

Brazil

Prepared by Lex Mundi member firm,
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Legal Aspects of Doing Business in Brazil

A Summary

May 2020

DEMAREST

Demarest

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Brazil: Business, Regulatory and Legal Overview

1 Political Structure

Brazil is a Federative Republic, consisting of the Federal District, 26 states, and over 5,000 municipalities. The country's capital is Brasília, located in the Federal District.

The Brazilian legal order functions under the Civil Law system and is based on codification and legislation enacted by the appropriate legislative powers at the federal, state and municipal levels.

The predominant law of the country is the Federal Constitution, which establishes:

- (i) the system of government;
- (ii) the attribution of competencies to the Legislative, Executive and Judiciary powers; and
- (iii) the legislative authority of the federal, state, and municipal administrations.

In 1990, through the implementation of a National Privatization Program ("Privatization Program"), the Brazilian government started to withdraw from activities that had been constitutionally reserved for it or other areas in which free enterprise would potentially perform more efficiently than the government.

As a result of the Privatization Program, many regulatory agencies were created aiming to regulate all activities that are considered essential to the country's economy and population. Accordingly, all Brazilian regulatory agencies play a crucial role in regulating the performance of activities that involve, for example, Health, Agriculture, Food Supply and Livestock, Telecommunications, Energy, Oil & Gas, land, air and waterway Transportation, Mining, Water resources, etc.

In respect of agreements entered into with the government, Law 8,666/1993 (Public Bidding Law) is the main legal instrument that regulates all agreements entered into between private parties and the government, establishing a series of principles, procedures and requirements that must be observed by the private party and Public Administration body involved in the public bidding process.

Another important aspect of the Brazilian regulatory system is that any individual or legal entity intending to carry out commercial activities (Industries, General Commerce and Service Providers) must obtain a series of registrations and licenses to legally operate. These registrations and licenses are analyzed and granted by Public Administration bodies at the Federal, State and Municipal level. Such enrollments will vary according to the development of the activity and locality.

2 Judicial Structure

The Brazilian Judiciary system is organized in accordance with Brazil's Federal Constitution, which divides the judicial structure into federal and state courts. In general terms, Brazilian courts have jurisdiction over any litigation in any way related to Brazilian territory. Federal courts have exclusive jurisdiction over any lawsuit where the federal government or any of its agencies or quasi-governmental bodies is a party to or has an interest in, as well as over cases involving foreign states or international agencies. All labor and electoral courts are also under federal jurisdiction. Nonetheless, the bulk of all private commercial litigation is adjudicated before the state courts.

Regardless of whether a lawsuit is filed in a federal or a state court, the parties have a constitutional right to appeal to an appellate court. In the state system, every federation unit (state) has its own state court of appeals. The federal appellate system, on the other hand, consists of five circuit courts of appeals.

At the next level of the judicial structure sits two superior courts, which are called the "*Superior Tribunal de Justiça*" (Superior Court of Justice) and the "*Supremo Tribunal Federal*" (Brazilian Supreme Court), both located in Brasília. Broadly speaking, the former has jurisdiction over any case decided by state or federal courts of appeals if the decision rendered by any of these courts violates federal law. The latter has jurisdiction over constitutional issues and may also revisit decisions rendered by any court if the Constitution is found to have been violated.

Brazil is a civil law jurisdiction and decisions are based on the application of statutory laws. Where there is no specific statutory provision, the courts may decide either on the basis of analogy and general uses and practices, or by applying general principles of law. In general, precedents are not binding but tend to be respected by lower courts.

All civil procedure rules are federal and applicable throughout the country, allowing lawyers to practice nationally. In general, civil procedure emphasizes expert evidence and documentary evidence over oral testimonies and concentrates much of the evidence gathering in the judge's hands. Brazil grants more powers for judges to control proceedings and to obtain evidence than is normally found in other civil-law countries. Hence, discovery is not allowed and lawyers, for instance, cannot privately collect depositions or make requests for admission. In addition, the Brazilian system permits a multiplicity of appeals, particularly interlocutory appeals, that can delay proceedings for lengthy periods. Finally, all decisions are made by judges. Jury trials are only permitted in crimes committed against a person's life, such as cases of first-degree murder.

3 Arbitration

In Brazil, enforcement of domestic arbitration decisions has been provided for by specific legislation since 1996. In 2001, the Brazilian Supreme Court finally upheld the constitutionality of the Brazilian statute validating contractual arbitration provisions, thus removing lingering doubts about the Brazilian courts' stance in this regard. Arbitration, however, is only permitted with regard to pecuniary and waivable rights, which cover most commercial transactions.

Foreign arbitration awards are also enforceable in Brazil. However, despite Brazil's having ratified the New York Convention on Enforcement of Foreign Arbitral Awards, foreign arbitration awards must still be ratified by the Brazilian Superior Court of Justice in order to be enforced in Brazil.

Banking and Finance

1 Industry Overview

Brazil has an open economy and international trade and investment are elements of paramount importance to the Brazilian economy. Driven by strong market players and seeking to enhance the economic environmental conditions that in turn would boost investors' confidence, the Brazilian Financial Sector has benefited from several key improvements introduced to its legal and regulatory framework in recent years.

Regarding the underpinning tenets of the Financial Sector, both the Federal Constitution and Law 4,595, which created the National Financial System ("SFN"), set forth the applicable legislation and complementary regulation. Accordingly, the SFN is headed by the National Monetary Council ("CMN"), which is the administrative organ responsible for establishing the monetary and credit policies that would ensure the constant stability of the local currency. CMN is complemented by the Central Bank of Brazil ("BACEN"), which has the legal duty of controlling inflation and financial stability. In relation to the securities market, the Brazilian Securities and Exchange Commission ("CVM") is the federal autonomous authority in charge of regulating the respective structure, operation and activities of the market.

As far as M&A deals and other relevant financial activities are concerned, BACEN and the Administrative Council for Economic Defense ("CADE") have adjusted and entered into a cooperative protocol to oversee transactions involving financial institutions and the potential financial and market competition impacts thereof. In accordance with the Federal Constitution, participation of foreign capital, in the form of direct investment in the stock of financial institutions, requires prior authorization of the Federal Government, by means of a Presidential decree to attest to the existence of the Brazilian interest in the given investment.

Although Brazilian governmental agencies do not provide direct financial support to foreign investors, the Federal Constitution ensures equality of rights between nationals and foreigners residing in the country. In this regard, the National Bank of Economic and Social Development ("BNDES") requires that borrowers have headquarters and administration in Brazil, regardless of whether their capital stock is held by foreign investors.

The legal definition of financial institutions takes into account the performance of three activities solely reserved for banks, namely: fundraising, intermediation and investment of resources of their own or those of third parties, in domestic or foreign currency, and the custody of financial assets owned by third parties. Public banks are fundamental players, for instance BNDES, Caixa Econômica Federal ("CEF") and Banco do Brasil ("BB") are responsible for providing the majority of the financial resources, mostly in connection with economic and social development activities.

The legal entities authorized by law to operate — contingent upon the prior approval granted by BACEN — are multiple banks, commercial and investment banks; investment, finance and credit companies; leasing companies; securities brokers and distributors, dealers and consortium administration companies, which are self-financing legal structures aimed at organizing the acquisition of durable goods and services.

In addition to respective BACEN prior authorizations to operate, the securities brokers (CTVMs) and the securities distributors (DTVMs) also require permission from CVM to operate. Such entities generally perform intermediation of securities purchase and sale, in addition to investment analysis, management of securities portfolios and other services related to the capital markets. “Home broker” tools have become very popular, allowing clients to access the services online, in addition to real-time support and assistance. As a consequence, there has been a significant expansion of activities in the investment service market in recent years, yielding a very promising outlook for business opportunities in the near term.

2 Investment Policies

Brazil welcomes foreign investment, which is an important source of capital for the development of strategic sectors of the Brazilian economy, including, but not limited to, infrastructure. All such investment transactions are grounded on the statutory principles and rules related to the allocation of foreign investment and remittance of funds abroad set forth in Law 4,131/1962, as amended.

Brazil has a number of agencies devoted to the promotion of investment, in most cases governmental. The main agencies include the National Bank of Economic and Social Development (*Banco Nacional de Desenvolvimento Econômico e Social* - BNDES), the Special Agency for Industrial Financing (*Agência Especial de Financiamento Industrial* - FINAME), the Amazon Development Superintendency (*Superintendência de Desenvolvimento da Amazônia* - SUDAM), and the Northeastern Development Superintendency (*Superintendência do Desenvolvimento do Nordeste* - SUDENE).

According to Brazil’s Constitution, foreign capital is prohibited in the following activities:

- (i) Development of activities involving nuclear energy. The Brazilian federal government has a monopoly over exploring, exploiting, processing, industrializing, and selling radioactive minerals and their byproducts, with only a few exceptions in relation to radioisotopes in certain circumstances. This restriction applies to both domestic and foreign private investment (Federal Constitution, Article 21, item XXIII);
- (ii) Development of activities involving oil and natural gas. The Brazilian federal government has a monopoly over research and exploration of natural deposits of oil and natural gas, as well as over their refining and transportation. The importation and exportation of oil and natural gas byproducts are also a monopoly of the Brazilian federal government. These restrictions apply to both domestic and foreign private investment. However, the federal government may engage public or private companies in performing the aforementioned activities, provided that they abide by the conditions set out in law (Federal Constitution, Article 177, items I, II, III and IV); and

- (iii) Health services. Brazil's Constitution prohibits the direct or indirect participation of foreign companies or foreign capital in healthcare in the country, except under those circumstances provided for by law (Federal Constitution, Article 199, Paragraph 3). Federal Law 13,097, of January 19, 2015, has authorized foreign capital to invest in certain fields of healthcare.

Foreign investment is permitted with certain restrictions in the following sectors:

- (i) Ownership and management of newspapers, magazines, and other periodicals, radio and television networks. At least 70% of the total capital and the voting capital of newspapers, magazines, and other periodicals must be held by Brazilian residents, with foreign investment therefore limited to a maximum of 30% thereof (Federal Constitution, Article 222, First Paragraph);
- (ii) Airlines with concessions for domestic flight routes. In June 2019, the President of Brazil, Jair Bolsonaro, approved a bill permitting (i) foreign carriers to operate domestically in Brazil and (ii) 100% foreign ownership of airlines. Prior to this, at least 80% of the voting capital of companies offering public air services had to be held by Brazilian residents, with foreign investment therefore limited to a maximum of 20% of such voting capital. In addition to the enactment of the Open Skies treaty, passed in 2018 and which increases flight routes between Brazil and the U.S., the increase of foreign ownership in the country will encourage competition and promote economic growth.
- (iii) Financial institutions. Foreign investments in the capital stock of financial institutions domiciled in Brazil require prior authorization of the federal government derived from international treaties, reciprocity treaties or governmental interest (Federal Constitution, Article 52 of the Act of Transitory Constitutional Provisions);
- (iv) Mineral resources. The research and extraction of mineral resources, as well as the use of potential of hydraulic energy, may only be carried out upon authorization or concession by the federal government to Brazilians or companies incorporated under Brazilian law and headquartered in Brazil (Federal Constitution, Art. 176, paragraph I); and
- (v) Rural properties. Federal Law 5,709/1971 restricts foreign individuals and foreign companies authorized to operate in Brazil from owning rural properties in Brazil. However, such matter is a subject of much debate and changes are under discussion in the political realm to liberalize the existing legal treatment.

3 Brazil's National Financial System

3.1 The CMN and BACEN

Brazil's National Financial System consists of the following regulatory and supervisory bodies:

- (i) the National Monetary Council (“CMN”);
- (ii) the Central Bank of Brazil (“BACEN”);
- (iii) the Brazilian Securities and Exchange Commission (“CVM”);
- (iv) the Superintendence of Private Insurance (“SUSEP”); and
- (v) the Office of Supplementary Pensions.

The CMN, jointly with BACEN and the CVM, regulates the Brazilian banking industry. The main activities of CVM, which specifically oversees capital markets, are summarized under section VI of this report.

Financial and monetary policy in Brazil is the responsibility of the CMN. It supervises monetary, credit, budgetary, fiscal, and public debt matters. CMN sets out regulations on:

- (i) credit;
- (ii) lending and capital limits;
- (iii) issuance of Brazilian currency (*Real*);
- (iv) gold and foreign exchange reserves;
- (v) savings, foreign exchange, and investment policies; and
- (vi) capital markets. BACEN and CVM, in turn, are responsible for the markets’ actual implementation of such regulations and for supervision.

The law states that BACEN shall:

- (i) execute the currency and credit guidelines established by CMN;
- (ii) regulate and supervise Brazilian financial institutions, both public and private;
- (iii) control the flow of foreign currency inbound and outbound; and
- (iv) supervise Brazilian financial markets.

3.2 Main Types of Financial Institutions

Brazilian law defines financial institutions as entities that perform activities that involve raising, brokering, or investing their own financial resources or those of third parties, in domestic or foreign currency, and the custody of financial assets owned by third parties. They may be public or private.

BACEN is the constitutional authority empowered to admit the incorporation and operation of financial institutions; in the case that financial institutions would consider foreign capital equity investments, as per specific Federal Constitution rule, there must be previous authorization from the Federal Executive Branch in the form of a Presidential Decree.

The public financial sector consists primarily of the following entities:

- (i) *Banco do Brasil*, a listed, private and public joint-stock company, controlled by the federal government and currently one of the largest commercial banks operating in the country. *Banco do Brasil* acts as a financial agent for the federal government, including for implementing the official rural credit policy, among others;

- (ii) National Bank of Economic and Social Development (BNDES), whose capital is fully held by the federal government. The BNDES is the government's development bank, primarily engaged in providing medium and long-term financing (either directly or through other public and private financial institutions) to the private sector, mainly for manufacturing;
- (iii) Federal Savings Bank (CEF), also a state-owned financial institution, which is responsible for implementing the federal government's policy regarding low-income housing and low-income workers.

The private financial sector consists of multiple-service banks; commercial banks; investment banks; investment, finance and credit companies (*financeiras*); leasing companies; direct credit companies; peer-to-peer lending companies; securities brokerages and securities dealers.

Foreign exchange banks and brokers, mortgage companies, credit cooperatives, cooperative banks, associations for savings and loans, and microcredit institutions are also regulated and supervised, respectively, by the CMN and the BACEN.

3.2.1 Multiple banks

Multiple banks must be incorporated with, at least, either a commercial or an investment portfolio; development (the latter exclusively for public banks); housing loans; investment, finance and credit companies (*financeiras*); and/or leasing are the other types of authorized institutions.

3.2.2 Commercial banks

The core business of commercial banks is the supply of funds for trade, industry, service companies' and individual's short and medium-term financing; demand and time deposits; management of securities portfolios; drafts; special rural credit; foreign exchange and trade transactions; customer on-lending of official funds provided by public sector credit institutions; and issuance and management of credit cards.

3.2.3 Investment banks

The core business of investment banks is:

- investments in companies by holding temporary equity interests therein;
- financing production by supplying fixed and working capital;
- management of third-party resources;
- purchase and sale of precious metals on the physical market, on its own and on third-parties' behalf, and of any securities on the financial and capital markets;
- trading on futures stock exchanges as well as on organized over-the-counter markets, on its own and on third-parties' behalf;
- participating in the process of issuance, subscription for resale, and distribution of securities;
- foreign exchange transactions (only upon specific authorization granted by the BACEN); and

- coordinating companies' reorganizations and restructurings by rendering advisory services, holding equity interests, and/or lending.

Investment banks may also render management-advisory services to businesses whose corporate purpose is directly tied to financial-market transactions, including bookkeeping, asset and liability management, and custody.

3.2.4 Investment, finance and credit companies (*financeiras*)

Investment, finance and credit companies (*financeiras*) loan money to finance goods and assets for individuals and legal entities, or/and provide working capital to the latter.

3.2.5 Leasing companies

Leasing companies engage in leasing activities, with special tax treatment, related to national or foreign movable assets, and to real properties acquired for own use by the leaseholder.

3.2.6 Direct Credit Companies and Peer-to-Peer Lending Companies

The Brazilian National Monetary Council issued on April 26, 2018, Resolution No. 4,656 ("Resolution"), regulating the authorization to operate, the transfer of corporate control, corporate reorganization and the liquidation of fintechs specialized in loan and financing transactions through an electronic platform.

The new regulation created the Direct Credit Companies (*Sociedades de Crédito Direto - SCD*) and the Peer-to-Peer Lending Companies (*Sociedades de Empréstimo entre Pessoas - SEP*) models.

The main goal of the Resolution is to create an environment of diversification among the economic agents that operate in the credit segment and, thus, to promote greater competitiveness and a higher degree of innovation within the sector. For this purpose, the Resolution seeks to confer legal certainty to credit transactions intermediated by worldwide electronic platforms also present in Brazil. Credit transactions formalized through electronic platforms in Brazil, as operated by fintechs, intend to be structured by market experts and legal advisors grounded in regulation addressed to the traditional financial market, which has entailed the need for involvement of traditional banks and equivalent financial institutions.

Under the terms of the Resolution, the purpose of the SCD is to carry out loan and financing transactions and to acquire credit rights exclusively through an electronic platform. The SCD may only transact out of its own equity. The SEP, in turn, is used to intermediate lending and financing transactions between parties, known as P2P (peer-to-peer) operations, also exclusively through an electronic platform. SEP will collect financial resources from creditors and, after negotiating within an electronic platform, it will direct such funds to the respective debtors. In no event shall SEP be able to use its own resources to carry out credit operations. In this sense, an SEP will execute certain instruments that will link the funds made available by the creditors to SEP and the corresponding credit operation with the debtor.

3.2.7 Open Banking

The joint operation of digital banking systems using open platforms and an array of finance-related businesses of different sectors is a practice that has been generating openings for technology innovation to thrive within the Brazilian financial market, which brings with it an upsurge of Fintechs forging their place in the Open Banking segment in Brazil.

From BACEN's perspective, Open Banking consists of the "sharing of data, products and services by financial institutions and other institutions authorized to operate, contingent upon the grant of consent by the institutions' clients, by way of opening and integration of platforms and infrastructures of informational systems, on a safe, swift and convenient basis." (BACEN Communiqué No. 33,455, dated April 24, 2019).

Considering the intersection of the banking system with all the new services and products offered by Fintechs to the public, BACEN has paved the way for the development of Open Banking in Brazil. Besides editing the Communiqué No. 33,455, BACEN has opened for public consultation of the market specific draft rulings that are expected to be enacted in the third quarter of 2020.

Open Banking in Brazil has been undergoing an implementation process aimed at increasing the efficiency in the credit and payment markets in order to promote a greater degree of competitiveness and a higher level of social and financial inclusion of the population that will ultimately enjoy access to new financial products and services. BACEN expects that Open Banking in Brazil will help clients and users of the banking sector to gradually gain a better understanding of the importance of budgeting, as well as looking for and making more profitable financial deals. All of this under a regulated and safe digital environment.

Consequently, the mechanisms of Open Banking shall encompass financial institutions, payment schemes players and other BACEN-authorized entities, which shall work together to the extent consented by each individual client and user based on data sharing, considering data related to:

1. services and products (location of support points, characteristics of products and services, contractual terms and conditions as well as financial costs associated with each type of service and product);
2. client's personal data and information (contingent upon client's prior consent, as applicable, in accordance with the Brazilian LGPD);
3. transactional data pertaining to each client (deposit, checking and investment accounts, credit operations, among others); and
4. money transfer, use of payment services.

BACEN expects that the observance of the upcoming Open Banking rules shall be mandatory only to large financial institutions qualified under the more complex business and compliance categories. The mandatory application of such rules will gradually be extended to other institutions, in accordance with a BACEN-structured action plan to be rolled out in 2020.

Along with the expected official BACEN regulation, self-regulation of the banking system entities (chiefly represented by the Brazilian Bank Federation FEBRABAN) will play a fundamental role in the Open Banking launch process. This is particularly the case of technological and operational proceeding standardization, including cybersecurity and systems interface integration, required always to be in compliance with the thresholds and protocols mandated by the official BACEN rulings.

4 Bank Accounts

Only Brazilian legal entities are required to maintain a bank account in the country to receive funds from a foreign investor or a financial institution. As a general rule, foreign investors are not required to have a bank account in the country in order to invest in Brazilian companies.

For sophisticated investment structures and instruments, however, a case-by-case analysis must be conducted to identify whether a bank account is required.

Foreign entities or nonresident individuals are allowed to open and maintain accounts denominated in Brazilian currency at authorized Brazilian banks. Accounts denominated in foreign currency are only available for residents and nonresidents in a few specific cases.

5 Lending

Brazilian banks provide financing through various types of credit transactions such as revolving credit facilities, forfeiting trade notes and receivables, working capital financing, loans, consumer loans, vendor/compror financing, checking accounts, credit assignments, leasing, export finance, real estate finance, rural credit transactions, and others.

Corporations are able to obtain financing domestically and internationally. International loan transactions must be registered with SISBACEN (the Electronic System of Registration of the BACEN) through the Financial Transaction Registry (*Registro de Operações Financeiras - ROF*).

Government and governmental agencies do not provide direct financial support to foreign investors. However, since the Federal Constitution ensures equality of rights between nationals and foreigners residing in the country, BNDES requires that borrowers have headquarters and administration in Brazil regardless of whether their capital stock is held by foreign investors.

With limitation to the foregoing in terms of BNDES loans, there is no general restriction for an investor residing outside of the country to receive loans from financial institutions domiciled in Brazil.

6 Export Financing

6.1 Export Prepayment Financing

Export prepayment financing basically consists of the structure according to which the importer or a financial institution prepays for exports with certain tax benefits. The exporter assumes the commercial debt, which shall be repaid upon export of the related products, without the need for further financial flows in the future.

In practice, usually the payment is advanced by a financial institution located outside of the country; i.e., the bank makes the payment in foreign currency to the exporter prior to shipping of the purchased products.

The importer is notified to pay the agreed-upon purchase price directly to the bank into a collection account located outside of Brazil.

The agreed-upon interest may be paid from Brazil by the exporter (either in cash, by shipping goods or by rendering of services).

Transactions with terms longer than 360 days require prior registration with BACEN.

In the event that goods are not shipped, the credit from the original transaction may be converted into a direct investment or currency loan. In this case, tax benefits are cancelled and the exporter shall be subject to the payment of all unpaid taxes plus the relevant ancillary charges provided in applicable laws.

Export prepayment financing may be structured as a club deal, allowing for credit risk to be shared among various participants.

6.2 Advance on Exchange Contracts (Adiantamento sobre Contratos de Câmbio- ACC)

An ACC consists of partial or total advance of payment in Brazilian currency equivalent to the foreign currency to which an exporter shall have right upon making exportation. In other words, an ACC is an advance of national currency to exporters, financed in foreign currency.

The purpose of this form of financing is to provide advanced funds to the exporter to produce and to sell goods to be exported in the future.

According to current regulations, ACCs can be provided for up to 360 days prior to the shipping of the goods.

6.3 Advance on Delivered Shipping Documents (Adiantamento sobre Cambiais Entregues- ACE)

The ACE mechanism is similar to an ACC, except for the time at which the funds are provided to the exporter: an ACE can be provided once the goods are manufactured and shipped.

According to current regulations, ACEs can be liquidated until the last business day of the 12th month subsequent to the shipment of goods.

6.4 Brazilian Government Export Financing Program (*Programa de Financiamento às Exportações - PROEX*)

PROEX is a program created by the federal government to provide conditions equivalent to those available on international financial markets for Brazilian export transactions.

Banco do Brasil is the financial agent in charge of managing PROEX.

The two types of financing under PROEX are:

- (i) PROEX *Financiamento* (“financing”); and
- (ii) PROEX *Equalização* (“equalization”).

PROEX *Financiamento* is allocated to exporters (supplier credit) and to importers (buyer credit) exclusively through *Banco do Brasil*, with funds supplied by the National Treasury.

PROEX *Financiamento* finances 85% of exports in any incoterm category in transactions with a financing period ranging from two to ten years. The remaining 15% costs are to be paid by the importer, on demand, or financed by an offshore bank. In transactions with a financing period limited to two years, the financed percentage can reach 100%.

PROEX *Equalização* allows financial institutions, located in Brazil or abroad, to equalize financing rates for export or import transactions of certain qualified Brazilian goods, services, and software. Through equalization, ultimate interest rates paid in export or import of Brazilian goods and services financing transactions can reach levels similar to those charged on international markets.

Under PROEX *Equalização*, an entity financing exports or imports of Brazilian goods or services can receive from the Brazilian Treasury the difference between the interest rate charged in the export or import financing transaction and part of the interest rate it would normally charge in the event that the export or import transaction was not being financed under PROEX.

This benefit is paid by the National Treasury (*Tesouro Nacional*), allowing exporters and importers of certain Brazilian goods and services to have access to financing conditions similar to those available to exporters or importers of non-Brazilian goods or services on international markets. This makes Brazilian exports more competitive internationally.

6.5 BNDES- Exim Credit Facilities for Foreign Trade

BNDES also offers a few credit facilities designed to create competitive conditions for the internationalization of Brazilian companies.

Financing to export goods and services falls into two categories:

- (i) Pre-shipment: finances the production of internationally competitive companies established under Brazilian law; and
- (ii) Post-shipment: finances goods and services abroad either by refinancing the exporter or through the buyer's credit category, in accordance with international standards.

Available guarantees are the same as those offered by export credit agencies (ECAs) to facilitate access to export credit. For instance, a transaction may include export credit insurance as a guarantee, covering commercial, political and extraordinary risks. In Brazil, these guarantees are offered by private insurance companies in the short term and by the federal government in the long term.

Requests may also be made to foreign banks that provide international guarantees for financing operations.

The information provided in this section, and further information about BNDES-Exim, can be found on BNDES's website at www.bndes.gov.br.

6.6 Export Credit Insurance and Guaranties

Brazilian exporters and financial institutions can benefit from export credit insurance provided by the federal government through the *Seguradora Brasileira de Crédito à Exportação* (SBCE) for export credit transactions against commercial, political and extraordinary risks that may affect Brazilian exports and/or the production of goods and the rendering of services related to Brazilian exports.

Export credit insurance policies provided by the SBCE may be covered by the Export Guaranty Fund, an accounting-type fund within the Ministry of Finance.

As such, the federal government and the SBCE provide greater competitiveness to Brazilian exports.

The SBCE has the following shareholders:

- Banco do Brasil;
- BNDES; and
- Coface (Compagnie Française d'Assurance pour le Commerce Extérieur).

The export credit insurance policies issued by the SBCE are also used as guarantees for export financing.

SBCE acts either on its own or on behalf of the federal government — in the latter case through a public bidding process.

Operationally, exports are divided into two groups, short term and medium/long term, depending on the payment term given to the importer.

7 Security

The main types of security interests available to lenders in Brazil are mortgages (in Portuguese, *hipoteca*), pledges (in Portuguese, *penhor*) and fiduciary transfers/assignments (in Portuguese, *alienação/cessão fiduciária*, respectively).

It is important to note that, in theory, any contractual provisions that authorize a lender to keep assets that are given to secure a loan are null and void. Only if the borrower and the lender so agree, upon default the borrower may transfer such assets to the lender as payment-in-kind of the outstanding debt.

Also, upon judicial and (in certain cases) extra-judicial enforcement of security, the lender is allowed to become the definitive owner of the asset given as security (in Portuguese, *adjudicação*).

7.1 Mortgage

A mortgage is the appropriate type of security for real estate properties and their accessories, railways, natural resources, ships and airplanes. Mortgages can only be created by a public deed (in Portuguese, *escritura pública*) prepared by a notary public (in Portuguese, *Tabelião de Notas*), except in certain cases where the law expressly authorizes a lien to be created within a private credit instrument or certificate (in Portuguese, *hipoteca cedular*). The maximum term for a mortgage according to the Brazilian Civil Code is 30 years, although it may be renewed through a new public deed.

Whenever a real property (the most common asset subject to mortgages) is mortgaged, both legal title to and possession of the property remain with the mortgagor (borrower). If the mortgaged property deteriorates or depreciates, and the borrower does not offer additional collateral, the loan accelerates. If the borrower makes proper repayment upon maturity of the loan, then the loan is terminated, and the mortgage, which is accessory to the loan, is also considered automatically terminated. A release document is signed and registered at the appropriate Real Estate Registry Office for effectiveness before third parties.

In a bankruptcy scenario (similar to U.S. Chapter 7), a loan secured by a mortgage is only subordinated to labor credits (up to a limit of 150 times the minimum monthly wage per employee - currently BRL 143,100.00 - one hundred and forty-three thousand and one hundred Brazilian Reais – or about USD 37,200.00 – thirty-seven thousand U.S. Dollars). That does not mean, however, that the lender is entitled to the full amount of the mortgaged property. The property is sold to benefit the bankrupt estate, and the lender is granted priority (with other creditors secured by mortgages and pledges) in sharing the proceeds thereof, as well as the proceeds from the sale of the bankrupt estate's other assets.

7.2 Pledge

A pledge is a form of security granted on movable assets. Stocks, personal movable assets, receivables and bank accounts can all be subject to a pledge.

Conventional subsets of pledges, as set out by law, include rural pledges (in Portuguese, *penhor rural*, where pledged assets are agricultural machinery and equipment, crops, inventories or animals), industrial and mercantile pledges (in Portuguese, *penhor industrial e mercantil*, for industrial machinery, materials, instruments, raw materials and manufactured products), pledged rights and credit instruments (in Portuguese, *penhor de direitos e títulos de crédito*, for receivables, rents, credits or credit instruments) and pledged vehicles (in Portuguese, *penhor de veículos*).

Whenever a pledge is created, title to the pledged asset remains with the pledgor (borrower), but possession may or may not be temporarily transferred over to the lender's domain. If the pledged asset is sold, deteriorated or modified, the loan accelerates. If the borrower makes proper repayment upon maturity of the loan, then the loan is terminated, and the pledge, which is accessory to the loan, is also considered automatically terminated. A release document is then signed and registered at the appropriate Registry of Deeds and Documents, Real Estate Registry Office, or traffic/transport/licensing department(s), as the case may be, for effectiveness with third parties.

A pledge is ranked the same as a mortgage for bankruptcy purposes. In a bankruptcy (similar to U.S. Chapter 7 - Liquidation) scenario, a loan secured by a pledge over the borrower's assets is only subordinated to labor credits (up to a limit of 150 times the monthly minimum wage per employee - currently BRL 143,100.00 - one hundred and forty-three thousand and one hundred Brazilian Reais – or about USD 37,000.00 – thirty-seven thousand U.S. Dollars. That does not mean, however, that the lender is entitled to the full amount of the pledged assets. These are sold to benefit the bankrupt estate, and the lender is granted priority (with other creditors secured by mortgages and pledges) in sharing the proceeds thereof, as well as the proceeds from the sale of the bankrupt estate's other assets.

7.3 Fiduciary Lien

Fiduciary types of liens – generally also applicable to stocks, real estate properties, personal assets, receivables and bank accounts – give a lender fiduciary ownership of an asset or right. Either a pledge or a fiduciary lien can be created on stocks, personal assets, receivables and bank accounts. Mortgages or fiduciary liens are alternatives for real properties.

If payment is properly made by a borrower upon maturity of the loan, title automatically reverts to the original owner (borrower).

When a fiduciary lien is created, possession of the asset is deemed to be split into direct possession, held by the borrower, and indirect possession, held by the lender.

Under Brazilian law, the following types of fiduciary liens are possible:

- (i) fiduciary transfer of non-fungible movable assets;
- (ii) fiduciary transfer of fungible assets – to domestic financial institutions only;
- (iii) fiduciary transfer of bank accounts;
- (iv) fiduciary transfer of real properties; and
- (v) fiduciary assignment of receivables.

In general terms, the advantage of fiduciary forms of security compared to pledges and mortgages is that the lender typically enjoys greater protection in the event of a borrower's bankruptcy (similar to U.S. Chapter 7 - Liquidation). A lender may take possession of an asset *de pleno jure*, while the borrower's other creditors have to abide by the terms and other conditions of a bankruptcy proceeding. That is, since ownership is deemed to be transferred over to the lender, the asset is not in theory considered part of the bankrupt estate for the purposes of apportioning among creditors in a bankruptcy proceeding.

In addition, in the event of judicial recovery (in Portuguese, *recuperação judicial*) (similar to U.S. Chapter 11), a lender secured by a fiduciary lien is not subject to the recovery plan.

A lender secured by a mortgage or a pledge is subject to the recovery plan approved by the creditors, but cannot be forced to release or to sell the mortgaged or pledged property.

Foreign Investment

1 General Rules

Foreign investment has been welcomed in Brazil for a long time and it constitutes an important source of capital for the development of the Brazilian economy. The basic law governing foreign investment was enacted in 1962 (Law 4,131) and was amended in 1964 (Law 4,390). The stability of Brazilian foreign investment legislation is a clear indication of the country's desire and firm commitment to attract and welcome overseas investors.

Foreign investment is not subject to government approvals or authorizations, and there are no requirements regarding minimum investment or local participation in capital (except in very limited cases such as in financial institutions, insurance companies, and other entities subject to the regulating authority of the Central Bank of Brazil—"BACEN"). Foreign participation, however, is limited or forbidden in the few areas of activities explained later in this chapter.

BACEN is responsible for:

- (i) managing the daily control over foreign capital flows in and out of Brazil (risk capital and loans under any form);
- (ii) setting forth the administrative rules and regulations for registering investments;
- (iii) monitoring foreign currency remittances; and
- (iv) allowing repatriation of funds. It has no jurisdiction over the quality of the investment and cannot restrict the remittances of funds from equity or loans, which are based on registration with the BACEN through its Electronic System of Registration.
 - In the event of a serious balance of payment deficit, BACEN may limit remittances of profits and prohibit remittances as capital repatriation for a limited period of time. This limitation, however, has never been applied even during Brazil's most difficult balance of payments problems.

Foreign investments in currency must be officially channeled through financial institutions duly authorized to deal in foreign exchange (commercial banks). Foreign currency must be converted into Brazilian currency and vice-versa through the execution of an exchange contract with a commercial bank. Foreign investments may also be made through the contribution of assets and equipment intended for the local production of goods or services.

2 Foreign Exchange Market

There used to be two official exchange-rate markets in Brazil (the commercial and floating rate markets), both of which were regulated and monitored by BACEN. The choice of one market or the other was mandatory and depended on the nature of the remittance of funds.

In March 2005, BACEN unified both markets, extinguishing the differences between them and enacted more flexible exchange rules. As a consequence, remittances of funds in and out of Brazil must now flow through one single exchange market regardless of the nature of payments.

3 Foreign Investment Registration

Foreign investments in currency or in assets and equipment must be registered with BACEN. Such registration grants the foreign investor the right to receive dividends and interest and to repatriate the investment.

Since August 2000, foreign investments in capital have had to be registered with the Electronic System of Registration of the online data system of BACEN. As for foreign loans, they also became subject to registration in the Electronic System of Registration of BACEN, as of February 2001.

The amount registered with BACEN as foreign investment includes the sum of

- (i) the original investment (whether in cash or in kind);
- (ii) subsequent additional investments (including the capitalization of credits); and
- (iii) potential reinvestment of profits. This aggregate amount constitutes the basis for repatriation of capital and computation of any eventual capital gains tax, as explained below.

4 Remittance of Profits

Since January 1996, profits paid by a Brazilian company to a foreign investor are not subject to withholding taxes. The foreign currency to be remitted has to be purchased on the exchange market directly from any commercial bank, upon presentation of a corporate act declaring dividends and relevant financial statements. Up to January 30, 2017, in order to enable the outflow of funds, the distribution of profits also had to be registered in the Electronic System of Registration of BACEN, in the form of Foreign Direct Investment (*Investimento Externo Direto* - IED). As of January 30, 2017, such registration is no longer necessary. No further approval or consent of BACEN is necessary, and there is no limitation on the amounts to be remitted if the original investment has been registered with BACEN as described above.

Payments of profits directly abroad are also permitted under Brazilian rules. If the Brazilian subsidiary holds an overseas bank account with sufficient balance to pay the related profits, such funds might be utilized to pay the foreign investor directly abroad. In this case, registration of the distribution of profits within the BACEN electronic system is required.

5 Repatriation of Capital

Foreign capital invested in Brazil may be repatriated at any time, and there is no minimum period of investment.

Repatriation of the investment up to the amount stated in the Foreign Direct Investment mode of the Electronic System of Registration of BACEN may be made free of any tax. As a general rule, any surplus over the registered amount will be treated as a capital gain, subject to withholding tax.

6 Other Forms of Funding Brazilian Subsidiaries

Brazil's foreign-debt challenges, combined with other circumstances, have forced the market to find other ways to fund Brazilian companies through note/bond issues and commercial papers placed outside Brazil under private and public placements. In recent years, BACEN has authorized a large volume of bonds, fixed-rate notes, floating-rate notes, commercial papers and fixed- or floating-rate certificates of deposit, to be traded abroad. Nonetheless, currently foreign loans with an average maturity term of up to 180 days are subject to a 6% financial transactions tax ("IOF"). Interest paid to foreigners is subject to withholding tax. Another source of funding has been the issuance of ADRs - American Depositary Receipts, and IDRs - International Depositary Receipts.

7 Restrictions on Foreign Ownership of Companies

Foreign capital may be freely invested in Brazil, and enjoys the same treatment granted to Brazilian capital, with the few exceptions noted in [item II.2](#) above.

Forms of Business Organizations

In Brazil, two types of corporate entities are most used in business transactions: the limited liability company and the corporation.

In general terms, the limited liability company offers a number of practical advantages and is recommendable if the partners desire simplicity and flexibility in the corporate structure, including lower maintenance costs and the inapplicability of some legal formalities that are mandatory for the corporations. A limited liability company is usually fitting for wholly owned subsidiaries or restricted joint ventures.

In the event, however, the partners wish for the company to issue debentures or other securities in the future, to become a publicly held company, or to admit other groups of investors, then the adoption of a corporation structure is preferable. A corporation is also preferable for ventures having a larger number or different groups of shareholders.

There are two categories of public registries of legal entities in Brazil: civil registries of legal entities and boards of commerce. Both have state jurisdiction. A business entity, such as the limited liability company and the corporation, must be registered at the board of commerce of the state where the company's head office is located, as well as at the board of commerce of any other state the company opens a branch. Simple partnerships, associations, and foundations are registered at civil registries of legal entities. Corporate documents, such as amendments to the articles of associations or by-laws, as applicable, as well as certain minutes of partners meetings, must be filed with the respective registry of the company.

1 Limited Liability Company

A Brazilian limited liability company, which resembles an American limited liability company (LLC), is the most common type of company in Brazil. Nowadays, it accounts for an estimated 70% to 85% of all companies consolidated in Brazil. They range from small enterprises with few partners to some of the largest businesses in the country.

On September 20, 2019, the Economic Freedom Law (Law 13,874/19) was enacted, which changed the requirement for a limited liability company to hold at least two partners. With the creation of a sole proprietorship, the incorporation of a limited liability company by a single person is permitted.

The partners may be legal entities or individuals, Brazilian or foreigner. If the partners are not Brazilian residents, they must have an attorney-in-fact in Brazil with powers to represent them in corporate matters in general and to receive services of process on their behalf.

According to Brazilian laws, the company's assets are not linked to the partners' net worth. The partners will only be held liable if they abuse their powers or violate the law or the articles of association.

In the event that the company's assets are not sufficient to bear the company's obligations, and the capital stock has not been fully paid-in, the partners shall be jointly liable up to the amount of capital stock. If the subscribed capital stock has been fully paid-in by the partners, the partners will be solely liable up to the amount of their respective interest in the capital stock.

A Brazilian limited liability company is organized through articles of association, which is a written agreement between or among the partners and that must be prepared in accordance with the Brazilian Civil Code. This agreement should clearly contain the partners' intentions for the company, such as the company's purposes, capital stock, administrators, authority of the administrators, etc.

The incorporation of a limited liability company occurs with the registration of the articles of association of the company at the board of commerce of the state where the company's head office is located, concomitantly with its registration with the Federal Revenue Office for issuance of the company's federal taxpayer identification number ("CNPJ"). Once the company is duly enrolled with the Federal Revenue Office it will be allowed to open bank accounts in Brazil and execute contracts.

After its incorporation, the limited liability company needs to obtain other standard licenses, such as the Municipal Tax ID, the State Tax ID (if applicable) and the Operating License. Depending on the company's activities, other licenses may be required, such as registrations with governmental agencies (for example, the Brazilian Health Surveillance Agency - ANVISA). In case the company carries out import and/or export activities, such company will need to obtain a license issued by the Foreign Trade Department, called RADAR.

Except in a sole proprietorship, as mentioned above, the amendments to the articles of association require the approval of partner(s) representing at least 75% of capital stock and must also be registered at the board of commerce.

Limited liability companies must adopt an accounting system, which consists of regular bookkeeping of commercial and financial information related to their activities.

Any remittance of funds to Brazil by foreign partners, either as an investment or as a loan, must be registered with the Central Bank of Brazil's Electronic System. This registration is essential for future payment of profits to foreign partners, repatriation of capital (for capital investments), and/or payment of interest and principal (for loans).

All foreigners that hold equity in Brazilian companies must be registered with the National Register of Legal Entities to obtain a corporate taxpayer identification number (CNPJ) if they are a legal entity, or an individual taxpayer identification number (CPF) if they are an individual.

The capital stock of a limited liability company is divided into quotas, which may be assigned and transferred. The number and ownership of quotas must be identified in the company's articles of association.

If not provided otherwise in the articles of association, transfers of quotas to other partners or third parties are permitted, unless partners representing more than one-fourth of capital stock do not agree with such transfer.

As a general rule, no minimum capital stock is required (exceptions in case of obtaining certain licenses). Nevertheless, the capital stock should be consistent with the company's initial operational needs. In the event that more is needed, the partners may increase the company's capital stock at any time, provided that the existing capital stock has been already paid in, by amending the articles of association.

The partners may pay in the capital stock with cash, credits or assets, and there is no legal time frame set forth by the law for payment thereof. Services may not be rendered in lieu of paying in capital stock. Capital increases will only be allowed after full payment of the previously subscribed amount.

Decisions taken by the partners in a partner's meeting are binding upon all partners, even if they were absent from the meeting or dissented from the deliberation taken.

A limited liability company may be managed by one or more persons — partners or not —, Brazilian citizens or foreigners, provided that they are residents in Brazil. The manager will be in charge of the company's management and representation.

The articles of association may establish different levels of control for the company and determine which matters depend on the partners' prior authorization, in addition to the matters already provided by the law.

As a general rule, the managers of the company are not liable for acts performed within the regular course of business. However, when they: (i) engage in negligent or wrongful conducts (abuse or misuse of corporate powers), although within the level of their duties or powers; or (ii) act in violation of the Law or the Articles of Association, they will be held personally liable under civil law for the losses they have caused.

The restrictions imposed on management powers, as set out in the articles of association duly filed with the competent registry, are also imposed on third parties negotiating with the company. For this reason, if the current articles of association impose clear limits on the manager's powers, the third party contracting with the company must observe the rules in this corporate document for the business to be effective.

A modification introduced by a law enacted in 2007 has established that the abovementioned rules previously applicable only to corporations, related to the booking and preparation of financial statements, as well as independent audits, would also be applicable to companies, or a group of companies under common control, that had in the previous financial year assets greater than BRL 240,000,000.00 (two hundred forty million reais) or annual gross revenue greater than BRL 300,000,000.00 (three hundred million reais). As a result of this law, some Boards of Commerce understood that if a company incorporated under a limited liability company (or any other corporate type) meets those requirements, the specific rules previously applicable only to corporations regarding the obligation to publish their financial statements in the Official Gazette and in another widely read newspapers would be applied to this company as well.

As a result, since 2007, this issue has been the subject of several debates in the Brazilian legal community, since some Brazilian lawyers understand that publication is not mandatory for limited liability companies considering that there is no express mention in the law related to the need for publishing the financial statements. There are many good arguments in favor of and against both interpretations. A decision in a lawsuit filed in 2008 ordered that the publication of the financial statements was mandatory; however, even after this judicial decision, only some Boards of Commerce¹ enforcing such a requirement for publication have been requesting confirmation that the financial statements had been published in order to file the Minutes of the Partners' Meeting or the General Shareholders' Meeting that have approved the financial statements of the companies that meet the requirements set forth in the law. Many companies have filed a *writ of mandamus* in order to be released from publishing its financial statements. In 2017, the Regional Federal Court, 3rd Circuit, unanimously decided to dismiss the obligation for limited liability companies to publish its financial statements, as provided to in the Resolution issued by Board of Commerce of São Paulo No. 02/2015.

2 Corporation

The main purpose of a Brazilian corporation (*sociedade anônima*), like U.S. corporations, is to make profits and distribute such profits as dividends to their shareholders.

A corporation's equity interest is represented by shares, which may be of different types, according to the advantages, rights and restrictions attributable to the shareholders. The two major types of shares are common and preferred. Corporations are also allowed to issue debentures.

Publicly held corporations must be registered with, and subject to, the supervision of the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários - CVM*). Corporations may also be privately held.

Only publicly held corporations may issue depositary receipts ("DRs"), which are certificates representing shares in the corporation. DRs are traded on foreign markets, enabling the company to raise funds outside of Brazil.

Brazilian corporations are organized through their bylaws, which are written documents that must abide by the Corporations Law. Corporations' bylaws must be approved by the inaugural general meeting and may be amended by a special general meeting.

¹ Since 2010 the Board of Commerce of the State of Minas Gerais, since 2011 the Boards of Commerce of the States of Rio de Janeiro, Tocantins, Goiás, and since 2015 the Board of Commerce of São Paulo.

To validly exist, a corporation must file with the board of commerce the minutes of the inaugural shareholders' meeting and the approved bylaws, a complete list of all the subscribers of the capital stock, and if the capital is paid in cash, the bank receipt for the initial ten percent (10%) payment. As an exception, in accordance with Law 4,595 of 1964, as amended, where the corporation is a financial institution, the percentage of the initial payment must be equal to or greater than fifty percent (50%) of the subscribed capital stock.

As a general rule, after submitting the relevant documents to the board of commerce, filing usually occurs within five (5) days, unless the board of commerce requires changes in the documents or requests additional information.

Like limited liability companies, corporations must also obtain all other standard registrations, as well as specific ones depending on the type of business to be carried out. In the same way, a corporation's shareholders, whether legal entities or individuals, must be enrolled with the CNPJ or the CPF, as the case may be.

Corporations must adopt an accounting system that consists of standard bookkeeping of commercial and financial information related to their activities, in addition to a ledger of nominative shares; a ledger of nominative share transfers; a ledger of minutes from the general meeting of shareholders; a ledger of shareholder attendance; a ledger of minutes from executive board meetings; and a ledger of opinions and minutes from the oversight council's meetings.

Unless otherwise provided for by law or bylaws, shareholder decisions require a simple majority of votes, without abstentions being taken into account.

The corporation may be managed by a board of officers and a board of directors (required in case of publicly held corporations), or just by a board of officers.

The board of directors is a collective decision-making body that consists of at least three members, appointed at the shareholders' general meeting. If the members of the board of directors are not residents of Brazil, they must appoint a representative who is a Brazilian resident to receive services of process in legal proceedings, according to Brazilian Corporations Law.

A board of officers is the corporation's executive body, consisting of at least two officers who must be Brazilian residents. The officers represent the corporation and perform all acts necessary for its normal operation.

As a general rule, officers and directors are only personally liable for their acts when they involve an abuse of power, excess of mandate, or violation of the law.

Corporations also have an oversight council whose basic function, when installed, is to oversee the acts of management.

Most of the corporate documents of a corporation, such as its bylaws, minutes of shareholder meetings and board of officers' meetings, annual reports, balance sheets, and other financial statements must be published in the Brazilian Official Gazette and in another widely read newspapers.

3 Other Legal Entities

Brazilian laws provide for other types of corporate entities, such as simple partnership (*sociedade simples*), secret partnership (*sociedade em conta de participação*), general partnership (*sociedade em nome coletivo*), limited partnership (*sociedade em comandita simples*) associations and foundations. However, those types of legal entities are not commonly adopted unless there is a specific business decision or operational reason that justifies adopting any of these types of legal entities.

In 2011 a new type of corporate structure was created, the *Empresa Individual de Responsabilidade Limitada* - EIRELI (which is an individual limited liability company). The EIRELI is formed only by one person, Brazilian or foreigner. Since EIRELI was created, there has been a discussion whether or not a legal entity could form an EIRELI. However, in 2018 the National Department of Business Registration and Integration ("DREI" - a Brazilian Federal authority which regulates the Boards of Commerce) established that EIRELI could be formed by legal entities, Brazilian or foreigner.

To validly exist, the EIRELI's charter shall be filed before the board of commerce of the state where it is located.

The EIRELI shall have a minimum capital of one hundred (100) times the highest minimum wage in force in Brazil, which shall be totally subscribed and paid in on the date of its incorporation, and its owner shall be liable for its obligations up to the amount of its capital stock. The assignment and transfer of EIRELI's ownership is allowed. However, it is not allowed that an individual be the owner of more than one EIRELI.

The rules applicable to a limited liability company shall be applied, *mutatis mutandis*, to an EIRELI.

Mergers, Acquisitions, Joint Ventures and Private Equity

1 General Overview

The Brazilian market offers many opportunities for companies that wish to expand their activities in Brazil by acquiring or merging with local companies, or even by teaming up with local partners.

As a general rule - except for certain regulated sectors such as telecommunications, aviation and rural land - there are no limitations on the percentage of capital stock of a Brazilian company that may be held by a foreign investor, or special prior approvals to be obtained apart from antitrust approvals by the Administrative Council for Economic Defense (“CADE”) (for more details on these rules, please see Chapter XII below – Competition Law).

2 Legal Framework

2.1 Acquisitions

The most common way for a foreign investor to expand activities in Brazil is the direct acquisition of one or more existing Brazilian companies, often using a pre-existing Brazilian holding company as the acquisition vehicle, which receives direct investment from the foreign entity and is used as the vehicle for acquisition, and if necessary, for arranging funding.

