FURRIELA ADVOGADOS

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DOING BUSINESS IN BRAZIL

MAIN LEGAL ISSUES

FURRIELA ADVOGADOS

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Limited Liability Companies, Corporations, and Other Legal Entities

Selecting the appropriate business structure is a crucial step in the global business decision making process. The Brazilian legal system offers several valuable solutions enabling organizations to form under both private and public agreements. This flexibility is illustrated through the comprehensive list of available entity structures including incorporated entities, unincorporated entities, and other entities. The available incorporated entity business structures discussed below include: (1) limited liability companies (sociedade limitada), (2) corporations (sociedade anônima), (3) simple partnerships (sociedade simples), (4) general partnerships (sociedade em nome coletivo), (4) limited partnerships (sociedade em comandita simples), and (5) limited partnerships with share capital (sociedade em comandita por ações). Unincorporatd entities include de facto partnerships (sociedade em comum) and secret partnerships (sociedade em conta de participação). Additionally, Brazilian law provides for alternative forms of association including: (1) associations (associações), (2) foundations (fundações), (3) cooperatives (cooperativas), and (4) consortiums (consórcio).

This section focuses on the two most commonly utilized structures, the limited liability company and the corporation. A major factor to consider is whether the Brazilian organization will need to issue securities. This will likely be a key determinant in deciding which of these available business structures the organization will adopt. The limitada resembles a U.S. Limited Liability Company (LLC) while the sociedade anônima is similar to a U.S. corporation, and is used when there is a need to issue securities.

1.1. Incorporated Entities

1.1.1. Limited Liability Companies

The Brazilian limited liability company (limitada) has several practical benefits, such as a relatively simple incorporation procedure, a flexible organizational structure and low maintenance costs. This corporate form is widely used for wholly owned subsidiaries. For business ventures comprised of many different shareholder groups, the sociedade anônima is usually recommended (see page 20 below).

1.1.1.1. Articles of Association

The Brazilian limited liability company is organized through its articles of association. This written agreement between the partners is prepared in accordance with the Brazilian Civil Code and is filed with the board of trade in the state where the organization is headquartered, as well is in the board of trade of any states that the organization operates physical branches. Any amendment to these articles must be approved by the partner(s) representing at least 75% of the organization's corporate capital, and filed with the appropriate board(s) of trade.

1.1.1.2. Formation and Registration procedures

The Brazilian limited liability company is valid upon the filing of its articles of association with the appropriate board(s) of trade. Board of trade filing requires: (1) power of attorney for all foreign partners, (2) name of the organization, (3) summary of each partner's qualifications, (4) the company's full address, (5) the purpose of the organization, (6) total amount of corporate capital and total amount of quotas, described below, (7) process to pay in corporate capital, (8) number of quotas to be held by each partner, (9) name and qualifications of manager, who must reside in Brazil, (10) management structure.

Once the articles of association are filed, the organization may then be required to obtain additional registrations including registration with: (1) The National Register of Legal Entities to obtain a corporate taxpayer identification number (Cadastro Nacional de Pessoa Jurídica—CNPJ), (2) State Enrollment, if the company will carry out trading and/or manufacturing activities (Inscrição Estadual—IE), (3) Municipal Taxpayer Registration (Cadastro de Contribuintes Municipais—CCM), (4) Electronic Statement Registration before the Brazilian Central Bank Electronic System (Registro Declaratório Eletrônico—Investimento Externo Direto do Banco Central do Brasil—RDE-IED), (5) National Institute of Social Security (Instituto Nacional do Seguro Social—INSS), and (6) Employee Severance Fund (Fundo de Garantia por Tempo de Serviço—FGTS).

If the organization engages in import/export operations it must also obtain prior authorization from the RADAR System with the Federal Customs Authorities and must be enrolled as an import export company with SISCOMEX (Foreign Trade Department). These applications must be filed in the Customs Department where the organization is headquartered. Further, additional registrations may be required for specific operating activities, e.g., licenses issued by the Sanitation Authority – ANVISA.

An organization is permitted to execute contracts and open bank accounts in Brazil after it is enrolled before the National Register of Legal Entities and receives its corporate taxpayer identification number (CNPJ). Remittance of funds to Brazil by foreign partners, either as investment or as loan, must be registered with the Brazilian Central Bank Electronic System. This registration before the Brazilian Central Bank is essential for future payment of profits to the foreign partners, repatriation of capital (in case of capital investments), and/or payment of interest and principal (in case of loans).

In addition to the enrollment of the Brazilian company with the National Register of Legal Entities, all foreign equity holders must be registered with this governmental authority to obtain a corporate

taxpayer identification number (CNPJ) and all foreign individuals holders must be registered with the Individual Taxpayer Register to obtain an individual taxpayer identification number (CPF).

1.1.1.3. Corporate Books and Records

The Brazilian limited liability company must adopt an accounting system to ensure regular bookkeeping of the commercial and financial information related to its activity and is required to maintain three ledgers: (1) the ledger of management minutes (Livro de Atas da Administração),[1] (2) the ledger of minutes and opinions of the audit committee (Livro de Atas e Pareceres do Conselho Fiscal),[2] and (3) the ledger of minutes of the partners' meetings (Livro de Atas de Assembléia).[3] To open these ledgers, the manager and accountant must sign the opening statement and obtain a registration number by filing the ledger with the board of trade.

1.1.1.4. Partners

The Brazilian limited liability company must be formed by at least two partners. Partners may be either individuals or legal entities. The partners do not need to be Brazilian citizens or entities; however, if none of the partners are residents of Brazil then they must appoint an attorney-in-fact located in Brazil. Partner liability is limited to the value of each partner's quotas and, for up to five years, their individual capital contributions. This limited liability applies to all obligations, including civil and tax liabilities. However, if a partner violates the law or the articles of association then the partner may experience exposure to additional tax liability.

1.1.1.5. Partners' Agreement

The partner' agreements are generally outlined in contracts establishing procedures for the implementation of the company's purpose. Unlike shareholders' agreements, Brazilian law does not provide that partners' agreements may be enforced against third parties. However, the prevailing trend is that the obligations contained within the agreement are enforceable by specific performance and the company is subject to the terms and conditions of the agreement.

1. Código Civil (C.C.) (Civil Code), Art. 1062 (2002) (Braz.).
2. Código Civil (C.C.) (Civil Code), Art. 1067 and 1069 II (2002) (Braz.).
3. Código Civil (C.C.) (Civil Code), Art. 1074, 1st paragraph (2002) (Braz.).

1.1.1.6. Corporate Capital

The corporate capital of a limited liability company must be fully subscribed at the date of its formation; however, there is no legal requirement for immediate payment, nor a minimum capital requirement. Partners may increase the corporate capital amount through amendments to the articles of association, provided that the initial corporate capital is fully paid-in. Partners, both foreign and domestic, may pay-in through cash, credits, or assets. However, the provision of services is not permitted as a method to pay-in capital.

1.1.1.7. Quotas

The capital of the Brazilian limited liability company is divided into quotas. Unlike corporate shares, quotas do not physically exist. Rather, they are evidenced by the filing of the articles of association. Generally, there are no legal restrictions on the possession, use, or disposals of quotas by partners. Therefore, the distribution of quotas among partners may be freely agreed upon, provided the company has at least two partners and each partner has at least one registered quota. Quotas may be assigned and transferred through amendment to the articles of association. However, quotas may not be publically traded – a Brazilian limited liability company may not issue securities of any kind, including debentures. Further, the articles of association may establish restrictions on the encumbrance of quotas thus providing a mechanism for partners' first right of refusal in the event that case a partner intends to sell an interest to a third party.

1.1.1.8. Quorum

The Brazilian Civil Code requires a quorum for the appointment and dismissal of managers.[4]

1.1.1.9. Partners' Meeting

The partners' meeting is the collective decision-making body, which must meet whenever the law or articles of association require. In addition to other matters specified by law or provided for in the articles of association, the following matters must be approved by resolution adopted by the partners: (1) approval of the manager's account (2) appointment of the manager, if made in a separate act other than in the articles of association, (3) dismissal of managers, (4) form of manager's compensation, (5) amendment to the articles of association, (6) merger, consolidation, and dissolution of the company, (7) appointment and removal of liquidators and decision on liquidators' account, and (8) request for debt rehabilitation proceedings. However, the partners' meeting may be waived if the partners adopt a unanimous written decision on the matter. Lastly, resolutions adopted in accordance with the law and the articles of association are binding upon all partners, even if absent from the meeting or dissented from the resolution. The necessary quorum for the validity of the meeting shall be, upon first call, partners holding at least three-quarters of the corporate capital and, upon the second call, partners holding any percentage of the corporate capital.

1.1.1.10. Management

The Brazilian limited liability company may be managed by one or more persons, partners, or other entity. Managers are not required to be Brazilian citizens; however, the manager must reside in Brazil.

If the partners appoint a foreign manager, who is not a partner, this person must hold a Brazilian permanent visa with authorization

4. Código Civil (C.C.) (Civil Code), Art. 1061, 1063, 1071, and 1076 (2002) (Braz.).

to act as manager of the specific company. This visa is issued by the Brazilian Ministry of Labor. The issuance of this visa requires the completion of an application, submission of required documents and either: (1) a foreign investment in the company in the equivalent of at least R$600,000, paid in by the partners, for each foreign citizen indicated for the position of officer (manager) of the company; or (2) a foreign investment in the company in the equivalent of at least R$150,000, paid in by the partners as well as commitment of the company to hire, within the next two years, ten Brazilian employees.

If the company has more than one manager, their joint signature may be required for the performance of all or certain acts. The articles of association may establish different levels of control for the company and determine which matters require the partners' prior authorization, which matters do not depend on it, or even different quorums depending on the matter.

The manager is entitled to legally bind the company and perform acts within the company's purpose in accordance with the articles of association. To limit the manager's powers, the partners may establish restrictions requiring partner approval for certain acts, e.g. the sale, purchase, or encumbrance of assets over a certain value, bank loans or agreements over a certain value.

Generally, managers are not liable for actions performed within the course of business that comply with both the law and the articles of association. The company, not the manager, is liable if the manager abuses their power, exceeds their power, or violates the law in case the manager performed these acts with the partners' consent – even if the acts violate the articles of association. However, any violation of any law by the manager will entail civil liability for losses caused to the company, in addition to criminal liability, if applicable to the case.

1.1.1.11. Fiscal Council

The articles of association may provide for a fiscal council. A fiscal council must have at least three members and three alternate mem-

bers all of whom reside in Brazil. The members may be partners, but must not be elected during the general partners' meeting. Minority partners, representing at least 20% of the capital, are entitled to elect one of the members of the fiscal council.

1.1.1.12. Assignment and Transfer of Quotas

Quotas are freely assignable and transferable among partners. Transfers to third parties are permitted unless the partners holding more than one-fourth of the capital do not agree with the transfer. If the assignment or transfer of quotas results in a change of the company's control then an amendment to the articles of association must be filed. This filing requires three clearance certificates: (1) a joint certificate of debts related to federal taxes and to debts enrolled in the List of Overdue Federal Debts issued by the Federal Revenue Department, (2) a debt clearance certificate issued by the Brazilian Social Security Institute (INSS), and (3) a certificate of good standing with the Unemployment Savings Fund (FGTS).

1.1.1.13. Financial Statements

Brazilian law requires companies, or a group of companies under common control, with assets greater than R$240 million or annual gross revenue greater than R$300 million to publish financial statements.[5] There is no specific law requiring publication for limited liability companies that do not meet the above criteria; however, there is much debate among Brazilian scholars related to this issue.

1.1.2. Corporations

A Brazilian corporation (sociedade anônima) is a company in which decisions are generally taken by majority vote and in which the management is separate from the shareholders. It is a corporate form usually utilized for ventures capable of gathering concentrations

5. Law No. 11638, Art. 3 (Dec. 28, 2007) (Braz.).

of financial resources from a large number of investors. If a company intends to issue debentures or other securities, become a publicly held company, or admit other groups of investors, then the adoption of the sociedade anônima form is mandatory.

The corporation's name must contain the expression "Sociedade Anônima," or "S/A" or "S.A.", or must be preceded by the word "Companhia," or "Cia". Proper nouns, the name of the founders, or the name of any other person may be used in the corporation's name. It is not mandatory that the name of the corporation contains the description of its main activity.

A corporation's equity interest is represented by shares; common, preferred, convertible, or founders. Shares may be represented by stock certificates and are transferred through annotations in the corporation's books.

The corporation may be either publically or privately held. Publically held corporations must register with and are subject to the supervision of the Brazilian Securities Exchange Commission (Comissão de Valores Mobiliários), and may have securities publicly offered or traded on organized securities markets. The stock of privately held corporations is not publicly traded; these corporations gather capital from shareholders or subscribers and may have simpler accounting and management systems. However, 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.

1.1.2.1. Bylaws

Corporations are organized through bylaws. These written documents are prepared in accordance with corporate law and are approved by the general meeting of incorporation. A general meeting must be held to amend these bylaws. This general meeting shall only be called to order if two-thirds of the shareholders representing the voting capital are present. However, on second call it may be called

to order with any number of shareholders.

The bylaws of privately held corporations may restrict the transfer of shares. This mechanism generally operates as a right of first refusal for current shareholders in the event of an acquisition.

1.1.2.2. Incorporation and Registration procedures

The formation of a Brazilian corporation requires an inaugural shareholders' meeting in the city where the headquarters will be located. During this meeting the bylaws shall be approved, executive officers elected, and in publicly held corporations the board of directors elected. Further, (when applicable) the fiscal council is also established in this meeting. Following this meeting, certified copies of the minutes, the approved bylaws, a complete list of all subscribers of capital stock, and if capital is paid in cash a bank receipt for the initial 10% payment must be filed with the board of trade. If these documents are deemed correct the board of trade will issue a certificate of registration. The corporation comes into legal existence when the certificate is issued.

After its incorporation before the board of trade, the corporation will need to apply to obtain other registrations in order to operate, such as: (1) National Register of Legal Entities to obtain a corporate taxpayer identification number (Cadastro Nacional de Pessoa Jurídica—CNPJ), (2) State Enrollment (Inscrição Estadual—IE), if the company will carry out trading and/or manufacturing activities), (3) Municipal Taxpayer Registration (Cadastro de Contribuintes Municipais—CCM), (4) Electronic Statement Registration before the Brazilian Central Bank Electronic System (Registro Declaratório Eletrônico—Investimento Externo Direto do Banco Central do Brasil—RDE-IED), (5) National Institute of Social Security (Instituto Nacional do Seguro Social—INSS), and (6) Employee Severance Fund (Fundo de Garantia por Tempo de Serviço—FGTS).

If the corporation intends to carry out import/export operations, it must obtain advance authorization from the RADAR System with the Federal Customs Authorities and must be enrolled as an import/export company with SISCOMEX (Foreign Trade Department). This application must be filed, and several documents must be presented to the Customs Department where the head office of the corporation is located. The application must contain information about the corporation and a forecast of the intended foreign trade operations for the next six months. The authorities will require detailed information to ensure the financial condition of the corporation is consistent with the intended foreign trade operations. Further, the corporation's capital stock shall be appropriate to the company's corporate purposes and, consequently, to the estimated amount of importation per year.

Other relevant licenses and registrations may also be necessary for the operation of the corporation, depending on the type of operations it will carry out.

The corporation will be allowed to open bank accounts in Brazil and execute contracts, after it is duly enrolled with the National Register of Legal Entities and has received a corporate taxpayer identification number (CNPJ).

Remittance of funds to Brazil by foreign shareholders, either as an investment or as a loan, must be registered with the Brazilian Central Bank Electronic System. This registration before the Brazilian Central Bank is essential for future payment of dividends to the foreign partners, repatriation of capital (in the event of capital investments), and/or payment of interest and principal (in the event of loans).

In addition to the enrollment of the Brazilian corporation before the National Register of Legal Entities (CNPJ), according to the rules issued by the Federal Revenue Department of Brazil, all foreigners that hold equity in Brazilian companies must also registered with such governmental authority. Therefore, foreign partners of Brazilian companies must be enrolled with the National Register of Legal Entities to obtain a corporate taxpayer identification number (CNPJ), in the case of a foreign legal entity, or with the Individual Taxpayer Register to obtain an individual taxpayer identification number (CPF), in the case of foreign individuals.

1.1.2.3. Corporate Books and Records

Corporations must adopt an accounting system which consists of standard bookkeeping of the commercial and financial information related to their activities. To open a ledger, the relevant officer and the accountant must sign the opening statement, and the ledger shall be filed with the board of trade in order to have a registration number. Corporations must maintain the following mandatory ledgers: (1) nominative shares register ledger, (2) nominative shares transfer ledger, (3) ledger of minutes of general shareholders' meetings, (4) ledger of shareholders' attendance, (5) ledger of minutes of executive board's meetings, and (6) ledger of opinions and minutes of fiscal council's meetings. Additional ledgers may be mandatory in the event that the company issues participation certificates (nominative participation certificate register ledger and nominative participation certificate transfer ledger) or has a board of directors (ledger of minutes of board of directors' meetings).

1.1.2.4. Shareholders' Agreement

Brazilian corporation law provides that shareholders' agreements governing the following matters are enforceable against third parties and must be enforced by the corporation, provided that a copy of the agreement is filed with the corporation: (1) the purchase and sale of shares, (2) preemptive rights, (3) the exercise of voting rights, and (4) the exercise of the power to control a corporation. If a violation of these provisions occurs, a lawsuit seeking specific performance may be filed to require the corporation and the shareholders to comply with the shareholders' agreement. Neither a shareholders' agreement nor the company's bylaws may result in the sale of the shareholder's right to vote, which is considered a crime under Brazilian law.

1.1.2.5. Capital Stock

The capital stock of a corporation is divided into shares, which must be recorded in the share transfer ledger and may be subscribed by at least one shareholder. Shareholders may be Brazilian or foreign, individuals or legal entities. Shares may be classified as common or preferred, depending on the rights or advantages granted to their holders. Shares may not necessarily have a face value.

The capital stock of a corporation must be immediately subscribed upon its incorporation by at least two shareholders. The liability of the shareholders is always limited to the amount of capital subscribed by them. Capital stock may be paid either in cash, credit, or assets. The amount equivalent to, at least, 10% of the issuance price of the shares subscribed in cash must be paid-in and deposited in a bank.

1.1.2.6. Shares

Like U.S. corporations, a Brazilian corporation's equity interest is represented by shares. These shares may be represented by stock certificates and must be nominative. The capital of a corporation may be divided into different types of shares, according to the advantages, rights and restrictions on each one. The two major types of shares are common and preferred. There is also a third, less common, type of share, called "fruition shares." Fruition shares do not represent a portion of the corporate capital; rather they result from the amortization of the common and preferred shares.

Common shares always contain voting rights in addition to other rights which their holders are entitled to. One common share corresponds to one vote in shareholders' meetings. These shares may be divided into different classes according to their convertibility into preferred shares; requirement for a Brazilian-born shareholder; or right to have a separate vote to elect members of the management boards.

Preferred shares may have their voting rights suppressed or restricted, according to the rules set forth in the corporation's bylaws. These shares have a preferential right in profit distribution, or priority in the reimbursement of the capital. The bylaws may ensure the owners of preferred shares hold the right to appoint one or more members of the management boards. These shares can also be divided into different classes, according to the preferences established in the bylaws. How-

ever, the number of preferred shares in a corporation, with no voting right, cannot be greater than 50% of the total number of issued shares.

