Legal for the Foreign **Guide** Investor in Brazil

CESA Centro de Estudos das Sociedades de Advogados

INVESTE SÃO PAULO
Agência Paulista de Promoção de Investimentos e Competitividade

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PRESENTATION

CESA – Centro de Estudos das Sociedades de Advogados, is a nonprofit law firms study center that brings together approximately 1,000 law firms in Brazil. Founded in 1983 in São Paulo, CESA has gradually expanded its activities, being now present in several Brazilian states.

The partnership between CESA and the Government of the State of São Paulo started in 1991, when the project for publication of the first Guide was launched. The Guide was printed in Portuguese and in English, and distributed by the Government of the State of São Paulo at all official events and opportunities of an international nature.

The project's positive outcome led CESA to review, expand and improve the Guide's structure and scope. The second edition was entirely supported by CESA and distributed exclusively to its associates, professional entities and institutions for development and promotion of Brazil abroad.

Since then, the Guide has undergone several updates, always counting on the support of CESA's member law firms. One of these updates was especially prepared to comply with a request from the Trade Promotion Department of the Ministry of Foreign Affairs, which from then has been distributing it at all international events held by the Ministry.

In the year of the 10th anniversary of the first Guide, at the request of the Governor of the State of São Paulo, Geraldo Alckmin, CESA now publishes this 9th edition, revised and updated in 2011.

São Paulo, January 2014.

Carlos Roberto Fornes Mateucci
Presidente Nacional

José Luis de Salles Freire
Presidente do Conselho Diretor

CESA – Centro de Estudos das Sociedades de Advogados
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FOREWORD

I proudly present the new edition of *The Legal Guide for Foreign Investors in Brazil*, prepared and now revised by the Center of Studies of Law Firms and Partnerships (CESA), at the request of the State Government of São Paulo.

As an emerging country, Brazil has progressively attracted foreign investments considering its special characteristics related to its economic stability, rule of law, and its ability to survive serious economic crises.

In view of the rising interest of foreign investors in Brazil, especially in São Paulo, the State government has created *Investe São Paulo*, a development agency which is the gateway to investors in the state. Such agency, oriented towards fostering investments and competitiveness, provides companies interested in establishing or expanding their businesses in the state of São Paulo all kinds of support they need. The agency acts as a facilitator to enable investors to approach the municipalities in the state of São Paulo, in addition to assisting foreign investors by presenting new opportunities in public--private partnerships and concessions, aiming at promoting the image of Brazil and the State of São Paulo as an investment destination. (www.investe.sp.gov.br).

Also, investors can now count on *Desenvolve SP*, a state development bank, responsible for financing medium and small-sized enterprises, offering them lower interest rates, below those offered in the traditional loan market. (www.desenvolvesp.com.br).

I would like to thank CESA for this important pro bono contribution and highlight its relevant role, insofar as it gathers nearly 1,000 renowned law firms in Brazil. Special appreciation goes to CESA President, José Luiz de Salles Freire, for his collaboration as well as to the lawyers Virginia Moira Huggard-Caine, Celso de Souza Azzi and Belisario dos Santos Jr., who have coordinated the preparation of this work.

Geraldo Alckmin
Sao Paulo State Governor

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SUMMARY

THE BRAZILIAN LEGAL SYSTEM

The Federative Republic of Brazil is formed by the indissoluble union of its states, municipalities and the Federal District. In the Brazilian legal system, rules are created mainly by the Legislative and Executive branches, and interpreted mostly by the Judiciary. Despite establishing the tripartite system (executive, legislative and judiciary branches), Brazil also adopted the system of checks and balances whereby each of the branches is empowered with part of the functions originally designed to be performed by one another.

These rules are arranged in various hierarchical levels, starting from the top, where lies the Federal Constitution, which was discussed, voted and promulgated by a National Constituent Assembly in 1988 within a democratic environment. Despite its existence for only a few decades, the Federal Constitution has been amended 67 times, the last one in 12.22.2010. Overall, the Constitution deals with a wide range themes and grants an extensive list of rights and guarantees to citizens and companies, besides establishing the country's political and administrative organization. Member states also have enacted

Chapter 1

their own constitutions, which must abide by and must not be in conflict with the Federal Constitution.

The entire legal system is based on the Federal Constitution, there including treaties and international conventions (which need to be approved by the Congress in order to become valid in Brazil), as well as laws and other administrative acts, such as decrees and ordinances.

The Federative Republic of Brazil is made of four political-administrative entities: the Union (federal government), the States, the Federal District and the Municipalities. All of them count with the three branches of government: the Legislative, the Judiciary and the Executive, except for the Municipalities. The latter do not have a Judiciary Branch.

The Federal Legislative Branch is composed of the House of Representatives and the Senate, which together form the National Congress. Its most important role is to legislate. The Federal Constitution determines that some matters must be regulated only by the Union and, therefore, it is up to the National Congress to legislate, among others, on Civil, Commercial, Criminal, Procedural, Electoral, Agrarian, Maritime and Aviation Law, as well as on Water, Energy, Computer Processing, Telecommunications, Monetary System, Insurance, Foreign Trade, National Transportation Policy, Port Regulation, Mineral Resources and Nuclear Activity matters.