As a general rule, Brazilian companies are acquired using the same mechanisms generally used internationally. Buyers and sellers execute an agreement setting forth terms and conditions of the acquisition, including the usual representations and warranties relating to the business being acquired. The accuracy of these representations and warranties and the general situation of the business are determined prior to closing through due diligence reviews by accountants, lawyers and experts appointed by the buyer.

Upon acquisition, the buyer is free to dismiss directors and officers of the acquired company and to appoint new directors and officers (the latter, as executives of the company, have to be residents of Brazil) of its choice.

Pursuant to Brazilian tax laws, capital gains from the sale of assets (including shares or quotas of capital) located in Brazil by a non-resident are taxable in Brazil, even if both seller and acquirer are non-residents. In this last situation, the tax may be due on the date of the sale and/or payment thereof, and the acquirer or its attorney-in-fact in Brazil is the party responsible for withholding the applicable capital gains tax when the acquirer is a non-resident.

Acquisition of listed shares must be preceded by an analysis of the actual share dispersion of the company's shares. Depending on the volume of shares on the market (free float), a public tender offer to purchase shares from the market will be required, and minority shareholders may have the right for a tag-along at up to 100% of the price paid by the shares of the controlling block.

Except for certain regulated sectors (such as telecommunications, aviation and energy) and CADE (if the transaction triggers legal thresholds), there is no need for regulatory approvals to carry out the acquisition.

Pursuant to Brazilian tax laws, the sale of a majority of capital triggers the requirement for certain tax "clearance" certificates of the target company, which will be required for filing acquisition documents.

2.2 Mergers

Brazilian law provides rules for the merger of two or more companies resulting in a new company (*fusão*), spin-offs (*cisão*), and a merger of one company into another (*incorporação*). In the context of an acquisition, a *fusão* is rarely used (usually regarded as a too troublesome with virtually no gains in comparison to the *incorporação*). A *cisão* is often used to reorganize a company prior to selling its shares, carving-out assets and liabilities that are not to be included in the sale. An *incorporação*, in turn, is used when a portion of the purchase price is to be paid with stock of the acquiring company (an *incorporação* results in the former partners of the sold company receiving newly issued stock of the acquiring company).

Prior to deciding on a *fusão*, *cisão* or *incorporação*, the company to be sold should be analyzed to verify if it will be able to produce debt clearance certificates from the tax authorities – a requirement under Brazilian law for any company that intends to merge with/or into another company, or to undergo a spin-off.

As in the case of acquisitions, mergers also require certain tax "clearance" certificates of the target company, which will be required for filing merger documents.

2.3 Joint Ventures

Apart from incorporating a new company or acquiring an existing one, foreign investors may also consider entering into joint ventures with Brazilian parties or other foreigners. Joint ventures in Brazil are usually structured in the form of a *limitada* or a *sociedade anônima*. The rights and obligations of the joint venture's partners are typically regulated by joint venture agreements, articles of association, by-laws, shareholder' agreements, and applicable corporate law.

2.4 Private Equity

Typically, private equity organized in Brazil takes the form of a private equity investment fund – “*Fundo de Investimento em Participações*” or “FIP”. The FIP is organized and exists pursuant to the rules of the Brazilian Securities and Exchange Commission (“*Comissão de Valores Mobiliários*” or “CVM”). A FIP is authorized to invest in stocks, debentures, warrants, and other securities that are convertible or negotiable in stocks of privately or closely held corporations, where the FIP actually participates in the invested company's decision-making process, by virtue of:

- (i) interest in the controlling block;
- (ii) shareholders' agreement; or
- (iii) other agreements or proceedings which assure the FIP's influence on the company's strategy.

The FIP must be managed by a legal entity authorized by the CVM to do so, including financial institutions. The FIP has been commonly used due to its tax advantages. However, in the past few years the tax authorities have been trying to restrict such advantages. For this reason, the tax impacts of investing in a FIP must be analyzed on a case-by-case basis.

A question often asked by foreign investors interested in acquiring a Brazilian company is whether they should acquire assets or stock. While in other countries an asset acquisition may provide far better insulation from the liabilities of the company selling the assets, in Brazil that may not always be the case, in particular with respect to tax and labor liabilities.

Brazilian tax law stipulates that the assets that once belonged to a company may be targeted by tax authorities to cover tax liabilities if the company selling the assets does not have sufficient funds to pay off such liabilities. In addition, if the purchasing company also “inherits” the employees of the company selling the assets, labor courts often declare the purchasing company a successor in interest of the selling company, thereby exposing the purchasing company to great potential risk of having to pay out severance packages, social security and other labor liabilities incurred by the employees prior to the transfer of their labor agreements from the selling company.

Hence, although an asset deal may in fact provide some insulation from the selling company's past liabilities, each situation should be analyzed on a case-by-case basis, not only to ensure that the structure makes sense from a tax perspective, but also to verify if the asset deal is ultimately worth the additional efforts involved in comparison to a stock deal.

3 Trends and Developments

M&A activity continues at a very strong pace in Brazil, driven in large part by privatizations being carried out by the current government. In addition, many sectors of the Brazilian economy such as oil & gas, infrastructure, and a few others are under a financial restructuring that will require assets to be sold as part of an attempt to reduce leverage, which will further incentivize investment. Other sectors, including agribusiness, technology and resilient consumer goods will continue to benefit for inherent capacities of the Brazilian economy.

At the same time, Brazil continues to be an important destination for many funds that were raised for private equity purposes and which had Brazil as a primary focus.

In terms of the regulatory environment, we expect to see Brazilian GAAP continuously revised and applied according to IASB standards. In addition, we expect improvements to the regulatory framework for certain sectors involving infrastructure (such as ports, waterways, railroads, etc.) and other key sectors for Brazil, such as agriculture. On the other hand, certain issues around foreign ownership of rural land continue to present a barrier to investment for the foreseeable future, however there is increasing discussion to liberalize legislation in this regard.

Capital Markets

1 Publicly-Held Corporations

1.1 General Overview

Publicly held corporations are subject to stricter rules on managerial structure, as the creation and maintenance of a board of directors (which is not generally required for closely held corporations) and the appointment of an Investor Relations Officer is mandatory.

1.1.1 Board of directors

The board of directors is responsible for defining general business policies and overall guidelines, including long-term strategies, and for controlling and monitoring the company's performance. The duties of the board of directors include, among other things, electing or removing executive officers and supervising the management team.

In accordance with the Brazilian Corporations Law, non-controlling shareholders of a listed company, whose interest represents a minimum of (i) 15% of the total voting shares, for voting shareholders, or (ii) 10% of the capital stock, for non-voting shareholders, have the right to appoint and remove one director and the respective substitute by split vote at a general meeting, provided that the foregoing minimum thresholds have been observed continuously for at least the three months preceding such general meeting. Should such minimum thresholds not be met, voting and non-voting shareholders may combine their interest to jointly appoint a director and its substitute if the combined interest surpasses 10% of the company's capital stock.

Since the amendment to the Brazilian Corporations Law implemented by Law 12,431/2011, non-shareholder individuals can be appointed as directors.

1.1.2 Board of executive officers

Executive officers are responsible for day-to-day management as appointed by the board of directors, and must be residents in Brazil. They have individual responsibilities established by the by-laws and the board of directors. One of the officers of a publicly-held company is designated as the Investor Relations Officer and is responsible for providing information to the company's shareholders, the CVM, and the organized securities market where the securities are traded.

1.1.3 Oversight council

Under Brazilian Corporations Law, the oversight council (in Portuguese, *Conselho Fiscal*) must be an independent corporate body. The primary responsibilities of an oversight council include monitoring management activities, reviewing the company's financial statements, and reporting its findings to the company's shareholders. The oversight council may be permanent or *ad-hoc*, in which case it will be instated at the request of shareholders whose interests represent at least 10% of the voting shares or 5% the non-voting shares. Additionally, in a publicly-held company these percentages may vary according to the company's capital stock, as per applicable CVM regulation.

1.2 Disclosure of material information

1.2.1 Periodic and occasional disclosure of information

Publicly-held corporations are subject to the reporting rules established by Securities Law, which require the company to provide periodic information to the CVM and the organized securities market where the securities are traded, including, but not limited to, the Shelf-Document Report (as defined below) and registration forms, financial documents, such as standardized financial statements, the annual and quarterly information, quarterly management reports, independent audit reports as well as the report on the *Brazilian Code of Best Corporate Governance Practices*. In addition, the company is required to file with the CVM all shareholders' agreements, documents related to annual general meetings, such as call notices, management proposal related to the agenda, summary of the resolutions taken and minutes of the annual general meeting and copies of minutes from general meetings, as well as the ballot papers for remote voting and the voting maps.

Since 2010, as a replacement for the previous IAN form (similar to the US 20-F-based Form), the CVM introduced a shelf-document report (in Portuguese, *Formulário de Referência*, "Shelf-Document Report"), which must be presented and submitted to a complete update annually, or whenever the specific events set forth by CVM Regulation 480, as amended, occur. Inspired by the "shelf registration system" model developed by the International Organization of Securities Commissions — IOSCO, the Shelf-Document Report is equivalent to its "shelf document" and is intended to provide information to investors periodically and at the time of issuance of securities (in the latter case, through its incorporation by reference).

1.2.2 Disclosure of trading of shares by the company, controlling shareholders, directors, officers and oversight council members

Pursuant to CVM rules, directors and officers, members of the oversight council, if installed, as well as members of the audit committee or any other technical or advisory committee, are required to disclose, to the company, the CVM, and the organized securities market where the securities are traded, within the timeframe and with the specific information required by the proper regulation, the number and type of securities issued by the company or publicly-held subsidiaries held by them or by persons related to them, as well as any change to their respective interests.

1.2.3 Disclosure of material trading

According to CVM Regulation 358, as amended, any material negotiation conducted by controlling shareholders, directors and officers, shareholders entitled to appoint directors and members of the oversight council, as well as investors of a publicly held company, resulting in increases or decreases of interest of multiples of 5%, triggers the disclosure obligation of such persons, who must report to the company, among other information, the ownership percentage held (including others securities entitling rights to shares, *i.e.* the Brazilian Depositary Receipts (defined below)) and intended to be held in the company, as well as the purpose associated therewith. Interests (or rights thereof) held by investors, related parties, and any other person acting together or representing the same interest – namely, entities under common control and funds managed by the same entity or related party – are calculated into such thresholds.

1.2.4 Disclosure of material information by the company

Pursuant to the CVM and the Securities Law, a publicly-held company is required to inform the CVM and the organized securities market where the securities are traded of any material developments relating to the company or its business. A material development consists of an event with the potential to affect the price of securities, the decision of investors to buy, sell, or hold such securities, or their decision to exercise any of the rights inherent to such securities.

1.3 Public offering for acquisition of securities

1.3.1 Mandatory offerings

According to CVM Regulation 361, as amended, public offerings for acquisition of securities (in Portuguese, *Oferta Pública de Aquisição de Ações*, “OPA”) are generally required:

- (i) for delisting a publicly-held company in the organized securities market;
- (ii) as a result of disposal of the controlling interest of a publicly-held company or resulting from bylaws-related provisions; or
- (iii) in other situations, as described in [item 1.3.2](#) below.

1.3.2 General rules

Such OPAs are generally:

- subject to registration with the CVM;
- intermediated by a financial institution;
- based on an appraisal report of the target company prepared by a specialized company, if launched by the company itself, its controlling shareholder, administrator or their related parties, or required by the applicable regulation; and
- pursued through an auction in the organized securities market on which the securities are traded.

a. Delisting procedure

The procedure for delisting a publicly held company:

- (i) must be launched by the controlling shareholder or by the company itself, in which case reserves will be required;
- (ii) must be followed when seeking the acquisition of all shares issued by the company; and
- (iii) requires:
 - (a) a fair price determined by an appraisal report, and
 - (b) the agreement of two-thirds of the free float, as defined by the CVM, for the company to be delisted. After the offering, if the free float drops to 5% of all shares issued by the company, a general meeting may authorize the redemption of such free float shares for the price of the offering.

b. Disposal of controlling interest

- (i) Other disclosure and public-offering-related obligations may apply if a significant percentage acquired by an investor results, under Brazilian Corporations Law, in disposal of the company's controlling interest. More specifically, the investor acquiring the company's control (directly or indirectly) must launch a public offering, to be approved by CVM, to acquire all voting shares issued by the company, at a price of at least 80% of the price paid for each controlling voting share plus accrued interest (legal tag-along right).
- (ii) This price is applicable to any publicly-held company in Brazil, except for corporations listed in special listing segments Level 2 (in Portuguese, *Nível 2*) and the New Market (in Portuguese, *Novo Mercado*) of the São Paulo Stock Exchange (in Portuguese, *B3 S.A. – Brasil, Bolsa, Balcão, "B3"*), for which additional tag-along rights rules apply, as described in [item 1.5](#) below.

c. Other offerings

A public offering for acquisition of shares is also mandatory should the controlling shareholder of a publicly-held company, or a party related thereto, reduce liquidity of a class of shares acquiring:

- (i) more than one-third of the free float shares of any given class (common or preferred) and subclass; or
- (ii) for certain companies listed in securities regulation, 10% of the free float shares of any given class, if the controlling shareholder already holds more than 50% of such class of shares and CVM understands that, within the following six (6) months, acquisition reduces liquidity of the shares.

Also, according to the CVM Regulation 361, an investor may acquire the controlling interest of a company through a public offering for acquisition of shares, either hostile or not. Such voluntary offering is generally not subject to registration with the CVM, except if the offering involves exchange of securities.

1.3.3 Tender offers - by-laws

Certain by-laws of publicly-held companies may require a public offering to be launched should an investor reach the threshold, and for the price determined, according to the provisions of the by-laws. Since this public offering is not provided for in Brazilian laws and regulations, a case-by-case analysis of each set of by-laws must be made to ascertain the applicable rules.

1.3.4 Other rules

For the purposes of execution of any sort of public offering for the acquisition of shares, the offeror must hold confidential any information regarding the offer until it is duly released to the market, as well as ensure that its directors, employees, advisors and other related third parties comply with the same duty.

When hired to intermediate the OPA, the securities broker-dealers, the securities distribution agents or the financial institution with investment portfolio shall not negotiate with the shares issued by the referred company, nor conduct research and create public reports about the company and the operation.

The restrictions above do not apply in the following cases:

- (i) trading on behalf of third parties;
- (ii) transactions clearly intended to monitor stock indexes, certificates or receipts of securities;
- (iii) transactions for hedge purposes regarding total return swaps contracted with third parties;
- (iv) transactions as market maker in accordance with CVM rules; or
- (v) discretionary management of third parties' portfolio.

During the OPA period, the offeror and its related parties are prohibited from:

- (i) selling, directly or indirectly, shares of the same class and subclass of those subject to the OPA (this prohibition, however, do not prevent the offeror to sell its own shares to third parties in auction);
- (ii) acquiring shares of the same class and subclass of those subject to the OPA, in the case of a partial OPA; and, finally
- (iii) performing operations with derivatives based on shares of the same class and subclass of those subject to the OPA.

1.3.5 Voluntary offerings

According to CVM regulations, an investor may acquire controlling interest of a company through a public offering for acquisition of shares, whether hostile or not. Such an offering is generally not subject to registration with the CVM, unless the offering involves an exchange of securities.

1.4 Special listing segments on the B3

1.4.1 Level 1, Level 2, and the New Market

The *B3* has three special listing segments, known as Level 1 (in Portuguese, *Nível 1*), Level 2 (*Nível 2*), and the New Market (*Novo Mercado*). Such classification was originally created to foster a secondary market for securities issued by Brazilian corporations with securities listed on the *B3*, encouraging such corporations to follow good practices of corporate governance. The listing segments were designed to trade shares issued by corporations voluntarily agreeing to abide by additional corporate governance practices and disclosure requirements along with those already imposed by applicable Brazilian law. These rules generally increase shareholders' rights and enhance the quality of information provided to shareholders.

To become a Level 1 company, in addition to the obligations imposed by applicable law to be a publicly-held corporation, the issuer must agree to:

- ensure that shares of the issuer representing at least 25% of its total capital are effectively available for trading;
- adopt offering procedures that favor widespread ownership of shares whenever making a public offering;
- comply with minimum quarterly disclosure standards;
- follow strict disclosure policies with respect to transactions by its controlling shareholders, members of its board of directors, and its executive officers involving securities that it has issued;
- maintain and publish a schedule of corporate events available to shareholders; and
- submit to *B3* a Code of Conduct and the company's Securities, applicable, at least, to the controlling shareholders and to the company's management members and staff.

Also, the chairman of the Board and the Chief Executive Officer may not be the same person. The listed companies have the maximum term of three years to rearrange their management structure, as applicable, to comply with such new requirement.

To become a Level 2 company, in addition to the obligations imposed by applicable law to be a publicly-held corporation, an issuer must agree to:

- (i) comply with all of the listing requirements for Level 1 corporations;
- (ii) grant tag-along rights for all shareholders in connection with a transfer of control of the company offering the same price paid per share of the controlling block for all non-controlling shareholders, regardless of the type of share;
- (iii) grant voting rights to holders of preferred shares in connection with certain corporate restructurings and related-party transactions, such as:
 - (a) any transformation of the company into another corporate form;
 - (b) any merger, consolidation or spin-off of the company;
 - (c) approval of any transaction between the company and its controlling shareholder or parties related to the controlling shareholder;
 - (d) approval of any valuation of assets to be delivered to the company in payment for shares issued in a capital increase;

- (e) appointment of an expert to ascertain the fair value of the company in connection with any deregistration and delisting tender offer from Level 2; and
- (f) any changes to these voting rights, which will prevail as long as the adhesion contract to the Level 2 regulation with the *B3* is in effect;
- (iv) have a board of directors consisting of at least five members out of which a minimum of 20% of the directors must be independent, and limit the term of all members to two years, reelection permitted, or three years without the possibility of reelection, under exceptional cases in which the company does not have a controlling shareholder holding more than 50% of the company's capital stock;
- (v) prepare annual financial statements in English, including cash flow statements, in accordance with international accounting standards;
- (vi) if it elects to delist from the Level 2 segment, conduct a tender offer by the company's controlling shareholder (the minimum price of shares to be offered to all shareholders will be the economic value determined by an independent firm with requisite experience); and
- (vii) adhere exclusively to the Market Arbitration Chamber of the *B3* (in Portuguese, *Câmara de Arbitragem do Mercado*) for resolution of disputes between the company and its investors, or arising from the Level 2 regulation.

Among the recent amendments to the Level 2 regulation, certain prohibitions were included to impose:

- (i) qualified quorum rules or limitation of voting rights for shareholders representing less than 5% of the company's capital stock (exception made for denationalized companies with preferred shares), and
- (ii) liabilities to shareholders voting in favor of any changes in the company's by-laws.

Finally, among other specific changes, the execution of any tender offer of the company's shares will require prior written opinion by the board of directors, which will not bind the final decision, to be defined at a shareholders' meeting.

To be listed in the New Market, an issuer must meet all of the requirements for Level 1 and Level 2 corporations and, in addition, the issuer must issue only common shares, except in cases of denationalization of the company, which might admit preferred shares to grant specific political rights to the denationalized entity.

1.4.2 Bovespa Mais and Bovespa Mais Nível 2

Bovespa Mais and *Bovespa Mais Nível 2* are segments of the organized over-the-counter market created to increase the opportunities for new, smaller and medium-sized publicly-held corporations to trade their shares on the *B3*, as these segments also adhere to advanced standards of corporate governance practices.

2 Insider Trading

2.1 Introduction

Insider trading rules in Brazil are very similar to those applicable in the United States, and apply either to the source of information (i.e. *tippers*, such as the managerial bodies of the relevant company) or to individuals to whom the information is presented, who misappropriate such information and trade based on it (i.e. *tippers*, such as lawyers and financial advisors). Brazilian legislation prohibits trading of securities based on privileged information² and imposes administrative, civil, and criminal penalties, depending on the degree of the infraction and position of individuals involved. These three penalties may be imposed either individually or collectively.

Administrative penalties may be imposed by the CVM and include, as provided for in Article 11 of the Brazilian Securities Law:

- warnings,
- fines, which vary according to the relevant transaction,
- temporary disqualification up to 20 years to exercise the position of director or oversight council member of a publicly-held company or any other entity registered with the CVM,
- suspension of authorization or registration to operate in capital markets;
- temporary disqualification, up to 20 years, to operate in capital markets;
- temporary prohibition, up to 20 years, to perform certain activities or transactions, for members of the distribution system or other entities registered with the CVM; and
- temporary prohibition, up to 10 years, to operate directly or indirectly in one or more types of transaction in the securities market.

Depending on the public interest, this Law authorizes the CVM to reach settlements with the infringing party that would suspend or prevent the commencement of administrative proceedings arising from violation of securities laws and regulations in general and, in the latter case, once the relevant party complies, will result in the proceeding being shelved by the CVM. Note that the effects of settlements with the CVM are limited to administrative penalties, and do not prevent the enforcement of civil and criminal penalties.

Since the amendment of the Securities Law in 2017, implemented by Provisional Measure No. 784, administrative fine amounts were heavily increased and now can range up to a maximum of the following values:

- (a) BRL50,000,000.00 (fifty million reais); or

² Privileged information: any non-disclosed information that may affect the regular course of business.

- (b) double the value of the issue, offer or irregular operation; or
- (c) three times the amount of the economic advantage obtained, or loss avoided, as a result of the insider trading; or
- (d) double the amount of the loss suffered by investors due to insider trading.

Civil penalties are usually imposed by way of indemnification lawsuits brought by individuals or by the state prosecutor to recover damages or losses suffered due to insider trading.

Criminal penalties range from 1 to 5 years in prison, and fines that can reach up to three times the illegal gain resulting from insider trading.

3 Securities Transactions in Brazil

The National Monetary Council (in Portuguese, *Conselho Monetário Nacional*, “CMN”) supervises both the financial market — which is regulated by the Central Bank of Brazil — and the securities market, including derivatives contracts, regulated by the CVM. Accordingly, securities transactions are subject to CVM regulation. The main activities related to these transactions are described below.

3.1 Public Offerings

3.1.1 Public offering

Any public offering of securities in Brazil, by an offshore or onshore entity, generally requires:

- (i) prior registration with the CVM of the offering (Articles 19 and 21 of the Securities Law) and, if applicable, the issuer,
- (ii) intermediation by an institution which is part of the Brazilian SDS (defined below) (Articles 15 and 16 of the Securities Law), and
- (iii) listing the offered securities on a Brazilian organized securities market (“Public Offering”).

3.1.2 Definition of public offering

An offering of securities in Brazil is deemed to be public if:

- any sales efforts (meaning the use of any form of communication directed at the general public for direct or indirect promotion of subscription or disposal of securities) is conducted in Brazil designed for the “general public”; or
- though not aimed at the general public, Brazilian investors have access to the information about the offering, and no precautions are taken to allow this access only to investors in countries, or locations where the offering is authorized.

For purposes of CVM regulation, “general public” means any class, category or group of persons, whether individualized or not in such capacity, except for those who hold prior, strict and customary commercial, credit, corporate or labor relationship with the issuer.

3.1.3 “Quiet period” and lock-up period

During the “Quiet Period” (in Portuguese, *Período de Silêncio*), the issuer, the underwriter — from its time of hiring —, and the managers of all institutions involved in a public offering, within sixty days before filing the public offering registration, or on the date of approval of the public offering, whichever occurs last, are prohibited from publicly disclosing any information regarding the offering or the issuer, except for information related to the corporation’s ordinary activities. In addition, the issuer and the intermediary institutions involved are subject to a “Lock-up Period”, until publication of the notice of closing, during which they may not perform any transaction with securities of the relevant issuer, or securities referenced therein, except in cases expressly provided for in relevant regulation.

3.1.4 Exemption upon request

Except as described in 3.1.7_ below, the CVM has not enacted to date any general rule waiving registration of a public offering of securities, even if issued abroad³. However, CVM Regulation 400, as amended, expressly allows the CVM to waive registration of the issuer and/or the securities offering, or some of its requirements (such as prospectus, offering initial notice, etc.). In granting such a waiver, the CVM will consider, among other aspects:

- (i) the securities par value or total amount of the offering;
- (ii) conformity to different procedures for offering securities in more than one jurisdiction, as long as equality of treatment with local investors is assured;
- (iii) the plan for distribution of securities;
- (iv) the target market through the offering, including geographic location and quantity; and/or
- (v) if the offering is aimed only at Qualified Investors or Professional Investors (defined below).

Such regulation does not specify the details for each of these situations, leaving analysis to the CVM on a case-by-case basis.

3.1.5 Definition of professional investors

The category of “Professional Investors” is recent and includes:

- (i) financial institutions and other institutions authorized to operate by the Central Bank of Brazil;
- (ii) insurance and capitalization companies;
- (iii) open and closed pension funds;

³ There is no similar rule in Brazil to Rule 144A - enacted in the US - which provides for a general exemption in certain circumstances for qualified institutional buyers.

- (iv) individual or legal entities that hold financial investments in an amount exceeding BRL 10,000,000.00 (ten million reais) and that additionally attest in writing their professional investor condition;
- (v) investment funds;
- (vi) investment clubs, provided that their investment portfolio is managed by a securities portfolio manager authorized by CVM;
- (vii) independent investment agents, investment portfolio managers, analysts and securities consultants authorized by CVM, regarding their own investments; and
- (viii) non-resident investors.

Moreover, it is important to note that special social security regimes instated by the Union, the States, the Federal District or the Municipalities may also be deemed professional or qualified investors, provided they are recognized as such as per the specific regulation issued by the Ministry of Social Security.

3.1.6 Definition of qualified investors

Regulation recently amended the definition of “Qualified Investors”, which now includes:

- (a) any “Professional Investor”, as defined in [item 3.1.5](#) above;
- (b) legal entities and individuals owning financial investments in an amount greater than BRL 1,000,000.00 (one million reais) and that additionally attest in writing their qualified investor condition;
- (c) in relation to their own investments, individuals approved in technical qualification examinations or that hold certifications approved by the CVM, as a requirement to be independent investment agents, portfolio administrators, securities analysts and consultants; and
- (d) investment clubs, provided that their portfolio is managed by one or more investors deemed to be Qualified Investors.

3.1.7 Automatic exemption

In accordance with the rules set forth by CVM Regulation 476, as amended, certain public offerings of securities are automatically exempted from registration if placed with limited sales efforts. Such exemption requires:

- (i) the offering to seek no more than 75 Professional Investors;
- (ii) the securities to be acquired, or subscribed, by no more than 50 Professional Investors;
- (iii) the securities offering not to be pursued through a public sales effort;
- (iv) all material information to be disclosed to investors — although there is no need for a prospectus;
- (v) no public offering of the same security to occur within the following four months after the exempted offering;
- (vi) the securities offered must be issued in Brazil;

- (vii) traded only among Qualified Investors and after the ninetieth day after completion of the exempted offering; and
- (viii) the issuer to:
 - (a) have audited its annual financial statements;
 - (b) disclose such statements on its website within three (3) months after completion of the fiscal year;
 - (c) disclose material information reports; and
 - (d) not trade its securities based on material, non-disclosed information.

3.1.8 EGEM

“Issuers with Major Market Exposure” (in Portuguese, *Emissores com Grande Exposição ao Mercado*, “EGEM”), inspired by the American version “Well-Known Seasoned Issuers” (WKSJ), are able to automatically register their public offerings with the CVM. A corporation will be qualified as an EGEM provided that it meets the following requirements:

- (i) publicly traded for at least three years;
- (ii) timely compliance with CVM requirements for the last 12 months; and
- (iii) has a free float equal to or greater than BRL 5,000,000,000.00 (five billion reais).

To benefit from the EGEM's automatic registration, the issuer and leading distribution underwriter must submit a request to the CVM, submitting, among other documents, a specific application declaring qualification as an EGEM and a standard prospectus. Following CVM approval, the offering registration takes effect within five business days. However, the CVM may, at any time, convert this application into a standard registration procedure, if these requirements are not strictly observed.

3.1.9 Equity crowdfunding

In 2017, CVM Regulation 588 instituted the possibility of public offerings of securities for small-sized companies, aptly named “*Equity Crowdfunding*”. These offerings are automatically exempt from CVM registration, being made instead through virtual platforms for participatory investment, that must be based in Brazil and registered with the CVM.

In order for a company to be considered a small-sized company eligible for an equity crowdfunding, it must have had a gross revenue of, at most, BRL 10,000,000.00 (ten million reais) in the fiscal year prior to that of the offering, and cannot be a publicly-held corporation. These offerings must have a target resource value of up to five million reais (BRL 5,000,000.00) and a maximum offering period of, at most, 180 days.

3.1.10 Primary and secondary public offerings

Public offerings may be pursued in the primary or secondary markets or both.

3.1.11 Securities distribution program

Publicly-held corporations that have already carried out public offerings of their securities may file a securities distribution program with the CVM for distribution of securities within two (2) years after such filing.

3.1.12 Additional lots

Securities regulations authorize an offering to be increased without having to change the registration statement:

- (i) by a decision of the underwriter (greenshoe) should the demand be greater than expected or
- (ii) by a decision of the offering party (hot issue), only for purposes of price stabilization⁴.

Such increases are limited to 20% or 15% of the number of securities initially offered, respectively, and may be individually or collectively exercised.

3.1.13 Brazilian depository receipts

Issuance, public offering, and trading of Brazilian Depository Receipts (“BDRs”) are all subject to CVM supervision. Similar to the general rule described above, an offering of BDRs may also require the issuer and offering to be registered with the CVM.

According to the applicable regulations, only foreign publicly-held or similar companies are authorized to issue the underlying assets of BDRs. As per CVM's regulations, the qualifications of a foreign issuer comprises, in addition to the location of the company, the sum of assets that the company owns abroad, in the target market, rather than the source of domestic revenue for the respective issuer. Accordingly, assets held by foreign entities in Brazil shall be considered in order for it to be qualified as a foreign publicly-held corporation.

There are two levels of BDRs:

- (i) sponsored, which are offered by a depository entity hired and/or authorized by the issuing company (classified in Levels I, II or III) and
- (ii) non-sponsored, under which issuer is not related and/or authorized by the issuing company (Level I only).

3.1.14 Other depository receipts

Brazilian publicly-held corporations are also authorized to publicly offer depository receipts (“DRs”) (e.g. *ADRs* and *GDRs*) abroad, provided a DR facility is approved by the CVM, custodian and depository institutions are hired, and other procedures set forth by applicable governing law, regulations, and self-regulations are followed.

⁴ Limitation for the hot issue introduced by CVM Regulation 601/18, which amended CVM Regulation 400.

3.2 Intermediation

3.2.1 Securities intermediation

Intermediation of securities transactions in Brazil, or the performance of intermediation activities in Brazil, including over the Internet, requires the intermediaries to be part of the Brazilian Securities Distribution System (“Brazilian SDS”), and to be registered with the CVM. The Brazilian SDS consists of institutions responsible for, or engaged with, the following activities with respect to securities:

- (i) distribution;
- (ii) purchase and resale for their own account;
- (iii) mediation (trading by an intermediary);
- (iv) stock exchanges;
- (v) organized over-the-counter markets;
- (vi) commodities brokers, special operators and the commodities and futures exchanges; and
- (vii) clearing and settlement.

The intermediation of securities offerings in Brazil is usually done by securities broker-dealers (in Portuguese, *Corretoras de Valores Mobiliários*), securities distribution agents (in Portuguese, *Sociedades Distribuidoras de Valores Mobiliários*), and other financial institutions, such as multiple, commercial, and investment banks, duly authorized by the Central Bank.

Accordingly, a foreign entity that wants to practice intermediation of securities in Brazil would, among other conditions, have to

- (i) be headquartered in Brazil (through a subsidiary) and obtain specific authorization by the Central Bank and the CVM; or
- (ii) obtain specific authorization from the federal government (Ministry of Development, Industry and Foreign Trade) to develop activities in Brazil, in addition to those referred in the prior item, which will require the setting up of a branch in Brazil; or
- (iii) hire an institution that is part of the Brazilian SDS duly authorized to perform such activities.

3.2.2 Authorized activities without registration

Intermediation of securities transactions offered exclusively outside Brazil, aiming at Brazilian investors, is not a violation of Brazilian laws and does not require the authorizations referred to above, provided that:

- (i) client prospective activities are conducted exclusively outside Brazil, and
- (ii) the intermediated transaction (e.g. relevant underwriting, placement or purchase/sale of securities) does not constitute a public offering of securities in Brazil.

3.3 Securities Analysis

3.3.1 Analysis activities

According to CVM Regulation 483, as amended, analysis of securities disclosed to the general public in Brazil is subject to CVM supervision. Accordingly, an individual intending to professionally perform this activity in Brazil must be certificated by a self-regulated entity registered with the CVM, which will also be able to monitor these activities and assess penalties in the event of violation of provisions in regulation or in the code of conduct previously approved by the CVM. The requirements for certification are:

- (i) a university degree;
- (ii) passing technical exams approved by the CVM; and
- (iii) unconditional adhesion to the code of conduct.

3.3.2 Reports

There are certain restrictions and mandatory disclosure for analysis reports, including:

- (i) being written in clear, objective language, differentiating interpretations from facts;
- (ii) naming a primary accredited analyst to prepare the report;
- (iii) adding a disclaimer to alert that the analysis contains personal opinions and that they were independently developed; and
- (iv) disclosing any potential conflict of interests by any member of the analysis team.

Securities analysts are required to send the report to the self-regulated entity within three days of distribution, and to keep a copy for at least five years.

3.4 Asset Management

3.4.1 Introduction

Asset management of third-party assets in Brazil is subject to CVM supervision, under the terms of CVM Regulation 558. Accordingly, an individual or legal entity intending to professionally perform this activity in Brazil must be previously authorized by the CVM, pursuant to certain experience-related requirements. Asset-management activities generally include advice to third parties on which securities to invest in and the investment decision itself (purchase and sale of securities).

3.4.2 Individuals

Authorization to manage assets in Brazil requires the individual to, among others:

- (i) be a resident in the country;
- (ii) hold a recognized bachelor degree in Brazil or abroad;

- (iii) be approved in a certification exam whose methodology and content has been previously approved by the CVM.

Under certain circumstances, the CVM may exempt the individual from:

- (i) the bachelor degree-related requirement, in which case the experience referred to above would have to be for a longer period, or
- (ii) the certification exam requirement, provided the individual can prove:
 - (a) at least, seven years of proven professional experience directly related to securities and investment funds asset management activities; and
 - (b) considerable knowledge of asset management.

3.4.3 Legal entity

Asset management by legal entities requires, mainly:

- (i) the entity to be headquartered in Brazil and have in its by-laws or articles of association a provision authorizing this activity;
- (ii) designation of at least one individual registered with the CVM for such activity; and
- (iii) the constitution and maintenance of human and technological resources appropriate to the firm.

Also, a “Great Wall” must be maintained between asset management and other departments of the legal entity, to prevent conflicts of interest.

3.4.4 Ongoing obligations

Ongoing obligations that asset managers are required to comply with include:

- (i) general reporting obligations; and
- (ii) obligations specifically provided for in the particular regulation or by-laws of the portfolio under management, which vary according to the markets targeted by the manager.

Asset managers are also required to:

- (i) keep documentation for at least five years related to activities - or an additional period if an agreement, or an administrative proceeding, requires otherwise; and
- (ii) keep confidential all activities performed with third-party funds.

4 Investment Funds

4.1 Funds in General

4.1.1 Introduction

The offering, trading, and management of investment funds (“Funds”) in Brazil is subject to the supervision of, and registration with, the CVM. Funds are non-corporate condominiums aimed at trading financial assets by an asset manager.

4.1.2 Management services

Management services include those related directly or indirectly to Fund maintenance, which are provided by an asset manager or a third party duly authorized to do so.

The asset manager is the primary party responsible for the Fund’s transactions and is also required to provide shareholders with material information affecting the Fund’s activities.

Management services include:

- (i) management of the Fund’s portfolio;
- (ii) investment advice;
- (iii) securities treasury, control, and processing activities;
- (iv) distribution of shares;
- (v) book-entry share activities;
- (vi) custody; and
- (vii) rating activities.

Third parties do not have to be hired to provide management services, except for the services described in items (iii) to (vi) above, for which the manager is required to have special authorization.

4.1.3 Forms of incorporation

According to the Fund’s by-laws, the Fund may be incorporated as:

- (i) an open-end condominium, under which voluntary transfer of shares is not allowed, but redemption of shares is permitted, or
- (ii) a closed-end condominium, under which redemption occurs upon expiry of the Fund or the class of shares, but voluntary transfer of shares is generally allowed. For both forms the amortization of shares is permitted, in accordance with the provisions of the Fund’s by-laws.

4.1.4 Distribution

As a general rule, distribution of shares issued by Funds requires intermediation by institutions in the Brazilian SDS (as defined above), and delivery to investors of a copy of the Fund’s by-laws and prospectus describing the offering.

Distribution of shares issued by closed-end Funds also depends on prior registration with the CVM, provided that in such distributions it is possible to have automatic exemption if the requirements detailed in [section 3.1.7](#) above are met.

4.1.5 Classification and limits

The portfolio's mix is the basis for the following types of Funds:

- (i) fixed-income;
- (ii) stock;
- (iii) multi-market; and
- (iv) currency exchange.

Securities regulation also provides for a new type of fixed-income fund, named "Simple Fund", which allows investors that aim at low risk investments with reduced costs.

Investment in foreign securities by Brazilian funds is permitted with specific restrictions, depending on the targeted investors and the level of asset concentration.

4.1.6 Professional and qualified investors

Funds targeting Qualified Investors or Professional Investors (defined above respectively in sections [3.1.6](#) and [3.1.5](#)) are generally authorized to implement flexible structures, including higher concentration limits, payment and redemption of shares with financial assets and exemption of prospectus.

4.1.7 Disclosure of material information

All material information related to the Fund's investment policy and the risks involved must be included in the prospectus and the Fund's by-laws, and also during the Fund's activities, in a specific report.

4.1.8 By-laws

A Fund's main corporate documents are its by-laws, which contain information related to its management, investment policy, risks, duration, and description of shares.

4.2 Structured Funds

In addition to the rules described above, the CVM supervises other Funds, some of which are described below, designed to be the vehicle for certain transactions.

4.2.1 Private Equity Investment Fund ("FIP")

As per CVM Regulation 578, as amended (which replaced CVM Regulation 391), FIPs are created under a closed-end condominium and designed for investing a minimum amount of 90% of its net equity in shares, quotas of limited liability companies (*sociedade limitada*), debentures, warrants, and other titles and securities that are convertible or tradable in shares of closely- and publicly-held corporations, in which the FIP effectively participates in the decision process. FIP investors must be Qualified Investors (defined above). Securities regulation also allows the FIP's to grant personal guaranties upon prior approval by its shareholders in a general meeting.

The main changes introduced by CVM Regulation 578 are: the possibility for the FIP (i) to invest in debentures, limited to 33% of its subscribed capital; (ii) to invest in quotas of limited liability companies (*sociedade limitada*), provided that the requirements set forth by such regulation are met; and (iii) to create different classes of quotas with different economic rights.

4.2.2 Real Estate Investment Funds (“FII”)

Federal Law 8,668/1993, as amended, and CVM Regulation 472, as amended, provides for FIIs, which are non-corporate vehicles managed by financial institutions. FIIs are closed-end funds that invest most of their equity in real estate or related rights. Since the Fund has no corporate veil, the manager is the fiduciary owner of the underlying assets, separated from the manager's assets.

FIIs must distribute at least 95% of profits to their shareholders based on balance sheets dated June 30 and December 31 of each year. Additionally, FII shareholders do not have any “*in rem*” right to real estate and projects invested in by the FII, and are not personally liable for any legal or contractual obligation concerning the FII real estate or projects or its manager, except for the obligation to pay in all subscribed shares.

4.2.3 Receivables Investment Funds (“FIDCs”)

As per CVM Regulation 356, as amended, FIDCs are either closed- or open-end Funds that invest more than 50% of their equity in receivables that are realized or to be realized, backed by financial or commercial transactions, including those involving property financing and services. Only Qualified Investors are authorized to subscribe or acquire shares issued by FIDCs.

Additionally, the CVM provides for a subtype of FIDC, called a Non-Standardized Receivables Investment Funds (“FIDC-NP”), which aims only at Professional Investors and is regulated by CVM Regulation 444, as amended. The FIDC-NP is authorized to invest in certain receivables which increase the risk assumed by investors, such as receivables:

- (i) due with payments pending,
- (ii) from public entities,
- (iii) related to ongoing lawsuits,
- (iv) whose existence or assignment to the FIDC-NP may be challenged,
- (v) originated by companies under bankruptcy or similar proceedings;
- (vi) that haven't been realized, with unknown face value; and
- (vii) any other type of receivable not covered under CVM regulations.

4.3 Financial Bills

The financial bill (*letra financeira*) is an instrument of credit issued by banks (multiple, commercial, or savings), mortgage and real estate credit companies, as well as credit, finance, and investment companies for fundraising purposes and traded in the national capital markets.

Issuance and negotiation of financial bills are subject to registration before a securities depository and settlement-related system authorized by the Central Bank of Brazil. The public offering of financial bills may be conducted in accordance with the CVM regulation applicable to any other securities, such as CVM Regulations 400 and 476, as amended.

Each financial bill must have a minimum face value of BRL 50,000.00 (fifty thousand reais), which must be increased to BRL 300,000.00 (three hundred thousand reais) in case such financial bill qualifies as a subordinated debt, and the issuance must last for at least two years (24 months). Any advanced redemption by the issuer within such minimum issuance term is prohibited. Such minimum issuance term does not interfere with the buyback permission granted by BACEN Regulation 4733, which allows the issuing financial institution to buy back up to 5% of its financial bills (only 3% if such financial bill qualifies as a subordinated debt), which must be held in its treasury.

4.4 Securities for Long-Term Financing

In order to enhance fund raising mechanisms for long-term financing, special securities providing beneficial tax regimes were created as a result of Law 12,431/2011, as amended.

Such Law introduces specific securities as alternative instruments for the financing of long-term projects, and grants beneficial tax treatment for individuals, foreign investors, companies, and investment funds complying with the requirements provided therein. Such securities may be summarized as follows:

- (i) investment project securities, including typical securities from securitization transactions:
 - (a) certificates of real estate receivables; and
 - (b) shares issued by FIDCs incorporated as closed-end condominiums, which acquire receivables from non-financial institutions;
- (ii) securities to finance investment projects qualified as priorities by the Federal Government (priority project securities, jointly referred to as “PPS”), issued until December 31, 2030, including:
 - (a) priority projects bonds (including infrastructure bonds);
 - (b) shares issued by FIDCs incorporated as closed-end condominiums; and
 - (c) certificates of real estate receivables. A prior specific authorization for issuance of PPS is deemed necessary according to the regulations enacted by the respective supervising authority; and

- (iii) investment funds authorized to invest in securities to finance investment projects qualified as priorities by the Federal Government.

4.5 Certificates of Receivables

Certificates of receivables are being largely implemented to fund specific industries, primarily real estate- and agribusiness-related companies.

Real estate-backed securities, known as “real estate-receivables certificates” (*Certificados de Recebíveis Imobiliários (CRIs)*), were created by Law 9,514/1997 and represent an enforceable promise to pay, in cash, for credits related to the real estate business. The most common assets linked to the issuance of CRIs are credits arising from contracts of purchase and sale with chattel mortgage from the Brazilian Real Estate Financing System (SFI), credits from lease contracts (built-to-suit), or credits originated by the deeds of real surface rights. CVM Regulation 414, as amended, applies to CRIs issuances and public offerings.

Agribusiness-backed securities, known as “agribusiness-receivables certificates” (*Certificados de Recebíveis do Agronegócio - CRAs*), were created by Law 11,076/2004 and represent an enforceable promise to pay, in cash, for credits related to agribusiness. Prior to the new CVM Regulation 600, issued on August 1, 2018, which regulates CRAs, CRI regulations (both Law 9,514/1997 and the CVM's regulations concerning CRIs) were extended to CRAs. Note that Law 9,514/1997 still applies to CRA for specific matters.

For further information about CRA, please refer to [section XXVII.2.1.5](#) below.

4.5.1 Securitization company

Among the special purpose vehicles used for securitization, the securitization company occupies a prominent role, along with the FIDCs. A securitization company is a non-financial corporation, organized as a company, and registered with the CVM (and, for this reason, it is classified as a publicly-held company) for the specific purpose of acquiring receivables and issuing asset-backed securities.

A single securitization company can accomplish (and indeed usually does) more than one securitization transaction, each backed by different groups of receivables. In order to avoid risk sharing among independent transactions, the securitization company may segregate each set of receivables linked to different issuances into separate equities to be managed under a fiduciary regime.

Labor Aspects

One of the most significant features of Brazil's labor system is that the laws regulate the details of labor/management relations to a much greater extent than in other countries. In addition, the concept of collective bargaining is also very strong in Brazil.

1 Brazilian Labor Code

Most of employee rights are compiled in what is known as the Brazilian Labor Code, or the CLT (*"Consolidação das Leis do Trabalho"*). As of November 2017, Law No. 13,467/2017 (*"Labor Reform"*) modified certain significant aspects of labor relations, intending to make labor relations in Brazil less bureaucratic and more flexible. The basic labor rights granted to employees in Brazil are as follows:

1.1 Legal limit of Regular Working Hours

The Brazilian legislation stipulates that working hours in Brazil are limited 44 hours per week or eight hours per day (item XIII, Article 7 of the Brazilian Constitution), unless provided for otherwise through a convention or an agreement entered into with the relevant labor union. The Labor Reform also authorized the "12x36" work system (twelve hours of work followed by thirty-six hours of rest), provided that the weekly working hours' constitutional limit is observed.

1.2 Vacation

Upon completion of each period of twelve months of work, employees are entitled to paid vacation of up to thirty calendar days, plus an additional payment equal to one-third that amount.

1.3 Minimum Wage

Employees in Brazil are entitled to a mandatory federal minimum monthly wage, which is annually adjusted by the Brazilian government (BRL 1,045.00 – one thousand and forty-five reais - as of February 1, 2020). Some Brazilian states also set a regional minimum wage, which must be complied with by a company carrying out its activities in that state. In addition to that, collective bargaining agreements may also set a minimum salary, which shall be granted if higher than the Federal/State minimum wages.

1.4 13th Salary

Employees in Brazil are entitled to an annual bonus, called the 13th salary (“13^o salário”), usually paid at the end of the year, on the basis of one-twelfth of their December earnings for each month worked that year. The employer shall pay 50% of the 13th salary in advance between February and November of the same year to which the 13th salary corresponds, at the employer's discretion, unless the employee requests the advancement of such amount together with his/her vacations, in January of the calendar year to which the 13th salary corresponds.

1.5 Profit/Results Sharing

Employees in Brazil are entitled to participate in a profits/results sharing plan of the company, implemented by a specific program negotiated between employers, employees, and workers' union, pursuant to Federal Law 10,101/2000.

1.6 Overtime Pay

Employees in Brazil are entitled to overtime pay with an additional allowance of at least 50% the hourly rate; overtime work on Sundays and holidays, when authorized, must be paid with the applicable additional allowance. The applicable collective bargaining agreement may set higher overtime allowances.

1.7 Maternity Leave

Employees in Brazil are entitled to paid maternity leave of 120 days (the amount paid by the employer is offset by social security contributions). Law 11,770/2008 establishes that employers may extend maternity leave for an additional two-month period, provided that the employer pays the employee's salaries during this additional period and the employee has joined a program of the federal government called “*Empresa Cidadã*” (“Citizen Company”). Employers granting this benefit to their employees are entitled to a tax benefit;

1.8 Paternity Leave

Employees in Brazil are entitled to five (5) days of paternity leave; Law 13,257/2016 establishes that employers may extend paternity leave for an additional 15-day period (totaling 20 days), provided that the employer pays the employee's salaries during this additional period and the employee has joined the same program “*Empresa Cidadã*” (“Citizen Company”) applicable for maternity leave. Employers granting this benefit to their employees are entitled to a tax benefit.

1.9 Prior Notice Period

In cases of dismissal without cause, the employer must grant the employee prior notice of dismissal of thirty (30) days in addition to three (3) days for each completed year of work for the company, limited to a total of ninety (90) days. Applicable collective agreements may have additional rules on prior notice.

1.10 Remunerated Weekly Day Off

Employees in Brazil are entitled to a 24-hour rest period for each week of work, preferably on Sundays. There are certain economic activities which are authorized by law to work on Sundays. This authorization may also be granted by the Economy Ministry or by the workers' union, if some requirements are met.

Work on Sundays and holidays, when authorized and not offset with rest days, must be paid in double and, if comprises overtime, must be paid with the applicable overtime allowance.

2 Other contributions or charges

Companies are also subject to the following social contributions or charges:

2.1 Social Security (“Instituto Nacional de Seguridade Social” - “INSS”)

Companies must pay 20% to 31.8% of payroll to the INSS; additionally, employees have 8% to 14% (as of March 1, 2020) of their monthly earnings deducted from salaries and withheld by the company for the INSS, subject to the limits provided for by law.

Payment of certain labor-intensive services (e.g., outsourcing, construction) is subject to an 11% withholding tax assessed on the total amount invoiced. The amount withheld may be offset against the social-security tax to be paid by the service provider.

2.2 Unemployment Savings Fund (“Fundo de Garantia do Tempo de Serviço” – “FGTS”)

Every month, an amount equivalent to 8% of the employee's monthly earnings must be deposited by the employer into the employees' Unemployment Savings Fund, in a blocked account at the "*Caixa Econômica Federal*" (Federal Savings Bank). If an employee is dismissed without cause, the employee is entitled to withdraw deposits made into the FGTS account during his/her employment with the company. The employer will also have to pay a fine of 40% of the total amount deposited into the employee's account in the case of a termination without cause on the employer's initiative. The employee also has access to the Fund upon retirement, or in specific occasions, as provided by law.