Common and preferred shares have the right to receive the mandatory dividend, which, if not otherwise agreed in the bylaws, shall be, at least, 25% of the net income. Lastly, Brazilian law requires that the pledge, the beneficial ownership, and the fiduciary sale must be recorded in the ledger of shares in order to be valid.

1.1.2.7. Quorum

Except if otherwise provided by law, general meetings' resolutions may pass by a simple majority, abstentions included. The bylaws of a closely held corporation may increase the quorum required for certain resolutions.

Provided that a higher quorum is not requested by the bylaws, the approval of shareholders representing at least one-half of the voting shares is necessary for the following resolutions,: (1) to create preferred shares or increase an existing class of preferred shares without maintaining the existing ratio with the remaining class of preferred shares (unless where already provided for in or authorized by the bylaws), (2) to change a preference, privilege, or condition of redemption or amortization granted to one or more classes of preferred shares, or to create a new, more favored class, (3) to reduce the mandatory dividend, (4) to approve the merger with another company, (5) to approve the participation in other groups of corporations, (6) to change the corporate purposes, (7) to terminate a state of liquidation of the corporation, (8) to create founders' shares, (9) to split the company up, and (10) to dissolve the company. The bylaws of a corporation with shares not admitted for trading on the stock exchange or on the over-the-counter market may establish a higher quorum to approve the matters specified above. The Brazilian Securities and Exchange Commission may authorize a quorum reduction in the above matters, in the case of a publicly held corporation whose shares are widely held and whose past three general meetings

were attended by shareholders representing less than one-half of the voting shares. In such event, the authorization of the Brazilian Securities and Exchange Commission shall be mentioned in the call notices, and the reduced quorum resolution may only be passed on the third call.

1.1.2.8. Management

A corporation shall have at least two officers who shall be Brazilian residents. Private corporations may be managed by a board of officers and a board of directors or only by a board of officers. Unlike private companies, publicly held companies are required to have a two-tiered management structure, composed of a board of officers and a board of directors.

Corporate law imposes on corporation managers the duties of diligence in the performance of the corporate business and loyalty to the company's interests. The duty of diligence requires officers and directors shall use the care and diligence that any active and honest men/women would normally use in their own businesses, similar to a reasonable person standard. The duty to act for the benefit of the corporation requires officers and directors to act to the benefit of the corporation. Even if elected by one shareholder, officers and directors shall not defend the interests of the shareholders who have elected them to the detriment of the interests of the corporation. The duty of loyalty provides that officers and directors shall serve the corporation with loyalty and shall not use, for their own behalf or on behalf of any third parties, business opportunities that are known by them due to their position in the corporation.

Generally, officers and directors are not liable for actions performed within the course of business that comply with both the law and the bylaws. The company, not the officer or director, is liable for acts performed by the officer or director if the officer or director abuses their power, exceeds their power, or violates the law provided that the officer or director performs these acts with the shareholders'

consent – even if the acts violate the bylaws. However, if the officer's or director's abusive act was performed without the consent of the shareholders, then the officer or director may incur liability to the shareholders. Further, any violation of law by the officers or directors will trigger civil liability for losses caused to the corporation, in addition to criminal liability, if applicable to the case.

1.1.2.9. Board of Directors

The Board of directors is a collective decision-making body which is mandatory in publicly held and optional in private corporations. The Board of directors must consist of at least three members, appointed by the shareholders' general annual meeting. The members of the board of directors must be individuals and they are not required to be residents of Brazil. Nonresident directors must appoint a representative who is a Brazilian resident to receive services of process in legal proceedings. The director's term of office may not exceed three years and reelection is allowed.

The main functions of the board of directors are to elect and dismiss officers; monitor the acts performed by the officers; appoint the independent accountants when necessary; authorize the sale of permanent assets and offering of guarantees to third parties; and discuss the management report and the board of officers' accounts.

The quorum for board of directors' resolutions shall be the majority vote, but the bylaws may establish a different quorum for some matters. It should be noted that one-third of the board of directors' members can be elected as board of officers' members.

In accordance with Brazilian corporate law and the Brazilian Securities and Exchange Commission interpretations, non-controlling shareholders of a listed company, whose interest represents for the three preceding months, a minimum of 15% or 10% of the voting shares or the capital stock respectively, have the right to elect one member of the board of directors. Should that percentage not be met, voting and nonvoting shareholders may add their shareholdings and elect one member if the aggregate percentage amounts to 10% of the company's capital stock.

1.1.2.10. Board of Officers

The board of officers is the executive body of the corporation. Its responsibility is to represent the corporation and perform all acts necessary for regular operation. The board is composed of, at least, two officers, who may or may not be shareholders; however, they must reside in Brazil. Officers may be elected for a maximum term of three years and reelection is allowed. Officers are responsible for the day-to-day management and are elected by the board of directors. One of the officers of publicly held companies is the designated investor's relation officer and is responsible for providing information about the corporation to the Brazilian Securities and Exchange Commission and the organized securities market where the company's securities are traded.

1.1.2.11. Fiscal Council

The fiscal council's basic function is to oversee the acts of management. The bylaws shall establish its form of operation; whether it will be permanent or eventual. The fiscal council shall have between three and five members and alternates. The members may or may not be shareholders, and shall be elected by the shareholders general meeting.

Fiscal council's members cannot be members of another management body of the company or its subsidiary, employees of the company or its subsidiary, not even spouses or relatives of the manager of the company twice removed.

1.1.2.12. Publications

Most corporate documents, such as bylaws, minutes of shareholders' meetings, board of officers' meetings, annual reports, balance sheets, and other financial statements, must be published in the Official Gazette and in any other newspaper with wide circulation.

1.1.3. Other Incorporated Legal Entities

Brazilian law provides for the existence of several additional forms of both incorporated and unincorporated entities. It is also important to note that some types of Brazilian companies may be structured to qualify as "partnerships" for U.S. tax purposes, thus allowing greater flexibility in structuring foreign subsidiaries of United States companies. The rights and obligations of the joint ventures in such companies are regulated by the joint venture agreements, articles of association, by-laws, shareholders' agreements, and the applicable corporate law. The structure of these entities, and several others, are briefly discussed below.

1.1.3.1. Individual Limited Liability Company

Law 12,441, which entered into force on 9 January 2012, instituted the individual limited liability company ('Empresa individual de responsabilidade limitada' / EIRELI), which in many countries is known as a sole proprietorship company.

Individual limited liability companies consist of a single person holding the entire fully paid capital, which must not be less than 100 times the highest minimum wage in force in the country. The company's name must have the addition of the term EIRELI. The natural person establishing an individual limited liability company can only participate in one of such individual limited liability company.

Individual limited liability companies are regulated by regulations governing "sociedades limitadas", where applicable.

1.1.3.2. Simple Partnership (Sociedade Simples)

Simple partnerships are generally limited to the performance of intellectual activities of a scientific, literary, or artistic nature. Generally including the activities conducted by doctors, attorneys at law, scientists, and writers, among others, in which the profession exercised is not an element of the corporate structure. These partnerships are organized by means of a private or public written agreement or articles of association.

Any and all amendments to the articles of association, such as those involving partners, corporate name, corporate scope, headquarters, duration, capital, management, and liability of the partners, will depend on the unanimous approval of the company's partners. All the other amendments will depend on the approval of partners representing more than 50% of the corporate capital.

In the event that the assets of the simple partnership are insufficient to pay the partnership's debts, partners are liable for the balance of debts, in a proportion of their amount of the losses within the partnership, except if they have agreed to be jointly and severally liable. The particular assets owned by the partners may only be reached to solve the partnership's debts, in the event that the partnership has no remaining assets.

1.1.3.3. General Partnership (Sociedade em Nome Coletivo)

General partnerships are business companies characterized by the exclusive participation of individuals. All partners have joint and unlimited liability for the obligations undertaken by the company. Notwithstanding the unlimited liability to third parties, partners may limit their liability among themselves in the articles of associations. Due to the main characteristic related to the unlimited liability of the partners, this corporate type is not frequently adopted. Another limitation for the use of this corporate type is that only the partners may be appointed managers of the general partnerships.

1.1.3.4. Limited Partnership (Sociedade em Comandita Simples)

Limited partnerships include two classifications of partners: (1) partners who have unlimited and joint liability for obligations incurred by the limited partnership, referred as to "comanditados"; and (2) partners that are solely responsible for paying-in the subscribed quotas, referred as to "comanditários".

Comanditários have the right to receive profits and may participate in the resolutions of the limited partnership and monitor its op-

erations; however, in the event that they practice any management or have their names included in the name of the limited partnership, their liability will be identical to the comanditados.

Comanditados, in addition to contributing capital, are responsible for the partnership's management and have unlimited liability before third parties.

1.1.3.5. Limited Partnership with Share Capital (Sociedade em Comandita por Ações)

Limited partnerships with share capital have the same legal nature as corporations.[6] Some differences between the limited partnership with share capital and corporations include the peculiar position occupied by officers of the limited partnerships with share capital. Only shareholders are allowed to be officers of limited partnerships with share capital. The shareholder(s) who serve as officer(s) of limited partnerships with share capital will have unlimited liability for the obligations undertaken by the legal entity. The bylaws must contain the indication of the officers for an unspecified period of time, and the replacement of officers must be approved by a shareholders' resolution representing, at least, two-thirds of the corporate capital.

The corporate name cannot include the name of shareholders who are not officers of the limited partnership with share capital. Considering the unlimited liability of officer shareholders, the general shareholders' meeting cannot approve, without the consent of the officers, the change of its corporate purposes, extend its duration term, increase or decrease its corporate capital, or create debentures or participation certificates "partes beneficiárias".

1.1.3.6. Benefit Corporation

In Brazil, there is no special legal entity, which would resemble

6. Código Civil (C.C.) (Civil Code), Art. 1090 to 1092 (2002) (Braz.).

7. Law No. 64040/1976 Art. 116 and Art. 154.

the (public) benefit corporations available in many states of the U.S. for mission-driven companies. However, Brazilian Corporate Law (which regulates the sociedade anonima and is supplementary applicable to the limitada), determines that a company has a "social function".[7]This social function of the company requires officers/directors to exercise their functions in the best interest of the company, which also includes considering the interests of stakeholders, such as employees, suppliers, customers, other creditors and the society as whole.

Moreover, officers/directors also have to observe the principles of Article 170 of the Brazilian Federal Constitution. Those principles not only include the social function of property, but also consumer protection, environmental protection, reduction of regional and social differences and full employment.

In addition, officers/directors may also be held personally liable for a breach of their duty to exercise their functions in accordance with the social function of the company.

Therefore, Brazilian corporate law does not prevent "mission-driven" corporations to pursue social and environmental goals and the bylaws of a Brazilian "benefit corporation", may set out the specific terms for the functioning of such a corporation.

Certification of benefit corporations, by B Lab's Latin American partner organization Sistema B is also available in Brazil.

1.2. Unincorporated Legal Entities

1.2.1. Secrete Partnership (Sociedade em Conta de Participação)

The secret partnership is an unincorporated company with no legal personality, even if registered. There are two classes of partners, the ostensible partner and participant partner. The ostensible partner conducts all business related to the corporate activity, and manages the company in his own name. Therefore, the ostensible partner has unlimited liability and is personally liable for the

obligations and business of the company.

The participant partner only contributes with capital to the company and receives profits from the income of the business operated by the ostensible partner. The participant partner is exclusively responsible to the ostensible partner, as provided for in the articles of association. In the event of bankruptcy of the ostensible partner, the participant partner becomes creditor thereof with no priority or preferences rights.

There are few formalities to be followed to organize a secret partnership, in addition to the articles of association. It is a company that exists only between its partners, but it does not exist in relation to third parties – third parties must deal exclusively with the ostensible partner. A secret partnership will have as its purpose a certain project or undertaking; therefore, the duration of this company is for a specified period of time.

1.3. Other Legal Entities

1.3.1. Association (Associação)

Associations are private entities, with legal personality and are characterized by the joining of individuals to carry out common nonprofit purposes. The individuals will not have among themselves reciprocal rights and obligations. The Brazilian Civil Code establishes that the association's bylaws must provide for the sources of funds used for its maintenance; otherwise, the association will be null and void. (See Section 4.1 below).

1.3.2. Consortium (Consórcio)

The main purpose of a consortium is to join efforts in order to explore a joint venture without the need to incorporate a separate legal entity. A consortium may be formed by all types of companies, by agreement between at least two companies. Companies taking part in a consortium shall be liable only for the consortium's activities,

except if otherwise expressly provided in the consortium agreement. In order for associated companies to protect themselves from risk with respect to the purposes of the consortium, the consortium agreement shall be registered with the board of trade with jurisdiction over the territory in which the consortium's head office is located. After the filing of the consortium agreement, the board of trade shall issue a certificate of registration which must be published in the official gazette of the state where the consortium is headquartered and in a newspaper with wide circulation. However, registration and publication does not make the consortium a personified entity. In other words, the parties of a consortium conduct their activities under their own name, but each party contributes a certain part of the work as the main reason for the formation of the consortium.

The formation of a consortium is subject to the approval of the Administrative Council for Economic Defense ("Conselho Administrativo de Defesa Econômica—CADE"), whenever: (1) it results in the control of a market share equal to, or in excess of 20%, or (2) if any of the parties had gross revenues, during the preceding fiscal year, equal to, or in excess of, R$400 million.[8]

1.3.3. Foreign Branch

Foreign companies may not have branches or representative offices in Brazil before their acts of incorporation are authorized by the Brazilian government. The procedure to apply for this authorization begins with the National Department for the Registry of Commerce—DNRC. The DNRC shall review and comment on submitted documentation prior to forwarding it to the Ministry of Development, Industry and Trade for analysis and issuance of the final governmental authorization through the official press. The Secretary

8. Law No. 8884, as amended, Diário Oficial da União (D.O.U.) (Diary of the Federal Government) of Jun. 13, 1994, Art. 54 § 3 (Braz.).

of Commerce and Services, to which the DNRC is subordinated, issues the final authorization.

Governmental authorization shall remain in effect for an unspecified period of time, unless it is revoked for any of the reasons mentioned below.

Once the opening of the branch is authorized by the Brazilian government through its Ministry of Development, Industry and Trade and Secretary of Commerce and Services, the next step is the registration of this branch with the Registry of Commerce. This registration is accomplished through the board of trade of the state where the branch shall be located and operate.

Once procedures above are concluded, the branch shall, like subsidiary companies, be duly registered with the competent tax authorities who are determined according to the corporate purposes of the branch, the National Registry of Legal Entities "CNPJ" being the first and most relevant for the start of business.

Additionally, foreign branches in Brazil shall: (1) appoint a representative to act on their behalf, with powers to resolve any issues and receive service of process in Brazil, (2) deposit the amount of the corporate capital attributed to the branch as approved by the governmental authorities with an official Bank (and register with the Central Bank of Brazil within 30 days), (3) ensure the branch's name is the same as the foreign company's name; the words "of Brazil" (do Brasil) or "to Brazil" (para o Brasil) may be added, (4) receive approval from the Brazilian government for any changes to the bylaws, (5) prepare the financial statements concerning the branch's operation in accordance with Brazilian law and publish them in the official press under the penalty of its authorization to operate being revoked, (6) if the foreign company is required to publish its financial statements and management acts under the law of its country of origin, these must also be published in Brazil under the penalty of its authorization to operate being revoked, and (7) be governed by Brazilian law and subjected to the Brazilian courts as to its acts or operations in Brazil.

1.4. Restrictions on Foreign Investments

According to the Brazilian Federal Constitution, the participation of foreign capital in the following activities is prohibited, because their implementation is under the responsibility of the federal government: (1) development of activities involving nuclear energy, (2) health services, (3) businesses abutting on international borders and ownership of countryside real estate properties, (4) post office and telegraph services, (5) airlines with concessions of domestic flight routes, and (6) the aerospace industry. Three additional ventures including: (1) financial services, (2) media, and (3) the acquisition of rural property, have limitations and restrictions on foreign investment.

2

Securities and Capital Markets

Brazilian securities markets are governed by Corporation Law[9] and Securities Law,[10] which created the Brazilian Securities and Exchange Commission (CVM). These two laws, along with other more specific regulations issued by the CVM, the National Monetary Council (CMN), and the Central Bank of Brazil, define the Brazilian capital markets regulatory system.

This system establishes the requirements, for listing and distributing securities; disclosing information by issuers, namely, publicly held corporations; protecting minority investors; licensing, registering, and supervising market participants, e.g., securities brokerage and distribution firms, publicly held corporations; investment by foreigners in the securities markets; and transactions performed on Brazilian stock, derivatives and commodities exchanges. On the criminal side, the system provides rules, among others, against insider trading and price manipulation.

Generally, securities are any investment contract, offered publically, under which one invests money in a common enterprise leading to expected profits solely from the efforts of a third party or an entrepreneur. The Securities Law specifically defines the following as securities: (1) shares, debentures, and warrants, (2) coupons, rights, subscription receipts and securities certificates, (3) securities deposit certificates, (4) notes, (5) investment funds, (6) commercial paper, and (7) derivatives. Federal, state, or municipal debts, or exchange drafts issued or due by a financial institution are not considered securities and, thus, are not subject to CVM's supervision.

The primary exchanges in Brazil are BOVESPA and BM&F. Until recently, these exchanges were non-profit mutual companies owned by member brokerage firms. In 2007, the exchanges went public and began trading shares on BOVESPA. BOVEPA is the only equities market in Brazil and the largest in Latin America, in terms of volume, market capitalization, and public offering of shares. BM&F is one of the largest derivatives markets.[11] Trading on these exchanges may only be carried out by member brokerage firms.

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The over-the-counter (OTC) market contains two categories: (1) organized OTC market overseen by self-regulated entities authorized by the CVM, and (2) nonorganized OTC market. The primary organized OTC markets are: (1) Balcão Organizado de Ativos e Derivativos (CETIP), (2) BOVESPA Mais, which is a special listing segment of BM&FBOVESPA for small and medium sized corporations committed to certain corporate governance requirements, and (3) SOMA which is a regular listing segment of BM&FBOVESPA for the remaining small and medium sized corporations.

Transaction settlements for securities traded on the BM&FBOVESPA occurs within three days following the trading date, and incur no adjustments for inflation. Delivery and payment for shares occurs through CBLC, a subsidiary of BM&FBOVESPA, which provides depository and risk management services. The CBLC guarantees the execution of trading transactions and

9. Law No. 6404, as amended (December 15, 1976) (Braz.).

10. Law No. 6385, as amended (December 7, 1976) (Braz.).

11. Available at http://www.bmfbovespa.com.br. http://www.bmfbovespa.com.br

provides multilateral clearing and settlement of trading transactions. Under the CBLC regulation, financial settlement takes place through the Central Bank's reserve Transfer System, clearing occurs in the CBLC custody system. Both clearing and settlement are final and irrevocable.

2.1. Transactions with Securities in Brazil

Generally, any public offering of securities in Brazil requires: (1) prior registration with the CVM of the issuer and the offering, and (2) intermediation by an institution which is part of the Brazilian Securities Distribution System (Brazilian SDS). An offer is considered public if, any sales efforts target the general public, or even if not targeting the general public, Brazilian investors have access to the offering's information and no precautions are taken to allow this access only to investors in other countries, or locations, where the offering is authorized, either through prior registration, a waiver granted by local authorities, or derived from applicable laws and regulations.

