

International Secondments (Brazil)

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A Practice Note explaining the issues to consider when entering into an arrangement to second an employee into or out from Brazil. It considers the legal principles and drafting issues.

Mandatory Local Laws and Acquired Rights

Brazilian Seconder

Brazilian Host

Immigration and Work Permits

Employer During Secondment

Duration of Secondment

Management During the Secondment

Payments and Benefits

Changes to Terms and Conditions of Employment

Continuity of Employment

Brazilian Seconder

Brazilian Host

Confidentiality and Restrictive Covenants

Secondment Agreement

Letter of Secondment or Employment Contract

Discrimination and Harassment

Liability

Liability for the Secondee's Acts or Omissions

Indemnity Between Seconder and Host

Data Protection

Intellectual Property

Tax and Social Security Considerations

Permanent Establishment Risk

Service Tax Issues

Social Security Contributions

Termination of Secondment

Termination of the Secondment Agreement

Termination of Employment

Substitute Secondee

Drafting Tips

General

Language

Governing Law and Jurisdiction

Execution and Other Formalities

An international secondment takes place when an employee (or group of employees) is temporarily assigned to work for a different part of their employer or employer's group in another jurisdiction or for a different organisation in another jurisdiction. This Note looks at the issues regarding international secondments into Brazil and international secondments going out from Brazil. It does not cover domestic secondments within Brazil.

It is imperative that the mandatory local laws of the jurisdiction where the secondment is taking place are considered from the outset so that when the secondment planning starts, the parties are aware of any potential issues that may or may not affect the decision to proceed with the secondment or the terms of the arrangements.

This Note details the mandatory local laws of Brazil that need to be considered when an individual is seconded into Brazil. However, if contemplating a secondment out of Brazil, in addition to the laws of Brazil that may apply to that arrangement, the mandatory local laws of the relevant host territory will also need to be considered, for example, whether a local employment contract is required.

There are several different terms that are used for the three parties involved in a secondment arrangement. In this Note it is assumed that when a secondment is made to another organisation:

- The original (or seconding) employer is referred to as the seconder.
- The seconded employee is referred to as the employee or secondee.
- The organisation to which the secondee is to provide their services is referred to as the host.

Unless said otherwise, in the Note, Secondment Agreement means the commercial agreement between the seconder and the host; and, Letter of Secondment is an employment agreement (or amendment to the employment agreement) between the seconder and the secondee.

In addition to this Note, the following resources are applicable to international secondment arrangements:

- *International Secondments: Checklist*
- *Standard Document, Secondment agreement: International*
- *Standard Document, Letter of secondment: International*

Mandatory Local Laws and Acquired Rights

Before initiating a secondment into or out from Brazil, it is fundamental to understand the mandatory local laws that will apply to the seconded employee, any immigration requirements to allow the employee to work in Brazil or in the host country, and any other restrictions on seconding employees from abroad into Brazil and out from Brazil into the host country.

Brazilian Seconder

Prior to seconding an employee from Brazil to another jurisdiction, the Brazilian seconder and the proposed host will need to confirm the law that governs the Secondment Agreement between the seconder and host, and to understand the mandatory laws of the host country and the rights the secondee will acquire during the international secondment.

A Brazilian seconder must be aware of Law 7064/1982. This law governs the secondment of individuals employed in Brazil and seconded to work in another territory.

An employee seconded from Brazil to another country remains employed by the Brazilian seconder (see *Employer During Secondment*). Therefore, whether or not concurrently employed by the host company during the secondment, the secondee must benefit from the minimum employment conditions provided under Brazilian law and the original Brazilian contract of employment, including, but not limited to 30 days of paid holiday, one-third vacation bonus, 13 monthly salary payments per year, Severance Fund (FGTS) payments, and a transfer allowance (this is to be agreed, but is usually equal to 25% of the secondee's gross salary during the secondment). The host company can, of course, grant anything in addition to these minimum requirements.

Irrespective of the law the employee and seconder agree applies to the employment during the secondment, the mandatory minimum protections of the host country may still apply to the secondee (such as rights to minimum pay, paid annual leave, rest breaks).

