganization,
allowing the debtors to present a reorganization plan based on their economic and financial capabilities other
than to apply for a deferring and/or reducing repayment of unsecured debts; helps reducing creditor’s risks
and tighten interest rate spreads to the extent that they relate to the probability of the satisfaction of a
creditor’s claim which increase as a consequence of the priority that the Law acknowledges.
KEY LEGISLATION AND REGULATORY AUTHORITIES

All levels of government in Brazil – the Federal Union, Federal District, States and Municipalities – have jurisdiction over environmental matters. Under the Federal Constitution, all three branches of power in Brazil play a role in environmental regulation as set out below.

EXECUTIVE BRANCH

In the Federal sphere, the Executive is headed by the President and consists of several Ministries including the Ministry of Environment. There are also several Federal agencies and councils with environmental responsibilities.

The Federal District, the States and most municipalities all have their own Environment Protection Authority (EPA), which are concurrently empowered with the Federal EPA to enforce environmental laws and regulations.

The primary authorities with a relevant role in environmental matters include:

- National (CONAMA) and State Environmental Councils, which are responsible for issuing regulations;
- Federal EPA (IBAMA) and State EPAs, which are responsible for enforcing laws and regulations by issuing orders for compliance and imposing administrative penalties;
- Federal Environmental Biodiversity Agency (ICMBio), which is responsible for enforcing laws concerning conservation units (protected areas, such as parks) and biodiversity protection;
- Federal and State Public Attorney’s Offices, which are responsible for conducting civil or criminal investigations and initiating lawsuits for environmental remediation or compensation;
- Environmental Police, which is responsible for investigating environmental crimes both alongside and in cooperation with the Public Attorney’s Office.

LEGISLATIVE BRANCH

The Legislative consists of the Senate and the House of Representatives and enacts Federal environmental laws.

The States and the Federal District have their own constitution and laws. The Federal Government, the States and the Federal District can all concurrently legislate on environmental matters. State and Municipal laws can be more stringent than Federal Law, but must follow Federal general rules and cannot violate a Constitutional or Federal Principle or Policy. Municipalities can legislate to supplement Federal and State laws and on environmental matters of local interest.
The key Federal environmental legislation in Brazil consists of:

- Federal Constitution, Article 225;
- National Environmental Policy (Law 6,938/81);
- Environmental Crimes Law (Law 9,605/98);
- Administrative Liability Law (Decree 6,514/2008).

**JUDICIARY BRANCH**

The Judiciary Branch – consisting of the Supreme Court of Justice, Superior Court of Justice, Federal and State Court of Appeals and Federal and State Courts – are empowered to decide environmental lawsuits. Precedents are not binding but provide persuasive guidance for future cases. The number of courts specialized in environmental law has increased significantly.

**ENVIRONMENTAL LIABILITY**

Environmental liability can arise in Brazil in a civil, administrative and criminal context.

**ADMINISTRATIVE LIABILITY**

Decree 6,514/2008 states that acts or omissions that violate laws on use, enjoyment, promotion, protection and recovery of the environment are administrative violations and punishable by administrative penalties, which range from warnings and fines up to shut down of activities.

Administrative liability is imposed through an administrative process initiated by the federal, state or municipal EPAs.

**CRIMINAL LIABILITY**

Under the Environmental Crimes Law, certain actions or omissions of individuals and corporations which are committed with fault or willful misconduct are “environmental crimes”.

Individuals involved directly or indirectly in environmental crimes are liable, to the extent of their guilt, for criminal purposes. In addition, officers, board members, auditors, managers, agents and legal representatives of a legal entity who were aware of the potential environmental crime but, when possible, failed to prevent it, may be also liable for criminal purposes. Lastly, legal entities may be held liable for criminal purposes when crimes result from decisions taken by their representatives or corporate body on behalf of the legal entity.

Criminal liability is imposed through a criminal lawsuit filed exclusively by the Public Attorney’s Office. Individuals are subject to penalties that range from fines to imprisonment and legal entities are subject to penalties that range from fines to shutdown of activities.
Concerning imprisonment, since the Environmental Crimes Law was enacted in 1998, only a small number of legal representatives and officers have been imprisoned under this regime. This has occurred in response to specific crimes which caused major environmental damages that impacted on communities and public health.

Most environmental crimes are considered to have minor offensive potential, what enables the defendant to plea bargain and seek conditional suspension of the penalty or the lawsuit, as long as the environmental damage is recovered.

**CIVIL LIABILITY - REMEDIATION/COMPENSATION**

In the civil sphere of liability, joint, several and strict liability applies. Strict liability means that liability may be imposed regardless of fault. The National Environmental Policy states that anyone who directly or indirectly causes environmental damage may be considered a polluter and therefore held liable for environmental damages. Thus, a mere link between the damage and the activity which caused, facilitated or contributed to the damage occurring is sufficient to establish environmental liability. Considering this broad definition, several agents may be held liable for environmental damages.

General limits of environmental liability are not clearly established by Court precedents. Therefore judicial decisions are usually considered on a case-by-case basis.

Civil liability is imposed through civil lawsuits that can be filed by:

- Injured individuals or legal entities;
- Public Attorney’s Office;
- Federal Government, States and Municipalities; or
- Private organizations, such as non-governmental organizations (NGOs).

**CIVIL LIABILITY - LIABILITY OF LENDERS**

Taking into account the broad definition on civil liability for environmental damages, lenders could be held liable for damages caused by activities financed by them.

There is limited court precedent on the potential liability of lenders and limits and criteria for establishing such liability are yet to be determined. Given this uncertainty, lenders must exercise caution in financing projects and the pre-lending due diligence should assess whether the projects hold the relevant environmental approvals and comply with applicable environmental regulations.

Additional measures such as monitoring environmental reports during the financing period can play an important role in minimizing a lender’s potential liability through a due diligence defense (where this is available). In establishing security packages in favor of lenders, it is also important to verify whether there are environmental issues such as contamination affecting assets granted as security to the lenders under fiduciary assignment structures (*alienação fiduciária*), as this could also attract environmental liabilities to the lenders.
CIVIL LIABILITY - PIERCING OF CORPORATE VEIL

Applicable laws provide that the “corporate veil” may be pierced and the legal entity can be disregarded whenever it represents an “obstacle to the recovery of environmental damages” (civil liability). However, there are no provisions under environmental laws setting out the circumstances in which the disregard doctrine can be applied in the context of environmental damages.

Court precedents on this matter are limited and inconsistent. The Superior Court of Justice’s most recent precedent (2007) has applied the provisions of the Brazilian Civil Code, which sets out general provisions for the application of the disregard doctrine. Pursuant to the Brazilian Civil Code, the disregard doctrine can only be applied if there has been abuse or fraudulent use of the legal entity. However, as such precedent is non-binding, some lower court decisions have applied the disregard doctrine in environmental cases regardless of any abuse or fraudulent use of the legal entity.

ENVIRONMENTAL LICENSING AND IMPACT ASSESSMENT

Under the Federal Environmental Policy, the operation of potentially polluting activities and the operation of activities that use natural resources require an environmental license.

Environmental licensing is an administrative procedure that usually encompasses three distinct and successive phases involving the issuance of three licenses:

- **Preliminary license** - Granted in the preliminary planning phase to approve the location and design of the project, to attest its environmental feasibility and to establish the basic requirements and conditions to be complied with in upcoming phases;
- **Installation license** - Authorizes the installation of the project according to the specifications contained in approved plans and programs, including environmental control measures and other conditions; and
- **Operation license** - Authorizes the operation of the activity in accordance with conditions which require measures to prevent, mitigate and compensate environmental impacts.

Installing or operating a potentially polluting activity without an environmental license or in non-compliance with its conditions may lead to criminal and administrative liabilities.

An Environmental Impact Assessment (EIA) is also required for licensing activities where they have the potential to cause a significant environmental impact. The scope of the EIA to be undertaken is broad, covering both environmental and social impacts. Usually the proponent of the activity and the relevant EPA execute a term sheet outlining the matters to be addressed in the EIA.
ENVIRONMENTAL INSPECTION AND CONTROL TAX AND ENVIRONMENTAL COMPENSATION

The operators of a potentially polluting activity or an activity that makes use of an environmental resource may be liable to pay a quarterly Environmental Inspection and Control Tax under Law No. 6,938/1981. The amount to be taxed is determined according to a facility’s annual gross revenue and its polluting potential or the intensity of environmental resource use.

Under Law 9,985/2000, environmental compensation is payable in Brazil for the installation and development of activities that cause “relevant environmental impacts”. The compensation must be invested in a conservation unit (e.g. parks). The concept of “relevant environmental impacts” is open and the EPAs play an important role in defining, on a case-by-case basis, which businesses are liable to pay environmental compensation.

The amount of compensation payable has changed over time. Most recently, Federal Decree 6,848/2009 settled the impact criteria on which compensation would be calculated and confirmed that 0.5% of the cost of the licensed activity was the maximum rate.

FOREST PROTECTION

In an attempt to curb ongoing deforestation, the Brazilian Forest Code was reviewed in 2012 (Law 12,651/2012). Under the Code, landowners are required to replant millions of hectares of illegally deforested land and landowners are required to preserve 20% to 80% of their private property. However, they may keep deforested hectares if they have been deforested in accordance with laws in force at the time (this right was not clear in the previous version of the Code). Provided that certain conditions are fulfilled, protected areas such as forests along rivers and hillsides may count towards meeting the mandatory 20% to 80% reserve (whereas previously these areas had been excluded from the calculation in most cases).

WASTE MANAGEMENT

Waste management requirements have increased in Brazil in recent years with the introduction of the Solid Waste Law (Law 12,305/2010). Requirements are now in place for comprehensive take-back schemes for the collection of a wide variety of used products and/or packages. Requirements have also been introduction for specific activities to implement a Solid Waste Management Plan and for the reuse and recycling of materials in package manufacturing.