Under Brazilian law investors may generally carry out any type of transaction in the Brazilian financial capital markets involving a security traded on a stock, future, or organized OTC market.[12]

Nonresident holders, jointly or severally, consist of individuals, legal entities, investment funds, and other joint investment entities that reside, are domiciled, or are headquartered outside of Brazil. An investor residing outside of Brazil must appoint a representative in Brazil with powers to take actions relating to the investment and appoint an authorized custodian in Brazil for the investments. Securities and other financial assets held by foreign investors in the Brazilian securities markets must be registered or maintained in deposit accounts or under the custody of an entity duly licensed by the Brazilian Central Bank or the CVM.

12. Law No. 4131 (September 3, 1962) (Brazil); and CMN Resolution No. 2689, Oct. 31, 2001 (Brazil); and CVM Regulation No. 325, Jan. 27, 2000 (Braz).

2.2. Disclosure of Material Information by Corporations

Brazilian Corporation Law classifies corporations into closely and publicly held. Publicly held corporations are registered with, and subject to, the supervision of the CVM, and may have securities publicly offered or traded on organized securities markets, provided certain disclosure requirements are met. These public corporations must produce standardized financial statements, annual and quarterly information, quarterly management reports and independent audit reports. Additionally, the corporation is required to file, shareholder agreements, call notices and copies of minutes of shareholder or board of director meetings with the CVM.

Further, publically held corporations are required to inform the CVM and the organized securities market where the securities are traded, of any material developments of its activities. A material development is an event with the potential to affect the price of securities, the decision of an investor to buy, sell, or keep such securities, or their decision to exercise any of the rights inherent in such securities, e.g., disposal of controlling interests, launching of a public offering, insolvency proceedings, and material contingencies.

CVM rules require directors, officers, and members of the fiscal and audit committees to disclose to the company, the CVM, and the organized securities market where the securities are traded, the number and type of securities issued by the company or subsidiary, held by them or any related parties, as well as any change in their interests. If an investor owns 5% or more of a certain class of shares, or securities entitling rights to such shares, issued by a publically held company in Brazil then the percentage triggers disclosure. Transactions involving less than 5% of a certain class do not trigger disclosure requirement, except if the law or bylaws provide otherwise.

2.3. Corporate Governance

Brazilian Law provides a set of mandatory rules to safeguard the interests of investors, lenders, creditors, employees and the communi-

ty. Companies may voluntarily comply with higher standards, either developed internally or by the organized securities markets. BOVESPA and the Brazilian Institute of Corporate Governance are two major sets of voluntarily rules.

2.3.1. BOVESPA Voluntary Rules

In 2000, BOVESPA introduced three special listing segments, known as Nível 1, Nível 2, and the Novo Mercado (Level 1, Level 2, and the New Market, respectively), which were created to foster a secondary market for securities issued by Brazilian companies by prompting corporations to follow enhanced corporate governance practices. The listing segments were designed for the trading of shares issued by corporations voluntarily undertaking 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 Nível 1 company, in addition to the obligations imposed by applicable law, the issuer must agree to (1) ensure that shares of the issuer representing at least 25% of its total capital are effectively available for trading; (2) adopt offering procedures that favor widespread ownership of shares whenever making a public offering; (3) comply with minimum quarterly disclosure standards; (4) follow stricter disclosure policies with respect to transactions made by controlling shareholders, members of its board of directors, and its executive officers involving securities that it issued; (5) submit any existing shareholders' agreement and stock option plans to BOVESPA; and (6) make a schedule of corporate events available to shareholders.

To become a Nível 2 company, in addition to the obligations imposed by applicable law, an issuer must agree to (1) comply with all of the listing requirements for Nível 1 companies; (2) grant tagalong rights for all shareholders in connection with a transfer of control of the company: (a) offer the same price paid per share of the controlling block for each common share; and (b) 80% of the price paid per share of the controlling block for each preferred share; (3) 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 Nível 2; and (f) any changes to these voting rights, which will prevail as long as the adhesion contract to the Nível 2 regulation with BOVESPA is in effect; (4) 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; (5) prepare annual financial statements in English, including cash flow statements, in accordance with international accounting standards, such as U.S. GAAP or IFRS; (6) if it elects to delist from the Nível 2 segment, conduct a tender offer by the company's controlling shareholder (the minimum price of the shares to be offered will be the economic value determined by an independent specialized firm with requisite experience); and (7) adhere exclusively to the Market Arbitration Chamber for resolution of disputes between the company and its investors.

To be listed in the Novo Mercado, an issuer must meet all of the requirements for Nível 1 and Nível 2 companies and, in addition, the issuer must (1) issue only common shares; and (2) grant tagalong rights for all shareholders in connection with a transfer of control of the company, offering to the minority shareholders the same price paid per share of the controlling block.

2.3.2. Brazilian Institute of Corporate Governance Voluntary Rules

The The IBGC was founded in 1995 as a nonprofit business and cul-

tural entity. It is the primary entity responsible for promoting corporate governance in Brazil. The IBGC "Code of Best Practices in Corporate Governance" is now in its fourth edition and provides general corporate governance rules for business entities, including corporations.

2.4. Insider Trading and Other Fraudulent Practices

Insider trading generally refers to the buying or selling of a security, in breach of a fiduciary duty or other relationship of trust and confidence, while in possession of material, nonpublic information about the security. Insider trading rules in Brazil, which resemble the rules applicable in the United States, prohibit the trading of securities based on privileged information. This prohibition applies to both the source of information (i.e. the tipper, who has consciously revealed inside information) as well as to individuals to whom the information is presented and who knowingly use such information to make a trade. Market abuse is also prohibited and involves fraudulent transactions or other deceitful actions aiming at artificially changing the regular operation of the securities markets or capital markets for the purpose of obtaining unfair advantages, including for a third party. Brazilian laws imposes administrative, civil, and criminal penalties for both offences, depending on the gravity of the infraction, which may be imposed either individually or collectively.

3
Foreign Investments

Foreign capital in Brazil is treated quite liberally; few areas are subject to restrictions. Legislation makes no distinction between domestic and foreign companies; the basic principle is that judicial treatment must be granted to foreign and domestic capital under the same terms. Investments in economic sectors that are not subject to conditions or restrictions may be freely made and are not subject to any prior approval, license, or authorization from authorities.[13] There is also freedom to completely or partially repatriate invested capital whenever the investor deems fit, as well as to remit profits obtained in Brazil. Once invested capital is registered, no authorization or permit from the authorities is necessary for repatriation or profit remittance.[14]

There are no maximum or minimum limits on the investment amount. Small amounts are permitted as well as very large sums. Treatment is not differentiated based on the origin of the investment: Investments made from investors in various countries are welcome and subject to the same rules. Activities that require a certain minimum capital and net worth (such as those of financial institutions) have the same requirements for both domestic and international investments. There are also no maximum or minimum terms for the investment: Investments may be made on one day and repatriated on the next day or remain in the country for decades.

Foreign investors are free to use any of the available company forms, and there is no restriction to foreign capital's access to capital markets.

13. See above for list of restricted sectors.

14. However, capital gains are subject to taxation, generally at the rate of 15%.

The rules are the same both for local and international entities.

It should be noted that the Central Bank is authorized to limit profit remittances or prohibit remittances as capital repatriation in case of a serous balance of payment deficit. However, even during Brazil's most severe balance of payment problems, this limitation has not yet been used.

4
Third Sector

The term "third sector" commonly refers to a sector of economy or society in between the government (first sector) and business (second sector), where not for profit entities, civil society and philanthropic organizations, among others, are immersed. In Brazil, all types of not for profit organizations are legally incorporated either as associations or as foundations. Both types of legal entities will be examined in this chapter.

4.1. Associations

The new Brazilian Civil Code, which came into force on January 1st, 2003, introduced an entire new chapter regulating associations. Please find below an overview of the main aspects regarding associations in Brazil.

4.1.1. Definition and Requirements

Article 53 defines associations as the organization of persons who unite for non-economic purposes without there being any reciprocal rights and obligations between the members of an association.

Article 54 lists all information that the associations' statute has to contain: (i) the association's name, purpose and head office; (ii) the requirements for admission, withdrawal and expulsion of members; (iii) the rights and duties of the members of the association; (iv) the resources for maintenance of the association; (v) the manner in which the deliberative bodies of the association shall be constituted and shall function; (vi) the requirements for amendment of the statute and for dissolution, and in case of dissolution, the destination of the association´s remaining patrimony; (vii) the form of administra-

tion of the association and the manner in which management's accounts shall be approved; (viii) the designation of the association´s representatives, for legal and non-legal purposes.

As described above, the association shall have as its purpose the pursuit of non-economic purposes described in the Statute. Therefore, it shall be considered "not-for-profit purposes". It is important to point out, that the fact that it shall have no economic purpose does not mean that the association shall not generate resources in order to maintain its activities and pay its employees. Rather, the members of an association shall not make any profits and all of the association's revenue shall be used for the benefit of the association itself, aiming towards the improvement of its activities. Therefore, as described above, the association's statute shall not establish reciprocal rights and duties among its members.

4.1.2. Structure:

The association may have up to three different administrative bodies: the Board of Directors, the General Assembly and the Fiscal Council.

The Board of Directors is the executive body of the association and is appointed by the association's members in order to direct the association for the term established in the Statute.

The General Assembly is the most important body of an association. According to Article 59, it is responsible for the decision-making process. The Brazilian Civil Code determines that the General Assembly shall have exclusive powers to (i) remove the administrators and (ii) amend the statute. The resolutions on those issues shall be made in a meeting especially called for the purpose and by a quorum according to what has been established in the Statute.

The Fiscal Council is responsible for the financial management of the association.

According to Article 56 of the Civil Code, the membership in an association is intransmissible, unless the association's statute provides otherwise. If a member of an association is the owner of a share or a fractional undivided interest in the association's patrimony, the transfer of that share or interest does not, per se, make the acquirer or heir a member of the association, unless the association's corporate statute provides otherwise.

Finally, the Civil Code determines further that a member can only be dismissed for just cause, recognized through a procedure that ensures the right of defense and the right to appeal, on terms set out in the corporate statute.

4.2. Foundations

4.2.1. Definition and Requirements

Article 62 does not provide a definition of foundation; instead, it provides its main legal aspects: I. it is created by the will of its founder (by public deed or testament), II. it consists of a special endowment of unencumbered property and/or assets that shall serve a specific public benefit or public interest purpose, that could be: religious, moral, cultural or assistance. From the requirements on Article 62 the doctrine defines foundation as "a collection of assets to which legal personality is granted by an operative law and that is devoted to public interest purposes". If the founder so wishes, the foundation's charter can set forth the manner in which the foundation is to be controlled and managed.[15]

Article 63 requires that a foundation has and discloses sufficient assets to achieve its purposes at the moment of its establishment, otherwise the insufficient assets may be transferred to another foundation with similar purpose.

General requirements to the creation of a foundation can be listed as: (I) endowment: a collection of unencumbered property and/or assets; (II) constitutive act (by public deed or testament); (III) charter

15. Civil Code, Article 62, sole paragraph.

or declaration of the foundation´s specific purpose; (IV) a statute, that should contain:

(i) the foundation's name, purpose and head office; (ii) the foundation's assets and the manner in which they shall be managed; (iii) the form of administration of the foundation; (iv) the manner in which the deliberative (Board of Trustees) and executive bodies (Board of Directors) of the association shall be constituted and shall function; (v) the requirements for amendment of the statute and for dissolution, and, in case of dissolution, the destination of the foundation's remaining patrimony; (vi) the designation of the foundation's representatives, for legal and non-legal purposes.

A private foundation is established by submitting its letter of establishment, constitutive acts, and charters to the Attorney General's Office (Ministério Público), the competent authority to oversee private foundations registration and activities. Upon receiving the Attorney General's approval, the founders then proceed to the registration of the founding documents in the proper public register office.[16]

A public foundation is created by legislative authorization and their assets may come from the federal government or other sources. Like their private counterparts, public foundations are established through registration of their constitutive acts in the public register. However, public foundations are not subject to oversight by the Attorney General's Office.

4.2.2. Structure

The foundation shall have at least three different administrative bodies: the Board of Trustees, the Board of Directors and the Fiscal Council.

The Board of Trustees is the legislative body of a foundation: it is responsible for defining the foundation's goals, objectives and actionable guidelines. The Board of Directors is typically the executive body of the association, responsible for the execution of the goals defined by the Board of Trustees and the general management. The Fiscal Council is responsible for the financial management of the foundation.

Unlike associations, where there are members and the Civil Code determines rules for the elections for positions within administrative bodies, foundations should strictly follow the founder's declaration and its statute regarding the rules for internal structure.

16. Civil Code, Articles 62 to 69; §120 Law 6.015 (Dec. 31, 1973) (Braz.).

4.3. Special Titles and Qualifications

In Brazil associations and foundations may apply, when they fulfill all legal requirements, for special titles and qualifications conferred by the government. The OSCIP title, the most relevant for the majority of the third sector organizations, will be examined in the next section.

4.3.1.1. OSCIPS

Law No. 9.790/99 established a new legal order applicable to not-for-profit entities (such as associations, civil societies and foundations), allowing them to qualify, as "Public Interest Civil Society Organization – OSCIP", and to sign, partnership agreements called "Termos de Parceria" with the municipal, state and federal governments. Through those agreements, the entity qualifying as OSCIP may receive public funds or other governmental support to execute public interest projects.

According to this law, a not-for-profit legal entity is an entity, which does not distribute to its members or participants, advisors, directors, employees or donors, any surpluses, gross or net, dividends, bonuses, shares or portions of its assets, derived from the performance of its activities. Therefore, it must use all its assets and income in pursuit of a relevant public purpose.

The law encompasses all activities that present social purposes related to social assistance, culture, education, health, economic and social development, human rights, democracy and the preservation and conservation of the environment.

4.3.1.2. Requirements

In accordance with article 4 of the law, in order for an entity to obtain the OSCIP status, the following items must be expressly stated in its Statute (see Appendix I):

a. Compliance with the principles of legality, morality, impersonality, publicity, economy and efficiency;

b. Adoption of administrative management practices which hinder the gain, individually or collectively, of benefits or personal advantages, due to participation in the decision-making process;

c. Establishment of a Fiscal Council or equivalent body, entitled to grant opinions regarding financial and accounting performance reports and regarding patrimony operations undertaken, preparing reports to the other bodies of the association;

d. Establishment that, in case of dissolution, the patrimony of the entity shall be transferred to another legal entity qualified as a OSCIP, preferably with the same social purpose;

e. Establishment that, in case the entity loses its status as OSCIP, the portion of its patrimony acquired with public funds shall be transferred to another legal entity qualified as a OSCIP, preferably with the same social purpose;

f. Expressly establish the possibility regarding the managers' remuneration, in other words, specify whether the entity wants to remunerate or not the directors who effectively act in its executive administration and those who render specific services to it; in both cases the market rates of the region where the activities are carried out have to be respected;

g. Requirement to respect the following accountability rules: (i) The fundamental accountability principles and the Brazilian Accountability Rules; (ii) Publication of the entity's activities and financial demonstrations reports, including all Negative Debts Certificates issued by the National Institute of Social Security and Unemployment Compensation Fund, which can be examined by any and all citizens; (iii) Performance of audits, including by independent external auditors, notwithstanding the use of resources object of the Partnership Agreement, as established by the regulation; (iv) Respect and performance of the obligations established in the sole paragraph of Article 70 of the Brazilian Federal Constitution.

4.3.1.3. Procedure

After fulfilling all the above mentioned requirements, the entity willing to qualify as an OSCIP must send a formal request to the Ministry of Justice, Department of *"Coordenação de Outorga e Títulos"* of the National Justice Secretary, together with certified copies of the following documents: (i) Request to the Ministry of Justice (see Appendix II); (ii) Statute duly registered before the competent Registration Office; (iii) Minutes of the Board election; (iv) Balance sheet of the current period; (v) Income Tax Exemption Declaration (Fiscal-Economic Information Declaration of the Legal Entity – DIPJ), together with the delivery receipt, related to the previous year; (vi) Registration before the Taxpayer Registry (CNPJ);

The entity shall send its request by mail or present it to the "Protocolo Geral" of the Ministry of Justice.

Once the qualification request is received, the Ministry of Justice has 30 days to decide whether to grant OSCIP status or not, and another 15 days to publish its decision in the Official Journal, through instructions of the National Secretary of Justice.

In case of a negative response to the qualification application, the Ministry of Justice shall send a report identifying all requirements that were not fulfilled. After making the necessary amendments, the entity may present its application again.

4.3.1.4. Partnership Agreement

The Partnership Agreement is an agreement aiming for cooperation between the OSCIP and the Government, in order to promote and execute public interest activities using governmental resources.

It is important to point out, that the qualification as an OSCIP does not necessarily mean that the entity will celebrate Partnership Agreements with governmental bodies. In order to execute a Partnership Agreement, the governmental body shall demonstrate its interest in promoting the partnership with the OSCIP. Besides, the governmental body shall indicate in which areas it wishes to execute the agreement as well as announce the operational and technical requirements. The selection of the OSCIP for the Partnership Term might be promoted through a Project Contest (although not mandatory). The OSCIP itself might also propose the partnership agreement, through presentation of its project to the government agency. In such case, the government representative shall assess the project's public importance and its convenience in relation to its public programs and policies, as well as the benefits to the public.

According to Article 10, 2nd paragraph, of Law No. 9.790/99, the Partnership Term shall explicitly determine:

(i) the objective, specifying the work program, in other words, the detailed program that the OSCIP undertakes to develop;

(ii) the goals and pre-established results, with the terms of execution and agenda for disbursement;

(iii) the objective assessment criteria regarding performance, as well as the results indicators;

(iv) the prevision for income and expenses, particularized according to the Brazilian Accounting Rules, including the remuneration and benefits to the staff to be paid with the resources obtained from the Partnership Term;

(v) the publishing in the official press according to the instructions established in Article 10, 4th paragraph, of Decree No. 3.100/99; and;

(vi) the obligation to render accounts to the Public Power, at the end of each fiscal year, including: (a) a report concerning the Partnership Agreement, comparing goals and achieved results and (b) a report containing all effective expenses and incomes;

APPENDIX I

STATUTE OF A PUBLIC INTEREST CIVIL SOCIETY ORGANIZATION/OSCIP

Chapter I – NAME, HEADOFFICE AND PURPOSE

Art. 1º. _____ (name of entity), constituted on _____, _____, is a private non-for-profit legal entity, with an indefinite term of duration, with head office in the City of _____ State of _____ and Venue in _____.

Art. 2º. The purpose of _____ (entity) is to _____ _____. **(Law 9.790/99, art.3º)**

Sole Paragraph. _____ (entity) does not distribute among its partners or members, counselors, directors, employees or donors, possible operational surplus, gross or net, dividends, bonus, shares or portions of its patrimony, obtained through the implementation of its activities, and uses them integrally in the performance of its social purposes. **(Law 9.790/99, sole paragraph, art.1º)**

Art. 3º. During the performance of its activities, _____ (entity) shall observe the principles of legality, impersonality, morality, publicity, economy and efficiency and shall not discriminate against race, color, gender or religion. **(Law 9.790/99, item I, art.4º)**

Sole Paragraph. _____ (entity) performs its activities through _____ (way through which it performs its activities: direct execution of projects, programs or action plans, through donations of physical, human and financial resources, or rendering of intermediary services of support to other non-for-profit or-

ganizations and to public sector agencies that work in related areas). **(Law 9.790/99, sole paragraph, art. 3º)**

Art. 4º. _____(entity) shall have an Internal Regulation, approved by General Assembly, that shall rule its functioning.

