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# DOING BUSINESS IN LATIN AMERICA AND THE CARIBBEAN

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# DOING BUSINESS IN LATIN AMERICA AND THE CARIBBEAN

PREPARED BY MERITAS LAWYERS
IN LATIN AMERICA AND THE CARIBBEAN

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## DOING BUSINESS IN LATIN AMERICA AND THE CARIBBEAN

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The following currency notations are used in this book.

| | | | |
|---|---|---|---|
| ARS | Argentinean Peso | DOP | Dominican Republic Peso |
| BSD | Bahamian Dollar | GTQ | Guatemalan Quetzal |
| BRR | Brazilian Cruzeiro Real | HNL | Honduran Lempira |
| KYD | Cayman Dollar | MXN | Mexican New Peso |
| COP | Colombian Peso | NIO | Nicaraguan Córdoba |
| CRC | Costa Rican Colón | PYG | Paraguayan Guarani |
| USD | United States Dollar | UYU | Uruguayan Peso |

*Please be aware that the information on legal, tax and other matters contained in this booklet is merely descriptive and therefore not exhaustive. As a result of changes in legislation and regulations as well as new interpretations of those currently existing, the situations as described in this publication are subject to change. Meritas cannot, and does not, guarantee the accuracy or the completeness of information given, nor the application and execution of laws as stated.*

With more than 196 million inhabitants and over 8.5 million square kilometers, Brazil is the largest country and economy in Latin America (its GNP in 2011 was roughly USD2.07 trillion). It is a federative republic, consisting of the union of states, municipalities and the federal district. Moreover, the 1988 Federal Constitution provides for a presidential type of government with three independent branches: the Executive, the Legislature and the Judicial.

Brazil follows a codified system of law. The Federal Constitution heads its legal system and provides for the fundamental rights of the citizen, sets out Brazil's political and administrative organization, defines the roles of the above-mentioned branches and legislates on tax, socio-economic and economic policies, civil and commercial law, employment relations and criminal law.

## FOREIGN INVESTMENT

Foreign investment has always played an important role in Brazil's development. Economic stability, its enormous consumer market and the strengthening of political institutions have increasingly attracted foreign capital.

Brazil welcomes foreign investments in all areas, yet Brazilian legislation does not permit a foreign company to directly function in the country. Therefore, it is necessary for foreign companies to open a branch or incorporate a subsidiary in Brazil. In order to open a branch, a foreign company is required to obtain authorization from the federal government, which requests proof of the company's existence in its home country. After obtaining authorization, the foreign company should then file its corporate documents with the competent Commercial Registry.

The Brazilian Central Bank (BACEN) is charged with registering, following up, and monitoring foreign investments. The Ministry of Finance, through the Federal Inland Revenue, focuses on taxation of these foreign investments. The registration of foreign capital with BACEN is mandatory and guarantees equal treatment for foreign and national capital. Trademarks, patents, machinery and other equipment, as well as financial assets, shall qualify as foreign capital for Brazilian law purposes, provided that such foreign capital belongs to individuals or corporate entities domiciled abroad.

BACEN has a modern system for the registration of foreign investments, the Declaratory Electronic Registration of Direct Investments, which provides that direct foreign investment shall be registered electronically on the online

information system of BACEN (SISBACEN). Capital investment, repatriation and profit remittance related to foreign investments duly registered with BACEN may be effected without prior authorization from BACEN. Also, foreign loan transactions and some specific transactions such as the issuance of securities abroad and loans relating to export transactions, can generally be registered through the Electronic Declaration Register of Financial Operations Registration Module – RDE-ROF, also with no need for prior authorization from BACEN.

Foreign investors have the same rights as national investors. The remittance of profits and the repatriation of reinvestments are based on the amount of the foreign investment previously registered at BACEN. Remittances of the funds abroad are prohibited when the original funds were not previously registered with BACEN upon entrance into Brazil.

## IMMIGRATION

Brazilian law contemplates several types of visas: transit, tourist, temporary, permanent, courtesy, official and diplomatic. Courtesy, official and diplomatic visas have special rules and are not dealt with in this publication.

## TRANSIT VISAS

Transit visas are granted to foreigners passing through Brazil en route to another country of destination. This situation occurs when the connection is long and the passenger does not remain restricted to the transit area of the airport.

Transit visas may be obtained at the nearest Brazilian consulate by presenting one's passport and connecting flight ticket. The visa will only be valid for the period strictly necessary to continue the trip.

## TOURIST VISAS

Tourist visas fall into two basic categories, depending on bilateral reciprocity agreements between Brazil and other countries. For countries that demand a visa, a visa stamp must be granted in the passenger's passport before departure. For countries that do not require a visa, passengers need only go through customs at seaport or border point of arrival.

Since reciprocity agreements may change, it is advisable to check with a Brazilian consulate before traveling.

Like transit visas, one may apply for a tourist visa at the nearest Brazilian consulate. In general, tourist visas are granted for a term of 90 days and are renewable for another 90-day period, with a total maximum stay of 180 days per year.

## TEMPORARY BUSINESS TRAVEL VISAS

Temporary business travel visas grant their holders authorization to carry on business activities in Brazil provided that such holders are not remunerated by entities domiciled in Brazil.

This type of visa may also be obtained by applying to the nearest Brazilian consulate and is usually granted for a term of 90 days, except for Australian, Canadian, New Zealand and American citizens, for whom visas of up to five years may be granted based on governmental treaties. Therefore, as occurs with tourist visas, business visas can also be waived by Brazil in accordance with international treaties.

## TEMPORARY WORK VISAS

Temporary work visas authorize their holders to work directly for a Brazilian company under an employment contract, subject to Brazilian Labor Law.

The Brazilian Immigration Authorities usually only grant temporary visas under employment agreements when (i) the foreigner is required to perform administrative, financial and managerial activities in Brazil; (ii) the salaries paid to foreigners do not exceed one-third of the total payroll; and (iii) the number of foreign employees does not exceed one-third of the company's total number of employees, although such criteria are challengeable in the light of the Brazilian Federal Constitution. The respective temporary work visa shall be valid for up to two years, renewable once for the same period of validity.

Technical assistance services may also be rendered to a Brazilian company by a foreigner holding an appropriate temporary work visa provided that the Brazilian company contracts a foreign legal entity for the rendering of services under the terms of a Technology, Transfer or Technical Assistance Agreement. While in Brazil, the foreigner remains an employee of the foreign company and receives his/her salary exclusively abroad. The respective temporary work visa shall be valid for up to one year, renewable once for the same period of validity.

The application for a temporary work visa should first be submitted to the Immigration Division of the Ministry of Labor. Upon approval, the Ministry of Labor sends the documents to the Ministry of Foreign Affairs, which in turn indicates the nearest Brazilian consulate abroad (where the applicant has been living for over one year or was born). The dependents and/or relatives of the main applicant are entitled to the same type of visa, but no permission to work in Brazil is granted.

## PERMANENT VISAS

Permanent visas are usually granted to foreigners being transferred to Brazil to occupy positions of officers/managers or directors of companies installed in Brazil. To qualify for such visa, the applicant must be employed outside Brazil by the parent company of the Brazilian affiliate. Moreover, to be entitled to such visa, the government requires a minimum investment of BRR600,000 in the employing company per permanent visa application. However, this investment can be reduced to BRR150,000 if the Brazilian affiliate assumes the commitment to generate at least 10 direct jobs over a maximum period of two years.

Permanent visas may also be granted to foreign investors who contribute to the Brazilian economy. The requirements for such application are: (i) the foreigner must be a quota holder/shareholder and administrator of a Brazilian company; (ii) an investment must be made equivalent to at least BRR150,000; and (iii) a descriptive briefing of the activities to be developed by the Brazilian company must be submitted to the competent authority as described below.

The application for permanent visas should be initially submitted to the Immigration Division of the Ministry of Labor; upon approval being obtained, the Ministry of Labor forwards the application to the Ministry of Foreign Affairs, which indicates the nearest Brazilian consulate abroad (where the applicant has been living for over one year or was born).

## MERCOSUL VISAS

Mercosul visas permit legal residence in Brazil for two years and are issued according to Normative Instruction DNRC N° 111/10. The Instruction applies to citizens of Mercosul countries who desire residence in Brazil and submit the necessary documentation to the appropriate Brazilian consular authority, or who currently reside in Brazil and submit the appropriate documentation requesting a change in residency status to the Brazilian immigration services.

The latter category of citizens can apply for residency in lieu of any process they used to initially immigrate into Brazil. Sanctions or other severe fines will be exempted when said citizen applies for a Mercosul visa. However, Mercosul citizens who immigrated into Brazil illegally are ineligible to apply for a Mercosul visa under Normative Instruction N° 111/10 while their illegal residency is in effect. In order to be eligible these Mercosul citizens must return to their country of origin and submit their requests for a Mercosul visa to the appropriate Brazilian consular authority.

These two-year Mercosul visas can be converted into permanent residency in Brazil so long as citizens submit a request for permanent residency and other necessary documentation to the appropriate authorities 90 days before expiration of the visa. If a permanent visa is not solicited and if, upon expiration

of the two year Mercosul visa the citizen does not report to the appropriate immigration authorities, then said citizen will become subject to Brazilian immigration law. So long as Mercosul visas are active, their possessors shall be afforded all legal rights and privileges enjoyed by Brazilian nationals.

## ENVIRONMENTAL LAW

Federal Law N° 6.938 of 1981 (the National Environmental Policy Law) was the first step in organizing an environmental protection system in Brazil. Such law laid the basis for regulation of the three spheres of environmental liability: civil, administrative and criminal.

Subsequently, Law N° 7.347 of 1985 introduced a new and effective judicial remedy for recovery of environmental damages: public civil action. This law provides a new kind of lawsuit similar to a class action, in which the federal union, states, municipalities, public prosecutors, NGOs or public or private entities are entitled to file a complaint to correct any event that could constitute a threat to the environment. In Brazil, reparation for environmental damage can be claimed by means of an individual lawsuit filed by the party suffering the damage or through public civil actions.