In addition, the parties will need to consider any immigration requirements and any regulatory restrictions (for example, certain roles in the host country may require specific qualifications or registrations).

Brazilian Host

Mandatory Laws of Brazil

The most common and relevant positions for secondees to come to Brazil and work are the following:

- Statutory officers (under this category, local employment is possible).
- Transitional jobs involving the provision of technical assistance (local employment is prohibited).
- Transitional jobs involving the provision of transfer of technology (local employment is prohibited).
- Maritime work (local employment is prohibited).
- Professional training (local employment is prohibited).
- Other employees (local employment is required to obtain the relevant work permit, but it can be simultaneous with the home employer).

Whether Brazilian labor laws apply to a secondee will depend on the work permit applied for (that is, whether local employment is required, as stated above). In addition, the different categories of secondee are subject to different immigration requirements.

Where the secondment involves employment with the host company in Brazil (for example, the applicable work permit requires local employment), then the full labor laws of Brazil apply, the host company must grant the secondee the minimum conditions provided under the law, and the seconded worker is entitled to the same benefits and rights as local employees.

If the work permit applied for is for a statutory officer, local employment is possible, the secondee can acquire full Brazilian employment rights if either:

- The Brazil host employer may choose to grant employment rights,
- The officer requests a court of law to grant them such rights by recognizing the reality of the relationship is that of employment.

See [Immigration and Work Permits](#).

The secondee will not acquire any Brazilian law employment rights if the secondment is made under a work permit for technical assistance, transfer of technology, professional training or maritime work, as local employment in Brazil is prohibited in such cases.

Brazilian laws do not apply to the employment terms between the secondee and the foreign seconder, or create any changes to them (rather, they apply when the individual is employed by the Brazilian host). However, a foreign employment contract (that is, an employment contract between the secondee and the foreign seconder) is enforceable in Brazil (that is, they may be enforced by the courts in Brazil) only if the secondee has a work permit allowing them to work in Brazil. If this is the case, and the scenario requires a local Brazilian employment relationship, the employment contracts in both the home country and the host country (Brazil) have effect simultaneously, for as long as the work permit remains valid.

A party to a Secondment Agreement needs to be aware of the Brazilian Labor Code (*Consolidação das Leis do Trabalho* (CLT)), dating back to 1943, and supplementary legislation.

Immigration and Work Permits

Immigration in Brazil is governed by Law No. 13,445/17 (Migration Law) and regulated by Decree No. 9,199/2017, which came into effect on 21 November 2017.

Since then, 41 Normative Resolutions have been issued by the National Council of Immigration establishing the requirements, conditions, terms of validity and procedures to be observed for requests of prior residence authorisation for the granting of temporary visas, and of residence permits, either for work purposes (such as for intra-company transferees, officers, offshore crew, foreign experts and technicians), or for investment purposes (such as individual investors or real estate), or for retirees.

In general, foreign nationals wishing to work in Brazil need a work permit. This can be obtained by either applying for a prior residence authorisation for the granting of a temporary visa (at the relevant Consulate if the applicant is outside of Brazil) or by applying for a residence permit within Brazil. There are some exceptions to this, for instance, individuals from Mercosur member countries can look for a job while living in Brazil, and dependents (either a spouse, partner, child, parent, or some other legal dependents as contemplated in the Migration Law) of a Brazilian citizen or of a foreign holder of a visa or a residence permit can apply for a family reunion visa or residence permit, which automatically allows them to also work in Brazil.

For information on the different visa application processes, see the [Ministry of Justice and Public Security's \(Ministério da Justiça e Segurança Pública\) website](#).

The length of the process to obtain residence and work permits is 30 to 60 calendar days if the application form and required documentation are complete and in the required format.