The number of lawsuits and civil inquiries on contamination caused by solid waste and on take-back schemes is increasing rapidly around the country. Solid waste management involves several agents with connected activities, thus it attracts a high risk of joint and several environmental liability. Failure to comply with rules on solid waste management may subject companies to administrative and criminal penalties, as well as to requirements to indemnify potential related environmental damages.
Real Property matters are primarily regulated by the Brazilian Civil Code (Law 10,406/2012) and other specific Federal laws such as the Real Estate Developments Law (Law 4,591/64), the Brazilian Lease Law (Law 8,245/91) and the Parceling of Real Property Law (Law 6,766/79).

Certain matters relating to real property transactions are regulated at the state and/or municipal levels, for example, the requirements and procedures for the parceling of land.

**ACQUISITION OF A REAL PROPERTY**

The Brazilian Civil Code recognizes the acquisition of real property by the following means:

- **Acquisition by agreement** - The parties execute an agreement by which the owner transfers real property to the purchaser, whether by sale and purchase, donation, swap or some other form of transaction recognized by Brazilian law. With few exceptions, Brazilian law provides that any transfer of the ownership of a real property shall occur by means of the execution of a public deed to be drawn up by the Notary Office and registered with the relevant Real Estate Registrar in the respective enrollment of the property;
- **Adverse possession** - Form of acquisition by extended possession of real property by a party after a certain period of time and provided certain legal requirements are satisfied;
- **Accession** - Form of original acquisition of real property whereby anything incorporated or added to property becomes a part of it (such as constructions and the accumulation of sand along a river-sided property);
- **Succession law** - Property passes to a deceased person's successor/s in accordance with a partitioning deed which is duly confirmed by a court of law.

**REAL ESTATE REGISTRAR**

Legal ownership of real property in Brazil is recognized through a registered system of title recorded with the relevant local Real Estate Registry. The transfer of land to another party must be registered with the relevant Real Estate Registry to ensure that legal ownership can be enforced and priority over third parties.

Real Estate Registrars hold records of all deeds and agreements involving real property interests, including documents of ownership, condominium, trusts, mortgages, liens, easements, usufructs, possession rights and leases. Searches of the relevant Real Estate Registrar are recommended before entering into any real property transactions.
SECURITY

The most common form of security used by lenders in Brazilian real estate transactions are mortgages and fiduciary transfers of title.

Mortgages are formalized through a public deed prepared by a public notary and registered with the relevant Real Estate Registrar to ensure validity of title and enforceability against third parties. There is no transmission of asset possession to the creditor under a mortgage. However, in the event of default by a borrower, the lender has the right to require judicial sale of the real property to recover the debt.

Guarantees such as the fiduciary transfer of title to real property (alienação fiduciária em garantia) are recognized under Law 9514/97 in the context of financings for the acquisition of real estate. Under such a guarantee, a borrower transfers title of its real property to a lender to secure payment of a loan (but the borrower retains actual possession), and upon payment of the loan, the borrower is entitled to receive the title in return. Such fiduciary agreements must be recorded with the Real Estate Registrar. In terms of foreign lenders, the fiduciary transfer of rural land may be limited for the reasons described in item E below.

LEASES

Residential and non-residential leases are regulated by the Brazilian Lease Law (8,245/91) together with the Brazilian Civil Code 10,406/2012. The Brazilian Lease Law sets out certain leasing requirements and obligations which the owner and tenant cannot depart from in their lease agreement. Lease agreements are not required to be in the form of a public deed.

TERM

There is no limitation on the lease term which can be agreed by the parties. Leases with unspecified terms are allowed under the Brazilian Lease Law. Where the lessor is an individual and the term is 10 years or more, express approval to the lease is required from the lessor’s spouse, otherwise after such period the spouse is not obliged to comply with the terms of the lease.

For commercial leases with a specified term, tenants have the right to seek renewal of the lease for a second term (equal to the first term) if all conditions of the lease have been met during the first term. This right of renewal is conditional on:

- Written and executed agreement existing between the parties;
- Term of the lease being 5 years or more; and
- Tenant having the same line of business at the leased property for at least 3 consecutive years of the lease.

For leases with a specified term, the lessor is not entitled to terminate early. However, the lessee may terminate the lease at any time, without cause, upon 30 days’ notice to the lessor and provided the lessee pays the penalty set out in the lease (proportional to the time elapsed from the beginning of the term).

For leases without a specified term, either party may terminate upon 30 days’ prior notice to the other party.
REGISTRATION OF THE LEASE AGREEMENT

Recording a lease with the Real Estate Registrar is not mandatory, although the parties may elect to do so as it provides the tenant with certain rights in the event the lessor sells the property to a third party. For example, a lease agreement grants the lessee a right of first refusal in the event the lessor wishes to sell the property. Where the lessee is not interested in exercising this right, the property may be sold to a third party.

If the right of first refusal is not respected and the lease agreement is recorded with the relevant Real Estate Registry, the lessee is entitled to file a lawsuit for compulsory judicial confirmation of ownership, and to pay the same price paid by the third party to become the new owner.

If the right of first refusal is not respected and the lease agreement is not recorded, the lessee’s only recourse is to seek damages from the lessor.

Recording the lease agreement with the relevant Registry obliges a new owner to respect the terms of the agreement. If the lease is not recorded with the Registry and the property is sold to a third party, the new owner may terminate the lease, without cause, upon 90 days’ notice to the tenant.

RENT

Rent is freely arranged between the parties in Brazilian currency (Real). However, every 3 years, both the lessor and the lessee can request judicial revision of the rent amount, according the current market prices.

SUBLEASE

Subleasing is permitted depending on the terms of the lease agreement and a previous authorization of the lessor is required. A sublease must follow the same terms as the lease. Whenever the lease is terminated, the sublease will consequently be terminated. The sublease value is limited to the price of the lease.

IMPROVEMENTS

The parties are free to negotiate their own terms about improvements made to the property during the term of the lease. Generally, a lessee is entitled to remove improvements made during the term, or to seek indemnification or compensation from the lessor for the value of the improvements if they are to remain in place, but most lease agreements include specific rules regarding improvements.

TERMINATION

A lease agreement may be terminated upon:

- Expiry of the term;
- Mutual agreement;
- Condemnation;
- Transfer of the property to a third party, where the lease is not registered as noted above;
- Default by a party; and
- Public authority undertaking repairs, rebuilding or maintenance which require the lessee to vacate.
ACQUISITION AND LEASING BY FOREIGNERS

There are no restrictions on the acquisition of urban real property by foreign residents residing in Brazil or foreign entities authorized to operate in Brazil. However, despite some controversy on the validity and extent of the applicable rules, certain restrictions currently apply to the acquisition and leasing of rural real property by foreigners under Laws 5,709/71 and 8,629/93, as well as under Decree 74,965/74.

Essentially, individuals and companies domiciled abroad are generally prohibited from acquiring rural property. An exception is available for succession acquisition by individuals.

Foreigners residing in Brazil and foreign-controlled Brazilian companies may acquire and lease property provided that the strict requirements of the legislation mentioned above are met, including:

- Ministry of Agriculture and INCRA (Governmental Agency in Charge of Redistribution of Rural Land in Brazil) must approve the proposed acquisition/lease of rural properties by foreigners residing in Brazil and by local subsidiaries with more than 51% of its stake held by foreigners or controlled by foreigners;
- Prospective foreign acquirer has to prove to the Ministry of Agriculture and INCRA that the land will be used to implement agricultural, livestock, industrial or colonization projects;
- Prospective foreign acquirer may purchase limited extensions of rural property, according to a certain percentage of the national territory which varies in each municipality;
- Congress approval is required for the acquisition of a rural land with an area greater than 100 modules of land. The length of the modules is defined by INCRA and varies according to the location of the land and the activity to be developed on it;
- Approval from the National Security Council is required if the land is located in areas considered to threaten national security (usually within 150km of the country’s borders, including the territorial sea); and
- Cases where the acquisition is important for the development of projects of national interest, the President may authorize the acquisition by means of a presidential decree.

The acquisition of rural land must be made by execution of public deed, duly registered with relevant Real Estate Registry Office.

Arguably, the constitutional validity of these restrictions may be open to challenge, although no such challenge has been mounted as yet. In the meantime, as the actual proceedings to obtain the required approvals have not been fully regulated by the competent authorities, local companies controlled by foreigners have been securing surface rights through other types of long term arrangements to avoid the above restrictions.
The Brazilian Federal Constitution requires the public administration at the federal, state and local levels to contract or perform all works, services, purchases and sales through public bidding procedures that ensure equal conditions for all bidders. This applies to the Federal Union, Federal District, States and Municipalities, as well as the entities of their direct administration, special funds, public foundations, public companies, mixed-capital companies and any entities controlled directly or indirectly by the Federal Union, States, Municipalities and Federal District.

The public bidding process is mandatory, save for cases when bid requirements can be waived or are inapplicable (addressed in Articles 24 and 25 of Law 8,666/93), in which cases direct contracting is permitted.

The majority of public bidding procedures adopted by the public administration are regulated by Law 8,666/93. Exceptions to this are:

- Bids promoted by the National Telecommunications Agency (Agência Nacional de Telecomunicações or ANATEL) and the National Oil Agency (Agência Nacional de Petróleo or ANP), which have their own regulated bidding procedures;
- Simplified auctions (pregões) under Law 10,520/2002 – this law sets out bids that are simpler when compared to the ones under Law 8,666/93 (they can be carried out even remotely by way of an internet platform), but mostly follow the same principles and qualification requirements;
- Simplified bidding rules adopted by Petrobras, the Brazilian state-owned oil company, under Decree 2,745/98; and
- Public tenders carried out under the Simplified Public Procurement Regime (Regime Diferenciado de Contratações or RDC).

Each and every contracting process, including government purchases, must observe a sequence of administrative procedures that consists of:

- Internal phase during which the tender subject and specifications are defined and the tender invitation is prepared; and
- External phase, which begins with official publication of the public request for proposal (“RFP”).

**INTERNAL TENDER PHASE**

During the internal phase, the following main steps apply:

- Public administration will specify the subject of the contract and prepare an estimate of the contracting price, based on research of the market which must be included in the RFP records;
Public administration must secure budgetary funding for payment of the anticipated costs in accordance with the Law of Fiscal Responsibility (Lei de Responsabilidade Fiscal), when applicable;

For the contracting of works and services, basic designs and descriptive memoranda must be prepared or hired by the public administration. Those documents must describe the works and/or services to be tendered with a high level of detail;

Once the price has been estimated, the public administration must define the tender model to be adopted. The models allowed in Law 8,666/93 for engineering works and services, and the purchase and sale of goods are: competitive bidding; comparison of prices; invitation to bid; bidding contests; and auction.