Art. 5º. In order to accomplish its purpose, the entity shall be divided into as many units of service rendering as necessary, which shall be regulated by the present statute.

Chapter II – PARTNERS

Art. 6º. _____(entity) is formed by an unlimited number of partners, distributed among the following kinds: _____(founder, benefactor, contributors, etc).

Art. 7º. The partners _____ (specify which ones) in order with their social obligations are entitled to:
I – vote and be voted for elective positions;
II – participate in General Assemblies;

Art. 8º. The partners are responsible for:
I – respecting the provisions of the Statute and Internal Regulation;
II – complying with the Directors' decisions; etc.

Art.9º. Partners are not personally responsible in any way for the entity's obligation.

Chapter III – MANAGEMENT

Art. 10. _____(entity) shall be managed by:
I – General Assembly;
II – Board of Directors;

III- Fiscal Council **(Law 9.790/99, item III, art. 4º)**.
Sole Paragraph. The Institution pays its managers that effectively work in the executive management and those that render specific services, respected in both cases, all prices charged by the market in the region where the activities are performed. **(Law 9.790/99, item VI, art. 4º)**

Art. 11. The General Assembly, entity supreme body, shall be formed by partners fully vested in the statutory rights.

Art. 12. The General Assembly is responsible for:
I – election of the Board of Directors and of Fiscal Council;
II – decision concerning the amendments to the Statute, as established in article 33;
III – decision concerning the dissolution of the entity, according to article 32;
IV – decision concerning the convenience to sell, compromise, mortgage or exchange entity's assets;
V – approve the Internal Regulation.

Art. 13. The General Assembly shall ordinarily meet once a year in order to:
I – approve the proposed annual schedule of the entity, presented by the Board of Directors;
II – assess the annual report of the Board of Directors;
III- discuss and approve the accounts and balance approved by the Fiscal Council.

Art. 14. The General Assembly shall meet, extraordinarily, when called:
I – by the Board of Directors;
II – by the Fiscal Council;
III – by requirement of_____ (number) partners in order with their social obligations.

Art. 15. The convocation of the General Assembly shall be published and posted in the headoffices of the Entity and/or publish on the local press, with at least _____ days in advance.
Sole Paragraph. Any Assembly shall take place on first call with the majority of its members and, on second call, with any number.

Art. 16. The institution shall adopt administrative management techniques, necessary and proper to hinder the gaining, individually or collectively, of benefits and personal advantages, arising from the participation in the decision making process **(Law 9.790/99, item II, art. 4º)**

Art. 17. The Board of Directors shall be formed by a President, a Vice-President, First and Second Secretaries, First and Second Treasurers.
Sole Paragraph. The Board of Directors' mandate shall be of _____ years, the consecutive re-election of which shall only be allowed once.

Art. 18. The Board of Directors is responsible for:
I – prepare and present to the General Assembly the proposed annual schedule for the entity;
II – execute the annual scheduled activities of the entity;
III – prepare and present to the General Assembly an annual report;
IV- meet with public and private institutions to mutually collaborate on common interest activities;
V- hire and dismiss employees;

Art. 19. The Board of Directors shall meet at least once a month.

Art. 20. The President shall:
I – represent _____ (entity) judicial and extra-judicially;
II-respect and make others respect this Statute and Internal Regulation;
III- preside the General Assembly;
IV- call and preside the Board of Directors' meeting; etc.

Art. 21. The Vice- President must:
I – substitute the President in case of absence or impediment;
II- assume the mandate, in case of vacancy, until its term;
III- assist the President in all general matters; etc.

Art. 22. The First Secretary must:
I – take part in the Board of Directors' meeting and General Assembly, and write down the minutes;
II – publish all news related to the activities of the entity.

Art. 23. The Second Secretary must:
I – substitute the First Secretary in case of absence or impediment;
II- assume the mandate, in case of vacancy, until its term;
III- assist the First Secretary in all general matters; etc.

Art. 24. The First Treasurer must:
I – collect and account all members' contributions, income, donations and allowances, and keep up to dated all entity's accounting;
II- pay the accounts authorized by the President;
III- prepare reports on incomes and expenses, whenever required;
IV- present to the Fiscal Council the entity's bookkeeping, including the reports regarding financial and accounting performance and regarding the patrimonial operations undertaken;
V- keep, under its responsibility, all documents related to Treasury;
VI- keep all cash on banks or credit establishments;

Art. 25. The Second Treasurer:
I – substitute the First Treasurer in case of absence or impediment;
II- assume the mandate, in case of vacancy, until its term;
III- assist the First Treasurer in all general matters; etc.

Art. 26. The Fiscal Council shall be formed by _____ members and its respective substitutes elected on General Assembly.

§ 1º The Fiscal Council mandate shall be together with the Board of Directors' mandate;
§ 2º In case of vacancy, the mandate shall overtaken by the respective substitute, until its terms.

Art. 27. The Fiscal Council must:
I – examine all accounting books of the entity;
II- give opinions concerning balances and reports of financial and accounting reports and of patrimonial operations undertaken, issuing legal opinions to the highest entity body; **(Law 9.790/99, item III, art. 4º)**
III – require to the First Treasurer, at any time, documents proving the economic and financial activities undertaken by the entity;
IV – supervise the work of eventual external independent auditors;
V – call extraordinary General Assemblies; etc.
Sole Paragraph. The Fiscal Council shall meet ordinarily every _____ months and, extraordinarily, whenever necessary.

Chapter IV – PATRIMONY

Art. 28. The patrimony of_____(entity) shall be constituted by goods and chattels, real estate property, vehicles, livestock, shares and government bonds.

Art. 29. In case of dissolution of the entity, the respective net patrimony shall be transferred to another legal entity qualified under the terms of Law 9.790/99, preferably with the same social purpose. (Law 9.790/99, item IV, art. 4º)

Art. 30. In case the Entity looses its qualification according to Law 9.790/99, the available patrimonial assets, acquired with public resources during the period of time in which it was qualified, shall be determined and transferred to another legal entity qualified under the terms of the same Law, preferably with the same social purpose. **(Law 9.790/99, item V, art. 4º)**

Chapter V – RENDERING OF ACCOUNTS

Art. 31. The rendering of accounts of the entity shall respect at least (Law 9.790/99, item VII, art. 4º):
I – Fundamental principles of accountability and Brazilian Accounting Rules;
II – Publication, by any proper means, at the end of the fiscal year, of the report concerning the activities and financial demonstrations of the entity, including the Negative Debts Certificates issued by the National Institute of Social Security and Unemployment Benefit Mandatory Fund;
III – Audits, including by independent external auditors, if necessary, on the use of eventual resources according to Partnership Agreements, as established in the regulation;
IV – Rendering of accounts of all received public resources and assets, according to the determination of the sole paragraph of article 70 of the Federal Constitution.

Chapter VI – MISCELLANEOUS

Art. 32. _____(entity) shall be dissolved based upon decision of the Extraordinary General Assembly, specially called for such purpose, if the maintenance of the activities become impossible.

Art. 33. The present Statute may be amended, at any time, by decision of the members' absolute majority, on General Assembly especially called for such purpose, and shall come into force on the date of registration before the Registration Office.

5
Taxation

The Brazilian tax system is governed by the Federal Constitution of 1988 and the National Tax Code,[17] issued in 1966. This basic legislation contains all general provisions, definitions, competences, procedures, and limitations pertaining to tax administration and assessment. The National Tax Code is for general application and must be observed by all tax authorities within the country, at the federal, state, and municipal level. The Federal Constitution sets forth which taxes each member of the federation has the authority to impose, and establishes the main principles of taxation to be followed by legislators. Federal taxes are described in detail in the Constitution in Articles 153 and 154, the most important include: (1) import tax (II), (2) export tax (IE), (3) income tax (IR), (4) tax on manufactured products (IPI), (5) financial transactions tax (IOF), (6) rural and land tax (ITR), (7) contribution tax for the social integration program (PIS), (8) social contribution tax on business entities' profits (CSLL), (9) social contribution tax for social welfare (COFINS), and (10) contribution tax over the business entities' payrolls (INSS).

State and federal district taxes described in Article 155 of the Federal Constitution are as follows: (1) value-added sales and transportation tax (ICMS), (2) inheritance and donations transfer tax (ITCMD), and (3) vehicles ownership tax (IPVA)

Finally, Brazilian legislation provides for municipal taxes which are determined by Article 156 of the Federal Constitution: (1) service tax (ISS), (2) real estate tax (IPTU), and (3) property transfer tax (ITBI). Each member of the federation has a tax code. However, they must observe the legal provisions of the Federal Constitution and National Tax Code.

5.1. Individual Income Tax

An individual becomes a Brazilian tax resident: (1) upon his or her entrance into Brazil in possession of a permanent visa, (2) upon his or her entrance into Brazil in possession of a temporary visa, with an employment contract in Brazil, or (3) if an individual enters Brazil under a temporary visa but with no employment contract in Brazil, then the individual will be considered a Brazilian resident after a period of 183 days (consecutive or not) of residence in the country over a period of 12 months.[18]

Brazil follows a universal taxation system. Individual income tax (IRPF) is levied on all income and capital gains earned by an individual regardless of the means of earning, location, legal status, denomination, nationality of the paying source or the goods realizing income or revenue. Once a nonresident expatriate becomes a Brazilian tax resident, his or her worldwide income (derived from Brazilian or foreign sources) obtained as of that date is subject to taxation in Brazil, and the tax resident shall present an annual income tax return to the Brazilian Federal Revenue Service. The income received from foreign sources—whether or not effectively transferred to Brazil—is subject to the monthly income tax assessment system (carnê-leão) and shall be included as taxable income in the annual income tax return.

Under Brazilian law, individuals who are residents of, or domiciled in, Brazil are taxed on a cash basis on their worldwide income. This means that their foreign-source income will only be subject to tax in Brazil when the money is paid or credited to their accounts, and is available to them. Brazilian-source income of such individuals is ordinarily subject to withholding income tax, as an advance of the tax due on the individual's returns. Capital gains are defined as the difference between the sales price and the cost of acquisition of an asset or right and are generally subject to 15% tax. The following tables list the cur-

17. Law 5.172, as amended (Oct. 25, 1966) (Braz.).
18. Normative Ruling SRF 208/02, Art. 2, Oct. 1, 2002 (Braz.).

rent applicable general taxation rates:

For income earned during the 2013 calendar year, the following monthly progressive rates were applicable:[19]

Tax Basis (R$)	Rate (%)	Deduction (R$)
Up to 1,710.78	–	–
From 1,710.79 to 2.563,91	7.5	128.31
From 2,563.92 to 3,418.59	15	320.60
From 3,418.60to 4,271.59	22.5	577.00
Over 4,271.59	27.5	790.58

For income earned during the 2014 calendar year, the following monthly progressive rates apply:[20]

Tax Basis (R$)	Rate (%)	Deduction (R$)
Up to 1,787.77	–	–
From 1,787.78 to 2,679.29	7.5	134.08
From 2,679.30 to 3,572.43	15	335.03
From 3,572.44 to 4,463.81	22.5	602.96
Over 4,463.81	27.5	826.15

5.2. Corporate Income Tax

All Brazilian legal entities are subject to corporate income tax (IRPJ). The corporate form does not substantially affect the taxes applicable to the entity. There are three methods for calculation of corporate income tax, namely: (1) real profit system, (2) presumed profit system, and (3) arbitrated profit system.

19. Provisional Measure N° 528 of March 25, 2011 (Braz.).

20. Provisional Measure N° 528 of March 25, 2011 (Braz.).

21. Income Tax Code, Art. 516, Decree 3000 (Mar. 29, 1999) (Braz.).

5.2.1. Real Profit System

Companies subject to the real profit system must recognize their revenues and expenses on an accrual basis. These companies may choose between taxation based on quarterly or on annual balance sheets. If taxation is based on a quarterly balance sheet, payment of taxes will be definitive, and all rules for calculating annual profit will apply to such quarterly profit (rates, additions, provisions, offsetting losses at a maximum of 30% of profits, etc.). Income tax, in this case, may be paid in up to three monthly installments.

If a company opts for payment on annual profits (the most common and generally recommended system), profits are calculated from a balance sheet covering the results for the entire year, but the tax must be prepaid monthly. These prepayments may be reduced or suspended if the company has paid more in taxes on accumulated profits for the period than were actually due, according to the rules for annual calculation.

5.2.2. Presumed Profit System

Companies required to adopt the real profit system they may select the presumed profit system. If the company's total gross revenue and profits are less than or equal to R$78,000,000 during the fiscal year. Under this simplified system, similar to the estimated monthly prepayment, the taxable basis for income tax is presumed at a pre-established percentage of gross revenue, plus other income (financial income, capital gains, etc.).[21] The taxpayer must calculate the corporate income tax on a quarterly basis, and the payment of the tax should be made by the last business day of the following month at the end of the taxable period. Companies subject to this system may opt to recognize its revenues for tax purposes on a cash basis or accrual basis. Usually, the companies under the presumed profit system adopt the cash basis.

5.2.3. Arbitrated Profit System

The arbitrated profit system is only applicable when a taxpayer fails to comply with the rules for keeping records or computing tax-

able income. The taxable income basis is arbitrated based on the presumed percentage of profits from the company's business.

5.2.4. Rates

Corporate income tax is levied at a rate of 15% on each month's taxable profit.[22] An additional 10% is levied on the amount of real or determined profit exceeding R$20,000 per month.[23] The taxable base for capital gains consists of the positive difference between the price obtained on the sale of an asset and its purchase cost.[24]

5.2.5. Dividends

Dividends received from other local companies, including subsidiaries and affiliates, are not subject to corporate income tax (IRPJ). However, since Law 9.249/95 was enacted, the profits, earnings, and capital gains made by branches, subsidiaries, or affiliates of Brazilian companies operating abroad are subject to taxation in Brazil. Income tax paid abroad on such profits, earnings, and capital gains may offset income tax due in Brazil.[25] The losses of these branches, subsidiaries, and affiliates are not taken into consideration when calculating Brazilian income tax and may only offset future profits of the same subsidiary or other branches in the same country.[26]

5.2.6. Interest on Equity

The possibility of Brazilian companies paying interest to their shareholders based on the equity that shareholders hold in the company was introduced by Article 9 of Law 9.249/95. This rule states that expenses incurred from interest paid by the company to its shareholders, within certain limits, may be deducted from the income tax base. It has the effect of a deductible dividend and may actually be considered a payment of dividends for corporate law purposes.

The difference between this interest on equity and dividends is that dividends are not subject to any taxation, while interest on equity is taxed at the source (through withholding income tax) at the rate of 15% (25% if the beneficiary is domiciled in a low-tax jurisdiction). In addition, interest on equity is considered taxable income for beneficiaries domiciled in Brazil, subject to normal taxation. The 15% withheld at the source may offset the income tax due by the beneficiary. If the beneficiary is an individual resident of Brazil, or if payment is made to a shareholder domiciled outside of Brazil, the 15% withholding income tax is the only applicable tax. Dividend payments are deducted from retained earnings, with no effect on the profit and loss statement. Interest on equity is registered as an expense of the company that paid it.

The basis for calculating this interest is the total amount of the company's equity accounts, less possible revaluation reserves not yet taxed. If the amount of equity accounts varies during the relevant period, the calculation will be made pro rata. The applicable interest rate may not exceed the Long-Term Interest Rate (TJLP), which is set by the federal government based on its bonds. The deductible amount is also limited to the higher of half of the profits of the period, or half of the company's retained earnings from prior periods.

5.2.7. Tax Losses

Tax losses may be carried forward indefinitely, but may offset only up to 30% of future profits made by companies.[27] For this purpose, a tax loss is defined as the accounting loss adjusted for tax purposes. Tax losses may be extinguished under certain circumstances, such as a result of mergers and spin-offs and may not be used by the survivor or successor. In addition, tax losses are extinguished when a company simultaneously undergoes a change in control and its business activity.

22. Income Tax Code, Art. 541, Decree 3000 (Mar. 29, 1999) (Braz.).
23. Income Tax Code, Art. 542, Decree 3000 (Mar. 29, 1999) (Braz.).
24. Income Tax Code, Art. 418, Sec. 1, and Art. 425, Decree 3000 (Mar. 29, 1999) (Braz.).
25. Income Tax Code, Art. 394 and 395, Decree 3000 (Mar. 29, 1999) (Braz.).
26. Income Tax Code, Art. 394, Para. 8, Decree 3.000 (Mar. 29, 1999) (Braz.).
27. Income Tax Code, Art. 510, Decree 3000 (Mar. 29, 1999) (Braz.).

5.2.8. Transfer Pricing

Brazilian law 9.430/96 introduced transfer pricing rules, establishing reference prices for goods, services, and rights imported and exported by Brazilian companies to and from related parties, for the purpose of corporate income tax and social contribution tax (CSLL) assessment.[28] The statute provides a specific list of designated related parties and it also provides that transfer pricing rules shall apply to transactions performed between a Brazilian company and foreign persons located in low-tax jurisdictions, regardless of whether there is a relationship between them or not.

5.2.9. Withholding Taxes

Profits and dividends are not subject to withholding income tax.[29] However, royalties are subject to a withholding income tax of 15%.[30] Interest is also subject to a withholding tax of 15%.[31]

5.2.10. Double Taxation Conventions

Brazil has entered approximately twenty-eight double taxation agreements with the following countries: South Africa, Argentina, Austria, Belgium, Canada, Chile, China, the Czech Republic, Korea, Denmark, Ecuador, Spain, the Philippines, Finland, France, the Netherlands, Hungary, India, Israel, Italy, Japan, Luxembourg, Mexico, Norway, Portugal, Slovakia, Sweden, and the Ukraine. In the absence of a double taxation treaty, a foreign tax credit for income tax paid in a given country may only offset Brazilian income tax on the income received from that country, limited to the amount of the Brazilian tax on such income.[32]

28. The statute provides a specific list of related parties.

29. Income Tax Code, Art. 692 and 693, Decree 3000 (Mar. 29, 1999) (Braz.).

30. Income Tax Code, Art. 710, Decree 3000 (Mar. 29, 1999) (Braz.).

31. Income Tax Code, Art. 702, Decree 3000 (Mar. 29, 1999) (Braz.).

32. Income Tax Code, Art. 395, Decree 3000 (Mar. 29, 1999) (Braz.).

5.3. Other Taxes

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

(1) Federal Taxes: Corporate Income Tax, 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 Profits (Contribuição Social sobre o Lucro), Contribution to the Social Integration Plan (Contribuição ao Programa de Integração Social – PIS), Contribution for Financing of the Social Security (Contribuição para Financiamento da Seguridade Social – COFINS), and Contribution for Intervention in the Economic Domain (Contribuição de Intervenção no Domínio Econômico – CIDE);

(2) State Taxes: Tax on the Circulation of Goods and Services (Imposto sobre a Circulação de Mercadorias e Serviços - ICMS), Tax on Vehicles Property (Imposto sobre a Propriedade de Veículos Automotores – IPVA) and Tax on Donation and on Inheritances (Imposto sobre Heranças e Doações - ITCMD); and

(3) Municipal Taxes: Service Tax (Imposto sobre Serviços - ISS), Real Estate Transfer Tax (Imposto sobre Transmissão Inter Vivos - ITBI) and Real Estate Property Tax (Imposto sobre a Propriedade Territorial Urbana – IPTU).