Mandatory severance pay for termination of employment contracts in Brazil varies according to the type of termination, as follows:

2.2.1 Termination without cause, on employer's initiative

- (i) Prior notice (30 days plus 3 days for each completed year of service in the same company, up to a maximum of 90 days of prior notice period);
- (ii) Balance of wages from the termination month;
- (iii) Unused earned vacations plus additional one-third payment;
- (iv) Pro-rated vacation plus additional one-third payment;
- (v) 13th salary (or pro-rated 13th salary, depending on the termination date);
- (vi) FGTS deposits: deposit in employee's blocked account (equal to 8% of employee's pay) in the termination month, based on the balance of wages, as well as prior notice and 13th salary;
- (vii) Forty-percent (40%) FGTS fine based on the amount deposited in employee's FGTS account;
- (viii) Any other labor right related to termination provided for under the current Collective Bargaining Agreement;
- (ix) Any other compensation or benefit contractually agreed with the employee.

If the employee is not required to work during the notice period, the payments above must be made within 10 days of the date when notification of dismissal was served. If the employee is required to work during the notice period, then termination dues must be paid on the first business day after the employee's last day of work.

2.2.2 Termination with cause, on employer's initiative

- (i) Balance of wages in the termination month;
- (ii) Earned vacation plus additional one-third payment;
- (iii) FGTS deposits: deposit in employee's account (equal to 8% of employee's pay) in the termination month.

Permitted circumstances for dismissal with cause are set out in Article 482 of the Brazilian Labor Code. Such circumstances entitle the employer to terminate the employee's employment immediately, without notice and without making payment in lieu of notice.

2.2.3 Termination as a result of employee's resignation

- (i) Balance of wages in the termination month;
- (ii) 13th salary (or pro-rated 13th salary, depending on termination date);

- (iii) Earned vacation plus additional one-third payment;
- (iv) Pro-rated vacation plus additional one-third payment;
- (v) FGTS deposits: deposit in employee's account (equal to 8% of employee's pay) in the termination month, as well as on 13th salary.

2.2.4 Resignation based on constructive dismissal ("indirect termination") due to serious fault committed by employer.

If an employee feels that his or her employer has committed a fundamental breach of the employment contract, he or she may request indirect termination of his or her employment contract citing the employer's fault. In this situation, the employee must seek an order from the labor courts, recognizing indirect termination and ordering payment of all sums due on termination of the employment contract, along with any other outstanding payments that may have been the cause of the indirect termination, such as previously unpaid wages.

If the employee wins the case, the same amounts due on dismissal without cause shall be paid.

2.2.5 Termination by mutual agreement.

Law No. 13,467/2017 set a new termination alternative by mutual agreement, entitling the employee to the following severance:

- (i) Half of the prior notice that would be due on a termination without cause on employer's initiative;
- (ii) Balance of wages from the termination month;
- (iii) Unused earned vacations plus additional one-third payment;
- (iv) Pro-rated vacation plus additional one-third payment;
- (v) 13th salary (or pro-rated 13th salary, depending on the termination date);
- (vi) FGTS deposits: deposit in employee's blocked account (equal to 8% of employee's pay) in the termination month, based on the balance of wages, as well as prior notice and 13th salary;
- (vii) Half of the FGTS fine based on the amount deposited in employee's FGTS account due that would be due on a termination without cause by employer's initiative;
- (viii) Any other labor right related to termination provided for under the current Collective Bargaining Agreement;
- (ix) Any other compensation or benefit contractually agreed with the employee.

2.2.6 Mass termination

Currently, the Brazilian law does not have any provision obliging companies to take specific procedures in cases of mass termination.

According to recurrent decisions issued by the Brazilian Labor Courts, it is mandatory to negotiate with the unions an additional termination package before mass redundancies effectively occur, under the pain of having the terminations annulled and the company compelled to negotiate with the union.

For this purpose, the courts understand mass redundancy as the simultaneous termination of a collectivity of employees resulting in a considerable reduction, in percentage terms, in the total number of a company's employees or in the total number of employees of certain establishment. However, there is no definition on the minimum number of terminated employees that would be considered as a mass termination.

Notwithstanding, as of November 2017 Law No. 13,467/2017 stated that collective dismissals shall be treated the same as an individual dismissals, and that no previous authorization of the labor union is necessary.

This matter may still generate controversies, since the previous jurisprudential understanding has as a basis a constitutional interpretation that can not be put aside due to the issuance of an ordinary law.

In view of the above, a case-by-case analysis is recommended.

3 Final Comments

Please note that the Provisional Measure No. 905/2019 is currently in force, which introduced several changes to labor regulations. However, such legal act needs to be converted in law by the Brazilian National Congress, a process that may lead to significant changes in its current wording.

Visas and Individual Income Tax

1 Overview

Law No. 13,445/2017 – in force since November 2017 – and Decree 9,199/17 changed the scenario regarding immigration in Brazil, with the aim of reducing the differences in rights between Brazilians and foreigners. However, it is still necessary to obtain certain authorizations for foreigners to work in Brazil.

Foreigners must obtain a residence permit and a temporary work visa to work in Brazil. In regard to the types of work visas that would be appropriate for foreigners who would be assigned to work in Brazil, we clarify that such foreigner will need to have **(i)** a valid visa, which allows him/her to enter the country and **(ii)** the appropriate Residence Permit, which is the authorization that will allow the individual to remain working in Brazil.

The visa and Residence Permit requirements are provided for in Law No. 13.445/2017, Decree No. 9.199/2017 and the regulatory norms issued by the National Immigration Council (the “Normative Resolutions”).

Regarding visas, there are currently three types that apply in Brazil:

- (i) **Visitor visa**: for tourism, business, transit, and artistic/sports activities purposes; does not allow the individual to work in Brazil;
- (ii) **Temporary visa**: applicable for work (with or without an employment contract), research, health treatment, study, vacation or summer job, family reunion and investment purposes, among others;
- (iii) **Official, diplomatic, and courtesy visas**: applicable for foreign government representatives or private employees who travel to Brazil for an official visit, that is of a temporary or permanent nature;

The Visitor visa, as well as the Official, Diplomatic and Courtesy visas are not recommended for individuals that will actually be working in Brazil.

As mentioned above, in addition to the visa - which allows the employee to enter Brazilian territory-, the foreigner will need a Residence Permit, which allows the individual to reside in Brazil and, depending on the case, to work in the country.

If the individual is abroad and intends to work in Brazil, he/she has to apply for a Residence Permit first and, once such “prior” Residence Permit is approved, the applicable visa will be issued accordingly.

It is also possible for a foreigner who is already in Brazil, under any of the visa types above, to apply for a Residence Permit without having to leave the country, “transforming” a Visitor or Official visa into the appropriate Residence Permit.

Below is a summary of the main aspects of each kind of visa based upon the current legislation in force.

2 Residence Permit for Investors

This Residence Permit is appropriate for the foreigner who intends to come to Brazil to invest personal resources in a Brazilian legal entity in order to promote jobs and income generation in Brazil.

The main requirement in order to obtain such permanent visa is the investment of personal resources from the foreigner into the capital stock of a Brazilian Company, under one of the following conditions:

- (i) At least five hundred thousand Reais (BRL 500,000.00) if the investment is made in a pre-existing or recently incorporated company; or
- (ii) Between one hundred and fifty thousand Reais (BRL 150,000.00) to five hundred thousand Reais (BRL 500,000.00) if the investment is intended for innovation activities or to research of a scientific or technological nature — in which case additional specific requirements apply, such as investment intended for innovation support of government institutions, having the company located in a technological complex, having participated and reached a final stage of a government program for startups, among others;

In both cases it is required to present a 3-year Business or Investment Plan, observing the requirements of the Normative Resolution, including company purpose and generation of job positions and income. Under this visa, the Immigration Department does not require foreigners to execute an employment contract with the Brazilian company.

3 Residence Permit for Officers and Managers

This Residence Permit is applicable to foreigners who will occupy directorial positions in Brazil, i.e., administrator positions, duly indicated in the Brazilian company's Articles of Association as an administrator, and with powers to sign documents on behalf of the Brazilian company, whether hired as an employee or a non-employed administrator.

In order to obtain such Residence Permit, the main specific requirement applicable to the Brazilian company receiving the foreigner will be one of the following:

- (i) Proof of direct foreign investments in the company, in the amount of at least six hundred thousand Reais (BRL 600,000.00) per foreign officer/administrator/executive, duly proven by an electronic report related to the registry of foreign currency with the Central Bank of Brazil; or
- (ii) Proof of direct foreign investments in the company, in the amount of at least one hundred and fifty thousand Reais (BRL 150,000.00) per foreign officer/administrator/executive, duly proven by an electronic report related to the registry of foreign currency with the Central Bank of Brazil, and the obligation to create ten (10) new jobs in a 2-year term from the date that the company is incorporated or that the respective manager enters the country;

The amounts above may belong to the company's headquarters abroad. Such amounts do not need to belong to the individual, as in the case of the investors' permit.

According to Brazilian legislation it is not possible to have a general manager who is not a Brazilian resident.

Under this Residence Permit, the immigration department does not require the foreigner to execute an employment agreement with the Brazilian company; thus, the foreigner may be hired as an effective employee of the company, or as a non-employed officer (see below specific comments on these types of engagement).

4 Residence Permit for Work Purposes with an Employment Agreement with a Brazilian Company

This type of Temporary Residence Permit is appropriate for foreigners who will be hired as employees in Brazil, to hold positions that do not involve management.

Thus, foreigners bearing this Residence Permit are not allowed to represent the Brazilian company, sign documents, contracts, checks or other documents on behalf of the Brazilian Company, or have powers of attorney granted to them to represent the company, under the risk of having the permit cancelled.

For this Residence Permit, the local employer has to demonstrate the compatibility between the professional qualification/experience of the foreigner and the activity that he/she will be performing in Brazil.

It is also required that at least two thirds (2/3) of the Brazilian entity's employees are Brazilian nationals.

Furthermore, it is also legally required to execute an employment agreement in accordance with the Brazilian Labor Law standards, and provide the minimum clauses provided in the templates set forth in the exhibits of Normative Resolution No. 02/2017.

This residence permit is valid for two (2) years, with the possibility of being transformed into an undetermined term permit.

5 Residence Permit for Rendering Technical Assistance Services, without an employment agreement

Under this type of Residence Permit foreigners can render technical assistance services in Brazil, as a result of a contract, cooperation agreement or covenant executed between a foreign entity and a Brazilian entity.

The residence permit can be granted for up to one (1) year, however, it is possible to request a renewal of the residence permit for an additional period of one (1) year, based on Normative Resolution No. 30/2018. In order to have the new request granted, it is necessary to provide a detailed request, justifying the need for the continuity of the services being rendered without an employment relationship.

6 Residence Permit for Technology Transfer Purposes, without an employment agreement

This type of Residence Permit is applicable to foreigners who enter the country to render services that arise from a technology transfer arrangement between a foreign entity and a Brazilian entity.

This residence permit is valid for one (1) year, however, it is possible to request a renewal of the residence permit for an additional period of one (1) year, based on Normative Resolution No. 30/2018, as long as the requesting party provides a detailed justification regarding the need for the continuity of the services being rendered without an employment relationship.

If the request is based only on the desire of the local company to retain the foreigner's services, it will be necessary to engage the individual as a regular employee, as per Brazilian Labor Law.

7 Citizens from Mercosur Countries (Brazil, Argentina, Uruguay and Paraguay), Chile, Peru, Bolivia, Ecuador and Colombia

As a result of an agreement among Mercosur countries (Brazil, Argentina, Uruguay and Paraguay), Chile, Peru, Bolivia, Ecuador and Colombia, the citizens of these countries may obtain a permit to live in any of them, and consequently have the same rights as those of the nationals of the country where they live, including the right to work.

In this sense, the citizens of the countries above that intend to live and work in Brazil do not need a work visa, but rather a residence permit to work in Brazil.

This permit is valid for 2 years and may become permanent if its renewal is requested within 90 days prior to expiration.

8 Residence for Citizens of Border Countries

Ordinance No. 09/2018 maintained certain rules of the previous Labor Ministry's Normative Resolution No. 126/2017, providing for the possibility to grant a permit to live in Brazil for up to 2 years to citizens of bordering countries that are not participants of the Mercosur residence agreement. Such request must be made directly at Federal Police offices.

In practice, this authorization is applicable to citizens of Venezuela, Suriname, Guyana and French Guyana.

9 Individual Income Tax

Upon arrival in Brazil, foreigners holding a permanent visa or a temporary visa with an employment contract with a Brazilian company are deemed taxpayers and subject to the same income tax laws applicable to other residents of Brazil.

As a taxpayer in Brazil, his/her worldwide income will be subject to Brazilian income taxation. A tax credit may be granted to income taxes paid in other countries, provided that certain conditions are met.

Business Operation Taxes

Taxation in Brazil is a vast and complex field, comprising numerous federal, state and municipal taxes⁵. The main taxes are:

- (i) **Federal Taxes:** Corporate Income Tax (“IRPJ”), Import Duties, Export Tax, Tax on Manufactured Products (“Imposto sobre Produtos Industrializados” - “IPI”), Tax on Financial Transactions (“Imposto sobre Operações Financeiras” - “IOF”), Social Contribution on Net Profits (“Contribuição Social sobre o Lucro Líquido” - “CSLL”), Contribution to the Social Integration Plan (“Contribuição ao Programa de Integração Social – “PIS”), Contribution to Finance Social Security (“Contribuição para Financiamento da Seguridade Social” – “COFINS”), and Contribution for Intervention in the Economic Domain (“Contribuição de Intervenção no Domínio Econômico” – “CIDE”);
- (ii) **State Taxes:** Sales Tax on the Circulation of Goods and Services (“Imposto sobre a Circulação de Mercadorias e Serviços” - “ICMS”), Tax on Vehicle Ownership (“Imposto sobre a Propriedade de Veículos Automotores” – “IPVA”); and Tax on Donation and Inheritances (“Imposto sobre Heranças e Doações”); and
- (iii) **Municipal Taxes:** Service Tax (“Imposto sobre Serviços” - “ISS”), Real Estate Transfer Tax (“Imposto sobre Transmissão Inter Vivos”) and Property Tax (“Imposto sobre a Propriedade Territorial Urbana” – “IPTU”).

1 Federal Taxes

1.1 Corporate Income Tax (“Imposto sobre a Renda da Pessoa Jurídica” - “IRPJ”)

The taxable profit is levied at the basic rate of 15% plus an additional rate of 10% on taxable profit that exceeds BRL 20,000.00 (twenty thousand reais) per month.

Basically, there are two methods of calculating the taxable profit:

- (i) real-profit basis (a method for calculating taxable profit based on the accounting result with some adjustments established by tax law, including transfer pricing and thin capitalization adjustments); and

⁵ Currently, the Brazilian Congress is analyzing proposals for a tax reform in order to simplify the tax system.

- (ii) presumed-profit basis (a method for calculating taxable profits based on a percentage of gross revenue).

Companies with total annual gross revenue in excess of BRL 78,000,000.00 (seventy eighty million reais) and others required by law, must calculate real profits based on quarterly or annual balance sheets. They are not allowed to calculate this tax based on presumed profits.

If taxation is based on a quarterly balance sheet, payment of taxes will be definitive, and all rules for calculating annual profits will apply to such quarterly profit (rates, additions, provisions, offsetting losses, etc.).

If the company opts for payment based on yearly profits (the most common and generally adopted system), these profits will be calculated from the profit-and-loss statement prepared in December, covering earnings for the entire calendar year, but the tax must be pre-paid monthly. Monthly pre-payment may be lowered or suspended if the taxpayer has accounting evidence that the pre-paid value until that month exceeds the tax value calculated based on real profits.

1.2 Social Contribution on Net Profits (“Contribuição Social sobre o Lucro Líquido” - “CSLL”)

This tax is owed at a general rate of 9% on adjusted net income calculated quarterly or annually (depending on the taxpayer’s income-tax option) and is not deductible from corporate income tax. While the basis of this tax is similar to that of corporate income tax, adjustments to calculate the taxable basis of the CSLL are sometimes different.

1.3 Contribution to Social Integration Plan (“Contribuição para o Programa de Integração Social” - “PIS”) and Contribution to Finance Social Security (“Contribuição para Financiamento da Seguridade Social” - “COFINS”)

Social Integration Program Contribution (PIS) and Social Security Financing Contribution (COFINS) are contributions levied on legal entities’ overall revenues (currently, export revenues and capital gain obtained from the sale of permanent assets are not subject to PIS and COFINS). There are basically two systems for the calculation of PIS and COFINS, namely: (i) cumulative system and (ii) non-cumulative system. Under the cumulative system, PIS and COFINS are generally levied at the rates of 0.65% and 3% respectively, and the taxpayer is not allowed to offset any tax credits. Under the non-cumulative system, PIS and COFINS are generally levied at the rates of 1.65% and 7.6% respectively, but the taxpayer is allowed to discount credits related to part of its costs and expenses, provided that certain conditions are met.

1.4 Tax on Financial Transactions (“Imposto sobre Operações Financeiras” - “IOF”)

The IOF is levied on general financial transactions (i.e. those involving exchange, securities, credit, gold and/or insurance). IOF tax rates vary according to the nature of the taxable transaction.

1.5 Contributions for Intervention in the Economic Domain (“Contribuições de Intervenção no Domínio Econômico” – “CIDE”)

In accordance with the Brazilian Constitution, the government has created several contributions for intervention in the economic domain (CIDEs):

- (i) CIDE for the Universal Telecommunications Service Fund (FUST);
- (ii) CIDE on remittances abroad of royalties and payment of services;
- (iii) CIDE levied on the importation and marketing of petrol, oil products, natural gas and its byproducts, ethylic alcohol and ethylic alcohol fuel;
- (iv) CIDE for the Development of the Cinematographic Industry; and
- (v) CIDE for the Telecommunications Technological Development Fund – FUNTTEL.

These CIDEs are levied on specific transactions and sectors of the economy and their rates and calculation basis vary depending on each case.

1.6 Import Duty

This is levied on the customs value of imported goods at different rates according to the goods tariff code in the Mercosur Tariff Schedule (TEC), which is based on the Harmonized System of the World Customs Organization (WCO). The customs value of imported goods is determined in accordance with the Customs Valuation Agreement of the World Trade Organization (WTO). As a rule, the customs value corresponds to the invoiced value of imported goods, plus the cost of international freight and insurance. Brazil has entered into preferential trade agreements with almost all Latin American countries and, as such, imports from those countries may benefit from reduction or exemption of the import duty. Imports from other member countries of the Southern Common Market are duty free, as long as the imported item has a certificate of origin from one of those countries.

1.7 Export Tax

A small number of products are subject to the export tax, such as:

- (i) raw hides and the skins classified as bovine (including buffalos), equine, sheep, or lamb;

- (ii) cigarettes containing tobacco (when exported to the Caribbean, Central and South America);
- (iii) weapons and ammunition (when exported to South America, except Argentina, Chile, Ecuador and Central America, including the Caribbean Islands).

The tax is calculated on the export price of the goods.

1.8 IPI

This tax is similar to an excise tax. It is levied on most manufactured products, whether made in Brazil or imported. Although the IPI is ultimately passed on to the final consumer, it is charged on each production step or phase of independent manufacturers.

The IPI is usually levied *ad valorem*. The rates are based on the type of product. The IPI is a value-added tax. A tax credit is allowed for the tax that has been paid in the purchase or importation of the raw material and components that are used in the manufacturing process of the product to be taxed or on the resale of the imported product. In the case of imported products, the IPI is calculated on the customs value, plus the import duty.

Taxpayers with an IPI credit balance accumulated for three months (regarding inputs) may ask the Brazil Federal Revenue Department for reimbursement in cash of the accumulated amount, or its use to offset other federal taxes.

2 State Taxes

2.1 ICMS

The ICMS is a value-added tax. It is levied on imported and domestic products at the time the goods leave the business premises. The ICMS due on each transaction is based on the price of products sold, and a tax credit is granted for ICMS paid on the purchase or importation of the products, as it is for the IPI.

Currently, ordinary rates in the state of São Paulo are 12% on transportation services, 18% on products imported, sold, or transferred within the state, and 25% on communication services. Other rates may also apply depending on the specific product, service or state in which the transaction occurs. Rates may also vary for interstate transactions: imported products or products with an imported content greater to 40% are subject to a tax rate of 4% (this rule is not applicable to products without similar in Brazil or if the product were manufactured in Brazil under a basic productive process - PPB).

In other cases, rates are usually 12% but can be 7% depending on the state of destination; the rationale is the following: the more developed the state, the higher the rate. Interstate transactions involving products for non-taxpayers (individuals or entities not involved in merchandise commerce) trigger the payment of an amount of ICMS resulted from the difference of the interstate rate and internal rate of the state to which the product is being shipped. This rule was approved by Constitutional Amendment 87/15 the amount will be paid partially to the origin state and partially to the destination state. From 2019 onwards, the ICMS will be paid 100% to the destination state. The ICMS is also imposed on interstate and inter-municipal transportation services and communications services.

For certain products, the ICMS is due according to the tax substitution regime (*"Substituição Tributária do ICMS - ICMS/ST"*), in which case the tax due on the entire commercial chain of the product shall be collected at once at the beginning (as a rule, by the manufacturer or the importer) based on estimated values determined by the government to be applicable to future taxable events.

As a rule, this system is implemented through a state agreement (*"Convênio ICMS"*) signed by all Brazilian states and the Federal District and is valid throughout Brazilian territory (except if one or more states decide not to implement the rule within its territory) or throughout specific protocols (*"Protocolo ICMS"*) signed by two or more states, in which case the system will only be valid for taxpayers located in the territory of each signatory state. However, there are cases in which one state, through a state law, may implement the ICMS/ST system for transactions within their territory or shipping products to taxpayers located in their territory.

Finally, it is important to mention that one of the biggest issues regarding ICMS is tax incentives to attract companies and develop the local economy. This situation is commonly referred as "tax war". To solve this, the Brazilian Congress issued Complementary Law No. 160/17 establishing requirements and procedures for validating the tax incentives granted without CONFAZ approval.

2.2 ITCMD

The Tax on Donations and Inheritances is levied on the transfer of personal assets or rights resulting from legal or testamentary inheritance and/or donations. Rates vary from 1% to 8% - depending on the state - of the fair market value of the transferred asset or right.

3 Municipal Taxes

3.1 ISS

The ISS is a municipal tax levied on all services listed in Supplementary Law 116/2003 (*"Lei Complementar - LC 116/2003"*), which are not subject to state taxation through the ICMS. Rates vary from 2% to 5%, depending on the municipality.

3.2 Real Estate Transfer Tax (assessed on transfers for value)

This tax is assessed on property transfers at a progressive rate that varies depending on the property value on all transfers for value of any nature, except in cases of contribution to capital stock.

3.3 Property Tax

The property tax (IPTU) is a municipal tax levied annually, normally, at a 1% rate on the appraised value of the real estate; rates vary by municipality.

It is important to mention that there is a tax reform underway that may change several aspects of tax law in Brazil.

International Trade

1 Brazilian Trade System

1.1 Introduction

The Brazilian Foreign Trade Chamber (“CAMEX”) is the governmental body in charge of defining the Brazilian international trade policy.

The agency in charge of trade remedies investigations is the Subsecretariat of Trade Defence and Public Interest (SDCOM), part of the Secretariat of Foreign Trade (SECEX), both of which are under the Ministry of Economy. SDCOM is the authority responsible for analyzing the existence of dumping and subsidies, and the resulting injury.

The Executive Management Committee under CAMEX is responsible for setting provisional or definitive anti-dumping, countervailing and safeguards duties, as well as for approving price undertakings.

The Federal Revenue Office (RFB) is the main governmental body in charge of customs controls and focuses primarily on customs clearance procedures and the collection of duties. Under the RFB, customs activities are managed by the Coordination of Customs Administration (COANA).

Imported goods may be subject to inspection by other governmental bodies during customs clearance procedures if they are subject to import-licensing requirements. The main governmental bodies in charge of import-licensing activities are the Ministry of Health, the National Health Surveillance Agency (ANVISA), and the Ministry of Agriculture, Livestock and Food Supply (MAPA).

2 Importing goods

2.1 Before you Ship

2.1.1 Qualification as an importer/exporter

Prior to engaging in foreign trade, Brazilian companies must qualify as importers/exporters with the RFB. Importers and exporters have access to the SISCOMEX, which is the electronic system used by the companies to submit their operations to customs clearance procedures.

In order to be qualified as an importer/exporter, the company must submit an application for a RADAR registration in the express, limited or unlimited modes. RADAR is an internal electronic system of the RFB in which the company's customs and tax records are maintained. This system is used for risk management purposes in international trade transactions.

As a general rule, the express RADAR allows companies to make imports limited to a total value of USD 50,000.00 (fifty thousand dollars) in every six-month period, the limited RADAR allows companies to make imports limited to a total value of USD 150,000.00 (one hundred and fifty thousand dollars) in every six-month period and the unlimited RADAR allows companies to make imports of any value.

2.1.2 Tax classification of imported goods

As a general rule, prior to importing goods, the importer must classify them in the Mercosur Common Nomenclature (NCM). Import licensing requirements and duty rates are determined based on the classification of imported goods in the NCM.

NCM is an eight-digit nomenclature based on the Harmonized System (HS) of the World Customs Organization (WCO). Hence, the first six digits of NCM are equivalent to the first six digits of any other nomenclature that is also based on the HS.



Classification of goods in the NCM is done in accordance with the General Rules for Interpretation of the Harmonized System and the Explanatory Notes of the Harmonized System.

In the event of doubts about classification of goods in the NCM, importers may file a request for ruling with the RFB. The requirements for this request are provided for in RFB Normative Instruction 1,464/2014⁶.

2.1.3 Import licensing requirements

Prior to authorizing the shipment of goods abroad, a Brazilian importer must verify import licensing requirements in SISCOMEX, which are determined in accordance with the type of importation and the goods classification in the NCM.

As a general rule, imports are not subject to any import licensing. In the event that an import license is necessary, licensing will either be automatic, with registration of the operation in SISCOMEX (after arrival of the goods), or non-automatic (registration of the operation depends on licensing prior to shipment of the goods abroad).

⁶ Available at: (<http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?visao=anotado&idAto=52329>)

Since 2014, the authorities have been modifying the SISCOMEX to implement the Single Window initiative as provided in the World Trade Organization (WTO) Trade Facilitation Agreement⁷. Among the main improvements promised by this initiative are those related to facilitating the requirement of import licenses, such as:

- (i) importer requiring the import license only once, for several operations;
- (ii) consenting bodies analyzing the requirement through the same platform; and
- (iii) consenting bodies performing jointly the physical verification of the product.

The general rules on import licensing are provided for in SECEX Ordinance 23/2011⁸.

2.2 Entry procedures

2.2.1 General

Import operations must be reported on Import Declarations registered in the SISCOMEX. This declaration must list the customs value of the goods, the respective classification in the NCM and other information about the import operation. Duties are calculated by the system and transferred online from the importer's bank account to the national treasury.

After the operation is reported in SISCOMEX, the importer must give the customs authorities documents that support the operation (commercial invoice, bill of lading, packing list, and certificate of origin, if applicable), and the goods are then selected for one of the channels for customs clearance.

The following channels exist for imports:

- (i) the green channel, in which the goods are released without further examination;
- (ii) the yellow channel, in which the documents are examined and if no problems are identified, the goods are released;
- (iii) the red channel, in which the documents and the goods are examined and if no problems are identified, the goods are released; and
- (iv) the grey channel, in which the goods are submitted to a special examination procedure, focused on customs valuation. If no problems are identified, the goods are released.

The customs clearance procedures for importation are set out in detail in Brazilian Customs Regulations⁹ and in the RFB Normative Instruction 680/2006¹⁰.

2.2.2 Indirect importation

⁷ Decree 8.229/2014 (planalto.gov.br)

⁸ SECEX Ordinance 23/2011, articles 12 to 29 (mdic.gov.br)

⁹ Decree no. 6,759 of February 5, 2009, Articles 542 to 579 (planalto.gov.br)

¹⁰ RFB Normative Instruction 680 of October 2, 2006 (receita.fazenda.gov.br)

Brazilian companies may import goods directly or indirectly (through other companies). Goods can be imported directly in the following cases:

- (i) imports of goods that shall be booked as fixed assets of the importer;
- (ii) imports of inputs to be used in the manufacture of products by the importer; and
- (iii) imports of goods to be distributed in the country by the importer to clients.

Brazilian legislation provides for two kinds of structures to import goods through other companies:

- (i) importation on behalf of another company (*“importação por conta e ordem”*); and
- (ii) importation of goods pre-ordered by other companies (*“importação por encomenda”*).

When acting as a service provider importing goods on behalf of another company, the importer is just in charge of customs clearance and does not acquire title to the imported goods. The purchaser of the imported goods may advance funds to the importer to cover payment of import duties, customs expenses, etc., and shall pay the exporter directly.

On the other hand, when goods are pre-ordered by a third party before they are imported, the importer acquires title to the goods. The company that has pre-ordered the importation may not advance funds to cover import duties, customs expenses, etc., and the importer will pay the exporter.

In both cases, it will be necessary to file at customs authorities the contracts executed between the companies prior to the first importation (service agreement in the case of imports on behalf of other companies, and a purchase and sale agreement in the case of imports pre-ordered by other companies). All companies must apply to RADAR and be qualified as an importer/exporter.

Each of the abovementioned structures to import goods is subject to a different tax treatment.

2.2.3 Authorized economic operators

The WCO Framework was the WCO's response to the threat of terrorism. Its goal is to enhance international supply-chain security in a way that does not impede, but rather facilitates the movement of goods. This goal is to be achieved through increased cooperation between customs administrations in importing and exporting countries and between customs administrations and businesses.

The partnership of customs administrations and businesses consists of granting benefits, such as faster processing of goods by customs through reduced examination rates, for companies that meet minimal supply-chain security standards and best practices. These companies were called “Authorized Economic Operators” (OEA) within the WCO Framework. These benefits translate into savings in time and costs to companies and allow the customs authorities to focus on other companies' operations. According to the WCO Framework, each customs administration must create its own program to establish this partnership with the private sector.

Brazilian companies may be qualified to the OEA program in two different modes: security and conformity (levels 1 and 2). Different criteria are applied to each type of OEA in order to grant the certificate, varying from the control of cargo units to the reliability of its accounting system. The benefit is a faster processing of goods by customs authorities through reduced inspection rates.

This regime is regulated by RFB Normative Instruction 1,598/2015.

2.3 Import Duties, Taxes, and Fees

As a general rule, goods imported into Brazil are subject to the following taxes, which must be paid by the importer upon registration of the Import Declaration:

- (i) **IMPORT TAX (II)**: levied on the customs value of the imported good at different rates depending on the good's classification in the Mercosur Common Nomenclature ("NCM");
- (ii) **EXCISE TAX (IPI)**: levied on the customs value of the imported good plus the Import Duty. The IPI rate also varies in accordance with the good's classification in the NCM;
- (iii) **STATE VALUE-ADDED TAX (ICMS)**: levied on the customs value of the imported good plus the II, the IPI, and the social contributions PIS/COFINS-importation;
- (iv) **PIS/COFINS-IMPORTATION**: levied on the customs value of the imported good, normally at a combined rate of 11.75%¹¹ - some goods are subject to different rates; and
- (v) **FREIGHT SURCHARGE FOR RENOVATION OF MERCHANT MARINE (AFRMM)**: calculated at a 25% rate over the cost of international ocean freight.

The customs value of imported goods is determined in accordance with the provisions of the Customs Valuation Agreement of the World Trade Organization (WTO), which states that the customs value, as a general rule, is the transaction value. If the transaction value cannot be used, alternate valuation methods provided by the Customs Valuation Agreement will be applied. Please note that, according to Brazilian legislation, international insurance and international freight costs are included in the customs value of imported goods.

The ICMS is a state tax owed on local sales and import operations. Its rates vary in accordance with the state in which the taxable event takes place, the goods being sold or imported, and the type of operation performed.

The IPI and the ICMS are normally creditable taxes. This means that, as a general rule, amounts paid in prior transactions may be offset against taxes due on subsequent transactions. The PIS/COFINS-importation may also be creditable if the importer collects the social contributions PIS/COFINS levied on local transactions, under the non-cumulative system.

¹¹ Please note that on June 22, 2015, Law 13,137/2015 was published, increasing PIS/COFINS - Importation combined rate from 9.25% to 11.75%. Such innovation became effective on May 1, 2015.

2.4 Tax Incentives

2.4.1 “Ex tarifário”

Capital goods, such as machinery and equipment, information and telecommunication goods are entitled to a reduction of the Import Duty rate to 2%, if there is no local production of similar products. This reduction can be granted only to goods classified in tariff codes marked in the Mercosur Tariff Schedule (TEC) as BK (for capital goods) and BIT (for information and telecommunication goods). It is granted through the creation of an exception (“*Ex tarifário*”) to the TEC. The application for this reduction must be filed by the importer prior to importation. After the exception has been granted, it remains valid for two years, and anyone that imports such goods benefits from the reduction of the Import Duty rate.

2.4.2 Drawback

The special drawback customs program is an export incentive applied under:

- (i) **Suspension:** inputs are imported with suspension of import duties. These inputs must be used to make goods that must later be exported;
- (ii) **Exemption:** the interested company shows that it has imported inputs with regular collection of taxes and has used these inputs to make goods that have already been exported. This company is allowed to import inputs with exemption of import duties in the same quantity and quality of those imported previously; and
- (iii) **Refund:** like the exemption option, the interested company shows that it has imported inputs with regular collection of taxes and has used these inputs to make goods that have already been exported. This company is refunded the import duties levied on the imported inputs.

The first two options in the program - suspension and exemption - are regulated and administered by the Foreign Trade Secretariat (SECEX). These are the most commonly used options by Brazilian companies. The third option, refund, is under the RFB administration and is not currently being used as a result of a lack of regulation.

An interested company must request the special drawback program prior to importing goods with suspension or exemption of duties. In order to obtain this export incentive, a certain percentage (around 60%) of local content in the exported goods is required.

2.4.3 RECOF-SPED

Brazilian companies may benefit from the special industrial warehouse program (RECOF-SPED), which allows imports and local purchases of inputs with suspension of taxes. These inputs must be used primarily in the industrialization of products that can either be exported or sold in the local market.

The RECOF-SPED is regulated by RFB Normative Instruction 1,612/2016¹².

2.4.4 Manaus Free Trade Zone (ZFM)

The Manaus Free Trade Zone was created to attract industries and trade to the Amazon region. All imported goods are exempt of taxes, provided that they are consumed within the free trade zone or exported abroad. Sales or transfers of these goods to other parts of Brazil result in payment duties suspended at the time of importation. Sales from other parts of Brazil to the Manaus Free Trade Zone are treated as exports.

Additionally, companies that have their industrial project approved by SUFRAMA (Superintendence of the Manaus Free Trade Zone) and perform the minimum manufacturing operations required by SUFRAMA and established in the respective PPB (Basic Production Process), may sell the manufactured goods to other parts of Brazil with an 88% reduction of the Import Duty triggered on the importation of the respective inputs. In addition to a lower Import Duty, these sales are exempt of IPI and benefit from lower rates of PIS and COFINS social contributions.

The aforementioned benefits are valid through 10/05/2073.

Companies established in the Manaus Free Trade Zone may also benefit from a 75% reduction of Corporate Income Tax (IRPJ) for a 10-year period. This benefit is granted by SUDAM (Superintendence for the Amazon Development).

These tax benefits are also applicable to certain specific areas of the Western Amazon region, which covers the states of *Acre*, *Amazonas*, *Amapá*, *Rondônia* and *Roraima*.

3 Trade Agreements

Brazil is a member of the Latin American Integration Association (ALADI)¹³, which was instituted in 1980 through the Montevideo Treaty to “promote economic and social development, harmony and balance throughout the region” (Preamble of the 1980 Treaty). As an ALADI member, all Brazilian exports to other ALADI members are granted with a minimum tariff preference, called the Regional Tariff Preference. Additionally, Brazil has entered into free trade agreements, so-called Economic Mutual Assistance Agreements (“ACE”), with several ALADI members in which higher tariff preferences were negotiated.

¹² RFB Normative Instruction 1,612/2016 (receita.fazenda.gov.br)

¹³ Current ALADI members: Original: Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela. Other members: Cuba, Nicaragua and Panamá.

Brazil also executed the MERCOSUR Treaty on March 26, 1991, in Asuncion, Paraguay, which intended to constitute a common market between Brazil, Argentina, Paraguay and Uruguay. Chile, Bolivia (both since 1996), Peru (2003), Colombia, Ecuador (both in 2004), Guyana and Suriname (the latter two in 2013) are associate members. Venezuela is a full member since August 2012, but its rights and obligations are suspended since August 2017¹⁴. Through Economic Mutual Assistance Agreements, the goal is to establish a free-trade zone throughout MERCOSUL and with all associate members.

Since January 1, 1995, there have not been tariff barriers between MERCOSUR member countries, which means that products originating in one member country and sold in the other countries, are not subject to customs duties. Additionally, a customs union was established to take effect on January 1, 1995. As such, a Common External Tariff (TEC) was established with the goal of preventing cash-flow deviations in trade.

Outside Latin America, Brazil has executed, together with the other MERCOSUR members, trade agreements with the following countries or trade bloc: Egypt, India, Israel, Palestine and the South African Customs Union (SACU). In 2019, Mercosur concluded the negotiations of the trade agreements with the European Union and EFTA, which still need to be ratified.

4 Trade Remedies

Trade remedies' regulations are divided into the following instruments:

- Anti-dumping measures.
- Countervailing measures.
- Safeguard measures.

The abovementioned instruments follow the applicable rules provided by the General Agreement on Tariffs and Trade 1994 (GATT) and the relevant WTO agreement. Anti-dumping rules were substantially amended in 2013. Changes to the countervailing and safeguard measures decrees are expected, as they were subject to public consultations in 2014 and 2017, respectively.

Brazil has implemented the public interest clause that may suspend or reduce the application of trade remedies measures. The public interest is regulated by Decree No. 8058/2013 and SECEX Order 8/2019.

4.1 Anti-Dumping Measures

¹⁴ Decision on the suspension of the Bolivarian Republic of Venezuela from Mercosur in applying the Ushuaia Protocol on the Democratic Commitment in Mercosur" (itamaraty.gov.br)

In Brazil, the imposition of anti-dumping measures is set out by Decree No. 8,058, dated July 26, 2013, which abides by the rules set forth by Article VI of the GATT 1947 and the WTO Anti-Dumping Agreement (ADA).

According to these regulations, dumping occurs when a foreign company exports products to Brazil at less than their normal value, i.e. if the export price of the exported product is less than the comparable price in the ordinary course of trade for a like product when shipped for consumption in the exporting country. If such dumping causes or threatens to cause material injury to an established industry in Brazil or materially retards the establishment of a domestic industry, Brazilian authorities may impose anti-dumping measures to offset the effects of dumping.

A dumping investigation in Brazil starts when local producers or business associations file a written petition together with a questionnaire at the Trade Remedies Department (DECOM) of SECEX (Foreign Trade Secretariat) setting out evidence of possible dumping practices of a certain company or companies in their exports to Brazil. Once accepted, the merits of the petition will be reviewed and an investigation will be initiated. Recently, the authorities regulated in further detail the requirements and deadlines for the habilitation of the domestic producers in the case of fragmented industries¹⁵. This change has facilitated the access of several industrial and agricultural sectors to trade remedies.

Investigations must be concluded within ten months from the initiation date, subject to an additional eight-month extension under special circumstances.

Within six months from the initiation of the investigation, but never before sixty days from the initiation, DECOM will provide a preliminary determination about dumping, injury and causal link and may impose a provisional measure on imports of the product under investigation, providing that:

- (i) all interested parties have had opportunity to express their opinions about the investigation;
- (ii) dumping, injury and causal link to the domestic industry are affirmatively determined on a preliminary basis; and
- (iii) authorities understand that such measures are necessary to prevent any injury during the course of the investigation. In case the provisional duty is applied, a retroactive collection of the anti-dumping duty may be imposed on the imports up to 90 days prior to the date of imposition of the provisional duty, in case certain criteria are met, such as the rapid increase of imports after the investigation.

During the investigation, the exporter may undertake satisfactory obligations to adjust prices or to cease exporting at dumping prices. SECEX should accept and CAMEX (Foreign Trade Chamber) must approve this undertaking. In this case the dumping proceeding may be terminated or suspended with no imposition of duties.

¹⁵ SECEX Ordinance n. 41/2018 (mdic.gov.br)

Anti-dumping duties and price undertakings proposed by exporters will remain in force only as long as the need exists to mitigate dumping and the resulting injury. However, these duties will cease five years following imposition, subject to extension if there is evidence that extinction of such duties could result in dumping and injury to domestic industry.

It is interesting to point out that the anti-dumping regulation ruled on several instruments to ensure the effectiveness of the dumping duty, such as:

- (i) reviews related to the imposition of the duty (due to change in circumstances; sunset review); and
- (ii) reviews related to the scope and the collection of the duty (new shippers' review; anti-circumvention review; restitution review; redetermination review).

4.2 Safeguard Measures

The imposition of safeguard measures in Brazil is governed by Decree No. 1,488, dated May 11, 1995, which abides by the rules set forth by Article XIX of the GATT 1947 and the WTO Agreement on Safeguards (SG Agreement).

As provided for in GATT Article XIX, a safeguard measure may be imposed on a product only if that product is being imported in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to domestic industry. Unlike anti-dumping, safeguard measures seek to protect national industry irrespectively of any unfair trade practice and its origin. It is applied when the domestic industry shows no competitiveness compared to foreign products.

During a safeguard investigation the interested parties will have the opportunity to submit any evidence that might be relevant to the investigation. Moreover, hearings may be scheduled.

Safeguard measures will remain in force only to the extent necessary to prevent or to remedy serious injury and to facilitate adjustment of the domestic industry. However, such measures will cease four years following imposition. These measures may be extended if there is evidence that:

- (i) they are still necessary to prevent or to remedy serious injury, and
- (ii) the domestic industry is not adjusting in accordance with the agreements settled with the government.

4.3 Subsidies and Countervailing Measures

The application of countervailing measures in Brazil is governed by Decree No. 1,751/1995, dated December 19, 1995, which is based on the WTO Agreement on Subsidies and Countervailing Measures (ASCM). Such Decree is currently under public consultation, to be updated later on, as was the case with the Anti-dumping regulation.

Countervailing measures seek to offset subsidies granted by a state to certain companies or sectors that end up artificially lowering their production costs. The imposition of countervailing duties depends on the conclusion, during an investigation, that the subsidy granted by another state results in injury to domestic industry.

Countervailing duties remain in force only as long as needed to mitigate or to prevent material injury. However, these duties will cease five years following imposition, subject to extension if there is evidence that the extinction of such duties could result in injury to national industry.

Investment Incentives

1 SUDENE Area

Investment in the northeast of Brazil can be carried out using an agency called SUDENE (*“Superintendência do Desenvolvimento do Nordeste”*) based on an investor's own project or a third party's project. Industrial and agricultural companies seeking to establish a business venture in the SUDENE area must submit a proposal to the agency, which, after approval, will entitle them to the following financial and tax incentives:

- (i) Financial support from the Northeast Investment Fund (*“Fundo de Desenvolvimento do Nordeste”*);
- (ii) Income tax reduction;
- (iii) Import Duties and IPI exemption or reduction in imports; and
- (iv) State and municipal incentives.

Legal entities are allowed to invest a portion of their corporate income tax in shares of the Northeast Investment Fund instead of making payments to the federal government. Said Fund will then invest in the subscription of shares of companies installed in the SUDENE area. A legal entity or group of legal entities that individually or jointly control the voting capital of a company located in the SUDENE area may allocate its income tax reduction as investment to that controlled company.

2 SUDAM Area

Investment can be carried out via the agency called SUDAM (*“Superintendência do Desenvolvimento da Amazônia”*), which is similar to that in the SUDENE area, in relation to investments located in the north of Brazil, primarily in the Amazon region. SUDAM has the financial support of the Amazon Investment Fund (*“Fundo de Desenvolvimento da Amazônia”*).

3 Manaus Free Zone

It is possible for any company to establish an affiliate in the Manaus Free Zone, which may benefit from an exemption of Import Duties on imported goods for internal consumption in the Free Zone, and for any level of industrialization and storage of imported goods that are subsequently exported.

Depending on SUFRAMA's prior approval of a specific project, it is also possible to import raw material, parts, and components without paying import duties and IPI, provided that said goods are used to make products listed in the manufacturer's project in accordance with the basic production process established by the tax authorities for said products. When the final product leaves the Manaus Free Zone to be traded into the country, the import duty related to imported raw materials, parts, and components is paid with an 88% reduction. This transaction is exempt of the Tax on Manufactured Products ("IPI").

4 Tax Incentives for Technological Innovation

There are federal tax incentives in Brazil created by the government to stimulate research and development of technological innovation in the country.

For such tax incentives purposes, the law considers technological innovation as the conception of a new product or industrial process, as well as the inclusion of new features or characteristics into the product or industrial process involving incremental improvements and effective gain in quality or productivity, resulting in more competitiveness in the market.

Some of the main federal tax incentives for technological innovation established by the Brazilian tax legislation (mainly Law 11,196/05) are mentioned below:

- (i) Special deduction of expenditures with technological research and development of technological innovation for corporate taxes (IRPJ and CSLL) purposes (i.e. deduction of more than 100% of the effective expense).
- (ii) 50% reduction of IPI (Federal Excise Tax) on equipment, machinery, devices, instruments and spare parts and tools related to such goods, to be used in research and technological development.
- (iii) Accelerated depreciation in relation to new machinery, equipment, devices and instruments to be used in research and technological development, for corporate taxes (IRPJ and CSLL) purposes.
- (iv) Accelerated amortization of expenditures with the purchase of intangible assets exclusively related to the technological research and development of technological innovation for IRPJ purposes.
- (v) Zero Rate of Withholding Income Tax (WHT) - Trademarks, Patents and Cultivars: zero rate of WHT levied on remittances abroad for the registration and maintenance of trademarks, patents and cultivars.
- (vi) Deduction of donations destined to projects carried out by Scientific and Technological Institutions (ICT): exclusion of the net profit, for corporate taxes purposes (IRPJ and CSLL), of up two and a half times the expenditures of money with scientific and technological research and technological innovation projects carried out by ICT. Note: such tax incentive may not be combined with the tax incentives mentioned in items "(i)" to "(v)" above and with other specific deductible donations allowable by law.

Competition Law

1 Introduction

The defense of competition in Brazil is based upon Article 173, Paragraph 4 of the Federal Constitution and Law 12,529/2011 (Brazilian Competition Law) which seeks to protect constitutional principles such as free enterprise and open competition, the social role of property, consumer protection, and restraint of economic power abuses.

The Brazilian System for Competition Defense (SBDC) is responsible for the defense of competition in Brazil. SBDC is composed by the Administrative Council for Economic Defense (CADE), directly involved in the prevention and investigation of anticompetitive conducts, and the Secretariat for the Promotion of Productivity and Competition Advocacy (SEPRAC), which is in charge of competition advocacy.

CADE has two main roles: preventive and repressive. The preventive role refers to the analysis and control of mergers that may lead to economic concentration or to the abuse of a dominant market position. The repressive role has the objective to identify and punish the economic agents that practiced infringements against the economic order (anticompetitive conduct).

2 Merger Control

In Brazil, a pre-merger notification system has been adopted since 2012. Thus, the companies must submit their transactions to CADE and wait for a favorable decision before taking any measures aiming for the implementation of the deal.

The Brazilian Competition Law sets forth that a mandatory filing shall be required in cases of any acts or agreements in which:

- (i) any of the entities involved in the transaction, or the respective “group of companies” to which they belong, has had an annual gross turnover or overall volume of business equal to or in excess of BRL 750,000,000.00 (seven hundred fifty million reais) in Brazil, during the preceding fiscal year; cumulatively with:
- (ii) annual gross turnover or overall volume of business in Brazil, by any other entity involved, or its respective “group of companies”, equal to or in excess of BRL 75,000,000.00 (seventy five million reais), during the preceding fiscal year.

According to CADE’s Resolution No. 2, group of companies shall be understood as:

- (i) the set of companies subject to a common control, internally or externally; and

- (ii) companies in which the companies mentioned on item (i) above hold, directly or indirectly, at least 20% (twenty percent) of the capital stock or voting capital;

It is important to bear in mind that there are specific rules for the calculation of revenues of investment funds for merger control purposes. According to the merger regulation, the following should be deemed as part of the same economic group for the purposes of calculating group turnover :

- (i) investors holding, directly or indirectly, at least 50% of the fund involved in the transaction (through individual stake or shareholder's agreement); and
- (ii) portfolio companies controlled by the investment fund directly involved in the transaction and the companies in which the fund holds, directly or indirectly, at least 20% of its capital or voting stocks.

However, if a transaction involving investment funds is subject to mandatory submission, the authorities may require information regarding other investment funds under the same management and their related portfolio companies for purposes of the effects assessment.

The maximum term for the analysis to be carried out by the competition authorities is of 330 days. CADE's Internal Ruling provides for the automatic approval of transactions which are not reviewed within the legal period referred herein. To be noted that cases submitted and assessed under the summary proceeding are decided by the General-Superintendence within 30 (thirty) days.

With respect to merger reviews, CADE's General-Superintendent is also entitled to grant clearance on transactions which do not pose competition issues without their submission to CADE's Tribunal. Under such circumstances, the Tribunal's right to arrogate jurisdiction and review the transaction is preserved, as well as the right of admitted third parties to challenge the decisions rendered by the Superintendent before the Tribunal.

In view of such possible arrogation and third parties' appeals, once the General-Superintendence clears the transaction the Parties must respect a 15 –day 'waiting period' to close and implement the deal.

According to the Brazilian Competition Law, a "Concentration Act" is characterized by:

- (i) the merger of two or more independent companies;
- (ii) the acquisition of one or more companies, directly or indirectly, through a purchase or exchange of shares, quotas, bonds or securities convertible into shares, or assets, tangible or intangible, through a contract or otherwise, the control of the interest in one or more companies;
- (iii) the takeover by one or more companies of another company; and
- (iv) the association, consortium or joint venture between two or more companies, except in cases of public bids.