For contracting ordinary goods and services (that have customary market specifications), regardless of value, the simplified auction model procedures are set out in Law 10,520/2002. The public administration has generally preferred to adopt the simplified auction model for purchase contracts.

The release of the RFP and its publication in the Official Gazette is the last step in the internal phase. The RFP must define the conditions for participation by the bidders, bidding and contracting timeframes, acts and the procedures to be adopted in the course of the bidding and attach a draft form of the contract, designs and other forms relevant to the contract and/or the RFP.

EXTERNAL TENDER PHASE

Once the RFP has been published, the external phase of the tender will begin.

The bidders must present their qualification documentation and commercial (and technical, if applicable) proposals in accordance with the RFP requirements at the address and time set out in the RFP.

The qualification documentation is required to give evidence of due legal existence and good standing in terms of tax, social security and labor obligations and of the bidder’s compliance with the financial and technical specifications set out in the RFP. Foreign bidders, when allowed to participate, must present documentation from their own jurisdictions, which must be equivalent and/or similar in purpose, to the extent possible.

The proposals presented by bidders which qualify under the RFP are ranked and the winning bid will be adjudicated according to the criteria chosen for the public bid, which may be one of the following:

- Best price – lowest price when the public administration is the purchaser and the highest price when the public administration is the seller;
- Best proposal in technical terms; or
- A combination of best price and best technical proposal.

Brazilian administrative law entitles bidders to file defenses and appeals in order to preserve their rights, such as in cases of wrongful disqualification of proposals and lack of compliance of the RFP with applicable legal requirements.
PERFORMANCE OF THE CONTRACT

A contract with the public administration in Brazil is deemed to be affected by the public interest, and therefore the law sets out conditions favoring the public administration, such as:

- Contractor is obliged to accept and perform increases of up to 25% in the agreed deliverable amounts under the contract; or
- In case of default of the public administration, the contractor must respect a 90-day cure period before suspending performance of the contract or terminating the contract.

As both protection and compensation vis a vis the above-mentioned prerogatives of the public administration, the contracting parties are entitled to a “financial-economical balance guarantee”, which means that the economics of the proposal submitted by the time of the public bid must be preserved and that the contract must be amended (typically in terms of price) whenever the returns of the contracting party are affected by events such as:

- Variations determined by or defaults of the public administration;
- Changes in legislation;
- Unforeseen and unexpected events, such as force majeure.

Any failure to perform the contract, either partially or totally, may result in termination of the contract and cause penalties to be imposed on the contractor, which may be:

- Warning;
- Fine corresponding to a percentage on the amount of the contract;
- Suspension of the right to contract with the public administration for a period no greater than two years; or
- Declaration of improbity to bid or contract with the public administration, for up to five years.

In case a winning bidder refuses to enter in to the contract with the administration, such conduct will be deemed as complete default for purposes of the imposition of penalties.

PRIORITY CONTRACTS

In 2010, Brazil passed Law 12,349/2010, which allows the Brazilian Federal Government, States and Local Governments and the public entities controlled by them to prefer Brazilian-made products and services in their purchases. From time to time, the Brazilian Federal Government may issue decrees appointing the products and services which can be preferred in the public purchases. The preference must be disregarded whenever the price of the Brazilian product or services exceeds the price of the foreign product in at least 25%.
SIMPLIFIED PUBLIC PROCUREMENT

In 2011, Brazil passed a law allowing the Brazilian Federal Government, states and local governments to adopt a special regime of public procurement (Regime Diferenciado de Contratação or RDC), which can currently be used in connection with the following matters:

- Infrastructure works for the 2014 Football World Cup and 2016 Olympic Games;
- Major Brazilian infrastructure program known as “Growth Acceleration Program” (Programa de Aceleração do Crescimento or PAC);
- Public health system;
- Prisons; and
- Educational facilities.

The main goal of the RDC is to simplify the procedure for public procurement and the execution of public contracts, including as a few key features:

- Allowing governmental entities to invert the phases of the tender, selecting the best proposals before the review of the qualification documents required from bidders. That is, only the winner of the bid will have its legal, tax, social security, labor and financial documentation scrutinized by the administration;
- Compensation owed to the supplier can be based and/or varied on the achievement of contractual goals;
- Contractor can be hired to deliver not only the executive design and the construction works, but also the basic design of the project (whereas in regular public biddings this is prohibited);
- Public entity in charge of the tender will not be obliged to disclose the budgetary source of funds reserved for purposes of the contracting.

PUBLIC-PRIVATE PARTNERSHIPS

Introduced in the Brazilian legal system by Federal Law 11,079/2004, the Public-Private Partnership (“PPP”) is a kind of public contract that allows private investments to be made in areas where, traditionally, only the public sector has been present. This model is intended to provide a secure stream of revenue to concessionaires of public services and utilities by means of payments from the public entities involved, as well as to create a new kind of concession (the administrative concession), in which administrative services (and not just public services or utilities), such as the management of administrative facilities could be assigned to a private company.

Federal, state and municipal administrations, which includes the government itself, public foundations, autonomous departments, state-owned and mixed capital companies, can enter into PPP agreements.

There are two kinds of PPPs:

- Sponsored PPPs; and
- Administrative PPPs.
Pursuant to the model employed in the traditional “concessions of public services”, the private partner builds assets as instructed by the Public Administration, and, later, renders services directly to consumers – who pay for them a tariff regulated by the Public Administration. Sponsored PPPs are largely based on such model, but with a key difference: in addition to payments made by consumers, in such PPPs the administration is also required to make direct payments to the concessionaire. As a result, the value of the tariffs charged from consumers is smaller than the value that would be charged under the model of traditional concessions.

An Administrative PPP is a contract for the direct or indirect rendering of services to the administration, even if such contract also comprises the execution of construction works. Administrative PPPs could be used, for instance, in the hiring of a private partner for the construction of a prison: in addition to building the prison itself, the private partner would later render certain services such as management, maintenance and cleaning of the facility – and, while charging for such services, the private partner would recover their initial investment. The same formula can be applied to public administrative centers and facilities of all kinds, like universities, judicial courts, state-owned companies’ office buildings, hospitals etc.

A PPP contract must involve at least R$ 20 million (roughly US$ 10 million), and its term, which shall be set in each case according to the amount of time necessary for the recovery of the investment made by the private partner, may range from 5 to 35 years. The PPP structure is not allowed for projects involving solely the supply of workforce, installation and supply of equipment or construction works.

While drafting Federal Law 11,079/2004, the Federal Government also took into account certain circumstances that may lead public concession agreements to be considered a risky endeavor in emerging markets. Acknowledging this reality, and for the purpose of increasing the international attractiveness of Brazilian PPPs, the Government introduced new institutional guarantees for private partners and private investors involved in PPP projects. In this perspective, the legal framework on which Administrative and Sponsored PPPs are based can be seen as an improvement of the model adopted in traditional concession agreements.

First of all, Federal Law 11,079/2004 allowed the Public Administration to create a private Guarantee Fund. Such fund will be managed by a private entity, created for the specific purpose of guaranteeing the payments that must be made by the Administration in PPP contracts; in case of default, payment should be made by such fund in 45 days. If, eventually, the Guarantee Fund defaults in its obligation to pay, the private partner will find it easier to file a complaint against it than filing a lawsuit against the Public Administration: since the fund is an entity of private law, it is not entitled to several procedural benefits that the Brazilian system grants to public law entities. As such, complaints filed against the Guarantee Fund tend to be more quickly judged and enforced.

Traditionally, the control of an entity that held a public concession could only be assigned upon the Public Administration’s previous approval. For the benefit of lenders involved in PPP projects, however, Federal Law 11,079/2004 allowed step-in rights that may be enforced without prior approval. Such step-in rights are to be regulated by contract between the private partner and the lenders, and may be exercised at the discretion of the lenders. Also for the purpose of affording a higher level of protection to lenders, Federal Law 11,079/2004 allows the parties in a PPP to contractually stipulate that public payments shall be made directly to lenders, either regular contractual obligations or public indemnifications related to the premature termination of the contract.
It is worth mentioning that PPP contracts require the prior issuance of a Public Request for Proposals (“RFP”) and shall be adjudicated only to the private party presenting the best proposal in a public bidding contest. The judgment of proposals may consider only the price asked by the bidder, or else the price in combination with technical aspects, to be evaluated in accordance with a score table provided for in the Public RFP.
INDUSTRY STRUCTURE AND MAIN AGENTS

The Brazilian electricity industry started in 1897, when the Emperor Dom Pedro II granted Thomas Edison authorization to introduce machinery and processes intended to provide street lighting in the country. Since then, the industry altered periods of private entrepreneurship, such as in the 1930s, when groups like Light were dominant, a period of coexistence of private and public companies (from the 1940s until 1979) and a period of almost total statization until 1997, when the Fernando Henrique Cardoso Administration carried out a massive privatization program in the energy sector.

Until the 1990s, the power sector in Brazil was largely dominated by state-owned companies.

However, by the late 1980s, the state-ownership model was already on the verge of collapse. This delicate situation was the result of heavily subsidized tariffs and a revenue shortfall in the sector, which led to the delay in the construction of some major hydro projects due to lack of funds for investment. Efforts to address the deterioration of the sector were not successful, a situation that further intensified the need for deep reforms.

In 1996, in President Fernando Henrique Cardoso’s term in office, the first reforms were introduced in the power sector, aiming to introduce the participation of private sector by privatizing state-owned utilities and assets and, therefore, laying down the first steps towards a deregulated and competitive model.

This reform also led to the creation, in 1996, of ANEEL (Brazil’s National Electricity Regulatory Agency), the independent regulatory body in charge of overseeing the electricity sector. However, the main restructuring steps were taken with the enactment of the 1998 Law (9,648/98). Those steps included the creation of an independent operator of the national transmission system (ONS) and an independent operator of the commercial market (MAE, renamed as CCEE in 2003), which became operational only in 2001.