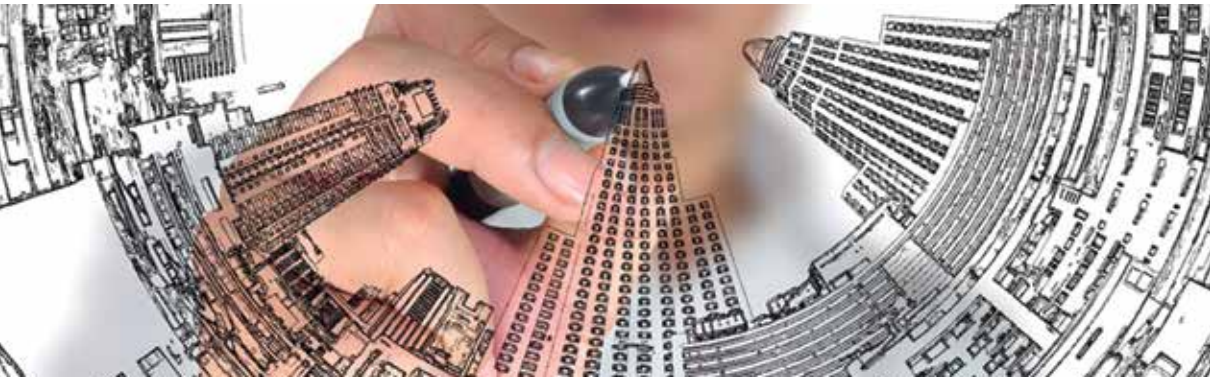
It is the role of the Legislative Branch of the States and of the Federal District to create state and district laws, as well as to create supplementary laws as regards, for example, Tax, Public Finance, Economic Law, as well as Production, Consumption, Soil's Defense, Natural Resources and Environmental Liability. On these issues, in case there is not a federal law on the matter, the State may regulate all of its aspects. On the other hand, the Legislative Branch of the Municipalities is limited to regulating issues of local content.

The Brazilian Judiciary is composed of the State, the Federal and the Specialized Courts. The judicial procedure consists of two ordinary judging phases, along with the extraordinary phase performed by the Specialized Superior Courts, i.e., the Superior Court of Justice (STJ), which deals overall with infra-constitutional issues, and by the Federal Supreme Court (STF), which deals only with constitutional matters.

The judges base their decisions on the interpretation of the existing rules and, in case of a legislative gap, they may apply analogy, custom and general principles of law to the case. In recent years, however, the Federal Supreme Court moved one step further to issue binding precedents, which may be enforced as formal law. Furthermore, repetitive appeals may be collectively examined by the higher courts, by means of a mechanism of judging altogether and at once a set of appeals regarding the same judicial issue. These recent enhancements to the judicial system intended to increase the effectiveness of court decisions and to reinforce the growing appreciation of judicial precedents in the Brazilian legal system, despite the fact that in Brazil the civil law system prevails (as opposed to the common law system, adopted in other countries).

The Executive Branch may also promote self regulation, within the constitutional and legal limits. Other issues related to various sectors of the economy may also be regulated by the Executive Branch, particularly by means of its regulatory agencies.

The legal rules that make up the Brazilian legal system, issued by the Union, the States, the Federal District and the municipalities, must comply with the Constitution. Likewise, the governmental acts must respect the Constitution, as well as its principles, such as legality, morality and efficiency. Private acts must comply with the constitutional provisions, the Civil Code and other specific laws. All of this regulatory system, therefore, establishes the rights and duties to all parties to the process, providing predictability to legal relations as well as presenting legal tools to enforce them.



INSTITUTIONS FOR ECONOMIC DEVELOPMENT

Decree-Law nbr. 200/67 and its later alterations classified the Federal Administration into Direct and Indirect, the first being constituted of the services integrated in the administrative structure of the Presidency of the Republic and the Ministries, and the Indirect of the services attributed to several legal entities of the Union, public (Autonomous Agencies and Foundations) or private (Government Controlled Companies, Public Companies and Foundations), linked to a Ministry.

The Public Federal Administration is directed by the President of the Republic, helped by the Government Ministers.

As determined by article 1 of Law nbr. 10.683, of May 28, 2003, the presidency of the Republic is essentially constituted by the Chief of Staff, by the General-Secretariat, by the Office of Industrial Relations, by the Office of Social Communication, by the Personal Cabinet, by the Cabinet for Institutional Safety, by the Office of Strategic Affairs,

Chapter 2

by the Office of Policies for Women, by the Office of Human Rights, by the Office of Policies for Promotion of Racial Equality, by the Office of Ports, and by the Office of Civil Aviation.

The Ministries are autonomous bodies of the top of the Federal Administration, located just below the Presidency of the Republic, the multiple functions of which were laid out by the Administrative Reform of 1967, with its later alterations.

Among the autonomous agencies are the Regulatory Agencies, public law legal entities which are constituted by means of law, and are given political, financial, rulemaking and management autonomy. The function of the regulatory agencies is to control and oversee the public activity to be carried out by private companies (ANP, ANEEL, ANATEL and others), by means of previous concession, permission or authorization.