Resolution No. 17/2016 set forth that an Associative Agreement amounts to a concentration act if:

- (i) it is executed between competitors in the same relevant market;
- (ii) the duration of the agreement equals or exceeds two years or, upon renewal, the two-year period is reached or exceeded; and

- (iii) the agreement fulfills the following conditions:(a) set up a common undertaking for the exploitation of a business activity, defined as the “acquisition or offer of goods or services in the market, even without profit purposes, provided that such activity is exploited by for-profit corporations in the private sector” and (b) set the sharing of risks and results in the business activity object of the agreement.

Submissions must be presented to the authorities preferably after the execution of a binding document between the parties.

Concentration Acts subject to mandatory submission to the authorities may not be implemented prior to CADE’s decision, under penalty of nullity. Failure to respect the mandatory waiting period, thus implementing the transaction or a part of it (also known as gun jumping) shall result in a fine ranging from BRL 60,000.00 (sixty thousand reais) to BRL 6,000,000.00 (six million reais), in addition to an administrative proceeding to review the competition aspects of the transaction. The acts implemented prior to clearance may also be declared null and void.

In this way, the parties shall maintain the physical structures and competitive conditions between them unaffected and are, therefore, prevented from promoting any assignment of assets or exercise of influence over the other party, as well as sharing any sensitive information which is not strictly necessary for the execution of the binding documents.

On May 20, 2015, CADE published its Gun Jumping Guidelines, aiming at establishing standards to be used as benchmarks for companies in negotiations. The Guidelines are non-binding but are an important indicator of CADE's rigorous approach towards Gun Jumping practices.

The parties can request a derogation for the early implementation of the transaction (i.e. before clearance), provided that the circumstances of the case so require and the conditions for the preservation of the reversibility of the transaction are maintained. The standard of proof to demonstrate financial losses resulting from a delayed closing is significantly high.

Concentration Acts which may result in the exclusion of competition on a substantial part of the relevant market, or which may create or strength a dominant position or result in the domination of a relevant market, shall be prohibited. Nevertheless, a transaction may be authorized when the strict limits required for the achievement of the following objectives are observed, alternatively or cumulatively:

- (i) increase of productivity or competitiveness;
- (ii) increase in the product or service quality; or
- (iii) increase of efficiency and technological/ economic development, a relevant part of which shall be shared with consumers.

While analyzing the transaction, CADE will take into consideration any of such efficiencies.

Finally, in cases where potential anticompetitive effects are identified, CADE may block the entire envisaged transaction or, most likely, conditionally approve it, engaging in negotiations and requiring the parties to execute a so-called Merger Control Settlement Agreement (“*Acordo em Controle de Concentração*” - ACCs).

3 Competition Infringements

The Brazilian Competition Law sets forth, in its Article 36, that any act, intended or otherwise, able to produce the following effects, even if such effects are not achieved, shall be deemed a violation of the economic order:

- (i) to limit, restrain, or in any way harm free competition or free enterprise;
- (ii) to control a relevant market of a certain product or service;
- (iii) to increase profits on a discretionary basis; or
- (iv) to abuse a dominant position in a certain market.

(v) The conduct is analyzed on a case-by-case basis using a rule-of-reason approach, except from cartel probes, cases in which the violations must be considered *per se* illegal.

In turn, paragraph 3 of Article 36 of the same law provides for a non-exhaustive list of conducts that may constitute a violation of the economic order to the extent that they may produce any of the effects mentioned in Article 36 referred to above, such as:

- (i) price fixing;
- (ii) territorial and client-base restrictions;
- (iii) exclusivity agreements;
- (iv) refusal to deal;
- (v) tie-in arrangements;
- (vi) price discrimination;
- (vii) resale price-maintenance, among others.

The Brazilian Competition Law sets forth fines for the involved companies ranging from 0.1% to 20% of the revenue in the business activity segment involved, in the year prior to the opening of the administrative process. CADE’s Resolution No. 3, published on May 31, 2012, provides for a list of the business activity segments which shall be taken into consideration as a basis for calculating possible fines, according to Article 37 of the Law.

With respect to administrative fines for individuals, the law provides for a range of fines from 1% to 20% of the fine applied to the company. Also, in the case of associations, unions or when it is not possible to calculate the entity’s turnover, the applicable fine ranges from a minimum of BRL 50,000.00 (fifty thousand reais) and a maximum amount of BRL 2,000,000,000.00 (two billion reais).

In addition to the pecuniary fines set forth above, and considering the gravity of the violation, the following penalties may also apply:

- (i) at the violator's expense, half-page publication of the summary of the decision in a court-appointed newspaper for two consecutive days, from one to three consecutive weeks;
- (ii) ineligibility for official financing or bidding processes involving purchases, sales, works, services or utility concessions with the federal, state, municipal and the Federal District authorities and related entities, for a period equal to or exceeding five years;
- (iii) recommendation of compulsory licenses for patents held by the violator;
- (iv) the company's spin-off, transfer of corporate control, sale of assets, partial discontinuance of activities; among others.

4 Criminal Aspects

In addition to the Competition Law, the Law 8,137/1990 states that a crime against the economic order occurs in the event of abuse of economic power through domination of the market or elimination of competition even if partially, by means of agreements or alliances among competitors, with the purposes of:

- (a) artificially fixing prices or outputs;
- (b) regionally controlling the market by company or group of companies; and
- (c) obtaining control of the distribution or supply network to the detriment of competition.

In summary, criminal prosecution occurs in cases involving collusion among competitors.

The penalties under the Law 8,137/1990 range from two to five years of imprisonment, plus a pecuniary fine.

5 Leniency Programs

Any individual or legal entity involved in competition infringement practices may apply for the Leniency Program, first introduced in Brazil in 2000, which may result in full or partial immunity.

Leniency agreements are increasingly being negotiated in Brazil concurrently with other jurisdictions. This is the result of intensifying cooperation between authorities, as they have enlarged information sharing, especially with respect to international cartels. Increasing fines are also calling companies' attention to the Brazilian Leniency Program.

The requirements for granting full immunity under Brazilian law are similar to those observed under the North American legislation. The main conditions for full immunity are:

- (i) the company or individual ("Beneficiary") shall be the first to inform the violation;

- (ii) the Beneficiary shall cease his/her involvement in the infraction completely, as of the date of the proposal;
- (iii) the authorities shall not have sufficient evidence to file charges against the companies or individuals at the time of the proposal;
- (iv) the Beneficiary must admit to participation in the violation and provide full/permanent cooperation with the investigation; and
- (v) the Beneficiary shall cooperate with the investigation in ways to identify all other co-participants and collect information and documents to prove the violation.

In the event that all legal requirements mentioned above are met, the Beneficiaries, companies, or individuals shall be granted full immunity (including from administrative and criminal penalties). If requirements are partially met, partial immunity may be granted (varying from one to two-thirds of the applicable penalty).

6 Cease and Desist Commitment

According to Article 85 of the Brazilian Antitrust Law CADE may agree on a commitment by the Defendant to cease the acts under investigation or their harmful effects (known as TCC) whenever CADE believes – based on its own discretion about the advisability and opportunity of such commitment – that the commitment meets public interest criteria.

Therefore, the TCC is an agreement that may be negotiated with CADE in order to advance the termination of the administrative proceeding. Any Defendant interested in entering into a TCC may submit a request to CADE, which shall be addressed to the Reporting Commissioner in charge of the case analysis, if the administrative proceeding has already been submitted to the Tribunal, or to CADE's Chairman, if the administrative proceeding is still in course before CADE's General-Superintendence.

If a proposal is made when the case is still under the General Superintendence's scrutiny, the negotiation deadline will be established at the discretion of the authority. If a proposal is made when the case has already been presented by the General-Superintendence to the Tribunal for a final decision, then the negotiation period will be limited to 30 days, renewable for another 30 days.

The negotiation process may be confidential at the discretion of CADE. However, the TCC itself, once approved, will be made publically available through CADE's website. Confidential information will be redacted.

The cease-and-desist commitment must:

- (a) specify the respondent's obligations to cease the conduct under investigation or its harmful effects, as well as other obligations deemed applicable;
- (b) set a daily fine for full or partial contempt of the obligations undertaken;
- (c) set the value of the pecuniary contribution to the Diffuse Rights Protection Fund (*Fundo de Defesa de Direitos Difusos*), when applicable.

Although CADE does not restrict the number of TCCs to be executed by interested parties, CADE's Internal Ruling predetermines the maximum level of discount applicable to the hypothetical fines the parties are subject to. Such discounts will consider the moment in time of the proposal and the degree of expected cooperation of the party.

With respect to the method applied by CADE for calculating the pecuniary contribution, note that CADE's directives set forth the following discount standards. (i) the first defendant to come forward and execute a TCC may benefit from a reduction from 30% to 50% of the expected fine in case of conviction; (ii) for the second defendant, the reduction is from 25% to 40% of the expected fine; (iii) from the third defendant on, the reduction is up to 25% of the expected fine (this is the applicable discount considering the stage of the Administrative Proceeding); (iv) for the agreements executed after the case is presented to the Tribunal, the maximum reduction shall be of 15% of the expected fine.

Thus, the regulation has predetermined levels of discounts depending on the moment in time the defendant comes forward and the degree of expected cooperation, i.e. the level of effective collaboration that the defendant will be able to engage in to assist on the investigation and conviction of the other defendants.

Whenever the administrative proceeding concerns an investigation of agreements, combination, manipulation or adjustment between competitors (*cartels*), the payment of a pecuniary contribution to the Fund for the Defense of Diffuse Rights and the admission of guilt are mandatory. CADE may also request the party to cooperate with the investigation to the extent possible.

It is worth mentioning that a settlement with CADE does not provide for criminal immunity nor for immunity at the civil or administrative levels.

7 Civil Damage Recovery Lawsuits

Companies convicted for anticompetitive conducts are also exposed to Civil Damage Recovery Lawsuits. Damage claims are not very common in Brazil yet, as opposed to the United States and Europe, for instance. This is possibly due to the fact that consumers are still not proactive in damage lawsuits, especially when the link between a possible damage and the company deemed liable is remote, which is the case in most of the anticompetitive practices. This is also possibly due to the lack of class action mechanisms in Brazil and other procedural aspects under development.

There is a bill of law under discussion at Congress that may establish doubled damages for defendants that are condemned by CADE. The developments of this bill of law may change the scenario described above.

Intellectual Property Rights

1 General Overview

Intellectual property in Brazil denotes not only industrial property rights but also other rights related to creations of the mind, such as copyright and software.

Following the definition of “industrial property” introduced by the Paris Convention, industrial property rights in Brazil cover trade and service marks, certification marks and collective marks, patents of invention, and utility model patents, industrial designs, geographical indication and protection against unfair competition. It also encompasses technology transfer, franchising, technical and scientific services.

Industrial property is mainly regulated by the Brazilian Industrial Property Law (Law 9,279 of 1996), the Paris Convention, and its Stockholm Revision, several norms issued by the Brazilian Patent and Trademark Office (“BPTO”), and the Central Bank of Brazil. Industrial Property Law 9,279 of 1996, which entered into force on May 15, 1997, consolidated the various rules governing the subject and introduced changes to the current protection of industrial property rights in Brazil.

The BPTO is the federal agency in charge of regulating and granting patent rights, registering trademarks, industrial designs and geographical indications, as well as of approving licensing agreements and any other agreements involving industrial property rights, technology transfer and technical and scientific services as mentioned above.

In 2017 the BPTO issued Normative Instruction No. 70/2017 and Resolution 199/2017 establishing new rules and formalizing certain requirements in relation to the recordal or registration of technology transfer agreements (*i.e.* industrial property licensing and assignment, technology supply, specialized technical assistance services and franchise agreements).

Normative Instruction No. 70/2017 introduced an explanatory note to be included in the certificate of recordal or registration of agreements, with the following content: ***“The BPTO did not analyze the agreement under the fiscal perspective and under the legislation governing the remittance of capital abroad.”***

The above new rule indicates that BPTO shall cease its exaggerated intervention in private contracts, such as posing changes or questioning remuneration provisions agreed to by the contracting parties. The tax and remittance rules were not changed, but BPTO will not make its own analysis and requirements regarding tax and remittance aspects.

2 Trademarks

As stated, Brazil is a signatory of the Paris Convention, and therefore, trademarks which have been registered with the appropriate governmental agencies of other signatory countries have priority in being granted local registration and protection. However, if a foreign holder applies for registration of a trademark in Brazil without a priority claim, as established in the Paris Convention (within six months of the foreign application), then priority protection from the Paris Convention for the interim period of time before application in Brazil will not be granted.

In order to be registered, the trademark must be new, lawful, and cannot be identical or confusingly similar to previous applications or registrations, nor may it be an expression of common use or a generic expression.

Trademark protection in Brazil is obtained by registering the trademark with the BPTO. However, Law 9,279 introduced two exceptions to this rule:

- (i) For well-known trademarks special protection is granted, regardless of whether or not they have been registered in Brazil before. This provision is aimed at protecting holders from piracy of well-known trademarks that are registered outside of Brazil, but not in Brazil. It also reinforces the protection of Article 6 *bis* of the Paris Convention, which has long granted protection for well-known trademarks regardless of their registration.
- (ii) For any person who in good faith, at the date of priority claim or of the application filing with the INPI by a third party was using an identical or similar mark for at least 6 (six) months in Brazil, to distinguish or certify a product or service that is identical, similar or akin, will have preferential right to registration.

Registration of a trademark is valid for a period of ten years and is renewable for successive ten-year periods. The extension must be requested during the last year in which registration is in effect (called the ordinary term) or within a 6-month period after the ordinary term (called the extraordinary term) against payment of a surcharge. A trademark registration may be cancelled if:

- (i) it is not used for five years from the date of its registration;
- (ii) its use is interrupted for more than five consecutive years; or
- (iii) the mark has been used in a modified form that implies alteration in its original distinctive character, as found on the certificate of registration.

Trade names in Brazil are not governed by the Industrial Property Law, and therefore are not subject to registration with the BPTO, although Law 9,279 of 1996 forbids the registration of trademarks identical or confusingly similar to third parties' trade names if it leads into confusion or association between those distinctive signs. Trade names are regulated by the Paris Convention, which assures protection to the owner of a trade name in all signatory countries, without filing or registration obligation, as well as by specific regulations issued by the National Department of Commerce Registry which require the registration of trade names with the Commercial Registry. Even though the Paris Convention demands that the protection of trade names shall be afforded throughout Brazilian territory, the Brazilian Civil Code in force since January 11, 2003, states that protection of corporate names is limited to the Brazilian state where the company is registered. However, there is a special provision of law that allows a company to expand its trade name protection to other states in Brazil by submitting special requests at the commercial registries of each state where protection is desired.

2.1 Madrid Protocol

On October 2, 2019, Decree No. 10.033/19 was published, entering into force in Brazil the Protocol on the Madrid Agreement for the international registration of trademarks, signed in Madrid, Spain, on June 27, 1989.

With the Protocol now in effect in the country, Brazilian titleholders who wish to register their trademarks in any of the other 120 countries that are part of the Agreement may do so directly with the BPTO, filing a single international application and paying only one fee.

The BPTO will also receive trademark applications from foreign and Brazilian companies that enter the Protocol and choose Brazil as their designated country.

The BPTO, as designated office, will have up to eighteen months to make a first analysis of the application, under penalty of automatic allowance. This first review can result in an office action or abeyance (which interrupts the 18-month review period) or a final decision (allowance or rejection of the application).

The Protocol is an advantage for trademark owners as it not only simplifies the registration process in several countries but also significantly reduces the costs of filing and maintaining trademarks in such countries.

In view of the accession to the Madrid Protocol, Brazil has needed to seek tools to harmonize trademark registration procedures between national applications and designations received through the Madrid Protocol.

To this end, it is important to stress two substantial changes: Brazil adopted the trademark regime in a multiclass system and co-ownership, which will only be implemented in the BPTO filing system from March 9, 2020.

As in order countries, in order to analyze the registrability of the trademark in a multiclass system, the BPTO Examiner will perform an anteriority search made exclusively in the classes claimed in the application under analysis, except for the cases of correspondence in the former national classification, as is currently the case.

2.2 Trademark Licensing Agreements

Trademarks may be subject to licensing agreements, provided that they are registered or in the process of registration with the BPTO.

However, trademark applications cannot generate royalties. It means that the trademark has to be duly granted by the BPTO before remittance of royalties.

3 Patents

Industrial Property Law establishes two types of patents: patents of invention and utility model, depending on the degree of the inventive procedure involved. For both kinds of patents, the law requires that the product or the process to be patented results in an inventive procedure, is new, and has an inventive activity and industrial application.

Patent protection is obtained by the patent granting by BPTO. An invention patent is valid for a period of 20 years, calculated from filing date of the patent application. However, given that a patent process may take years, the Industrial Property Law assures that the patent validity period cannot be shorter than 10 years as from the date patent is granted. Utility models are valid for 15 years as of the filing date. However, as it happens in the case of invention patents, the Industrial Property Law assures that the utility model validity period cannot be shorter than 7 years as of its granting date.

As informed above, to be patentable, an invention must be new and capable of use in industry. An invention is considered new when it is not part of the “state of the art”. The “state of the art” includes all data and information made available to the public in Brazil or abroad written or verbally, by use or by any other means, before the filing or priority date. It includes the contents of patents in Brazil and abroad. An invention is capable of industrial use when it can be made or used in industry, including agricultural industry.

The patent holder must use the patent in Brazilian territory within three years from the granting date in order to avoid the possibility of having its patent subject to mandatory licensing to a third party. A patent can also be subject to mandatory licensing if its owner exerts his rights in an abusive manner or whenever the sales volume of the patented products does not meet local market requirements.

It is important to highlight that the BPTO has been taking several measures to try to decrease the backlog¹⁶ on patent analysis, such as signing Cooperation agreements with other patent offices, such as the European Patent Office (EPO), Patent Office in Argentina (AR), Patent Office in Japan (JP) and in the United States (USA).

3.1 Patent Licensing Agreements

Patents may be the subject of a licensing agreement if they are registered with the BPTO or in the process of registration.

Patent applications cannot generate remittance of royalties until the patent is granted by the BPTO.

However, royalties can be charged and credited in licensee's financial statements for payment after the patent granting, from the date of the registration request of the patent license agreement before the BPTO.

4 Industrial Designs

Any ornamental shape of an object, or the ornamental combination of outlines and colors applicable to a product, which result in a new visual effect, may be considered an Industrial Design.

Granting an industrial design, unlike patent regulation, is not subject to prior examination by the BPTO regarding its merit. Registration is immediately published and granted by the BPTO if the application complies with all legal requirements. However, the applicant may, at any time, request examination by the BPTO as regards the novelty and originality of its industrial design.

Registration is valid for a period of ten years as of the filing date and can be extended for three consecutive five-year periods.

4.1 Industrial Design Licensing Agreements

Industrial designs may be subject to a licensing agreement if they are duly registered with the BPTO or in the process of registration.

¹⁶ Furthermore, on July 27, 2017, the BPTO issued a public consultation on a proposal to reduce the current patent backlog by streamlining examination of pending applications.

According to the proposal, eligible applications would form a separate queue and would be allowed as published or notified upon their national phase entry. This means that such applications would not undergo substantive examination. Letters patent would be issued with a general disclaimer calling attention to the non-patentable subject matter set forth in Articles 10 and 18 of the Brazilian Industrial Property Act.

It is important to note that this consultation is a preliminary step and has the purpose to invite the public to contribute with inputs on the proposed streamlined procedure. We noted several contributions, especially from Brazilians intellectual property associations, regarding the consultation. In the case that BPTO decides to move forward with the implementation of an Act, it will come in force.

5 Technology Supply

Technology in Brazil is defined as know-how not protected by a patent of invention or utility model. The basic concept of the Brazilian rules with regard to the use of technology by a Brazilian party has been that technology is subject to “transfer” to a Brazilian party rather than to a “license” (this rationale prevails since 1975 due to the former (and revoked) BPTO Normative Act 15). In other words, technology may be assigned (“sold”) but not licensed. Nevertheless, the parties can agree with some restrictions to the use of the technology, such as confidentiality obligations. In consideration of the “sale”, the supplier may be entitled to certain fees during the term of the agreement, but the recipient should be free to use the technology after expiration of the agreement.

The deduction of the fees paid as compensation for the technology supply for tax purposes is restricted to the five-year period of the agreement (see Article 364, Paragraph 1 of the Income Tax Regulation instituted by Decree no. 9,580/2018). This term may be extended for an additional period of five years if the contracting parties can demonstrate that the technology was not completely transferred to the receiving party or that the agreement is essential to the maintenance of the competitiveness of the receiving party.

Since 2017 the parties are free to stipulate the term of the agreement in accordance with the necessary duration of the know-how provision, provided that the agreement is executed for a determined term (indefinite terms are not accepted by the BPTO, according to its rules).

6 Technical and Scientific Services

Agreements involving the rendering of technical and scientific services, where there is transfer of know-how (through, for example, provision of reports and data) from one party to the other party are subject to recordation with the BPTO. These services usually involve engineering services and should not be confused with the category of “professional services”, which are exempt from registration with the BPTO to enable the remittance of payment abroad and the payment can be made through any commercial bank.

The BPTO only accepts that payments for technical and scientific services that take place based on man/hour or man/day costs.

In 2015 the BPTO issued a Resolution listing certain contracts for technical and scientific assistance services which are not subject to registration with the BPTO because they do not imply technology transfer, such as preventive maintenance services for equipment and/or machinery.

7 Franchising

Franchising is defined as a system by which a franchisor grants a franchisee the right to use a trademark or patent (in practice and according to Brazilian legal doctrine, the right to use trademark is essential in a franchise deal), along with the right to the exclusive or semi-exclusive distribution of products or services, and possibly also the right to use the technology of implementation or management of related business or operational system developed or retained by the franchisor.

The new Law 13,966, known as the Franchising Law, modifies some aspects of Law 8.955 of and regulates the terms of a franchising agreement, clarifying the relationship between franchisor and franchisee. The new Law came into force 90 days after December 27, 2019, on March 27, 2020.

The former Law created the “Franchise Disclosure Document”, which must include mandatory pieces of information that shall be disclosed to the potential franchisee, including a more detailed description of the franchise in which the prospective franchisee intends to engage, as well as information about the franchisor, both of which are crucial elements for the prospective franchisee to consider whether or not to engage in the business investment.

A franchisee may obtain the cancellation of the franchise agreement even after it is signed if the Franchise Disclosure Document is not delivered to the prospective franchisee at least 10 days prior to execution of the franchise agreement, preliminary agreement or any other agreement related to the franchise deal or the payment of any amounts by the franchisee. In this regard, for instance, it is required that the Franchise Disclosure Document be delivered by the franchisor to the franchisee at least ten days prior to signing the franchise agreement or payment of any fee by the franchisee to the franchisor.

The cancellation of the franchise agreement can obligate the franchisor to return all amounts paid by the franchisee plus damages.

7.1 Franchising Agreements

Franchising agreements executed between a local franchisee and a foreign franchisor must be registered with the BPTO.

Even if the franchise agreement includes only trademark *application*, the remittance of payments abroad due for the franchise agreement will be allowed.

8 Registration

As a general rule, agreements relating to industrial property rights, technology transfer and technical and scientific services involving transfer of know-how must be approved by and registered with the BPTO for the following purposes:

- (i) Remittance of royalties abroad, in which case the agreement must also be registered with the Brazilian Central Bank;
- (ii) Deductibility of payments as operational expenses for Brazilian income tax purposes. In this case, registration at the Brazilian Central Bank is also necessary; and

- (iii) Enforcement of the obligations *vis-à-vis* third parties.

As regards item (iii) above, registration of a licensing agreement with the BPTO is not mandatory for documents issued by the licensee to prove the use of licensed trademarks or patents to be accepted as proof of actual use by the BPTO, in the event of cancellation on the grounds that lack of use is requested by a third party.

9 Software

Software is regulated by Law 9,609, known as the Software Law, enacted on February 19, 1998. The law contains provisions regarding:

- (a) copyright protection for software;
- (b) the rules for marketing software; and
- (c) the penalties imposed in the case of infringement of software copyrights and marketing.

“Software” or “computer programs” are defined as “the expression of an organized set of instructions in natural or codified language embedded in physical media of any nature to be necessarily used in automated machines to handle data, devices, peripheral instruments or equipment, based on digital or analogous techniques to make them operate in a specific manner and for specific purposes.”

The law grants authorship protection for software programs for fifty years from the first day of January of the year following the software’s publication or, in the absence of publication, fifty years from the date of the software's creation.

In terms of protection for foreigners, the law applies the international principle of reciprocity. Protection is extended to foreigners domiciled outside Brazil, as long as the country where the software was created grants the same rights to Brazilians.

The aforementioned Software Law 9,609 determines that authorship of the software is already assured, regardless of its registration. However, the author may pursue registration of the software with the INPI in order to allow the shift of burden of proof in civil procedures. Registration can be requested on a secret or non-secret basis, and the software registration is automatically issued, if it complies with formal requirements.

10 Copyright

Copyright protection extends to original works of authorship in any tangible form of expression, such as books, letters, conferences, music compositions, cinematography works, photographs, translations and any other kind of transformation of the original works, drawings, paintings, sculptures and other tangible forms thereof.

Copyright is regulated by Copyright Law 9,610, enacted on February 20, 1998, which protects and regulates all creative works of inspiration. Additionally, Brazil is a signatory to two other major international treaties, the Bern and Geneva Conventions.

Copyright ownership is vested in the author of the work (or contributors if developed jointly). The duration of a copyrighted work is for the entire life of its author, and seventy years thereafter. If the work is created by two or more authors, the duration of seventy years starts after the death of the last surviving author.

Copyright registration is not a prerequisite for obtaining protection. However, registration is always helpful to deter piracy, and as proof of ownership in case of litigation. In this case, the author may register his/her work with specialized entities in accordance with the nature of the work.

11 Tax Aspects

11.1 Withholding Income Tax (IRRF)

As a general rule, the payment (credit, delivery, employment or remittance) of royalties or fees abroad under intellectual property rights agreements are subject to withholding 15% in income tax (or a 25% rate if the beneficiary is domiciled in a “low tax jurisdiction” as defined by Brazilian tax law).

The IRRF is an ordinary burden on the beneficiary of the payment abroad, and, as a rule, it is deducted from the amount to be paid. Nevertheless, the parties may formally agree that the Brazilian payer will assume the burden of the IRRF owed by the beneficiary domiciled abroad. In this situation, Brazilian tax legislation establishes that the Brazilian payer must gross up the IRRF tax basis.

Amounts withheld in Brazil as IRRF may generate credits for the beneficiary domiciled abroad that may offset its foreign income tax, if such provision is contained in a treaty to avoid double taxation between Brazil and the beneficiary’s country, or if it has been provided for in the legislation of the country to which remittance is being sent.

11.2 Contribution for Interference with the Economic Order (CIDE)

CIDE is levied on the payment (or credit, delivery, remittance or employment) of remuneration to parties domiciled abroad, related to:

- (i) supplying technology;
- (ii) providing technical support (i.e., technical support services or specialized technical services) with or without technology or know-how transfer;
- (iii) transferring and licensing trademarks;
- (iv) transferring and licensing to exploit patents;

- (v) administrative assistance and those of similar nature; and
- (vi) royalties of any kind.

CIDE is not levied on payments related to software licenses, unless the source code of the software is provided to the payer (in which case the agreement is considered technology transfer, according to the Brazilian legislation).

Payment of CIDE is incumbent on the company domiciled in the country, given that, unlike the IRRF, this contribution is due by the payer domiciled in Brazil and not by the foreign beneficiary.

11.3 PIS/COFINS-Importation

PIS/COFINS-Importation is levied at a joint rate of 9.25% on the importation of services (and at a joint rate of 11.75%¹⁷ on importation of goods). Services subject to these taxes include those performed in Brazil or abroad, whose results are verified in Brazil. The taxable basis of PIS/COFINS-Importation taxes is the amount paid (or credited, delivered, used or remitted) abroad before the withholding income tax (IRRF) deduction, plus the Services Tax (ISS) and the PIS/COFINS-Importation tax amounts. If the Brazilian company is under the non-cumulative system and if the “services” imported could be regarded as inputs used or consumed in the company’s core business, then PIS/COFINS-Importation collected may be offset against PIS and COFINS accruing on the Brazilian company’s monthly revenue.

The levy of PIS/COFINS-Importation on payments abroad as intellectual property rights used to be a controversial matter in Brazil. Because most of the agreements involving intellectual property rights does not involve a “to do” obligation (but the mere license of rights), there are legal grounds to sustain at courts that these specific transactions do not characterize a service rendering and should not subject to the levy of PIS/COFINS-Importation.

Nevertheless, tax authorities have been rendering administrative decisions on the sense that agreements involving the payment of royalties are not subject to PIS/COFINS- Importation, provided that the amount of royalties charged in the respective agreement is segregated from other amounts charged as technical services technical assistance and other services rendered under the same agreement.

¹⁷ Please note that on June 22, 2015, Law 13,137/2015 was published, increasing PIS/COFINS - Importation combined rate from 9.25% to 11.75%. Said innovation became effective on May 1, 2015.

11.4 Services Tax (ISS)

The Services Tax (ISS) is a municipal tax levied on the provision of services at a range of 2% to 5%, depending on the nature of the service and the location (municipality) of the Brazilian company. The ISS is also levied on imported services, in which case the payer is responsible for collecting ISS due on service importation. Some intellectual property rights were included in the list of services subject to ISS (such as trademark license, software license and franchising). Because these agreements in general do not involve a performance obligation (but the mere licensing of rights), there are legal grounds to sustain in court that the ISS should not be due in these cases.

11.5 IOF tax

Currency transactions to pay royalties or fees abroad are subject to the Tax on Financial Transactions (IOF) at a 0.38% rate. The IOF taxpayer is the Brazilian company that pays the funds abroad, but the Brazilian bank in charge of the currency exchange is responsible for collection and payment.

11.6 Deductibility

As a general rule (applicable to any and all expenses), only necessary, usual and regular expenses made in connection with a company's business may be deducted from the tax basis of Corporate Income Taxes (IRPJ and CSLL).

In addition to the general deductibility rule above, Brazilian income tax legislation establishes specific conditions and limits for the deductibility of certain intellectual property rights expenses. These specific conditions for tax deductibility should be analyzed on a case-by-case basis. But as a general rule, the deduction of royalties for the use/exploitation of patents, technology supply (including software licensing agreements with assignment of the respective source code considered technology transfer) or technical support, is limited to 1% to 5% of the net sales price of the product (or services) connected to the patent, technology supply, or technical support. This 1% to 5% limit varies in accordance with the business and the essentiality of the product/service to the Brazilian economy, as per Finance Ministry Ordinance 436 of 1958 (and amendments). Royalties deductions for the use of trademarks are limited to 1% of the net sales price of the products (or services) bearing the trademark, when the trademark is not connected to technology supply, technical support, or patent exploitation. The deduction of royalties for the use/exploitation of patents, trademark, technology supply, or technical support also depends on registering the respective agreement at the National Institute of Industrial Property (INPI) and the Central Bank of Brazil. Please note that the payment of the royalties mentioned herein is not subject to Brazil's transfer pricing rules.

Data Privacy and Cybersecurity

1 General Overview

General principles and provisions on data protection and privacy are provided for in the Federal Constitution, the Brazilian Civil Code, as well as in other laws and regulations that address particular types of relationships or activities, such as the Consumer Protection Code, labor laws and norms governing financial institutions and other entities authorized to operate by the Brazilian Central Bank. Furthermore, the Brazilian Internet Act (Law No. 12,965/14) and its regulatory decree No. 8,771/2016, establishes principles and guarantees for internet users, including protection of their personal data in the digital environment, as well as the rights and duties of internet connection and application providers, including their liability.

In 2018 Law No. 13,709/2018, amended by Law No. 13,853/2019 (the “General Personal Data Protection Law” or “LGPD”) was sanctioned in Brazil and was scheduled to enter into force on August 15, 2020¹⁸ to govern the processing of personal data.

2 The LGPD

Under the LGPD, processing of personal data includes any operation related to a natural person who can be identified, such as the collection, classification, access, reproduction, transmission, elimination, etc., of personal data.

The LGPD is highly inspired by the GDPR – *General Data Protection Regulation* (the European Data Protection Regulation), however the Brazilian legislation takes on certain particularities and require adaptations, even for European entities that process personal data under the following circumstances:

- (a) processing is carried out in Brazil (even when personal data is only collected in Brazil);
- (b) processing has the purpose of offering goods or services to data subjects located in Brazil;
or
- (c) personal data from data subjects located in Brazil (including foreigners) are processed.

The LGPD establishes the following sanctions:

¹⁸ Presently there are draft bills discussing the postponement of all or some of the provisions of the LGPD.

- Simple fine of up to 2% of the revenue of the legal entity based in Brazil, limited to 50 million Reais **per each** infraction.
- Daily fine, limited to 50 million Reais.
- Publication of the infraction, following due investigation and confirmation of its occurrence.
- Blocking and/or elimination of the personal data in question for the infraction.
- Partial suspension of the operation of the database to which the violation refers.
- Suspension of the exercise of the activity of processing of personal data to which the infraction refers, for 6 months.
- Partial or total prohibition of the exercise of activities related to data processing.
- Warning, indicating the deadline for the adoption of corrective measures.

Furthermore, companies will have the duty to report to data subjects and the supervisory authority (“Data Protection National Authority” or “ANPD”) the security incidents that may cause significant risk or damage to data subjects. Failure to comply with such norm and other rules set out on the LGPD will subject companies to the aforementioned sanctions.

Environmental Law

1 Overview of Environmental Law

Historically, environmental regulations were created to address different impacts arising from economic activities in the country, such as:

- forests (Brazilian Forestry Code - Law 12,651/2012);
- mineral resources (Mining Code – Decree-Law 227/1967);
- fishing (Decree-Law 221/1967);
- hunting in general (Hunting Code - Law 5,197/1967),
- water use (Water Code - Decree no. 24,643/1934, and the national policy for the use of water resources - Law 9,433/1997),
- waste management (National Policy on Solid Waste Management – Law 12.305/2010)
- air emissions involving stationary and mobile sources (Conama Resolution 382/2006 and 436/2011, and Conama Resolutions [403/2008](#), [414/2009](#), [415/2009](#), [418/2009](#), [426/2010](#), [432/2011](#), [433/2011](#))
- a National Biodiversity Law (Law 13,123/2015) and
- environmental licensing for potentially pollutant activities (Supplementary Law 140/2011)
- soil and management of contaminated areas (Conama Resolution 420/2009)

The development of environmental concerns worldwide and the enactment of numerous international agreements resulted in a growing consciousness in Brazil bringing about the adoption of a National Policy Law for the Environment (Law 6,938/81), which was crowned with the approval in the Brazilian Constitution of 1988 containing an entire chapter addressing environmental issues. One could say that environmental protection as it is mirrored in legislation countrywide was ultimately consummated with the enactment of the National Environmental Criminal and Administrative Law (Law 9,605/98), which was further regulated in 2008 by Decree No. 6,514/2008.

In 1985, another important law was enacted: Law 7,347/1985, which created Public Civil Actions. Similar to American class actions, the Brazilian law allows the public prosecutors to file lawsuits aimed at protection of the environment, and it bestows standing to non-governmental agencies to bring suits under its terms.

At present, regulations regarding environmental protection in the country abound. They range from nuclear-damage penalties to coastal-management rules as well as from the creation of conservation units to the requirement to implement environmental-education systems in schools, among others.

Additionally, the states and sometimes the municipalities (when there is a local and specific interest) throughout the country are empowered to implement their own regulations regarding environmental protection and the use of natural resources at state and local levels.

In parallel, a significant number of bills of law are being analyzed by the National Congress, as a result of the proposed deregulation and review of the environmental policies that are proposed by the current government, especially the Bill of law 3729/2004, which reviews the environmental licensing proceeding.

2 Main Requirements Applicable to Industrial Activities

With regard to industrial activities, applicable regulations generally require environmental licenses and permits *prior* to the commencement of a company's activity.

As for pollution-control systems, they are implemented to a large extent in industrialized centers like the states of São Paulo and Rio de Janeiro. Both the lack of environmental permits and the act of polluting can be deemed criminal acts and trigger criminal sanctions in addition to administrative penalties (warnings, fines, interdiction of the company's activities among others), and civil sanctions (obligation to recover or compensate environmental damages).

3 Environmental Liability

Environmental liability, under Brazilian law, may occur in three different independent levels:

- (i) civil;
- (ii) administrative, and
- (iii) criminal.

It is said that the three spheres of liability mentioned above are "different and independent" because, on the one hand, one sole action by the offender may generate environmental liability at the three levels: civil, administrative, and criminal, and applicability against it of three different sanctions. On the other hand, the absence of liability in one of those spheres does not necessarily exempt the offender from liability in the others.

Environmental civil liability results from action or omission of the offender that results in environmental damage of any kind and is characterized as a modality of strict liability. Such liability results in the civil penalty of repairing or indemnifying for the damage caused to the environment and consequent damage to third parties.

Administrative liability results from an action or omission of the offender that involves violation of a rule of environmental protection, irrespective of fault or actual occurrence of environmental damage.

Finally, criminal liability depends on a finding of fault or malice of the offender, and occurs by the action or omission of an individual or legal entity that is typified in criminal law.

With regard to environmental liability, two more national rules are worth mentioning: strict liability and joint liability. The general provisions concerning environmental liability in Brazil provide for strict liability, i.e., sanctions are imposed regardless of fault. Joint liability will be mostly acknowledged in circumstances of outsourcing the transportation and final disposal of waste/residues or in case of contaminated areas when there is more than one agent responsible for the same environmental damage.

4 Environmental Licensing

In Brazil, most of the industrial activities are qualified as potentially pollutant, therefore demanding compliance with specific requirements pertaining to the environmental licensing of such activities.

The environmental licensing generally involves a three-step administrative proceeding, involving the issuance of three different (although connected) licenses by the competent environmental agency:

- (i) Previous Environmental License – approves the environmental viability of a certain project, as well as its location.
- (ii) Installation License – authorizes the implementation/construction of the project;
- (iii) Operation License – authorizes the beginning of the company's activities.

In addition, in the case that the activity is qualified as “significant”, the issuance of the previous license will be conditioned to the submission of an Environmental Impact Study and Report (EIA/RIMA), and also comply with additional legal requirements (such as public hearings, payment of compensatory measures, among others).

Specifically in connection with licensing, in 2011 the Supplementary Law 140/2011 became effective, which has established new parameters regarding jurisdiction, setting the roles of each federative entity at federal, state and municipal levels. The new legislation determines, for instance, that environmental licensing shall be a unique proceeding, which jurisdiction on federal, state or municipal level shall rely on certain criteria, as follows:

- (i) Federal, depending on the location (i.e., involvement of two or more states) or subject matter (i.e., production of radioactive material);
- (ii) Municipal, for activities which licensing causes local impacts; and
- (iii) State, in residual manner, in connection with activities not subject to licensing by Federal and Municipal authorities.

Also, it brings provisions in connection with environmental infractions, ascribing the responsibility for issuing infraction notices, and bringing administrative actions to the entity responsible for its licensing or authorization procedure.

5 Management of Contaminated Areas

In general, terms, the management of contaminated areas derives from the application of the environmental liability concepts, triggering the obligation to recover any environmental damage caused by the activity.

It is important to note that the concept of environmental liability can be extended to the property owner, financing agents, as well as to the lessee, based on certain legal doctrines that have been applied by court decisions.

In addition, at the federal level, CONAMA Decision 420/2009 sets forth the main requirements applying to the process of identification, delineation and remediation of soil and groundwater impacts. It is also important to highlight that some states have enacted specific regulations. One important precedent is the state of São Paulo, the first in Brazil to enact a law focused on the management of contaminated areas.

São Paulo State Law 13,577/2009 lays down procedures for identification and mapping of contaminated areas and implementation of mechanisms for remediation. This law makes it possible not only for the party at fault and/or the owner of the property to be held liable for the contamination, but also the tenant, the holder of the effective title, and the economic beneficiaries of the area.

Earlier, the state program on management of contaminated areas, which is a reference in Brazil, was operating by means of administrative rules of the São Paulo State Environmental Agency (CETESB), but those procedures were encompassed by the aforementioned law in 2009. The proceeding, updated in 2017, has also been adopted in other states, due to the lack of a Federal Regulation on the theme.

6 Post-Consumption Liability

Recent federal regulations establish the liability of manufacturers of certain products classified as generators of significant environmental impact (such as tires, batteries, electronics, lubricant oils and packages and fluorescent lamps) for relevant post-consumption waste. In 2010, Law 12,305/2010 was enacted creating the National Policy on Solid Waste. One of the major innovations of this law is the acknowledgment of shared responsibility for the product life cycles as a basic principle of solid waste management in Brazil. The law imposes on manufacturers, importers and retailers of certain high-impact products the obligation to implement a reverse logistics system aimed at cradle-to-grave management of the products and waste. The law also provides for the elimination of all dumps in the country and substitution by proper landfills.

7 Forest Code

As of 2012, all the activities related to the use and suppression of forest resources are subject to the new forest regime passed by Law 12,651/2012, a highly controversial law which imposes a new regulatory regime to the rural properties of the country. This law states new limits and definitions for areas qualified as “permanent preservation areas” as well as for the maintenance of legal reserve areas, and requires enrollment before the Rural Environmental Registry as a condition for the obtaining of loans or rural credit.

Permanent Preservation Areas are defined by Articles 4, 6 and 6 of Law 12,651/2012. Interference in such areas is only allowed if the activity is previously authorized and qualified as public utility, social interest low environmental impact, as states Article 8 combined with Article 2, VIII, IX and X.

Legal reserve is a percentage of land that land owners must designate and promote conservation practices. In Brazil, this percentage is of 20%, except in the Legal Amazon Area, where the percentage may be increased to 35% (if the vegetation is qualified as savannah), or 80% (if the vegetation qualifies as Amazon Forest), out of the total property area. The forest code allows for the compensation of legal reserve areas, and creates a legal reserve quota that can be used to attest compliance with the forest code requirements. In addition, it also defines specific rules to forest management and exploitation activities and forestry products supply control.

8 Biodiversity Law

Access to biodiversity resources in Brazil is currently regulated by Federal Law 13,123/2015.

Previous regulation by Provisional Measure 2,186/2001 was highly criticized by the market due to its focus on excessive governmental control and sanctioning of activities broadly characterized as bio-piracy.

The enactment of the 2015 Biodiversity Law has been announced as recognition by the Federal Government of the previous excesses and an attempt to balance the need of control over the exploitation of genetic resources/traditional knowledge and the realities of the industry.

Main provisions of the 2015 Biodiversity Law are:

- (i) creation of a registry (SISGen – launched in November 2017), in which activities involving access or export of genetic resources shall be previously registered by the relevant company, on a self-declaratory basis;
- (ii) definition of activities that are subject to previous authorization or mere registration;
- (iii) requirement of notification by the company to CGEN, previously to the economic use of the final product resulting from the access;
- (iv) distinction between the concepts of remittance and sending of samples of genetic resources to foreign institutions;

- (v) establishment of minimum of 1% of the annual net revenue resulting from the economic use of the final product (% can be reduced to up to 0,1%, in case a sector agreement in this sense is signed by the industry), for purposes of benefit sharing, and
- (vi) special treatment for the regularization of past uses.

9 International Law

Finally, it should be noted that Brazil is a party to numerous multilateral environmental agreements, such as the Climate Change Convention, the Biodiversity Convention, the Basel Convention on the Movement of Hazardous Waste, the Montreal Protocol, and UNCLOS, among many others. Rules reflecting such agreements are being enacted at the national level so as to comply with relevant international obligations.

Contract Law

The Brazilian Civil Code, in force since January 11, 2003, provides for the general principles of Contract Law and rules regarding most legal agreements; e.g. distribution, agency, lease, free lease; whereas the remaining contractual types are either governed by specific statutes (such as, among others, the sales agency agreement) or have no legal system, in which case the agreement must comply with the general assumptions and requirements set out by the Brazilian Civil Code.

Therefore, it is necessary to determine whether a given agreement falls within one of the regulated frameworks (either the Civil Code or a specific statute) before its execution in order to ascertain if it meets the formal and substantial requirements set forth by Brazilian legislation.

The following are the requirements for a contract to be enforceable in Brazil: qualified party, lawful scope, and proper or not-legally-forbidden form. However, certain agreements may require further essential elements, according to their nature. As an example, the price is an essential element in a purchase and sale agreement.

As a general principle, the parties (Brazilian or foreign citizens) are free to enter into agreements with each other and to set mutual obligations at will (principle of free will). As long as an obligation is not unlawful, in conflict with the law, immoral, or impossible to be enforced, it is considered valid. Moreover, there must be some balance between the mutual obligations set in a contract, i.e. a contract cannot set evidently disproportional encumbrances on one party, while granting extreme advantages to the other.

Under the Brazilian legal system, the principles of contractual effectiveness, good faith, and the social role of contracts are used for the purposes of interpreting agreements, subject to some limitations. Indeed, the contractual conditions must neither diverge from nor infringe statutory rules, which in most cases prevail over the mutual agreement between the parties.

According to the Introductory Law to the Brazilian Civil Code, the law applicable to international agreements is the law of the place where the obligations are established, which is the domicile or principal place of business of the proposing party. Hence, in principle, in Brazil, the parties are not allowed to choose the governing law of a contract, based on which the contract shall be analyzed and interpreted.

If one of the parties is foreign, foreign law may apply to the contract through the mechanisms of private international law, although Brazilian legal culture is still averse to doing so. In short, if an action is filed and the court considers itself legitimate to rule on the dispute, then Brazilian law is very likely to be applied.

Finally, it is important to point out that under Article 224 of the Brazilian Civil Code, documents drafted in any foreign language must be translated into Portuguese in order to have legal effect in Brazil, except in the case that arbitration was chosen to solve any dispute arising from the contract. When a contract is submitted to court, Article 192 and its Sole Paragraph of the new Brazilian Civil Procedure Code establish that its sworn translation must be attached to the case records.

It should be also noted that consumer relationships are regulated by the Brazilian Consumer Code, which, in Article 51, I, states that contractual clauses concerning the sale or supply of goods and services shall be deemed void and unenforceable if they prevent, exempt, or reduce the seller's or suppliers' liability for defects of any kind in goods/services or imply a renouncement or a waiver (by the consumer) of relevant rights. Such clause also states that "in consumer relations between supplier and corporate-entity consumers, the amount of indemnity may be limited in justifiable situations".

Litigation / Arbitration

1 Litigation in Brazil

The Brazilian Judiciary is organized by the Brazilian Federal Constitution, which divides the judicial structure into federal and state courts. In general, Brazilian courts have jurisdiction over litigation in any way connected with the Brazilian territory.

The federal courts have exclusive jurisdiction over any lawsuit that the federal government or any of its agencies or quasi-governmental bodies is party to or has interest in, as well as over cases involving foreign states or international agencies. All labor and electoral courts are also subject to federal jurisdiction. On the other hand, all private and commercial litigation is subject to being heard and decided on by state courts.

In general, civil procedure rules are federal and applicable throughout the country, which allows attorneys to practice everywhere in Brazil. All decisions are taken by judges, and jury trials are only permitted in crimes committed against someone else's life, such as cases of first-degree murder and abortion.

A lawsuit begins with a written complaint to the competent court setting out the pertinent facts leading to litigation, as well as the respective claims by the plaintiff. Apart from that, the complaint must also indicate any evidence that is intended to be produced to support claims, a request of service of process upon the defendant, as well as the amount in dispute corresponding to an economic assessment of the claim.

Brazilian service of process is very formal and conducted entirely by a judge, resulting from constitutional guarantees of due process of law and a full right to a fair defense. Thus, any failure related to the service of process may cause an entire proceeding to be considered null and void.

After service of process, the defendant is entitled to submit a formal written defense. Besides antagonizing the claim on its merit, the defendant can also challenge formalities not fulfilled by the plaintiff, present a countersuit, plea due to lack of jurisdiction, challenge the economic assessment of the claim, or even the authority or impartiality of the court. Due to the promulgation of our new Civil Procedure Code (enacted in March 2015 and effective in March, 2016), all issues related to the respondent's defense are mandatorily addressed through a single motion (up to March 2016, procedural issues were submitted to the Court through independent and specific motions).

The new Brazilian Civil Procedure Code states that evidence may be collected through documents (including all kinds of media), examinations carried out by judicial experts, direct inspections, witness and parties depositions, and other means. As a rule, the burden of proof falls on the party that alleges a fact. Thus, the plaintiff must present evidence that supports the claim and its grounds, while the defendant must prove the counter-facts that impair, modify or terminate the lawsuit. Some exceptions do apply, especially:

- (i) in claims related to consumer relationships or the environment and
- (ii) when is clearly easier for one of the parties (regardless if the plaintiff or the defendant) to evidence a certain fact. In such cases, Brazilian law stipulates that the burden of proof is reversed.

It is important to emphasize that Brazil grants more powers to judges to control the proceedings and to obtain evidence than one normally finds in civil-law countries. Hence, discovery is not allowed, and attorneys, for instance, cannot privately collect depositions or make requests for admission or ask questions addressed to the opposing party.

After having produced all evidence, the parties present their final briefings, with a summary of facts and the solution that ought to be given to the dispute in question, opening the phase for the lower-court judge to render his/her final decision. The cases, in the first instance, are usually decided by a single judge.

Regardless of whether the lawsuit is filed in federal or state court, the parties have a constitutional right to appeal to an appellate court. In the state system, every state has its own state court of appeals. The federal appellate system, on the other hand, consists of five circuit courts of appeal.

In addition, the Brazilian system allows an enormous multiplicity of appeals, particularly interlocutory appeals, that can delay proceedings for lengthy periods. The new Code of Civil Procedure allows parties to challenge certain types of decisions (there is a list set out by the Code) that are rendered during the proceeding.

At a higher level, the judicial structure has two superior courts that are called the “*Superior Tribunal de Justiça*” (Superior Court of Justice) and the “*Supremo Tribunal Federal*” (Brazilian Supreme Court), both located in Brasília, the capital of Brazil. Broadly speaking, the former has jurisdiction over any case decided by a state or federal court of appeals if the decision rendered by these courts violates any federal law. The latter has jurisdiction over constitutional issues and may also revisit decisions rendered by any court if the Brazilian Constitution happens to be violated.