However, the reforms were not sufficient to prevent a long coming energy crisis that was to unfold in 2001. In January 2003, the new administration led by Luiz Inácio Lula da Silva took over among criticism of the reforms introduced in the electricity sector by the administration of President Cardoso, supporting a model in which the system should be fully regulated. The pending privatizations of three generation subsidiaries of the large state-owned utility, Eletrobras, were then stopped.

Despite initial expectations, the Lula administration opted for a model that, however more centrally planned than the model conceived by the Cardoso administration, aimed to attract long-term private investment to the sector and relied heavily on public auctions for long term power purchase agreements to foster competition and increase of energy offer. In addition, the existing institutions were preserved – nevertheless some reforms lead to a confuse allocation of incumbencies between the MME and ANEEL – and in some cases strengthened, such as with the creation of a new company, named Empresa de Pesquisa Energética (EPE), created with the specific mission of developing an integrated long-term planning for the power sector in Brazil.
The current regulatory framework is defined by Law 10,848/2004 and has the main objective of guaranteeing the energy supply, promoting tariff moderation and the continuing expansion of the sector activities (generation, transmission and distribution). The expansion is based on the principles of fair return on investments and free access, together with tariff adjustments.

One of the defining elements of the regulatory framework is the establishment of energy auctions as the main procurement mechanism for distribution companies to acquire energy to serve their captive consumers, those that are not entitled to purchase energy in the unregulated market.

With respect to deverticalization, the new regulatory regime establishes the obligation of partial unbundling (i.e. separation in different legal entities of the activities of generation and transmission) on one side and distribution of energy on the other side, meaning that energy distribution companies may not operate or invest in generation or transmission businesses.

The general policies for the power sector in Brazil are prepared currently by Electric Policy National Council (Conselho Nacional de Política Energética or CNPE), a consulting committee of the Presidency of the Republic on energy, and specific policies are assigned to the Ministry of Mines and Energy (Ministério de Minas e Energia or MMW), the executive’s ministry in charge of the policies and authorizations regarding mining, oil, gas and power industries. Although the MME originally has the original incumbency of granting concessions or authorizations for generation, transmission and distribution of power, the president has delegated this power to ANEEL by decree.

**LICENSING REGIME**

The operational agents of the industry are authorized either by means of concession contracts or strictu sensu authorizations enacted by ANEEL. There are also few cases of permissions of public service granted to long existent rural electrification cooperatives.

There are concessions of public service, such as those granted to distributors, transmission companies and public generators, and concessions of hydroelectric potentials, granted to independent producers. Concessions are obtained through public bidding procedures conducted by ANEEL and the respective contracts are signed with the Federal Government, the renderer of the public services and of the hydroelectric potentials. The concession contracts have, among others, provisions on the concessionaire’s rights and duties, tariffs, consumer rights, administrative penalties, extension and termination procedures. As the concession is a public law contract, the public power has the so-called exorbitant power (also known as jus variandi), which entitles it to make unilateral alterations to the contract and even terminate it in advance.

Nevertheless, any increase in the costs of the concessionaire due to unilateral alteration of the contract or any act taken in another sphere by the government, such as new taxation, will be compensated by the tariff increases, indemnification or revision of the terms and conditions of the concession, such as the term of the concession, and the public power must indemnify the non-amortized investments of the concessionaire in case of advance termination of the contract.

The installation of hydro power plants over 50 MW as well as of transmission lines are subject to prior bidding for granting a concession.
Authorizations, in turn, are acts issued unilaterally by ANEEL upon request to independent producers (hydro power capacity lower than 50MW or thermoelectric plants), self-producers and commercialization companies.

Wind power generation projects must also request authorization from Comando Regional da Aeronáutica (COMAR), which will be granted provided that the project does not create any risks to airports and aviation.

ENERGY COMMERCIALIZATION

In order to make nationwide commercialization possible, the current regulatory framework provides that every agent has the right to access the national grid, either directly or via distribution systems. The accessing agent has to contract the connection and use of the transmission system or of the distribution system, according to its situation, and pay the respective connection and use tariffs.

Distribution use tariffs are paid to the distributors and are regulated by ANEEL. Each distributor has its own tariff. Transmission system tariffs are calculated so that the total annual allowed income of transmission companies are paid by all transmission users to the ONS, which duly distributes the income across the companies.

Generators of renewable sources – hydro, biomass, biogas, wind, solar and qualified cogeneration – injecting up to 30MW of power into the grid, as well as consumers purchasing power from those generators, are entitled to a 50% discount on grid use tariffs. Solar generation commencing commercial operation up to December 31, 2017 is entitled to an 80% discount for the first 10 years of operation. This incentive plays a big role in fostering investments in renewables in Brazil and has helped to create a big market for “incentivized energy” in the context of the Brazilian energy free market.

Power commercialization in Brazil is structured in two main settings: a regulated environment and a free market environment.

The market is organized by Câmara de Comercialização de Energia Elétrica (CCEE), the energy commercialization chamber, the market and spot market administrator – like ONS, a private entity formed and governed by power sector companies and regulated by ANEEL. CCEE aggregated consumption and generation measurements on a real-time basis, keeps the market accounts and settles the spot market transactions.

The prices of energy are defined under free market conditions: in the regulated market, generators will bid the prices they find suitable and, in the free market, will enter into freely negotiated agreements. Only distribution and transmission tariffs are fixed by ANEEL.

Prices in power purchase agreements (“PPAs”) are, in general, subject to annual adjustments to inflation. Auction PPAs set forth conditions allowing prices to be reviewed should new taxation and/or legislation impact energy prices. Parties are free to negotiate conditions for the revision of prices in free market PPAs.
**PUBLIC ENERGY AUCTIONS**

The regulated market is based on power auctions where, as a rule, greenfield generation projects sell power for future delivery (new energy auctions are carried out 3 (A-3) or 5 (A-5) years ahead date the delivery of energy is supposed to commence), by way of power purchase agreements with terms ranging from 15 to 25 years, resulting from auctions jointly conducted by ANEEL, EPE and CCEE. The Government may also call, at its discretion, auctions for generators that are already operating brownfield projects.

In the regulated environment, energy is purchased either by a pool of distributors or by CCEE (only when the auction is for “reserve-energy” agreements). The auctions congregate generators on the selling side, competing to offer the lowest price to the pool. Distributors are, by law, allowed to purchase energy solely in the regulated environment, except for 10% of their energy demand, which can be purchased in the free market from distributed generation plants (small generators connected to the distributors’ own grid).

The amount of power needed by the pool of distributors remains secret until the end of the auction. The bids are no higher than a ceiling price defined by MME.

In order to be eligible to participate in a regulated market auction, a generation project must be subject to a technical qualification process beforehand, which is carried out by EPE. The main requirements a generation project must fulfill for purposes of technical qualification by EPE are (Ordinance 21/2008, from MME, defines the requirements for the technical qualification of a generation project):

- Descriptive memorandum containing a comprehensive technical, economic and environmental description of the project;
- Project’s budget;
- Documentation giving evidence that the entrepreneur has secured rights to the land needed for the construction and operation of the project – except for PCHs, which are entitled to the expropriation of lands for the lake and the power plant;
- Certification of wind measurements and of estimated annual energy output of wind projects, issued by an independent certifying entity;
- Access opinion;
- Water permits, for PCHs and, as the case may be, thermoelectric plants;
- Environmental licenses applicable to the project;
- Environmental studies produced for purposes of the environmental licenses application;
- For thermoelectric plants (such as biomass and biogas), evidence of the plant’s ability to store combustibles enough for continuous operation at nominal capacity;
- For PCHs, as the case may be, the basic design of the plant or the plant upgrade and/or refurbishment project approved by ANEEL;
- For solar projects, the certification of the solarimetric data, issued by an independent certifying entity; and
- For wind projects, a statement that the turbines to be deployed will be new.

An entity participating in the auction must meet certain legal, fiscal and financial requirements set forth in the applicable auction’s public request for proposal, such as a minimum net worth corresponding to 10% of the project’s budget and the need to present a bid bond in amount corresponding to 2.5% of the total investment needs of the project. If successful in the auction, a performance bond corresponding to 10% of said amount must be delivered in replacement of the bid bond.
If a project is successful in selling energy in the auction, MME will issue a generation authorization and construction must start. If an entrepreneur manages to deliver a project ready before the date energy supply is supposed to start, it can sell the energy generated before such date in the free market.

If the construction of a project is not concluded on time, as a general rule, the generator must purchase power in the free market in order to fulfill its obligations under the PPA. In such a case, though, the generator will receive payments calculated in accordance with the lesser of the following prices:

- PPA price or 85% thereof if delivery is delayed for more than three months;
- Composition of the average energy spot price and a spread calculated pursuant to ANEEL’s regulations; or
- Actual price set forth in the free market agreement the generator has procured.

FREE MARKET AGREEMENTS

Generators, commercialization agents and free consumers (consumers which, due to a qualified power demand, are entitled to purchase power from any generator or commercialization agent) can trade power in the free market environment, under freedom of contracting conditions. The free market represents nearly 30% of the total amount of commercialized energy in Brazil.

Free market PPAs do not require prior approval from ANEEL or MME or to be registered with any of those authorities. Parties to the PPA must, however, insert information concerning amounts of energy and period of supply in CCEE’s electronic system in time so that the agreement will be considered for purposes of settling the energy market. Both CCEE and ANEEL have the authority to request copies of PPAs for inspection purposes.

Differently from auction PPAs, free market agreements tend to be for short to mid-term, are there are relatively scarce free market PPAs with terms longer than 5 years. Due to the absence of a secure long-term stream of revenues, hence, generation projects dedicated to the free market are not as suitable for project finance structure as projects selling energy via auction PPAs, unless the project sponsors manage to obtain long term bilateral PPAs.

CHARACTERISTICS OF THE BRAZILIAN POWER MATRIX AND PROJECT OPPORTUNITIES

Brazil is part of a privileged group of countries where power generation is predominantly originated from a renewable source, hydroelectricity. The dominance of hydroelectricity in the Brazilian matrix, however, brings some inconveniences which the Brazilian Government has been trying to overcome through diversification of energy sources. The biggest concern relates to reliability of the power supply which can be deeply compromised by the dependence of hydro power on seasonal conditions.