In addition, the 1988 Constitution devoted an entire chapter (Chapter VI: Article 225) to the environment. The caption of Article 225 establishes that "all people are entitled to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, it being the duty of both the Government and the community to defend and preserve it for present and future generations."

Finally, the Environmental Crimes Law N° 9.605 of 1998 and its regulatory Decree N° 6.514 of 2008 complete the basic regulatory framework for more rigorous action concerning environmental protection in Brazil. Such statute establishes a series of administrative infractions and crimes committed against the environment as well as their corresponding sanctions.

Environmental crimes are divided into:

- Crimes against fauna or flora
- Crimes against urban order and cultural sites
- Pollution crimes
- Crimes against environmental administration (operating without a license, for instance)

Environmental administrative offenses are provided for under Chapter VI of the Environmental Crimes Law, which, in general terms, states that any action or omission violating environmental protection laws will be considered an

administrative offense (Article 70). Administrative sanctions, such as fines ranging from BRR50 to BRR50 million, may be imposed by the environmental protection agencies whenever environmental damage is perceived or when the company is operating without the relevant licenses, among other violations.

Brazilian authorities also addressed several specific areas of concern and certain sectors and activities (the oil and gas industry, genetically modified organisms, toxic fertilizers, biodiversity, etc.) are today subject to specific regulations in addition to general regulations.

## LIABILITY FOR DAMAGES

Brazil has a global environmental liability system, composed of civil, criminal and administrative liability. It is possible for an environmental offender to incur all three types of liability concurrently.

Under the National Environmental Policy Law, Brazil adopted a strict liability system. Paragraph 1, Article 14, of the National Environmental Policy Law provides for strict liability with respect to damages caused to the environment: "... the polluter is obliged, irrespective of the existence of negligence, to indemnify or repair the damages caused to the environment and to third parties, caused by its activities ... "

In other words, liability for environmental damage can be imposed even in the absence of fault on the part of the offender. Moreover, each party related to the incident that generated the damage is responsible for it and is liable for the entirety of the injury done to the environment. However, the paying party has the right of recourse against the other liable parties.

The Brazilian Constitution (Article 225, paragraph 3) establishes that activities deemed harmful to the environment will subject the offenders, whether individual people or corporate entities, to the penalties (administrative fines) and criminal sanctions (Law 9.605/98), without affecting the obligation to repair the damages caused (tort liability).

In essence, two elements are required to establish environmental liability under Brazilian law:

- The existence of damages
- A connection between the actions/activities and the damages incurred

Moreover, the National Environmental Policy Law also defines a polluter as the person and/or entity directly or indirectly involved in the environmental damage. This is a very broad concept and authorizes, practically, any party involved in the activity/event causing environmental accident to be held liable for

the entire amount of the damages (notwithstanding their right to proportionally recover their losses from the other responsible party).

The above-mentioned interpretation is widely adopted by the Public Prosecution Service in the judicial sphere, in order to seek civil indemnification and/or recuperation of the damaged environment through the filing of a public civil action.

Brazilian law also provides for a general obligation to restore, repair and recover the environment. Basically, the polluter may be held liable to compensate for the damages caused (monetary damages), if such damages are of a magnitude that recovery/restoration (clean-up measures, for instance) are not possible. Failure to comply with an order to repair environmental damage or to cease polluting activities is punishable by a daily fine. Any monetary damages that may be payable are directed to a federal or state fund dedicated to the recovery of other damaged areas.

There is no statute of limitations for civil actions involving environmental matters, which means that they can be brought at any time. Furthermore, there is no cap on the amount of indemnification.

## GOVERNMENT RESPONSIBILITIES

All governmental levels have concurrent authority to define environmental standards, rules and legislation, and grant environmental permits. Certain areas depend exclusively on federal permission, such as:

- Projects that cross national borders
- Projects within Brazilian territorial waters
- Projects located in two or more Brazilian states

## GOVERNMENTAL BODIES

The Ministry of the Environment is responsible for planning, coordinating, supervising and controlling national policy and governmental standards established for environmental control. The Brazilian Institute for the Environment and Natural Resources (IBAMA) is responsible for overseeing, executing and enforcing environmental policies. IBAMA has agencies throughout the 26 Brazilian states.

The National Environmental Council (CONAMA) drafts the basic guidelines for environmental protection (standards for air and water quality and noise levels) and regulations for the preparation of environmental impact assessments and reports. CONAMA is made up of representatives from the federal, state and local agencies, as well as from the private sector and nongovernmental organizations. All agencies work within the Brazilian Environmental System (SISNAMA).

## ACTIVITIES SUBJECT TO LICENSING

In general, any activity, project (including modifications or expansions) or venture, whether it uses natural resources or not, and which can be considered as current or potential polluters, or that may cause, in any way, impact/damage to the environment, must obtain a license. Environmental licensing occurs in three separate and consecutive stages, that is to say, each phase of the project requires a specific license issued by the competent environmental authority, in the following manner:

- Preliminary License (LP) - Granted during the planning phase (basic guidelines to be followed during the next licensing stages)
- Installation License (LI) - Authorizes the implementation of the project
- Operating License (LO) - Authorizes the operation of the project

The environmental agency will determine if an environmental study is required to obtain a license. The Environmental Impact Study (EIA) and the Environmental Impact Report (RIMA) are the most important studies to be filed, though they are not the only ones that may be required to secure the licenses. These studies must be done prior to the application for any license.

Generally, all the licenses establish certain conditions that must be complied with and indicate an expiration date that, if necessary, may be renewed.

## PUNISHMENT FOR ENVIRONMENTAL DAMAGES

The National Environmental Policy Law establishes the following sanctions to whoever contributes to the illegal activities provided by such law, whether the offender is an individual or a corporate entity:

- Fines (the most common may reach up to BRR50 million)
- Deprivation of rights
- Imprisonment
- Others

## WATER RESOURCES

Under Article 12 of Law N° 9.433/97, Brazilian Federal Legislation establishes that the right to use water resources, including the derivation or capture of an amount of water existing in a body of water or the extraction of water from a subterranean aquifer (whether for final consumption or as a raw material in the manufacturing process), as well as the addition to a body of water of sewage and other liquid or gaseous residues, treated or untreated, for the purpose of the dilution, transportation or final disposal of such residue, and finally the utilization of hydroelectric power, require authorization from the relevant authority (State Water Resources Secretary or the National Water Agency ANA).

## GENETIC RESOURCES

Provisional Measure N° 2.186-16/01 (Provisional Measure) regulates access to Brazilian genetic heritage (*patrimônio genético*) for the purposes of scientific research, technological development or bio-prospecting activities.

## THE PROVISIONAL MEASURE

- Establishes that access to genetic resources and/or to traditional knowledge in Brazil should only be carried out with the prior consent of the federal government (Article 2), and
- Creates the Genetic Heritage Management Council (CGEN) as the authority entrusted to regulate and authorize such access.

## FOREST LEGISLATION

After a highly controversial legislative procedure, Federal Law N° 12.615 was enacted on 30 April 2012, and brought important innovations on the following provisions: (i) the economical use of the Legal Reserve; (ii) the new concept of Areas of Permanent Protection; (iii) the Rural-Environmental Registry; and (iv) the Programs for Environmental Legalization.

According to the law, every rural property must have a preservation area of native forest, which is called the Legal Reserve. The extent of such area depends on the location of the property, but this varies from 20% to 80% of the total area of the property. After the enactment of Law N° 12.615, it became possible to economically explore the LRs, subject to the authorization of the competent environmental agency.

As for the Areas of Permanent Protection, these are defined as rural or urban regions that are specially protected due to their natural resources, such as water resources, landscape, geological stability and biodiversity.

It is important to stress that if APP or LR areas are damaged, the owners of the properties where they are located are strictly liable to repair them, even if they have not caused the damage.

Moreover, the Rural-Environmental Registry is a federally owned, satellite image, database designed to facilitate visual confirmation of degraded areas. Today, the LRs are added to the satellite images and filed with the State Environmental Agency, thus improving governmental inspections of the preservation areas. Such registry is mandatory for all rural properties.

Finally, the Programs for Environmental Legalization will be implemented by the federal government within two years with the purpose of regulating irregular possessions and properties, especially with regard to APPs and LRs. A federal decree provides for an amnesty on previous fines and other penalties, from before 2008, for any owner who adheres to the programs.

# ANTITRUST

The Brazilian Antitrust Law (Law N° 12.529) is based upon the 1988 Federal Constitution and is guided by the principles of free enterprise, free competition and consumer protection.

Law N° 12.529 entered into effect on 29 May 2012 and introduced many changes in the Brazilian antitrust system. The Administrative Council for Economic Defense—CADE—is now the sole authority responsible for reviewing mergers and acquisitions and investigating anticompetitive practices.

CADE is composed of three bodies, which operate within the same structure:

- Administrative Tribunal, which delivers judgments on all cases under the Antitrust Law;
- General Superintendence (GS), which took over the functions previously developed by the Secretariat for Economic Law (SDE) and the Secretariat for Economic Monitoring (SEAE) on both merger control and anticompetitive behavior investigations; and
- Department of Economic Studies (DEE), which supports both the Tribunal and the GS on complex economic matters.

Other than structural matters, the new Brazilian Antitrust Law brings the pre-merger notification system into the Brazilian antitrust arena and sets forth different thresholds for the notification of concentration acts.

## MERGER CONTROL

The acts and agreements which may lead to the creation of any form of market concentration, including mergers, the direct or indirect acquisition of controlling interests or assets, the incorporation of companies, and the execution of a cooperation agreement, consortium or joint venture, must be submitted to CADE for review and approval prior to the closing in case they cumulatively meet the following thresholds:

- The economic group of at least one of the parties has, during the previous financial year, recorded gross revenue deriving from invoices issued exclusively in the Brazilian territory, equal to or exceeding BRR750 million; and
- The economic group of at least one of the parties involved in the transaction has, during the previous financial year, recorded gross revenue deriving from invoices issued exclusively in Brazilian territory, equal to or exceeding BRR75 million.