Commonly, due to the type of visa that is necessary, secondees to Brazil require a local employment contract (see [Mandatory Laws of Brazil](#)). However, there are other types of visas under which the secondee remains an employee of the foreign employer. For instance:

- Temporary visas and residence permits for professional training at a Brazilian subsidiary, branch or parent company can be granted for a term of up to two years and is non-renewable.
- Long-term technical assistance visas and residence permits are granted for up to one year and renewable for a similar period.
- Non-renewable short-term temporary visas are valid for a stay of up to 180 days in one migration year (a 12-month period counted from the date of first entry with the temporary visa).
- Long-term transfer of technology visas and residence permits are granted for up to one year and renewable for a similar period.
- Maritime temporary visas and residence permits can be granted for up to two years, renewable for as long as the lease agreement of the ships/platforms is in effect.

A statutory officer may request a prior residence authorisation for the granting of a temporary visa or a residence permit for an indefinite term, but either one should be cancelled if the appointment ends and the officer is removed from the company's bye-laws.

Although the immigration authorities will issue a work permit to a statutory officer without a local contract of employment with the Brazilian entity, the labor courts might grant a claim for employment rights with that Brazilian entity, particularly if the Brazilian host company is a subsidiary of the foreign seconder and if the secondee remains an employee of the foreign seconder.

Employer During Secondment

If the secondment is from Brazil to a host country, the secondee's Brazilian employment agreement with the seconder will remain in effect, irrespective of any mandatory employment laws in the host country. In this case, the parties cannot choose to change the employer to the host employer, but the host can be the employer simultaneously with the Brazilian seconder.

If Brazil is the host country, who the secondee's employer is depends on the work permit that the secondee applies for (see [Mandatory Laws of Brazil](#) and [Immigration and Work Permits](#)). For a traditional secondment, the Brazilian host company must be the employer, although simultaneous employment with the foreign seconder is possible. However, an exception is that if the secondee's work permit is for technical assistance, transfer of technology, professional training or maritime work, then local employment in Brazil is prohibited.

An employment agreement between the secondee and the Brazilian host employer may be required if the secondee will be a statutory officer (see [Brazilian Host](#)), but the immigration authorities will grant the visa to a statutory officer regardless of whether there is such an agreement or not.

Duration of Secondment

A traditional secondment into Brazil involves the secondee entering into a local contract of employment with the host in Brazil (that is, due to the type of work permit required), for a specified term of up to two years (this limit is imposed by immigration laws), at the end of which it can be changed if a residence permit for an indefinite term is obtained. The default employment agreement in Brazil is open-ended. As a result, it is a common mistake to execute an open-ended contract, which will trigger unnecessary severance fees if the secondment ends on the expiration of the two-year term.

The secondee must request a prior residence authorisation for the granting of a temporary work visa, or a residence permit, which can limit the time that a secondee can remain in Brazil. In addition to the traditional secondment involving the secondee entering into a local contract of employment, there are other types of visas under which the secondee remains an employee of the foreign employer. See *Immigration and Work Permits*.

Management During the Secondment

When an individual is seconded out from Brazil, irrespective of whether a local employment contract is required in the host country, the Brazilian employment contract remains in force during the secondment period (see *Employer During Secondment*). Therefore, the Brazilian seconder is responsible for the management of the employee's rights under the Brazilian labor laws, such as timely holidays and payroll, throughout the secondment period.

If the secondee has concurrent employment agreements with the seconder and the host (for example, where the secondee is seconded to Brazil and employed by the Brazilian host entity, or a host country requires local employment), the seconder can continue to conduct performance reviews but these can instead be conducted by the host where the host becomes the employer. In practice, the secondment agreement is likely to address how the employers manage the secondee during the secondment.

When a secondee is seconded into Brazil, unless the work permit is for technical assistance, transfer of technology, professional training or maritime work (for which local Brazilian employment is prohibited), local employment in Brazil is required and the parties may agree that the Brazilian employment is the only employment during the secondment or have simultaneous employment agreements in Brazil (the host country) and in the home country.

If the host is in Brazil and the seconder is overseas, and the secondee is working under a work permit for technical assistance, the transfer of technology, the professional training and maritime work permits, the foreign seconder must conduct performance and pay reviews of the secondee because there will be no local Brazilian employment and, as a result, there is no authority for the host company to review performance or the capacity for it to make any payments.

Payments and Benefits

The seconder (be that a Brazilian entity or a foreign entity) can continue to make payments, and provide benefits, to the secondee when it remains the employer of the secondee.