Currently, backup power for the Brazilian grid is provided mostly by heavy oil, coal and gas powered plants. However, increasingly other alternative sources such as wind, solar and sugarcane bagasse, which complements hydro generation with regard to seasonality, are gaining importance in the Brazilian energy matrix.
EPE is responsible for preparing the most important study of the federal Government in connection with the energy sector expansion planning, which is the Plano Decenal de Expansão de Energia (PDE), a Ten-Year Expansion Plan which projects provides the trends and its projections for that period and is updated on an annual basis. According to the most recent Plan, investments of US$214 billion would be needed until 2019, to be used mainly in essential major hydroelectric and transmission projects. This investment is essential to ensure Brazil continues to grow consistently over the next ten years. The consumption of power is expected to grow nearly 5.1% each year in Brazil in the period 2010-2019, which would make it necessary to add the equivalent of 6,300MW of new installed capacity to the system within the next ten years.

EPE estimates that 35,245MW of hydro projects will be implemented within the next 10 years, of which 2/3 have already been auctioned to private investors and are already under construction. Among those projects is the construction of Madeira Complex (6,450MW) and Belo Monte (11,000MW) hydroelectric plants in the Amazon, and of transmission lines necessary to connect these new plants to the national grid.

Another development is the renewed government interest in nuclear energy, which flagship is the third nuclear plant of the Angra complex: Angra 3 (1,309MW), at a cost estimated at some US$3 billion, but other nuclear plants may follow suit. The Brazilian government has announced internal studies on 6 new nuclear plants, to be built by 2030, which could result in nuclear power representing 5% of the national generation capacity.

Another trend with perspective of growth in the industry, already mentioned above, is the generation of power from alternative sources, such as wind, biomass, small hydro and solar. As per the Ten-Year Expansion Plan, alternative sources may account for 14,655MW in installed capacity within the period of 2010-2019, which is the equivalent of a hydro power plant such as Itaipu.

These plans may also be affected by the recent discovery of huge offshore natural gas fields along with the so called “pre-salt” oil fields. The abundant gas may lead the Brazilian government to stimulate natural gas thermo electrical generation and cogeneration.

In order to help the industry to achieve its investment goals, the Brazilian government launched an investment program called Programa de Aceleração do Crescimento (PAC) two years ago, which promotes investment in energy projects (among other sectors), offers tax exemptions (PIS/COFINS) and privileged conditions for the financing of private projects via BNDES, the Brazilian state-owned development bank. These conditions consist especially of reimbursement terms from 14 to 20 years and of the financing of up to 85% of the project.

Currently, there are some tax incentives available for renewable energy projects, the most relevant of which is REIDI. The acronym stands for Special Regime for Investments in the Infrastructure Sector and creates tax benefits for the acquisition of fixed assets for certain legal entities with infrastructure projects (including energy) approved by the government, valid for 5 year after the approval of the project. In addition to the current incentives, there are bills under discussion at the federal and state legislative houses, aimed at granting tax incentives for renewable energy. For example, at the federal level, Bill 311/2009 provides for exemptions (PIS/Cofins, duties and IPI excise tax) regarding imports, R&D, manufacturing and sales of equipment, materials and technology related to solar, wind and marine power. Some States are considering different ICMS exemptions or tax cuts for imports and manufacturing of equipment for the generation, as well as for sales of renewable energy (solar, wind, hydro-power, biomass, among others).
The Brazilian oil and gas industry is primarily regulated at the federal level by the Federal Constitution, the Petroleum Law (9,478/97), the Pre-Salt Law (12,351/2010), as well as by a number ordinances and resolutions issued by the National Agency of Oil, Natural Gas and Biofuels (ANP).

**PRODUCTION SHARING AGREEMENT AND CONCESSION MODEL REGIMES**

Two regimes exist in Brazil for the grant of exploration and production (E&P) rights:

- Production Sharing Agreement (PSA); and
- Concession model regime.

A third regime called Cessão Onerosa, onerous transfer, also exists in Brazil but applies solely to Petrobras.

**PRODUCTION SHARING AGREEMENT**

The PSA regime only applies to E&P activities in the pre-salt reserves and other strategic areas still to be determined by the Federal Government. This regime was introduced in 2010 by the Pre-Salt Law following the discovery of impressive oil reserves beneath a thick layer of salt in ultra-deep waters off the coast of Brazil.

At this stage, only one bid round has been held for a PSA - known as the First Production Sharing Bid Round. It was held in October 2013 and comprised the Libra field, which the Brazilian Government estimates to have reserves of 8 to 12 million barrels. The consortium formed by Petrobras, Shell, Total, CNOOC and CNPC won the bid.

**CONCESSION MODEL**

The concession model regime applies to all remaining areas, including those granted prior to the enactment of the Pre-Salt Law. The concession regime was introduced by the Petroleum Law in 1997, and together with an amendment to the Federal Constitution, it terminated the monopoly that Petrobras, at that time a company controlled by the Brazilian Government, had held over all E&P activities in Brazil. From 1997 to 2010, concession agreements were the only regime available for E&P activities in Brazil.

After a five year hiatus, two bid rounds were held in 2013 for oil and gas concessions, the 11th bid round (for onshore and offshore oil and gas blocks) and the 12th bid round (for onshore blocks).
OWNERSHIP OF OIL AND GAS RESERVES

Under the Federal Constitution, oil and gas reserves in the Brazilian national territory are the property of the Federal Government. This includes inland deposits and those in the territorial sea, the continental shelf and the exclusive economic zone. Despite the grant of exploration rights under a concession regime or PSA, the Federal Government remains the owner of all oil and gas reserves in Brazil. However, the Federal Constitution recognizes that ownership may be transferred upon production of oil and gas through the concession regime.

Under the Petroleum Law, ownership of oil and gas is transferred from the Federal Government to the concessionaire at the production measurement point – this is a physical mark proposed by the concessionaire and agreed with the ANP. The concessionaire's ownership rights can be freely disposed of by the concessionaire.

Under a PSA, the Federal Government retains ownership of the oil and gas produced, even after the measurement point. Although ownership is not transferred, the companies in a PSA earn a return based on exploration costs where they discover commercially viable reserves, and on production value.

Upon commercial discovery of deposits, the Federal Government will repay the E&P companies certain approved costs incurred with E&P activities (cost oil) and share the remaining oil (profit oil) in accordance with the applicable PSA. The ANP sets a minimum percentage of profit oil to be reserved to the Federal Government and this percentage will vary in accordance with international oil prices and well productivity.

REGULATORY BODIES

The main oil and gas regulatory bodies are the:

- **Ministry of Mines and Energy (MME)** - Responsible for establishing general policies and matrices in connection with natural resources, energy, oil and gas and fuels;
- **National Centre of Energy Policy (CNPE)** - Develops the legal regime and policies for the use of natural resources and is also responsible for establishing overall energy policies and matrices;
- **National Agency of Oil, Natural Gas and Biofuels (ANP)** - National regulator responsible for contracting and supervising oil and gas activities and establishing technical and economic parameters for the industry.

EXPLORATION AND PRODUCTION RIGHTS

CONCESSION REGIME

Concession rights are granted through bid rounds organized by the ANP, where private and state-owned companies may bid for areas. Since the enactment of the Petroleum Law, the ANP has organized 12 bid rounds to make over 1,200 offshore and onshore areas available for E&P.
For each bid, the ANP prepares a tender protocol which sets out, among other things:

- List of blocks offered;
- Minimum exploration requirements;
- Government takes; and
- Legal, technical and financial qualifications that must be held by the concessionaire in order to participate in the bid round and to be granted an area.

During past bid rounds, the ANP has considered three criteria in evaluating bids and granting areas:

- Signing bonus offered by the concessionaire;
- Minimum exploration program; and
- Bidder’s commitment to acquire local goods and services (i.e. the “local content” offered).

On execution of the concession contract, concessionaires pay the signing bonus and submit any financial and performance guarantees required by the ANP. Under the concession contract, the concessionaire assumes all costs and risks in connection with the E&P operations and is subject to various obligations that must be complied with in order to maintain the concession.

The exploration phase of a concession commences on execution of the concession contract and usually lasts from 2 to 8 years. During the exploration phase the concessionaire must:

- Meet the minimum exploration program (PEM);
- Drill the well/wells agreed under the PEM at least to the depth agreed;
- Submit an annual work program and budget plans;
- Pay an occupation fee; and
- Submit quarterly reports regarding local investments and expenditures.

In the event of a discovery, the concessionaire must notify the ANP, submit an Evaluation Plan for the prospect, and submit a Development Plan if the prospect is commercially feasible, which is then approved by the ANP.

The production phase starts with confirmation that the prospect is commercially feasible and in general lasts for 27 years. All operations are conducted in accordance with the Development Plan approved by the ANP for that area, which may be amended from time to time with ANP’s acknowledgment. During the production phase the concessionaire must:

- Conduct the operations in accordance with the Development Plan and an Annual Production Plan;
- Submit an Annual Production Plan each year for the following year;
- Submit monthly production and annual reserve reports;
- Submit well status and completion reports; and
- Pay the occupation fee, royalties and special participation (where applicable).
**PSA REGIME**

E&P rights are granted under the PSA regime in two ways, either by the direct hire of Petrobras, or through bid rounds where private companies may participate.

Under the Pre-Salt Law, only Petrobras may be directly hired by the Federal Government for oil and gas E&P under the PSA regime. This exclusive rights will most likely to be granted for specific areas considered by the Government to be of high strategic value.

The alternative bid round process is organized by the ANP in accordance with the Pre-Salt Law. Under this process, Petrobras and private companies, jointly with a government wholly owned company named Empresa Brasileira de Administração de Petróleo e Gás Natural SA - Pré-sal Petroleo SA (PPSA), may create consortia and bid for available areas in the bid round. In effect, private companies can only hold rights under the PSA regime by means of a consortium created jointly with Petrobras and PPSA, and it is mandatory that Petrobras is the operator. Even through a consortium, only Petrobras may act as the operator of the pre-salt areas.