With regard to the procedure for filing with CADE:

- The parties must file the transaction after the execution of the first binding agreement (determining what can be considered a binding document is quite imprecise and requires a case-by-case analysis);
- The notifying parties must pay a filing fee in the amount of BRR45,000;
- Most of the transactions filed are cleared within 30 days of the filing date. This is not applicable to complex cases, which will take longer to be cleared. In any event, according to the Brazilian Antitrust Law, all the transactions must be reviewed and cleared by CADE within 330 days;
- Approximately 94.5% of transactions filed with CADE are cleared without any restrictions (years 2011 and 2012); and
- CADE's decisions are subject to judicial review.

Failure to submit a transaction or noncompliance with the filing deadlines may be penalized by a fine ranging from approximately BRR60,000 to BRR60 million.

It is important to note that the Brazilian Antitrust Law is applicable to acts performed and agreements entered into outside of Brazil in case their effects should somehow have an impact on the Brazilian market (for example, when the parties to the transaction have subsidiaries or affiliated companies in Brazil).

## ANTITRUST VIOLATIONS

CADE is also the authority responsible for the review and punishment of anticompetitive behavior.

Among others, the following practices may be considered as violations to the economic order and thus be punished by CADE:

- Fixing prices and conditions for sale in collusion with competitors;
- Adopting uniform business practices in collusion with competitors;
- Limiting or restraining new companies' access to the market; and
- Selling products below costs (predatory pricing).

Anticompetitive behavior, besides triggering the imposition of administrative fines on both the company and its management, triggers civil and criminal liabilities that may be avoided by entering into leniency agreements with the competition authorities.

# CONSUMER RIGHTS

Law N° 8.078/1990 enacted the Consumer Protection Code to enforce the rights of the consumer assured in Article 5 of the constitution.

The Consumer Protection Code defines the concept of consumer/client as being the end user of products and services. The supplier of goods or services is defined, among other aspects, as a person/entity engaged in a profitable and professional activity the target of which is the consumer. Within the scope of the consumer relationship, the Consumer Protection Code assures various principles and prerogatives to the consumer, and also imposes several obligations on the supplier of products or services.

Among the rights ensured to consumers are: health and safety protection for consumers with respect to products and services purchased; and access to specific information referring to merchandise, goods and services in general, with the prohibition of misleading advertising and control of contracts containing "abusive" clauses, including those that may lead the consumer to assume obligations that are excessively burdensome.

Moreover, the above mentioned law also contains specific provisions regarding the reparation of damages deriving from illegal acts, breach of contract and violation of public rules or rules referring to consumer rights. Furthermore, consumer rights may also be protected by consumer agencies or associations, and also by the Public Prosecution Service.

This law has also shifted the burden of proof away from the unsatisfied consumer to the supplier of goods and services. Accordingly, the seller of products or provider of services must produce evidence confirming that their merchandise or services complies with the norms and standards required by law, that any possible damages incurred by the consumer were not caused by their products or services, and also that there is no direct connection between the damages incurred and the product or service purchased.

Therefore, sellers and service providers are bound to strict liability for the product sold and services rendered. Accordingly, once the damage is ascertained and the nexus between the damage and the product or service is confirmed, the obligation to indemnify arises, irrespective of whether the seller or provider has acted with or without malicious intent, notwithstanding the personal liability of professionals, which should be subject to the verification of guilt. Consumer protection legislation also provides for the joint and several liabilities of all parties involved in the consumption chain.

On the other hand, the Consumer Protection Code provides for situations that do not imply liability: the service provider or seller of a product will not be held liable if the consumer or a third party is found exclusively liable for the damages.

The seller will be held jointly and severally liable whenever it is not possible to identify the manufacturer or producer. Other aspects implemented by this law are:

- The adoption of a legal concept generally known as "piercing of the corporate veil" (originating from the American and European legal systems where shareholders may be held liable for debts of their companies and have their personal assets attached);
- Advertising rules that are particularly strict and must be observed in accordance with the principles established in the Consumer Protection Code, forbidding the dissemination of abusive or misleading advertising, offers or publicity;
- Express prohibition of abusive contract clauses and also abusive practices perpetrated by product suppliers or service providers.

These principles serve to oblige advertising companies to render their services in a manner consistent with the law to protect the interests of consumers and assure fair competition.

The Brazilian Consumer Protection Code is compatible with similar regulations on the subject matter in other countries. Brazilian courts have been careful to enforce this law in order for it to strictly adhere to its main objective of protecting consumer interests and fostering fair competition between the players in the supply market.

In order for Brazilian industry to expand and generally attract new investments to the consumer market, the protection offered by the Consumer Code promotes the integration between consumers and suppliers of products or services in a safer manner and simultaneously places them in tune with possible joint projects in Brazil and abroad so as to encourage the sustainable development of mass consumption. Understanding consumer rights in different jurisdictions will certainly contribute to the expansion and growth of business dynamics within the Brazilian territory in a more expeditious, profitable and legally protected manner.

## ARBITRATION

In 1996, the Brazilian Arbitration Act (Law N° 9.307/1996) was enacted, establishing a modern legal framework based on the arbitration laws of developed countries as well as on the UNCITRAL Model Law on International Commercial Arbitration. This Act grants foreign investors additional security when entering into contracts with Brazilian domiciled parties containing clauses that submit any arising conflicts to arbitration.

Brazil has also ratified the 1958 New York Treaty on the recognition and enforcement of foreign arbitration awards. With the ratification of this treaty, Brazil clearly joins the group of countries that have included arbitration in their legal systems, and have acknowledged arbitration as an effective means of dispute resolution.

Brazil has ratified several other arbitration treaties, such as the Inter-American Convention on International Commercial Arbitration and the Mercosul Treaty on International Commercial Arbitration Agreements.

All legal instruments for the development and application of arbitration have been enacted in Brazil. The agreements to arbitrate contained in domestic and international instruments are recognized under Brazilian law and the awards rendered by arbitration tribunals may be enforced in Brazil, provided that they were adjudicated in Brazil or were submitted for ratification to the Brazilian Supreme Court of Justice (STJ) for awards rendered abroad.

## BUSINESS ENTITIES

The new Civil Code (Law N° 10.406/02), effective as of January 2003, changed the rules governing all companies established in Brazil, except for corporations (*sociedades por ações*). In accordance with the Civil Code, companies incorporated in Brazil will be classified either as a *sociedade empresária* (business company) or as a *sociedade simples* (nonbusiness company). A business company conducts organized economic activity aimed at the production and circulation of goods or services. All corporate documents, including those establishing the company, must be filed with the Commercial Registry (*Junta Comercial*). An entity conducting any other activity (including intellectual, scientific, literary or artistic activities) is considered a nonbusiness company. All corporate documents of a nonbusiness company, including those establishing the company, must be filed with the Civil Registry for Corporate Entities (*Registro Civil das Pessoas Jurídicas*). It must be noted, however, that since the above mentioned concepts are vague, many misunderstandings may arise when classifying a company.

Prior to January 2003, service companies were classified as *sociedades civis* and their corporate documents were filed with the Civil Registry for Corporate Entities. Since this type of classification no longer exists, such companies will have to convert into business companies, and therefore must file their corporate documents with the Commercial Registry. Business companies are most commonly incorporated as limited liability companies (*sociedades limitadas*) or corporations (*sociedades por ações*), the latter always considered to be "business

companies" regardless of their corporate objectives. Also, a new type of business company with a single individual as shareholder, known as the individual limited liability company (EIRELI), has been available in Brazil since January 2012.

## LIMITED LIABILITY COMPANIES *(SOCIEDADES LIMITADAS OR LTDAS)*

Limited liability companies are now regulated by the Civil Code. Formerly, they were regulated by Decree N° 3.708/19. The company's Articles of Association (*Contrato Social*) may contemplate the subsidiary application of either the provisions of the Civil Code regarding nonbusiness entities or of the Law of Corporations (Law N° 6.404/76 and its amendments).

The principal aspects of a limited liability company are as follows:

- It is incorporated by at least two quotaholders executing its Articles of Association, filed with the Commercial Registry or with the Civil Registry for Corporate Entities in the state in which its head offices are located. A shareholder of a limited liability company is called a quotaholder since the capital of the company is divided into quotas as opposed to shares.
- A husband and wife married under the universal community regime (past, present and future property) (*regime da comunhão universal*) or compulsory separate property regime (*regime da separação obrigatória*) cannot be quotaholders of the same company.
- The Articles of Association establish the company's corporate capital, but no minimum amount is required (except for certain types of companies such as banks and insurance companies).
- The corporate capital is divided into quotas.
- Each quota usually confers upon its holder the right to one vote at quotaholders' meetings; however, the Civil Code does not address the possibility of having nonvoting quotas, known as preferred quotas.
- Quotaholders are in principle not liable for the debts and other obligations of the company; however, they are jointly and severally liable for the total payment of the subscribed capital.
- Quotaholders may pay their respective equity interests with assets (but not services), which are required to be appraised.
- The company's capital may be increased by a quotaholder resolution. A right of first refusal is granted to existing quotaholders so that all of them may subscribe to the quotas to be created as a result of the increase.

- Quotas may be assigned to third parties, depending on the provisions of the Articles of Association. Likewise, it is possible to bar heirs and successors from becoming quotaholders, depending on the provisions of the Articles of Association.
- Only individuals, quotaholders or not, residing in Brazil may be appointed as directors (*administradores*) of limited liability companies. Foreigners wishing to occupy management positions must first obtain a permanent visa, in accordance with minimum legal requirements. Please refer to the Immigration section of this publication for additional information on permanent visas.
- The company may have one or more directors (*administradores*).
- Quotaholders determine the directors' remuneration.
- An audit committee (*conselho fiscal*) may be created depending on the provisions of the Articles of Association, which shall be composed of at least three members, be they quotaholders or not. The audit committee is one of the corporations' boards predicted by Law N° 6.404/76, the main function of which is to audit the corporation's management, and it may or may not, depending on the provisions of the bylaws, accumulate attributions of the audit committee predicted in the Sarbanes-Oxley Act, 2002.
- Law N° 11.638/07 mandates that large-sized companies—those companies, or groups of companies under the same control, with total assets in their preceding final year in excess of BRRl240 million or gross revenues of over BRRl300 million, regardless of corporate nature (thus encompassing limited liability companies of this size)—are subject to the conditions of Law N° 6.407/76 with regard to bookkeeping, the drafting of financial statements and the demand for bookkeeping assessments performed by an independent auditor registered with the Brazilian Securities and Exchange Commission, or the CVM. This includes publishing such financial statements in the official gazette and a widely distributed newspaper.
- Limited liability companies with more than 10 quotaholders must mandatorily approve matters under their responsibility at a quotaholders' meeting, which must observe specific Civil Code requirements regarding call notices, and the opening and passing of resolutions. Companies with fewer than 10 quotaholders may hold quotaholders' meetings, subject to less bureaucratic procedures, in accordance with the provisions of their Articles of Association.