2.1. Ministries

MINISTRY OF JUSTICE

Cares for the following matters: defense of the legal system, of the political rights and of the constitutional guarantees; judiciary policy; nationality, immigration and foreigners; narcotics; public safety; indian rights; Federal, Highway and Railway Polices and of the Federal District; planning, coordination and administration of the national penitentiary policy; defense of the national economic order and consumer rights; indians and consumer complaints (ombudsman); Federal Police complaints (ombudsman); full and free legal, judicial and extrajudicial assistance for those in need (so considered in law); defense of the assets and own of the Union and the entities belonging to the indirect Federal Public Administration; Government actions aiming at repression of misuse, of unlawful trafficking and of unauthorized production of narcotic substances and drugs that cause physical or psychic dependence; coordination and implementation of the work of consolidation of the rulemaking acts in the scope of the Executive Power, and prevention and repression of money laundering and international legal cooperation.

MINISTRY OF FOREIGN AFFAIRS

Operates in the field of international policy; of diplomatic relations and consular services; of international cooperation programs, and is also responsible for parti-

cipating in the commercial, economic, technical and cultural negotiations with foreign entities and governments; and support for Brazilian delegations, parties and representations in multilateral international organisms and agencies.

In summary, it helps the President of the Republic in the formulation Brazil's foreign policy, assuring its execution, maintaining diplomatic relations with governments of foreign States, international organizations and organisms, as well as promoting the interests of the Brazilian State and society abroad.

MINISTRY OF TRANSPORTATION

Is responsible for matters pertaining to railway, highway and waterway transportation; merchant navy, ports and navigable ways; and airway transportation. The following entities, among others, are linked to this ministry:

DNIT – National Department of Transportation Infrastructure;

ANTT – National Agency of Land Transportation.

MINISTRY OF AGRICULTURE, LIVESTOCK AND SUPPLY

This Ministry is responsible for the following matters: agricultural policy, encompassing production, commercialization, supply, storage and guarantee of minimum prices; agribusiness development and production; agribusiness market, commercialization and supply; agricultural information; animal and vegetal sanitary defense; overseeing inputs used in agribusiness activities; classification and inspection of animal and vegetal products and byproducts; soil protection, conservation and handling; technological research in agriculture and livestock raising; meteorology and climatology; rural cooperative and association, agro energy, rural extension and technical assistance; policy related to coffee, sugar and alcohol, planning and exercise of governmental action in the activities of the [sugar]cane agro-industrial sector. The following entities, among others, are linked to this ministry:

EMBRAPA – Brazilian Agribusiness Research Company, responsible for making feasible solutions for sustainable development of the rural area and agribusiness;

CEAGESP – General Warehouses and Deposits Company of São Paulo which, with warehousing and depositing networks, assure a large part of the supply of the State of São Paulo.

MINISTRY OF EDUCATION

Is responsible for the following matters: national education policy; child education; education in general, encompassing primary, secondary and higher schooling, special education and distance education, except for military education; education of youths and adults; professional education; educational evaluation, information and research; university extension and research; teaching and financial assistance to needy families for schooling of their children or dependents.

MINISTRY OF CULTURE

Cares for the national culture policy; protection of the Brazilian historical and cultural heritage; delimitation of the lands of the remnants of the *quilombo* (runaway slave settlements) communities, as well as determination of their demarcations.

MINISTRY OF LABOR AND EMPLOYMENT

Is responsible for: policy and guidelines for generation of jobs and income and worker support; policy and guidelines for modernization of labor relations; overseeing labor, including ports and application of the sanctions established in legal or collective rules; salary policy, immigration policy; professional development and training; work health and safety; and urban cooperatives and associations.

MINISTRY OF SOCIAL SECURITY

Is responsible for caring for social security and supplementary social security, and assuring to their beneficiaries indispensable means of maintenance, for reasons of disability, old age, involuntary unemployment, family burdens and imprisonment or death of those on whom they were economically dependent.

MINISTRY OF HEALTH

Has the attributions of: national health policy; coordination and overseeing of the Universal Healthcare System; environmental health and actions for promotion, protection and recovery of individual and collective health, including of workers and indians; health information; critical health inputs; preventive action in general, sanitary control and surveillance of borders and sea, river and air ports, health surveillance, especially as to drugs; food and medications; scientific and technological research in the area of health. The following entities, among others, are linked to this ministry:

ANVISA – National Sanitary Surveillance Agency;

ANS – National Supplementary Health Agency.

MINISTRY OF DEVELOPMENT, INDUSTRY AND FOREIGN TRADE

Cares for the policy of development of industry, trade and services; intellectual property and transfer of technology; metrology; industrial quality and standardization; foreign trade policies, including participation in related international negotiations; defense of trade; support for micro and small size companies, and handicraft; execution of trade registration activities. The following entities, among others, are linked to this ministry:

INMETRO – National Metrology Institute;

INPI – National Industrial Property Institute;

BNDES – National Economic and Social Development Bank, which, being a federal public company, with private law legal identity and own equity, has the objective of supporting undertakings that contribute to the development of the country. The BNDES has two wholly owned subsidiaries, FINAME (Special Industrial Financing Agency) and BNDESPAR (BNDES Participations), created with the respective objectives of financing the commercialization of machines and equipment and enabling the subscribing of securities in the Brazilian capital market. The three companies jointly make up the so-called "BNDES System".