Similar to the bid rounds organized by ANP under the concession regime, each bid round for pre-salt areas (and other strategic areas) involves a tender protocol which sets out:

- List of blocks offered;
- Minimum exploration requirements;
- Government takes;
- Minimum percentage of oil reserved to the Federal Government; and
- Signing bonus.

The legal, technical and financial qualifications of the participant companies are also specified.

ANP evaluates the bids for compliance with the tender protocol requirements and the primary decision making criterion is the share of profit oil that will be available to the Federal Government. The bid offering the greatest share of profit oil to the Federal Government will win the area. By way of example, the winning consortium in the first bid round for a PSA offered 41.65% of the profit oil to the Federal Government.

As with the concession regime, the PSA exploration phase will involve discovery and evaluation of commercial feasibility and the production phase will involve development works. Obligations on the PSA contractor during these phases include:

- Payment of financial guarantees by the contractor;
- Limitations, terms and criteria for the payment of cost oil and profit oil;
- Accounting rules and procedures for ANP to follow and control exploration, evaluation, development and production;
- Minimum exploration program;
- Criteria for the preparation of exploration and development plans, as well as a work program;
- Information, reports and data that must be submitted to ANP;
- Contract term no longer than 35 years; and
- Policies and contingency plans for health, safety, security and the environment.
As with the concession regime, the PSA contractor will assume all costs and risks in connection with its operations.

ROYALTIES AND OTHER PAYMENTS

Under the concession regime, Federal, State and Municipal governments are compensated with the following, to be paid in local currency:

- **Signing Bonus** - A lump sum paid by the winner of a concession area upon the execution of the concession contract. The minimum amount of the signing bonus is set out in the tender protocol documents and each company bids in response to this minimum;
- **Royalties** - Compensation fee payable monthly, usually fixed at 10% of production value. Royalties may be reduced up to 5% depending on the geological risks, production expected and other relevant issues;
- **Special Participation** - Extraordinary compensation payable by concessionaires in cases of high volumes of oil and gas production or high profitability fields. Calculations are based on the production earnings after royalties, exploration investments, operational costs, depreciation and taxes;
- **Occupation Fee** - Annual fee paid for the occupation or retention of areas during the exploration, development and production phases, calculated based on the km of the area retained or occupied. The occupation fee due is set by the ANP in the concession contract and applies for onshore areas only.

For the PSA regime, contractors have to pay a signing bonus and royalties (fixed at 15% of production value) and neither is recoverable out of the cost oil. Unlike the concession regime, the signing bonus under the PSA regime is not offered by companies in the bid round, but is fixed by the MME for each area. For the first bid round, the signing bonus was R$15 billion, payable in a single installment.

No special participation or occupation fee is payable under the PSA regime.

CONTRACTING STRUCTURES

Under the concession regime, companies either operate on stand-alone structures holding 100% of the concession rights or work in association with one or more local partners by means of a consortium structure accepted by the ANP. In stand-alone structures, the concessionaire company is solely responsible for undertaking the E&P activities over the concession area. For consortiums, a consortium agreement must be executed which specifies the participation interest of each company and identifies one party as the operator responsible for the E&P operations. Under the Petroleum Law, all consortium members are jointly and severally liable for the performance of all obligations under the concession contract.

Consortium members often also enter into Joint Operating Agreements (JOAs) to, among other things, regulate operations, specify responsibilities of the operator and remaining parties, and enable cash calls to be made. JOAs are widely used in the O&G industry.
As outlined above, under the PSA regime, only Petrobras may hold E&P rights individually and act as operator of pre-salt areas. Other companies participating in a PSA regime must enter into a consortium with Petrobras and the PPSA. Petrobras must hold at least a 30% interest in the consortium and must be the sole operator of the E&P activities. PPSA acts as manager of the PSA with no participating interest or investment obligation, but with fifty% of the voting rights at the Operating Committee. Private companies will be entitled to bid and hold the remaining participation interest in the PSA consortium. As an example of composition, the first PSA bid round was won by a group led by Petrobras (as mandatory operator with a 40% stake – 10% higher than the minimum requirement), Shell (20%), Total (20%), CNPC (10%) and CNOOC (10%).

The PSA consortium is administrated by an Operating Committee. PPSA will be entitled to elect half of the members of the Operating Committee, including the chairman, and the other consortium members will elect the remaining members. The chairman of the Operating Committee elected by PPSA will have the power of veto on the Operating Committee, enabling him to prevent the adoption of any resolution.

**BRAZILIAN COMPANIES AND FOREIGN OWNERSHIP**

Only companies incorporated under Brazilian laws, with management and head offices in Brazil, may perform E&P activities in Brazil and be granted oil and gas rights under the Petroleum Law or the Pre-Salt Law.

While only domestic companies can perform E&P activities, there is no limitation or requirement for the ownership or control of the Brazilian incorporated company to be held by local residents. In that sense, foreign parties may hold 100% of a company participating in a bid round, just so long as such the company is duly incorporated and headquartered in Brazil and has resident management. To encourage foreign involvement, the ANP allows foreign companies to participate directly in bid rounds so long as they assume the obligation to incorporate a Brazilian company with headquarters and management in Brazil if they win the bid.
Brazil has strong consumer protection legislation under the Consumer Protection Code (CDC). In comparison to suppliers, consumers are considered to be the weakest party in the supply chain. The CDC establishes a number of consumer protection rules that protect consumers from the vulnerabilities they face in the unbalanced supply relationship.

The legal definition of “consumer”, according to the CDC, is very broad, which means that its application embraces a large number of relationships, including, in some cases, relationships between legal entities. Consumer rights under the CDC provide:

- Protection against goods and services deemed to be dangerous or hazardous;
- Protection against misleading advertising and abusive contractual provisions;
- Certain implied warranties;
- Indemnification for patrimonial and moral damages;
- Requirements to be properly informed about potential risks and characteristics of products or services; and
- Inversion of the burden of proof.

Implied warranties recognized under the CDC exist regardless of whether they are specified in a contract and their application cannot be excluded by a contract. They warrant the adequacy of goods or services, including that they are fit for purpose, are not defective, set out accurate information about the goods or service and do not present an unreasonable risk to consumer or a risk to their health and safety.

Under these implied warranties, consumers generally have the right to complain to a supplier within 30 days (non-durable services or products) or 90 days (durable services or products) of identifying a problem. The supplier must generally address the complaint by fixing the problem within 30 days. If the problem cannot be fixed, the consumer may choose for the good or service to be replaced, full reimbursement of the purchase price, or a proportional reimbursement of the purchase price.

In relation to contractual arrangements, the CDC also establishes a consumers’ right to obtain judicial revision of clauses deemed to be unfair or excessively burdensome. Such clauses under the CDC include those that allow the supplier to unilaterally change prices, cancel a contract or modify the contents of a contract.

The CDC devises a product liability concept similar to that applies in the United States and imposes a standard of strict liability on suppliers. Liability may be applied jointly, potentially to all entities in a supply chain. Note, however, that no punitive damages are provided under the CDC. Liability may be defended only if the supplier shows evidence that:

- It did not play a role in placing the product on the market;
- The alleged defect did not exist; or
- The damage resulted from the consumer’s or a third party’s exclusive fault.
Under specific circumstances, legal entities may contractually agree on the limitations of their liability before other legal entities, but not individual consumers.
Following is a summary of the types of visas currently available for a non-Brazilian citizen to do business or work in Brazil, as well as brief comments on personal income tax consequences in connection therewith.

PERMANENT VISAS

PERSONAL INVESTOR (NORMATIVE RESOLUTION 84/2009)

This type of visa will be granted to a foreigner who wants to come to Brazil to invest his/her own foreign capital in Brazil (in productive activities). In this case the foreigner will need to prove the investment of a minimum of the equivalent, in foreign currency, to R$ 150,000. In special situations, if the investment is lower than the equivalent to R$ 150,000, the National Council of Immigration may render a decision granting a visa to the foreigner who can prove the social relevance of the project. The visa will initially be granted on a conditional basis, and the foreigner must prove, at the end of the first 3-year period, that he/she remains as a foreign investor and that the project generated job positions for Brazilians. Upon such proof, the visa will become unconditional.


This type of visa is appropriate for foreign company officers, managers, directors, and executives, with managerial powers, who come to Brazil as representatives of a company, commercial group and/or economic conglomerate. This visa will be granted provided that both the applicant and the company fulfill the stipulated requirements by Normative Resolution 62/2004. The company that intends to appoint a foreigner to a managerial position will need to evidence the following:

- Investment equal to or higher than R$150,000 or the equivalent in another currency, for each hired foreign manager, and generate a minimum of ten new jobs during the first two years after the installation of the firm or the arrival of the foreign manager; or
- Investment equal to or higher than R$600,000, or the equivalent in another currency, for each hired foreign manager.

An unconditional permanent visa will be obtained provided that the foreign manager exercises the function for which the work permit was applied, in the designated company, for the duration of the initial conditional period (period of mandate, or 5 years if undefined), and if applicable, the necessary job positions were created within the two year period.
TEMPORARY VISAS

BUSINESS

This visa is applied for at the nearest Brazilian Consulate and is issued on the basis of an application and the payment of a fee. Since April 1995, the Brazilian Consulate, at its own discretion, is allowed to grant a multiple entry temporary business visa valid for up to ten years, depending on reciprocity of treatment. For each entry the foreigner has a maximum stay of a 90 day term that can be extended for the same period, allowing the foreigner to stay in the country for the maximum period of 180 days per year, except that, on a reciprocity basis, for nationals of countries who are signatories to the Schengen agreement the maximum allowed period of stay in Brazil is 90 days within a 180 day period.

Under a temporary business visa, the foreigner is prohibited to render any kind of technical assistance service or work in Brazil. This visa authorizes its holder to carry out business activities in Brazil but not to be compensated by a “Brazilian source”.