- There are specific quorums for approving certain matters. For example, amendments to the Articles of Association and/or amalgamations, mergers or dissolution of the company require an affirmative vote of quotaholders representing at least 75% of the company's capital. The quorum required for appointing directors (*administradores*) may be unanimity, two-thirds of the capital or 50% plus one quota, depending on whether or not the capital has been fully paid up, and if the appointment of the director (*administrador*) has been included in the Articles of Association or in a separate instrument.
- The approval, by quotaholders, of the financial statements and directors' accounts is required once a year, within four months following the end of the financial year.
- Quotaholders may withdraw from the company whenever there is an amendment to the Articles of Association, an amalgamation or merger.
- A limited liability company may not issue securities, such as debentures and commercial papers, and does not have access to capital markets.

## **CORPORATIONS** *(SOCIEDADES POR AÇÕES OR S.A.)*

Brazilian corporations are governed by Law N° 6.404/76, which has been amended several times over the last few decades. The new Civil Code did not affect the rules governing this type of company.

Brazilian corporations may be publicly held or closed, depending on whether or not they are registered with the Brazilian Securities Commission (CVM) and their shares are allowed to be traded on stock exchanges or, as the case may be, the over-the-counter market.

Publicly held corporations are subject to stricter rules than closed corporations, not only because of the provisions of Law N° 6.404/76 (as subsequently amended), but also because of audits and a number of rules issued by the CVM, usually dubbed "Directives" (*Instruções*) and "Regulations" (*Deliberações*).

### Closed Corporations

- These are generally established by a General Meeting of Incorporation, in which all shares that make up part of the company's capital are subscribed, the bylaws are approved and the members of the board of directors (*Conselho de Administração*), if any, or the members of the Executive Board (*Diretoria*) are appointed.
- There must be at least two shareholders except when the corporation is a wholly owned subsidiary (*subsidiária integral*).

- The minutes of the General Meeting of Incorporation shall be filed with the Commercial Registry of the state in which the head offices of the corporation are located.
- The bylaws shall establish the corporation's capital, but no minimum amount is required (except corporations operating in certain sectors, such as banks and insurance companies). However, if the corporation has a board of directors, it is allowed to increase the corporation's capital up to a pre-established "authorized capital" limit as provided in the bylaws.
- The corporation's capital is divided into shares, with or without par value.
- Shares may be ordinary or preferred, but preferred shares may not exceed 50% of the corporation's capital.
- Ordinary and preferred shares may be divided into different classes, depending on the rights thereby conferred.
- Generally, each share confers one vote upon the shareholder. However, the bylaws may determine that the preferred shares have no voting rights or that this right be restricted to certain matters.
- Preferred shares confer the preemptive right to receive dividends and/or reimbursement of capital if the corporation is dissolved and may, in accordance with the bylaws, confer fixed or minimum dividends, and/or a dividend of 10% above the dividend paid to the ordinary shares.
- Shareholders are not liable for debts or other obligations of the corporation. However, they are liable for paying up the shares for which they subscribed.
- Shareholders may pay their respective equity interests with assets (but not services), which are required to be appraised. Such appraisal must be approved at a shareholders' meeting.
- A corporation's capital may be increased by a shareholder's resolution. A right of first refusal is granted to existing shareholders so that all of them may subscribe the shares to be issued as a result of the increase.
- Shares may be assigned to third parties, depending on the provisions of the corporation's bylaws. The corporation may only acquire their shares for the purposes of holding them as treasury shares, cancel or resell them, in special circumstances provided by law, such as redemption.
- Corporations must have an executive board, comprised of at least two officers, who must be individuals, be they shareholders or not. The officers must reside in Brazil. Foreigners who wish to

occupy such management positions are required to obtain a permanent visa, in accordance with minimum legal requirements. If the corporation has a board of directors, only one-third of its members can be appointed as officers.

- A corporation may have a board of directors, depending on the provisions of its bylaws, residing or not in Brazil. If the appointed members do not reside in Brazil, they must grant a power of attorney to a Brazilian resident who may then receive service of process and represent such member in Brazil. Brazilian law contemplates mechanisms for ensuring that minority shareholders and holders of preferred shares may appoint some of the members of the board of directors.
- Shareholders will determine directors' remuneration.
- Corporations must have an audit committee (*conselho fiscal*) on a permanent or nonpermanent basis. However, its operation is optional. The audit committee must be comprised of no less than three and no more than five members, be they shareholders or not. Shareholders representing 10% of the voting shares or 5% of nonvoting shares may request that the audit committee be convened. As is the case with the board of directors, Brazilian law contemplates mechanisms for ensuring that minority shareholders and holders of preferred shares may appoint some of the members of the audit committee. The audit committee is one of the corporations' boards predicted by Law N° 6.404/76, whose main function is to audit the management of the corporation, and it may or may not, depending on the provisions of the bylaws, accumulate attributions of the audit committee predicted in the Sarbanes-Oxley Act, 2002.
- Corporations are required to hold one annual shareholders' meeting (*Assembléia Geral Ordinária*) within four months following the closing of the fiscal year, which shall pass resolutions regarding the corporation's financial statements and officers' accounts, utilization of net profits and distribution of dividends, election of directors and the audit committee, whenever applicable.
- Any other matters requiring shareholder approval must be resolved at an extraordinary shareholders' meeting (*Assembléia Geral Extraordinária*).
- Shareholders may be represented at meetings by means of duly appointed proxies, who must be shareholders, attorneys or directors of the corporation. In this case, the power of attorney must have a limited term of one year.

- Law N° 6.404/76 (as subsequently amended) establishes the terms and procedures for the calling and opening of a general meeting and the approval of resolutions. The corporation's bylaws must comply with the rules provided therein.
- In general, matters submitted for resolution at a duly opened general meeting may be approved by shareholders representing 50% of the voting capital plus one voting share. Applicable legislation provides for a higher quorum for some specific matters. The corporation's bylaws may determine a quorum higher than that established by law.
- Shareholders dissenting from some of the matters provided by law may withdraw from the corporation, upon reimbursement of the value of their shares—such value to be determined based on the attributable net worth or economic value, depending on the provisions contained in the corporation's bylaws.
- The corporation's financial statements must be published and filed with the Commercial Registry except for closed corporations with fewer than 20 shareholders and net worth less than BRRl1 million, in which case these corporations must only file their statements with the Commercial Registry.
- Brazilian corporations may privately issue securities as provided for in Brazilian law, including debentures and warrants.

## Publicly Held Corporations

Provisions applicable to closed corporations are also applicable to publicly held corporations. Nonetheless, it is worth noting the following:

- Publicly held corporations may be incorporated by means of an initial public offering. In order for this to occur, a company must first obtain a publicly held corporation registration statement and the issuance of shares registration statement from the CVM. Closed corporations may become publicly held corporations by obtaining such registration statements. CVM Directive N° 480/09 and its respective amendments govern this matter.
- Publicly held corporations must pay an annual inspection fee to the CVM (Law N° 7.940/89).
- In order for the corporation to cancel its publicly held corporation registration statement with the CVM, it must effect a public offering to buy all outstanding shares in the market, except for the shares held by the majority shareholder. In addition to the norms contained in Law N° 6.404/76 and its amendments, CVM Directive N° 361/02 and its amendments also govern this matter.

- Common shares issued by publicly held corporations may not be divided into classes.
- Article 17 of Law N° 6.404/76 establishes that preferred shares issued by publicly held corporations, or shares having limited voting rights, may only be traded in the capital market if they confer at least one of the following rights:
  - Dividend of at least 25% of the net income of the period, with shareholders having preference to receive such dividends in a total amount equal to at least 3% of the attributable value of the share;
  - Dividend of at least 10% more than the dividends attributed to common shares;
  - Tag along, as guaranteed to common shares.
- Publicly held corporations may effect public or private offerings of any security negotiated in capital markets. However, there are a number of norms issued by the CVM regarding this matter.
- The corporation's purchase of its own shares is subject to CVM Directives N°10/80 and its amendments, in addition to the provision of Law N° 6.404/76 and its amendments, as previously stated.
- As per Article 254-A of Law N° 6.404/76, the sale of the majority interest in the publicly held corporation may only be made if a public offering is carried out to acquire all of the outstanding voting shares. The price per share must be more than or equal to 80% of the price of the shares comprising the controlling block. This matter is also dictated by CVM Directive N° 361/02 and its amendments.
- Financial statements and all accounting issues relating thereto are subject to CVM control, by means of a number of Directives and Regulations. Therefore, the CVM has the power to determine a correction of financial statements whenever applicable; furthermore, it may require that the publicly held corporation publish its financial statement again after such correction is made.
- As per Directive CVM N° 480/09, publicly held corporations must send their financial information to the CVM every quarter, by means of a form called the Quarterly Information (ITR), which is made available to all the shareholders of the company and to the market. Publicly held corporations must also send the Financial Statement Form (DFP) to the CVM. In addition, publicly held corporations must send the Reference Form (*Formulário de Referência*, FR) to the CVM. These documents (ITR, DFP and FR) must be prepared in accordance with CVM rules.

The Financial Statements Form (DFP) must be: (i) filed with financial data statements prepared in accordance with accounting rules applicable to the issuer; and (ii) delivered: (a) by a domestic issuer, within three months of the end of the year or on the date of submission of financial statements, whichever occurs first; or (b) by a foreign issuer, within four months of the end of the year or on the date of submission of financial statements, whichever occurs first.