MINISTRY OF MINES AND ENERGY

Is responsible for matters related to geology, mineral and energy resources; utilization of hydraulic energy; mining and metallurgy; oil, fuel and electrical energy, including nuclear. The following entities, among others, are linked to this ministry:

Agencies

ANEEL – National Electrical Energy Agency, responsible for regulating and overseeing the generation, transmission, distribution and commercialization of electrical energy;

ANP – National Oil Agency, responsible for promoting the regulation, contracting and overseeing of the economic activities which are part of the oil industry.

Linked companies:

PETROBRÁS – Petróleo Brasileiro S.A.;

ELETROBRÁS – Centrais Elétricas Brasileiras S.A.;

MINISTRY OF COMMUNICATIONS

Its duty is to care for the national telecommunications policy, including radio broadcast; telecommunications services; radio broadcast and postal services. The following entities, among others, are linked to this ministry:

ANATEL – National Telecommunications Agency, responsible for promoting the development of telecommunications in the Country so as to equip it with a modern and efficient telecommunications infrastructure, capable of offering to the users suitable and diversified services at fair prices, in the entire national territory.

MINISTRY OF SCIENCE AND TECHNOLOGY

Cares for the formulation and implementation of the national scientific and technological research policy; planning, coordination, supervision and control of the science and technology activities; formulation of the policy for development of in-

formation technology and automation; national bio-safety policy; space, nuclear policy, and control of the export of sensitive goods and services.

MINISTRY OF THE ENVIRONMENT

Its attributions are: policy for actions related to the environment and water resources; policy for preservation, conservation and sustainable utilization of ecosystems, biodiversity and forests; improvement of environmental quality and sustainable use of natural resources; policy for integration of environment and production; environmental policies and programs for the Legal Amazon (*Amazônia Legal*) and ecological-economic zoning. The following entities, among others, are linked to this ministry:

ANA – National Water Agency;

IBAMA – Brazilian Institute of the Environment and of Renewable Natural Resources.

MINISTRY OF DEFENSE

Its basic attributions are: care for the policy of national defense; military policy and strategy; national marine policy; manage and coordinate the Armed Forces; aeronautical policy, etc.

MINISTRY OF FINANCE

Basically cares for the formulation and execution of economic policy. The Ministry of Finance is responsible for addressing matters related to currency, credit, financial institutions, capitalization, popular savings, private insurance and open private social security; customs and tax policy, management, overseeing and collection; public accounting and financial management; management of domestic and foreign public debt; economic and financial negotiations with governments, multilateral organisms and governmental agencies; prices in general and public and administrative tariffs; overseeing and control of foreign trade; carrying out studies and research to follow the state of the economy and authorizations, save those of the competence of the National Monetary Council; free distribution of prizes as a form of advertising when made by means of lottery; consortium, retail sales of goods

operations, by mans of public offering, among others. The following, among others, are part of the organizational structure of the Ministry of Finance:

CMN – NATIONAL MONETARY COUNCIL. One of the entities of the Ministry of Finance, the purpose of the CMN is to formulate currency and credit policy, with the objective of economic and social progress of the country.

The attributions of the National Monetary Council are: establish the general guidelines of the monetary, exchange and credit policies; regulate the conditions for the organization, operation and overseeing of the financial institutions, and discipline the instruments of monetary and exchange policy.

BACEN – CENTRAL BANK OF BRAZIL, also linked to the Ministry of Finance, has the following principal attributions: comply and make comply with the rules that regulate the operation of the National Financial System (issued by the National Monetary Council); perform the services of the medium of exchange; be the depositor of the official reserves of gold and foreign currency; exercise control of credit in all its forms; control foreign capital under the law; regulate the performance of the services of clearing of checks and other securities; negotiate on behalf of the Brazilian Government with international and foreign financial institutions; exercise overseeing and grant authorizations to financial institutions; execute, as an instrument of monetary policy, buy and sell operations of federal public securities, etc.

MINISTRY OF PLANNING, BUDGET AND MANAGEMENT

Cares for participation in the formulation of the national strategic planning; evaluation and socio-economic impacts of the policies and programs of the Federal Government, and preparation of special studies for reformulation of policies, etc. The following, among others, is an entity linked to this Ministry:

IBGE – Brazilian Institute of Geography and Statistics Foundation.

MINISTRY OF AGRARIAN DEVELOPMENT

Its functions are basically agrarian reform and promotion of sustainable development of the rural segment, constituted by families of farmers. The following, among others, is an entity linked to this Ministry:

INCRA – National Institute of Colonization and Agrarian Reform.

MINISTRY OF NATIONAL INTEGRATION

Is basically responsible for: formulation and conduction of the policy for integrated national development; formulation and conduction of the regional development plans and programs; establishment of integration strategies for the regional economies, among others.

MINISTRY OF SPORTS

Areas of responsibility: national policy for development of the practice of sports and social inclusion by means of sports.