The Contribution for Financing of the Social Security (Contribuição para Financiamento da Seguridade Social - COFINS) is The Contribution for Financing of the Social Security (Contribuição para Financiamento da Seguridade Social – COFINS) is a federal social contribution levied on the corporate taxpayer's monthly gross income at a 3% rate. The taxable basis includes all gross revenues (including financial income, exchange variation income etc.), but does not include canceled sales or services and unconditional discounts, among others. For companies calculating their corporate income tax according to the real profit system the COFINS rate is 7.6%. Since this is a non-cumulative tax, certain

costs and expenses (such as inputs utilized for the manufacturing of goods, electrical energy used in the premises of the legal entity etc.) can be discounted. Some economic sectors, companies that calculate its Corporate Income Tax based on presumed profits, and specific types of revenues are still subject to the cumulative system of the COFINS, at the rate of 3%.

The Social Contribution on Profits (Contribuição Social sobre o Lucro) is 9% of the adjusted net profits, calculated monthly or annually (pursuant to an option for income tax made by the taxpayer) and is not deductible from income tax.

The Tax on Financial Transactions (Imposto sobre Operações Financeiras – IOF) is imposed on credit transactions, the execution of currency exchange agreements, the acquisition of securities, insurance transactions and the acquisition of gold. Rates range from 0% to 25%. According to the objectives of the monetary, foreign exchange and fiscal policies, under certain circumstances there are exemptions from the IOF tax. The calculation basis of this tax varies depending on the transaction.

The Contribution to Social Integration Plan (Contribuição para o Programma de Integração Social – PIS) is levied on the monthly gross revenue of Brazilian companies at a 1.65% rate. The taxable basis includes all gross revenues (including financial income, exchange variation income etc.), but does not include canceled sales or services and unconditional discounts, among others. This contribution is a non-cumulative tax, allowing the taxpayer to discount 1.65% of specific costs and expenses determined by the law (inputs used to the manufacturing of goods, electrical energy used in the premises of the legal entity and others). Some economic sectors, companies that calculate its Corporate Income Tax based on presumed profits, and specific types of revenues are still subject to the cumulative system of the PIS contribution, at the rate of 0.65%.

Contributions for Intervention in the Economic Domain – CIDE

(Contribuições de Intervenção no Domínio Econômico – CIDE) are based on the Brazilian Federal Constitution, the government has created several contributions for intervention in the economic domain (CIDEs), e.g., CIDE for the Universal Telecommunications Service Fund (FUST), CIDE on remittances abroad of royalties and payment of services, CIDE levied on the importation and marketing of petrol, oil products, natural gas and its byproducts, ethylic alcohol and ethylic alcohol fuel, CIDE for the Development of the Cinematographic Industry, and CIDE to the Telecommunications Technological Development Fund – FUNTTEL.

Few products are subject to the export tax, e.g., raw hides and skins of bovine (including buffalos), equine, sheep or lambs animals, cigarettes containing tobacco (when exported to the Caribbean, Central and South America), and weapons and ammunition (when exported to South America exception made to Argentina, Chile and Ecuador and Central America, including the Caribbean Islands). The tax is calculated on the export price of the goods.

The IPI tax, which is similar to an excise tax, is imposed on transactions with manufactured products as they leave the factory where they have been manufactured. It also applies to imported products at the time pf importation and the first resale by the importer. The IPI is usually levied at valorem. The rates vary depending on the product's nature. IPI is levied at each production step or phase of independent manufacturer, although it is ultimately passed on to the end customer. The IPI is an non-cumulative tax, which means that the IPI due in prior transactions (e.g. importation of raw materials), can be offset against the IPI due for a subsequent transaction (e.g. manufactured product).

State taxes include ICMS and ITCMD. ICMS is a value-added tax, imposed on imported and domestic products at the time such goods leave the business premises. ICMS is further due on interstate and intermunicipal transportation services and communication services. ICMS due on each transportation is based on the price of the

products sold. Similarly to the IPI, the ICMS paid in each transaction can be offset against ICMS due in upcoming transactions. ICMS rates vary from State to State. Currently, common 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. Different rates may apply depending on the product, service or State in which the transaction occurs. Rates on interstate transactions are usually 12% but may be as low as 7% depending on the State of destination.

The Tax on Donations and Inheritances (ITCMD) is imposed on the transfer of assets or rights due to inheritances and donations. Rates vary from 1% to 8% of the fair market value of the transferred asset or right.

The ISS is a municipal tax levied on the supply of services of any nature, except those subject to federal taxation through the IPI, or those covered by the ICMS. Rates vary form 2% to 5% according to the municipality.

The Real Estate Transfer Tax is levied on most onerous transfers of real estate. Rates vary according to the actual value of the transaction or the appraised value of the property. The Real Estate Transfer Tax does not apply to real estate transfers as capital contributions.

The Real Estate Property Tax is levied annually at a 1% rate on the appraised value of real estate. Rates vary depending on the municipality.

6
Customs and International Trade

For many years, the focus of Brazil's foreign trade policy was to reduce imports and encourage exports. However, since the 1990s, Brazil has experienced a significant decline in customs duties and modernization of import systems and procedures. Today importing into Brazil requires the navigation of a governmental registration system. However, even today significant variability exists in the government system.

Brazilian import operations are conducted by means of electronic registration with the Integrated System of Foreign Trade (Sistema Integrado de Comércio Exterior - SISCOMEX). Licensing for imports is either "automatic," occurring with SISCOMEX registration (after arrival of the goods) or "non-automatic" (registration of the operation depends on licensing prior to the shipment of the goods abroad). A list of items subject to non-automatic licensing includes: (1) imports under drawback; (2) imports subject to restrictions or tax benefits; (3) items subject to similarity exam; (4) used material; (5) imports made under a financial or operational licensing; and (6) imports made without exchange coverage (capital investment, donation).

Generally, all imports are subject to import duty, IPI, and ICMS, PIS and COFINS whether carried out with or without exchange coverage. However, the import duty rate for machinery and equipment not produced locally may be reduced to 2% upon request of the importer to the competent authorities. The import duty is calculated on the total CIF (cost, insurance, and freight) value of the import, as long as the price of the product is in conformity with the customs valuation rules of Chapter VII of the GATT of 1994. Import duties are charged based on the tariff classification of the product in the TEC/SH (Foreign Common Tariff – Harmonized System).

The cost and ability to import into Brazil is subject to significant variability. Currently, Brazil's import tariffs range from 0 to 35%, with an average applied tariff rate of 11.5%. The average bound tariff, i.e., the rate that cannot generally exceed under WTO rules is 31.4%. Given the large disparities between bound and applied rates, foreign exporters face significant uncertainty in Brazil due to the government's ability and willingness to raise applied rates to bound levels. For example, in both August and September of 2009, Brazil raised tariffs as much as fourteen percentage points on several industrial products including industrial alcohols, valves for pneumatic transmissions, parts of electric appliances, and many more.

Even within Latin American alliances, imports into Brazil face uncertainty. Although, imports from other member countries of the Southern Common Market ("MERCOSUL", as it is called in Brazil or "Mercosur", as it is called in the Spanish-speaking countries) are free of import duty, as long as the imported item has a certificate of origin from one of the country members;[33] tariffs may be imposed by each MERCOSUL member on products imported from outside the region that transit at least one MERCOSUL member before reaching their final destination. Thus, the current MERCOSUL Common External Tariff (CET) averages 11.5 percent and ranges from 0 percent to 35 percent ad valorem, with a limited number of country-specific exceptions.

Further, MERCOSUL has allowed its members to maintain an "exception list" of products that may have different import duty rates. Brazil is permitted to maintain 93 exceptions to the CET until December 31, 2011. Brazil's Foreign Trade Chamber (Camex) decided in June 2009 to raise import duties on a select group of 8 imported steel products by removing these items from an exceptions list of 100 duty-free products contained in MERCOSUL's CET. Products covered under this action included different types of hot- and cold-rolled steel in plates and coils. This action increased the import tariffs to between 12 percent and 14 percent. Further, in December 2009, Brazil – along with the other MERCOSUL members – approved tariff increases for hundreds of products within the CET, including dairy, textiles, and bags, backpacks, and suitcases. In many cases, the applied tariffs were increased up to the bound levels. Therefore, due to the significant variability related to imports it is recommended that a strong consideration be made to leverage the local manufacturing capabilities.

33. The current MERCOSUL member countries include Brazil, Argentina, Uruguay, Paraguay and Venezuela. Bolivia, Chile, Columbia, Ecuador, and Peru are associate member countries. Mexico is an observer of the agreement.

7
Financial Institutions and Transactions

7.1. The National Financial System

The Brazilian financial system (Sistema Financeiro Nacional) consists of the following regulatory and supervisory bodies: (1) the National Monetary Council (CMN), (2) the Central Bank, (3) the Brazilian Securities and Exchange Commission (CVM), (4) the Superintendence of Private Insurance (SUSEP), and (5) the Supplementary Pension Secretariat (Secretaria de Previdência Complementar). The banking industry in Brazil is regulated and supervised by the National Monetary Council, the Central Bank, and the Brazilian Securities and Exchange Commission.

7.2. Financial Institutions and Regulatory Overview

Financial institutions are those public or private legal entities that have as their core or subsidiary activity the collection, intermediation, or application of their own financial resources or those of third parties in domestic or foreign currency, and the custody of third-party property values. Individuals exercising any of these activities either on a temporary or permanent basis shall also be regarded financial institutions for the purposes of the law and thus subject to regulation and supervision by the Central Bank of Brazil.

Financial institutions may only operate in the country with prior authorization by the Central Bank of Brazil or a decree by the executive branch, in the event that they are foreign.

Campaigns designed to raise funds from the public, undertaken by physical or legal persons within the jurisdiction of Brazil, shall require prior authorization from the Central Bank of Brazil with the exception of public stock subscriptions, undertaken in accordance with the law of corporations.

7.3. Interest Rates

Article 192, § 3, of the Brazilian Federal Constitution, enacted in 1988, established a 12% per year ceiling/cap on bank loan interest rates. The current Civil Code provides that interest rates shall be capped at the rate charged by the National Treasury Office (Fazenda Nacional) or the SELIC (base rate paid by federal government bonds). Despite the fact that there is presently some uncertainty as to whether the SELIC or the 12% per annum interest rate established in the Brazilian tax code should apply, the latter understanding (12% p.a.) has currently prevailed. Nevertheless, Brazilian courts have interpreted that financial institutions are not subject to the aforementioned Civil Code limitations, provided that the interest amount charged follows current market rates. The limitations stated above, therefore, apply to loan transactions between nonfinancial institutions only; financial institutions are currently free to establish interest rates at market conditions.

7.4. Security

Security is regulated mainly by the Civil Code. Security may be classified as "personal" type (pessoais) and "in rem" type (reais). Personal Security (garantias pessoais) is the equivalent of a guarantee in the United States, meaning that another "person" is also liable for repayment of the debt in the event that the debtor does not do so in a timely fashion. No priority is granted to the creditor in insolvency circumstances, and the creditor has no rights over a particular asset of the debtor. A personal security may be either a letter of guarantee (fiança) or those guarantees granted in relation to an instrument of credit (aval). In Rem Security ("garantias reais"), security over an asset, includes; pledges, fiduciary ownerships, mortgages (primarily for immovable assets), and antichresis (assignment—as repayment of

a debt—of the right to proceeds arising from a property whose title is transferred by the debtor to the creditor to secure performance of repayment obligations).

7.5. Lending

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

Corporations may obtain financing both domestically and internationally. International loan transactions must be registered with SISBACEN (the Central Bank Computer System) through the Registry of Financial Operation (or ROF).

8
Competition (Antitrust)

The Brazilian Competition Act is the main statute governing competition issues.[34] This legislation is very broad and includes not only merger and control provisions, but also offenses or violations to free competition in Brazil, penalties, and procedures. In addition to this statute, there are other pieces of civil and criminal legislation that govern the notification of horizontal concentration and vertical integration acts in regulated industries and criminalization of hard-core cartel and other illegal commercial practices.[35] The Brazilian Competition Act applies to all individuals and legal entities that conduct business in Brazilian territory or abroad, to the extent that their conduct may have an effect on the Brazilian market.[36]

Unlike the U.S. legal system, Brazilian competition practices are not based on court decisions. Administrative agencies are responsible for investigating, challenging, and ruling on all cases. The judiciary plays a different role, acting only as an appeals body when convicted parties wish to challenge a final decision issued by the administrative authority.

The governmental agency responsible for enforcement of the Brazilian Competition Act is the Administrative Council for Economic Defense (CADE), an independent federal agency connected to the Ministry of Justice. CADE's plenary is a collegiate body composed of seven members, and its decisions are taken by majority of votes,

34. Competition Act, Law No. 12.529 (Nov. 30, 2011) (Braz.).
35. Law No. 8137, as amended (Dec. 27, 1990) (Braz.).
36. Competition Act, Law No. 12.529 (Nov. 30, 2011)Art. 2 (Braz.).

requiring a minimum quorum of five members.

CADE is assisted by the Secretariat of Economic Monitoring (SEAE), reporting to the Ministry of Finance. Together, these two agencies constitute the Brazilian System of Competition Defense (SBDC).

In regulated industries, other regulatory agencies may act as assistants to CADE by issuing technical reports. Concerning criminal investigations and judicial claims, the police and the public prosecutor will be involved.

9

Hiring, Labor, Employment, and Visa Issues

Labor rights in Brazil are divided into two categories: (1) individual labor rights and (2) collective labor rights. Individual labor rights address an employee's individual relationship with his or her employer, while collective labor rights address union organizations and the collective relationships between the employer and the union that represents employees in collective negotiations.

Labor rights are outlined in the Brazilian Constitution, as well as laws, decrees, provisional measures, ordinances and regulations, international conventions and treaties (ratified by the Brazilian government), company policies, supreme court decisions, superior labor court (TST) decisions, use, and customs. These principals include: (1) employee protection, given that the worker is considered the weaker part of the relationship with the employer, (2) in labor-related conflicts, at any level or jurisdiction, whenever there is a doubt regarding evidence, the court's decision will favor the employee, (3) the application of the most favorable law, (4) the most beneficial or favorable condition will be applied, (5) priority of reality, under which actual facts prevail over written documents, (6) protected salary or salary integrity, (7) defense of the employee's honor and ethical code, (8) nondiscriminatory practices, and (9) continuity of the employment relationship.

Labor rules also protect foreigners.[37] Mercosur countries, such as Argentina and Uruguay, have an agreement with Brazil under which employees from these countries may travel freely between them, as long as limitations provided in the agreement are upheld. If the for-

37. The primary immigration law is Federal Law No. 6815, as amended (Aug. 19,1980) (Braz.).

eign employee holds a work visa under which the foreign employee is employed in Brazil, the employee will have the same rights as a Brazilian employee.

Individual and collective conflicts are resolved by labor courts. Direct agreements entered into between employees and employers to resolve conflicts are not valid, since the Brazilian Constitution provides the right to sue as part of individual guarantees.

9.1. Labor Benefits

Maternity leave in Brazil provides for a 120-day leave payable by the Social Security Administration. The employee receives maternity leave allowance equal to the salary paid by the employer. Maternity leave is also extended to employees who adopt children. Paternity leave consists of five consecutive days starting with the child's date of birth.

A profit sharing or result participation plan involves a sum paid annually or semiannually by the company as a result of a plan prepared by a committee consisting of specific employees elected for this purpose.[38] There are special legal requirements, such as clear and objective goals, the worker's union participation, among others. The company incurs no costs with social charges.

Overtime pay consists of 50% on the amount corresponding to one regular hour worked. This percentage may change based upon the applicable collective bargaining agreement (to 60%, 70%, 80%, etc.). Overtime may be offset with days off within no more than one year following the event. Compensation may be paid upon written agreement directly with the employee, but an argument may be made that the agreement should be executed with the relevant union.

Every 12 months employees are entitled to a paid vacation of 30 calendar days, of which 10 days may be taken in cash. In addition, a vacation bonus must be paid in an amount equal to one-third of the employee's monthly salary. The employer has up to one year to grant

38. Law No. 10101, as amended (Dec. 19, 2000) (Braz.).

vacation from the date that the right to vacation period is completed. If this period is exceeded, the vacation and vacation bonus (one-third) must be paid out twice. Instead of 30-days vacation, employees have the right to opt to take 10 days of vacation in cash provided that they submit a written request 15 days prior to the end of the vacation entitlement period. If the employee does not make the request accordingly within the 15-day period of time, the employer has the right to refuse the request.

In case of termination of the employment agreement by the employer, 30 to 90 days prior notice has to be granted, depending on the time period of employment. If the employer does not want the employee to work during the period of prior notice, the corresponding days of salary may be paid as compensation. It is common in Brazil to pay the prior notice compensation.

If employees resign from a job, they must give the legal minimum of 30-days' notice. If employees ask the employer to be released from working during the 30-day notice period, and the employer agrees to release them, the employer is not allowed to deduct the 30-day notice from the employee's severance pay.

However, if the employer refuses to accept release, and the employee leaves the company, the employer has the right to deduct the 30-days' salary from the statutory severance pay.

Unemployment insurance is paid by the Ministry of Labor for a period of five months following unjustified termination of an employment contract. The company must provide the employee with a voucher for unemployment insurance at the time of dismissal.

The employer must pay the first 15 days following an employee's accident. Thereafter, the employee will receive benefit payments from the Social Security Administration.

Every month, employers must deposit an amount equivalent to 8% of the employees' monthly salary into the employee's Guaranteed Unemployment Fund at the Federal Savings Bank (Caixa Econômica Federal). If an employee is dismissed without cause, the employee

may withdraw the FGTS deposited, and the employer must pay the employee a penalty corresponding to 40% of the total amount deposited in the FGTS, and an additional 10% to the relevant governmental authority. Regardless of termination of employment, FGTS deposits may also be withdrawn by employees upon retirement, for the purchase of a house, a serious illness, in addition to other situations provided by law. If employees are terminated for cause in accordance with the definition provided under the Labor Code, [39] or if the employee resigns, the employer is released from paying the fine of 50%, and the employee is not allowed by law to withdraw the money deposited by the employer into his/her FGTS account.

If work is performed between 10:00 p.m. and 5:00 am additional night pay is required in the amount of 20% of one regular hour's pay. This percentage may change as determined by a collective bargaining agreement.

Employees proven to be exempt from receiving overtime, that is, employees holding positions of trust or employees who work outside of the office may work during this period of time without any additional pay for night work.[40]

Further, regardless of the time, the employer must supply uniforms and individual protection equipment free of charge.

Every year, employers must provide a 13th salary, which is also known as a Christmas bonus, equal to one-twelfth of the salary earned in the month of December for each month of service during that calendar year. The 13th salary must be included when calculating the FGTS and social security contributions.

39. Labor Code, Art. 482 (Braz.).

40. Labor Code, Art. 62, II (Braz.).

41. Precedent No. 51 of the Superior Labor Court on Policy Advantages and Option or New Policy establishes that: 1. Clauses of policies that revoke or amend previously approved advantages will only be applicable to employees hired after the amendment's implementation; and 2. In the event of two coexisting policies of a company, the employee's option for one of them has the effect of renouncing the rules of the other.