UNDER A LABOR CONTRACT (NORMATIVE RESOLUTION 99/2012)

Brazilian entities may require this visa in the event 2/3 of the employees of the Brazilian company are Brazilian citizens and that 2/3 of the total of the company’s payroll is paid to Brazilian employees. For purposes of the “Law of 2/3”, as this rule is known, foreigners who have been living in Brazil for 10 years or more and are married to a Brazilian citizen or have a Brazilian child, and Portuguese citizens irrespective of any other individual situation, and nationals of the MERCOSUL countries who live in Brazil with residency granted under the MERCOSUL Agreement, are counted as Brazilians.

Foreigners applying for this type of visa must evidence that they have education, qualification and professional experience compatible with the function to be exercised in Brazil. Education and qualification are demonstrated by means of diplomas and/or certificates, and for people who do not have a college diploma, a minimum of 9 years of study must be proven. In the case of candidates whose artistic or cultural activities do not depend on formal education, a minimum experience of three years in the exercise of the profession must be proven. Such documents must be legalized by the Brazilian Consulate where the documents were issued and translated in Brazil by a sworn public translator.

Professional experience is demonstrated by means of a letter from the current or prior employers abroad, showing a minimum experience of two years for medium-level candidates, and one year for candidates who hold a bachelor’s degree. Holders of master’s or Ph.D. qualifications do not need to submit letters of experience.

Proof of education, qualification and professional experience is also waived:

- For citizens of South American countries;
- If the applicant is a legal dependent of a foreign national who already holds a temporary visa for Brazil; and
- Exceptionally, if the compatibility between the professional profile of the candidate and the function to be held in Brazil can be demonstrated through other means.
The foreigner will be an employee of the Brazilian company and may either earn the total remuneration in Brazil or part in Brazil and part abroad (split payroll). The labor contract will be governed by Brazilian labor laws and the foreigner will be entitled to all the benefits provided by the Brazilian Labor Legislation, such as Christmas Bonus, 30 day Annual Vacation, Guarantee Severance Fund (FGTS), and social security (INSS).

During the first two years, the employment contract must be for a determinate period of time. Should the Brazilian company want to extend the contract beyond a two year period, the new employment contract must be for an indeterminate period of time.

The visa will be valid for up to two years (either one year renewed for another year, or two years from the beginning), and at the end of the second year, it can be changed to a permanent visa. The permanent visa will be conditional for the first two years such that the foreigner can only work for the company which is sponsoring the visa.

While the foreigner holds a temporary visa, he/she will only be able to work for the company which applied for his/her work authorization, and for the position the Ministry of Labor allowed him/her to work. However, changes of employers are permitted within the same economic group, and changes of functions are also allowed, provided, in each case, that they are notified and justified to the Ministry of Labor within a 15 day period after the change occurs.

UNDER A TECHNICAL ASSISTANCE AGREEMENT AND WITH NO LABOR CONTRACT IN BRAZIL (NORMATIVE RESOLUTION 61/2004)

There are three categories of technical assistance visas: long term, short term and emergency, none of which can be changed into a permanent visa.

Normative Resolution 61/2004 regulates two of those categories: the long-term and the emergency visas, whereas the short-term visa is regulated by Normative Resolution 100/2013, which came into effect on May 9, 2013.

The long term technical visa may be granted for up to a one year period, renewable for another year, for technicians coming to work in Brazil under a technology transfer contract, or a technical assistance agreement, or a cooperation/convention agreement between a Brazilian and a foreign company. The foreigner remains an employee of the foreign company and cannot receive any salary from the Brazilian company. This visa cannot be granted to foreigners who will hold functions in Brazil which are merely of an administrative, financial or managerial nature. As part of the work authorization application documentation, a detailed training program must be submitted, informing:

- Professional qualifications of the foreigner;
- Scope of the training program;
- Number of Brazilians who will be trained;
- Form of execution of the training program;
- Place where the training will be given;
- Expected duration of the training program; and
- Results expected from the training program.
For this type of visa, the candidate must have at least three years of experience in an activity related with the services which are being contracted. An authenticated copy of the contract between the Brazilian and the foreign companies for the rendering of services must also be submitted, as well as proof that whoever signed on behalf of the foreign company was empowered to do so.

The short term technical visa may be granted for up to 90 days in each period of 180 days, and is non-renewable. This visa cannot be granted to foreign nationals who will hold functions in Brazil which are merely of an administrative, financial or managerial nature.

This visa is applied for directly at the Brazilian Consulate, with no need for a prior approval of a work permit by the immigration authorities in Brazil. According to NR-100/2013, in addition to all other documents normally required for a visa application, a letter must be submitted by the Brazilian company, with a copy of its Cadastro Nacional da Pessoa Jurídica (CNPJ number), requesting the issuance of said visa.

The rules concerning the letter from the Brazilian company vary depending on the Brazilian Consulate where the visa will be applied, so one must always check with the appropriate Brazilian Consulate to verify what its requirements are.

The emergency technical visa is granted directly by the Consulate, with no need to have a prior authorization from the Ministry of Labor, whenever there is a fortuitous situation that may endanger people’s lives, the environment, the assets of the Brazilian Company, or that has caused an interruption of the production or of the rendering of services, for a maximum of 30 days within a 90 day period. Such a visa is non-renewable.

FOREIGNERS WORKING ON BOARD OF A FOREIGN SHIP OR PLATFORM (NORMATIVE RESOLUTION 72/2006)

This is the type of visa that should be applied for by those foreigners who work, on a continuous basis, on board of a foreign ship or platform operating within Brazilian territorial waters. It may be applied for a period of up to two years, renewable for successive two year periods, but cannot be changed into a permanent visa. Under this type of visa the foreigners remain as employees of the foreign company and, therefore, do not receive any salaries from the Brazilian company.

For purposes of Normative Resolution 72/2006, a platform is defined as the fixed or floating installations or structures which are directly or indirectly involved in the research, exploitation and exploration of resources originating from inland or sea waters and their subsoil, as well as from the continental platform and its subsoil.

If a foreign ship or platform remains under operation within Brazilian territorial waters for a period longer than 90 continuous days, then it must employ Brazilian seamen and other professionals, according to a certain ratio. In the case of ships and platforms used for the exploration and prospection, the ratio is as follows:

- After 180 days of operation, 1/5 of the total workforce must be Brazilian;
- After 360 days of operation, 1/3 of the total workforce must be Brazilian; and
- After 720 days of operation, 2/3 of the total workforce must be Brazilian.
In addition to normal work authorization application documents, the applying company must also submit:

- Copy of the freighting contract signed with a Brazilian company, or copy of the service or risk contract signed with a Brazilian company or, if applicable, a copy of the Concession granted by the Brazilian National Petroleum Agency; and
- List of names of all foreign carriers and platforms contracted or freighted by the requesting party, also containing information on the numbers of Brazilian and foreign citizens employed aboard each ship or platform.

FOREIGN NATIONALS WHO WORK FOR A FOREIGN COMPANY FOR PURPOSES OF PROFESSIONAL TRAINING AT A BRAZILIAN BRANCH, SUBSIDIARY OR PARENT COMPANY BELONGING TO THE SAME ECONOMIC GROUP (NORMATIVE RESOLUTION 87/2010)

This type of visa can be granted to a foreign national who is an employee of a foreign company and comes to Brazil for professional training at a Brazilian company which is a branch, subsidiary or parent company belonging to the same economic group. For the purposes of this visa, professional training is the activity which aims to develop the skills and knowledge of the foreign individual through on-the-job training in Brazil.

With this type of visa, the foreign national remains an employee of the foreign company and is forbidden to receive any remuneration paid in Brazil.

This visa can be granted for a maximum period of one year, and it is non-renewable.

RN 87/2010 also regulates the granting of visas, without an employment relationship in Brazil, to foreign nationals who come to receive training in the operation and maintenance of machines and equipment which are manufactured in Brazil. This visa can be granted for a maximum period of 60 (sixty) days, it being renewable once.

FOREIGN STUDENTS OR THOSE RECENTLY GRADUATED WHO COME TO BRAZIL UNDER A PROFESSIONAL EXCHANGE PROGRAM (NORMATIVE RESOLUTION 94/2011)

This visa is aimed at foreign nationals who come to Brazil to participate in professional exchange programs at a Brazilian company.

For purposes of RN-94/2011, a professional exchange program is the international social and labor learning experience performed at a workplace, aimed at improving the initial or continuing academic education, with the purpose of exchanging knowledge and cultural and professional experiences.

The foreign national must be registered as an employee of the Brazilian company, being subject to all the Brazilian employment legislation, including, but not limited to, 30 day Annual Vacation salary, vacation, FGTS and social security.

For a foreign national to obtain this visa it is necessary to prove the enrollment in a graduate or post-graduate course, or that graduation occurred within the last 12 months prior to the application, and to submit, among other documents, the undertaking between the foreign national and the Brazilian company, with an intervening Brazilian Professional Exchange Program entity, where the terms of the exchange program are stipulated.
This visa may be granted for a one year period, and it is non-renewable.

FOREIGN NATIONALS COMING TO BRAZIL TO WORK EXCLUSIVELY IN ACTIVITIES RELATED TO THE 2014 WORLD SOCCER CUP AND THE 2016 RIO DE JANEIRO OLYMPIC AND PARALYMPIC GAMES (NORMATIVE RESOLUTION 98/2012)

This visa is aimed at foreign nationals who are coming to Brazil to work exclusively in the preparation, organization, planning, and execution of major sports events to be hosted in Brazil and to guarantee that such visas are granted in an expeditious way. The upcoming sporting events include the FIFA World Soccer Cup in 2014 and the Rio de Janeiro Olympic and Paralympic Games in 2016.

For this purpose, the Brazilian General Coordination of Immigration must render a decision within five days counting from the date the work permit application is filed, and immediately advise the Ministry of Foreign Affairs, which in turn must authorize the Brazilian consulate to process the visa on a priority basis. For purposes of this type of visa, the general rule concerning jurisdiction of the granting consulate does not apply, i.e., the applicant need only be in the jurisdiction where the visa application is filed.

For purposes of this visa, the only substantive requirement is to prove that the foreign national is involved in the activities related to one of the above events. Such proof is made through a request from FIFA, or a third party appointed by FIFA, in the case of the 2014 FIFA World Soccer Cup, or from the Organization Committee of the 2016 Rio de Janeiro Olympic and Paralympic Games. There is no special requirement concerning neither salary reduction nor proof of experience or education.