If there are simultaneous employment agreements with the foreign seconder and the Brazilian host, the Brazilian host must either:

- Make the payments (and provide the appropriate benefits) to the secondee required under the laws of Brazil.
- Run a shadow payroll in Brazil to account for payments required under the laws of Brazil made by the foreign seconder in the calculation of all applicable employment payroll benefits and taxes, including paid holidays, one-third vacation bonus, 13th month salary and FGTS payments.

If the secondment entails local employment in Brazil or if the secondee holds a statutory officer visa, the foreign seconder can continue to pay the secondee and the Brazilian host company can reimburse the foreign seconder (via an invoice for expenses). However, where the seconder and the host are in the same corporate group, it will not be able to account for reimbursement payments between the seconder and the host as inter-company expenses.

The foreign payroll is invisible to the Brazilian authorities, but the host company in Brazil and the employee are required to pay taxes (social security and individual income tax) on a worldwide basis so (unless the host company makes payments to the secondee) a shadow payroll will need to be set up by the host in Brazil so that these payments can be made.

If the secondment does not allow local employment in Brazil (that is, in the case of technical assistance, transfer of technology, professional training and maritime work permits) the Brazilian host cannot reimburse the seconder for any associated costs. In this case, the Brazilian host pays the seconder's contractual fees only, and the seconder must factor in the secondee's salary and wages when pricing the services to be provided.

If the secondment is from Brazil, the Brazilian employment agreement remains in effect. Provisions for reimbursement from the foreign host company to the Brazilian seconder are valid but the monies reimbursed constitute revenues of the Brazilian company and will be subject to taxation as such.

Collective Bargaining

Brazilian employment law requires the employer, whether this is the host or seconder, to adjust salary according to the applicable collective bargaining agreement, which also determines the date for adjustment.

Leave

Under a Brazilian employment contract, paid holiday is regulated by statute and the employee must take their 30 days of leave in a block. The splitting of leave is permitted under written agreement in no more than three periods of leave, one of which being at least fourteen days long and the shortest being at least five days long.

Overtime

In Brazil, overtime is treated as salary. As such, the payment of overtime impacts on every employment benefit that is salary-based, for example, paid holiday, 13th month salary and FGTS, and will be taxed accordingly (that is, social security contributions and income tax).

Changes to Terms and Conditions of Employment

Continuity of Employment

Brazilian law does not require exclusive employment.

Therefore, if seconded to Brazil, the secondee's employment with the seconder can remain in full effect, running alongside the Brazilian employment (where local employment is required), and the secondee's rights will not be detrimentally affected.

The Brazilian employment agreement remains in effect during a secondment from Brazil.

Brazilian Seconder

When an employee is seconded from Brazil to another country, the secondee remains employed by the Brazilian seconder, and the host company must permit or facilitate the secondee to benefit from the minimum employment conditions provided under Brazilian labor law and the original Brazilian contract of employment. For example, allowing the secondee to take 30 days of paid holiday and adhering to any applicable working time limits.

The Brazilian seconder and secondee must execute a specific addendum to the contract of employment, stipulating the transitional benefits during the secondment period, including moving expenses, insurance and transfer allowance (*Law 7064/1982*), as well as voluntary benefits, such as housing, family benefits and so on.

Where any changes to the employment terms are made that are not mandated under Brazilian law, such changes will either:

- Depend on the employee's consent, where there are any changes of substance to the employment agreement.
- Not depend on the employee's consent, because they are either improvements that do not need consent (for instance, promotion), or organisational or operational changes that do not affect the substance of the agreement, such as moving offices within the same metropolitan region.

Regardless of whether or not the seconder and the host organisation are within the same corporate group, the immigration papers required and the contracts that must be executed between the parties do not differ. Either way, if a Brazilian organisation is the seconder, the Brazilian employment remains in effect.

Brazilian Host

Where the Brazilian host becomes the secondee's employer, the host company must grant the secondee the minimum conditions provided under the laws of Brazil. Brazilian laws do not apply to the employment terms between the secondee and the foreign seconder, or create any changes to them.