Any voluntary benefit frequently granted by the employer, regardless of whether the concession of such benefit is linked to the fulfillment of certain conditions, may be considered as a vested right, and any change in its conditions of concession that are not favorable to the employee may be questioned in court. Based upon precedents in the superior labor court, new policies will only be valid for new employees, and the previous conditions must be maintained for employees hired during the effectiveness of those conditions.[41] Not all benefits granted by an employer are part of an employees' pay, but depending on the nature of the benefit, it could potentially be considered as such. Thus, the legal nature of each benefit must always be analyzed in advance.

9.2. Social Contributions "Labor Charges"

It is important to emphasize that Brazilian companies are subject to significant social security contributions or charges, due to employment contracts, including: (1) the social security contribution (National Social Security Institute—INSS): 20 - 28.8% of payroll shall be paid by the company to the INSS. Additionally, employees contribute 8 - 11%, through payroll deductions paid by the company, limited to a ceiling amount that is currently equivalent to R$ 482,93, and (2) the government-guaranteed unemployment fund, 8% is contributed monthly by the company.

9.3. Compensation

Generally, Brazilian salaries are fixed, although variable salaries are possible. Similarly, it is possible to establish mixed compensation: with part of the salary fixed and part variable (commissions, premiums, bonuses, etc.). Salaries must be paid on or before the fifth business day of the month subsequent to the month worked. Salary advances are customarily given on a two-week basis, and depend on a collective bargaining agreement.

Salary adjustments are defined in collective bargaining agreements, and occur once a year. Salary increases based upon employ-

ee merits cannot be offset with salary adjustments provided under the collective bargaining agreement, except if otherwise provided in said collective agreement.

Salaries paid to employees in Brazil cannot be based in a foreign currency, as provided by law. Employee salaries may not be lowered without an agreement entered into with the relevant labor union. Officers or managers with an employment relationship are entitled to have their salaries adjusted under the collective bargaining agreement, except if otherwise provided in such collective agreement.

Any change to the employees' compensation that may result in a loss to the employee is considered unlawful, except via collective bargaining agreement, thereby entitling the employee to seek redress from the labor courts to restore the previous pay condition in addition to the payment of any possible differences.

9.4. Termination Procedures

If an employer wishes to terminate an employment agreement without cause, the employer shall give the employee 30 to 90 days' prior notice, depending on the time period of employment. Some collective bargaining agreements may establish longer periods of time. The notification letter shall specify whether or not the prior-notice period must be worked by the employee. In the event of a worked notice period, the employee is allowed to leave two hours before the end of the regular work day or be absent for seven consecutive days throughout the prior-notice period. Whichever alternative the employer chooses, it must be expressly stated in the dismissal letter. In the event that the employer does not want the employee to work during the notice period, the employee will be compensated in lieu of the notice period. A dismissal letter is considered a legal formality. Severance pay shall be made: (1) within 10 days as from the date of termination of employment, if compensation is given in lieu of 30-days' notice, or (2) on the first day after the 30-day worked notice period ends. Ratification of employment termination is mandatory in cases of dismissal of employees who have worked for more than one year.

The Brazilian Labor Code defines several events where an employer may dismiss an employee for cause.[42] These events are: (1) dishonest act, (2) lack of self-restraint or improper conduct, (3) regularly doing business on his or her own behalf or for a third party without the permission of his or her employer, or when in competition with the company for which she/he works, or is prejudicial to his or her work, (4) criminal conviction of the employee, in a final ruling, provided that the execution of the penalty has not been suspended, (5) inadequate discharge of duty, (6) habitual drunkenness or drunkenness during working hours, (7) violation of trade secrets, (8) act of disobedience or insubordination, (9) abandonment of employment, (10) injurious act to the honor or reputation of any person, which takes place during working hours, as well as physical violence practiced under the same conditions, except in the event of legitimate defense either of one's self or of others, (11) injurious act to the honor or reputation of his or her employer or superior, or physical violence against them, except in the event of legitimate defense either of one's self or of others, and (12) persistent gambling.

When terminating employment with cause, the dismissal letter is a legal formality, as well as a necessity to indicate the legal provision violated by the employee, and depending on some collective bargaining agreements, a brief summary of the facts. Failure to do so may lead to termination being considered null and void. Currently, drunkenness is not considered a motive for terminating employment for cause because the labor court considers it a social problem. With respect to the other motives listed above, employers should seek legal instruction upon suspicions of any act that could be considered a cause for dismissal, because although the employer may consider that a fault was committed by the employee, depending on the evidence, that fault may not justify termination for cause.

42. Labor Code, Art. 482 (Braz.).

If an employer terminates employment, the employee may file a labor lawsuit against the company to question the existence or not of cause to terminate the employment agreement. If the labor court decides that the fault was not proven or not serious, the court may consider the termination for cause null and void, and condemn the employer to pay the statutory severance as if the employee was terminated without cause. If the employee had job tenure, the court may grant reinstatement to the employee.

In turn, the Labor Code provides that, employees may consider their employment agreement terminated and demand severance compensation as if dismissals were without cause when (1) work demanded from an employee is beyond his or her strength, is forbidden by law, is contrary to proper conduct, or is not included in the clauses of the employment agreement, (2) the employee is treated with excessive severity by the employer or by the superiors, (3) the employee is in eminent danger of suffering an injury, (4) the employer fails to comply with the obligations of the employment agreement, (5) the employer or his or her representatives practice any act injurious to the honor or reputation of the employee or of any member of his/her family, (6) the employer or his representatives use physical violence on the employee, except in the event of legitimate defense, and (7) the employer decreases the employees' work (when remunerated by work performed), to a degree that considerably affects the amount of the employee's salary.[43]

Non-compete agreements surviving termination of employment may be challenged before the labor courts, in the event that (1) the employee is not properly compensated, (2) there is no limitation to the non-compete period, (3) there is no limitation with respect to territory, and (4) there is no limitation in the employer's business. Generally, labor courts consider that any employee has the freedom to work for anyone, but the courts have accepted non-compete

43. Labor Code, Art. 483 (Braz.).

agreements as valid when the above requirements are met.

A confidentiality agreement surviving termination of employment is considered valid. In the event of any breach of confidentiality by the employee, the employer must have strong material evidence of the breach to enforce the confidentiality obligation.

9.5. Labor Disputes

All lawsuits between employees and employers are decided by labor courts, including collective lawsuits between labor unions and companies. In the event that a settlement is reached in court, the employee's full release is legally binding. The labor court legal system has three levels: (from bottom to top) labor court, regional labor court, and superior labor court. Constitutional violation issues may be submitted to the Supreme Court. In order to nullify or void any court's (lower, regional, or superior) decision, the affected party shall bring a special action within two years following the final decision date. Any right claimed in court is subject to adjustments for inflation, as well as interest rates of 1% per month, applied starting on the date that the lawsuit is filed.

9.6. Visas

The permanent visa is granted to foreigners who are transferred to Brazil from foreign companies to work at their subsidiaries or affiliates as officers or as a director; that is to say, in an administrative position, per the Brazilian company's articles of association. To obtain this visa, a Brazilian company and the employee must meet certain requirements, which include submitting the foreigner's qualifications for the position. Additionally, it must be proven that the foreign affiliated company has invested at least an amount equivalent to R$600,000 in the Brazilian company for each foreign citizen indicated to occupy a position as directors or officers in the company; or that it has invested at least an amount equivalent R$150,000 in the Brazilian company. Under the latter circumstance, the obligation is

to create 10 new jobs within a two-year period of time from the date that the respective manager enters the country. Once the foreigner obtains the permanent visa, the visa holder must reside in Brazil under the conditions of the permanent visa.

Temporary visas may be granted for a maximum period of two years to foreigners who will work in Brazil, pursuant to the execution of an employment contract with a Brazilian employer. For that, the foreigner must prove his or her prior professional experience related to the activities to be performed in Brazil. These visas may be renewed once for an additional two-year period, by authorization of the Ministry of Justice. Thereafter, the bearer of the temporary visa may apply for transformation of the visa into a permanent visa, provided all legal conditions are met. Brazilian labor law requires that the staff of companies with three or more employees must be two-thirds Brazilian. Additionally, at least two-thirds of the payroll must be paid to Brazilians. For purposes of these rules, an alien residing in Brazil for more than 10 years who has a Brazilian spouse or child is considered Brazilian. The foreign worker must have the same salary as the other employees who perform the same function.

A technical visa is valid for 90 days, renewable for an additional 90 days, and is granted to foreigners who come to Brazil on a temporary basis to perform services that involve a transfer of technology, or to provide technical assistance services, as provided in an agreement executed by a Brazilian company with a foreign company. For this visa: (1) the foreigner is not allowed to receive any pay from the Brazilian company, (2) the foreigner must have professional experience of at least three years in the specific activities they will perform in Brazil, and (3) the Brazilian company must grant health insurance to the foreign technician for the period the technician remains in Brazil, among others.

10
Environmental Law

Historically, Brazilian regulations aimed at environmental protection have been designed to address the country's diverse environment. As a consequence, Brazil's environmental law began with enactments of separate regulations regarding the use and exploitation of specific types of natural resources, such as forests (Brazilian Forest Code),[44] minerals (Mining Code),[45] and water usage (Water Code).[46] The global development of environmental concerns and the enactment of numerous international agreements has resulted in growing environmental awareness in Brazil. This has influenced the adoption of a new era of environmental rules, imposing more integrated protection of previously "scattered" environmental scheme, coordinating governmental agencies in charge of specific institutional duties in order to implement those environmental rules.

The enactment of a National Environmental Policy resulted in systematization of institutional and governmental agencies and their respective duties, such as the Federal Environmental Agency (IBAMA, responsible for enforcement actions), the National Council for the Environment (CONAMA, responsible for the creation of regulatory standards), and state environmental agencies.[47] This law also defined the main instruments of Brazil's environmental policy: environmental standards, zoning, licensing, evaluation of environmental impacts, and penalties for noncompliance with environmental measures, among others.

44. Law No. 12.651 (May 25, 2012) (Braz.).
45. Law Decree No. 227, Feb. 28, 1967 (Braz.).
46. Decree No. 24643, Jul. 10, 1934 (Braz.).
47. Law No. 6.938 (Aug. 31, 1981) (Braz.).

In 1985, another important federal law was enacted that created the so-called public civil action.[48] Similar to America's class actions, this Brazilian law allows the public prosecutor's office to bring lawsuits aimed at protecting the environment, and confers standing to nongovernmental agencies to bring suits under its terms.

The main principles and instruments for the protection of Brazil's environment also receive special protection under the current Brazilian Constitution. Enacted in 1988, the Constitution contains an entire chapter addressing environmental issues and creates a general duty for the government and citizens to protect and defend the quality of the environment for present and future generations. Article 225 of Brazil's Constitution also sets forth obligations applicable to the preservation and recovery of ecosystem and species; preservation of the variety and integrity of genetic heritage; supervision of entities engaged in genetic research and manipulation; a definition of territorial areas eligible for special protection; and the creation of three levels of liabilities for those who cause environmental damages, among other obligations.

With the enactment of the 1988 Constitution, the three federation levels (federal union, states, and municipalities) gained regular responsibilities to protect the environment; to fight against corruption in any of its forms; to inspect potentially polluting activities; and to preserve forests, fauna, and flora.[49]

In 1998, Brazil enacted a law establishing criminal sanctions for corporations and individuals that commit environmental crimes.[50] In 2008, a federal decree was enacted to regulate this law for administrative violations against the environment, providing for several types of offenses and respective penalties to be imposed on those committing violations against the environment.[51] This decree also contains a section regulating the procedure for determining administrative violations against the environment for environmental agencies to follow, including terms and defense procedures, among other issues.

At present, regulations regarding environmental protection in the country abound. They range from nuclear damages to coastal management rules and from the creation of conservation units to the requirement to implement environmental education systems in schools, environmental quality standards for water, effluents, air emissions, and even post-consumption liability. Additionally, both the states and municipalities throughout the country are empowered to implement their own regulations regarding environmental protection and the use of natural resources at regional and local levels.

10.1. Environmental Issues Faced During Start-Up and Acquisition

The Federal Constitution ensures that everyone may freely exercise any economic activity, independent of authorization by public bodies, except for the cases set forth in law[52] and in light of certain principles, such as environmental protection.[53] In this regard, the law establishes environmental licensing as one of its tools for the construction, installation, and operation of activities using natural resources considered actually and potentially polluting, as well as those able to cause environmental degradation.[54]

According to the Federal Constitution, the federal government, states, and municipalities have the authority to require environmental licensing. In order to regulate this matter, the National Environmental Council (CONAMA) issued a resolution defining general rules for this licensing authority to be exercised.[55] These

48. Law No. 7.347 (Jul. 24, 1985) (Braz.).
49. Fed. Const., Art. 23, items VI and VII (1988) (Braz.).
50. Law No. 9605 (Feb. 12, 1998) (Braz.).
51. Federal Decree No. 6514, Jul. 22, 2008 (Braz.).
52. Fed. Const., Art. 70 (1988) (Braz.).
53. Fed. Const., Art. 170, item VI (1988) (Braz.).
54. Federal Law No. 6938 (Aug. 31, 1981) (Braz.), establishing the National Environmental Policy and its purposes and formulation and application mechanisms, along with other provisions
55. CONAMA Resolution No. 237, Art. 4, 5, and 6, Dec. 19, 1997 (Braz.)..

rules are summarized below:

(i) the federal government, by means of the Brazilian Institute of the Environment (IBAMA), is in charge of granting environmental licenses for activities and ventures that produce a significant environmental impact at the national or regional level and are: (a) located or jointly developed in Brazil and a neighboring country; (b) in the territorial sea; (c) at the continental platform; (d) in the exclusive economic zone; (e) on Indian lands; (f) on conservation units within the federal government's domain; (g) located or developed in two or more states; (h) have direct impacts that go beyond the territorial limits of Brazil or one or more states; (i) designed to research, explore, produce, process, transport, store, or dispose of radioactive material at any stage, or that use nuclear power in any of its forms and applications, in an opinion issued by the National Nuclear Power Commission; and (j) military bases or ventures, where applicable, subject to specific legislation.

(ii) the states, by means of their environmental bodies, will be in charge of environmental licenses for ventures and activities: (a) situated or developed in more than one municipality; (b) in conservation units controlled by the state; (c) situated or developed in forests and other forms of natural vegetation subject to permanent conservation; (d) that have direct environmental impacts that go beyond the territorial limits of one or more municipalities; and (e) delegated by the federal government to the states through legal instruments or conventions.

(iii)lastly, municipal governments will be in charge of environmental licenses for ventures and activities: (a) with local environmental impacts; and (b) those that are delegated to the municipal government by the state through legal instruments or conventions.

It is not uncommon for this division to be challenged. Occasionally, the validity of environmental licenses is questioned based on designation of an activity's impacts as "local," "regional," or "nation-wide," which would result in licensing by different environmental agencies; that is, municipal, state, or federal (IBAMA).

Another argument challenges the constitutionality of CONAMA's resolution, contending that such matters cannot be legislated by resolution. The Federal Constitution states that this issue is to be governed by supplementary laws to be enacted by the federal government.[56] In this regard, Congress is debating a supplementary bill, which establishes rules for cooperation among the federal government, states, the Federal District, and municipalities in administrative actions resulting from common authority related to environmental protection, including environmental licensing.[57]

According to the procedures of Brazilian environmental law, the licensing process involves three consecutive phases, each corresponding to the issuance of three different licenses: (a) Preliminary License (LP), granted during the preliminary planning phase, which approves the enterprise or activity's location and project, attests to the project's environmental feasibility, and establishes the basic and conditional requisites to be met during the next implementation phases; (b) Installation License (LI), which authorizes the enterprise or activity pursuant to the specifications in the approved plans, programs, and projects, including environmental control measures and all other conditional requirements, which determine whether a license is granted; and (c) Operating License (LO), which authorizes the operation of an activity or enterprise after checking on actual compliance with the conditions set forth in prior licenses containing environmental control measures and conditions required for operation.

Some activities may not be subject to environmental licensing. In this case, these activities shall obtain a certificate waiving environmental licensing from the respective environmental agencies.

56. Fed. Const., Art. 23 (1988) (Braz.).

57. Supplementary Bill No. 388 (Oct. 20, 2007) (Braz.).

11
Commercial Litigation and Arbitration

The Brazilian legal system is founded upon the country's Federal Constitution, which provides for organization of the executive, legislative, and judicial branches, as well as the authority given to federal, state, and municipal governments, including the Federal District.[58]

The Brazilian Constitution grants the legislature the power to legislate on a comprehensive variety of matters, including civil and commercial relations; criminal and procedural law; aeronautical, maritime, telecommunications, and radio broadcasting; the environment; capital market and the monetary system; energy.

Certain matters, such as the environment, consumer protection, education, and taxes, are subject to concurrent authority for legislation, which allows states and municipalities, as well as the Federal District, to pass their own laws, provided that they abide by the general principles and guidelines arising out of the Federal Constitution and federal law.

Additionally, Brazil follows a codified system, where the main legal rules are compiled into codes. For instance, the main civil and commercial rules are set out in the Civil Code,[59] and procedural rules are set out in the Civil Procedure[60] and Criminal Procedure Codes.[61]

Court decisions must be rendered in full compliance of existing legislation and its best interpretation. In the absence of a specific applicable statute, court decisions should be grounded on analogous circumstances, customs, and general principles of law.[62]

Finally, due to the strict civil law nature of the Brazilian legal system, judicial precedents and case law are not binding, except for certain specific statements issued by the Supreme Court for constitutional matters, which have a binding effect.[63] Nevertheless, although they are not binding, relevant precedents of superior courts tend to be respected by lower courts.

58. *See Fed. Const., Art. 44 to 126 (1988) (Braz.).*
59. *Código Civil (C.C.) (Civil Code) (2002) (Braz.).*
60. *Código de Processo Civil (C.P.C.) (Civil Procedure Code) (1973) (Braz.).*
61. *Código de Processo Penal (C.P.P.) (Criminal Procedure Code) (1941) (Braz.)*
62. *See Decree no. 4657, Art. 4 (1942) (Braz.).*
63. *Fed. Const., Art. 103-A (1988) (Braz.).*

12
Bankruptcy and Insolvency

Bankruptcy and insolvency is regulated by Law 11.101 (the "Bankruptcy and Reorganization Law"), which was inspired by Chapters 11 and 7 of the U.S. Bankruptcy code. Thus, not only does it govern bankruptcy proceedings, but it also provides for the so-called judicial and extrajudicial (out-of-court) reorganizations of legal entities. However, the Bankruptcy and Reorganization Law is not applicable to certain activities, such as those concerning public entities, financial institutions, leasing companies, insurance, and private healthcare companies.

Pursuant to the Bankruptcy and Reorganization Law, bankruptcy is a liquidation proceeding (similar to the procedures of Chapter 7 that provide for liquidation of a company), whereby the creditors of a legal entity are paid as the entity's assets are sold off. These bankrupt companies are not entitled to continue operations and their executives are removed once bankruptcy is decreed.

Judicial or extrajudicial reorganization, similar to the U.S. Chapter 11 procedures, aim to provide an entity faced with insolvency problems the opportunity to restructure its operations upon establishing a business reorganization plan, the implementation of which is intended to support payment of the entity's debt and to enable the continuity of its activities. Unlike a bankrupt company, while under judicial or extrajudicial reorganization, the company remains under the control of its original executives and continues to operate as a going concern in an effort to maximize value.