The Reference Form shall reflect the provisions of Annex 24 of CVM Directive N° 480/09, having been updated annually, should be delivered within five months of the end of the year, without prejudice to its resubmission on the date of application for registration of a public offering of securities.

- Publicly held corporations are required to engage an independent auditor, duly registered with the CVM, subject to CVM Directive N° 308/99, as amended by CVM Directive 509/11.
- The CVM may postpone the opening of any shareholders' meeting whenever it perceives that the shareholders were not duly informed of the agenda to be discussed at such meeting.
- Disclosing information and trading shares of publicly held corporations are subject to CVM Directive N° 400/03 and amendments of CVM Directive N° 482/10, which requires that all such corporations have their information disclosure policy approved in advance by the CVM.
- Increasing the corporate capital of a publicly held corporation and the public offering of shares, as well as any distribution of securities in the primary and secondary markets, are subject to CVM Directive N° 400/03 and its amendments (CVM Directive Nrs. 429/06, 442/06, 472/08, 482/10, 488/10, 507/11 and 528/12), which contain a number of requirements that must be complied with when carrying out this type of transaction.
- The amalgamation, merger or split of publicly held corporations must comply with all of the provisions of Directive Nrs. 319/99 and respective amendments (Directive Nrs. 320/99 and 349/01) that establish the minimum requirements vis-à-vis information to be disclosed to the shareholders on these operations, disclosure deadlines, appraisals, pricing shares in order to calculate the share swap value, etc. The conditions of the amalgamation, merger or split must be communicated by the company to the CVM within 15 days prior to the date of the general meeting that will deliberate on the issue.

- The penalties that publicly held corporations, their officers, members of the audit committee and shareholders are subject to are provided in Law N° 6.385/76 and its amendments and may include warnings, fines, and suspension or cancellation of rights, according to the seriousness of the violation. The CVM regulates the procedures that parties will undergo when applying such penalties. The CVM is entitled to communicate to the Public Prosecutor (*Ministério Público*) any evidence of a crime recognized as having occurred in the capital market.

As regards corporate governance, the CVM issued a booklet in June 2002 called "CVM Recommendations on Corporate Governance," in which the CVM establishes practices that it believes should be observed by publicly held corporations, their officers and controlling shareholders. Some of the rules applicable to the corporations and their shareholders are contemplated in CVM Directive 358/02 and the amendments to CVM Directive Nrs. 449/07 and 369/02.

In some cases, these practices do not conform to the provisions of Law N° 6.404/76, while in others, it enhances the requirements of said law. For example, the CVM recommends that if the majority equity interest is sold, a public offering for the purchase of the outstanding shares be carried out for the same price to be paid for the shares that comprise the controlling block, and that the offering be made to all shareholders. However, Law N° 6.404/76 determines that the price should be at least 80% and applicable solely to common shares.

Clearly, since these practices do not fall under the CVM's sphere of control, they are merely recommendations, and cannot, under any circumstance, be enforced by the CVM.

## Individual Limited Liability Company (EIRELI)

Law N° 12.441/2011, effective January 2012, introduced a new corporate figure into the Brazilian Civil Code, namely the Individual Limited Liability Company or *Empresa Individual de Responsabilidade Limitada* (EIRELI), as it is called in Portuguese. Such companies have limited liability (just like a limited liability company) and a single shareholder, who must be an individual, whether Brazilian or foreign.

The following requirements should be satisfied to incorporate an EIRELI:

- The corporate capital of the EIRELI must be fully paid up on the date of the filing of the corporate acts for registration with the Commercial Registry, and set at an amount equivalent to at least 100 times the highest minimum salary in force in Brazil.

- The company name must adopt the abbreviation "EIRELI."
- The sole individual shareholder can only figure as the owner of just one EIRELI.

Law N° 12.441/2011 also contemplates the possibility of converting an existing limited liability company into an EIRELI with the concentration of quotas of such limited liability company into a single owner.

# TAXATION

## FEDERAL TAXES

The following taxes may only be levied by the federal government: import tax; export tax; income tax; tax on industrialized goods (i.e., excise tax); tax on financial transactions; tax on ownership of rural land; and tax on large fortunes, social contributions, and contributions of intervention in the economic domain.

## INDIVIDUAL INCOME TAX (IRPF)

Individuals resident in Brazil are subject to IRPF on their worldwide income. IRPF should be calculated and paid on a monthly basis, and the monthly payments are considered as advances of the IRPF due at the end of each fiscal year. The amount due at the end of each fiscal year, calculated over annual taxable income and after the deduction of monthly IRPF payments (i.e., tax credits), should be paid on the last business day of April of the subsequent year. By such date, an individual is also required to file the annual income tax return.

The IRPF due monthly is calculated based on the following sliding scale (data for fiscal year 2013).

| **Monthly Income** | **Rate** |
|---|---|
| Up to BRR1,710.78 | Exempt |
| From BRR1,710.79 to BRR2,563.91 | 7.5% |
| From BRR2,563.92 to BRR3,418.59 | 15.0% |
| From BRR3,418.60 to BRR4,271.59 | 22.5% |
| More than BRR4,271.59 | 27.5% |

Any income tax paid abroad may be offset as a foreign tax credit against the IRPF that is due on a monthly or annual basis, limited to the amount of IRPF due in Brazil over the same income or earnings obtained abroad. No carry-forward to subsequent years is permitted for such foreign tax credit.

Capital gains incurred by individuals resident in Brazil are taxed separately from other income, subject to income tax at the rate of 15%.

An expatriate working in Brazil is considered a local resident:

- On the date of arrival in Brazil, if the expatriate holds a permanent visa;
- On the date of arrival in Brazil, if the expatriate holds a temporary visa and entered into a labor agreement with a Brazilian company (i.e., the expatriate is an employee of a Brazilian company and his employment agreement is governed by Brazilian labor laws);
- After 183 days present in Brazil within a period of 12 months, continuously or not, when an expatriate holds a temporary visa without having entered into an employment agreement with a Brazilian company.

## FEDERAL CORPORATE TAXES

### Corporate Income Tax (IRPJ) and Social Contribution on Net Profits (CSLL)

IRPJ is a federal tax charged at the rate of 15% over taxable income. There is also a surtax of 10% on annual taxable income exceeding BRR240,000 (BRR20,000 per month). CSLL is also a federal tax levied at the rate of 9% on taxable income.

Taxable income is gross income minus permitted deductions. Gross income encompasses active (operational) and passive (nonoperational, such as interest, capital gains, etc.) income. It encompasses onshore and offshore income as well (i.e., taxation on a worldwide basis). Taxable income is still adjusted by additions and exclusions determined by legislation (e.g., tax loss carry-forwards). Usually, the basis of IRPJ and CSLL is very similar, but there are some specific differences.

Companies may elect to calculate their taxable income under either the actual profit method (known as *lucro real*) or the presumed profit method (known as *lucro presumido*) every fiscal year. Under the actual profits method, companies determine taxable income by effectively subtracting all permitted deductions from gross income. Under the presumed profits method, companies calculate taxable income by applying a percentage set forth by law on operational income and adding its product to nonoperational income. The law establishes such percentage, which varies depending on the activity conducted by the company. For instance, a percentage of 32% should be multiplied by gross income generated by the rendering of services in general. Companies that carry out activities that fall within categories to which different percentages apply should use the respective percentage over the portion of gross income related to each activity.

Certain companies are not permitted to adopt the presumed profit method, these include companies with gross income exceeding BRR48 million, that have foreign subsidiaries, banks, etc.

The presumed profit method tends to be more advantageous if the actual profit margin of the activities of the Brazilian company is higher than the percentage set by law.

Ordinary and necessary expenses are deductible in the calculation of IRPJ and CSLL based on the actual profit method. The law also permits companies to deduct interest on equity paid to identified shareholders as a financial expense, to the extent that such interest on equity:

- Does not exceed the amount resulting from the multiplication of the annual TJLP (Long Term Interest Rate), which is an interest rate calculated quarterly by the Central Bank of Brazil on the net worth of the company (discounting the revaluation reserve) pro rata die, and
- Is equal to or lower than 50% of the greater of
  - The current fiscal year profits (before interest on equity deduction)
  - Accumulated profits and profit reserves

Amounts paid or credited to shareholders as interest on capital are subject to withholding tax.

In the actual profit method, locally incurred tax losses may be indefinitely carried forward, but they are only able to offset taxable income up to 30% in a given fiscal year. Therefore, even having accumulated tax losses exceeding their taxable income, Brazilian companies are required to pay IRPJ and CSLL, since only 30% of such income may be offset against such accumulated tax losses. Tax losses incurred by foreign branches or subsidiaries cannot be offset against income generated locally.

Dividends based on profits ascertained as from 1 January 1996, paid out or credited by companies, are no longer subject to income tax, whether paid out to individuals or to companies resident in Brazil or abroad.

International transactions between related companies (including companies located in tax havens) are subject to transfer pricing rules in Brazil, for both imports and exports. Interest practiced in cross-border loans between related companies is also subject to transfer pricing rules. Interest on such loans should not exceed the LIBOR rate for six-month U.S. dollar deposits plus a spread of 3%; otherwise the excess is not deductible by the Brazilian borrower. On the other hand, the same amount shall be accounted as a taxable income by the Brazilian lender.

For purposes of IRPJ and CSLL ascertainment, the thin capitalization rules establish two different limits, based on the debt to equity ratio, for the deduction of interest paid to related parties or to residents in tax havens or in regions with privileged tax regimes.

In summary, the interest paid to related parties is deductible up to the limit of the debt-to-equity ratio of 2:1. The limit to interest paid to residents in tax havens or regions with a privileged tax regime is 0.5:1.

There are fiscal incentives for the performance of certain activities (e.g., technology) or regions (e.g., north and northeast of Brazil).

## Taxes on Gross Income - PIS and COFINS

PIS and COFINS are federal social contributions levied on a company's gross income. Some revenues, such as dividends and financial revenues, are not currently subject to PIS and COFINS. Such taxes are imposed under two systems: cumulative (*cumulativo*) and noncumulative (*não-cumulativo*). The law lists which companies are subject to each regime. In general, companies that determine their taxable income under the actual profit method are subject to the noncumulative PIS and COFINS while those that elect the presumed profit method are under the cumulative system. There are special cases in which companies may be subject to both regimes.