If Brazil is the host country, the requirement for and the content of the addendum depends on the type of secondment. If the secondment requires the secondee to obtain a work permit with a local employment contract, a contract of employment with the Brazilian host company is a pre-requisite to the issuing of the applicable work permit (that is, for types of work permit other than for technical assistance, transfer of technology, professional training and maritime work).

If the secondee will be a statutory officer of the Brazilian host, the parties must execute the corresponding corporate papers, including the secondee's appointment, in the company's bye-laws.

If the secondee is applying for a work permit for technical assistance, transfer of technology, professional training visa or maritime work, under Brazilian law no documentation between the seconder and the secondee is required.

The laws of Brazil do not require the Secondment Agreement (between the seconder and the host) to be in writing, so there is no specific format or content required.

Unless the secondee is applying for a technical assistance, transfer of technology, professional training or a maritime work permit, the secondee must become an employee of the host in Brazil and an employment agreement is required. The employment contract must indicate:

- The employee's name, CRNM (ID card for foreigners) number, taxpayer registration and social security number, which depend on the prior issuance of the work permit. In the employment agreement to be submitted to the immigration authorities as part of the documentation required for approval of the work permit the employment contract must

indicate the passport number. The parties can amend the contract to include the numbers of the employee's Brazilian documents.

- The employer's name, taxpayer registration and address.
- The place of work.
- The job title.
- Any other condition that the employer might deem to be necessary, for example, exemption from overtime for management positions or external work.

Confidentiality and Restrictive Covenants

Secondment Agreement

Non-compete

Non-compete restrictions are valid under certain conditions.

Restrictive covenants between the seconder and the host will not bind the employee. Under Brazilian law, if the host declines a job application by the secondee, it may be in breach of the secondee's rights. The secondee can then bring a claim through the courts requiring the host to indemnify the secondee for the loss of an opportunity.

Non-solicit

A non-solicitation covenant between the seconder and the host is only valid if indemnification is the sole remedy for breach. That is, the Brazilian courts will not grant injunctions to suspend or otherwise prevent a party from entering into agreements with the employee under such covenants.

Letter of Secondment or Employment Contract

Non-compete

Where there is a non-compete provision in the Brazilian employment contract, to be enforceable the employment agreement must include provision for the Brazilian employer to compensate the employee for a reasonable amount (considering the term, geographic extension and areas of business included in the non-compete obligation). If the employment contract is silent on this, the employee can either:

- Bring a court action to be released from the non-compete provision.
- Disregard the provision and either:
 - defend their position if the company sues; or
 - seek that the judge arbitrates on the issue of compensation.

Under the laws of Brazil, the duration of the non-compete restriction must be reasonable. Usually, up to 12 months is acceptable.

In addition, the covenant must not amount to a complete prohibition on working, as the Federal Constitution of Brazil secures the right of workers to exercise their profession.

Non-solicit

A non-solicitation covenant between the secondee and its employer is unlikely to be enforced by the Brazilian courts in light of the constitutional provision for freedom of profession and occupation.

Discrimination and Harassment

A secondee to Brazil benefits from protection against discrimination and harassment by the host or its employees.

Discrimination is generally prohibited under the Federal Constitution of Brazil. There are also laws regulating special circumstances, for instance, employees who have AIDS cannot be discriminated against, nor can employers ask for pregnancy tests.

Harassment is not specifically regulated. It is treated as a wrongdoing under the general rules on civil liability that are applicable to the employment agreement.

Liability

Liability for the Secondee's Acts or Omissions

Under the laws of Brazil, an employer is responsible for the professional acts of its employees, including negligent acts and wilful misconduct (*Civil Law*). The employer is not responsible for acts that are unrelated to the employment, even if performed during work hours.

Whether the Brazilian host company is liable for the acts of the secondee on a technical assistance, transfer of technology, professional training or maritime work permit will depend on the circumstances, and in particular, its degree of control over the professional services. However, the Brazilian host company is usually not liable as these types of work permit do not permit local employment.