MINISTRY OF TOURISM

It responsibility is to care for the national policy for development of tourism.

MINISTRY OF CITIES

Is responsible for the policy of city development; sector housing policies; basic and environmental sanitation; city transportation, traffic and city water systems, among others.

MINISTRY OF SOCIAL DEVELOPMENT AND HUNGER ALLEVIATION

Cares for the coordination of the national policies for social development; food and nutrition safety; social assistance and citizenship income.

MINISTRY OF FISHING AND AQUACULTURE

Is responsible for directly advising the Government in formulating policies and guidelines for the development and stimulation of fishing and aquicolous production.

2.2. CHAMBERS OF COMMERCE

Aiming at economic approximation of Brazil with other countries, increasing commercial and financial flow between them, there are a series of Chambers of Commerce in our country, among them: American Chamber of Commerce; Japanese Chamber of Commerce and Industry; Italian-Brazilian Chamber of Commerce and Industry; Chamber of Foreign Trade (CAMEX), among others.

These Chambers of Commerce represent a source of safe information in order to establish commercial relations between contractors from different countries, helping in the contact between the interested parties and providing help whenever necessary.

The Chambers of Commerce are destined to cooperate with the business community, constituting strong allies of the countries in the interest of good progress of their undertakings, always respecting the legislation of those involved in seeking their progress.

FOREIGN CAPITAL

3.1. General Features

Foreign capital in Brazil is governed by Laws Nos. 4131 (the Foreign Capital Law) and 4390 of September 3, 1962 and August 29, 1964, respectively. Both laws are regulated by Decree No. 55762 of February 17, 1965, and have been amended.

Foreign capital is considered to be any goods, machinery and equipment that enter Brazil with no initial disbursement of foreign exchange, and are intended for the production of goods and services, as well as any funds brought into the country to be used in economic activities, provided that they belong to individuals or companies resident or headquartered abroad.

3.2. Registration of Foreign Capital

The registration of foreign capital must be made through the Central Bank Information System (*Sistema de Informações do Banco Central* – SISBACEN) – RDE-IED (*Registro Declaratório Eletrônico – Investimento Externo Direto*) Mode.

Chapter 3

For electronic registration purposes, foreign direct investment is defined as the permanent ownership interest held in the Brazilian investee, whether individuals or legal entities, residing, domiciled or headquartered abroad, through the ownership of shares or quotas representing the corporate capital of Brazilian companies, as well as the allocated capital of foreign companies authorized to operate in Brazil.

The foreign investment to be performed and registered is not subject to preliminary review and verification by the Central Bank, being thus declaratory, performed through a statement, which means that the Brazilian investee and/or the representative of the foreign investor are responsible, themselves, for registration of foreign investments.

All foreign investments must be registered with the Central Bank of Brazil. This registration is essential for offshore remittances, capital repatriation and registration of profit reinvestment.

3.3. Currency Investments

No preliminary official authorization is required for investment in currency. The investment to subscribe for capital or to buy a stake in an existing Brazilian company can be remitted to Brazil through any banking establishment authorized to deal in foreign exchange. However, closing of the exchange contract is conditional on the existence of a RDE-IED registration number for the foreign investor and the Brazilian investee.

Registration of the investment is made through the RDE-IED System by the Brazilian company receiving the investment, and/or foreign investor, within 30 days of closing of the exchange contract for the remittance.

Registration of foreign investments originating from a non-resident account duly maintained in Brazil is made in Brazilian currency. Transactions relating to such investments must be made through the non-resident account, and the corresponding investment registration will be updated through the RDE-IED Mode.

3.4. Investment by Conversion of Foreign Credits

Conversion into investment of foreign credits duly registered in the RDE-IED Mode is not conditional on the Central Bank's preliminary authorization. Conversion into

foreign direct investment is defined as "the transaction whereby credits eligible for offshore transfer based on prevailing rules are used by nonresident creditors to acquire or pay in an ownership interest in the capital of a company in Brazil."

Registration of foreign direct investment resulting from conversion, however, depends on receipt by the Brazilian investee of (i) a statement from the creditor and committed investor, defining exactly the due dates of the installments and respective amounts to be converted, and in the event of interest and other charges, also the period to which they refer and the respective rates and calculations, and (ii) a binding statement from the creditor, agreeing to the conversion.

3.5. Investment by Import of Goods without Exchange Cover

Investments made via import of goods (tangible only) without exchange cover, as contribution to corporate capital, do not require the preliminary approval of the Central Bank.

Registration of foreign direct investments resulting from the import of intangible assets without coverage by an exchange contract requires preliminary approval of Central Bank. For tangible assets, registration requires (i) the value of the registration made through the ROF (*Registro de Operações Financeiras* – Registration of Financial Transactions) Mode of the RDE System linked to the Import Declaration (DI); and (ii) the currency stated on the corresponding ROF.

Registration through the RDE-IED Mode requires that both tangible and intangible assets be exclusively intended for paying-up of capital.

Registration of foreign capital that enters Brazil in the form of assets must be made in the currency of the investor's country or, upon express request of the investor, in another currency, maintaining the exchange parity.