As a civil-law jurisdiction, all decisions in Brazil must be based on statutory laws. Where there is no specific statutory provision, the courts may decide based on analogy and general uses and practices, or by applying the general principles of law. In general, precedents are not binding, but there have been several changes in the recent years to give special authority to decisions rendered by the Superior Courts. Constitutional Amendment No. 45, which came into force in 2004, introduced into the system the possibility of the Supreme Court to issue, in certain cases, binding precedents. The new Civil Procedure Code grants similar powers to the Superior Court of Justice - the decision taken by the Superior Court of Justice in repetitive cases will have to be followed by the Lower Courts.

Finally, it is important to mention that, since 1996, Brazil has an arbitration act, admitting the possibility of resolving civil and commercial litigation, not bearing inalienable rights, through arbitration.

In the beginning, there was a controversy of whether this act was constitutional, as it puts aside the judicial structure. However, in 2001, the Brazilian Supreme Court upheld the constitutionality of the act, validating contractual arbitration provisions, thus removing lingering doubts in that regard.

In view of this fact, both domestic and foreign arbitration awards are fully enforceable in Brazil. Foreign arbitration awards, however, need first to be ratified by the Brazilian Superior Court of Justice, despite the fact that Brazil has ratified the New York Convention on the Enforcement of Foreign Arbitral Awards.

2 General Overview of Criminal Liability

Brazilian criminal law operates under a culpability verification or by a subjective responsibility system, with the necessity to have a clear chain of causation as a condition for establishing criminal liability. Criminal liability is personal, which means that only the person who is directly related to the unlawful act may be held liable for the crime.

A company cannot be held criminally liable for its actions, with the exception of environment-related offenses, in accordance with the Brazilian Federal Constitution, in article number 225. Its employees, managers, officers and legal representatives, however, can be held liable for any criminal act committed, even if acting on behalf of the company.

As previously mentioned, though, the chain of causation is a prerequisite for the establishment of criminal liability; therefore, only the employees, managers, officers and legal representatives who took part in the offense may be criminally responsible.

Any charges filed must describe the unlawful conduct of each defendant, clarifying their participation in the criminal act for them to be held criminally liable for the alleged offense. Strict liability is not accepted in the Brazilian criminal system.

It is important to stress that those taking part in an offense committed through a corporate entity are subject to varying degrees of culpability, according to their conduct.

Nevertheless, the mere fact of a person to hold a management position in a particular company is not sufficient to establish criminal responsibility. Directors, managers, legal representatives or employees of a company not involved in the offense - whether due to lack of authority or interference on the subject, either because they were not in the company upon the occurrence of the facts - cannot have criminal liability according to our legal standards and superior court precedents.

3 Tax-Related Crimes and Consequential Criminal Liability

Tax evasion consists of undue suppression or reduction of taxes, as well as any accessory charges through any of the following conduct:

- (i) omitting information or providing false statements to treasury authorities;
- (ii) defrauding tax investigators by providing imprecise elements, or omitting transactions of any kind in a document or ledger required by tax law; and
- (iii) falsifying or altering any document related to a taxable transaction.
- (iv) This offense is punishable by imprisonment from two to five years, plus a fine to be defined by the court.

Submitting a false declaration or omitting a declaration of earnings, assets, or facts, or employing fraud to **exempt oneself** in part or in full from paying taxes, as well as failing to withhold taxes or social contributions owed by the legal deadline, are also punishable from six months to two years of incarceration.

It is worth noting that the Federal Supreme Court has established that, where tax crimes that require a result in order to be considered consummated (material crimes) are concerned, a criminal investigation or proceeding is only possible as of the conclusion of the administrative proceeding that precedes criminal charges. Therefore, one may only be held criminally liable for such a crime after conclusion of the due administrative proceedings.

In accordance with the provisions set forth under Article 9, Paragraph 2, of Law 10,684/2003, payment at any time of taxes owed extinguishes punishment for the crimes set forth under Law 8,137/1990.

Paying installments of the debt from tax evasion/omission, however, does not extinguish punishment. It merely suspends it until payment has been made in full, at which time punishment will be lifted.

Where a company is concerned, its managers at the time of the offense are to be held criminally liable for tax evasion and crimes against the economic order as provided for in Law 8,137/1990 if they omit or provide false information to tax authorities with the purpose of suppressing or reducing taxes owed, or if they provide incorrect or untrue data or neglect operations of any kind in a document or book required under tax laws.

It is important to highlight that during investigations related to tax crimes, the police authority might request the lifting of the seal of financial data/information of individuals, which depends on the judge's decision, during any sort of police/administrative inquiry or judicial proceeding. Even though the Brazilian Constitution does not provide specifically for a right to financial confidentiality, this right can be inferred from a general provision concerning the right to privacy and intimacy, as set forth in Article 5, Item X, of the Federal Constitution.

In the current Brazilian scenario, it appears that, many times, the authorities attribute to taxpayers the practice of tax crimes in everyday situations of mere non-compliance with the tax legislation, in which there is no fraud, intent or any element that justifies criminalization.

In a decision on December 18, 2019, most of the ministers of the Supreme Court decided to consider a crime punishable by imprisonment from 6 months to 2 years, plus fine, due to the failure to pay a tax called ICMS, even if declared by the taxpayer. ICMS is a state tax imposed on operations related to the circulation of goods and on the provision of interstate, intercity and communication services.

According to recent judgements (which are not definitive because it is possible for interested parties to appeal), the non-payment of the tax will be subject to criminalization as long as there is reiteration or if the taxpayer intentionally decides not to pay the amount owed to the state.

It is also important to mention that the authorities are communicating with each other in order to share data and information, especially the Federal Revenue, the Central Bank, the Securities Commission and the Financial Intelligence Unit (former COAF), which has increased the chances of a criminal tax issue in the daily life of Brazilian companies.

4 Labor-Related Crimes and Consequential Liability

Brazilian legislation sets forth ample protection for workers, both through common legislation and the Constitution. Compliance with labor laws demands great attention in order to avoid claims in labor or criminal spheres.

Labor relations in Brazil are regulated by the Consolidated Labor Laws (CLT) ([Chapter VII.1](#) above), which establish a complete system to protect workers, their rights and guarantees.

Where crimes against labor organization in Brazil are concerned, the Brazilian Criminal Code sets forth as a crime, in Article 203, the frustration, through fraud or violation, of a labor right assured by existing labor laws, punishable with imprisonment from 1 (one) to 3 (three) years.

Within the context of subjective responsibility, the manager responsible for failure to comply with such labor laws may be held criminally liable for the offense resulting from lack of compliance.

Although not mentioned in the chapter of the Brazilian Criminal Code that sets forth crimes against labor organization, a few other offenses related to labor issues are also worth mentioning.

The crime of diminishing an employee to a condition similar to a slave by submitting him/her to forced labor, exhausting working hours, demeaning labor conditions, or restricting his/her freedom in any way through debt contracted with the employer, as set forth in Article 149 of the Brazilian Criminal Code, is punishable by incarceration of two to eight years, plus a fine to be defined by the court.

Exposing one's life or health to direct and imminent danger is also considered a crime, as set forth in Article 132 of the Brazilian Criminal Code, punishable by incarceration of three months to one year, if a greater injury doesn't accrue from such endangerment. The applicable penalty is increased from one-sixth to one third if the exposure to such danger is due to the transportation of people, in violation of rules set forth by law, with the purpose of rendering services at any establishment.

Concerning occupational accidents, the individual that gave cause to such accident may be held liable for bodily injury or even involuntary manslaughter.

Regarding bodily injury, an offense provided for under Article 129 of the Brazilian Criminal Code, the applicable penalty is incarceration from three months to one year for unintentional injuries.

In the event of involuntary manslaughter, the applicable penalty is incarceration from one to three years, which may be extended by a third if:

- (i) the crime occurs due to failure to comply with professional technical regulation;
- (ii) the agent fails to provide immediate aid to the victim or doesn't seek to mitigate the consequences of his/her act; or
- (iii) flees to avoid being caught in the act.

5 Bankruptcy Law Violations and Consequential Criminal Liability

Law 11,101/2005 (hereinafter, Bankruptcy Law), which regulates bankruptcy and judicial and extra-judicial restructuring in Brazil, provides for crimes related to this matter in Articles 168 to 178, for which the applicable penalties vary from incarceration from two to six years up to detention from one to two years, plus a fine to be defined by the court.

Article 179 specifically stipulates that the company's directors, managers, officers, councilors and even its trustee shall be held equivalent to the debtor or bankrupt party for criminal purposes.

Under Article 180, the court order that grants judicial or extra-judicial restructuring is a condition precedent to criminal liability where the aforementioned crimes are concerned.

6 Crimes Against the Environment and Consequential Criminal Liability

As already mentioned before, criminal liability in Brazil is, as a rule, individual and personal. The Federal Constitution, however, provides for exceptions to this rule, allowing corporate criminal liability.

The corporate criminal liability for crimes against the environment is fully regulated by Act 9,605/98 (“Environmental Crimes Act”). According to section 3 of the Environmental Crimes Act, companies may be held criminal liability if the environmental crime is committed (i) by a decision of its legal or contractual representative or his collegial body and (ii) in the interest or benefit of the entity. In addition, corporate liability does not exclude the criminal liability of individuals, authors, co-authors or participants of the crime.

Law 9,605/1998, the Federal Law concerning crimes against the environment, provides for offenses committed against fauna and flora, urban order and historical sites, as well as the environment as a whole. Under this law, the emission of gas, liquid, or solid waste in violation of legal standards is punishable with severe penalties, such as imprisonment for up to five years, plus a fine to be defined by the court, if the local ecosystem or human health is comprised from said pollution.

Moreover, Decree No. 6,514/2008 provides for administrative infractions against the environment and sets forth the administrative proceeding for investigation of such infractions as well as applicable penalties.

Lack of proper licensing is also considered a serious offense, which may result in the suspension of the company’s activities when operating without required environmental licenses, as well as imprisonment of the responsible individuals. The environmental agencies issuing such licenses are also criminally liable if the licenses are issued to companies that do not comply with environmental laws.

Criminal liability in environmental matters is imputed in accordance with the agent’s degree of guilt and is ascribed not only to the agents directly involved with the environmental damage but also to any party cognizant of the criminal conduct and negligent in impeding such offense from being committed, despite being able to do so. Brazilian Superior Court of Justice (STJ) had the position that corporate criminal liability was only admitted in cases in which there was simultaneous responsibility of at least one individual.

In August 2013, however, the 1st Panel of the Brazilian Supreme Court of Justice (STF) changed this opinion to allow corporate criminal liability independently from individual criminal liability. The Justices have determined that the Constitution does not require the criminal liability of legal entities for environmental crimes to the simultaneous prosecution of individuals theoretically responsible within the company.

Since then, both STF and STJ began to authorize the prosecution and conviction of companies for environmental crimes, regardless of the imputation of the same fact to a representative of the company.

Therefore, a company may be held criminally liable for a crime against the environment notwithstanding the possibility of personally penalizing the individuals involved with such offense.

In situations in which the existence of a legal entity becomes an obstacle to the recovery of damages caused to the environment, Law 9,605/1998, in Article 4, provides for piercing corporate veils. Where penalties are concerned, individuals may face deprivation of freedom (imprisonment or confinement), as well as restrictions of rights (rendering services to a community, temporary limitation of rights, partial or total interruption of activities, fine, house confinement), which may replace a penalty that deprives freedom, provided that the conditions set forth in Article 7 of Law 9,605/1998 are met.

Legal entities, in compliance with the dispositions set forth in Article 21 of Law 9,605/1998, are subject to fines, restrictions of rights (partial or total interruption of activities, temporary interdiction of the commercial establishment/activity, banishment from public-private partnerships, as well as any government subsidies or grants) and rendering services to a community.

7 Consumer-relations Crimes and Consequential Criminal Liability

Federal Law 8,078/1990 instituted the Brazilian Consumer Protection Code, which establishes the legal principles and requirements applicable to consumer relations in Brazil.

The Consumer Protection Code provides, among other things, for regulations and liabilities on products and services provided to consumers and it sets forth the rules and applicable sanctions on administrative, civil, and criminal proceedings resulting from failure to comply with consumer laws.

Articles 61 to 74 provide for consumer-related crimes, most of which involve violation of the manufacturer's or service provider's duty to inform certain aspects of the commercialized products/services, either by omitting or rendering false or incorrect information on labels, casings, packages or advertising, thus misleading the consumer.

The applicable penalties for such offenses vary from incarceration from one month to two years, plus a fine to be defined by the court, to restrictions of rights alternatively or cumulatively (rendering services to a community, temporary limitation of rights, broadcasting in popular media of the terms in which the offender was found guilty, at the expense of the offender).

Law 8,137/1990, in Article 7, also sets forth crimes against consumer relations, punishable by incarceration from two to five years, or a fine.

8 Crimes Related to Economic Laws and Consequential Criminal Liability.

Law 8,137/1990 provides, in its Article 4, for the following conducts considered as crime against the economic order:

- (i) abuse of economic power with the intent to dominate the market by eliminating competition in part or in full and
- (ii) creation of an arrangement, convention, agreement, or alliance among offering parties, with the goal of artificially setting prices or quantities sold or produced, therefore exercising regionalized control over the market.

These offenses are punishable by imprisonment of two to five years, or a fine.

Law 12,529/2011 also provides for administrative infractions against the economic order in its Article 36, establishing that the acts under any circumstance, which have as object or may have the following effects shall be considered violations to the economic order, regardless of fault:

- (i) to limit, restrain or in any way injure free competition or free initiative;
- (ii) to control the relevant market of goods or services;
- (iii) to arbitrarily increase profits; or
- (iv) to abusively exercise a dominant position. Conduct shall be analyzed on a case-by-case basis.

On the subject of crimes against the economic order, cartels require special attention. Cartels are an association of business owners who enter into an agreement concerning variables significant to market competition.

As far as penalties are concerned, under Law 12,529/2011 legal entities may face a fine, as will its managers, if directly or indirectly responsible for the offense. Other applicable sanctions are set forth in Article 37 and may be imposed cumulatively with the previously mentioned ones or individually.

In addition to the pecuniary fines above, and considering the gravity of the violation, the following may also apply:

- (i) half-page publication, at the violator's expense, of the summary of the sentence in a court-appointed newspaper for two consecutive days, from one to three consecutive weeks;
- (ii) ineligibility for official financing or to participate in bidding processes involving purchases, sales, works, services or utility concessions with the federal, state, municipal and the Federal District authorities and related governmental entities, for a minimum period of five years;
- (iii) imposing compulsory licensing of patents held by the violator;
- (iv) the company's spin-off, transfer of corporate control, sale of assets, partial discontinuance of activities; among others.

Law 12,529/2011 also provides for a deferral (leniency) program, set forth in Articles 86 and 87, according to which, where crimes against the economic order, provided for under Law 8,137/1990, are concerned, execution of a leniency agreement, in compliance with the conditions set forth by law, results in suspension of the statutes of limitation on such crimes and prevents criminal charges.

Repression to antitrust offences takes place both in the administrative and criminal spheres.

In the administrative sphere, the occurrence of a violation of the economic order takes place regardless of its agent's malicious intent, even if harmful effects are merely potential and have not yet materialized. In the criminal sphere, there must be proof of the agent's intent (malice), as well as proof of damage caused to the economic order.

During the course of investigations involving crimes against the economic order, there may be a breach of bank confidentiality, which must be authorized by a judge during any sort of police/administrative inquiry or judicial proceeding.

9 Crimes Involving the National Financial System and Consequential Criminal Liability

Considered as the Brazilian "white collar crime legal system", Law 7,492/1986 provides for crimes against the financial system and crimes damaging the country's economic order. It seeks to protect both individual and collective interests from such crimes, a concept in which market organization, the regularity of its instruments, as well as the confidence required from them, and the security of business transactions performed are of a special substantiality.

The white -collar crime law thus addresses harmful or dangerous acts that attack goods or interests affiliated with the state's financial policy, which is to say, funding, administration, and disbursement, as well as any other conduct violating individual interest and wealth.

Article 1 of Law 7,492/1986 defines financial institutions as legal entities of public or private law that have as their main or accessory activity, whether cumulative or not, the funding, intermediation, or application of third-party funds, or those institutions that deal with securities. The concept of financial institutions may also encompass those that take on or manage insurance, exchanges, consortiums, capitalization, or any other type of third-party savings or fund, as well as individuals who perform any of these activities.

Crimes against the national financial system are set forth in Articles 2 to 23 of the white -collar crime law. Applicable sanctions are imprisonment for one to twelve years, plus a fine to be defined by the court.

Given the extensive list of possible agents, in light of the broad concept of a financial institution, and the fact that such characterization is essential to impute any of the crimes set forth under the white -collar crime law, each criminal charge must be carefully examined.

In accordance with subjective culpability, legal entities cannot be held liable for white collar crimes. Therefore, in compliance with Article 25, agents deemed to be directors, managers, and controllers, as well as receivers, liquidators, or trustees of the financial institution, are to be held criminally liable for the offenses set forth under Law 7,492/1986.

During the course of investigations involving white collar crimes, there may be a breach of bank confidentiality, which must be authorized by a judge during any sort of police/administrative inquiry or judicial proceeding.

10 Money Laundering Crimes and Consequential Criminal Liability

Law 9,613/1998, known as the “money laundering law”, lists transactions defined as money-laundering-related crimes. This law was updated in 2012 by the Law 12,683/2012 and it was updated to the newest anti-money laundering policies.

Money laundering consists of activities or operations seeking to provide a legal appearance to the economic product of a crime previously committed, with the intention of allowing such product to enter the formal economy, and, therefore, making it available for use by the perpetrator of the crime preceding the money laundering.

It is worthwhile to mention that the law does not specify the crimes that may be considered antecedent to money laundering, assuming that any criminal offense could precede the offense of money laundering.

In addition to the legal assets affected by previous crimes, what is intended through punishment of money laundering is to prevent the agent from using the spoils of the previous crime as if they were legal, which would be destructive to the economy, the financial system, taxation, and a series of legal assets that may be included within the protection of the social order and society itself.

The Federal Money Laundering Law also created the Council for the Control of Financial Activities (“COAF”), which has the purpose of governing and applying administrative penalties, as well as examining and identifying activities suspected to be illegal, as set forth in the money laundering law, notwithstanding the jurisdiction of other agencies or entities.

As the Brazilian State is unable to inspect all financial and commercial acts, a system of compulsory collaboration was created, whereby professionals and entities working in sectors most used by criminals to hide resources must notify public authorities whenever they become aware of suspicious transactions, such as transactions with high values and fractional deposits.

In August of 2019, the Brazilian federal government issued Provisional Measure No. 893, which changed the name of COAF to FINANCIAL INTELLIGENCE UNIT (UFI), moving the structure to the Central Bank.

In this way, banks, jewelers, insurance companies and art auctioneers, for example, have a legal obligation to collaborate with the authorities, reporting acts of possible concealment of illicit goods and values to the UFI.

It should be noted that the UFI has an administrative structure, and cannot request the launch of a police investigation, and it cannot promote measures such as breach of bank secrecy.

UFI is allowed to, for example:

- (i) receive and organize data, and prepare Financial Intelligence Reports, to contribute to the authorities in the investigation of crimes.

- (ii) elaborate rules aimed at certain sectors sensitive to money laundering, and that do not have their own regulatory structure, such as factoring companies, for example, on the form and method of registering customer information, and on the suspected acts of money laundering that must be reported.
- (iii) launch administrative proceedings and apply sanctions to entities and persons who fail to comply with the legal rules on preventing money laundering. Banks, which are regulated by the Central Bank, or Insurance companies, which are regulated by SUSEP, must observe the rules established by the corresponding regulatory body, before which they will be processed administratively.

Regarding criminal liability, any individual legally responsible for a legal entity that hides or disguises assets, rights, or money resulting from the criminal activities precedent to money laundering may be punished with incarceration from three to ten years, plus a fine to be defined by the court.

In accordance with subjective culpability, legal entities cannot be held liable for money laundering crimes. The agent who committed the conduct set forth by law as money laundering is criminally liable.

It is important to note that during the course of investigations involving money laundering crimes a breach of bank confidentiality may be authorized to determine whether the crime was committed or not. Such breach has to be authorized by a judge during any sort of police/administrative inquiry or judicial proceeding, because, even though the Brazilian Constitution does not provide specifically for a right to bank confidentiality, this right can be inferred from a general provision concerning privacy and intimacy, as set forth in Article 5, item X, of the Constitution.

In addition, due to the Federal Law No. 13.964/2019, investigations of money laundering may use undercover police officers, and controlled action techniques.

In this sense, police officers will be able to infiltrate on a criminal organization to obtain information that can be used in investigations, and to monitor and observe the conduct of suspects, without acting immediately, taking action at the most appropriate time to obtain evidence and information.

11 Crimes Against Social Security and Consequential Criminal Liability

Regarding crimes against the social security system, two specific offenses are worthy of mention: tax evasion of social-security contributions and undue appropriation of social-security contributions.

Where tax evasion of social security contributions is concerned, the provisions are those set forth under Article 337-A of the Brazilian Criminal Code. Evasion of social security contributions consists of suppressing or reducing social security and any accessory contributions through conduct such as fully or partially omitting revenue or profits earned, payments made or credited, as well as any other social-security contribution generating event.

In terms of undue appropriation of social-security contributions, Article 168-A of the Brazilian Criminal Code states that it consists of a failure to transfer contributions withheld from employees to the social security administration in compliance with the rules and deadlines set forth by law or a specific contract.

Both crimes are punishable by incarceration of two to five years, plus a fine to be defined by the court.

In accordance with the provisions set forth under Article 9, paragraph 2, of Law 10,684/2003, payment, at any time, of the owed taxes and their accessories extinguishes punishment for evasion of social-security contributions and undue appropriation of social-security contributions.

Where tax evasion of social-security contributions is concerned, paying installments of the debt does not extinguish punishment. It merely suspends it until payment is made in full, at which time the punishment is effectively lifted.

12 Crimes Against Intellectual Property Rights and Unfair Competition and Consequential Criminal Liability

Law 9,279/1996, informally known as “industrial property law”, governs the rights and obligations of industrial property. Protection of rights related to industrial property takes place through the concession of invention patents and utility models, as well as the concession of registry for industrial designs and trademarks, in addition to the repression of unfair competition.

The industrial property law also sets forth crimes against intellectual and industrial property rights, in Articles 183 to 194.

Applicable punishment for such crimes varies from imprisonment from three months to one year, or a fine, in the event of:

- (i) unauthorized use or manufacturing of products whose application for a patent is pending,
- (ii) reproduction or alteration of a trademark, or
- (iii) manufacturing products whose application for industrial design has been approved; and
- (iv) imprisonment from one to three months for other cases, such as
 - (a) use of trademark or advertisement expression to indicate false origin of a product, or
 - (b) use of false geographical indication.

If the violated trademark is a famous, certified, or collective mark, or if the violating party is a sales representative, an authorized individual, company, partner or employee of the industrial property owner or its licensee, the aforementioned penalties may be increased from a third to a half of the originally imposed punishment.

Law 9,279/1996 also provides for crimes related to unfair competition, set forth under Article 195. Unfair competition occurs under questionable means through the use of incorrect and harmful methods, seeking to modify proper, healthy competitive relationships.

Unfair competition is viewed as a crime due to the use of illegitimate means or methods to modify the normal competitive relationship, resulting in undeniable harm to its victims and interfering in the development of activities involving the creation and use of intellectual work.

Some of the conduct listed as unfair competition includes:

- (i) unauthorized use of a third party's corporate name or confidential information;
- (ii) diversion of clientele;
- (iii) deliberately misleading consumers; and
- (iv) disclosure or employment of fraudulent means or false statements concerning a competitor with the intention of obtaining a competitive advantage;
- (v) among other types of fraud.

All practices related to unfair competition share an undercurrent of the agent's specific malice. The agent acts with the intention of harming a competitor or obtaining an improper advantage, deliberately violating the law.

Crimes related to unfair competition are punishable by incarceration from three months to one year, or a fine.

The practices set forth as unfair competition are subject to civil liability, and during the course of a civil lawsuit, the harmed party may be entitled to financial compensation due to losses and damages arising from such practices.

The Brazilian Criminal Code also provides for violation of copyrights under Article 184, according to which partial or total reproduction of copyrighted material, without the author's specific and express authorization, with an economic purpose, constitutes a crime punishable by incarceration from three months to one year, plus a fine to be defined by the court, or imprisonment from two to four years, plus a fine to be defined by the court, depending on specific aspects of the offense.

13 Corruption Related Crimes and Consequential Criminal Liability

The Brazilian Criminal Code provides for crimes committed against the government, whether by private individuals or public officials. Among such crimes are those of corruption (active and passive), set forth under Articles 333 and 317, respectively, corruption in international transactions, set forth under Article 337-B, and graft, set forth under Article 316.

Active corruption consists of offering or promising an undue advantage to a public official, to lead him to perform, omit or delay the performance of an act inherent to his position. The applicable penalty is imprisonment from two to twelve years, plus a fine to be defined by the court.

Passive corruption consists of soliciting or receiving for oneself or another party, directly or indirectly, even if not holding the position or prior to holding it, however by reason of it, an undue advantage, or accepting a promise of such advantage. The applicable punishment is imprisonment from two to twelve years, plus a fine to be defined by the court.

Corruption in international business transactions consists of promising, offering or giving directly or indirectly an undue advantage to a foreign public official, or a third party, to lead him to perform, omit or delay the performance of an act inherent to his position and related to the international business transaction. Punishment for this offense is imprisonment from one to eight years, plus a fine to be defined by the court.

Graft consists of demanding for oneself or another party directly or indirectly, even if not holding the position or prior to holding it, however by reason of it, an undue advantage. The applicable punishment was changed by the Law No. 13.964/2019 to imprisonment of two to twelve years, plus a fine to be defined by the court.

On the subject of corruption, it must be noted that Brazil is also a signatory to four international treaties concerning this matter, all of which have been enacted by Legislative Decrees No. 3,678/2000, 4,410/2002, 5,015/2004 and 5,687/2006, all of which intend to ensure that no public servant is corrupted in their relationship with private entities.

Decree No. 3,678/2000 resolves issues regarding offenses related to the corruption of foreign public officials and the measures that must be adopted by the signatory states.

Decree No. 4,410/2002 aims to strengthen the mechanism needed to prevent, detect, punish, and eradicate corruption, in addition to defining in precise terms the acts of corruption in international transactions.

Decree No. 5,015/2004 has the main purpose of reiterating the criminalization of corruption, as well as establishing measures against such practices and the liability of the legal persons involved.

Decree No. 5,687/2006 defines measures that must be adopted by the laws of the signatory states regarding bribery of national and foreign public officials, and public international organization employees.

Moreover, the Law 12,846/2013 provides for the strict liability of legal entities, in an administrative and civil sphere, for the practice of acts against the Brazilian and foreign public administration.

According to the abovementioned Law, Brazilian legal entities can be held liable regardless of the corporate type adopted, like entities personified or not, constituted in fact or in law, even temporarily. Likewise, foreign legal entities with registered office, branch or representation in the Brazilian territory could be held liable for any of the offences provided by law.

It should be noted that, despite the absence of legal provision holding legal entities criminally liable, this act implicates severe administrative and civil penalties, as fines that varies from 0,1 to 20 percent of the gross revenue of the entity in the preceding year, or between BRL 6,000.00 (six thousand Brazilian reais) to BRL 60,000,000.00 (sixty million Brazilian reais), if it is not possible to estimate the gross revenue, full compensation for the damages, publication of judicial sentence, loss of assets, partial suspension and interdiction of the activities, prohibition of contracting with public agencies and prohibition to receive public incentives, subsidies, grants, donations or obtain loans, and, finally, the compulsory dissolution.

Such measures, both administrative and civil, also provides for the liability of persons responsible for the management of the corporation, i.e. managers, directors, board of directors, or anyone who has contributed to the practice of harmful act, besides the possible criminal liability, which in accordance with subjective culpability can only be held criminally liable in case of willful conducts.

In contrast to the severe penalties above mentioned, the legal text allows the application of more lenient sentence for companies with effective compliance programs, as well as the reduction up to two thirds of the fine for companies that cooperate with the investigations and sign a leniency agreement.

14 Securities Law Violations and Consequential Criminal Liability

Law 6,385/1976, which regulates the stock market and established the Brazilian Securities and Exchange Commission (CVM), provides, in its Articles from 27-C to 27-F, for crimes against the stock market.

As set forth under such provisions, the practices of market manipulation, insider trading, and illegally engaging in an occupation, activity, or function, are subject to criminal liability, notwithstanding administrative or civil punishment, if applicable.

Market manipulation consists of performing simulated or embezzlement-related operations with the purpose of artificially altering the securities market functioning structure, in order to obtain undue advantage or profit, or to cause damage to third parties. It constitutes an offense punishable by imprisonment from one to eight years, plus a fine of up to three times the amount of improper advantage obtained as a result of the crime.

Insider trading consists of using relevant confidential information that is not, and should not, be made available to the general public, due to its potential to provide undue advantage in negotiations. This crime is punishable with imprisonment of one to five years, plus a fine of up to three times the amount of improper advantage obtained as a result of the crime.

Illegally engaging in an occupation, activity, or function consists of holding any office or acting on the securities market as an institution, individual, or collective manager, independent auditor, or securities analyst, without proper authorization or registration at the appropriate administrative authorities, as required by law or regulation. This offense is punishable with imprisonment from six months to two years, plus a fine to be set by the court.

Concerning criminal liability, in observance of subjective responsibility, only individuals may be held liable for the aforementioned offenses.

Specifically regarding insider trading, it must be noted that, as set forth by Law 6,385/1976, the duty of confidentiality is a condition precedent for criminal liability. Theoretically, only those legally bound can be found guilty of insider trading.

15 Criminal Organizations

The Criminal Organizations and Special Techniques of Investigation Law (Law 12,850/2013) came into force in 2013, establishing the crime of criminal organization, considered when four or more people come together in an organized way and with division of activities to take any kind of advantage practicing criminal offenses.

The greater changes brought by the new Law was related to the forms about proving the existence of a criminal organization. The main changes are described below.

First, there is the institute of the rewarded collaboration ("*colaboração premiada*"). Article 4 of Law 12,850/2013 sets out the possibility of one of defendants to have his sentence reduced by one to two thirds in case of reporting the existence of a criminal organization to the authorities. It is noteworthy that such report must achieve the purpose for which it is intended, not setting the benefit in the case it does not achieve it.

Law 12,850/2013 also provides, in its Article 8, the institute of the controlled action. Police authorities delay immediate arrests being made for a later time, which will help agents to gather a larger amount of evidence, facilitating the prosecution and the punishment of a criminal act committed by a Criminal Organization.

Lastly, Article 3, item VII of the mentioned Law brings to light the figure of the undercover police agent. It is a State agent who infiltrates the criminal organization in order to gather as much evidence as possible related to the crimes committed.

16 Larceny and other frauds

The Brazilian Penal Code provides for crimes committed with the use of fraudulent means.

Larceny by trick, provided for in article 171 of the Penal Code, is the classic example and, in its standard format, follows as a model for other similar figures, such as those provided for in articles 172 to 179 of the Penal Code.

Larceny by trick consists of obtaining an illicit advantage to the detriment of someone else, inducing or keeping this person in error, through an artifice, trickery or any other fraudulent means.

The fundamental characteristic of this crime is the fraud used by the agent to induce or keep the victim in error, with the purpose of obtaining an illicit patrimonial advantage. Punishment for this offense is imprisonment from 1 to 5 years, plus a fine to be defined by the court.

The same penalty is applied to those who practice the following acts: disposition of someone else's property, fraudulent sale, defraud of pledge, fraud in receipt of insurance or indemnity and fraud in the check payments.

In Brazil, many legal entities are becoming victims of the fraud crime, committed by employees linked to sensitive areas of the company, such as the Financial Department, Accounts Payable and Human Resources, for example.

In addition, banks and large business conglomerates find themselves indirectly linked to frauds practiced against their clients, requiring these people to register the facts before the police authority formalize an internal investigation, or for simple control in compliance.

Until Federal Law No 13.964/19, larceny by trick was considered a public criminal lawsuit that did not require any request of the victim.

In this context, the authority would initiate a police inquiry, and, at the end of the investigation, the Public Prosecutor's Office could offer a criminal complaint against the person under investigation, regardless of the victim's wishes.

Federal Law No. 13,964/19, however, added paragraph 5 to article 171 of the Penal Code, which conditioned the criminal lawsuit on larceny by trick depending on the representation of the victim. Thus, it is not enough for the victim to report the criminal fact to the police authority, by means of a police report, for example, but rather, it is necessary to formalize to the authorities the desire to criminally pursue the perpetrator of that crime.

If the victim is the Public Administration, direct or indirectly, or a child, an adolescent, a person with a mental disability, incapacitated, or over 70 years of age, it will not be necessary to formalize representation with the police authority. This ensures the protection people considered as vulnerable.

The Brazilian Penal Code also establishes the crime of issuing a simulated duplicate, which consists of issuing an invoice, duplicate or bill of sale that does not correspond to the merchandise sold, in quantity or quality, or to the service provided. Punishment for this offense is imprisonment from 2 to 4 years, plus a fine to be defined by the court (article 172 of the Brazilian Penal Code).

There is also the provision for the crime of abuse of the incapacitated (art. 173 of the Penal Code), inducement to the practice of gambling, betting or speculation (Article 174 of the Penal Code), and fraud in commerce, which consists of selling as perfect or a false or deteriorated commodity, or to deliver one commodity for another (Article 175 of the Penal Code).

Article 177 of the Brazilian Penal Code provides for the crime of fraud and abuse in the constitution or management of a business corporation.

This crime consists of promoting the constitution of a business corporation by making, in prospectus or in communication to the public or the assembly, false communication about the constitution of the company, or fraudulently hiding facts related to it.

The punishment for this type offense is imprisonment from 1 to 4 years, plus fine (if the fact does not constitute a crime against the popular economy).

According to the article 177 of the Brazilian Penal Code, the same penalty shall be applied if the crime does not constitute crime against the popular economy in the following situations:

“I - to the director, manager or supervisor of a public limited company, who, in a prospectus, report, opinion, balance sheet or communication to the public or the assembly, makes a false statement about the economic conditions of the company, or hides fraudulently, in whole or in part, a fact related to them; II - to the director, manager or supervisor who, by any means, promotes a false listing of shares or other securities of the company; III - to the director or manager who borrows from society or uses, for his own benefit or that of a third party, the assets or social assets, without prior authorization from the general meeting; IV - to the director or manager who buys or sells, on behalf of the company, shares issued by it, except when permitted by law; V - to the director or manager who, as a guarantee of social credit, accepts as pledge or surety the shares of the company itself; VI - the director or manager who, in the absence of a balance sheet, in disagreement with it, or by means of a false balance sheet, distributes fictitious profits or dividends; VII - the director, the manager or the supervisor who, through an intermediary, or colluding with a shareholder, obtains the approval of an account or opinion; VIII - to the liquidator, in the cases of nos. I, II, III, IV, V and VII; IX - to the representative of the foreign corporation, authorized to operate in the country, which performs the acts mentioned in nos. I and II, or give false information to the Government.”

Article 178 of the Penal Code provides for the crime of irregular issuance of deposit or warrant. The punishment for this type offense is imprisonment from 1 to 4 years, plus fine.

Finally, article 179 of the Penal Code provides for the crime of execution fraud, which consists of the alienation, deviation, destruction or damage of assets, or simulation of debts. The punishment for this crime is imprisonment from 6 months to 2 years, plus fine.

17 Final Remarks

It is important to mention that Brazilian Criminal Law sets forth some legal benefits, which can be applicable to the above-mentioned crimes, depending on their penalties. The most common are: criminal settlement, conditioned suspension of proceedings and non-prosecution agreement.

17.1 Criminal Settlement

Crimes in which the maximum penalty does not exceed 2 years are considered a misdemeanor by article 61 of the Federal Law No. 9.099/95 and entitles the offender to the benefit of entering into a “criminal settlement” with the Public Prosecutor’s Office.

The proposal of a criminal settlement consists of the immediate application of a penalty of restriction of right (e.g. monetary payment, temporary suspension of rights or rendering of community service) to the offender.

The criminal settlement do not require the offender to plead guilty to a crime and, for this reason, the acceptance of a criminal settlement does not implicate an assumption of guilt and does not lead to criminal records. If accepted and accomplished, the criminal settlement prevents the launching of a criminal lawsuit.

17.2 Conditioned suspension of the process

Crimes in which the minimum penalty is equal or does not exceed 1 year entitles the offender to the benefit of entering into a deferred prosecution agreement (suspension of the criminal lawsuit) with the Public Prosecutor’s Office.

The situations that authorize the suspension of the process are provided for in article 89 of Law No. 9.099/95.

The proposal of suspension of the lawsuit consists of a probation period from 2 (two) to 4 (four) years of which the defendant may have to observe the following conditions:

- Compensation for damages, unless it is not possible to do so;
- Prohibition from visiting certain places (such as night clubs);
- Prohibition from traveling away from the city of domicile without a court order authorizing the trip;
- Monthly visits to the criminal court to inform and justify his activities.

When the probation period comes to an end without any violation of the established conditions, the judge closes the case.

17.3 Non-prosecution agreement

The recent edition of the Federal Law No. 13.964/2019 introduced the article 28-A to the Brazilian Penal Code, which allows the execution of a non-prosecution agreement.

According to the new article, the Prosecution might not file a criminal complaint against the person investigated in certain crimes committed without violence, and with a minimum penalty of less than 4 (four) years, upon the agreement to comply with certain measures.

The agreement to be signed between the Public Prosecutor, the investigated person and his lawyer must be ratified by the judge. The Law establishes that, separately or cumulatively, the following conditions are necessary to settle the non-prosecution agreement: confession of the crime, compensation for the damages, unless it is impossible; waiving certain assets related to the offense; provision of services to the community; and payment of a fine.

The judge may return the case to the Public Prosecutor's Office if he considers the conditions proposed to the investigated to be inadequate, insufficient or abusive, and may also refuse to ratify the agreement, returning the case to the Public Prosecutor's Office to complete the investigations, or to offer a complaint.

The non-prosecution agreement is applicable for most of the crimes provided for in the Brazilian legal system, including those committed against the government, whether by private individuals or public officials.

In addition, the non-prosecution agreement can be considered evidence for the purposes of applying the Anti-Corruption Law, for example, causing impacts to the company related to the investigated who has confessed to committing the crime.

Insolvency, Bankruptcy, Reorganization

1 Legal Framework

Federal Law No. 11,101/05 (the “Bankruptcy and Reorganization Law”) sets out the rules for bankruptcy and insolvency in Brazil. There are three procedures that deal with companies in distressed financial situations: (i) Bankruptcy Proceeding (liquidation); (ii) Judicial Reorganization; and (iii) Out of Court Reorganization with Court Confirmation (or Extrajudicial Reorganization).

The Judicial Reorganization and the Extrajudicial Reorganization are intended to give the company in an unhealthy financial situation the chance of reorganizing its activities in order to preserve its existence as a going concern. Consequently, it intends to provide sufficient means for a company to pay off its creditors in an orderly manner.

The Bankruptcy Proceeding has the purpose of liquidating the debtor’s assets under a court-supervised environment. Proceeds of the sale of assets are used to pay off claims according to the priority rules provided for in the Bankruptcy and Reorganization Law. The term “Bankruptcy” is understood in Brazil as liquidation, similar do Chapter 7.

2 Bankruptcy Proceeding

The Bankruptcy Proceeding does not intend to reorganize the financial situation of the debtor, but rather to liquidate its assets and use the proceeds of such sale to pay off creditors.

A bankruptcy request can be filed by the company, its shareholders or partners, or any of its creditors. Although the Bankruptcy and Reorganization Law provides that the debtor has the obligation to request self-bankruptcy, there are no penalties in case the debtor does not file a voluntary Bankruptcy Proceeding.

The Bankruptcy and Reorganization Law allows a company to file for self-bankruptcy if the company considers that it does not meet the requirements for commencing a Judicial Reorganization.

Bankruptcy Proceeding has to be ruled by a Court and is never automatically granted upon filing, given that the Court must accept the company's request. The entire proceeding is court-supervised and the trustee will be in charge of managing the company's assets and liabilities.

Although the company participates in the proceeding, the purpose of the bankruptcy is to maximize the recovery of assets to the benefit of the creditors; therefore, the interests of the company's partners and officers are subordinated to the interests of the creditors.

Bankruptcy and Reorganization Law sets out the requirements upon which creditors may request the bankruptcy of the debtor, some of which are outlined below:

- (i) default to provide payment of any liquid obligation stated in a credit instrument in an amount higher than 40 minimum Brazilian monthly wages;
- (ii) failure to pay, make a deposit of or post collateral to secure obligation subject to an enforcement proceeding;
- (iii) arbitrarily advancing the liquidation of assets or making payment in a damaging or fraudulent way;
- (iv) attempt to perform or performing simulated transactions or disposal of all or substantially all assets to a third party, either a creditor or a not ; and
- (v) transfer of establishment to third parties, either creditors or not, without the consent of all other creditors and without keeping sufficient assets to fulfill its obligations.

Once the Court accepts the filing and decrees that the company is bankrupted, the company is shut down, the officers are compulsorily removed from the company's management, and a trustee is appointed to liquidate the company. Under certain specific circumstances, the Court may rule that the company should continue operating for a specific period following the bankruptcy decree.

Further, a bankruptcy decree entails (i) acceleration of all company's debts; and (ii) conversion of foreign currency-denominated debts into national currency.

The Bankruptcy Proceeding starts by identifying all creditors and the amount of their respective credits. Once it is determined, being ensured to the creditors the possibility of challenging the figures submitted by the debtor, the assets of the debtor will be appraised and sold thereafter.

The sale of assets can take place under one of the competitive processes mechanisms set forth in the Bankruptcy and Reorganization Law: (i) auction, by oral bidding; (ii) sealed bids; or (iii) public proclamation. The most commonly used mechanism is the public auction. In certain circumstances, the court may authorize alternative methods for the sale of assets.

The money arising from such sale will be used to pay off creditors, according to the priority rule provided for in the Bankruptcy and Reorganization Law, as follows:

- (i) credits owed for labor relationships up to 150 minimum monthly wages per creditor and those resulting from labor accidents;
- (ii) secured credits, up to the amount of the asset offered as security;
- (iii) tax credits, regardless of their nature and time of constitution, except for tax penalties;
- (iv) special privilege credits;
- (v) general privilege credits;
- (vi) unsecured credits;
- (vii) contractual penalties and monetary penalty due to breach of criminal or administrative law, including tax penalties; and
- (viii) subordinated credits.

Certain credits are not placed in the hierarchy of the bankruptcy credits and must be paid before any of the abovementioned credits. Such credits are:

- (i) remuneration of the trustee and labor credits arising from work performed or after the bankruptcy decree;
- (ii) amounts provided by the creditors to the estate after the bankruptcy decree;
- (iii) costs, fees and taxes related to the bankruptcy decree, management of the estate and sale of the assets and court costs arising from lawsuits in which the estate has faced unfavorable outcome;
- (iv) credits arising from transactions entered into during a Judicial Reorganization (in the event of conversion of the Judicial Reorganization into a Bankruptcy Proceeding) or after the bankruptcy decree; and
- (v) credits excluded by law from such credit priority rule, such as credits secured fiduciary lien and credits resulting from advances in export foreign exchange sale agreements.

Subordinated credits, last in the credit ranking, shall be considered as those qualified as such by law or contract, as well as credits held by the indebted company's partners, shareholders or its managers without an employment relationship. Such credits shall only be paid after all other debts (including unsecured debts) held by the debtor have been duly satisfied.

During the Bankruptcy Proceeding, an investigation will be open to assess whether the debtor committed any fraud or wrongdoing that might have caused or helped cause the bankruptcy.

If fraud or wrongdoings are found, the debtor, its shareholders and officers may be sued for damages, in accordance with the general rules of civil liability. The Bankruptcy and Reorganization Law does not provide for a specific regime of civil liability of shareholders, officers and directors of insolvent or financially distressed companies.

As a rule, the officer, partner or shareholder is not personally responsible for the losses caused by the company to third parties or that it itself suffers as a result of its own activities, provided that such losses are derived from regular management acts, as considered those practiced by the administrator within its legal and statutory attributions, in compliance with the company's corporate purpose.

With respect to transactions executed by the debtor prior to the bankruptcy decree, it is worth noting that the Bankruptcy and Reorganization Law sets forth a preference period up to 90 days, which is counted retrospectively as of one of the following events: (i) the date when the Bankruptcy Proceeding has been requested; (ii) the date when the Judicial Reorganization has been requested (in cases of conversion of the Judicial Reorganization into a Bankruptcy Proceeding); (iii) the date when the first protest of a commercial title not paid by the debtor has taken place.

Within this period the following acts are considered ineffective:

- (i) payment of any unmatured debt or liability;
- (ii) payment of matured debts by other means than those established in the relevant contract;
- (iii) granting of mortgages or pledges to secure already-existing debt;
- (iv) any act entered into by the debtor for free, during a period of two (2) years before the bankruptcy decree;
- (v) waiver to assets which would be inherited by the debtor;

- (vi) sale of business without the prior consent of the creditors or payment of their claims, if the remaining assets are not sufficient to cover such liabilities existing at the time such business has been sold;
- (vii) registration of any right over or transfer of immovable property after the bankruptcy decree.

In all cases mentioned above, the Court in charge of the Bankruptcy Proceeding may consider the corresponding transaction ineffective regardless of the filing of a specific fraudulent conveyance lawsuit.

Furthermore, any other act and/or transaction performed with the intent of defrauding creditors is subject to avoidance as long there is proof of (i) the collusion between the parties to the transaction and the corresponding fraudulent intent; and (ii) actual losses to the state.

The Court in charge of the Bankruptcy Proceeding may void such fraudulent transaction upon request made by creditors, the trustee, or the Public Prosecutor within 3 years as of the bankruptcy decree. Such request should be made in the form a specific revocation lawsuit. If the revocation lawsuit is granted, the transaction will be considered void and the assets will return to the state.

Finally, it is important to mention that a company under bankruptcy is prevented from doing business in the country until the conclusion of the proceeding. As a rule, the restriction of doing business in the country does not apply to the partners, shareholders, officers and directors of the bankrupt company.

3 Judicial Reorganization (“Recuperação Judicial”)

The Judicial Reorganization is intended to give a company in an unhealthy financial situation the chance of voluntarily reorganizing its activities in order to preserve its existence as a going concern upon the approval of a reorganization plan by the majority of its creditors. Consequently, it intends to provide sufficient means for a company to pay off its creditors and emerge from a financial crisis.

In order to be entitled to benefit from a Judicial Reorganization bail-out structure, the debtor:

- (i) must prove that it has been in operation for at least two consecutive years;
- (ii) must not have been declared bankrupt before, or, if so, must have obtained a final discharge court decision regarding its previous responsibilities;
- (iii) must not have obtained judicial-reorganization benefits over the past five years preceding the request; and
- (iv) must not have had its managers or controlling shareholders sentenced for any type of crime, provided for in the Bankruptcy and Reorganization Law.

The Bankruptcy and Reorganization Law does not provide for specific rules concerning joint filings of Judicial Reorganization and/or subsequent joinder and/or consolidation of proceedings of multiple debtors. Brazilian courts have ruled that joint filing by multiple debtors is allowed depending on the factual circumstances of the case, notably in cases of companies within a same economic group whose businesses, activities and debt obligations are heavily coordinated and/or interconnected.

In addition, Brazilian courts have allowed, in a few cases, foreign entities to join Judicial Reorganization proceedings as named debtors. These cases relate to companies that had incorporated non-operation foreign subsidiaries in the form of financial vehicles specifically designed to access international capital markets for capital raising purposes in the benefit of the parent company and/or other companies within their economic group.

Given that the Judicial Reorganization is not designed to wind up the debtor, its officers and directors keep running the business while the company undergoes the proceeding. Thus, during the Judicial Reorganization, the debtor or its officers will remain conducting the debtor's business activities under the scrutiny of a committee of creditors - if implemented - and a court-appointed trustee. Although the relevant Bankruptcy Court appoints a trustee to oversee the Judicial Reorganization and monitor the company's affairs in the benefit of the interests of all stakeholders involved in the proceeding, such trustee does not manage the company.

On the other hand, the Bankruptcy and Reorganization Law provides that removal of officers and managers of the debtor is authorized if any of them (i) has been sentenced for bankruptcy crimes and/or economic crimes pursuant to specific criminal law; (ii) has given cause for one to conclude that there are strong indicia of practice of any of the bankruptcy crimes provided for in the Bankruptcy and Reorganization Law; (iii) has acted in bad faith or with the intent to defraud creditors; (iv) has spent money on personal affairs in excessive amounts and inconsistent with his or her financial situation; (v) has authorized payment of expenses that would not be justified given their nature and/or amount in light of the debtor's business; (vi) has either caused the debtor to be left with unreasonably small capital or entered into transactions harmful to the debtor's regular course of business; (vii) deliberately creates or omits any credit in the submission of the list of creditors that should support the initial filing of the Judicial Reorganization without reasonable cause and/or court approval; (viii) refuses to provide information requested by the trustee and/or committee of the creditors; (ix) has her removal provided for in the reorganization plan.

Removal, however, depends on a court ruling preceded by pleadings of the interested parties and gathering of evidence. In other words, court proceedings are needed for an officer of the debtor to be removed from office by virtue of one of the situations provided for above.

All of the debtor's mature and unmatured debts up to the date of the filing are subject to the Judicial Reorganization except for a few types of credits, such as those derived from advances on foreign exchange contracts (ACCs), credits arising from lease arrangements, as well as those secured by specific types of collateral (e.g. credits collateralized by fiduciary lien and credits with retention of title).

On the other hand, debts originated after the date the filing are not subject to the Judicial Reorganization and must be paid according to their conditions. Also, obligations incurred by a debtor prior to the filing of a Judicial Reorganization will keep their original contractual conditions unless the reorganization plan provides otherwise.