Original or host employer

Liability depends on whether the seconder or the host is the secondee's employer. Both could be jointly liable if the secondee is simultaneously employed by the seconder and the host.

Indemnity Between Seconder and Host

Brazilian law recognises the concept of one party indemnifying the other for certain liabilities and exposures, and the contractual right of recourse under such an indemnity is available under Brazilian law. For example, subject to applicable law:

- The host indemnifying the seconder for any losses and exposures suffered by:
 - the secondee arising from the acts or omissions of the host, its employees, or agents; and

- a third party arising from any act or omission of the secondee.
- The seconder indemnifying the host for any claim from the secondee arising from its employment by the seconder or its termination, save for any claim from the secondee relating to any act or omission of the host, its employees, or agents.

However, if the secondee is working for the Brazilian host under a technical assistance agreement, it would be illogical for the host to waive the seconder's liability for the technical services provided.

Data Protection

The seconder and the host (either from Brazil or a foreign territory) must observe the new Brazilian General Personal Data Protection Law (Law 13,709/18 or LGPD), published on 14 August 2018 and in force since September 2020. The LGPD replicates key points of the General Data Protection Regulation (GDPR). The LGPD applies to any agent (individual, legal entity or public agency) who performs data processing, a term defined in the text as "any operation carried out with personal data", ranging from simple access to the data of employees, suppliers and consumers to storage, transfer, classification, erasure, or any other handling of such personal data. As such, the legislation will be relevant to several areas within companies, such as marketing, HR, IT, legal and compliance. The LGPD applies not only to companies established in Brazil but also to entities that process or collect data in the Brazilian territory and companies that aim to offer or supply goods and services to individuals located in Brazil.

The international transfer of data is authorised only in the circumstances set out in the LGPD, which include, but are not limited to:

- Transfer to countries that provide a level of protection deemed appropriate by the competent data protection authority.
- Transfer by means of standard contractual clauses, by which the data controller guarantees compliance with the law.

It should be noted that the LGPD does not apply to the processing of personal data originating outside Brazil, provided that both:

- The country of origin provides the same or similar levels of protection to the LGPD; and
- The personal data is not any of the following:
 - the subject of the communication;
 - processed in shared use with Brazilian processing agents; or
 - the subject of international data transfer with another country other than the country of origin.

(Article 4 (iv), LGPD)

The transfer of criminal records is problematic. In Brazil, the use of criminal background information is likely to be seen as discrimination, unless particular circumstances apply, for instance, where a person is applying for a job as an armed guard.

Intellectual Property

Intellectual property (IP) is a matter of public policy in Brazil.

The Brazilian employer, whether seconder or host, and the Brazilian host of an officer or director of the board with a work permit issued without an employment agreement, is the owner of work that is made for hire, meaning that the employer owns IP created within the scope of the employee's job. The employee and the employer share ownership of work produced during business hours (paid for by the employer) or using the employer's property (such as tools and equipment), or both, if the work was not within the scope of the job.

The employee is the sole proprietor of IP created outside business hours without the use of the employer's property.

The owner of intellectual property rights created by the secondee during the secondment depends on the provisions and scope of the secondment agreement between the seconder and the host. For example, in principle, if the IP created is a development of a pre-existing patent or copyright, the Brazilian host employer will be the proprietor provided that the creation is a new concept or idea that comes about as part of the local employment agreement. However, the foreign seconder will be the proprietor if the creation is part of services provided by the seconder to the Brazilian host company, particularly if the secondment is under a technical services agreement (that is, when the secondee is not employed by the Brazilian host entity).

Tax and Social Security Considerations

Specific tax and social security advice should be sought before entering into an international secondment arrangement, the information contained in this note is not intended to be exhaustive.

Permanent Establishment Risk

It is important for a seconder to consider the risk that sending a secondee overseas may create a permanent establishment tax risk for the seconder in the foreign host territory.

Where obligations arise for the seconder in the host country, the seconder needs to be very careful not to create a permanent establishment in the host country such that it gives rise to a local tax presence which could potentially result in their profits being taxed in that country as well as in their home country.