In essence, the Bankruptcy and Reorganization Law creates relevant mechanisms that allow for more expeditious credit recovery, while providing a sound legal framework for the actual restructuring of the insolvent entities' businesses.

12.1. Judicial Reorganization

The Bankruptcy and Reorganization Law enables debtors and creditors to discuss the continuity of the company's regular business activities in an effort to reach an agreement in connection with a reorganization plan that may provide the debtor with the necessary economic conditions to face and overcome temporary financial trouble, rather than ceasing operations. Thus, it may help prevent unemployment and a drop in the debtor's market share.

12.1.1. Characteristics of Reorganization

According to the Bankruptcy and Reorganization Law, reorganization focuses on restructuring a company, thus enabling continued operations as a going concern to maximize value.

Reorganization may be requested by: (1) the debtor, which may be an individual (who does business in his or her name in an organized manner), or a business entity, (2) a surviving spouse, (3) heirs of the debtor, or (4) an administrator (inventariante) or remaining partner.

The Bankruptcy and Reorganization Law also provides special procedures for reorganization of small businesses.

As a basic requirement, a company must have been in business for at least two years to be eligible to apply for the benefits of reorganization. Additionally, approval of reorganization depends on the fulfillment of other prerequisites, namely: (1) the company must not have been declared bankrupt, or if declared bankrupt, must have a final court decision with discharge of its previous responsibilities; (2) the company must not have obtained the concession of reorganization in the past five years; and (3) the company's manager or controlling partner must not have been sentenced for a bankruptcy crime as defined in the Bankruptcy and Reorganization Law.

Upon filing the reorganization request, a company must explain the reasons that led to its critical economic situation and the current status of its net worth. All of these aspects must be addressed in a balance sheet specifically prepared to substantiate the reorga-

nization request. Along with this balance sheet, the company must provide the court with copies of its financial statements relating to the last three fiscal years.

Likewise, the company must present to the court as part of its reorganization request: (1) a comprehensive report of creditors and the respective amount outstanding, (2) a list of employees and indication of amounts due to each one in terms of salaries and indemnities for labor agreement termination, (3) all of the most recent corporate actions duly filed with the competent state board of trade, (4) a list of the personal assets of the company's controlling parties and administrators, (5) bank statements of the company's cash flow and possible investment and financial assets, and (6) a comprehensive list of legal actions filed against the company with assessment of possible awards and the certificates issued by the negotiable instrument protest office with jurisdiction over the place where the company is headquartered.

The set of mandatory documents supporting the reorganization request are examined and processed by the presiding judge. If duly submitted, the request shall be approved, and the judge will simultaneously appoint a judicial trustee, ordering the suspension of all legal actions filed against the company seeking payment of accurate and certain amounts, except such based on credits not subject to the effects of reorganization.

To complement a reorganization order and properly publicize its terms and conditions, a judge shall order publication of a notice in the Official Gazette to report a summary of the company's formal request and the corresponding approval decision. In this notice, all creditors must be disclosed.

Once the request is approved, and reorganization is granted, the company loses the ability to cancel the proceeding, unless it obtains approval from creditors, as decided in a general creditors meeting.

12.1.2. The Reorganization Plan

Within 60 days of court authorization for implementation of reorganization, the respective plan must be filed by the debtor with the court to prove the feasibility of the company's proposed restructuring.

This reorganization plan must be accompanied by a financial and economic report coupled with an evaluation of the company's then-current situation. The plan must clearly outline a detailed description of the alternatives the company will implement and the results of the economic feasibility analysis.

One of the main characteristics of a reorganization plan is the possibility of using several mechanisms (in any combination) to resolve the debtor's financial troubles, involving modification of the debtor's management, debt, corporate, and asset structures.

The reorganization plan may not include payment of any amount resulting from labor relationships with the company, including amounts due in connection with indemnities related to labor accidents within a period longer than one year. In order to further protect the credit rights of the company's workers, the law provides for payment in 30 days of any salary amount outstanding over the past three months, up to a total equal to five minimum wages.

If the plan is approved by the general creditors meeting, as explained below, during a two-year period, compliance with the reorganization plan will be supervised by the competent court, judicial trustee, and creditors committee. At the end of this period: (1) the court will declare an end to reorganization, despite the fact that its implementation may take longer, and (2) in case of violation of any surviving provision of the reorganization plan, a creditor may file for specific performance of this provision or request conversion of reorganization into bankruptcy for the company.

Finally, a reorganization may be turned into a bankruptcy case in the following situations: (1) in the event that the general creditors deliberate to reject the proposed reorganization plan, or (2) if the company fails to file the reorganization plan on a timely basis, or (3) if the company breaches any of its covenants under the approved reorganization plan during the two-year period following the plan's approval.

12.2. Extrajudicial Reorganization (out-of-court reorganization)

Another important feature of the Bankruptcy and Reorganization Law is the debtor's option to apply for extrajudicial reorganization. Extrajudicial reorganization involves all credits (one sole class or several classes) or group of creditors of the same nature and subject to similar payment conditions, except for labor, labor accidents, and tax obligations. In other words, it does not necessarily need to comprise secured and unsecured creditors; it may involve only one of them.

As in the judicial reorganization, a plan of reorganization shall be presented to the creditors by the debtor. In the event that this plan is approved by three-fifths of the creditors having their credits subject to the extrajudicial reorganization, the plan is considered approved, and the minority (two-fifths or less) are bound by the plan. The approved plan is submitted to the court for validation. The court generally confirms compliance with few formalities.

A competent court's approval of extrajudicial reorganization has the following consequences: (1) maintenance of the rights, lawsuits, or collection proceedings against the debtor, (2) preservation of the creditors' prerogative to commence bankruptcy proceedings by creditors not subject to the extrajudicial reorganization plan, (3) the extrajudicial reorganization plan may neither set forth early repayment of any debt nor establish unfavorable treatment to creditors which are not subject to such plan, (4) secured creditors shall approve the suppression or replacement of the collateral in case of its disposal, (5) the exchange rate variations of foreign currency credits may only be avoided should the entitled creditor expressly approve it in the extrajudicial reorganization plan, and (6) the extrajudicial reorganization plan is binding even on nonparticipating creditors if the credits of the nonparticipating creditors are addressed in such plan, and it is duly signed by creditors representing three-fifths of each class of credit addressed in such plan.

In practice, extrajudicial reorganization is not widely used in Brazil, particularly because it does not stay the enforcement actions filed against the debtor, as is the case in judicial reorganization. Therefore, it is difficult for the debtor to negotiate with its creditors if there is no "mandatory" stay period in the lawsuits filed against the creditor.

12.3. Bankruptcy

The Bankruptcy and Reorganization Law establishes that, upon suspension of a company's activities, bankruptcy will seek to preserve and optimize the productive use of a company's assets and other resources, whether tangible or not. Bankruptcy is based in the principles of expeditiousness and procedural economy.

A bankruptcy decree has two effects on debt: (1) early termination of all company's indebtedness as of the date of the decree upon proportional deduction of unearned interest, and (2) conversion of foreign currency-denominated debt into local currency based on the foreign exchange rate valid for the date on which the bankruptcy is decreed.
A bankruptcy request may be filed by:
(1) the company itself, upon evidence of its insolvency,
(2) any of its stakeholders, as provided in the law or certificate of formation, or
(3) any of the company's creditors if any of the following conditions exist:

(i) failure to provide payment of any liquid obligation when owed, represented by promissory notes, commercial invoices, or any other type of credit instrument in an amount higher than the equivalent to 40 minimum wages (approximately U.S. $8,100);

(ii) failure to enact early liquidation of assets or destructive or fraudulent ways of making payments;

(iii) simulated deal or alienation of all or substantially all assets to a third party, creditor or otherwise, attempted or actually performed;

(iv) transfer of establishment to others, creditor or otherwise, without the consent of all other creditors and without keeping sufficient assets to satisfy liabilities;

(v) simulated transfer of main establishment with a view to dodging laws and regulations or inspections or even harming creditors;
(vi) posting or reinforcement of guarantees to the creditor with respect to past obligations, without keeping sufficiently free and clear assets to satisfy liabilities;
(vii) absence without leaving a qualified representative and sufficient funds to pay creditors, abandonment of establishment, or attempt to hide away from domicile, head office, or principal place of business; and
(viii) failure to fulfill within a fixed period of time an obligation assumed under the judicial recovery plan.

12.3.1. Creditor Ranking Priority

Brazilian creditor priority is as follows: (1) credits from labor relationships up to 150 minimum wages per creditor and those resulting from labor accidents, (2) credits in rem guaranteed up to the amount of the guaranteed asset, (3) tax credits, irrespective of the nature and time of incorporation, except for tax penalties, (4) special privilege credits, (5) general privilege credits, (6) unsecured credits, (7) negotiated penalties and monetary penalty due to breach of criminal or administrative law, including tax penalties, and (8) subordinated credits.

12.3.2. Credits with Special Treatment

The following credits enjoy special treatment in a bankruptcy proceeding: (1) employment obligations related to wages owed over the three months prior to the bankruptcy request, up to a limit of five minimum wages per creditor, paid as soon as there are available funds, (2) credit securitization transactions: it is possible to state the ineffectiveness or rejection of an assignment act should it generate as a consequence a loss for the security holder. The funds granted will be refunded to the debtor by the contracting party (that shall have acted in good faith), in case of rejection or ineffectiveness of the agreement, (3) funds granted to the debtor during judicial reorganization, including those related to expenses with assets or service suppliers and loan agreements, shall be considered credits not subject to the creditors' agreement, in the event of bankruptcy adjudication, provided that credit ranking priority is followed.

13
Insurance and Reinsurance

The Brazilian insurance, reinsurance, supplementary pension plan, health plans, and capitalization markets have consistently developed over the past several years. During 2007 and 2008 the reinsurance market was opened.[64] Previously the market was dominated by the Brazilian Reinsurance Institute (Instituto de Resseguros do Brasil—IRB), a mixed-capital company (51% government and 49% private enterprise).

The Superintendent of Private Insurance (Superintendência de Seguros Privados -SUSEP), an independent governmental agency affiliated with the Finance Ministry, monitors the markets for insurance, reinsurance, supplementary pension plans (as opposed to open private pension plan), and títulos de capitalização (certificated savings plans).

Insurers operating in the health insurance market and all companies in that sector, e.g., cooperatives, group health care, and self-management, are monitored by the Brazilian Private Health Care Agency (Agência Nacional de Sáude Suplementar—ANS).

64. *Supplementary Law No. 126 (Jan. 16, 2007) (Braz.), which ended the reinsurance monopoly in Brazil.*

65. *Source: Mergers & Acquisitions in Brazil—An analysis of the 90s—KPMG Corporate Finance.*

14
M&A and Private Equity

Brazil entered the global market of mergers and acquisitions in the early 1990s, some 20 years after the United States. The primary reasons for this change included: (1) the opening of the economy under President Collor, (2) the Real Plan, and (3) privatizations.

Prior to the 1990s the Brazilian economy had market "reserves" in several industries, from automobiles to computers. In 1992, President Collor revoked most of the market reserve rules. This prompted competition in both quality and price in many sectors, as a result, Brazilian industry was forced to modernize which, in turn, opened an important door for foreign investors.

Following the Real Plan in 1994, Brazil entered a new period of economic stability and controlled inflation. This resulted in an even more attractive market for foreign investors, who could then enjoy an improved investment environment.

Finally, important changes in Brazilian corporation law, along with the privatization of Brazilian companies in sectors such as telecommunications, energy, and mining opened a new range of markets for foreigners to invest.

As a result of these important events, over half of the deals in the 1990s involved foreign funds, with average growth in total transactions for the period (including both domestic and cross-border deals) reaching 13% per annum.[65]

In the early 2000s, Brazil revamped its capital market legislation with the creation of special, high-level corporate governance segments in the São Paulo Stock Exchange. A boom in Brazilian capital markets ensued with a record number of Initial Public Offerings. Once capitalized, publicly traded companies began to seek

acquisitions, disputing target companies with private equity and venture capital funds also began looking at Brazil as a promising country for investment. In April 2008, Brazil was granted "investment grade" status by Standard & Poor's.

Law 11638, which entered into force on January 1, 2008, continued the trend in Brazilian rules applicable to the preparation and disclosure of financial statements pursuant to international financial reporting standards issued by the International Accounting Standards Board (IASB). More specifically, this law provides for new rules on accounting of financial instruments, impairment, intangible assets, business combinations, and amortization of premiums resulting thereof. This development, in particular, is significant to foreign investors, who are now able to analyze the financial statements of Brazilian companies with much more transparency, relying on international standards.

As in the rest of the world, the recent world economic crisis did not spare the Brazilian economy. Access to credit is not as cheap or abundant, and liquidity became a first concern to many investors. However, with stock markets reaching historic lows or near-IPO prices, the dual track of the stock market is not regarded by most as an alternative in the short term, and the price of target companies in Brazil (whether or not in distress) have again become attractive.

Although it is still too soon to predict the future of the Brazilian M&A market, it is fair to say that the Brazilian economy and corporate legislation have come of age, providing a stable environment for foreign investors with an appetite for opportunities.

14.1. Asset Purchase versus Stock Purchase

Foreign investors interested in acquiring a Brazilian company often ask what the implications of pursuing an asset or share deal. The main drivers for legally defining whether a business will be acquired by purchasing shares or assets are a business's succession liabilities and taxation on the transaction. An acquisition agreement is generally organized in the same manner in Brazil, whether it involves assets or shares.

14.2. Acquisition Structures

14.2.1. Stock Acquisition

The most common structure for a foreign investor wishing to expand its activities in Brazil is the direct acquisition of stock in existing Brazilian companies, often using a Brazilian holding company as the acquisition vehicle. The reason is that Brazilian law allows for amortization of the premium (the difference between the book value and price paid) in stock acquisitions for tax purposes, provided that the acquiring company is merged with the acquired company after the acquisition. A Brazilian holding company may also be convenient for a foreign investor that wishes to invest in multiple transactions in Brazil. Funding for an acquisition may come in the form of debt or equity, but in both cases, the funds or the debt must be registered with the Central Bank of Brazil.

In the case of limited liability companies (limitadas), the acquisition of 50% plus one of a company's quotas does not guarantee control. Since enactment of the new Brazilian Civil Code in 2002, many important decisions of these companies depend on the approval of partners representing 75% of the company's capital. In addition, the company being sold must be able to produce debt clearance certificates from Brazilian tax authorities—a requirement under Brazilian law for companies whose control is being sold or that intend to merge with or into another company, or to undergo a spin-off process.

A stock purchase is taxed differently than an asset purchase. Generally, stock purchases are subject to capital gains taxes, corporate income taxes, and taxes on revenues, whereas asset purchases are subject to corporate income taxes, taxes on revenues, and value-added taxes. Asset purchases are generally less tax efficient than stock sales, but the exact results of the analysis will vary greatly on a case-by-case basis.

14.2.2. Asset Acquisition

In Brazil, unlike many other countries, the acquisition of assets does not necessarily provide protection from the acquired company's liabilities, particularly tax and labor liabilities. Brazilian tax and labor laws generally favor the concept of a business's legal succession when the main elements that constitute a business (clients, assets, trademark, employees, etc.) are transferred from one legal entity to another. Therefore, in an asset acquisition, it is very likely that even if the legal entity is not wholly purchased, if most of the elements that constitute its business are transferred, then the acquiring entity will likely succeed the selling entity in all of its labor, tax, environmental, and other civil liabilities.

Further, Brazilian tax law stipulates, assets that once belonged to a company may be sought by tax authorities to offset tax liabilities if the company selling the assets is not left with sufficient funds to pay off its debt.

In the event purchasing company also "acquires" the employees, labor courts often declare the purchasing company a successor in interest of the selling company. The result is exposure to all liabilities accrued in employment contracts applicable to these employees, including payment of severance packages, social security, and other labor rights to which the employees are entitled prior to the selling company's transfer of their contracts.

An asset-acquisition structure is most effective when only a portion of the business is acquired and thereafter operated at a different location, with different employees and different clients, while the seller continues the remaining operations.

14.3. Corporate Reorganizations

Brazilian law provides rules for the merger of two or more companies resulting in a new company (fusão), spin-offs (cisão), or the merger of one company into another (incorporação). In the context of an acquisition, a fusão is generally too troublesome and provides virtually no advantages over incorporação, and thus is rarely used. A cisão is often used to reorganize a company prior to the sale of its stock, separating assets and liabilities that are not to be included in the sale. The incorporação is generally used when part of the purchase price is to be paid in stock from the acquiring company (an incorporação results in the former partners' of the sold company receiving newly issued stock of the acquiring company).

When control is sold, prior to deciding on a fusão, cisão, or incorporação, it is important to verify whether the target company is able to produce debt clearance certificates from the tax authorities. Tax consequences result from each of these transactions and usually also play a role in this decision.

14.4. Joint Ventures

In addition to 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 corporation (sociedade anônima). The rights and obligations of the partners in a joint venture are typically regulated by joint venture agreements, bylaws, shareholders' agreements, and Brazilian corporate law in general.

14.5. Stock Purchase Agreements

An asset or stock purchase agreement (SPA) in Brazil generally resembles those commonly used internationally in cross-border transactions. Given the influence of common law agreements, SPAs in Brazil also tend to describe: (1) the relevant aspects by which the purchase and sale are implemented, including details of the purpose of the acquisition and the respective price and payment conditions, and (2) the general framework of indemnities that will govern the relationship of the buyer and seller following the acquisition—which is usually made based upon representations and warranties by the seller in connection with the purchase of the sale and its condition.

14.6. Shareholder's Agreements

As in most jurisdictions, it is advisable to have a shareholders' agreement in place to govern the relationship of shareholders and bind their votes in certain situations. A typical Brazilian shareholders' agreement provides for minority shareholder protection rights, such as right of first refusal, right of first offer and tagalong, and controlling shareholding rights, such as drag-along rights and the right to appoint members of the company's administration.

Certain provisions of a shareholders' agreement may, be set out or even repeated in the company's bylaws. As a general rule, the decision to include this provision in the shareholders' agreement is based on confidentiality concerns because bylaws are public, whereas shareholders' agreements are, in principle, limited to the company's shareholders and members of its administration.

15
Real Estate

Real estate issues are primarily governed by the Brazilian Civil Code[66] and by other specific laws at the federal level, e.g., the Real Estate Development Law,[67] the Brazilian Lease Law, and[68] the Parceling of Real Property Law.[69] Certain matters related to real estate transactions are regulated at the state or municipal level, e.g., local taxes, real estate registry issues, and zoning and environmental regulations.

According to the Brazilian Civil Code, the acquisition of real estate may occur by (1) adverse possession (usucapio), (2) accession, (3) acquisition, and (4) succession rights.

Joint ownership of buildings is very common in urban residential and office buildings, these interests are registered in the same way and have the same legal force as absolute freehold interests. There are two main forms of joint or common ownership: Condominio and Condomínio Edilício.

Easements confer limited rights in favor of one person's land over another's land and may be positive, permitting the owner of the "dominant" land to exercise certain rights over the "subservient" land, or negative, prohibiting the subservient owner from exercising one of its ownership rights.

Surface rights (Direito de Superfície) confer to a person the right to build or to plant on another person's land, for a specified period of time. The concession of surface rights may be paid or free of charge and must be granted through a public notary deed.