In summary, the Judicial Reorganization comprises the following phases:

1. The debtor files the Judicial Reorganization proceeding seeking a decision authorizing it to take advantage of the Judicial Reorganization;

2. Upon fulfillment of several procedural and formal items, the Court grants a processing order. Such decision immediately stays all collection lawsuits filed against the debtor and suspends the enforceability of credits due but not collected yet (except, as a rule, for tax collection lawsuits).
3. This “stay period” lasts 180 days as of the date when the decision that granted the reorganization protection was granted. Although the Bankruptcy and Reorganization Law does not allow any extension of the stay period, Brazilian courts often allow such extension depending on the factual circumstances of the case, notably in cases where the debtor did not cause any delay in the reorganization proceeding.
4. Concomitantly with the processing order, the Court also appoints a trustee, which will be in charge of overseeing the debtor's activities and report them to the Court and to the creditors by means of periodic reports.
5. After the processing order is granted, the trustee has the duty to publish a list with all creditors and their respective credits. Creditors have the right to challenge the figures and the nature of their credit in case they are inaccurate.
6. In parallel, within 60 days as of the date when the reorganization protection is granted, the debtor has the obligation to file a reorganization plan, setting out a detailed description of the alternatives that the company will follow to implement the reorganization and the payment plan for all the debt subject to the Judicial Reorganization, including maturity extension, interest rate caps, discounts applied to principal amounts, as well as any other feature related relevant feature related to the restructuring such as additional collateral granted.
7. If the debtor fails to file the reorganization plan in a timely fashion, the Judicial Reorganization must be converted into a Bankruptcy Proceeding. Because of that, the initial plan filed by debtor is often a place-holder, and it is usual for debtors to subsequently file a new reorganization plan or amendments to the reorganization plan previously filed.
8. After the filing, creditors have the ability to object the reorganization plan.
9. If any objection to the reorganization plan is filed, the Court shall call a creditors' meeting to put the reorganization plan to a vote. As a rule, the purpose of the creditors' meeting is to approve, reject or propose amendments to the reorganization plan presented by the debtor.
10. In the creditors' meeting, the creditors shall be represented by fully empowered attorneys-in-fact charged with carrying out discussions about the features of the reorganization plan, as well as challenging and proposing amendments to the reorganization plan, as necessary. However, the debtor shall always have the last word on the format of the reorganization plan. Creditors only have the power to approve or reject the reorganization plan and are not entitled to propose an alternative plan or impose changes to the plan to which the debtor does not agree.
11. According to the approval process provided for in the Bankruptcy and Reorganization Law, each class of creditors must either accept the reorganization plan or reject it. There are four classes of creditors provided for in the Bankruptcy and Reorganization Law: (i) Class One – Labor Claims: holders of credit rights deriving from labor legislation or indemnities arising from labor accidents; (ii) Class Two – Secured Claims: holders of credit rights secured by in rem collateral (i.e. mortgages, pledges etc.); (iii) Class Three – Unsecured Claims: unsecured creditors, as a whole, general privilege and special privilege; and (iv) Class Four – Micro and Small Business: creditors holding credit framed as micro or small business.

12. Within Class One (Labor) and Class Four (Micro and Small Business), acceptance of the reorganization plan requires holders of more than one-half in number of claims voting to accept the plan. Within Class Two (Secured) and Class Three (Unsecured), acceptance requires holders of more than one-half in Real amount and in number of claims voting to accept the plan.
13. At its discretion, the court may approve a reorganization plan that has not been accepted by all classes of creditors, provided that such plan meets certain voting standards and does not discriminate creditors within the dissenting class (cram-down). The cram-down standards are: (i) acceptance of more than one-half of claims in Real amount regardless of the classes of creditors; (ii) acceptance by two classes of creditors or one class if there are only two classes of creditors; (iii) within the dissenting class, the plan must have been accepted by one-third of the claims, in number of claims and Real amount if the dissenting class is either the Unsecured or Secured Claims or in number of claims if the dissenting class is either the Labor or the Micro-and Small Companies Claims.
14. For the purposes of both a straight approval or a cram-down decision, voting quorum is verified according to the holders of claims (number of claims and corresponding Real amounts) that attend the creditors' meeting.
15. As a general rule, if the reorganization plan has not been approved in the creditors' meeting, the Court must convert the Judicial Reorganization into a Bankruptcy Proceeding.
16. After the creditors' meeting, Court should decide on the approval of the reorganization plan, either by a straight approval (in the case that the requisites for approval have been met) or the grant of a cram-down decision.
17. In the case that the Court confirms the reorganization plan, debtor and creditors will be strictly bound by it. Upon such decision, debtor will be under supervision of the Court and under Judicial Reorganization protection for the period of two years, even if the reorganization plan provides for extensions of maturities longer than two years. Default on the plan during such supervision period may cause the conversion of the Judicial Reorganization into a Bankruptcy Proceeding.
18. After such supervision period has elapsed, the Court will declare the closing of the Judicial Reorganization. Ulterior default on the reorganization plan allows creditors to enforce the terms and conditions of the reorganization plan applicable to their particular credits.

The reorganization plan may provide several alternatives for the company to emerge from the financial crisis, including grace periods, haircuts, postponement of maturity dates, mergers, drop-downs, sale of assets, replacements of managers, increase of the capital stock, DIP Financing, among any other lawful means approved by the creditors.

As a general rule, the debtor has discretion to propose the payment conditions to creditors; however, already-matured labor claims should be paid within one year as of the approval of the reorganization plan. Similarly, wage-related claims up to 5 minimum wages that had been matured for three months prior to the filing should be paid within 30 days.

Additionally, the company under a Judicial Reorganization is not allowed to dispose of its fixed assets without a court and creditors' approval.

In general, there are two mechanisms for a sale of fixed assets in the context of a Judicial Reorganization: (i) a sale under section 66 of the Bankruptcy and Reorganization Law, which requires court approval followed by potential objections by creditors; and (ii) a sale of an isolated business unit [*Unidade Produtiva Isolada – “UPI”*]. The latter entails a sale and purchase clear of encumbrances and liabilities and free from succession, including labor and tax obligations, provided that (i) the reorganization plan expressly provides for such sale; and (ii) the sale takes place under one of the competitive processes mechanisms set forth in the Bankruptcy and Reorganization Law.

It is also worth mentioning that in 2014, Federal Law 13,043 was enacted, creating a special program that allows companies that have filed for or are undergoing judicial restructuring to pay their federal tax debts in up to 84 monthly and consecutive instalments, in accordance with its terms and conditions.

4 Out of Court Reorganization with Court Confirmation (Extrajudicial Reorganization)

The Extrajudicial Reorganization allows a debtor and certain of its creditors to settle a reorganization plan aiming at restructuring the debtor's indebtedness. In some specific circumstances, the Extrajudicial Reorganization allows a debtor to impose such workout on other creditors of the same class of creditors (*e.g.* secured and unsecured) or of a certain group of creditors of the same nature and subject to similar payment terms within a same class (*e.g.* suppliers and creditors that hold unsecured notes).

Although such proceeding is deemed “out-of-court”, the effects of the private reorganization plan and its imposition on other creditors depend on a Court ruling to be made in the context of an Extrajudicial Reorganization.

In summary, the Bankruptcy and Reorganization Law allows a debtor to file for Extrajudicial Reorganization and request a Court to impose the reorganization plan on other creditors provided that creditors representing more than 60% of a same class or group of creditors have accepted and executed the reorganization plan.

On the other hand, the Extrajudicial Reorganization does not apply to labor or work accident-related claims, tax obligations and credits that are not subject to Judicial Reorganization by virtue of Law, such as credits collateralized by fiduciary lien and credits derived from advances on foreign exchange contracts (ACCs).

In addition, as a rule, the Extrajudicial Reorganization does not entail automatic stay, unlike the Judicial Reorganization. Creditors not subject to the reorganization plan or creditors that have not adhered to the reorganization hold their ability to file or continue their legal proceedings against the debtor.

Upon the filing of the Extrajudicial Reorganization, a public notice is released and creditors may challenge the reorganization plan within 30 days on the following limited grounds: (i) debtor has failed to meet the 60%-threshold to cram down the plan on non-supporting creditors; (ii) the reorganization plan entails acts forbidden by law or fraudulent transactions; and (iii) non-compliance with any other requirement or formality imposed by law that may apply to the case.

If an objection is filed, the Court shall make a ruling on the (i) allowance of credits; and (ii) confirmation of the reorganization plan and its imposition on the non-supporting creditors within the creditors subject to the Extrajudicial Reorganization.

Unlike the Judicial Reorganization, the rejection of the reorganization plan underlying the Extrajudicial Reorganization does not cause the liquidation of the debtor.

Once the Court makes a ruling on the reorganization plan, interested parties may appeal. As a general rule and pursuant to the Bankruptcy and Reorganization Law, such appeal neither stays the proceeding nor does it prevent the implementation of the reorganization plan.

Confirmation of the reorganization plan entails (i) replacement of the old indebtedness subject to the Extrajudicial Reorganization for the restructured indebtedness to be paid according to the terms and conditions of the reorganization plan; and (ii) dismissal of any lawsuit filed to collect on debt subject to the reorganization plan.

Real Estate

1 Introduction

Real estate regulation in Brazil is heavily rooted on the registry system inaugurated by Federal Law 6,015/1973. The most common matters are primarily governed by the Brazilian Civil Code and by Federal Laws 6,015/1973 (“Public Records Law”); 9,514/1997 (“Fiduciary Lien Law”); 8,245/1991 (“Lease Law”); and 5,709/1971 and Decree No. 74,965/1974 (both the “Rural Real Estate Legislation”), Federal Decree No. 59,566/1966 (“Rural Leases and Partnership Law”) and Federal Law No. 4,504/1964 (“Rural Land Act”).

Brazil has state regulations on notarial and conveyancing matters and municipal ordinances on land use & occupancy regulations and urban property taxation.

Rights over real estate have two primary stems, namely:

- (i) Possession: A fact consisting of the occupation of a real estate by an individual or legal entity out of which certain rights and obligations derive; and
- (ii) Ownership: A right of proprietorship over real estate, mandatorily constituted by title duly registered before the competent Real Estate Registry Office.

Real Estate Registry Offices are, in summary, responsible for keeping record of all title transfer, liens, encumbrances, physical changes and possession aspects over the real estates. Notary Publics are, in summary, responsible for drawing-up agreements that are required by law to be entered into by a public instrument, notarizing signatures, attesting as to the authenticity of copies of documents, among others.

The types of *in rem* rights over real estate in Brazil are: (i) ownership; (ii) surface; (iii) use; (iv) right-of-way; (v) enjoyment; (vi) habitation; (vii) acquisition; (viii) pledge; and (ix) right of floor slab (“Direito de Laje”, which roughly translates to the right of the floor slab, allows for the obtaining a distinct title for construction on top of or under another building despite the fact that it sits on the same land). Some rights to guaranty are also *in rem* rights: such as mortgage, fiduciary lien, antichresis and seizure.

The classification of a property depends on its use and it is, therefore, not decisive where the property is located (i.e. property located in an urban area with municipal zoning regulations will be considered rural property if used for rural purposes). There are two main types of property: (i) rural property; and (ii) urban property.

Urban properties can be classified as residential, commercial and industrial. The ownership of urban property may be classified as fractional ownership, joint ownership in a condominium building or a co-ownership in an ordinary condominium.

All the regulations applicable to property records, rules, restrictions and other requirements depend on the classification of the property.

2 Recording of Acts and Information before the Competent Real Estate Registry Office

Federal Law 6,015/1973 was enacted to create the so-called public records, which serve the purpose of maintaining in public knowledge and in accordance with the sequential order of the events all acts and information related to a real property. This legislation assigned special emphasis on the recording of acts and information related to real estate and their title holders.

The primary document created by Federal Law 6,015/1973 is the enrollment certificate or the property record file, which contains a description of the real estate's area, of its boundaries, main characteristics and registered owner, valid and former liens, easements, environmental data, among others.

Recordation of all acts relevant to that real estate is made on the enrollment certificate¹⁹. With respect to rural land, there are specific rules related to the description of a property's boundaries and the confirmation by the federal authorities that such description does not overlap another.

Certain acts have their recordation before the enrollment certificate as a requisite of validity, such as acquisition, liens and encumbrances (e.g., usufruct). This is to say that the parties to a given transaction may enter into and execute relevant documents, deeds or perform necessary acts, but unless and until recordation is completed before the Competent Real Estate Registry Office, certain effects will not be achieved. Below are some examples:

- (i) In an acquisition, the acquirer is not fully vested in the title of ownership to the real estate and the seller remains as owner for all intents and purposes;
- (ii) In a collateral, the creditor will not be able to foreclose on the real estate in the event of payment default;
- (iii) In a usufruct, the use right will not be upheld before a good faith third party who acquires the real estate.

Other acts do not have recordation as a validity requirement, but a party holding interest in a real estate may procure recordation to make known such interest to the public in general as to protect it. This is the case, for instance, of:

- (i) Recordation of lease agreements, which assure tenant's right of first refusal and the lease validity clause in the event of a sale. This means that if the lease is registered, an acquirer: (a) will be precluded from purchasing the real estate unless the tenant does not exercise its right of first refusal ; and/or (b) will have to maintain the lease in force until the expiration of its term.

¹⁹ The Law governing Public Records dictates that recordation of relevant acts are made by means of registration (those which constitute the in rem right) or annotation (for all other acts or facts related to the property or its owner).

- (ii) Purchase rights (commitment of purchase and sale and purchase option), which will bar the sale of the real estate to a third party without the purchaser's consent. Also, the purchase rights will be acknowledgeable as an *nm rem* right upon the recordation of the agreement, including for tax purposes..

3 Acquisition of Title over Real Estate

According to the Brazilian Civil Code, real estate may be acquired by:

- (i) Bilateral instrument;
- (ii) Adverse possession ("*usucapião*");
- (iii) Accession; and
- (iv) inheritance rights.

As explained in item 2 above, the documents and facts listed need to undergo registration on the real estate's enrollment certificate before the competent Real Estate Registry Office in order for title to vest in their beneficiaries.

3.1 Bilateral Instrument

Real Estate acquisition by means of a bilateral instrument is operated either by a public deed or a corporate act. In some cases, a bilateral instrument operated by a private agreement is applicable.

In Brazil, a public deed is an agreement drawn by and executed before a public notary whereby a party transfers to another a certain right over a real property (e.g. ownership, usufruct or any collateral), whether by purchase and sale, donation, property exchange, payment in-kind, mortgage or any other type of agreement.

The act of drawing public deeds is subject to collection, normally by the acquirer, of the applicable transfer tax, "ITBI" (in case of ownership transfer by a sale), and "ITCMD" (in case of ownership transfer by a donation or inheritance transfer²⁰), in addition to the Notary Public's costs. Other costs related to the deed registration on the property record files will be due.

²⁰ Please refer to items 7.3 and 7.4 below.

If the parties agree on an installed payment, the parties may execute a private or public instrument (commitment) governing acquisition contingent upon payment in full of installments. Such commitment might have the authority to constitute the *in rem* property acquisition right. The structure whereby the commitment is typically entered into comprises a down payment by the buyer, followed by a due diligence over the real estate, the seller and prior owners. Positive due diligence's findings work as a condition precedent to the deal closing (ownership transfer), which, if achieved, obliges the buyer to pay the remainder of the purchase price upon drawing and execution of the deed.

The commitment of purchase and sale may be subject to other conditions precedent, which, like the due diligence, subject the effectiveness of the purchase to their achievement. Most common conditions precedent require the seller to make certain rectifications to the real estate records, e.g., cancellation of liens, annotation of constructions, but can also comprise other measures, such as confirmation of the viability of the intended use of the property, environmental investigations or building entitlements and permits, among others.

Acquisition operated by means of a corporate act occurs in cases where a partner contributes into an entity's corporate capital real estate in exchange for stock underwritten. In this case, the relevant corporate act, normally a bylaws, serves as title of acquisition. Unless the social purpose of the acquirer entity is real estate activities, ITBI taxes are not due by the entity.

It is worthy to point out that irrespective of whether the acquisition is object to a public deed or a corporate act, the parties will be required to present certain mandatory documents, either to the Notary Public or to the Real Estate Registry Officer. These documents reveal the seller's financial liabilities and could impair or ultimately bar the transfer. The most common cases where this situation occurs are:

- (i) Judicial attachments: a Judicial authorization is required for disposal of the real estate;
- (ii) Federal tax outstanding liabilities: the seller may be required to present information to allow the Notary Public / Real Estate Registry Officer to assess whether the disposal's ultimate intention is to evade taxes;
- (iii) Labor debts: require the acquirer to publicly acknowledge that the liabilities could cause the transaction to be undone.

3.2 Adverse Possession ("*Usucapião*")

Adverse possession is a form of acquisition of real estate by the exercise of possession rights by an individual over an extended period, provided that certain legal requirements are met. This institution awards a good-faith possessor of the real estate with the ownership title, thus granting stability and legal safety to acts perpetrated over said real estate.

The interested party possessor of the real estate is required to produce evidence, either judicially or extrajudicially, of the possession and compliance with other conditions. After a judicial or extrajudicial proceeding in which the evidence is accepted, a registrable property title will be issued in the name of such interested party.

Typically, good-faith possessors are found in the countryside of Brazil, occupying either parts of bigger lands, where the owners may have difficulty controlling informal occupation, or in land previously held under public domain. It is somewhat common for good-faith possessors to enter into agreements with investors of energy projects, for instance.

3.3 Accession

Pursuant to the Brazilian legislation, real estate acquisition by accession is the incorporation onto a land of an asset (either man-made or deriving of natural occurrence), which attaches to the land and entitles its owner to acquire such asset by accession. Under certain conditions, accessions also triggers indemnification obligation by the land owner.

The most common occurrence of this institute is the construction of a building on a third party's land by an investor.

Upon completion of the building, the individual/entity in charge of it will procure the issuance of the occupancy certificate ("*habite-se*") and the clearance certificate of social security taxes ("INSS") specific to the construction. These documents will allow registration of the building on the land's enrollment certificate, which will operate acquisition thereof by the land owner.

A party that constructs a building in good faith is entitled to obtain indemnification from the land owner, as consideration for said owner having acquired by accession the building. On the other hand, if the building's value is found to be substantially higher than the land's value, the party who carried out its construction may procure the purchase of the land upon payment to the land owner of indemnification as consideration for the acquisition.

3.4 Inheritance Rights and Corporate Succession

Transfer of real estate by inheritance rights occurs upon the passing of its owner, followed by a judicial or extrajudicial proceeding in which the heirs claim their rights over the deceased's estate, including any real estate owned. This proceeding will cause a title to be issued, which, once registered, will operate the real estate transfer to the heirs estate. As a condition for registration, the heir will be subject to the payment of the corresponding ITCMD²¹.

While title issuance and registration are pending, it is possible to enter into agreements over the real estate, contingent upon the effective transfer.

²¹ Please see item 7.4 below.

Likewise, in a corporate transaction that results in the winding-up of an entity holding real estate, the surviving entity will be vested in the respective title of ownership. This title will be materialized in the corporate documents whereby the transaction was operated, and which will need to undergo registration before the competent Real Estate Registry Office.

Unlike with the transfer of inheritance, corporate succession is not subject to ITCMD, but to ITBI to be assessed and collected upon title registration.

4 Collaterals over Real Estate

A collateral over a real estate grants the creditor the right to foreclose on the real estate if the debtor defaults any of its financial obligations, provided that the creditor has the asset sold to keep its proceeds.

Mortgages and fiduciary sales are the most commonly used real estate backed collaterals in secured transactions. These collaterals serve as basis to securitization operations.

4.1 Mortgage

A mortgage is a collateral that encumbers the real estate owned by debtor borrower or a third party. The lender is not vested in neither possession or ownership rights over the real estate.

Normally, a mortgage secures the loan's main amount and ancillary costs, such as interest, taxes, late payment charges and expenses, and, in some cases, preset losses and damages, in which the borrower may incur in the event of failure to comply with the terms of the underlying credit agreement.

A mortgage is created by means of a public deed, registered before the competent Real Estate Registry Office, or by a private instrument, most commonly use in financial operations.

Registration of public deed to the mortgage before the Real Estate Registry Office is mandatory and essential for the creation of the collateral. Only after registration, the mortgage will be enforceable in avoiding any other creditors that the borrower may have from tapping the real estate in their recoveries.

Considering that the borrower remains in ownership and possession of the mortgaged real estate, it may freely sell it to third parties, in which case the collateral survives the sale. This ultimately means that a third -party acquirer is exposed to the risk of foreclosure if the borrower defaults its obligations and triggers accelerated maturity of the debt, usually a consequence of payment default in mortgage agreements.

It is worth noting that one real estate may be encumbered by more than one mortgage to more than one creditor. In this case, in a scenario of default, the mortgages are enforced in the order in which they were created (i.e., as registered in the respective real estate enrollment).

To use the mortgaged real estate to resolve its credit, a lender must follow certain steps, namely:

- (i) File a judicial enforcement lawsuit, seeking judicial acknowledgement of the debt and its amount;
- (ii) If the lender prevails, it is awarded foreclosure on the real estate;
- (iii) Once seized, the real estate must be judicially sold in an auction (the lender is precluded from keeping the real estate as payment in-kind);
- (iv) The proceeds from the sale will be used to pay judicial costs and the debt;
- (v) If the proceeds from the sale are insufficient, the lender will still have a recourse against the borrower.

In a judicial reorganization scenario, a real estate encumbered by a mortgage could be used in the recovery plan to pay creditors other than the collateral's beneficiaries. In the event that the borrower undergoes bankruptcy, a lender beneficiary to the mortgage will prefer certain creditors (such as unsecured ones) but will fall behind other ones (such as labor and tax).

4.2 Fiduciary Lien over Real Estate

A fiduciary lien over a real estate (*"Alienação Fiduciária em Garantia"*) is a transaction whereby a borrower holds possession and the right to reacquire the property ownership by paying the debt, transferring the ownership of the property on a fiduciary basis to lender. The constitution of fiduciary lien causes the real estate property title to be shared between borrower and lender, in an inseparable manner, creating certain limitations to the exercise of property and possession rights, such as leasing, sale, encumbering and others. Fiduciary lien creates the condition that default in payment of the debt will cause the title to the real estate to revert to the lender (*"property consolidation"*), which will have the obligation to auction the real estate to collect funds for the payment of the debt. This means that, unlike with the mortgage, taking into consideration that in the beginning of the foreclosure the ownership entitled to creditor on a fiduciary basis will turn into full ownership, the foreclosure of the collateral triggers the applicable transfer taxes²².

Normally, a fiduciary lien secures the debt's main amount and ancillary costs, such as interests, taxes, late payment charges and expenses, and, in some cases, preset losses and damages, in which the borrower may incur in the event of failure to comply with the terms of the underlying credit agreement.

A fiduciary lien is created by means of a private or public instrument and its effectiveness depends on its registration before the relevant Real Estate Registry Office. Therefore, only after being registered, will the fiduciary lien be enforceable, including to prevent the property from being affected by other creditors.

²² Please see item 7.3

The Borrower will not be able to sell the property nor create further encumbrances. Also, leases require borrower's express consent to be enforceable against them.

The foreclosure must follow certain steps, as follows:

- (i) Upon default, the lender will notify the borrower of the default for payment within 15 days following receipt of the notice;
- (ii) Should the borrower's default be confirmed, the lender will have to collect the property ownership transfer tax and promote the registration of the property consolidation on his behalf;
- (iii) Procure an extrajudicial auction sale of the property (the lender is precluded from keeping the real estate as payment in-kind);
- (iv) The property be auctioned for the minimum amount, whichever is higher between: (a) the amount stated by the parties in the corresponding instrument; or (b) the amount assessed by the municipality for purposes of calculating the transfer taxes;
- (v) If the minimum amount in item "iv" is not achieved, a second auction will take place for an amount equivalent to the sum of the debt, auction expenses, insurance premiums, legal charges, including taxes, and common area expenses.
- (vi) If the amount in item "v" is not achieved, the lender will acquire full title to the real estate and the borrower will be released from its obligations.
- (vii) The proceeds from the sale will be used to pay the auction costs and the debt, provided that any amount remaining will be returned to the borrower²³;
- (viii) If the proceeds from the sale are insufficient, the lender will be precluded from further recovering against the borrower. The only exception where the lender will be able to continue the foreclosure is in a certain revolving loans agreement executed with a financial institution.

In a judicial reorganization or bankruptcy proceeding, the encumbered real estate will not be reachable by other creditors that the borrower may have.

5 Acquisition of Rural Real Estate by Foreigners

Acquisition of rural real estate by foreign individuals or foreign legal entities is governed by the Rural Real Estate Legislation. This piece of legislation is centered on three main legal issues:

- (i) A general limitation on the acquisition of rural real estates by any foreigner, individual or legal entity, subject to intended use of the property;
- (ii) The matching of a foreign legal entity with a Brazilian legal entity with the majority of its capital is held, at any title, by an individual residing or legal entity based abroad or that are controlled directly or indirectly by a foreign individual or legal entity ("Brazilian Entities of Foreign Capital");

²³ The fiduciary sale was initially created as a means to secure real estate acquisition. Over time, its application was expanded to comprise other more complex transactions.

- (iii) The discussion over the applicability of such restrictions for farmland acquisition and its rural lease²⁴ only, or for other types of rights over farmland, such as right of surface, usufruct or free lease.

Such restrictions and issues are applicable to urban properties. Lease agreements over rural real estate are also subject to these restrictions.

For rural land that is not located on border/frontier areas: authorization of the National Institute of Colonization and Agrarian Reform (“INCRA”) is required for an acquisition of in rem rights or certain possession rights over rural land, not located on border/frontier areas, by a foreign legal entity, legal entity controlled by foreigners or foreign individual, and is contingent on a prior request/submission of an exploitation project (describing the intended use of such property) to INCRA and issuance of its prior authorization is a legal requirement to proceed with such transaction. This requirement is extensive to Brazilian entities controlled (by majority capital or directive power) by a foreign individuals or legal entities residing/based abroad and to corporate transactions resulting in the direct real estate title transfer of rural land, or in corporate transactions/reorganizations that result in transfer of shares or quotas in an entity holding rural land.

For rural land that is located on border/frontier areas: authorization of the National Security Council (“CDN”) is required for an acquisition of any in rem rights or any possession rights over rural land located on border/frontier areas, by a foreign legal entity, legal entity controlled by foreigners or foreign individual, is contingent to a prior request/submission of an exploitation project (describing the intended use of such property) to CDN, and such request must be initially submitted to INCRA. Issuance of CDN’s and INCRA’s prior authorization is a legal requirement to proceed with such transaction. This requirement is extensive to Brazilian entities controlled (by majority capital or directive power) by a foreign individuals or legal entities residing/based abroad. Corporate transactions resulting in the indirect transfer of rural land located on border/frontier areas, or in corporate reorganizations that result in transfer of shares in an entity holding rural land are also subject to such prior authorization, but the respective authorization process is initiated directly before the CDN.

The acquisition of farmland without prior authorization might be considered null and void. The analysis of the validity of such acquisition depends on the time that the property was acquired, its use, its location and its area and other aspects. Considering that not only the law on farmland acquisition by foreigners, but the Federal Constitution and the official understanding from the Federal authorities that are binding to the governmental agencies changed a few times in the past 30 years, such analysis must be made on each case, upon the presentation of the proper documentation.

The legal scenario dictates that foreign entities may only acquire rural real estate upon governmental authorization to be granted in view of a project to develop and implement agricultural, industrial and/or colonization projects.

²⁴ Please see item 6.2 below

The Notaries Public, Real Estate Registry Officers and INCRA oversee application of the restrictions and the property registry before INCRA must be annually updated. This means that the control on farmland acquisition by foreigners can be made: (i) by the Notaries Public, upon drafting of the relevant deed; (ii) by the Real Estate Registry Officers, upon registration of the ownership transfer deed; and (iii) by INCRA, upon registration of the transaction, in the event that Notaries Public and Real Estate Registry Officers fail to bar a prescribed transaction. The review made by any of these agents will initiate the procedures that might lead to the annulment of a transaction that was subject to the restrictions without regard for the restrictions currently in force.

6 Leasing Real Estate

6.1 Urban Leases

Urban real estate leases are governed by the Lease Law. The legal framework introduced by the Lease Law is legislation that promotes tenants' right to remain on the leased property real estate, even, at times and in commercial leases, to the detriment of the landlord's will. As such, the Lease Law awards great protection to the individual's residence and the legal entity's goodwill.

Below are certain clauses that normally apply to the lease relation.

- (i) **Right of First Refusal:** Tenant has a right of first refusal over the leased real estate, if the landlord intends to sell it to a third party, in equal conditions to the ones offered by said third party. This right applies irrespective of contractual provision. Nonetheless, if contractually stipulated, the tenant may wish to have the agreement registered on the leased real estate's enrollment certificate. This registration will have the effect of acknowledging the right of first refusal to the public in general, including for its enforceability.
- (ii) **At-will termination:** The landlord is not entitled to lease at-will termination. Early termination by the landlord is restricted to causes strictly outlined in the Lease Law. The tenant, on the other hand, may early terminate the agreement, irrespective of cause, upon payment of a contractually agreed penalty, reduced proportionally to the period of the agreement already elapsed.
- (iii) **Renewal Right:** In commercial lease agreements the tenant may, upon filing a specific lawsuit, have the right to extend the lease term for another term, provided that all of the following conditions are met:
 - a. the lease agreement must be executed in writing and for a specific term;
 - b. the minimal term of the agreement, or sum of the terms of continuous and uninterrupted leases must be of at least five (5) years;
 - c. the tenant must have been using the real estate to develop the same business for at least the last three (3) years prior to the filing of the lawsuit; and
 - d. the landlord must request extension of the term in the period comprised between one (1) year and six (6) months prior to the lease's expiration date.

- (iv) **Validity Clause:** Sale of the leased real estate does not in and of itself trigger the termination of the lease agreement, but the purchaser of a leased real estate has the right to terminate the agreement with a ninety (90) day prior notice after the registration of the sale on the real estate record files before the relevant Real Estate Registry Office. A validity clause eliminates this right upon the registration of the lease agreement on the real estate record files for validity clause purposes. If not registered, the tenant will only be entitled to losses and damages.
- (v) **Built-to-suit agreements:** The Lease Law specifically governs built-to-suit lease agreements. The provisions of the Lease Law stipulate: (i) that the parties may waive the right to have the mark-to-market rent judicially reviewed (landlords' and tenants' triannual statutory rights); and (ii) in the event of tenant at-will termination, the tenant is subject to an early termination fine in the corresponding amount of up to all rents maturing until the expiration of the original lease's term.

6.2 Rural Leases and Partnerships

Rural leases are governed by the Rural Leases and Partnership Law and are defined as the transfer of possession by landlord to the tenant for the latter to exploit a rural activity as defined under the Rural Land Act. This means that the activity must be of an agricultural, livestock or agroindustry activity.

The Rural Leases and Partnership Law stipulates the minimum duration of rural leases, in accordance to the activity developed, to which the parties are bound.

Federal Law 8,629/1993 stipulates that the restrictions imposed by the Rural Real Estate Legislation are also applicable to leases of rural real estate. Please refer to item 5 above.

Considering that unlike purchase and sale transactions, lease agreements are normally entered into by means of a private instrument that does not require registration, verification by the authorities of compliance with the restrictions is difficult. To address this issue, Instruction 43/2015, enacted by the National Justice Council, innovated the effective legislation by saying that lease agreements by foreign individuals or legal entities over rural real estate must be mandatorily entered into by means of a public deed.

Rural partnerships are the agreements whereby a landowner partners with a third party for the development of an activity under the Rural Land Act. The parties share the proceeds (both financial and in-kind) of said partnership as consideration for their activities, subject to certain percentages as stipulated in the Rural Leases and Partnership Law.

7 Taxes Related to Real Property in Brazil

Under Brazilian law, there are specific taxes related to real property.

7.1 Real Estate Tax – IPTU (Municipal Tax)

A municipal tax accruing on the ownership of urban real estate annually and assessed over the value attributed by the municipal tax authorities to said real estate (usually close to market value). The rates vary according to the municipality where the real estate is located.

All urban real estate property in Brazil owned by individuals or legal entities as of January 1st of each year, is subject to Urban Real Estate Property Tax payable to the municipality within whose jurisdiction the property is located. IPTU is the main annual tax imposed on urban real estate properties, and the surface area of the real estate property, its location, the value of its constructions etc. are used to calculate such tax.

7.2 Tax on Ownership of Rural Land- ITR (Federal Tax)

A federal tax accruing on the ownership of rural real estate annually and assessed over the value of the land itself (without crops, constructions etc.). The rates vary in accordance with the size and degree of use of the real estate.

All rural real estate property in Brazil owned by individuals or legal entities as of January 1st of each year, is subject to Rural Real Estate Property Tax, payable to the Federal Government. Calculation of ITR is based on information provided by the property owner to the Federal Revenue (information includes the surface area, the purpose of its use, extent of preserved native forest, agricultural production, among several other considerations).

7.3 Real Estate Transfer Tax (Onerous Transfers)- ITBI- (Municipal Tax)

A municipal tax accruing at a variable rate (depending on the municipality) on all onerous ownership transfers or usufruct of real estate. The real estate transfer tax rate will be applied on the higher value between: (i) the transaction actual price; or (ii) the value of the real estate as assessed by the municipality.

This tax does not apply in cases of contribution of the real estate to the capital in exchange for underwritten stock of companies that do not have its main income from real estate activity.

7.4 Real Estate Transfer Tax Accruing over Donation and Inheritance Transfers – ITCMD

A state tax accruing at a variable rate (depending on the state) on all transfers by donation or as a consequence of inheritance rights, and normally assessed over the higher between: (i) the transaction price; or (ii) the value of the real estate as assessed by the state.

7.5 Foro

A fee due by individuals or legal entities holding a right to use a real estate owned by a third party, usually the Federation, under an *aforamento* regime. This fee is due annually and in addition to the IPTU or ITR and is assessed over the value attributed by relevant tax authorities.

7.6 Laudemium

A fee accruing at a 2% rate on all onerous transfers, of any kind, of real estate owned by a third party, usually the Federation, under an *aforamento* regime, and normally assessed over the higher between: (i) the transaction price; or (ii) the value of the real estate as assessed by the Federal Government.

8 General Considerations over Other Real Estate Aspects

8.1 Co-ownership

Real estate may be owned jointly by more than one individual or legal entities, in which case they share the costs, expenses and income relating to the use of the real estate. This means that ownership title is held jointly, without possession allocation over the common real estate. There are two main forms of joint or common ownership, namely tenancy in common (undivided portion of ownership or “*Condomínio Geral*”) and co-ownership or “*Condomínio Edifício*”, the latter applicable to real estate with constructions (residential or office buildings, industrial facilities, storage & logistics facilities).

8.2 Easements

Easements confer limited rights in favor of one’s real estate (the “dominant” land) over another one’s real estate (the “servient” land). They may be either positive, permitting the owner of the dominant land to exercise certain rights over the servient land (e.g. a right of way); or negative, prohibiting the owner to the servient land from exercising one of its ownership rights (e.g. building above a certain height).

This institute was created in 2002 and, as such, certain aspects of the legislation are still pending regulation, such as, for instance, taxes accruing over its creation and extinction, by the relevant municipalities.

8.3 Surface Rights

Surface rights (“*Direito de Superfície*”) entitle its holder to build or to plant on a real estate owned by a third party for a determined term. The concession of surface rights may be paid or gratuitous and must be granted by a public deed.

8.4 Usufruct

Usufruct is the temporary right to use and to profit from a third party's real estate (except for the practice of any acts that may result in the disposal of the real estate). The usufruct's maximum duration is for the life of the usufructuary, if the beneficiary is an individual, or for 30 years, renewable for an additional 30 years, if the beneficiary is a legal entity.

8.5 Fees and expenses related to the acquisition of a real property

Notarial and Real Estate Registry Office fees vary from state to state, and are regulated by state law. In each state, the same fees will be charged by every Real Estate Registry Office and Notary Public practicing in that state.

Lawyer's fees can be negotiated and are established by the Brazilian Bar Association in its main fee guidelines. To ensure the validity of negotiations and compliance with the relevant legal formalities, it is advisable to have a lawyer present. Furthermore, the presence of a lawyer also serves to ensure the accuracy of the deed's content in relation to the description of the property, the description of the succession of rights of the seller and his/her predecessors, in addition to other legal requirements.

Depending on the circumstances, other costs might be applicable, such as the *laudemium*, applied to marine land (properties located on islands or properties that fall under an occupancy regime or a permit issued by the Federal Government).

8.6 Specificities with respect to rural land | property boundaries description and its environmental data

Brazilian Law prescribes particular provisions in relation to rural land, and anyone with the intention of acquiring rural land must be aware of (i) specific rules/regulations with respect to the description of the boundaries of rural land that detail satellite geo-referenced coordinates in accordance with the proper topographical rules established by the National Institute of Colonization and Agrarian Reform (“INCRA”), and (ii) specific rules/regulations with respect to demarcated preservation areas on such properties and cadaster thereof with the State and the federal environmental agencies.

It is important to note that the description of rural properties by way of satellite geo-referenced coordinates must be certified by INCRA and may lead to other legal measures/requirements with respect to the property regularization given that the description must be recorded in the property ownership record file. In addition to certification by INCRA, as a requirement for the valid execution of a deed of sale of rural land, registration with the relevant Real Estate Registry Office is also required if the property in question comprises an area of more than 100 hectares in extent (note that this provision will soon apply in transactions involving properties smaller than 100 hectares in extent).

It is also important to note that the registration of rural property data with the State and the Federal environmental agencies is a further requirement for the execution of deed of sale for the acquisition of rural land, coupled with its registration with the relevant Real Estate Registry Office.

In addition, the rural property must be registered with the Federal Revenue, since the property must have an identification number ("NIRF").

8.7 Notes on real estate realtor activities

Under Brazilian law, a Real Estate Realtor must be registered with the relevant agency ("CRECI"). A broker's participation in a transaction is not mandatory but if a broker has been hired, even if the broker is not responsible for the effective conclusion of the transaction, regardless of whether the transaction is duly concluded, the realtor's fees would be still be due. The parties may (and should) agree to incorporate a provision in the deed of sale stipulating effective conclusion of the transaction as a prerequisite to the payment of realtor's commission.

Realtor's commission may vary in accordance with the arrangement between the party and the broker, with an upper limit of 6% (six per cent) of the purchase price, established by law in general/standard/conventional cases.

Insurance, Reinsurance and Supplementary Pension Plans

1 Supervision

The Brazilian Private Insurance Council (*Conselho Nacional de Seguros Privados - CNSP*) is the regulatory body in charge of enacting the rules that regulate the establishment, organization, operation and transaction of insurers, reinsurers, brokers and open private pension plan. The Superintendence of Private Insurance (*Superintendência de Seguros Privados - SUSEP*) is the agency in charge of enforcing and regulating these rules and monitoring the market as a whole. Both CNSP and SUSEP are under the aegis of the Ministry of Finance.

Pension funds (or “closed private pension funds”), which are more closely related to benefits plan by specific sponsoring companies, are regulated by the National Supplementary Pension Plan Council (*Conselho Nacional da Previdência Complementar - CNPC*) and supervised by the Superintendence of Supplementary Pension Plans (*Superintendência de Previdência Complementar - PREVIC*) affiliated with the Ministry of Social Security.

The Supplementary Health Care System is a supplement to the Brazilian public health care system and is regulated by the Supplementary Health Care Council (*Conselho de Saúde Suplementar - CONSU*) and the Brazilian Private Health Care Agency (*Agência Nacional de Saúde Suplementar- ANS*), which is responsible for the establishment, organization, and supervision of the health-insurance market and companies in such sector (for instance, cooperatives, group health care, and self-management).

2 Legal Framework

Most general legal rules applicable to insurance and reinsurance contracts are set forth in the Civil Code and in the Supplementary Law 126/2007. Specific provisions on property, casualty, and life insurances – among others - are subject to specific regulations issued by CNSP and SUSEP. In the context of the Supplementary Health Care System, contracts and the supplementary pension plans are subject to specific laws and regulations.

To the extent that these contracts involve “consumers” (as a rule, insurance agreements that are considered as consumer contracts and entities, such as small businesses, tend to fall under this concept), they are also subject to the Consumer Protection Code, which establishes guidelines and principles that are highly protective of consumers rights.

3 Licensing Process

The incorporation, transfer of controlling shares, or restructuring (among other acts) of insurers, reinsurers, capitalization companies, open private pension funds, and health care companies in Brazil involve a series of procedures set forth in legislation and depend on authorizations by SUSEP and ANS, including presentation of business plans and identification of shareholders.

In order to operate in Brazil, an insurance company must necessarily be incorporated in Brazil as a joint-stock company. There is no restriction on foreign-capital interest in the ownership of Brazilian insurance companies.

The minimum capital of an insurance or open private pension company consists of the higher value between the base (fixed) capital and the risk-based capital.

In order to operate in all states of Brazil, the minimum base capital required is BRL 15,000,000.00 (fifteen million reais). In the event that an insurance company operates only in some regions it is necessary to maintain a fixed amount of BRL 1,200,000.00 (one million two hundred thousand reais), added to a variable amount which is determined in accordance with the regions where the insurance company has been authorized to operate.

There are very detailed and specific rules regarding both calculation of the risk-based capital and the procedures necessary for adopting corrective and recovery plans.

4 Selling Insurances and Certification

An insurance broker, who may be an individual or a legal entity, is the facilitator legally authorized to intermediate sales of insurance contracts.

The insurance broker profession is in a transitional phase in the Brazilian legal system.

The Executive Order No. 905 issued by the Brazilian President on November 11, 2019, repealed Law No. 4594/1964 and partially repealed the Decree Law No. 73/1966, which used to regulate the broker insurance profession together with SUSEP²⁵ administrative rules.

Currently, the insurance broker profession has been regulated by resolutions issued from the Brazilian Institute of Self Regulation of the Market of Insurance Brokers (IBRACOR), which has been recognized by SUSEP as the entitled association to self-regulate the profession.

²⁵ Superintendence of Private Insurance – the Brazilian insurance regulatory body.

These resolutions replicated most of the rules already inserted in the repealed laws, but determined that in this transitional period only IBRACOR is entitled to grant license for new insurance brokers.

The Executive Order No. 905, however, is still not definitive and must be confirmed by the Congress until March 2020. On the meantime, many of lawsuits that question its constitutionality were filed in Brazil's Supreme Court and are still pending of decision.

Such changes donot affect the Reinsurance Broker, regulated by Supplementary Law 126/2007, which must be a legal entity (with a professional liability insurance) authorized by SUSEP to intermediate reinsurance contracts.

According to Brazilian law, an insurance company may not incorporate a sister brokerage company. In fact, brokers must not be owned by insurance companies or maintain any employment relationship or act as director of insurance companies. Some financial groups do have both insurance companies and insurance brokers, however, the latter is linked to a holding company or a bank - but never to the insurance company.

Regulation addresses the need to certify insurance company employees and similar persons at insurance companies accredited by SUSEP, whenever these firms operate in:

- (i) average regulation and settlement;
- (ii) internal control systems;
- (iii) customer service; and
- (iv) direct sales of insurance products, capitalization, and open supplementary pension funds.

5 Reinsurance

Brazilian legislation provides for three types of reinsurers: local, admitted and occasional. Admitted and occasional reinsurers are foreign companies, whereas local reinsurers are companies incorporated under Brazilian legislation with head offices in Brazil, and organized as joint-stock companies.

As a rule, but still subject to the technical, contractual, operating and risk particularities, and to provisions of both CNSP and SUSEP, insurance regulation applies to reinsurers as well.

A local reinsurer must have at least BRL 60,000,000.00 (sixty million reais) in capital and must meet risk-based capital and solvency-margin requirements.

Admitted and occasional reinsurers are foreign companies registered at SUSEP that have net equity of least USD 100,000,000.00 (one hundred million dollars) and USD 150,000,000.00 (one hundred fifty million dollars), respectively, a power-of-attorney²⁶ appointing an individual attorney-in-fact domiciled in Brazil, and have submitted numerous documents, including their financial statements.

Admitted reinsurers must also establish a representative office in Brazil, authorized in advance by SUSEP and named as such, with the sole business of representing the admitted reinsurer. The representative must be domiciled in Brazil and hold power-of-attorney.

The representative office may be a Brazilian company or a branch office. A company registered as an admitted reinsurer is currently required to own at least 4/5 (four-fifths) of the representative office's capital, and there is no exception for reinsurance groups.

An admitted reinsurer must also keep an escrow-account with SUSEP worth a minimum of USD 5,000,000.00 (five million dollars) in the case that the admitted reinsurer operates in all lines of business; or a minimum of USD 1,000,000.00 (one million dollars) if it works solely with life reinsurance.

Lloyd's has been recognized as an admitted reinsurer, with a representative office located in Rio de Janeiro, and its Central Fund can be accepted as net equity for the purpose of the aforementioned minimum thresholds.

Rating requisites for admitted and occasional reinsurers are set out below:

²⁶ Exceptionally, upon consultation, SUSEP may authorize an insurance company or a local reinsurer to act as the attorney-in-fact of an occasional reinsurer.

ADMITTED

Risk Rating Agency	Minimum Level Required
Standard & Poor	BBB
Fitch	BBB
Moody's	Baa3
AM Best	B+

OCCASIONAL

Risk Rating Agency	Minimum Level Required
Standard & Poors	BBB
Fitch	BBB
Moody's	Baa2
AM Best	B++

There are two advantages that a local reinsurer has over admitted and occasional reinsurers:

- a preferential offer of 40% of each cession; and
- exclusivity rights to reinsure coverage for survival in life-insurance, as well as to reinsure supplementary pension fund transactions.

In contrast to admitted reinsurers, occasional reinsurers are not required to have a representative office nor to maintain reserves under any circumstances in Brazil, however their headquarters cannot be located in tax havens²⁷.

Currently, the percentage that can be assigned from insurers to occasional reinsurers was increased to 95% of the total reinsurance premiums, considering the totality of their operations in each calendar year. The previous limit was 10%.

²⁷ Tax havens are countries or dependencies that do not tax income or that tax it at a rate of less than 20%, or whose internal laws provide relative secrecy as to the owners of corporations or their representatives.

Also, the percentage that can be transferred by local reinsurers to occasional reinsurers increased to 95% of the premiums related to underwritten risks, given the totality of their operations in each calendar year. The previously provided limit was 50%.

Admitted and local reinsurers must maintain a proper internal control system. There is no minimum structure for such purpose, but rather minimum elements that should be considered when setting up the internal controls of each admitted reinsurer, as listed by regulation²⁸.

The size and complexity of such structure depends on the complexity each company's operations. That way, all minimum elements and procedures may be contained in an extremely simple structure of one or two people, and in specific reports.

In terms of reporting information to SUSEP, admitted reinsurers are also required to submit a Periodic Information Form (FIP) every month, which is a set of tables to be completed by each company with information on its structure and operations.

6 Reinsurance Contracts

Brazilian insurers and local reinsurers may only assign risks in reinsurance and retrocession transactions to local, admitted, and occasional reinsurers, with or without the intermediation of reinsurance brokers.

Because Brazilian law was set up for establishing and developing a strong local reinsurance market, it provides local reinsurers with a preferential offer of 40% of every cession.

Reinsurers shall have five business days (for facultative contracts) and 10 business days (for automatic contracts) to formalize their interest in the full or partial acceptance of the risk, as long as under the same conditions offered abroad with silence being construed as refusal.

The preferential offer does not apply to retrocession by local reinsurers, which, for their part, as well as insurers, may transfer 95%²⁹ of premiums issued for risks that they have underwritten in each calendar year.

Exceptions to this rules apply to the following lines:

- surety bond;
- export credit;
- rural credit; and
- domestic credit.

²⁸ SUSEP Circular 249, February 20, 2004, Article 2, items I to VII, Article 3, items I to VIII (Braz.) (amended by SUSEP Circular 363, May 21, 2008)

²⁹ Increase presented by the Decree No. 10.167/2019.

As for reinsurance contracts, regulation sets forth certain requisites whenever writing and structuring contractual documents, such as the need for:

- (i) an insolvency clause, and
- (ii) prohibition of direct-payment clauses (except in cases of the insolvency of the cedant, provided that payment of indemnity has not been made from the reinsurer to the cedant or from the cedant to the insured party, in case of optional contracts, or in all other cases whenever there is a clause that, in such case, calls for direct payment).

If there is intermediation of the contract, the intermediation clause cannot limit or restrict the direct relationship between cedants and reinsurers, nor grant powers to reinsurance brokers beyond those needed and appropriate to perform their jobs.

The contract must stipulate whether the broker has authorization or not to receive money for indemnity and premiums, whereby payment of indemnity to the broker will not represent fulfillment of the reinsurer's obligation until received by the cedant, and payment of premiums to the broker must be considered as immediate release of the cedant.

Regulation additionally sets out that, among other requisites:

- (i) Contractual formalization of reinsurance transactions must take place within 270 days. After this period, if not formalized, reinsurance will be construed as non-existent from the outset; and
- (ii) Contracts for reinsurance of risks located within domestic territory must stipulate submission of any disputes to Brazilian legislation and jurisdiction, allowing for an arbitration clause, which, according to specific legislation, may apply foreign law;

Notwithstanding the above, Supplementary Law 137/2010 amended Supplementary Law 126/2007 to allow CNSP to provide for risk transfer - reinsurance and retrocession transactions - with other persons further to the authorized reinsurance companies, in the case that local, admitted and occasional reinsurers do not have the necessary capacity.

Oil & Gas

1 Brazilian Oil & Gas Sector

In accordance with the Brazilian Constitution, petroleum, natural gas and other mineral resources are property of the Union. The exploration and production of petroleum, natural gas, and other fluid hydrocarbons (“E&P”) are a federal government monopoly, as well as the refining, the import and export of oil, gas and derivatives, maritime shipping of crude oil and derivatives produced in Brazil and any type of pipeline transportation. From its creation, in 1953, until the enactment of the Constitutional Amendment No. 9, in 1995, the state-owned company *Petróleo Brasileiro S.A. – Petrobras*, had exclusive control over the petroleum and natural gas activities in Brazil, excluding, therefore, the participation of any private company in E&P activities.