Under the cumulative system, PIS and COFINS are levied at the rates of 0.65% and 3% respectively.

Under the noncumulative system, the PIS and COFINS burden corresponds to:

- The product of 9.25% and its gross income
- Less the PIS and COFINS credits granted to it

In order to calculate the PIS and COFINS credits, the 9.25% should be applied to certain costs and expenses that companies have with local corporate entities. The law expressly provides that PIS and COFINS credits are only granted to costs and expenses derived, for example, from:

- Acquisition of goods for resale
- Purchase of goods and services used in the manufacturing of products destined for sale or in rendering services (inputs), including fuel
- Lease of buildings and equipment from corporate entities, which should be used in the taxpayer's activities
- Depreciation of fixed assets
- Consumption of energy in the facilities of the taxpayer

There are certain limitations for the use of credits. For instance, in general, no credit is allowed regarding financial expenses. If companies are not able to absorb all PIS and COFINS credits in a certain month, they are entitled to carry them forward to offset future PIS and COFINS debts or even, in certain cases, to offset against other federal taxes debts.

PIS and COFINS are also levied on imports of goods and services at a general rate of 9.25%. Different rates are applied on the importation of specific goods set forth by the law.

## Withholding Tax (WHT)

Withholding taxes are imposed on payments made from residents in Brazil to other residents and from residents to nonresidents. Payment of certain service fees from a resident in Brazil to another resident triggers certain withholding taxes at the combined rate of 6.15% (IRRF, COFINS, PIS and CSLL), which are considered as advances of IRPJ, CSLL, PIS and COFINS due in the period. It is necessary to ascertain the nature of the service rendered to confirm whether such withholding taxes are applicable.

This table indicates withholding taxes applicable on payments to nonresidents.

| Type of Income | Rate Applicable to Ordinary Jurisdiction | Rate Applicable to Tax Haven |
|---|---|---|
| Dividends | 0% | 0% |
| Interest on equity | 15% | 25% |
| Interest | 15% | 25% |
| Technical Services Fees | 15% | 25% |
| Service Fees | 15% | 25% |
| Royalties | 15% | 25% |
| Capital Gains | 15% | 25% |
| Financial Leasing Expenses | 15% | 15% |
| Operational Leasing Expenses | 15% | 15% |

With regard to financial leasing expenses, it is important to mention that if the lease agreement clearly specifies, per remittance to be executed, the portion of the expense that is related to the amortization of the leased asset and the respective financial costs, such portion related to the amortization of the asset may be excluded from the basis of the IRRF.

With respect to capital gains, the law recently imposed a withholding tax on the sale of assets located in Brazil by a nonresident to another nonresident. Normative Instruction N° 1.037/10, as amended by Normative Instruction N° 1.045/10 issued by the Brazilian IRS, contains the current tax haven blacklist as

well as privileged tax regimes, under Article 24-A of Law N° 9.430/96, by the Brazilian IRS.

Brazil has entered into tax treaties to avoid double taxation with several countries. The tax treaties ratified by Brazil follow the main features of the OECD model, even though Brazil is not an OECD member. Tax treaties with Brazil may be used for reducing the tax burden of international structures and optimizing foreign tax credits upon the use of clauses related to tax sparing and matching credits. Brazil has not yet ratified a tax treaty with the United States of America or the United Kingdom (two of its principal trading partners), but there are cases of reciprocal tax treatment between Brazil and the USA, the UK and Germany that could occasionally serve as means to avoid double taxation in specific situations.

Withholding tax is triggered on income deriving from funds managed by financial institutions at rates that vary depending on the characteristics of the funds.

## Contribution of Intervention in the Economic Domain (CIDE)

***CIDE Royalties***

CIDE is a local contribution on royalties and technical service fees remitted to nonresidents. It is levied at a rate of 10%. It is due by Brazilian companies that pay royalties and technical service fees to nonresidents. Royalties deriving from the licensing of software are currently exempted from CIDE Royalties.

***CIDE Oil and Gas***

This is levied on import and local transactions involving oil and its derivatives, gas and other products at specific rates.

## Excise Tax – Federal VAT (IPI)

IPI is a value-added tax imposed on each phase of the manufacturing process. Its rates vary depending on the importance of the manufactured item. The fiscal classification of an item allows one to identify the applicable IPI rate. The IPI basis is the price of the manufactured item.

For IPI purposes, an industrial activity means any operation which modifies the nature, operation, finishing, presentation or purpose of a product, or which improves a product for consumption, such as its conversion, processing, packaging, repackaging or restoration.

IPI is also imposed on the importation of goods. The rate varies according to the product's fiscal classification.

## Tax on Financial Transactions (IOF)

IOF is levied on foreign currency exchange, financing agreements, insurance and on transactions involving securities at different rates.

- IOF on foreign currency exchange may be imposed at the rate of 25%, but in general, remittances to or from abroad are currently subject to the rate of 0.38%. Cross-border loans with a minimum average term lower than or equal to 320 days (or loans with a higher average term, but with a put or call option exercisable over such 320-day period), are currently subject to a 6.38% rate. Cross-border loans with a longer term are subject to IOF at the rate of 0%.

- IOF on securities may be imposed on any transaction involving bonds and securities. Currently, most transactions are subject to IOF at the rate of 0%, except certain specific cases (i.e., fixed yield transactions with a maturity period lower than 30 days or when withdrawal occurs before maturity—IOF at rates ranging from 0% to 1%). However, the IOF rate may be increased at any time to a maximum rate of 1.5% per day, by means of a decision of the Minister of Finance.

- IOF on insurance is charged at different rates, depending, in general, on the nature of the insurance and of the insured.

- IOF on credit is imposed at different rates. On credit agreements where a lump sum is transferred to the borrower for a predefined period, IOF is charged at a daily rate of 0.00411% limited to a rate of 1.88%. Loan agreements with nondefined periods are subject to the same rate, although said limitation is not applicable.

## Import Tax (II)

Import tax is a federal tax levied on the import of goods, and is imposed upon customs clearance of the imported goods. Import tax is calculated on the customs value of the imported good. The rate may vary according to the fiscal classification of the product.

## Social Security Contribution on Payroll

Social security contributions are levied on payroll and salaries, to be paid, respectively, by companies and beneficiaries. There are also social contributions due to other agencies (SESC, SENAE, etc.).

For beneficiaries, the calculation basis is the gross salary, limited to BRR3,467.40, and the applicable rate varies from 8% to 11%, depending on the amount received.

For companies, the social contribution is imposed on the total payroll, and the rate may reach approximately 28%, depending on the company's activities.

## Tax on Ownership of Rural Land (ITR)

The tax on ownership of rural land is payable by individuals and companies. Its basis is the value of the land but takes into account other factors.

## Tax on Large Fortunes

The federal government has not yet introduced a tax on large fortunes.

## State on Federal District Taxes

***State VAT (ICMS)***

ICMS is the main state tax and is imposed on transactions that imply the legal transfer of goods, and on interstate and intermunicipal transport services as well as on communications services. ICMS is also levied on imports.

ICMS is a value-added tax which allows the taxpayer to book tax credits from the ICMS paid on the purchase of raw materials, intermediate products, packaging materials, and goods to be resold.

ICMS rates vary depending on the state, and the nature of the goods or services. In general, in the state of São Paulo, the rate is 18%. Interstate transactions are subject to reduced ICMS rates (4%, 7% or 12%, depending on the state of destination and on the nature of the transaction).

## Inheritance and Gifts/Donations Tax (ITCMD)

ITCMD is a state tax imposed on inheritance, gift/donation or succession, applicable on transfer of real estate and other assets which do not involve payment or other consideration. The ITCMD rate varies from state to state. In São Paulo, as a general rule, the rate is 4%, but certain exemptions are granted for transfers up to a certain amount.

## Tax on Ownership of Motor Vehicles (IPVA)

This state tax is levied on the ownership of motor vehicles, based on the market value of the item. Its rate varies according to each state and the type of vehicle.

## Municipal Taxes

***Services Tax (ISS)***

ISS is levied on the rendering of certain services listed in a national law. Each municipality issues its own legislation for ISS, but it cannot add any additional service not listed by the national law. ISS is also levied on imports of services.

The taxable event of ISS is the performance of a listed service by an individual or a company. The basis for ISS is the price of the service.

In accordance with national legislation, the minimum ISS tax rate is 2% and the maximum is 5%, which varies depending on the municipality and the service rendered. The most common rate in the largest Brazilian cities is 5% (e.g., for most services in the cities of São Paulo and Rio de Janeiro).

### Tax on Ownership of Urban Land (IPTU)

IPTU is a municipal tax applicable on the ownership, control or possession of urban land or buildings.

### Real Property Transfer Tax (ITBI)

ITBI is a municipal tax imposed on the sale, purchase or assignment of real estate or related rights, provided that such transaction is not a gift.

The rate may vary according to the city. In the city of São Paulo, the rate of such tax is 2%, calculated on the market value as established by the City Council. This tax must be paid when executing the deed of transfer.

## INTELLECTUAL (INDUSTRIAL) PROPERTY

Brazil is a signatory of almost all the main international intellectual property treaties (such as the Paris, Bern and Rome Conventions, and TRIPS, among others). Intellectual property rights are regulated by federal laws in Brazil (the main ones being Federal Law N° 9.279, enacted in 1996—Industrial Property Law, which also regulates unfair competition; Federal Law N° 9.610 , enacted in 1998—Copyright Law; and Federal Law N° 9.609, enacted in 1998—Software Law).

The Brazilian Patent and Trademark Office (*Instituto Nacional da Propriedade Industrial*—INPI) is the governmental agency in charge of protecting industrial property rights, as well as registering licensing and technology transfer agreements. The registration of patents, industrial designs and trademarks is performed by the INPI.

### PATENTS

Patents are granted for inventions and utility models (partial or full improvements on physical objects that are of practical use and have industrial application). A Brazilian patent grants its holder the power to prevent third parties from producing, using, selling or importing patented products.