66. *Law No.10406, as amended (Jan. 10, 2001) (Braz.).*
67. *Real Estate Development Law, Law No.4591, as amended (Dec. 16, 1964) (Braz.).*
68. *Lease Law, Law No. 8245, as amended (Oct. 18, 1991) (Braz.).*
69. *Parceling of Real Property Law, Law No. 6766, as amended (Dec. 19, 1979) (Braz.).*

Usufruct gives a person the temporary right to use and profit from another person's property (excluding the right to sell). It is a temporary right; hence, its maximum duration is for the life of the usufruct if the beneficiary is an individual or for 30 years if the beneficiary is a legal entity.

In general, Brazilian law considers that foreigners (individuals and companies) have the same rights to acquire real estate under the same conditions applied to Brazilian citizens and Brazilian companies; however, there are some restrictions on these rights.

15.1. Acquisition of Real Estate

Generally, the acquisition of real estate occurs when two parties (legal entities or individuals) execute an agreement through which one transfers to the other a certain piece of real estate, whether by purchase and sale, donation, exchange, or any other type of agreement provided in Brazilian legislation.

Except with regard to transfer of title through certain corporate acts, which may be directly recorded with the Real Estate Register, Brazilian law requires that all transfers of title for real estate are performed through the execution and recording, by the parties, of a public deed.

However, it is very common in Brazil that the parties negotiate that payment will be made in installments, and therefore, prior to execution of the public deed, the parties commonly execute a private agreement through which both parties commit to sell and purchase the real estate, and upon payment of the last installment, the public deed is executed and presented for recording with the Real Estate Registry.

15.2. Establishment of Title

In Brazil, title to real estate is handled through a "registered land" system. In order to acquire real estate in Brazil, one must have possession of the property and ensure that the transferred title is recorded with the competent Real Estate Registry. The Real Estate Registers maintain a record of all deeds and/or contracts involving real estate rights to real estate (ownership, condominium, trusts, mortgages, easements, usufructs, possession rights, lease agreements, etc.); therefore, title searches may be conducted upon request at the Real Estate Register of the jurisdiction where the property is recorded before entering into real estate transactions.

The legal effect of registration is effective ownership/possession against third parties. Recording a deed/contract also creates priority over third parties. Real Estate Registers record any attachments or injunctions on a particular piece of real estate when ordered by a Brazilian court.

15.3. Acquisition of Real Estate by Foreigners

The acquisition of land for urban development by foreigners has no restrictions. The acquisition of rural real estate by foreigners is subject to three restrictions under Law No. 5709: (1) foreigners residing abroad are generally prohibited from acquiring rural property, (2) foreigners residing in Brazil are authorized to purchase limited extensions of rural property, according to a certain percentage of the national territory, and provided (3) the acquisition is subject to the effective exploitation of the land, according to projects to be presented to the governmental authorities. [70] The three conditions detailed above are only in reference to rural land which may be used for agricultural purposes.

Law No. 5709 states that a foreign individual resident in Brazil may only own land up to 50 rural modules, a measure of size determined for each region with similar economic and ecological characteristics and the type of agricultural operation possible in said area. A foreign individual residing abroad may not acquire land in Brazil; however, this limitation is not applicable in the case of acquisition of land by succession law.

The courts have recognized that § 1 of Article 1 of Law No. 5709/1971 was not approved by the Federal Constitution of 1988,

70. Law No. 5709, as amended (Oct. 7, 1971) (Braz.).

deciding not to require notaries and registrars to comply with the restrictions imposed by the determinations and Law No. 5709/1971 and Decree No. 74.965/1974, as well as the inscription on the Extrajudicial Portal, in relation to Brazilian legal entities whose majority shareholder focus on power foreigners residing outside Brazil or people legal headquartered abroad.

Restrictions to the acquisition of rural land by Brazilian legal entities controlled by foreign capital have been in effect since the 1995 amendment to the Brazilian Constitution[71] eliminated the classification between Brazilian entities and Brazilian entities controlled by foreign capital. Nevertheless, the restrictions relating to foreigners and foreign companies with authorization to trade in Brazil remain in force.

The law provides that foreign companies may only acquire rural lands in order to develop and implement agricultural, industrialization, and/or colonization projects, and the authorization will only be granted if the project is a part of the corporate purpose of the foreign legal entity buying the land. The projects must be approved by the Ministry of Agriculture, or by the Department of Commerce and Industry of Brazil, on a case-by-case basis. In cases where this acquisition is important for the development of projects of national interest, the President may authorize this acquisition by means of a presidential decree.

15.4. Real Estate Leases

In Brazil, real estate leases are governed by the Lease Law, and the general rules of the Brazilian Civil Code. The regulation of leases is deemed to be of "public order," and therefore, the applicable regulations may not be altered by contrary agreement between the parties. Real estate leases do not need to be enacted by public deed or recorded with the Real Estate Register for validation purposes, and they may be enacted in writing or executed verbally. Recording of an

71. Federal Constitution (1988) (Braz.).

agreement at the Real Estate Register, however, may grant certain rights to the tenant with regard to the continuation of the lease in the event of the sale of the property to third parties during the agreement, and to payment of indemnification resulting from breach, by the landlord, of the right of first refusal.

There is no required term specified by the Lease Law. Therefore, the term may be defined by the parties. The Lease Law also allows for the execution of a lease agreement for an unspecified period of time.

With regard to commercial leases executed for a specific period of time, the Lease Law grants the tenant, among other things, certain protections, including the right to renew the lease for a second term, equal to the first term, if all the conditions for the exercise of such right are met (the Renewal Right). The conditions for the Renewal Right are: (1) the contract must be executed in writing for a specified period of time, (2) the minimum term of the lease, or the sum of the aggregate and uninterrupted terms of the lease, is at least five years, and (3) the tenant is performing its same line of business, for a minimum and uninterrupted term of three years. The fact that all conditions for application of the Renewal Right are met does not mean that the renewal will occur automatically. In the event that the landlord refuses to respect the Renewal Right, the tenant may claim its right in court, through a proper legal claim (the Renewal Claim). The Renewal Claim must be filed by the tenant within the penultimate semester of the term of the lease agreement.

The Lease Law provides that, if a tenant remains in the property and continues to pay the rent after the end of the agreement's term without opposition by the landlord, the lease agreement will be deemed renewed for an unspecified period of time, and termination may occur at any time, enacted by any of the parties, upon a 30-day prior written notice, as explained below.

The tenant has the right to early termination of a lease agreement for a specified period of time at any time, regardless of cause, upon a 30-day prior written notice and the payment of a fine to the landlord

in the amount contractually agreed upon by the parties (commonly, in the Brazilian market, this fine is defined as an amount equivalent to three monthly rents, but the parties are free to negotiate). However, in a specified period agreement, the landlord may not terminate the agreement in advance without cause. According to the Lease Law, the only remedy available for the landlord to regain possession of the leased property is the filing of an eviction claim against the tenant, as consequence of a default or breach of contract by the tenant.

15.5. Real Estate Taxes in Brazil

The ITR federal tax is levied annually on the value of the land itself (without crops, construction, etc.). The rates vary in accordance with the size and degree of use of the property. A company may be subject to this tax if it acquires rural land.

The IPTU municipal tax is a tax on urban property levied annually on the value attributed by the tax authorities to such real estate (usually, close to market value). The rates vary according to the municipality where the real property is located.

The real estate transfer tax is assessed at a variable rate (depending on the value of the property) on all onerous transfers, under any heading of real estate, except in cases of contribution to the capital of companies.

16
Intellectual Property

Recently, a growing number of private and public entities in Brazil have realized the importance of protection of intellectual property rights and the impact such protection may have for their activities not only in Brazil, but worldwide.

In the era of knowledge, intangible assets are key to promoting innovation and assuring market share. Therefore, protection of intangible assets by means of registering intellectual property rights, as well as contracts and litigation involving intellectual property rights, can be strategic for an enterprise's success. Negotiation of intellectual property assets is a powerful tool and definitely an efficient way to pursue a competitive position in the market.

Intellectual property is protected in Brazil by the Federal Constitution and covers industrial property rights and other rights related to creations of the mind, such as copyrights and software.

Industrial property rights cover patents, industrial designs, trademarks, and geographic signs. The Brazilian Industrial Property Law[72] also provides for contracts involving technology transfer, technical and scientific services, franchising, and protection against unfair competition. Industrial property is regulated primarily by the Brazilian Industrial Property Law, which consolidates the various rules governing the matter and introduced changes to current protection of industrial property rights in Brazil. It is also regulated by the Paris Convention[73] and its Stockholm Revision,[74] as well as several norms issued by the

72. Industrial Property Law, Law No. 9279, as amended (May 15, 1996) (Braz.).
73. Decree No. 1263, as amended, Oct. 10, 1994 (Braz.).
74. Decree No. 75572, as amended, Apr. 8, 1975 (Braz.).

National Institute of Industrial Property (Instituto Nacional da Propriedade Industrial—INPI) and the Central Bank of Brazil.

The INPI is the federal agency in charge of regulating and registering patents, trademarks, and industrial designs and approving licensing and any other agreements involving industrial property rights.

Copyrights are covered by the intellectual property umbrella as well. Copyright protection covers creative works of the mind expressed in any mode or fixed in any tangible or intangible support known or to be invented in the future. Copyrights are mainly regulated in Brazil by the Copyright Law[75] and the Berne Convention.[76]

Software is subject to provisions of the Copyright Law, but it is mainly governed by the Software Law.[77]

Foreigners are allowed to apply for registration of intellectual property rights in Brazil.

16.1. Industrial Property

The Brazilian Industrial Property Law establishes two types of patents: (1) the patent of invention, which is the basic concept of an invention that is considered new, involving an inventive step, and applicable to industry, and (2) the utility model, which focuses specifically on the object of practical use or a part thereof that represents a functional improvement, and must also be new, involving an inventive step, and applicable to industry.

An invention is considered new when it is not construed as "state of the art," which covers all data and information made available to the public whether in Brazil or abroad, written or verbally, by use or any other means, before the filing or priority date. It includes the contents of patents in Brazil and abroad. An exception to this rule occurs in the event that the object of a patent application is disclosed during the 12 months prior to the filing or priority date if such disclosure is made by (1) the inventor, or (2) the INPI, or (3) others, if based on data directly or indirectly obtained from the inventor or from an inventive act.

75. Copyright Law, Law No. 9610, as amended (Feb. 20, 1998) (Braz.).

76. Decree No. 75699, as amended, May 6, 1975 (Braz.).

77. Software Law, Law No. 9609, as amended (Feb. 20, 1998) (Braz.).

The Industrial Property Law strictly states what is not considered an invention or utility model: discoveries, scientific theories, and mathematical methods; purely abstract concepts; commercial, accounting, financial, educational, advertising, lottery and inspection schemes; plans, principles, or methods; literary, architectural, artistic, and scientific works, or any aesthetic creations; computer programs per se; presentation of information; game rules; operational techniques and methods, as well as therapeutic or diagnostic methods for application to the human or animal body; and all or part of natural living beings and biological materials found in nature, even if isolated therefrom, including the genome or germoplasm of any natural living being, and the natural biological processes. Therefore, a patent cannot be granted in those cases.

The Industrial Property Law also sets forth what is not patentable, which includes anything contrary to morals, standards of respectability, and public safety, order, and health; substances, materials, mixtures, elements, or products of any kind, as well as modification of their physical-chemical properties, and the respective processes for obtaining or modifying them, when resulting from transformation of the atomic nucleus; and all or part of living beings, except genetically enhanced microorganisms, which meet the three requirements of patentability—novelty, inventive step, and industrial application, and which are not mere discoveries.

It is important to note that in these cases, inventions will not be patented, even if they meet the other legal requirements.

A patent may be applied for by (1) the inventor or his or her heirs, (2) the assignor or its successors, or (3) the party to whom the law or the employment/service contract determines that ownership belongs. In this connection, a patent application may be filed directly

by a company as an assignor of an invention or as the legitimate owner as a result of an employment or service contract. A co ownership of patents is also accepted in Brazil: by two or more natural persons, two or more companies, or by a company and a natural person.

A patent is valid for a period of 20 years if related to inventions, or 15 years if related to utility models, both counted from the date of the patent's filing in Brazil. Considering the possibility that patent examination may take several years, the Industrial Property Law ensures that the effective patent term shall not be less than 10 years for inventions and seven years for utility models.

As a general rule, a patent holder is entitled to prevent others from using, producing, selling, offering, or importing a patented product or a process or a product obtained directly by a patented process. A patent holder is also assured the right to be indemnified for improper use of the patented object, even if it occurs during the period between publication of the patent application and its granting.

A patent is terminated in any of the following cases: (1) expiration of the validity term, (2) renunciation by the patent holder, (3) declaration of forfeiture, (4) failure to pay the annuity fee by the legal deadline, or (5) failure to appoint an attorney-in-fact in Brazil, in case of foreign patent holders.

16.2. Trademark

Trademark protection in Brazil is designed for visually distinctive signs, which means that nonvisible signs such as sounds, scents, tastes, and textures may not be registered as trademarks.

Depending on its purpose, a trademark may be classified as a: (1) product or service trademark, to distinguish a certain product or service from others of a different origin which may be identical, similar, or alike, (2) certification trademark, to attest that a product or service conforms with determined technical standards or specifications, especially with regards to its nature, quality, material, and methodology, or (3) collective trademark, to identify products or services from members of a given entity.

In terms of product and service classification, Brazil has not entered into the Nice Agreement, however, it has adopted the Nice classification since January 2000 (currently, the 9th edition) in order to adjust classification to international standards.

In order to be registered, a trademark must be lawful, new, and unhindered by any of the legal provisions for nonregistrable signs. The Industrial Property Law contains a comprehensive list of what is not registrable as a trademark, which includes, among other items, the reproduction or imitation of prior trademark applications or registrations for identical or similar products or activities and signs of generic, common, necessary, ordinary, or simply descriptive character.

A trademark may be applied for registration by corporate or natural persons, under public or private law. A mark may only be applied to cover products or services related to the activities in which the applicant is actually and legally engaged. Co ownership of trademarks is not permitted in Brazil.

In principle, registration shall be granted to the first party to file an application, provided that it complies with legal requirements. Protection given to priority claims and well-known or famous marks constitutes the exception to this rule. Another exception set forth in Brazilian law is for prior use. A person or company, acting in good faith in the priority or filing date, has been using an identical or similar sign for at least six months in Brazil to distinguish an identical or similar product or service shall have the right of preference for registration.

Registration of a trademark is valid for a period of 10 years, renewable for successive 10-year periods.

The owner of a trademark registration is entitled to take all legitimate and necessary measures to safeguard its material reputation, which includes the possibility of opposing, notifying, and filing lawsuits against third-party practices that infringe trademark rights.

A trademark registration is terminated in any of the following cases: (1) expiration of the validity, (2) renunciation by the titleholder,

(3) declaration of forfeiture, or (4) an attorney duly qualified and domiciled in Brazil has not been appointed to represent the foreign titleholder in administrative and judicial proceedings.

16.3. Copyrights

Copyright protection extends to original works of authorship in any tangible form of expression, including, but not limited to, texts in literary, artistic, or scientific works; lectures, speeches, sermons, and other works of the same nature; theater plays and musicals; choreographies and pantomimes; music composition (with or without words); audio and visual works (with or without sounds), including cinematographic works; photographic works and other works produced by an analogous process; drawings, paintings, engravings, sculptures, lithographs, and works of kinetic art; illustrations, maps, and other works of the same nature; drafts, mock-ups, and three-dimensional works relating to geography, engineering, topography, architecture, park and garden planning, stage scenery, and science; adaptations, translations, and other transformations of original works, presented as new intellectual creations; and computer programs and collections or compilations, anthologies, encyclopedias, dictionaries, databases, and other works which, by virtue of the selection, coordination, or arrangement, constitute intellectual creations.

Copyrights are governed by the Copyright Law, which protects and regulates all creative works of inspiration, encompassing the rights of the author and neighboring rights. Furthermore, Brazil is a signatory to two major international treaties, the Berne and the Universal Copyright Convention (also known as the Geneva Convention).

Copyright ownership vests in the author (or contributors, if developed jointly) of the work. The duration of a copyrighted work lasts for the life of its author and 70 years from January 1 of the year following the author's death. If the work is created by two or more authors, the duration of 70 years starts after the death of the last surviving coauthor. In cases of anonymous or pseudonymous works, the term shall be 70 years from January 1 of the year following that of initial publication.

Unlike industrial property rights, copyrights do not require prior registration with the competent authorities to be protected and enforceable. A copyright is born when it is created. However, registration may be helpful for proving ownership by demonstrating prior conception of the work in relation to third parties. In this regard, and depending on the nature of the work, different agencies/institutes are in charge of registration, each of which has specific requirements and procedures for registration.

History

>>FURRIELA ADVOGADOS was founded in 1989, just before Brazil began to "liberalize" its legislation and procedures for international trade and investment, which resulted in a significant increase in foreign investment in the country and the redirection of the role of the government in the economy, through privatizations in various public sectors.

>>In the context of the modernization of the government and Brazil's insertion in the international scenario, the firm was lead to specialize on advising Brazilian and international clients in a wide range of areas such as Business Law, Corporate Law, Commercial Law, Contracts, Civil and Commercial Litigation, Banking Law, Environmental Law, Labor Law and Real Estate Law, with a strong focus on international investments and every aspect related to international business.

>>Moreover, since its foundation, FURRIELA ADVOGADOS is also known for its pioneer role in highly specialized areas of law, such as Environmental Law, Non-Governmental-Organization Law and the area known today as the Third Sector, where it has contributed to the establishment of norms and the evolution of practices.

>>Although the office has significantly expanded, FURRIELA ADVOGADOS has maintained its traditional high level of quality and professional standards.

>>After more than 20 years of activities, FURRIELA ADVOGADOS today is a full service law firm, with a modern structure compatible with the best firms on the globe and maintains correspondents in the cities of Rio de Janeiro, Brasília, Porto Alegre and Ribeirão Preto – Brazil and States of New York and Ohio – U.S.A.

>>Currently, it is safe to say, that besides the traditional areas of law its team also assembles a strong background in Sports Law and Economic Law, including questions related to competition and antitrust, consumer's relations and product liability, Stock and Financial Market Regulation and M&A, having developed expertise as well in the automotive, banking and food sectors.

Legal Services Provided

FURRIELA ADVOGADOS is a full service law firm, offering comprehensive legal support in every aspect of a business and the main areas of law:

I. Corporate Law and International Investments;
II. Stock Market and Financial Market Regulation;
III. Foreign Investments;
IV. Contracts;
V. Bank Legislation;
VI. Economic and Antitrust Law;
VII. Environmental Law;
VIII. Third Sector;
IX. Civil and Commercial Law;
X. Labor Law;
XI. Consumer Law;
XII. Tax Law;
XIII. Administrative Law; and
XIV. Sports Law.

Founding Partner

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Associated Institutions

In order to expand and fortify FURRIELA ADVOGADOS' reach and presence throughout the national and international community the office has built a close relation, as a member, with some of the most renowned active institutions in the legal and international relations field.

Correspondent Law Firms

FURRIELA ADVOGADOS has an active presence in the main cities of Brazil, such as Rio de Janeiro, Porto Alegre, Brasília, and Ribeirão Preto, as well as in the States of New York and Ohio, U.S.A., with the support of its branches and partners.

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