Foreign capital is considered to be any goods, machinery or equipment that enter Brazil with no initial disbursement of foreign currency, and are intended for the production or marketing of goods or rendering of services. The import of used goods is conditional on the absence of similar goods in Brazil. Used goods must be used in projects that foster the country's economic development.

Once the tangible goods have been cleared by customs, the Brazilian company has 90 days to register the investment with the Central Bank of Brazil.

3.6. Investment on the Capital Market

Nonresidents in Brazil, either individuals or legal entities, may invest in the Brazilian financial and capital markets.

Nonresident investors may use the same registration to invest in the fixed- and variable--income markets, and may migrate freely from one type of investment to the other. To access these markets, the foreign investor must appoint a representative in Brazil, who will be responsible for registration of the transactions, and obtain a registration with the Brazilian Securities Commission (*Comissão de Valores Mobiliários* – CVM).

The securities belonging to foreign investors must be kept in custody by entities authorized by CVM or by the Central Bank to provide such service, or registered, if applicable, with the Special Settlement and Custody System (*Sistema Especial de Liquidação e Custódia* – SELIC) or with a registration and financial settlement system supervised by the Central Agency for Custody and Financial Settlement of Securities (*Central de Custódia e de Liquidação Financeira de Títulos* – CETIP).

3.7. Remittance of Profits

There are no restrictions on the distribution and remittance of profits abroad. The dividends or profits paid to shareholders or partners of companies headquartered in Brazil, even when remitted abroad, are not subject to withholding taxes, except those based on profits booked before January 1, 1996.

Profit remittances must be registered as such through the RDE-IED Mode, considering the ownership interest held by the investor in the total shares or quotas that make up the paid-up corporate capital of the investee.

3.8. Reinvestment of Profits

Reinvestments are profits made by companies established in Brazil and allocated to persons or companies resident or domiciled abroad, which have been reinvested in the company that produced them or in another sector of the domestic economy.

Reinvested earnings are registered in the currency of the country to which such earnings could have been remitted, and reinvestments derived from investments made in Brazilian currency will be registered in Brazilian currency.

Earnings obtained by a foreign investor and further reinvested in Brazilian investees (even if such investees are different from the companies in which the earnings were obtained) for the purpose of paying up or purchasing shares and/or quotas, may be registered under Investment in the RDE-IED System. These earning to be reinvested are registered as foreign capital (in the same manner as the original investment) thus increasing the tax base for tax assessment on any future repatriation of capital.

In the cases of reinvestment by profit capitalization, interest on net equity and profit reserves, the ownership interest held by the foreign investor vis-à-vis the total number of paid-in shares or quotas in the corporate capital of the investee in which the earnings were originated will be observed.

3.9. Repatriation

Foreign capital registered with the Central Bank of Brazil may be repatriated to its country of origin at any time without preliminary authorization.

Foreign currency amounts registered with the Central Bank as nonresident investments may be repatriated without income tax assessment. In this case, the foreign currency amounts, which proportionally exceed the original investment (capital gain) will be subject to 15% withholding income tax.

3.10. Transfer Abroad of Investments in Brazil

The acquirer, individual or legal entity resident or domiciled in Brazil, or the acquirer's attorney-in-fact, when such acquirer is resident or domiciled abroad, shall be responsible for the retention and payment of the income tax applicable to capital gains earned by the individual or legal entity resident or domiciled abroad, who disposes of property located in Brazil.

The foreign purchaser will be entitled to register capital in the same amount as the registration previously held by the selling company, once again regardless of

the price paid for the investment abroad. In this case, the registration number in the RDE-IED Mode of the Central Bank of Brazil should be changed to reflect the name of the new foreign investor, which is essential to allow the new investor to remit/reinvest profits and to repatriate capital.

3.11. Restrictions on Remittances Abroad

Remittance of funds abroad is restricted when such funds are not registered in the RDE-IED System, since remittance of profits, repatriation of capital, and registration of reinvestment are all based on the amount of foreign investment registered.

3.12. Restrictions on Foreign Investment

Below are certain prohibitions and limitations imposed on foreign capital in the Brazilian economy.

(a) Prohibitions:

Participation of foreign capital is prohibited in the following activities:

- the development of activities involving nuclear energy;
- health services;
- post office and telegraph services; and
- the aerospace industry[1].

(b) Limitations

- The acquisition, operation or lease of rural lands by a Brazilian company under foreign control, an alien residing in Brazil or by a foreign-based legal entity authorized to operate in Brazil is subject to certain conditions prescribed by law, as well as, in certain cases, to congressional authorization.
- There are also some limitations on the acquisition of real properties alongside frontier areas, for national security reasons. Acquisition of these lands is conditional on prior authorization of the General Office of the National Security Council.

1 Referring to the launch and orbital positioning of satellites, vehicles, aircraft and related activities, excluding the manufacture or marketing of said items and their accessories.