### Application Requirements

- Novelty
- Industrial use or application
- Inventive step or inventiveness

### Terms of Effectiveness

"First to File" Rule – Ownership of a certain patent is assured to the person who first registered it with the INPI. Patents may be granted for periods of:

- 20 years for inventions
- 15 years for utility models

Once the patent expires, the invention enters the public domain.

### Compulsory Licensing

According to Brazilian law, a nonexclusive, compulsory license may be issued on these occasions:

- National emergency or public interest
- Abuse of patent rights
- Abuse of economic power
- Failure to exploit the patent in the Brazilian market within three years of its granting or failure to adequately serve the Brazilian market

### Timing

The issuance of a patent in Brazil takes approximately seven to eight years.

## INDUSTRIAL DESIGNS

Industrial designs are legally defined as "the plastic ornamental shape of an object or the ornamental combination of lines and colors that may be applied to a product, establishing a new and original visual result in its external configuration that must be used in industrial production."

An industrial design must not belong to the state of the art and must be original (so defined as "those that have a distinctive visual configuration from previous objects"). The law specifically foresees that the combination of known elements may be original if it results in an original combination. The law excludes from protection any works deemed purely artistic, with no industrial application.

Industrial designs are not subjected to substantial examination with the INPI. They are granted for a 10-year period, extendable for three additional five-year periods.

## TRADEMARKS

Under Brazilian law, trademarks must be "visually perceptive." Brazil allows protection of word, design, word and design and tridimensional signs as (i) product; (ii) service; (iii) certification; and/or (iv) collective trademarks. Geographical indications are also protectable in Brazil.

The holder of a foreign trademark may claim priority of protection of this trademark in Brazil within six months following its filing in a country member of the Paris Convention.

### Application Requirements

There are clear legal limitations with regard to the object of the trademark protection. For example, colors alone are not subject to protection, unless they are combined in a peculiar and distinctive manner, while letters, dates, expressions or signs used in advertising or the titles of literary works, among many others, are generally excluded from protection as a trademark, which does not mean that they may not be afforded other types of protection.

The registration of a sign is not dependent upon the actual use of the trademark at the moment of filing or to obtain the certificate of registration, but there is a forfeiture system in which the holder of the trademark can forfeit its rights if he/she does not use the trademark in Brazil within five years of its registration or interrupts its use for more than five years.

### Terms of Effectiveness

The Brazilian trademark system is based on the "first to file" jurisdiction for trademark protection, so as a rule trademark rights are only obtained by means of valid trademark registration. Under this system the priority of use is given to the applicant that was the first to file a request for trademark protection with the INPI.

Brazil adopts the International NICE classification for service and product trademarks to assess classes of registration. Each application may only correspond to one class of products/services and the protection of the trademark limited to its class of registration.

Both rules indicated above (first to file and class protection) are waived for the protection of well-known (protected independently of registration in Brazil) and famous trademarks (once registered in Brazil its protection is extended to all classes of products/services). The protection of well-known and famous trademarks is subject to a case-by-case analysis.

### Timing

The issuance of a trademark in Brazil takes approximately three to four years.

## COPYRIGHTS

The Brazilian Copyright Law is mostly based on the French *'droit d'auteur'* system and establishes wide protection to authors under moral and patrimonial rights. The scope of the law is clearly shown in the definition of protected intellectual works: they are "the creations of the spirit expressed in any way and fixed in any support, tangible or intangible, known or that may be invented in

the future." Copyright protection is independent of registration and lasts for 70 years after the death of the author.

It must be noted that moral rights have a considerable impact on copyright negotiations and contracts in Brazil, since legally these rights cannot be waived or assigned.

Brazil currently does not have any legal statutes providing safe harbor for Internet providers with regard to copyrights infringements, but there are considerable discussions and proposals in Congress to address this matter.

## Software

The Brazilian Software Law awards computer programs the same level of protection (with few exceptions) of copyrights. Therefore, the protection of software in Brazil does not derive from registration and lasts for 50 years following January 1 of the year subsequent to its release or creation.

Registration of Software with the INPI is performed to guarantee priority of use and authorship. Registrations of source code and other technical documents relating to the software may be kept confidential. Violation of software rights is subject to penalties ranging from monetary fines to imprisonment.

## Domain Names

In Brazil, domain names are registered with the Brazilian Internet Steering Committee (CGI.br, created by Interministerial Ordinance N° 147 and Registro.br is the official entity responsible for domain name registrations). Domain names are granted on a first-to-file basis; nonetheless, there are regulations against registering domain names with proprietary words or trademarks.

For a Brazilian company, the registration of domain names in Brazil basically requires a copy of the Ministry of Finance's Corporate Taxpayer Registry (CNPJ) and certain technical information. However, for foreign companies that wish to register a domain name, certain specific rules and restrictions may apply. Such companies must be represented at the Registry by a local agent or attorney, with the power to register, cancel and transfer title to the domain name as well as change the designation of the individual who represents the company in the registration authority.

## Technology Transfer

As a general rule, agreements relating to industrial property rights (such as technology transfer and technical assistance agreements) must be approved by and registered with the INPI for the following purposes: (i) remittance of royalties abroad; (ii) deductibility of payments for Brazilian tax purposes; and (iii) enforcement of the obligations before third parties.

It must be noted that technology in Brazil (that is not protected by a patent) is "transferred" rather than "licensed," which means that technology of this nature may be sold but not licensed. For this reason, the recipient of the technology must always be free to use the technology after the expiry of the agreement.

It should be noted that, even though a formal rule limiting the term for a technology transfer agreement does not exist, the INPI has traditionally approved technology transfer agreements for a five-year period. Such term may be extended for an additional five-year period if the company attests that the technology has not been fully absorbed.

### FRANCHISES

Franchises in Brazil are subject to a Franchise Law (Federal Law N° 8.9559/94). The scope of regulation of this law, however, is very narrow, generally being limited to the disclosure obligations. In fact the disclosure period is heavily regulated; the law foresees in detail all information that must be disclosed by the franchisor before the execution of any binding document.

Although registration of a franchise contract is required before the INPI, it is not a prerequisite for its validity and enforceability, and registration is required for three purposes: i) to enforce the contract against any third party (a distributor, for example); ii) to remit royalties and any other amounts abroad; (iii) to allow fiscal deductions.

## LABOR LAW

The Brazilian Consolidated Labor Code (CLT) establishes judicial procedures for labor claims, rules regarding the relationship between employees and employers, and regulations for the organization of unions and collective bargaining procedures.

Brazilian employee-employer relations are also governed by employment contracts, labor and social security statutes other than the CLT, collective bargaining agreements and companies' internal rules of conduct (*regulamento interno*).

Collective bargaining agreements are entered into between employees' and employers' unions, or directly with employers (*acordos coletivos*). These agreements may set forth rights that could ultimately benefit employees more or less than the existing statutory rights.

## PRIMARY LABOR RIGHTS

Employment relationships in Brazil are regulated by federal laws, which are applied to all employees. In accordance with Article 3 of the Consolidation of Brazilian Labor Laws (CLT), an employee is defined as an individual who renders services (*pessoalidade*), on a regular basis (*habitualidade*), and is subordinated (i.e., is subject to the direct oversight) to his/her employer (*subordinação*) against receipt of compensation (*onerosidade*).

It follows from the foregoing that if any individual renders services in Brazil through a relationship with the above-mentioned requirements (even if such individual is hired as an independent contractor), the individual will be considered an employee and, therefore, be entitled to labor rights that cannot be waived, such as:

- An annual mandatory salary increase, which is based on a percentage rate set forth in the collective bargaining agreement negotiated by and between the respective employers' and employees' unions. This percentage rate will govern regardless of whether the employees and employers concerned are affiliated with such unions. Alternatively, the increase may be based on a collective labor claim filed by the employee's union against the employer's union.
- An annual Christmas bonus equal to the employee's monthly compensation.
- An annual 30-day paid vacation coupled with a bonus equal to one-third of the employee's monthly compensation.
- An accrued severance fund (FGTS) paid into by the employer, who shall deposit an amount equal to 8% of the employee's monthly compensation in a special bank account in the employee's name at the Federal Savings Bank (*Caixa Econômica Federal*).
- A transportation voucher for the total cost of the employee's transportation that exceeds 6% of the employee's monthly compensation.
- 15 days of sick leave paid for by the employer. Thereafter, the social security administration shall pay the employee's salary during an extended sick-leave period that it determines to be reasonable.
- 120 days of maternity leave paid by the employer.
- Five days of paternity leave paid by the employer.
- For dangerous working conditions, a 30% premium.

- For unhealthy working conditions, 10%, 20% or 40% of the national minimum wage premium, depending on the conditions.
- For temporary relocation, a transfer premium of at least 25%.
- For dismissal without cause, indemnification corresponding to 40% of the deposits made into the FGTS during the employment relationship and a social security contribution corresponding to 10% of such deposits.
- For overtime, a minimum premium of at least 50% of the regular hourly rate.
- For night shifts, increased pay calculated in the following manner: every 52 minutes and 30 seconds worked after 10:00 pm but before 5:00 am is considered equal to a full 60 minutes of work and also a 20% premium over the regular hourly rates.
- Certain employee categories, such as bank employees (*bancários*) and telephone operators (*telefonistas*), are entitled to reduced working hours (six-hour shifts).
- For some professions there is a specific minimum salary guarantee.
- A weekly paid rest period, preferably on Sundays.

It is important to note that benefits which are not provided for by the law or stipulated in a collective bargaining agreement, but rather are extended by the employer on a discretionary basis (i.e., discretionary bonus), become a vested right to the employee when paid repeatedly and shall not be reduced or suppressed unless done through a separate collective bargaining agreement.

Certain labor obligations, such as social security contributions, FGTS, severance payments, and taxes withheld are calculated based on the employee's total compensation (including Christmas bonus, average overtime pay, bonuses, etc), rather than his/her base salary.

Where the social security contributions are concerned, the employer must pay up to 28.8% of the total payroll to the National Social Security Institute (INSS). Such contributions may be increased in cases involving companies with a history of work-related accidents or sick leaves or in case of work under dangerous or hazardous conditions.