A visa under RN 98/2012 may be granted with or without an employment relationship, for up to two years, or for up to one year in the case of technical assistance. The visa is extendable in any of these situations up to December 31, 2014, for the World Soccer Cup, and December 31, 2016, for the Olympic and Paralympic Games.

A dependent of a holder of this type of visa can work in Brazil, provided that he or she has a work visa of his or her own, as provided by RN 99/2012.

MERCOSUL AGREEMENT

The Mercosul Agreement applies to citizens of the MERCOSUL signatory and associated countries. The signatory countries are Argentina, Brazil, Paraguay, and Uruguay. At present, the associated countries are Bolivia, Chile, Colombia, and Peru. Ecuador, also an associated country, is in the process of finalizing internal approvals.

Based on the MERCOSUL Agreement, nationals of any of those countries may apply for temporary residence in the other countries, and after two years may apply for change of temporary residence into permanent. The application can be made either abroad or in Brazil, even if the candidate is in Brazil in an irregular situation, in which case he or she does not have to pay a fine and is not subject to any other administrative sanctions.
BRAZILIAN DOCUMENTS

After the foreigner’s arrival in Brazil with a work visa, a series of Brazilian documents will be required in order to remain legally in Brazil:

- **Brazilian identity card** (RNE - Law 6,815/1980, article 30) - The foreigner must personally apply for this document at the Federal Police, within 30 days after the date of arrival in Brazil;
- **Labor card** (*Carteira de Trabalho e Previdência Social* or CTPS) - The foreigner who has a temporary visa “item V” – under a labor contract – must apply for this document after registering at the Federal Police. The Brazilian Company must register the foreigner as its employee within 30 days of the date of arrival, as well as register the exact salary amount stated in the labor contract submitted to the General Coordination of Immigration, at the Ministry of Labor, when the work authorization was applied for;
- **Enrollment with the CPF/MF** - Such enrollment is required in order for a foreigner to open a bank account, buy or rent an apartment, buy a car or a mobile phone, pay income tax in Brazil etc. A foreigner coming to Brazil under a permanent visa or a temporary visa “item V” – under a labor contract – should immediately apply for a CPF/ MF, as he/she will become a tax resident in Brazil on the date of arrival;
- **Registration with the National Social Security Institute** (*Instituto Nacional do Seguro Social* or INSS) - It is important that the company enrolls the foreigner who has a permanent visa in the INSS, so that he/she can contribute to Brazilian social security as an “individual contributor”;
- **Driver’s license** (*Carteira Nacional de Habilitação* or CNH) - A foreigner who has a temporary visa or a permanent visa must necessarily obtain a Brazilian driver’s license after a period of 180 days in Brazil if they wish to drive in the country. This is very important because if, for example, the individual has an accident after the initial 180 days, it would be considered that he/she was driving without a proper driver’s license, even if he/she had a valid foreign driver’s license.

VISA CANCELLATION

In the event the foreigner and his legal dependents leave Brazil before the expiration of the visa or whenever the validity of a visa expires, the Brazilian Company must file a petition at the Ministry of Labor and Ministry of Justice (as the case may be) requesting the cancellation of the visa.

APPLICABLE TAXES

Foreigners coming to Brazil under a permanent visa or a temporary visa “item V” – under a labor contract – will become tax residents on the date of their arrival in Brazil and will be subject to income tax on amounts received both in Brazil and abroad (i.e., worldwide income is subject to taxation in Brazil).

The foreigner holding a temporary visa “item V” – without an employment contract in Brazil – will only be subject to income tax on his/her worldwide income after an actual stay in Brazil of 183 days, consecutive or not, within a 12-month period counted from the first date of arrival in Brazil bearing the visa, or from subsequent arrivals, if the 183 days are not reached within the first 12-month period (Normative Instruction 202/2003).
Veirano Advogados is one of the leading and most renowned Brazilian business law firms, focused on developing tailored solutions for multinational companies operating in strategic sectors of the economy.

OUR FIRM

Founded in 1972, Veirano Advogados is a full-service law firm providing a complete spectrum of legal services to support business activities in both regulated and unregulated sectors. With approximately 300 attorneys working in an integrated fashion, we handle both routine and complex multidisciplinary cases that require the coordinated talents of professionals with diverse areas of expertise.

Our services range from providing assistance in M&A transactions, privatizations and company formation to representing clients in disputes, from offering advice on tax issues and infrastructure projects to guiding companies through the challenges inherent in highly regulated industries, to name a few examples of our broad range of work. Our main goal is to identify needs and develop tailored solutions, enabling safe and informed decision making – one client at a time.

At Veirano, we understand that our professionals are our equity in a globalized market. In order to build strong client-service teams of specialists, we recruit Brazilian attorneys with multicultural backgrounds who have received additional education and training in first-tier law schools and law firms in the US, Europe and Asia.

For over 40 years we have built strong relationships with leading companies in various industry sectors, simplifying international relations and opening pathways for business in Brazil, from Brazil to the world and from the world to Brazil. This is how we contribute to the success of our clients and collaborate for a strong economy.

ALLIANCES & PARTNERSHIPS

Beyond our presence in Rio de Janeiro, São Paulo, Porto Alegre and Brasília, we enjoy solid relationships with law firms in the various Brazilian states and maintain a wide network of partner law firms across more than 120 countries around the world. As a result, we provide seamless services wherever they are required.

We also participate in several international legal organizations, such as:

- Global Advertising Lawyers Alliance (GALA)
- Ius Laboris - Global HR Lawyers
- World Services Group (WSG)
PRACTICE AREAS

Our expertise covers a broad range of legal services, with emphasis on the following practices and industries:

**Law Practices**
- Anticorruption, Corporate Integrity & Compliance
- Antitrust & Competition
- Banking & Finance
- Commercial Contracts
- Corporate & Mergers and Acquisitions
- Corporate Immigration
- Dispute Resolution
- Environment
- Government & Regulatory
- Insolvency, Restructuring & Distressed Investing
- Intellectual Property
- International Trade / WTO
- Labor & Employment
- Private Equity & Capital Markets
- Tax & Customs
- White-Collar Crimes

**Industry-Oriented Practices**
- Aerospace, Naval & Defense
- Electric Energy
- Information Technology & Communications
- Infrastructure & Projects
- Insurance, Reinsurance & Pension Funds
- Media & Entertainment
- Mining
- Oil, Gas & Biofuels
- Real Estate
- Shipping

CLIENT INDUSTRIES

For over 40 years we have built strong relationships with leading companies operating in many different industry sectors, such as:

- Aerospace, Naval and Defense
- Agribusiness
- Automotive
- Banks and Financial Services
- Biofuels
- Chemical and Petrochemical
- Construction and Engineering
- Consumer Goods
- Education
- Electric Energy
- Health Care
- Hospitality and Tourism
- Information Technology
- Infrastructure
- Insurance and Complementary Welfare
- International Bodies and NGOs
- Machines and Equipment
- Media and Entertainment
- Metallurgy and Siderurgy
- Mining
- Oil and Gas
- Pharmaceutical and Cosmetics
- Pulp and Paper
- Real Estate
- Services
- Shipping
- Sports and Leisure
- Telecommunications
- Transport and Logistics
- Water and Sanitation
- Wholesale and Retail
As the first Brazilian firm to receive the *Chambers Client Service Law Firm of the Year* award, our continuous dedication to clients is consistently recognized by leading industry publications, in particular:

- **Chambers Global 2014**
  - Leading firm in 14 practice areas
  - 37 leading individual recognitions

- **Chambers Latin America 2015**
  - Leading firm in 26 practice areas
  - 51 leading individual recognitions

- **IFLR 1000 2015**
  - Recommended firm in 5 practice areas
  - 8 leading lawyer recognitions
  - 2 rising star recognitions

- **Latin Lawyer 250 2014**
  - Recommended firm with 22 practice areas highlighted

- **Legal 500 Latin America 2014**
  - Recommended firm in 20 practice areas
  - 4 leading lawyer recognitions
  - 53 lawyer recommendations

- **Who’s Who Legal Brazil 2014**
  - 39 lawyer recognitions

Some of our recent awards include:

**Marine Money International - Editor’s Choice Deal of the Year 2013**
Veirano Advogados advised DNB Bank and DNB Markets, as sole advisor, global coordinator, bookrunner and MLA, in the US$584 million project finance & ECA deal for Technip Odebrecht PLSV CV. As part of the transaction, the Firm also advised all lenders involved: Banco Itaú, Bank of Tokyo-Mitsubishi UFJ, HSBC, Standard Chartered, SMBC, Credit Agricole, ABN AMRO, K-Sure, GIEK and Eksportkreditt.

**Latin Lawyer - Project Finance Deal of the Year 2013**
Veirano Advogados acted as Brazilian counsel to the lenders, agents and hedge providers in the US$1.2 billion financing of the Chaglla hydropower plant in Peru, sponsored by the Odebrecht Group. Bound to be the country’s second largest hydropower facility, it is one of the first project finance facilities of the BNDES for a project located outside of Brazil.

**Chambers Latin America - Lifetime Achievement 2012**
Founding partner Ronaldo C. Veirano received the prestigious *Chambers Lifetime Achievement* award in recognition for a longtime and productive career spanning more than 40 years of contributions to the Brazilian legal market.

**Latin Lawyer - Bankruptcy/Restructuring Deal of the Year 2012**
Veirano Advogados advised Bank of New York Mellon, in its acting as trustee to the bondholders in the acquisition of Brazilian power distributor Centrais Elétricas do Pará (CELPA) by Equatorial Energia through judicial restructuring, the largest of its kind since Brazil’s new bankruptcy and restructuring law entered in to force.
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The matters discussed in this publication are highly summarized and are up to date as of June 2014. Since several areas of Brazilian law are currently in a state of accelerated change, some of the matters discussed herein may be subject to change in the near future. Upon request, we will be glad to clarify or further elaborate on any of the foregoing matters. Veirano Advogados will not be held liable for the accuracy or completeness of the information contained herein, nor in any way for how it is applied.

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