- There are also certain restrictions on participation of foreign capital in financial institutions; however, these restrictions can be lifted in the national interest.
- The development of the public air services, for the operation of regular transportation, depends upon prior concession. According to Law, such concession, on its turn, shall only be granted to Brazilian legal entities (son understood those headquartered and managed in Brazil), and in which at least 80% of the voting capital is owned by Brazilians (limitation which also applies in capital increases). Moreover, the management of such companies must be conferred exclusively to Brazilians. Finally, the entering of foreign capital, within the authorized 20% of the voting capital, depends upon approval from the aeronautical authorities.
- Some restrictions apply to foreign investment in the ownership and management of newspapers, magazines and other periodicals, as well as in radio and television networks.
- Brazilian companies, even when under foreign control, may request and obtain permission to operate in the mining sector.

BRAZILIAN FOREIGN EXCHANGE REGIME

The foreign exchange ("FX") regime consists in ascertain the form through which the FX rate of a certain country will be established. The choice of such regime is a decision of economic policy, which is connected with the choice of the FX market in which such exchange rate will be formed, e.g., if in an official exchange rate market or if in a floating exchange rate market .

Historically the definition of Brazilian FX regime is carried out by Brazilian government through exchange control measures. Noteworthy is that exchange controls are exercised in Brazil not only through FX rules and regulation, but also through tax and foreign trade rules and regulations, whereby the Brazilian government may either encourage or discourage the inflow of foreign capital and the investment of Brazilian capital abroad.

In this connection, Brazilian authorities have recently introduced changes in tax regulations to increase the tax rates applicable to foreign capital entering Brazil, in order to curb the growing appreciation of the Brazilian real against other foreign currencies, such as the U.S. dollar.

Chapter 4

4.1. FX Control

Exchange control in Brazil is closely connected with the regulation of foreign capital flows. Historically, this regulation presents barriers to the outflow of funds, in order to protect Brazilian currency. In the decade of 1930, after heavy price reductions of basics products that represented an important portion of Brazilian exports, Brazilian authorities issued the first rules aiming to structure an exchange market in Brazil.

In this connection were issued rules requiring the entering in Brazil of funds connected with exports, such as Decree No. 23,258/33, currently revoked, and the Brazilian government started to promote strict control over the exporters, in order to avoid the maintenance of exports' funds abroad. This exchange control was justified because at that time funds connected with exports represented the main source of funds capable of contribute with the equilibrium of Brazilian balance of payments.

Only in 1960 the two main statutes on foreign capital and FX markets were issued in Brazil: Law No. 4,131/62 and Law No. 4,595/64.

Law No. 4,131/62 defines foreign capital in Brazil, presents the categories of foreign investments and also requires that foreign capital be registered upon entering Brazil, such registration to be made with the Central Bank of Brazil ("Central Bank").

Law No. 4.595/64 lays down the general rules of Brazilian financial system and creates the Brazilian Monetary Council ("CMN") and the Central Bank. After the issuance of this Law, the CMN and the Central Bank commenced to control and regulate Brazilian FX market. The CMN is responsible for formulating overall foreign exchange policy. In accordance with the guidelines established by the CMN, exchange controls, regulations affecting foreign capital, and the management of international reserves are under the jurisdiction of the Central Bank.

Law No. 4.131/62 and Law No. 4,595/64 changed the FX market and foreign investments landscapes, and remain in force fundamental statutes related thereto.

4.2. Brazilian Exchange Regime and the FX Market

Up to 1988, the exchange rate regime in Brazil was the regime of official rates exchange regime, under which exchange rates were determined by Brazilian government and not by the market supply and demand. Thus, the FX market was the official FX market, entirely regulated by the Central Bank.

Such official rates exchange regime was a reflected the successive FX crises faced by Brazil, which lead Brazilian government to establish several limits and bureaucracy requirements over the purchase of foreign currency.

As a result of such official market and of the strict FX controls, there was the development of a FX market named as "parallel", which was not provided for in any regulation nor was recognized by Brazilian authorities. In the parallel FX market the foreign currency was illegally negotiated, with FX rates that were different from the ones from the official market.

In response to the development of the parallel FX market, Resolution 1,552/88 (currently revoked) established the floating FX rates market, popularly known as "tourism FX". Such floating FX market was separated from the official FX market and allowed foreign currency to be negotiated with prices and conditions freely agreed between the counterparties.

Therefore the floating rate exchange market was characterized by the free floating (or variation) of the exchange rates, which obeyed the supply and demand for foreign currency. Such FX market of floating rates initiated the process to make Brazilian FX market more flexible.

In 1990, the CMN established the free rate exchange market, through Resolution CMN 1,690/90, currently revoked. The free rate exchange market extinguished the FX market of official rates and the FX Brazilian regime became a country with both floating rate exchange regime and free rate exchange regime.

The first movement towards to the unification of the aforesaid FX markets occurred in the beginning of 1999, through the issuance of rules that aimed the unification of such markets. The Central Bank Communiqué No. 6,565/99 informed Brazilian markets that, as of January 18, 1999, Central Bank "*will allow that the interbank*

market …determines the FX rate", and pointed out, however, that the Central Bank could "*occasionally interfere in such markets, in order to restrain FX rates disorderly movements*".

Therefore, since 1999, a floating exchange rate regime, with minor government intervention, has been adopted.