All employees and employers in Brazil are considered to be represented by unions. Any rules agreed to under collective bargaining agreements, including the value of the labor union contribution, will bind all employers and employees, whether such employers and employees are associated to their respective unions or not.

As mentioned above, Brazilian labor legislation is federal, and therefore applied equally to all Brazilian states. However, the various labor unions throughout Brazil do not have equal political and economical strength. As such, some labor unions are more flexible in negotiations, while other unions are much more rigid. It is important to note that, although some conditions (like work shifts and additional pay for overtime) may be negotiated and governed by collective bargaining agreements, the suppression of benefits which are established by law (i.e., Christmas bonus, FGTS or additional pay for unhealthy/hazardous working conditions) may not be waived, even through collective bargaining agreements.

## WORKING HOURS

Employees are normally limited to working eight hours per day and 44 hours per week, unless a specific collective bargaining agreement (*acordo de compensação de jornada*) is negotiated with the labor union or overtime is paid. In certain fields of activity, the maximum number of hours an employee is permitted to work is reduced. In any case, employees should limit their overtime to a maximum of two hours per day.

Managers and employees who perform external functions, which could make determining and controlling the number of hours worked impossible, are considered exempt from control of working hours, and hence are not entitled to overtime.

Despite the recent changes to the CLT regarding services performed outside of the company's facilities as promoted by Law N° 12.551, enacted on 16 December 2011, Brazilian labor courts are still discussing the impact of such changes in current practices, including whether companies are required to effect any payment to employees who receive a company mobile or pager. The current case law indicates that only if the employee is required to perform any services after his/her working hours, may the employee be entitled to overtime pay. However, due to Law N° 12.511/2011 there are discussions on whether, in addition to such overtime pay in the case of effective work, the employee receiving a mobile phone or pager should be entitled to an "on-call premium" or similar payment, although such claims have been denied in the past. Therefore, we recommend companies to restrict the use of mobile devices and remote access to e-mails to key employees and, preferably, to those exempt from control of working hours, until the labor courts provide final guidance regarding the impact of such new regulations.

## PROFIT SHARING PROGRAMS *(PARTICIPAÇÃO NOS LUCROS OU RESULTADOS – PLR)*

If a PLR program respects the legal requirements, the amount paid to an employee as part of such a program is not considered part of the employee's

compensation for the calculation of social security or other employment entitlements. PLR programs, however, are limited in that they may pay out in only six month intervals, or longer. It is important to note that PLR programs must be negotiated with the employees' union or an in-house committee elected by the employees which should include a labor union representative.

PLR payments may be made based on profits or on goals. When paid based on goals, they must be ascertained by objective criteria expressly specified in the program.

Moreover, PLR payments based on profits may either be paid in fixed amounts, in percentages of employees' salaries, or by sharing part of the profit earned by the company (whether earned only in Brazil or worldwide). The form of payment must be negotiated by and between the parties.

## TERMINATING THE EMPLOYMENT RELATIONSHIP

Brazilian employment law recognizes four different types of employment agreement termination.

***Dismissal with Cause***: Dismissal with cause is only possible in those situations provided by law, which include theft, disobedience of a direct order, noncompliance with the company's internal rules and policies, among others. In such cases, the employee is only entitled to accrued vacation, salary balance or FGTS contribution n the salary balance.

***Employee's Resignation*** (*pedido de demissão*): Upon resigning, an employee must give the employer 30-day prior notice; otherwise the employer may discount an amount corresponding to one month's salary from the employee's severance payment. Please note that after Law N° 12.506, enacted on 13 October 2011, the minimum 30-day prior notice must be increased by three additional days per year of service rendered by the employee to its current employer (after the first year of service), limited to a maximum of 60 additional days. However, due to the fact that such law has just been enacted, it is not clearly determined if such additional days of the prior notice should be applied to the employees in case of resignation or just to the employers in case of dismissal without cause. Additionally, the employee is entitled to accrued and pro-rata vacation, pro-rata Christmas bonus, salary balance and FGTS on the salary and Christmas bonus.

***Dismissal without Cause***: Dismissal without cause is permitted but is subject to the employer providing the employee with a minimum 30-day prior notice (which may be increased by the applicable collective bargaining agreements). The employer is required to pay the severance due in case of resignation and a dismissal indemnification corresponding to 50% of the balance of the employee's FGTS account.

***Indirect Dismissal*** (dismissal caused by the employer): Indirect dismissal or constructive dismissal has the same consequences as dismissal without cause and occurs whenever the employer is liable for a breach of contractual obligations, including delay on salary payment, salary reduction or physical or psychological aggressions.

***Lay-offs*/*Collective Dismissals***: Although collective dismissals or lay-offs are not specifically regulated by Brazilian employment law, please note that recent precedents from the Brazilian Superior Labor Court (TST) indicate that companies conducting collective dismissals should previously negotiate alternatives with the respective unions as a means of reducing costs.

***Severance Payment Deadlines***: Regardless of the form of dismissal, the employee is entitled to receive his/her severance payments by the 10th day following the dismissal (in the event of dismissals with an indemnified 30-day prior notice) or by the first working day after the worked prior notice.

***Job Tenures***: Please also note that under Brazilian employment law, employees in certain conditions have job tenures, and may not be dismissed without cause, such including:

- Union leaders, from the employee's registration as a candidate to one year after the end of his/her term;
- Expectant mothers,: from the confirmation of pregnancy to five months after the birth;
- Employees who have suffered a workplace accident or are receiving social security allowances due to labor related illness, for 12 months after their return to work;
- Members of the Internal Accident Prevention commission (CIPA), from the employee's registration as a candidate to one year after the end of his/her term.

## EFFECTS OF EMPLOYER BELONGING TO A CORPORATE GROUP

In accordance with Brazilian labor law, a corporate group is comprised of several companies. For the purposes of employer-employee relations, the corporate group is considered the employer of all member company employees. Labor law establishes that companies formed as part of the same corporate group shall be deemed jointly and severally liable for the obligations assumed by each group with regard to their employees.

## EFFECTS OF MERGERS AND ACQUISITIONS *(SUCESSÃO DE EMPRESAS)*

Notwithstanding mergers or acquisitions, which consequently generate changes to the original corporate structure, labor rights and obligations shall not be affected.

Therefore, the successor company shall comply with the terms deriving from the original employment agreements, and shall be deemed liable for pending labor contingencies, whether judicial or extra-judicial.

## CONFIDENTIALITY CLAUSES

Brazilian labor law recognizes an implied obligation not to disclose confidential information or trade secrets to which an employee is privy during the course of the employment relationship. The breach of this obligation is considered a motive for dismissal with just cause, even if not explicit in the employment agreement. This obligation remains in force after the termination of the employment relationship.

## NONCOMPETE

Brazilian labor law determines that unless otherwise agreed to by the parties to an employment relationship, the employee shall not compete with the employer during the period of employment. Additionally, Brazilian intellectual property laws establish that confidential information provided by the company to any service provider (employee, consultant, shareholder, etc.) cannot be disclosed to third parties, regardless of any confidentiality or noncompetition agreement entered into by the parties.

With respect to post-employment noncompetition obligations, companies have only recently started to implement such obligations with respect to employees in Brazil. Therefore, neither Brazilian courts nor labor laws clearly lay down such provisions' validity or the mandatory requirements for them to be considered valid. Although their enforceability is still under debate, recent labor court decisions accepting such agreements require that:

- The noncompetition period must be limited and a reasonable maximum period of limitation is two years;
- A reasonable territorial limitation for the enforcement of the clause must be established;
- Indemnification must be paid to compensate the employee's "employment market" reduction (since he/she would not be able to render services to certain competitors).

Please note that if the employee fails to follow such noncompetition obligation the company will only be able to claim damages, since Brazilian case law usually

does not enforce such clauses in order to prevent the employee from working for a competitor of the former employer (usually based on the constitutional freedom of work principle); therefore the chance of obtaining an injunction or other judicial remedy to effectively avoid such noncompetition is remote.

In view of such precedents, such clauses have little effectiveness in Brazil. In turn, if the company fails to provide such compensation, there is a risk that the employee claims to receive his/her last salary, since he abided by such obligation.

## DISCRIMINATION

Law N° 7.716/89 establishes that to deny or prevent someone's employment on the basis of race is a crime, punishable with two to five years' imprisonment. Additionally, the Brazilian Federal Constitution forbids racial discrimination and Law N° 9.029/95 establishes specific rules regarding discrimination based on gender, race and age.

Brazilian labor courts are authorized to adjudicate claims regarding discrimination, specifically damages arising from pain and suffering sought by the employee in cases of discrimination.

## CORPORATE E-MAIL

Some courts understand that corporate e-mails cannot be monitored. However, recent decisions of the Superior Labor Court establish that corporate e-mail is the employer's property which can be used only for professional purposes and may be monitored by the employer as long as the employee is previously informed.

## SEXUAL HARASSMENT

Law N° 10.224/01 establishes that sexual harassment is a criminal public offense punishable with one to two years' imprisonment. Some cities contain special police departments focused solely on offenses against women.

At the very least, sexual harassment may be considered a violation of the employment relationship by the employer, thereby giving employees legal just cause to terminate the relationship and entitling them to receive all severance payments referred to above.

Additionally, the offended employee could initiate a labor claim, seeking damages for pain and suffering.

## APPRENTICES

In accordance with Brazilian legislation, companies must hire apprentices, corresponding to at least 5% of their staff, to perform functions that include apprenticeships.

## HANDICAPPED EMPLOYEE QUOTA

A company shall reserve a certain percentage of positions for handicapped employees. This percentage is determined according to the company's size in the following manner:

- Up to 200 employees - 2%
- From 201 to 500 employees - 3%
- From 501 to 1,000 employees - 4%
- Over 1,000 employees - 5%

## STATUTE OF LIMITATIONS

The statute of limitations for an employee to bring a claim against a current employer regarding violation of any of the above-mentioned rights is five years. After the severance of an employment relationship, an employee has two years to file a claim in the labor courts regarding a violation of any of these rights occurring within the five preceding years.

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