Service Tax Issues

If the Brazilian company is the host, payments to a foreign company would have the character of services fees, which in general attract the following taxation:

- 25% withholding income tax (WHT).
- 2% to 5% local services tax (*Imposto sobre Serviços* (ISS)).
- 9.25% social security contributions (contributions to the social integration programme (*Contribuição ao Programa de Integração Social*) (PIS) and contributions to the financing of social security (*Contribuição para o Financiamento da Seguridade Social*) (COFINS)).

WHT and ISS are withholding taxes deducted from services fees, while PIS and COFINS are payable by the Brazilian importer of services (this is an import type tax).

The total cost for the Brazilian host entity is equal to the services fees (including WHT and ISS deducted, if the seconder passes the cost of these on to the host) plus the PIS/COFINS. In addition, a 0.38% tax on financial transactions (IOF) is imposed on the foreign exchange (conversion of Brazilian currency into foreign currency for the purposes of the payment).

However, if a secondment is for technical services or transfer of technology, the WHT due is 15% with an additional 10% contribution due for intervention in the economic domain (*Contribuição de Intervenção no Domínio Econômico*) (CIDE). Note that CIDE is also payable by the importer of the services (similar to PIS/COFINS), and thus is not deducted from the invoiced services fees.

If the Brazilian company is the seconder, the receipt of funds also qualifies as services fees. Due to the services being provided abroad (in the country where the host is domiciled), the transaction is considered to be an export of services, and is exempt from ISS, PIS/COFINS and IOF. The Brazilian entity is only subject to taxation if it derives a profit from the secondment, which is taxed at the general 34% corporate income tax rate.

Social Security Contributions

Secondee

The following apply to a secondee employed by a Brazilian host entity (or an officer or director of the board of the host entity, without an employment contract):

Tax. Income tax is payable up to 27.5%.

Social security. Social security payments must be made of between 7.5% to 14% of salary, up to a maximum of BRL 713.10 (this amount is readjusted every year, based on the amount of the minimum salary).

Seconder

Tax. If the seconder is a foreign entity, no tax is payable in Brazil (however, see *Service Tax Issues*). If the seconder is in Brazil, the seconder must withhold the secondee's income tax and pay the monies to the federal revenue service.

Social security. If the seconder is a foreign entity, no social security benefits are payable. If the seconder is in Brazil, contributions between 27% and 28.5% are payable (because the Brazilian employment agreement remains in effect).

Host

Tax. If the host is a foreign entity, none. If the host is in Brazil and there is local employment, it must withhold the secondee's income tax.

Social security. If the host is a foreign entity, none. If the host is in Brazil and there is local employment, contributions between 27% and 28.5% are payable.

Termination of Secondment

Termination of the Secondment Agreement

Subject to the Secondment Agreement including the appropriate provision, the Secondment Agreement can be terminated by the seconder or host with immediate effect without notice (or potentially by making a payment in lieu of notice) in the event of any of the following:

- The termination of the secondee's employment contract.

- The other party being guilty of serious or repeated breaches of the terms of the secondment agreement.
- The other party becomes insolvent or makes any arrangement with its creditors.

Termination of Employment

In the context of there being a Brazilian employment agreement in effect, the following apply.

Secondee

The Brazilian employment agreement can be terminated by the secondee without notice for just cause as a result of a serious breach by the employer (constructive termination), that is either the seconder or the host, as the case may be. Just cause consists of a serious breach of the law or the contract, for example, where the employer defaults on a salary payment.

If the secondee comes to Brazil on a technical assistance, transfer of technology, professional training or a maritime work permit, Brazilian labor laws do not apply (see *Mandatory Laws of Brazil*).

The secondee is not a party to the Secondment Agreement, therefore it is unlikely the secondee will have any ability to terminate the Secondment Agreement.

Employer (Seconder or Host)

The Brazilian employment agreement can be terminated without notice for just cause as a result of a serious breach of the law or the contract by the employee, for example, fraud, or a repetition of minor breaches if there is an escalation in disciplinary actions (warning and suspension), for example, in the case of negligence.