In 1995, Constitutional Amendment No. 9 was enacted, easing the state monopoly by removing *Petrobras*’ exclusivity in E&P activities and allowing the federal government to contract private and state-owned companies to perform these activities.

Amendment No. 9 opened the upstream segment to private domestic and foreign companies. In 1997, Federal Law No. 9,478 (known as the Petroleum Law) was passed, establishing a new regulatory framework (a “Concession Regime”) for oil and gas activities and creating the National Petroleum Agency (ANP) to promote regulation, contracting and monitoring of economic activities related to the oil and gas industry.

The end of the monopoly and successive annual bidding rounds organized by ANP attracted domestic and foreign investment to Brazil, including leading international E&P players.

The announcement of large discoveries in 2007 motivated new changes to the law. A new regulatory framework was enacted in 2010 with the main goal to create a regime (“Production Sharing Regime”) to regulate E&P activities of an area with recent discoveries with large potential, the so-called “Pre-Salt” areas. The new regulatory framework implemented several legal changes as further detailed, including also a third regime of direct contracting of Petrobras (“Transfer of Rights Regime”).

Although there was a suspension of bidding rounds for a couple of years related to the creation of the new regime, the Government in the last years implemented certain changes to the legislation to encourage investment in the sector and promoted a series of relevant bidding rounds, including relevant areas under the Concession Regime, Production Sharing Regime and for the exceeding production of the areas of the Transfer of Rights Regime.

Additionally, ANP launched an Open Acreage bidding round (*Oferta Permanente*), in which there are areas constantly listed for interested parties to bid at any time. The first round of the Open Acreage bid was held in 2019; a second round was already approved by the ANP, and is currently being arranged.

ANP and the National Council for Energy Policy (CNPE) are jointly considering the areas to be offered at the upcoming bidding rounds, scheduled to take place in 2020 and 2021, with four (4) such rounds already approved. The 17th Bidding Round and the 7th Pre-Salt Production Sharing Bidding Round shall occur in 2020. In 2021, the 18th Bid Round under the Concession regime, as well as the 8th Pre-Salt Production Sharing Bidding Round are expected to be held.

In addition, the government projects potential investments in the sector until 2027 which, along with the regulatory agenda approved throughout 2017, 2018 and 2019, as well as the promotion of mature fields and basins, may unlock investments in the short-term.

According to the ANP, in 2019 there were 115 economic groups operating in the E&P segment, most of which are foreign. Despite the sector's opening to private companies in the late 1990s, *Petrobras* is still the dominant player in the country's oil sector, holding considerable market share in upstream, midstream and downstream activities.

2 Concession Regime

Under this regime, E&P business is governed by concession contracts preceded by bid rounds organized by the ANP. Through these concessions contracts, the Government grants companies or consortiums, incorporated under Brazilian law, the exclusive right to explore, develop, and produce hydrocarbons in a specified block and normally for a 30-year period, at their own expense and risk. The production (of oil and/or gas) is entirely owned by the concessionaires.

In return, the Petroleum Law establishes the following types of government take to be paid out by the concessionaire, as specified in the tender protocol:

- (i) **Signature bonus:** sum offered by the bidding company in the auction. The minimum value is established in the tender protocol of the bidding round.
- (ii) **Royalties:** financial compensation owed by the concession holders of E&P activities, corresponding, as a general rule, from 5% to 10% of the output value from each field.
- (iii) **Special profit-sharing:** special compensation owed by the concession holders, collected only in the event of large production volumes or high profitability from the field.
- (iv) **Payment for occupation or retention of the land:** an amount to be paid annually by the concession holders, beginning on the signing date of the concession contract, as set forth in the tender protocol and the concession contract.

In addition to these stakes owed to the Brazilian government, the Petroleum Law calls for payment of a percentage of production (usually 1%) to the owners of the land.

The tender protocol for a specific bid round sets out, among other provisions:

- (i) the areas to be offered;
- (ii) the minimum exploration program to be performed in each area;
- (iii) the minimum local content requirements for acquisition of equipment and services; and
- (iv) the technical, financial, and legal qualification criteria for candidates to be eligible to participate in the bid.

Moreover, competing bids for oil and gas concessions are evaluated on a grading system, with scores awarded according to the bidders' proposed signature bonus and minimum exploration program. The proposed local content used to be bid criteria, but it was excluded in recent rounds.

As a matter of national policy, the ANP includes in its bidding rounds minimum requirements of local content which may vary from round to round, depending on the location and respective material, equipment, or services to be supplied.

The policy of local content has been eased over the past years. The agency has established new local content requirements for the last offshore bid rounds, simplifying the overly-detailed percentages of previous bidding rounds, as well as improving the rules for local content inspection during the performance of E&P activities.

3 Production Sharing Regime

In 2007, *Petrobras* announced what is believed to be the largest discovery of oil and natural gas accumulations found in the Western Hemisphere in the last thirty years. The huge potential of these new oil and natural gas resources, so-called "Pre-Salt" reservoirs, in addition to the sheer volume, the quality of the oil - considered a light crude oil with high commercial value - and the fact that the reserves found so far indicate that exploration risks are relatively low, have motivated the government to rethink the country's petroleum regime.

As a result, the Brazilian government opted for the introduction of the production sharing regime for the exploration and exploitation of hydrocarbons within the Pre-Salt areas and others "strategic" areas, maintaining, therefore, the concession regime for the exploration and production operations out of such areas.

Its legal framework consists of three pieces of legislation. The main pillar of the new regime is the Law No. 12,351/2010, which governs the E&P activities under a "production sharing" regime. Under this framework, in the event of commercial findings, the contractor will have the right to recover the costs and investments from the results of the oil and gas produced (known as Cost Oil). The portion of the production resulting from the difference between the total production volume and the portions related to the cost in oil and royalties due, will be split between the federal government and the contractor (known as Profit Oil), in accordance with the criteria defined by the contract. The contractor will bear the risks of exploration and development.

The new regulatory framework also provides for some additional mandatory elements for the production sharing regime, such as minimum local content and the value of the subscription bonus to be paid by the winning parties. Moreover, the criteria for awarding an agreement to a bidder, under the proposed system, is the offer with the highest percentage of Profit Oil to the federal government. Foreign companies participating in public bids will also be required to organize a local company under Brazilian law if they are awarded an agreement.

In addition, *Petrobras'* role in the operations in the Pre-Salt areas was minimized by recent changes in the regulatory framework. The Law No. 12,351/2010 was amended in October, 2016, no longer requiring *Petrobras* to be the exclusive operator of all areas granted by the federal government under production sharing regime. After such amendment, the Decree No. 9,041 of May 2, 2017, introduced *Petrobras'* pre-emptive right to hold a minimum participating interest and be the operator of the pre-salt area, in which case it must comply with the minimum stake of thirty percent interest in the consortiums to be formed with third parties contractors. In the event the state-controlled company waives its pre-emptive right, it may participate on the bidding round, along with the other bidders, under equal conditions of participation.

The second piece of legislation, Law No. 12,276/2010, authorized the federal government to assign *Petrobras* certain areas located in the Pre-Salt that have up to five billion barrels of equivalent oil, waiving the requirement of public bidding, subject to a payment which shall be made by *Petrobras* with government bonds. The concession of these areas involves *Petrobras'* assumption of all risk, with ultimate ownership of the output. This is referred to as the Transfer of Rights Regime.

The third piece of legislation, Law No. 12,304/2010, authorizes the creation of a public company, *Pré-Sal Petróleo S.A. (PPSA)*, with the purpose of governing production-sharing agreements and agreements for trading hydrocarbon fluids, owned by the federal government. The PPSA will have a voting majority on operating committees.

The last pillar of the framework is the creation of a Social Fund. This Social Fund has been created to serve as a regular source of financing for social projects in Brazil.

In 2019, ANP held an unprecedented bidding round, over the surplus volume arising from the areas assigned to *Petrobras* under the Transfer of Rights regime (*cessão onerosa*). Despite having offered high potential blocks in the Pre-Salt area, with an estimate ranging from 6 to 15 billion of existing oil barrels, the bidding round did not manage to receive offers for all offered areas.

As a result, the Federal Government has been discussing changes in the proposed model for the bid round which may include a prior agreement with *Petrobras* for the compensation of its investment in the areas. In the 2019 bid round, this agreement was to be entered into with *Petrobras* after the areas were granted.

4 Refining

As with E&P activities, the refining of domestic or foreign petroleum is a federal-government monopoly. When authorized by the state through a specific process at the ANP, petroleum refining and natural-gas processing can be carried out by private companies incorporated under Brazilian law.

Currently, Brazil has an installed refining capacity of approximately 2,400,000 barrels per day, divided among 17 refineries, 13 of which are owned by *Petrobras* and correspond to 98,2% of the total refining capacity, while the other 4 are privately held.

As part of *Petrobras'* divestment plan, and as provided for under a settlement agreement between the state-owned company and the Brazilian antitrust authority (*CADE*), *Petrobras* is required to sell 8 of its 13 refinery assets. The initiative was praised by the market, and is seen as a unique opportunity for introducing new players to the Brazilian refining complex.

The ongoing sale process was divided into two phases with 4 refineries each, which are scattered across the South, Southeast and Northeast regions of Brazil. Both are expected to be concluded by the beginning of 2021.

5 Transportation

The federal government also has a monopoly over maritime shipping of crude petroleum of domestic origin or petroleum by-products produced in the country, as well as general pipeline transportation. As with the E&P activities, Constitutional Amendment No. 9 relaxed *Petrobras'* monopoly allowing private companies to engage in any type of transportation of petroleum, its derivatives and natural gas.

According to the Petroleum Law, any company or consortium of companies created under Brazilian law may be granted an authorization from the ANP to build facilities and to engage in any type of transportation of petroleum, its derivatives and natural gas, whether for domestic supply, import or export.

In 2009, the government enacted the Federal Law No. 11,909 (known as the Gas Law), which regulates activities of transportation through pipelines, storage, liquefaction, regasification, treatment, processing and marketing of natural gas, and introduces a number of key elements to encourage the development of natural gas industry in the country. The Gas Law was received with certain enthusiasm by participants of the segment, particularly with regards to the provisions that introduce competition in the construction and operation of pipelines, the assurance of access by third parties to the new and existing pipelines, and the creation of certain degree of wholesale competition by enabling industrial consumers and gas-fired power generators to by-pass local distribution companies and buy gas directly from producers, importers or retailers.

The Gas Law introduced the concession regime for the construction, expansion and operation of pipelines for the transport of natural gas. The Ministry of Energy would propose, on its own initiative or as requested by third parties, new pipelines or the expansion of existing ones. New pipeline construction and expansion projects will be preceded by an open season aimed to identify potential shippers and the level of interest in the project. The main criterion to be applied in awarding concessions for transportation will be the lowest annual revenue. Initial user of the gas transport service are granted with an exclusivity period, that shall not be superior to 10 years, to use the hired capacity of the new transport gas pipelines. Such exclusivity period shall be determined by the Ministry of Energy and studied on a case-by-case basis, considering an estimated time for the amortization of investments before opening access.

Recognizing the importance of a transparent and non-discriminatory access regime to transportation network for the development of a competitive gas market, the Gas Law assures the access to third parties to the network even during the exclusivity period. An open season process shall be conducted to grant third parties interested in contracting available or idle capacity in the pipeline.

Although many changes were implemented, the Gas Law did not create a competitive market in Brazil. A program with players from the industry and the Government was created to suggest changes that could foster investments in the sector. This program was called *Gás para Crescer* (Gas to Grow) and resulted in a Bill of Law which is awaiting approval from Congress. The goal to create a competitive market would include the sector unbundling, creation of an entry/exit system of tariff, coordination of the market by an independent agent, among other changes.

Although the Bill of Law is still in Congress, the entry of new shippers in the market has been promoted by Petrobras with the sale of pipelines assets as part of its divestment program. In 2017, the subsidiary *Nova Transportadora do Sudeste (NTS)*, owner of a relevant gas pipeline network, was sold. Two years later, Petrobras also sold 90% of its equity interest in *Transportadora Associada de Gás (TAG)*, another relevant gas pipeline network. The state-owned company is currently divesting the remaining 10% stake in TAG and is planning to sell its 10% interest in NTS and 51% interest in Petrobras Gás S.A. (*Gaspetro*), an entity with participation in many of the gas distribution companies with concessions of different states.

Along with the Gas to Grow initiative, in 2019 yet another program was launched by the Federal Government, namely the New Gas Market (*Novo Mercado de Gás*), aiming at the increase of competition among players in the natural gas market. It consists of a series of principles and guidelines set out under the CNPE Ordinance No. 16/2019, such as the unbundling of the natural gas chain, supporting the privatization of state-owned gas distributors, as well as establishing clear rules for non-discriminatory access to essential facilities, gas processing plants and LNG terminals, among others.

In addition, the Decree No. 9,934/2019 created a committee for monitoring the opening of the Brazilian natural gas market (*Comitê de Monitoramento da Abertura do Mercado de Gás Natural – CMGN*), with the primary purpose of overseeing the implementation of such measures fostered by the New Gas Market program.

6 Special Customs Regime for the Oil and Gas Industry (Repetro-Sped)

Brazilian companies that research and produce oil and gas (as well as those companies hired by them) may benefit from the Repetro-Sped. This special customs regime is regulated by the Brazilian Customs Code (approved by Decree No. 6,759/2009) and by the RFB Normative Instruction No. 1,781/2017. Repetro-Sped basically provides the following benefits:

1. Definitive imports of the goods specified in Annex I of the referred Normative Instruction permanently with suspension of federal taxes;
2. Temporary imports of the goods specified in Annex II of the Normative Instruction with the suspension of federal taxes;
3. Fictitious exports of goods manufactured in Brazil with the subsequent importation with the benefits described in items I and II above; and
4. Purchases of raw materials and intermediary products with suspension of federal taxes.

Repetro-Sped is a federal regime, thus in principle it applies only to federal taxes. However, the Brazilian states have reached the Agreement No. 03/2018, which allows them to reduce or exempt the state VAT (“ICMS”) on transactions benefited by the federal special customs regime.

Maritime Law

1 General Rules

Maritime law is traditionally known as the oldest branch of law, and in Brazil this isn't too far from the truth. The basic law governing the matter was enacted in 1850 (Law No. 556), and is known as the Brazilian Commercial Code.

As a general rule, the Code sets out the entire private structure of relationships around ships, as well as the people involved in shipping activity, the main contracts, insurance, loss due to collision, gross average, and liabilities.

Alongside the issues treated by this imperial Act, there are other important laws dealing with specific issues of maritime law, such as Marine Mortgage, Special Brazilian Records, Oil Spills at sea, etc. Moreover, decrees and normative rules were enacted in order to adapt such an old Code to the requirements of the current maritime commercial scenario.

Navigation safety is an issue fundamental to the steady development of marine activity and, therefore, in Brazil, this issue remains under the competence of the Maritime Authority, duly exercised by Brazil's Navy through the Directors of Ports and Coasts.

Besides the investigative powers of the Maritime Authority, exercised through the Port Captaincies distributed throughout Brazil, the law entitles it to regulate the activity regarding navigation safety aspects and their relationship with other uses of the sea, such as cable installation, submarine scientific research, etc.

However, the said regulatory competence is, in fact, exercised by the Maritime Authority through the NORMAMs (Maritime Authority Rules), which also deal with the vessels' certification, classification societies, the foreign vessels in transit in Brazil, pilot services, naval inspection activities, ships ballast water, maritime meteorology, administrative investigation and others.

To better demonstrate the development of the maritime activity in the country, it is appropriate to describe the main institutions and their role in the maritime systematic and the Brazilian navigation.

2 The Port Captaincy

The Port Captaincy plays a fundamental role in marine-traffic regulation, as it is the means by which the Maritime Authority makes effective its rules. Its authority is related, among other items, to the safety at sea within Brazilian jurisdictional waters and to incidents which may cause pollution of waters under national jurisdiction.

The Port Captaincy is part of the federal administration, a subset of the Ministry of Defense, and it operates in Brazilian territory as the Maritime Authority through its representatives located in all organized ports and seaside locations. It has authority to make rules on a wide range of issues related to safety at sea. This Maritime Authority also regulates pilot services, determines the minimum safety crew required for each ship, determines the equipment to be carried on board ships and platforms, establishes the limits of domestic navigation, and sets out rules related to naval inspections and surveys.

Given its authority in regulating and controlling safety at sea, the provisions of Federal Law No. 2,180/1954, which governs the Maritime Tribunal's establishment, entitle the Port Captaincy to investigate marine accidents within the scope of its authority.

3 The Maritime Tribunal

The Maritime Tribunal, with jurisdiction over national territory, is a self-regulating body that assists the Judiciary, is connected to the Navy Command and its purpose is to judge on sea, river and lake matters. Considering the technical approach of issues related to the Maritime field, Federal Law No. 2,180/1954 regulates the proceedings of investigation and judgment of administrative infractions related to accidents and relevant facts observed at maritime, lacustrine and fluvial navigation.

The proceedings start with the Port Captaincy's investigation whose conclusions, when duly referred to the Maritime Tribunal, will grant due judgment and imposition of penalties, that may vary from fine to suspension of the maritime activities, among others.

Although defined as a tribunal, the institution that is a subset of the Navy consists of an administrative body, and it is composed by seven judges:

- (i) a President, Navy's General Officer on or off duty;
- (ii) two military judges, off-duty officers of the Navy; and
- (iii) four civil judges, experts in insurance, maritime and public international law.

After receiving investigation records, the Maritime Tribunal analyzes all evidence gathered and decides whether the Port Captaincy report on the accident is sufficient for judgment of the case, or if it needs to gather further evidence to ground its adjudication. For that purpose, there is a Special Navy Prosecutor at the Tribunal with authority to review the entire investigation, referred by the Port Captaincy and request whatever is necessary to judge the case. Pending the Maritime Tribunal's review and judgment, there is no statute of limitation on tort claims.

The Maritime Tribunal, as mentioned, is an administrative body whose decisions are guidelines for state and federal courts' adjudication. Its judgments are limited to the technical aspects of the case, enforcement of which results in the imposition of administrative penalties, such as fines, suspension of seafarer's certificates, licenses, etc.

4 The Specialized Judicial Body in the State of Rio de Janeiro

To improve judicial adjudication of Maritime issues, the state courts of Rio de Janeiro have created specialized bodies for maritime cases.

Maritime judicial adjudication is now performed by judges in charge of bankruptcy and all corporate issues, considering this area was comprised into the Commercial Code.

Maritime activity is commonly governed by customary and written rules in a mix of sources from Common Law and Civil Law systems which require expert judges possessing familiarity with all such matters to try accordingly.

For this reason, the state of Rio de Janeiro has included maritime cases under the authority of these bodies dedicated to hearing corporate and commercial matters.

5 The Brazilian Agency of Waterway Transport- ANTAQ

Brazil's waterway transport market has been regulated by the Brazilian Agency of Waterway Transport (ANTAQ) since the adoption of Federal Law No. 10,233/2001. Part of the Brazilian Ministry of Transportation, this agency plays a fundamental role in the market by regulating, supervising, and controlling maritime transport services rendered by private entities, including the commercialization of port infrastructure.

Under waterway transport rules, ANTAQ is entitled to authorize companies to offer maritime services within Brazilian ports and/or with Brazilian cargo, authorize foreign vessels to be chartered by Brazilian Shipping Companies, control Shipbuilding procedures, approve proposal for revision/adjustments of port rates, make rules for the Port Authorities, organize bidding process for the concession of Organized Ports or for the authorization of Terminals for Private Use, among other important functions of the maritime and port activity.

With the advent of ANTAQ, the entire industry came to be organized, supervised and regulated by it. ANTAQ's role is essential, not only to the operation of vessels in Brazilian jurisdictional waters, but also to chartering of foreign ships and to activities related to the organized ports and terminals of private use.

6 Ship Registration

To address maritime issues, focus must be placed on the ship. Under Brazilian law, many parts of Brazilian maritime activity such as domestic transport, as well as the transport of Brazilian State cargo and a percentage of importing cargo, even on an oceangoing way, in principle, shall be performed with a Brazilian registered ship.

According to the terms of the Federal Law No. 7,652/1988, amended by Law No. 9,774/1998, Brazilian ships are those duly registered within Brazil's Maritime Authority at the location of the owner's residence or wherever the ship is supposed to be operated.

Vessels' registration is also important for the demarcation of Brazilian Law's extraterritoriality, since those rules are always applicable to every act performed on board of ships flying the Brazilian flag and which are registered in the country.

Vessels with more than 100 tons of gross tonnage must be registered at the Maritime Tribunal in Rio de Janeiro. For vessels with less than this volume, the registration is simple and remains under the competence of the Port Captaincy.

Registration may also take place abroad at any Brazilian embassy or consulate, which will issue temporary registration valid until the ship's arrival in the port where it will be registered definitively.

A ship may not be registered to foreigners who do not reside in Brazil, except for boats used for sport and recreation.

7 Brazilian Special Registry- REB

In times of great scarcity of jobs in the marine sector, the Special Brazilian Registry was created as a tool to promote the maritime industry and Brazilian maritime activities as a whole.

It is important in the maritime context to mention the Special Registry of Ships at the Maritime Tribunal, which enables the ship owner and/or carrier to obtain tax exemptions, increase the number of foreigners in the crew, hire insurance abroad, and receive financial aid from the Merchant Marine Fund.

This registration was created by Federal Law No. 9,432/1997 and is regulated by Federal Decree No. 2,256/1997.

Every Brazilian ship operated by Brazilian shipping companies is eligible for this registry. Foreign vessels might be eligible if bareboat chartered by Brazilian shipping companies with due flag suspension.

8 Tax Incentives for Building, Maintaining/Repairing, and Converting Ships and Port Modernization

In order to advance the naval industry in Brazil, the Brazilian Customs Code has provided for certain important tax exemptions on the importation of spare parts to maintain and repair ships. The same treatment is provided for the importation of spare parts and equipment for ship modernization and conversion.

A few requirements must be fulfilled for the Treasury to grant these exemptions:

- (a) the beneficiary must be registered with the Treasury for that purpose;
- (b) transportation of imported goods must be done in ships flying the Brazilian flag or chartered by Brazilian shipping companies; and
- (c) ship modernization or conversion must be registered with the Maritime Tribunal in the Brazilian Special Registry.

There is also a tax system for importing parts and equipment to be used in the shipbuilding process or to replace a part and equipment already imported and used in the shipbuilding chain.

Law No. 11,033/2004 established a tax system for the Modernization and Growth of Port Infrastructure (REPORTO), which is intended to expedite the acquisition of capital goods by the beneficiaries thereof. This system was established in August 2004, and it was initially intended to be in effect until December 31, 2007. This term was extended until December 31, 2011 by Law No. 11,726/2008, until December 31, 2015 by Law No. 12,688/2012 and until December 31, 2020 by Law No. 13,169/2015.

REPORTO suspends the levying of several taxes (IPI, PIS, and COFINS) on domestic sales of machines, equipment, spare parts and other goods to be used as fixed assets of companies that benefit from this system, for exclusive use in ports for loading, unloading, and cargo-transfer services, operational support and security systems, environmental protection services, dredging services, and in professional training centers for worker training and education.

When the REPORTO beneficiary is the direct importer of the goods, it will also benefit from suspension of the import duty, IPI, PIS-importation, and COFINS-importation taxes on the transaction. However, suspension of the Import Duty will only apply to machines, equipment and other goods for which there is no similar domestic product.

The suspension of taxes under REPORTO is converted into an exemption provided that the imported goods are applied on the purposes declared to the customs authorities in order to obtain the tax relief.

Aviation Law

1 General Rules

Aviation activity in Brazil is governed primarily by the Brazilian Aviation Code, adopted by Federal Law No. 7,565/1986 (the “Code”), which applies the principles and rules adopted by International Conventions, such as the Warsaw Convention of 1929 (modified by the Hague Convention of 1955), the Chicago Convention of 1944, the Geneva Convention of 1948, the Rome Convention of 1955, the Tokyo Convention of 1963 and the Montreal Convention of 1999.

The Code provides an overview of concepts that apply to Brazilian air navigation, air traffic, aeronautical infrastructure, aircraft, crew, and services directly or indirectly related to flight.

Given the depth of private relationships related to flight, a code of laws regulating those issues was necessary to unify the legal system of civil aviation activity. Among the issues address above, the code deals with the concept of Brazilian air space, construction and operation of airports, air safety, aircraft, certification, registry, liabilities, and many other important topics to transporting people and cargo by air.

However, considering that the Code was enacted in 1986 and since then many innovations were introduced in the sector - for instance, the use of unmanned aerial vehicles known as *drones* - a Bill is currently under discussion in the Federal Senate for an amendment and updating of the Code.

To provide an overview of the aviation scenario in Brazil, a few considerations of relevant aviation institutions and topics are required.

2 Brazilian Civil Aviation Agency- ANAC

Brazil's air transport market has been regulated by the Brazilian Civil Aviation Agency (ANAC) since the adoption of Federal Law No. 11,182/2005. The agency began operating in 2006 and replaced the Civil Aviation Department (DAC). ANAC is a federal autonomous body, which is linked to the Ministry of Transport, Ports and Civil Aviation. The agency plays a fundamental role in the market by regulating, supervising, and controlling air transport services rendered by private entities, including the operation of airports.

ANAC authorizes companies to manufacture aeronautical products and render air services at Brazilian airports by issuing a Certificate of Approval of Air Transport Company (CHETA) and recognizing those applicable to foreign Air Carriers. ANAC is also responsible for conceding air services on specific routes and for authorizing flight times for all airlines flying in and/or to Brazil by issuing an approval (HOTRAN).

Note that the agency also plays a special role into the legislative process of technical issues related to the field and is empowered to enact bidding rules addressed to the players of the sector involved into the air activity.

The agency also works as an administrative dispute settlement body for air carriers and airport operators. The entire public airport infrastructure is controlled by the Brazilian Airport Infrastructure Company (INFRAERO), a state-owned company, which is responsible for managing, operating and controlling all government-operated federal airports (i.e., those whose operations have not been transferred to private parties by way of concessions), including safety, operational conditions and infrastructure, all regulated by ANAC.

Also, Brazilian air traffic is controlled by the Air Traffic Control Department of the Brazilian Air Force (DECEA), which is responsible for air traffic management, meteorology, communications, aeronautical information, cartography, implementation, flight inspection and staff training for all aeronautical systems.

3 Airlines Companies

Recently, Law No. 13,842/2019 amended the Code and suspended all restrictions on foreign ownership interest in airline companies and in the management of Brazilian airlines, which motivated the expansion strategy.

The new ruling enables foreign groups to incorporate a fully owned air transportation company in Brazil and to obtain before ANAC a concession for operating the so-called “serviços públicos aéreos” (*free translation* – public air services), which includes operating domestic flights, currently a highly concentrated market.

Together with the increase in the foreign investment’s limit, there will also be changes in the management of airline companies that might be managed by foreign investors too.

Open-skies systems are also applicable to foreign companies interested in having their registration countries linked to Brazil. To be eligible to fly to Brazil, the foreign airline must be designated by its country and if so, duly authorized by the ANAC. After the completion of legal requirements before ANAC the foreign airline company may set up a branch office in Brazil, which requires due registration at commercial institutions. Foreign airline companies authorized to operate in Brazil must have permanent agents in Brazil, with full powers to handle and resolve any issues, including powers to receive service of process on behalf of the company.

Following the completion of commercial requirements for registration, the airline company must request an authorization to operate in Brazil before ANAC, and have its flights duly authorized by the same agency.

After ANAC authorization and certification are obtained, if applicable, Brazilian and foreign airline companies must abide by all technical and legal regulations issued by the agency, subject to imposition of fines.

In 2018, the Brazilian Aviation Sector made an important advancement with the promulgation of the Open Skies Agreement between Brazil and the United States, on June 26, 2018. In addition to the liberalization of the rules, there will be a reduction of government intervention in the American-Brazilian relations. As is well known, for an Open Skies policy to be effective, it is essential to have bilateral and even multilateral Air Transport agreements ratified between nations.

The aforementioned agreement represents an expansion in the entire offer of Air Services between Brazil and the United States, resulting in a lower cost to fly, making it easier for travelers and entrepreneurs.

Following the enactment of the Open Skies treaty with the USA, ANAC also announced having signed Open Skies treaties with the United Kingdom, The Netherlands and Luxembourg.

4 Aircraft Registration

The most important element of aviation activity is the aircraft itself. As such, the aircraft's nationality is a relevant point to be considered when providing air services.

According to the terms of the Brazilian Aviation Code, Brazilian aircraft must be registered before the Brazilian Aviation Authority in its registry sector, also called the Brazilian Aeronautical Registry ("RAB"), located in Rio de Janeiro.

Registration concludes when the aircraft's nationality and enrollment certificate have been issued.

Certain contracts related to the aircraft, such as leasing agreements and mortgages, must be registered within the Brazilian Aeronautical Registry in order to guarantee its legal effects against third parties.

To every aircraft registered before the RAB, the Brazilian law is applicable, even if flying from foreign territories and in cases where international law does not provide otherwise.

5 Tax Benefits for Aircraft Maintenance and Repair

In order to advance the aviation industry in Brazil, the Brazilian Customs Code has provided some important tax exemptions for the importation of spare parts for aircraft production and repair.

Law No. 12,249/2010 established the Special Tax Incentive System for the Brazilian Aircraft Industry (RETAERO), which suspends the following taxes on the sale of inputs in the domestic market or importation of goods:

- PIS and COFINS taxes on the seller's income, when the buyer is a legal entity beneficiary of RETAERO;

- PIS-Importation and COFINS-Importation taxes, when the importer is a legal entity beneficiary of this system;
- IPI on the shipment of goods from the manufacturing or similar establishment when the buyer in the domestic market is a legal entity beneficiary of the system, and
- IPI on imports, when the importer is a manufacturing establishment owned by a legal entity beneficiary of the system. Related technology and technical assistance services may also benefit from PIS, COFINS, PIS-Importation and COFINS-Importation suspension.

On January 1, 2013, Decree No. 7,923/2013 entered into force and changed certain parts of the wording of Law No. 12,149/2010. The new wording of the Law defined the recipient of the special regime as the legal person that manufacture parts, tools, components, equipment, systems, subsystems, inputs and raw materials, or provides services of basic industrial technology, development and technological innovation, technical assistance and technology transfer to be employed in the maintenance, conservation, modernization, repair, review, conversion and manufacturing of products classified under heading 88.02 of the Mercosur Common Nomenclature (NCM). Before the amendment, only aircraft classified under heading 88.02 of NCM enjoyed the benefit.

The suspension of taxes under RETAERO is converted into the application of a zero rate of such taxes provided that the goods are applied on the production or maintenance of aircraft.

Companies may qualify for RETAERO for up to five (5) years as of June 14, 2010. Benefits under the system, in turn, may be enjoyed on acquisitions and imports within a five-year period of the date of qualification for RETAERO.

6 Remodeling of the passenger and cargo transport services

On December 13, 2016, ANAC approved the Resolution No. 400/2016, which defines the new General Conditions of Air Transportation (CGTA), and the new rights and obligations of passengers. The Resolution establishes rules for passengers' assistance, baggage, ticket purchase, among others.

Through this review, together with the consolidation of the rules, all General Conditions of Air Transportation and assistance rights guaranteed to all passengers must be centered in one sole normative document. According to ANAC, the main goal of this change is to optimize the passengers' rights, making the Brazilian rules compatible with international market standards, together with encouraging competitiveness among the airline companies and the growth of the market, which will enable the entry of low-cost services companies and the unification of air transport.

Recently, on August 7, 2019, ANAC Resolution No. 526 was also published, which brought some important changes related to the passenger and cargo transport services:

- (i) Extinction of the operation types provided in RBAC No. 119;
- (ii) Creation of 2 operation modes: regular/scheduled and non-regular/unscheduled;

- (iii) Establishment of new parameters for the technical and operational airworthiness requirements in the certification process for aircraft and airlines;
- (iv) Aircraft operators of up to 19 seats and 3,400 kg or helicopters must follow the RBAC No. 135 regulation for regular (scheduled) and non-regular (unscheduled) operations. On the other hand, operations of aircrafts of over 19 seats and more than 3,400 kg, must follow the rules of RBAC No. 121.

These changes aim to make modernization and simplification in the certification process viable by harmonizing concepts and adopting coherent technical parameters, thus establishing an even more favorable environment for the development of the sector.

7 DRONE Regulation

Considering the fast-growing number of unmanned aircraft in Brazil, the need arose to regulate the sector in order to ensure operational safety and the control of the equipment that has been used in the national territory as well as qualified professionals to operate this technology.

Thus, the following standards were published:

- ANAC: (RBAC-E) No. 94 – provides for the drone operational technical requirements, such as flight guidelines, equipment registration/classification, the pilots' obligations and operational restrictions. DECEA: provides for regulation of matters involving: the use of drones (i) in Public Security Operations, Civil Defense and Federal Revenue Inspection; (ii) for the benefit of the bodies linked to the Federal, State or Municipal Government; (iii) for recreational purposes; (iv) for implementation of regional committees to discuss drone matters.
- ANATEL: provides for all drone regulation related to telecommunication matters, in order to avoid any kind of interference with the different kinds of media.

Mining Sector

1 Legal and Regulatory Framework

Mining activity, referring to exploration (understood as the research work) and exploitation of mineral resources, is regulated by article 176 of the Brazilian Federal Constitution, by the Brazilian Mining Code, by special laws and by regulations issued by National Mining Agency (hereinafter referred as “ANM”).

Pursuant to Article 176 of the Brazilian Federal Constitution, there is a constitutional separation between the ownership of the surface (real estate properties) and the mineral resources existing in it, which belong to the Brazilian Federal Government (article 20, IX FC).

Therefore, any mineral exploration and/or exploitation may only take place with a prior approval granted by the Brazilian Federal Government, through administrative procedures conducted before ANM according to Mining Code provisions.

Essentially, the mining segment structure in Brazil is composed of two competent authorities which duties complementary to each other:

- National Mining Agency (ANM), created by Law 13.575/2017, member of the indirect Federal Public Administration, submitted to the special autarchic regime and linked to the Ministry of Mines and Energy, in substitution of the prior National Department of Mineral Production (DNPM).
- Ministry of Mines and Energy (MME).

The Mining Code (article 2), provides for the following regimes of exploitation of mineral resources (i.e. types of mining titles): (i) Authorization and Concession; (ii) Mineral Licensing (“*Licenciamento Mineral*”); (iii) Small Scale Mining Consent (“*Permissão de Lavra Garimpeira*”), and (iv) Monopoly Regime.

The difference among them relates to the mineral substance purpose of exploitation, the miner (whether an individual or a legal entity) and the size limitation of the area for each mineral substance. Considering its applicability to all types of mineral substances, the most common regime is Authorization and Concession, explained below.

2 Foreign Participation

According to the Mining Code, the mining authorizations may be conceded both to Brazilian individuals or Brazilian entities.

Constitutional Amendment No. 06, of August 15, 1995 extinguished the distinction between companies of national and foreign capital, requiring only that the mining entity is Brazilian; i.e., that it has principal office and administration in the country, irrespective of capital origin and control.

In view of the above, currently, Brazilian regulations allow for the direct or indirect foreign investment in mining in Brazil (except for mining rights located at border areas) and most of the foreign investments are made via acquisition of a Brazilian company which already holds the mining rights. The other alternative would be a greenfield operation, which would require initial geology studies followed by the organization of a Brazilian entity and the application of the mining licenses.

It is important to highlight that there is a restriction still in force for foreign capital related to activities conducted in border areas, explained in item 2.2 below.

2.1 Mining Entities

For the development of mining activity - considered from a business standpoint – any of the association forms existing in Brazil may be used; i.e., the mining entity may be organized under a corporation, a limited liability partnership, or as any other form deemed to be most beneficial.

Entities that seek authorization for exploration or exploitation, once incorporated and registered under the National Department of Commerce Registry, have 30 days to file before the ANM the bylaws or articles of associations and shareholders agreements in force, as well as any future modification thereof.

The entities holding Exploitation Permits located near or over the same mining zone may obtain permission for the formation of a Mining Consortium by means of a Federal Government Decree. The mining proximity, to which the Mining Code refers to for the formation of a consortium is not the physical proximity but, rather, it is that which enhances extraction productivity or its capacity.

Because this is an activity of national interest, some requirements must be observed as to the incorporation of operating entities and development of the work.

2.2 Real Estate and National Safety Aspects

Despite ANM's liberal understanding as to the presence of foreign capital entities in the mining segment, there are legal restrictions to international capital regarding activities that are carried out over the border line (with the exception of exploration and exploitation of mineral substances of immediate use in civil construction).

The legal definition of “border line” is: “the internal border 150 km (one hundred and fifty kilometers) wide, parallel to the earthly division line of the national territory”.

The competent body to govern over the operation of certain activities over the “border line” is the National Defense Council (CDN, the acronym for *Conselho de Defesa Nacional*). The interested parties must request from the CDN a prior authorization, meeting the following requirements, which must be expressed on the entities bylaws or articles of incorporation:

- 51% (fifty one percent) of the capital, at least, must be held by Brazilians;
- two thirds of the entities' employees must be Brazilian;
- the entities' administration must be composed, effectively, of Brazilian nationals (voting majority).

The proceeding for obtaining CDN's consent is commenced before the ANM itself, with the filing of the requirement and agency's first analysis. Besides the documentation usually required, the interested parties must present certain specific documents, such as:

- (i) evidence of administrators' or quota holders' nationality; and
- (ii) nominal relation, listing the nationality and number of shares of all shareholders, in the case of corporations.

Such documents will be forwarded for the Council's assessment and issuance of opinion, favorable or not, after which the process will return to the ANM following the normal course.

There are, still, restrictions to foreign participation - individuals or entities - in a company holding real estate rights over rural properties located over the “border line”. Considering that the easements needed for the mining activities are “integrating parts of the mines” – as defined on the Code – and that said easements are a real estate right (as pointed out even by the “border line” specific legislation), there must also be prior consent by CDN for the introduction of an easement.

Such foreign participation is subjected to the same procedures aforementioned, not only the head offices, but any facility with representation powers or delegations.

3 Mining Permitting Procedures Overview

As mentioned above, the Mining Code (article 2), provides for four types of regimes of exploitation of mineral resources (i.e. types of mining titles): (i) Authorization and Concession; (ii) Mineral Licensing (“*Licenciamento Mineral*”); (iii) Small Scale Mining Consent (“*Permissão de Lavra Garimpeira*”), and (iv) Monopoly Regime. The difference among them relates to the mineral substance purpose of exploitation, the miner (whether an individual or a legal entity) and the size limitation of the area for each mineral substance.

Notwithstanding, miners are required to submit their mining title request to ANM, with all documentation provided for in the Mining Code.

Considering its applicability to all types of mineral substances, the most common regime is Authorization and Concession.

Essentially, the Authorization and Concession regime is composed of 2 phases:

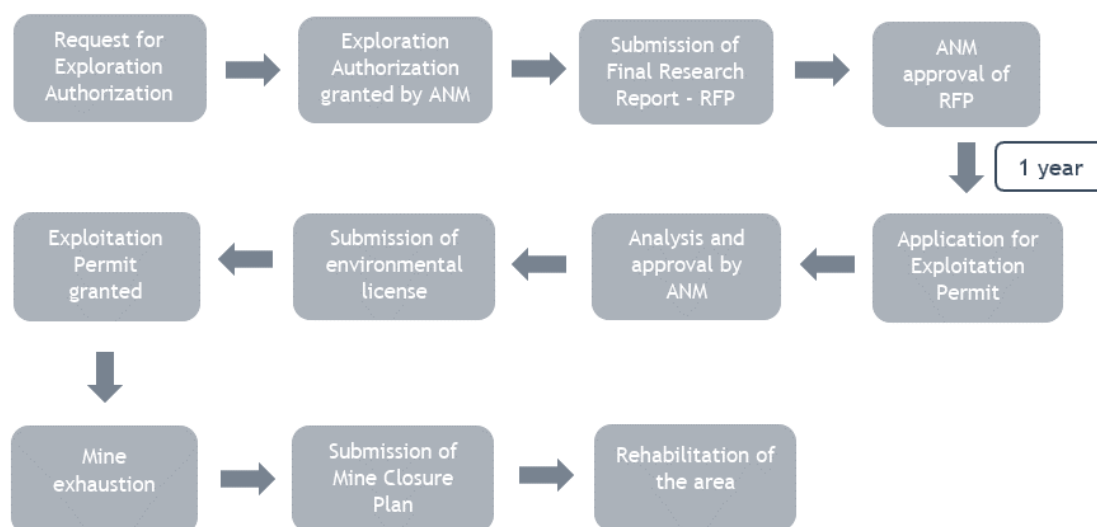
- (i) **Exploration Phase (Exploration Authorization):** at this stage, mineral extraction is not allowed (as a general rule), and its purpose is to carry out all the work necessary for the definition of the deposit, its appraisal, and the determination of its economic viability. After the work is completed, the miner shall submit a document known as “Final Research Report” (“RFP”) with the definition of the deposit.

After approval of the RFP, the preparatory stage for mining begins through presentation of the application for exploitation, within one year of the approval. At this stage, the presentation of environmental license will be required as a condition of the granting of the Exploitation Permit, as explained below. If such environmental license is not presented, the exploitation application may be rejected by ANM.

- (ii) **Development Phase (Exploitation Permit):** understood as the set of coordinated operations aimed at the industrial development of the deposit, that being, the extraction of useful mineral substances contained therein until their beneficiation.

As a general rule, the Exploitation Permit grants to the miner the right to exploit the deposit until it is exhausted, provided that it does not cause the forfeiture of the title.

It is worth noting that further to the mining authorizations abovementioned, the miner must still obtain the relevant environmental licenses. In practical terms, both administrative procedures for obtaining the mining and environmental licenses must run together, as documents issued by ANM may be required by the environmental agency, and, in parallel, documents issued by environmental agency may be required by ANM for granting of Exploitation Permit.



3.1 Exploration Authorization

Companies interested in drilling a mine area, for the purposes of studying the existence of technically and economically feasible deposit, must apply for an 'Exploration Authorization' before ANM. The decision of ANM on the approval or not of the issuance of the Exploration Authorization is appealable. In the case that the decision is maintained, it can be appealed at a second stage, before the MME.

The Exploration Authorization can be assigned or transferred upon request to ANM.

Concerning the validity of the Exploration Authorization, we note that it shall be granted, according to ANM's own criteria, for no less than 1 year and not more than 3 years, with a single extension allowed upon duly justified request submitted for ANM's approval.

A legislative change through Decree No. 9.406/2018 restricted the possibility of successive extensions taking into consideration situations of: i) impossibility of entrance in the real estate property; ii) absence of permits and authorizations required to carry out the exploration work, provided that the miner has been diligent and has not contributed to the delay in issuance, in any event.

The holder of the authorization is obliged to implement its exploration work, submitting to ANM the RFP on the existence of technically and economically feasible deposits, which is prepared under the supervision of an entitled technician, within the term of the authorization's validity or its renewal term. The non-submission of the technical report within the due term would subject the holder to the payment of a fine, calculated according to the hectares of the explored area.

It is possible for the holder of the Exploration Authorization to use public or private areas to explore. Concerning private areas, we inform that the landowner or occupiers are entitled to a negotiable fee for the occupation of the area and also to an indemnification for damages that may be caused and may arise due to the exploration works. In the case of use of public areas, the indemnification for damages is also applied, but the fee for the occupation is dismissed.

If the landowner or occupiers cannot reach an agreement on the abovementioned fees with the holder of the license, then the case shall be submitted to the Court's evaluation.

Once the Exploration Authorization is issued by ANM, the respective holder must:

- (i) begin the exploration works within 60 days;
- (ii) not interrupt the exploration works without justification (after commencement), for more than 3 consecutive months or for 120 days accrued and not consecutive. In any event, the initiation or reinitiation, as well as the interruptions of the works must be promptly notified to ANM;
- (iii) provide notification to ANM if another substance that is not encompassed in the Authorization is found, for which ANM must authorize a new term for the exploration works; and
- (iv) an annual fee must be paid until the RFP is submitted to ANM. This Annual Fee per Hectare ("*Taxa Anual por Hectare*") is calculated according to the mineral substances involved, the area and the location of the mine and others, by criteria of ANM.

Once the RFP is approved, it begins the preparatory stage for mining through presentation of the application for exploitation, within one year as of the approval (extendable for equal period upon justification presented by the holder of the license). At this stage, the presentation of an environmental license will be required as a condition of the granting of the Exploitation Permit, as explained below. If such environmental license is not presented, the exploitation application may be rejected by ANM.

In the event that the holder of an Exploration License does not apply for the Mining Concession within the term (or extended approved term) established in the Mining Code, the explored area will be declared available for mining requests by third parties (i.e. tender procedures).

3.2 Exploitation Permit

The application for the Exploitation Permit must also be supported by several documents, such as easements and Economic Development Plan (PAE), among others, as listed in the Mining Code.

If the applicant of the Exploitation Permit does not comply within the due term, with additional requirements that may be demanded both from ANM or MME, at their sole discretion, the area will be declared available for mining concession for third parties interested in the area (i.e. tender procedure).

The MME is the competent authority for issuance of the Exploitation Permit, except for mineral substances that can be explored under Licensing Regime, whose competence of issuance lies with ANM (art. 2, XVIII, Law No. 13.575/2017).

Within 90 days from the publication of the Exploitation Permit, the holder of the mining concession must request from ANM the occupancy of the mine.

The holder of the mining concession must comply with all the requirements established in the Code, such as:

- (i) initiate the mining works provided in the Mining Plan, within 6 months from the publication of the Exploitation Permit;
- (ii) mining the field in accordance with the Mining Plan approved by ANM (non-compliance is subject to penalties that can either result in a warning or forfeiture of the Exploitation Permit);
- (iii) extract only the mineral substances indicated in the Exploitation Permit;
- (iv) promptly notice ANM of any discovery of new mineral substances not included in the Exploitation Permit;
- (v) not suspend the mining works without approval of ANM;
- (vi) submit to ANM, by March 15 of each year, the report of the activities of the previous year.

The holder of the Exploitation Permit, through requirement duly justified to ANM, can obtain temporary suspension of the mining activities, or notice the waiver of its title. In both cases, the requirement will be accompanied by a report of the works carried out and the status of the mine studied.

In case of suspension request, the miner is authorized to interrupt the activities while the request for temporary suspension of mining is pending decision by ANM. ANM will evaluate *in loco* the mining area and issue a technical report for the decision. If the requirement for the suspension of the works is denied or the waiver is consummated, ANM will suggest the necessary measures for the continuation of the works and application of the penalties, if applicable.

3.3 Mine Closure

The closure of the mine is a relatively new subject in Brazil and became a significant topic after a major environmental accident occurred in 2015 in the state of Minas Gerais. Following the incident, several mining fields were identified in a state of abandonment and potentially capable of causing environmental damage.

Therefore, according to an amendment in mining legislation (Decree No. 9.406/2018), the extinction of a mining title is subjected to: i) prior ratification of the renunciation request by ANM, and; ii) execution of the Mine Closure Plan, though prior approval by the ANM.

As a result of the above, the abandonment of the mining field and/or the unjustified interruption or suspension of the exploration and exploitation works for a period greater than those provided for in the law, as well as renunciations/waivers not made in accordance with the procedures above, will subject the mining company to penalties that may be imposed by ANM.

4 Statutory Royalty (“CFEM”)

Applicable law in Brazil requires that the mining companies pay a statutory royalty known as “CFEM” (*Compensação Financeira pela Exploração de Recursos Minerais*) on the revenues from the sale of minerals resources extracted from areas located in Brazil; on the revenue from the consumption; on the price of exportation, considering the Tax Authorities parameter price; on the amount of the foreclosure, in the scenario of a mineral good acquired at a public auction; on the amount of the first acquisition of the mineral good, in the case of extraction under the Small Scale Mining Consent (“*Permissão de Lavra Garimpeira*”). Such royalty is essentially a consideration for the economic use of mineral resources in Brazilian territory.

The payment of the statutory royalty is due whenever the exploitation works of the mineral rights commences. It is worth mentioning that it will not only be due as from the commercialization of the minerals resources extracted, as there is an understanding that the statutory royalties are paid in cases where the mineral is either utilized, processed or consumed by the mining company itself.

The rates to be levied on the sold mineral products vary according to the substance extracted. According to the modifications provided by Law 13.540/2017, the rates on the sold mineral vary from 1% to 3,5%.

5 Penalties

The Mining Code provides for the following penalties in view of noncompliance with obligations by the miner: (i) warning (art. 63, I); (ii) fines (art. 63, II), up to a maximum amount of approximately BRL 3,495.86³⁰ which is applied for each infraction and doubled in the case of recurrence; and (iii) forfeiture of the mining title (art. 63, III).

Although there is no express provision in the Mining Code, ANM may also determine the interruption of activities (art. 45 of Law No. 9.784/99 and Administrative Rule No. 155/2016). The interdiction is normally applied in cases of illegal mining activity (activities conducted without permit or outside the boundary of the mining title), extraction above the limit allowed in the exploration phase, or when there is a risk of damage to the environment.

Forfeiture of mining titles is the most serious penalty provided under Brazilian mining legislation, since it is the loss of the mining title. It can be applied in the following situations:

- (i) formal characterization of the abandonment of the deposit or mine;
- (ii) non-compliance with the time periods for initiating and reinitiating exploration and exploitation work, despite having received a warning and a fine;
- (iii) intentional carrying out of exploration work not in agreement with the conditions described in the Exploration Consent, despite having received a warning and a fine;
- (iv) proceeding with high grading or the extraction of substances not included in the Exploitation Permit, despite having received a warning and a fine; and/or
- (v) failure to comply with recommendations repeatedly made by the inspection agent, characterized by the third recurrence of violations with fines within the period of one year.

6 Relevant legislative changes

6.1 Mining Dams

In Brazil the mining industry plays a major role in the national economy. A big challenge faced by the mining industry is waste disposal management, resulting from the mineral processing. The primary way to store such waste is to allocate it within tailing dams.

³⁰ Administrative Rule 23/20, that came into force on March, 1, 2020.