The seconder or host can terminate the Secondment Agreement for just cause (for example, where there is a default in the payment of secondment fees), but it will not automatically affect the local employment agreement with the secondee, which the applicable party will need to terminate without cause (see *Return to the Seconder*). As a result, there is a need to include indemnifying provisions in the Secondment Agreement in relation to any claims arising from the employment or the termination of the secondee.

Under the labor laws of Brazil, retirement does not cause the summary termination of employment. Termination of the employment due to retirement only occurs if this is requested by the employee.

In any event, Brazilian law does not apply to contracts of employment between the secondee and a foreign company (that is, an employer outside of Brazil), regardless of whether the company is the seconder or the host.

Termination of the Secondment by a Foreign Host

In the event the secondee is seconded from Brazil to a foreign host, and the foreign host terminates the Secondment Agreement, the Brazilian seconder can only terminate the secondee's Brazilian employment in accordance with the labor laws of Brazil.

For example, if the secondee has special protection from involuntary dismissal (that is, the Brazilian Labor Code grants the employee job security, for example pregnant employees or employees elected as union representatives) the Brazilian employer can only terminate the secondee's employment if the secondee's misconduct constitutes a breach of their duties towards the Brazilian seconder, for example, where the secondee commits fraud. Conversely, the Brazilian seconder does not have just cause to terminate the Brazilian employment agreement based on a provision of law or contract exclusive to the foreign jurisdiction, for example, the consumption of alcohol outside of business hours.

Return to the Seconder

An employee seconded out from Brazil remains employed by the Brazilian seconder and the seconder must repatriate the secondee when the secondment ends (*Law 7064/1982*).

The Brazilian seconder can terminate the employment without cause immediately after repatriation (with notice, or indemnification in lieu of notice), unless the employee has statutory protection against dismissal, for example, in the case of pregnancy.

Substitute Secondee

This is a matter of civil contract law, as there is no labor regulation on international secondment agreements between two companies. It may be possible under the terms of the Secondment Agreement for a substitute secondee, however to work in Brazil a new immigration process still needs to be followed for any substitute who is a foreign national.

Drafting Tips

General

The laws of Brazil do not require the Secondment Agreement to be in writing, so there is no specific format or content required.

An employee seconded out from Brazil remains employed by the Brazilian employer throughout the period of secondment, and the seconder must execute a specific addendum to the employment agreement (see *Brazilian Seconder*).

If seconded to a Brazilian host, unless the secondee will be providing services where local employment is not permitted, the secondee will be employed by the Brazilian host and shall require a Brazilian employment agreement (see *Brazilian Host*).

Language

The Secondment Agreement and Letter of Secondment can be executed in any language that is comprehensible to both parties. However, the Brazilian court will require a sworn translation of the Secondment Agreement, or Letter of Secondment, into Portuguese in the event of litigation.

Governing Law and Jurisdiction

The Secondment Agreement is not subject to Brazilian labor law. Under local civil law, the parties can choose a foreign venue and applicable laws. However, if the agreement will be performed in Brazil, the Brazilian courts will have concurrent jurisdiction with the contractual venue and the judge can apply Brazilian law by analogy.

However, if the employee is seconded out from Brazil, they will remain employed by the Brazilian seconder and subject to Brazilian labor laws (although, mandatory laws of the host country may apply). Also, if seconded into Brazil, and employed by the Brazilian host, that employment will be subject to the labor laws of Brazil.

Execution and Other Formalities

Execution formalities

No particular legal form is required for the Secondment Agreement.

No particular formalities are required regarding the contracts of employment or secondment services, provided that they are not intrinsically illegal, for example, in violation of the immigration rules and work permits. There is one exception, however. If the parties apply for a work permit under a technology transfer agreement, the contract must observe specific aspects of intellectual property law.

Registration formalities

The employment agreement may need to be filed with the immigration authorities unless the secondee is working in Brazil on a technical assistance, transfer of technology, professional training or a maritime work permit, in which case no employment relationship in Brazil exists.

If the Secondment Agreement involves a technology transfer agreement, the parties must file this agreement with the Brazilian Patent and Trademark Office (*Instituto Nacional da Propriedade Industrial* (INPI)).

END OF DOCUMENT