Despite the long history of the mining industry in Brazil, regulations related to tailing dams are relatively new. The first law referring to dam safety only came into effect in 2010, by means of the enactment of Federal Law No. 12,334/2010, which established the Dam National Safety Policy, applicable to all kind of dams, not only those intended for the mining sector.

The Dam National Safety Policy sets out general requirements for dam owners with respect to dam safety, including classifying dams based on risk, development of dam safety plans, and dam safety inspections and reviews.

Consequently, two years later, the ANM published Ordinance No. 416/2012 and Ordinance No.526/2013, regulating the specific aspects of the obligations applicable to mining dams.

Since the incidents that took place in 2015 and 2019, several legislative changes have been put forward.

The most recent was Ordinance No. 13/2019, issued by ANM, that set out further restrictive obligations related to the operation and decommissioning of mining dams. In addition, such Ordinance implemented the obligation of decommissioning or rendering inoperative the dams built or raised by the upstream or an unknown method. The decommissioning deadlines vary according to the specific characteristics of the structures.

Additionally, in 2020, the National Nuclear Energy Commission (“CNEN”) published Ordinance No. 257/2019, which created the Radioactive Tailing Dams System, resulting from the mining operations that beneficiate radioactive ores, and that establishes specific deadlines and obligations related to these kinds of dams.

6.2 Deadlines for the granting of mining rights

In 2020, ANM issued Ordinance No. 22, which came into force on February 1, 2020, establishing the maximum deadline for ANM to carry out the analysis of certain requirements submitted in the mining proceedings, in accordance with the provisions in articles 11 and 18 of Decree No. 10.178/2019.

The new Ordinance brought a significant change for the mining sector. If the ANM does not deliver a decision within the period established in the Ordinance, the requirement listed in Annex I will be tacitly approved. This means that the requirement will be considered approved if instructed with all the documentation and information necessary for its analysis.

It is important to highlight that under the terms of §3 of art. 2 of the Ordinance, even if tacitly approved, the ANM may further verify compliance with legal requirements.

6.3 Deadlines for the granting of mining rights

Also, in 2020, the Federal Law No. 13,975/2020 was published, which authorized the exploitation of industrial clays, ornamental rocks, and calcium and magnesium carbonates under the Licensing regime. As a consequence, for those miners interested in exploiting these substances, the change enables less bureaucracy, since the licensing regime is simpler when compared to the concession regime.

7 Recent Legislation Proposals

Several changes to the current model adopted for the mining sector in Brazil have been proposed and have been under discussion in the House of Representatives during the last 5 years.

The well-known proposal for a new mining framework, Bill 5,807/2013, whose objective was a major change in the current mining system, after years of discussion (until 2017), was criticized for causing legal uncertainty and preventing new investments in the sector.

After years of discussions and given the difficulties of reaching the quorum to vote, the Federal Government presented in July, 2017, the Revitalization of the Brazilian Mineral Industry Program, which brings about essential changes for the sector. At first, three Provisional Measures were signed interim measures that includes the creation of the National Mining Agency (ANM), changes in the Mining Code and the improvement of the legislation that deals with Financial Compensation for the Exploration of Mineral Resources (CFEM), statutory royalties.

The purpose of the Program is to increase the participation of the mining sector in Gross Domestic Product (GDP), generation of jobs and new investments. After the vote, two of the Provisional Measures were converted into law (Law No. 13.575/2017 that creates ANM and Law No. 13.540/2017 that brings changes to statutory royalties) and, unfortunately, the provisional measure that proposed changes in the Mining Code was not voted on within the constitutional term and lost effectiveness.

As a result of the loss of effectiveness of the Provisional Measure to amend the Mining Code, the Federal Government published Decree No. 9.406/2018 with some specific changes in the regulation to the Mining Code, as follows:

- (i) Possibility of continuing the exploration work after approval of the RFP. The result, however, cannot be used for rectification or complementation of the RFP information.
- (ii) The non-submission of the RFP will lead to the opening of the availability procedure. The previous legislation stated that if the RFP was presented after the mining title term expiry, the area was considered free for new requirements.
- (iii) Inclusion of the reuse of wastes and tailings in the concept of exploitation work and incentives to mining fields destined to the reutilization, including through amendment of the Exploitation Permit by simplified process.
- (iv) Admission of a single extension request for Exploration Authorization term, except if i) proved the impossibility of entrance in the real estate property; ii) absence of permits and authorizations required to carry out the exploration work, provided that the miner has been diligent and has not contributed to the delay in issuance, in any case.
- (v) Changes in the availability procedure, which may be preceded by a public offer to evaluate the attractiveness of the areas for electronic auction.
- (vi) Prohibition of the successive extension of the “*Guia de Utilização*” term, issued for a period of one to three years, extendable one time only.
- (vii) Adoption of international criteria for classification of resources and reserves.

- (viii) Establishment of a 60day term, counted from the formulation of the requirement, so that the miner can attest to the beginning of the environmental licensing, demonstrating every 6 months the status of the licensing.
- (ix) Mandatory execution of the Mine Closure Plan before the extinction of the mining title and its inclusion as a mandatory requirement of the PAE, subject to ANM approval.
- (x) Possibility of the mining right being given as a guarantee for a financing, pursuant to requirements to be regulated by the ANM.
- (xi) Possibility of the ANM, after Mine Closure Plan approval, to put the area in availability or to block it.
- (xii) Setting a time criteria of 5 years for application of the double penalty in the case of recurrence.
- (xiii) Authorization so that the miner can interrupt the mining activities while the request for suspension is pending analysis by the ANM.
- (xiv) New possibilities of fines, among them one for conducting mining activities without a mining title.
- (xv) Establishment of conditions for exploration in an area declared a National Reserve or in areas under a monopoly regime.

Other bills that seek to repeal the restrictions on foreign capital in border areas, regulations for mining activities in indigenous lands and other relevant issues are still subject to a vote, but there is no forecast for their publication.

Compliance

1 Compliance in the Spotlight

To correspond to the requirements set forth by the international treaties against corruption, Brazil enacted Law 12,846/2013 (known as the “Anticorruption Law”) on August 1, 2013. Said law provides for the civil and administrative liability of legal entities for acts harmful to public interest and against the Public Administration.

In this new legal scenario, it is essential that both national and foreign companies review their operational and administrative routines in view of the new rules, adopt and enhance their Codes of Ethics and Conduct, and implement practices in line with the legal standards for relationship with the Public Administration through Compliance Policies.

The main legislation directly addressing corporate risk and compliance management in Brazil are:

- Law No. 12,846/13 - Anticorruption Law
- Law No. 12.850/13 – Criminal Organizations
- Law Decree No. 8,420/15 – Anticorruption Law Regulation
- Law No. 13,303/16 – Public Companies’ Law
- Law No. 12,529/11 – Competition Law
- Law No. 9,613/98 – Money Laundering Law
- Law No. 8,666/93 – Public Bidding Law
- Law No. 8,429/92 – Improbity Law
- Law Decree No. 2.848/40 - Criminal Code
- Law No. 13,869/19 – Abuse of Authority Law
- Law No. 7,492/1986 – White Collar Law
- Law No. 13,608/18 – Reporting Channels Law
- Ordinance No. 909/15 – Evaluation of Integrity Programs
- Ordinance No. 910/15 – Administrative Responsibility and Leniency Agreements
- Law No. 12,813/13 – Conflict of Interest Law
- Central Bank Circular 3,978/20 – Policy and Procedures related to AML/CFT

The Anticorruption Law has become the main statute on the fight against corruption, notwithstanding its recurrent joint application with the other legislations referred above, on a case-by-case basis. It applies to any corporation, foundation, association or foreign company that has its registered office, branch or representation in Brazil and which practices wrongful acts against the public administration. Both foreign governments and public international organizations are encompassed by the term “public administration”.

The law provides for an administrative and civil strict liability of legal entities, but it does not exclude the administrative and civil individual liability of its directors or officers or of any natural person who is a perpetrator, co-perpetrator or participant of the tort. Directors and officers shall only be held accountable in connection with a tort to the extent of their culpability.

Parent companies, subsidiaries, affiliates, or co-members of a consortium, within the scope of the contract, may be deemed joint and severally liable for the corrupt practices established in the law, with such liability being limited to the payment of penalty fines and full compensation of the damages caused. In the event of a merger or amalgamation, the responsibility of the successor is restricted to payment of a fine to the extent of the assets transferred.

2 Illegal Practices

Under the Anticorruption Law, the following acts are prohibited: (i) to offer, promise or give an undue advantage to a national or foreign public official; (ii) to finance, pay, sponsor or by any other means facilitate such illegal acts; (iii) to use an interposed individual or legal entity to conceal or dissimulate the real objective or the identities of the beneficiaries of the acts committed; (iv) to hinder the government's investigations or hearing activities, or to interfere in their actions.

In the context of public bids, such Law also prohibits: (i) frustrating or defrauding the competitiveness of a public procurement procedure by means of an arrangement, agreement or any other method; (ii) preventing, disturbing or defrauding the performance of any act in a public procurement procedure; (iii) removing or attempting to remove a bidder in public procurement procedure, by means of fraud or offering any kind of advantage; (iv) defrauding public procurement procedures or related contracts; (v) creating a legal entity to defraud a public procurement procedure or to enter into government's contract; (vi) obtaining, fraudulently, an undue advantage or benefit from an amendment to or an extension of the agreement with the government, or from the notice of the public procurement procedure or the related contractual instruments; or (vii) rigging bids, manipulating or defrauding the economic-financial balance of a government contract.

These broad definition of wrongful acts may lead to abuses on the part of the public administration in initiating investigations and proceedings against corporations. Its provisions may lead to various interpretations, exposing companies to greater risks. These risks will be better measured when regulations are implemented, and jurisprudence and case law evolves.

2.1 Fines and Penalties

In the administrative branch, companies held liable for wrongful acts under the law shall be fined and required to publish the decision in the media.

The amount of the fine may vary from 0.1% to 20% of the gross revenue of the last fiscal year prior to the initiation of administrative proceedings. If it is not possible to apply such criteria, the competent authority may apply a fine that varies from BRL 6,000.00 (six thousand reais) to BRL 60 million (sixty million reais). For purposes of evaluating the amount of the applicable fine, the competent authority will take the following into consideration: (i) seriousness of the offense; (ii) benefit earned; (iii) consummation or attempt; (iv) degree of injury; (v) negative effect caused by the unlawful act; (vi) cooperation in investigations of the legal entity; and (vii) existence of internal control mechanisms (effective compliance program).

In the judicial branch, competent authorities may apply the following sanctions: (i) forfeiture of property, rights or amounts representing advantage or profit directly or indirectly obtained from the infringement, subject to the right of the injured party or a good-faith third-party; (ii) partial suspension or interdiction of the activities of the company; (iii) compulsory dissolution of the company; (iv) prohibition from receiving incentives, subsidies, grants, donations or loans from public agencies and public financial institutions or from financial institutions controlled by the government for a minimum period of 1 year and a maximum period of 5 years.

3 Leniency Agreements

The Anticorruption Law establishes the possibility of leniency agreements with investigating authorities. These agreements are possible if collaboration with the government result in the identification of other involved parties, and in the swift acquisition of information and documents proving the illegal act. Directors and officers who collaborate with information and documents will not benefit from any possible reduction of sanctions eventually applied by the authority. For purposes of the Anticorruption Law, only the legal entities are entitled to obtain such benefits.

4 Integrity Programs

Each company will determine, on a case-by-case basis, the level of governance it intends to implement, following best guidelines and legal standards provided by the legislation. In this regard, it is recommended that companies implement mechanisms and internal control proceedings against irregularities on the application of its conduct and ethics statutes. Such mechanisms, referred to as an 'integrity program', must be suitable and updated according to the activities and requirements of the undertaking. The existence of a well-structured integrity program helps to diminish penalties in the event of an infraction of the compliance or anticorruption obligations set out by law.

As a corporate governance tool, a solid compliance program enables the setting of a safe environment for the interaction among the company, its investors and management, preserving directors and managers from Administrative, Civil and Criminal potential liabilities.

Decree No. 8,420/2015 provides for the minimum requirements for an integrity program to be considered effective and, thus, enable the involved company to benefit from a reduction in fines for infringements. According to the Decree, a compliance program consists of:

“[the] mechanisms and internal proceedings of integrity, auditing and incentives to denounce violations in the context of a corporation, and the effective application of codes of ethics and conduct, policies and guidelines with the objective to detect and correct violations, fraud, irregularities and illicit acts committed against the public administration, either national or international.”

Minimum requirements for the program to be considered a mitigating factor include:

- engagement of senior management of the company;
- implementation of a code of ethics, code of conduct and compliance policies applicable to all employees and managers;
- extension of the program to third parties such as suppliers, service providers, agents and associated companies;
- periodic training;
- periodic risk assessment;
- proper accounting registries;
- internal controls that secure trustworthy financial reports;
- internal proceedings that prevent fraud and illicit acts;
- independence means and delegation of powers to the compliance officer;
- an open communication channel for reporting of irregular activity;
- disciplinary actions in case of violations;
- internal procedures to secure the immediate interruption of the detected violation, and damage remediation;
- appropriate checking measures for hiring third parties; and
- disclosing donations to political parties and candidates transparently.

5 AML/CFT Applicable to Financial and Banking Operations

Aiming at bringing the Brazilian banking system closer to the current reality affected by the risks of new forms of money laundering crimes, the Central Bank of Brazil enacted — in January 2020 — Circular 3,978 providing for new AML/CFT rules.

As per the new rules, the financial institutions and other BACEN-authorized entities are called upon to implement internal controls and procedures in accordance with the characteristics and complexity of the line of business developed by each institution.

Although the new rules set forth certain guidelines, each institution has the flexibility to establish its own set of policies and procedures in a manner more compatible to its operational activities, which shall be based on the profile of its clients and service users, as well as on such activities risks and other elements related to the profile of institution's employees, partners and service renders.

5.1 AML Policy

AML Policy must be documented and previously approved by the institution's board of directors and/or the board of officers. Furthermore, from now on the institution's personnel must be trained to deal with the combat of money laundering and financing of terrorism.

5.2 Prudential Conglomerate

Institutions comprising prudential conglomerates are authorized to adopt one single AML/CFT set of policies, procedures and internal risk analysis, upon prior approval by the board of directors or board of officers, as applicable. Moreover, the procedures intended to monitor, select and analyze the suspicious operations, including the report of such operations to the Federal Financial Operation Board COAF, may also be shared on a centralized basis by all the institutions of the same conglomerate.

5.3 Appointed Officer

Each institution must submit to BACEN the name and qualification of one specific officer in charge of representing the institution before BACEN in connection with all AML/CFT related matters.

5.4 Know Your Client ("KYC")

As to the KYC policies, Circular 3,978 provides for the related processes determining that they must consider as basic elements regarding the clients and users, specific identification, qualification and associated risk level. The procedures for qualification of the clients must be carried out upon the gathering and processing of personal and financial information pertaining to each client and duly evidenced by means of proper and valid documentation compatible with the level of risk and the nature of the business with each client.

5.5 Ultimate Beneficiary Owners

Equally relevant and mandatory upon the enactment of Circular 3,978 is the need to identify the individuals who are considered the ultimate beneficiary owners of legal entities that deal with and enter into agreements with the financial institution. The new rule creates the obligation for the institutions to apply to the ultimate beneficiary owners the same procedures that are applicable to the legal entity as for the risk measurement related to the intended business.

The institutions may establish a minimum value as a reference to the equity participation to determine when someone will be considered an ultimate beneficiary owner, subject to a minimum of 25% (calculated either direct or indirectly). To that end, the institution must follow the same patterns defined by the Brazilian Internal Revenue Service to facilitate the identification of the individual subject to the ultimate beneficiary owner regulatory treatment.

5.6 Employees, Business Partners and Service Providers

Financial institutions must from now on implement procedures for application to the relationship with their own personnel, all sorts of business partners and service providers. The gathered KYC information and documents related to such relationships must be maintained by the institutions for ten years as of the date of termination of each contractual relationship.

5.7 Risk Assessment

The institution must take into account and assess the risks related to the likelihood of materialization and magnitude of financial impacts, as well as legal, reputational and socioenvironmental effects stemming from its business and operational relationships with clients, users, employees, business partners and services providers, as applicable. The new rules permit that the institution create specific set of risk categories in order to make possible the establishment of specific controls.

5.8 Suspicious Operations and Business Situations

As to suspicious operations and business situations, the procedure related to monitoring, selection and analysis of risks must be detailed and in written format in a risk manual distributed across the institution following its approval by the institution's board of directors and/or board of officers, as applicable. The monitoring and selection of suspicious situations must be fully carried out in forty-five days as of the date the facts occurred.

5.9 Reports to COAF

The suspicious cases must be reported to COAF. The communications derived from suspicious activities must be completed within the following date when the decision to report has been taken. In the case that the institution has not reported any suspicious situation to COAF within the span of one year, a declaration must be filed with COAF stating that no case has been found suspicious and subject to report; such 'negative report' must be filed within ten business days as of the termination of the respective fiscal year.

5.10 Publicly Exposed People ("PEP")

The new rules broadened the already existing concept of PEP. From now on, besides the individuals already enlisted, city counselors, mayors and state congressmen, as well as political parties' presidents and treasurers or equivalent must also be included.

Agribusiness

1 Concept and Importance of the Sector in the Economy

From 2000 to 2019 (third quarter period), agribusiness showed continuous growth in its exports. The cumulative increase of the external sales in the first three quarters of 2019 compared to the same period of 2000, represented 354% (IVE-Agro / Cepea). The expectation for 2020 is that Brazilian agribusiness will keep growing in comparison to 2019.

Agribusiness is of great importance to the Brazilian economy. Besides the generating of employment and income, it has strongly contributed to the Brazilian macroeconomic stability through its foreign sales, since the foreign exchange inflows mitigates the trade deficit from the other productive sectors.

In 12 months (between October/2018 and September/2019), the export volumes (IVE Agro / Cepea) of almost all products considered in export indexes has increased 9%. The figures of the first three quarters of 2019 compared to the same period of 2018 are significant, with the highlights being corn (130%), cotton (114%), coffee (38%), ethanol (20%), wood (6%) and meat. On the other hand, orange juice and sugar have decreased shipments, respectively 9% and 20%.

Over the past nineteen years, from 2000 to 2019, the trade balance of Brazilian agribusiness (export revenues minus imports expenditures) grew by more than three times, which resulted in an increase of more than 350%.

Agribusiness is a strategic sector for the Brazilian economy and it has contributed strongly to the macroeconomic stability of the country. Representing an important portion of Brazilian GDP (gross domestic product) in 2018, it may be the only sector with a significant growth compared with industry and services.

Moving past the old agrarian concept and the traditional barriers between the production, manufacturing and services sectors, the agribusiness industrial complex comprises a group of activities aimed at agricultural and animal husbandry production. Such production processes involve a group of interrelated activities, represented by agricultural and animal husbandry production, fishing, forestry, agribusiness, logistics and food distribution, domestic and foreign trade, stock markets, public policies, end consumers, input manufacturing and technical services rendering and consulting companies. The agro-industrial systems or chains include all the players involved in the production, processing, and marketing of a specific product. The same systematic view of the agricultural business also applies to the financing structures, the futures and commodities exchange and specific public policies.

Therefore, “Agribusiness” can be defined as “an organized group of economic activities comprising the manufacturing and supply of input, production, processing, storage and distribution for foreign and domestic consumption of products of agricultural and animal husbandry origin, as well as the stock and futures markets and the appropriate forms of financing, organized according to specific public policies”. The term “agribusiness” is very close to the concept of agro-industrial complex, which includes all companies that produce, process and distribute agriculture and animal husbandry products.

2 Rural Credit and Private Agribusiness Financing System

The National Rural Credit System (“SNCR”) is more than a credit system, given that it also acts as a planning instrument for production in order to avoid bottlenecks in the supply of primary assets to the co-related sectors, including the supply of foreign currency for the import of capital goods. In this case, credit is the incentive mechanism that complements the market to guide production and long-term investment. For a qualified loan, the borrower must be a rural producer and the borrowed amount must be specifically destined for agriculture.

The SNCR was highly criticized starting in the 1980s. The main arguments behind such criticism were that its effects were not very significant on the growth of agricultural production, on the technologies adopted by producers and on productivity increase.

Beginning in 1988, the government introduced rules to regulate and reduce government intervention in the farming and animal husbandry markets.

In this context, the actual re-organization of the agricultural policy began on August 22, 1994, when the Law 8,929 was enacted and provided for the Agricultural Bond (“CPR”). In addition, Law 11,076 was enacted on December 30, 2004, in line with the guidelines set forth in the 2004/2005 Farming and Animal Husbandry Plan, whose intention was to provide the sector with new sources of financing through the creation of new financial instruments to drive and support agribusiness, such as the Agricultural Certificate of Deposit (“CDA”), the Agricultural Warrant (“WA”), the Agribusiness Credit Rights Certificate (“CDCA”), the Agribusiness Letter of Credit (“LCA”) and the Agribusiness Receivable Certificate (“CRA”), within a truly new system.

Based on the new formulation of agribusiness credit instruments, the government's conducting role, through economic law in its planning method, has pursued the definition of specific instruments in order to benefit the real integration between the agro-industrial market and the financial and capital markets, which would be less dependent on scarce government resources and more resistant to the usual adversities of this segment (within such new system).

Law 11,076/2004 created a new financial regulation for agribusiness with the direct cooperation with the private sector. The government strengthened the pillars of Private System for the Financing of Agribusiness almost 40 (forty) years after the implementation of the SNCR.

The government, which used to intervene directly in the rural activity, is now one that encourages private initiatives as a source of funding. Hence, by means of instruments with their own characteristics and specific legal regime, the role of the main agribusiness financier has shifted to the private financial market.

With the new financial instruments, the financial market is now equipped with more adapted instruments, and the capital market has become an alternative to finance agribusiness, increasing the long-term liquidity of the production chains. Furthermore, these new financial instruments have provided refinancing for agribusiness companies, thereby becoming instruments to limit risk and to raise funds to increase the supply and to reduce credit cost for Brazilian agribusiness. In relation to this new context and financing system for the sector, it is important to mention that the Brazilian legal framework had long required the existence of a modern legal system, necessary for all the private credit instruments, in order to limit the potential for legal disputes that might eventually increase insecurity with respect to compliance with the agreements, thereby increasing the interest rates and reducing credit offer.

Law 13,331, dated September 1, 2016, still under such new system, allowed CDCA and CRA to be subject to exchange rate fluctuation, which is an advantage for exporters. To this end, the CDCA and the CRA should (in alignment with exporters needs):

- (i) be integrally backed by agribusiness credit rights subject to exchange rate fluctuation for the same currency, as established by the CMN;
- (ii) be negotiated exclusively with non-resident investors in accordance with the laws and regulations in force; and
- (iii) observe other applicable CMN rules.

Nowadays, the local exporting agro-industries will be able to take on international financing with lower interest rates.

2.1 New Instruments for the Financing of Agribusiness

2.1.1 Agricultural Bond (Cédula de Produto Rural - CPR)

The CPR was introduced by the Law 8,929, dated August 22, 1994. Originally, such Law only provided for the modality referred to as “Physical CPR”, in which the issuer undertakes the obligation to deliver certain quantity of product on a certain date and at a certain place. Monetary values are not mentioned. This modality represents an obligation of physical delivery of products. Additionally, considering it is a representative instrument of the products, the Law provides that it can be traded on stock and over-the-counter markets.

The “Financial CPR” (CPRF) is a CPR modality established by Law 10,210, dated February 14, 2001, which included Article 4-A to the Law 8,929/2000. Similar to the Physical CPR, the CPRF includes the description of the product and the respective amount negotiated; the difference lies in the settlement method. The CPRF does not provide for the physical delivery of the product, only for the settlement upon payment, on due date, of the amount corresponding to the specified amount of product multiplied by the fixed price or the index applicable to such product, which will be described in the instrument.

2.1.2 Agricultural Certificate of Deposit (Certificado de Depósito Agropecuário - CDA) and Agricultural Warrant (Warrant Agropecuário - WA)

The Agricultural Certificate of Deposit (CDA) was introduced by Law 11,076/2004. It was created for the trading phase of the agricultural and animal husbandry production. The CDA represents a commitment to deliver agricultural and animal husbandry products, their by-products, sub-products and residues with economic value, deposited in warehouses that are part of the warehousing system for agribusiness product. The Agricultural Warrant (WA) was created together with the CDA. The WA is a credit instrument that grants right of pledge over the products described in the CDA.

2.1.3 Agribusiness Credit Rights Certificate (Certificado de Direitos Creditórios do Agronegócio - CDCA)

The Agribusiness Credit Rights Certificate (CDCA) was introduced by Law 11,076/2004. It is a freely traded credit instrument that represents a commitment to pay in cash the correspondent amount indicated thereof. It is an extrajudicial executive instrument. Only rural producers' cooperatives and other legal entities that carry out trading, processing or industrialization of agricultural and animal husbandry products and input or machinery and implements used in agricultural and animal husbandry production can issue such instrument. It must be registered with registration and cash settlement system of assets authorized by the Brazilian Central Bank (“Bacen”) and held in custody by financial institutions or other institutions authorized by the Brazilian Securities and Exchange Commission (“CVM”) to render custody of securities services.

2.1.4 Agribusiness Letter of Credit (Letra de Crédito do Agronegócio - LCA)

The Agribusiness Letter of Credit (LCA) is also a freely traded credit instrument that represents a commitment to pay in cash. It is also an extrajudicial executive instrument, but only financial institutions can issue LCAs. It must be registered with registration and cash settlement system of assets authorized by the Brazilian Central Bank (“Bacen”) and held in custody by financial institutions or other institutions authorized by the Brazilian Securities and Exchange Commission (“CVM”) to render custody of securities services. It is also important to mention that the value of this instrument cannot exceed the total value of the credit rights attached thereto. Furthermore, the LCA grants right of pledge over the credit rights tied to them.

2.1.5 Agribusiness Receivable Certificate (Certificado de Recebíveis do Agronegócio - CRA)

The Agribusiness Receivable Certificate (CRA) is a freely traded credit instrument, exclusively issued by Securitizing Companies of Agribusiness Credit Rights, representing a commitment to pay in cash and that constitutes an extrajudicial executive instrument.

After months under a public hearing, the CVM Regulation 600 - new regulation that regulates CRA - was issued on August 1, 2018. Before such regulation was issued, financing through CRA had been under the umbrella of CVM Regulation 414, applicable to CRI. Therefore, it will certainly guarantee greater effectiveness and legal certainty for such financing method.

3 Land Statute and Agrarian Contracts

In order to give appropriate legal structure, principles and specific rules to business relations in rural areas, special legislation was created that now governs the commercialization of land and the use of other people's work in the achievement of such — the Land Statute (Law 4,505/64 as ruled by the Decree-Law 59,566/66).

The Land Statute rules the sharecropping and livestock, agriculture, agro-industrial or extractive partnership. The farmer can commercialize the rural activity using third party land by lease or partnership, using his experience and sharing the results/profits.

The so-called agrarian contracts are provided for in the Land Statute and are divided into two distinct types of contract: the rural lease and the agricultural partnership. Both contracts are “bilateral, onerous, consensual and non-solemn” and may be executed in writing or verbally.

Thus, the agricultural partnership agreement and the leasing aim to regulate the possession or temporary use of land or property, between the owner of a rural property and the one that exercises any agriculture, livestock, agro-industrial, mining or mixed activity on it.

3.1 Agricultural Partnership

The agricultural partnership is regulated by the Article 4 of Decree-Law 59,566/66. According to such Decree-Law, consisting of the “agrarian contract by which a person undertakes to assign to another, for a certain period of time or not, the specific utilization of a rural property, its part or parts, including or not, improvements, other goods and/or facilities, for the purpose of being engaged in agricultural, livestock, agro industrial, extractive or mixed farming activities; and/or for the delivery of animals for breeding, rearing, wintering, fattening or extraction of raw materials of animal origin, by sharing, alone or cumulatively”.

In this modality, the utilization of the land is made available by the owner, named by the law as the “partner-grantor”, to the one who will directly develop the rural activity on the land, called the “partner-grantee”, with a specific purpose, prohibiting the partner-grantee from utilizing the land for any other purpose than the one determined by the partner-grantor.

The main characteristic of this contract is the sharing of risks among the contractors. They share the risk in relation to the products, profits and even losses arising from the contractual relationship. In fact, when signing a partnership contract, both parties will only be entitled to receive the products if the activity is successful; otherwise, the parties shall bear the losses resulting from unsuccessful production. In other words, in the partnership contract there is the sharing of advantages, such as products, profit and crops, as well as risks, such as Act of God cases and force majeure events. It is important to emphasize that the sharing must necessarily cover the cases of production failure, whether due to the destruction of a crop by pest or other similar adversities, or due to variations in the price of the products. In these cases, in addition to the partner-grantee not receiving any amounts, the partner-grantor shall not require any payments from the other party. Thus, by means of the agricultural partnership contract, there is only the concession of a certain rural property and goods for a specific use, with the purpose of economic development and consequent sharing of the results, whereby the accessories are also affected by this contract.

The agricultural partnership agreement has distinct modalities (agricultural, livestock, extractive, agro-industrial). For each of these modalities, the law requires that a percentage be stipulated for each partner regarding their respective participation in the results of the partnership, observing, therefore, the limits established in article 96, item VI, of the Land Statute from 20% to 75% over the results obtained with the partnership.

3.2 Rural Lease

The rural lease is regulated by the Article 3 of Decree-Law 59,566/1966, as the “agrarian contract in which a person undertakes to assign to another, for a certain period of time or not, the use and enjoyment of a rural property, its part or parts, including or not other goods, improvements and/or facilities, with the objective of developing agricultural, livestock, agro-industrial, extractive or mixed activities, upon certain remuneration or rent, observing the limits of percentage defined in the Law.” Unlike the partnership, the lease allows the lessee not only the use, but also the enjoyment of the rural property, since the inherent risks of production are the sole responsibility of the lessee.

It is a contractual modality characterized by the stipulation of a fixed income to the lessor, but which must always observe the limits established in Article 95, XII, of the Land Statute, so that the established value does not exceed the limit of 15% of the registral value of the property, in the case that the lease covers the totality of the property, including its improvements, and the limit of 30% for the partial lease covering only selected portions of land for the purpose of developing “intensive and highly profitable” activities.

Therefore, unlike what occurs in the partnership, the lease is a contract that allocates the risk of the agricultural activity only to the lessee, as the direct developer of the right over the land.

4 Storage System for Agribusiness Products

The dependency of the agribusiness sector, in relation to the storage of its products, further hindered by the insufficient storage capacity of the Brazilian rural property stimulated the creation of a more professional warehousing system.

The establishment of the Agricultural and Animal Husbandry Products Storage System (SAPA) by Law 9,973/2000 and the enactment of Law 11,076/2004, which allowed the issuance of CDA and WA, forced the general warehouses that only stored agricultural products to adapt themselves to the new regulation in order to continue storing the referred products.

Such legislation, which governs the registration of agricultural and animal husbandry products warehouses, provides for a series of registrations to be obtained so that the warehouse is considered an agribusiness warehouse. Registration is concluded with the certification issued by the Ministry of Agriculture, Animal Husbandry and Supply (MAPA).

5 Agricultural Insurance

Agricultural production and revenue are strongly associated with natural events, and are also variable, which renders medium and long-term planning difficult. The risk of agriculture has increased, either because of climatic instability, associated with global warming and the intensification of capital in the composition of the product, or because of the effects of the fluctuating exchange rate on the sector's income. Agricultural insurance is an important instrument for risk management.

Agricultural insurance is also an important instrument for agricultural policy, since it enables the producer to be protected against losses resulting especially from adverse weather phenomena. However, it covers not only agricultural activity but also animal husbandry activity, the rural producer's estate, products, credit for trading thereof, in addition to life insurance for the producer. The most important objective of agricultural insurance is to provide coverage which simultaneously protects the producer, as well as provides guarantee for the producer's financiers, investors, business partners, all parties interested in the greatest possible dilution of risks, through the combination of several insurance lines.

Public Law and Financing

Brazil has reached a prominent position in the global economy in the past decade.

The internal market, due to a successful income distribution plan, nowadays comprises more than one hundred million consumers with significant purchase power. International trade operations have quadrupled from 2002 to 2012. The traffic of airports and roads doubled in the same period. In agriculture, Brazil occupies the first place as exporter of beef, chicken, orange juice, coffee and sugar, and second place as exporter of soy.

Such scenario, however, cannot be sustained and continued without the development of infrastructure projects towards the supply of the demands mentioned above. The government realized that the available infrastructure would not suffice the times to come based on the future perspectives.

In 2017, the Brazilian Government launched *Avançar*, a new round of concessions that amount to BRL 190,000,000,000.00 (one hundred and ninety billion reais) in investments. According to the most recent information publicly available, up to March 31, 2018, 24% of the planned concessions related to *Avançar* were concluded and the remaining projects were in development. Moreover, the opportunities in the Brazilian Infrastructure sector are related not only to concessions, Public-Private Partnerships and public works contracted directly with the Brazilian Government, but also with the complex and wide-ranging supplies of goods and services required to perform such contracts, meaning great opportunities for all sizes of business. In this way, it becomes indispensable to know and understand the forms by which the relation between the government and the private may interact.

1 The Bidding Procedure

The public procurement bidding process is a constitutional requirement in Brazil in order to select the private party entering into an agreement with the Government. This requirement is meant to ensure that potential corruption is avoided when leaving the choice to the public agents.

In general, the principles applicable to Brazilian Public Procurements are provided by Article 37, XXI, of the Brazilian Constitution. The provision lists five fundamental guidelines that must be observed by the Direct and Indirect Public Administration (Union, States, Federal District and Municipalities) in the course of their activities:

- legality;
- impersonality;
- morality;
- publicity; and
- efficiency.

Most of the rules subsequently included in the relevant statutes stem directly from such constitutional provision.

The most important statute related to the subject is Law 8,666/1993 (“Bidding Law”), which established the general rules for bidding and contracts of the Administration, also ruling over the permission for foreign companies to participate in the procedure. To do so, such companies must have a legal representative in Brazil and need to meet, in international tenders, the requirements of the Bidding Law, upon presentation of equivalent translated and authenticated documents by the consulate of the foreign country.

Foreign companies are also allowed to participate in the bid procedures by means of a consortium. In the case that the consortium is formed with a Brazilian company, the latter will always be the leader. It is also important to bear in mind that according to the Bidding Law, the companies that form a consortium have joint and several liability.

Apart from the basic documentation common to both national and international companies, international companies already allowed to operate in Brazil need only a registered consent Decree to participate in the bid procedures. It is important to note that international companies compete with the national ones under equality principles in relation to guarantees, requirements and procedures.

1.1 Bidding Modalities

There are six modalities of bidding procedures, regulated by Law 8,666/1993:

- (i) competition;
- (ii) price survey;
- (iii) invitation;
- (iv) contest;
- (v) auction; and
- (vi) reverse auction (regulated by Law 10,502/2002).

1.1.1 Invitation

Invitation is a procedure intended for a certain number of participants and applies to purchase of goods and services up to BRL 176,000.00 (one hundred and seventy six thousand reais), or contracting public constructions or engineering services up to BRL 330,000.00 (three hundred and thirty thousand reais).

1.1.2 Price survey

Price survey applies in the purchase of goods and services valued between BRL 176,000.00 (one hundred and seventy six thousand reais) and BRL 1,430,000.00 (one million, four hundred and thirty thousand reais) or contracting public constructions or engineering services from BRL 330,000.00 (three hundred and thirty thousand reais) to BRL 3,300,000.00 (three million and three hundred thousand reais).

1.1.3 Competition

Competition is the modality adopted in order to purchase goods and services valued above BRL 1,430,000.00 (one million, four hundred and thirty thousand reais), or contracting public constructions or engineering services over BRL 3,300,000.00 (three million, three hundred thousand reais).

1.1.4 Contest

Contests are intended for the selection exclusively of a scientific, technical or artistic work.

1.1.5 Auction

Auctions are intended for the sale of movable assets, sale of seized or confiscated goods and disposal of real property that belongs to the Government.

1.2 Bidding Types:

In addition to different modalities of bidding there are the admissible evaluation criteria, usually referred to as “types” of bidding.

The Bidding Law also mentions four types of bidding:

- (i) lowest price;
- (ii) best technique;
- (iii) technique and price; and
- (iv) highest bid or offer.

1.2.1 Lowest price

The “lowest price” type is the most common type of bidding for procurement in general, in which the lowest priced proposal wins the bid.

1.2.2 Technique and price

The “technique and price” bidding awards relative grades for the technical and the price proposals. A weighted average is calculated and the bids are ranked according to their final grades.

1.2.3 Best technique

In practice, the “best technique” is a very uncommon type, due to its complexity and relative ineffectiveness.

1.2.4 Highest bid or offer

The “highest bid or offer” is appropriate for auctions or for other biddings in which the government agency is the seller.

The evaluation of the bids must be conducted in accordance with the criteria previously set forth in the solicitation, always respecting the publicity principle. Any secret, confidential, subjective or classified element, criteria or factor that may directly or indirectly hinder the equality between bidders and the competition is strictly forbidden.

The bids will be analyzed in accordance with the provision set forth in the solicitation, which must contain all the necessary requirements to be fulfilled. The committee will examine the object's characteristics and the price with the subsequent choice of the most beneficial proposal.

After the qualification phase, the bidder may not withdraw its bid. Therefore, the winning bidder has the obligation to execute the agreement when summoned. Failure at this point will result in the application of penalties and loss of the bid bond possibly presented at the outset of the procedure.

2 Concessions & Public-Private Partnerships (PPPs)

Law 8,987/1995 (“Concessions Law”) establishes general rules regarding concessions of public services. The services set forth in the Concessions Law could be provided alone or coupled with the construction of public works or facilities. The risk of concession should be borne by the concessionaire, which shall recoup its investments from revenues collected from users.

PPPs are a means of concession of public services, which can be partially or totally subsidized by the Administration. It is regulated by Law 11,079/2004 (“PPPs Law”) and involves a previous competition bidding to choose the private party.

There are two modalities of concession under PPP:

- (i) sponsored PPP, in which the private party is partially remunerated by the Administration, together with the fares charged for executing the public service; and
- (ii) administrative PPP, in which the object will be direct or indirectly used by the Administration, thus totally subsidized by it.

The PPPs Law provides that a PPP regime must be applied to the bodies of the direct Public Administration, including the Executive and Legislative powers, the special funds, the autonomous bodies, foundations and public companies, such as all entities that are, in some way, controlled by the federal entities.

The PPPs Law sets forth that contracts may, in an additional way, predict the requirements and conditions for the authorization, by the public partner, of the transfer of control or the temporary administration of the PPP or the Specific Purpose Vehicle (SPV) to the financiers and the guarantors that do not have direct corporate commitment. The goal is for the SPV to be able to search for its financial restructuring while at the same time have guaranteed the continuity of the service provision. This Law, in addition, includes articles that treat concepts referring to the General Assembly, its structural issues and also the temporary administration.

3 Differentiated Regime for Public Contracts (RDC)

Created to meet the demand of civil works, mobility and health system for the FIFA Soccer World Cup in 2014 and the Olympics Games in 2016, the RDC is an alternative to Law 8,666/1993, conferring a fast track for the Administration's biddings.

The RDC is regulated by Law 12,642/2011 and applies to biddings and contracts necessary for:

- (i) Olympics and Paralympics Games, that took place in Rio de Janeiro in 2016;
- (ii) FIFA's Confederations and World Cup, held in 2013 and 2014, respectively;
- (iii) infrastructure and services works for the airports of the main cities hosting the events mentioned in items (i) and (ii) above;
- (iv) actions within PAC (a federal program for accelerating economic growth);
- (v) infrastructure and engineering services for SUS (public health system);
- (vi) infrastructure and engineering services for criminal and socio-educational institutions; and
- (vii) actions of bodies and entities that are focused on science, technology and innovation.

It is not mandatory to hire through the RDC – the option must be expressly made in the bid invitation.

The main differences between the RDC and the bidding model regulated by Law 8,666/1993 are:

- (i) inversion of habilitation and judgment phases: while in the traditional model the offers are analyzed before the capacity of the bidders, these phases are reversed in the RDC;
- (ii) confidentiality of the Administration's budget, to avoid anti-competitive acts;
- (iii) new criteria of judgment, such as “best artistic content” and “highest economic revenue”; and
- (iv) possibility of contracting more than one private party for executing the same object, to increase efficiency.

4 Investments Partnership Program- PPI

The Investments Partnership Program (PPI) was created by Law No. 13,334 in September 2016, with the aim of extending and streamlining the public-private interactions, for the performance of public infrastructure and other privatization projects.

The PPI is applicable to public projects that (i) are already in execution stage or that will be executed through partnership agreements signed by the Federal Public Administration; (ii) will be executed through the signing of public agreements by the State or Municipal Public Administrations; (iii) any other agreements that are a part of the National Privatization Program (Law No. 9,491/1997).

The main purposes of the PPI are the expansion of the investments opportunities and of the job offer, the technological and industrial development incentives, according to Brazil's social and economic goals. Also, the PPI intends to ensure the expansion of the public infrastructure, the wide and fair competition among the partnerships and provision of services agreements, the steadiness and legal certainty, in addition to facilitating the State's role in regulation, along with the self-sufficiency of the public regulatory entities.

The main guidelines of the Program are the stability of public policies, legality, quality, efficiency and transparency in the State's performance, and the guarantee of legal certainty, not only to the public agents, but also to the public and private entities involved.

Among the latest projects implemented or under implementation through the PPI are the following:

4.1 6th Round of Airports Concessions

The government has announced a new round of airport concessions. Three clusters of airports located in the North, South and Central regions of Brazil will be submitted to public bid. Please see below other relevant information regarding the project:

Cluster	Airports	Initial award	Planned investments
North	Manaus	BRL 43 mi	BRL 4 bi
	Porto Velho		
	Rio Branco		
	Boa Vista		
	Cruzeiro do Sul		
	Tabatinga		
	Tefé		
Central	Goiânia	BRL 49 mi	BRL 4,5 bi
	São Luís		
	Teresina		
	Palmas		
	Petrolina		
	Imperatriz		
South	Curitiba	BRL 516 mi	BRL 8,9 bi
	Navegantes		
	Londrina		
	Joinville		
	Bacacheri		
	Pelotas		
	Uruguaiana		
	Bagé		
	Foz do Iguaçu		

The bidding documents are currently under public consultation for a 45-day period. The next public hearings sessions will take place in the following locations: (i) Goiânia; (ii) Manaus; (iii) Curitiba; and (iv) Brasília. Besides that, the documents will be available for online contributions during a period of 45 days. Any interested party can submit contributions and request for clarifications until April 1st, 2020.

The auction is expected to occur in the fourth trimester of 2020.

4.2 Public consultation for the concession of seaport terminals

The Brazilian Agency of Waterway Transport (ANTAQ) has initiated a public consultation procedure for the tender bid related to two new seaport terminals in the port of Suape. Such seaport terminals are intended for general cargo, especially vehicles and containers, and, according to the information provided by the government, will result in approximately BRL 1.2 billion in investments.

4.3 Leasing of Itaquí Port area

On July 27, 2018, the Brazilian Agency of Waterway Transport (ANTAQ) promoted a public tender bid for the leasing of an area and infrastructure in the port of Itaquí. The area is intended for the logistics of general cargo (especially pulp and paper) and was awarded to Suzano Papel e Celulose. The project will require investments estimated at BRL 214.8 million.

4.4 Sale of power distribution companies controlled by Eletrobras

The government initiated a process to sell six power distribution companies, all of them subsidiaries of Eletrobras, a Brazilian public power company, which is also under a privatization process. The following companies were sold under public tender bids:

- (i) *Companhia Energética do Piauí* – CEPISA (responsible for the power distribution services in the state of Piauí) was sold to Equatorial (a Brazilian public-held power company) on July 26, 2018;
- (ii) *Companhia de Eletricidade do Acre* – Eletroacre (responsible for the power distribution services in the state of Acre) was sold to Energisa (a Brazilian public-held power company) on August 30, 2018;
- (iii) *Centrais Elétricas de Rondônia* – CERON (responsible for the power distribution services in the state of Rondônia) was sold to Energisa (a Brazilian public-held power company) on August 30, 2018; and
- (iv) *Boa Vista Energia S.A.* (responsible for the power distribution services in the state of Roraima) was sold to a consortium formed by Oliveira Energia and Atem.

The next step on the process to privatize the power distribution companies will happen on September 26, 2018, when *Amazonas Distribuidora de Energia S.A.* (responsible for the power distribution services in the state of Amazonas) will be sold. The government is still trying to privatize *Companhia Energética de Alagoas* – CEAL (responsible for the power distribution services in the state of Alagoas), but a judicial injunction has suspended the process.

5 Contractual and Anticipated Extension, and Re-bid

Law No. 13,448 was published in June 2017, editing rules and general guidelines for the extension and re-bid of partnership contracts in highway, railroad and airport sectors. The rules are applicable to the projects qualified for this purpose according to the Investments Partnership Program (PPI).

This law provides three instruments for the contracts: (i) contractual extension; (ii) anticipated extension; and (iii) re-bid.

The contractual and anticipated extension are applicable for highway and railroad sectors according to the following rules:

- (i) Contractual, in cases of end of contractual term, as long as formally expressed within 24 months before the end of the original contractual term;
- (ii) Anticipated, in which the final term of the contract will be altered and can include new investments not previously set out in the original contract; it can only be used in cases where the contractual execution is between 50-90% of the original term;
 - a. for highway concessions, it is necessary that at least 80% of the due obligatory works were executed between the initial concession term and the date of the extension request;
 - b. for railroad concessions, it is necessary to prove the compliance with the security and production goals defined in the contract for three years in a five-year interval or compliance with security goals defined in the contract in the last five years; both cases counting from the date of the extension's request.

In all cases, the original contract or invitation to bid should have a provision for extension. The extension shall be for a shorter or equal period to what is set out in these documents. Any party can request the term extension. However, it is necessary that the contract has not been extended before.

The extensions should be submitted to public hearing, opened to suggestions for at least 45 days. The parties should sign a contractual amendment with the new terms and new investment schedule. The amendment must be submitted to the Federal Audit Court (TCU) together with the studies and reports regarding the case.

5.1 Re-bid

This instrument is applicable for highway, railroad and airport sectors.

This mode constitutes an amicable extinction of the concession agreements in place, in cases where the concessionaire is unable to comply with the contractual or financial obligations originally taken. The parties shall sign a contractual amendment formalizing the details of the agreement.

In order to allow the re-bid process, the original concessionaire must present: (i) the justification and technical elements that show the ability and convenience of the process, with proposals for solution of the difficulties faced; (ii) renounce of the term for correction of failures and infractions, for forfeiture effects; (iii) formal statement on the intention to embrace the re-bid process irrevocably and irreversibly, in accordance with the law; (iv) necessary information for the re-bid process, especially the statements related to investments in reversible goods linked to the business and financing instruments used in the contract.

The original concessionaire will be entitled to indemnification, to be defined by means of arbitration or other private dispute resolution instruments, and eventually paid by the new concessionaire. On the other hand, the Granting Authority will be responsible for the indemnification to the lessors of the original concessionaire.

The Law prohibits that the following persons participate in the re-bid process: (i) concessionaire or SPE originally contracted for the execution of the partnership contract; (ii) SPE's shareholders holding at least 20% of the stock at any time before the re-bid process. This limitation extends to the participation of these persons in consortium, capital stock or new SPE participating in the new bid.

In all cases, the responsible entity should present a technical study to support the extension or re-bid, with proper identification of the object, reason and other relevant information, which shall be subject to public hearing opened to suggestions for at least 45 days.

6 State Companies

Law No. 13,303, published in June 2016, brought rules regarding the legal status of state companies, mixed corporations and its subsidiaries, in the Federal, State and Municipal scopes.

Regulating the administration of these kind of companies, this Law intends to promote the efficiency of such administration, establishing several governing and transparency mechanisms, concerning all the state companies that carry out economic activities of manufacturing or commercialization of goods and provision of services, in order to enhance the legal certainty and the actions of the regulatory public entities. In this way, the Law establishes that the state companies must make public, annually, its goals regarding the public policies, as well as financial data that expresses the costs of such activities.

Furthermore, the Law establishes specific rules for all kinds of agreements of these institutions, for the bidding procedures and for the contracts. In addition, it provides for the obligation to be guided by the social function of the company, related to the fulfillment of the collective interests, aimed at the economic well-being and the allocation of resources generated by the company to society, in a socially efficient way.

Another goal of this Law is to make stricter the criteria for the appointment of its managers, aiming for a separation from politics. Thus, it is established that appointments for management positions can only include citizens whose reputation is unblemished, who holds significant knowledge of the company's area, such as an academic education consistent with the position he/she is appointed to, and who must not be ineligible. In addition, he/she must meet one of the following criteria:

- (i) Ten years of professional experience in the public or private sector, in the company's area of practice;
- (ii) Four years of experience in the directorship of a company with a corporate purpose similar to the state company, a position of trust in the public sector or as a professor/researcher in the areas in which the company operates;
- (iii) Four years as an independent professional in activity related to the area of practice of the state company.

The Board of Directors will be composed of up to ten members, with 25% of them being independent, and must not hold any previous relation to the state company, or with holders of public offices in the Executive and Legislative Branches.

7 Project Financing

The National Economic and Social Development Bank (BNDES) has had a major role in project financing transactions in Brazil during the last decades, and has been supported by the two federal state-owned banks (Banco do Brasil and Caixa Econômica Federal) and other local state-owned banks (such as Banco do Nordeste and Banco da Amazônia). Other state-owned lenders that are usually reached out to by project owners in Brazil include the investment fund of the *Fundo de Garantia por Tempo de Serviço* (FGTS, in English - Government Severance Indemnity Fund).

In recent years, mainly due to the aftermath of the "Car Wash operation" investigation, there has been a retraction of BNDES funds and companies have started to seek other forms of private financing which became available, such as syndicated financings granted by commercial banks and the issuance of incentivized debentures (under the terms of Law No. 12,431/2011).



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