4. 2.1. Unification of Brazilian FX Markets

As of the unification of the exchange markets, Brazil has witnessed a significant development in the unification of its FX system with the enactment of Resolution No. 3265 by the CMN ("Resolution 3265"), on March 4, 2005. As provided above, prior to Resolution 3265, Brazilian FX market transactions were either performed primarily in the free exchange rate market – the "commercial market" as it was so-called – and the floating exchange rate market. Resolution 3265 combined both markets.

In addition to the unification of the commercial and the floating rate markets, the new exchange regulation widened the permission for the purchase and sale of foreign currency, and for the execution of Brazilian investments abroad, both in relation to individuals and legal entities, without any limitation in value.

Per Resolution 3265, the commercial market and the floating rate market are now part of one and the same market (the "FX Market", as set forth by the very Resolution 3265 and as referred to hereafter).

In consequence of such unification, access to the Brazilian FX Market on an unrestricted basis was made the general rule. Resolution 3265 was recently replaced by Resolution No. 3,568/08 and, although the general rule mentioned above remains valid, such new Resolution has established new and even more flexible FX rules.

The unrestricted access rule is set forth in article 8 of Resolution CMN n.º 3.568/08, which read as follows:

"Article 8 [1]. Individuals and legal entities may purchase and sell foreign currency or

1 The translation of article 8 and its first paragraph is as true as possible to original Portuguese regulatory language. Where originally present, ambiguity was maintained.

carry out international transfers in *reais*, of any nature, irrespective of any amount limitation, provided that the counterparty in the transaction is dully authorized to operate in the foreign exchange market, with observance of the legality of the transaction, having as basis the economic grounds and the responsibilities defined in the supporting documentation."

Considering the provisions set forth in the aforementioned regulation, Brazilian individuals shouldn't find any restrictions to access the FX market for the purpose of remitting abroad proceeds deposited in Brazil, provided that such FX transaction is carried out by an authorized agent, i.e. a financial institution authorized to operate in the FX market by the Central Bank ("Authorized Agent"), and also provided that the remittance of proceeds complies with the FX principles described in article 8 of Resolution 3568: legality of the transaction, its economic grounds and analysis of the liabilities defined in the appropriate documentation.

Yet, as an outgrowth of Resolution 3265, the Central Bank laid down Circular No. 3,280/05, introducing the Regulations of the Exchange Market and International Capital (to which we shall refer by the Portuguese acronym "RMCCI"). The RMCCI, as amended from time to time, is a practical reference tool for FX regulations.

Therefore, Brazilian FX Market is currently much more flexible than it was in the past. Nowadays FX transactions may be freely executed, provided that the aforesaid principles are met. Noteworthy is that certain institutions and investment vehicles, such as financial institutions and mutual funds are still subjected to specific rules as to FX transactions, which will not be analyzed herein due to the fact that they fall out the scope of this chapter.

4.3. Nonresident Account in Local Currency, and International Transfer in Brazilian Reals

Finally, noteworthy is that the RMCCI provides that individuals or entities residing or headquartered abroad may hold a deposit account in Brazil in local currency. A holder of such account must register with Central Bank at the time the account is established. All activity with respect to the account will be made through unilateral transfers in Brazilian reals, which must comply with the provisions governing FX transactions, where applicable.

Therefore, international transfers in Brazilian reals correspond to activity in a checking account of a nonresident with a bank in Brazil, which holds local currency. The activity in such account will be limited to money orders and transfers on behalf of the account holder.

CORPORATE TYPES

5.1. General Aspects

Brazilian legal system provides for some forms of joint efforts in which some of them lead the interested parties to the organization of corporations provided with legal character, while others are not incorporated and thus, not always lead to the organization of a company. In relation to the latter species, consortia and other forms of legal businesses can be highlighted where the parties do not detach from their individual corporate status. On the other hand, the companies are organized by mere written agreement, either private or public, in which the wish of the contracting parties may lead them to organize incorporated or unincorporated entities. Among the latter are "sociedade em comum" and "sociedade em conta de participação".

In relation to incorporated entities, the Brazilian legislation provides for the following types: *sociedade simples*, *sociedade em nome coletivo*, *sociedade em comandita simples*, *sociedade limitada*, *sociedade anônima* and *sociedade em comandita por ações*.

The Law gives corporate status to such companies after the registration with the competent pubic registry office, which thus become le-

gal entities with assets separated from those of their partners and diferents levels of responsibility for the social obligations.

Brazilian Law also provides for the associations, foundations and co-operatives, forms of association which, either due to the fact that they are not aimed to obtain profit to distribute, or because of the particular characteristics of their formation or by their corporate purpose, are different from business corporations, whether or not they present positive income.

We should mention at this point that, apart from *sociedades anônimas*, all the corporate types foreseen under Brazilian legislation may indistinctly function as *sociedades simples* or of business corporations, which, must however, be expressed in their articles of association since their organization, and *sociedades simples* shall be filed in the Civil Registry of Legal Entities and business corporations shall be filed with the Boards of Trade.

5.1.1. Sociedade Anônima

Sociedade anônima or *companhia*, characterized under article 1088 of Brazilian Civil Code and regulated by Law No. 6,404 of December 15, 1976 (partially amended by Law No. 9.457 of June 5, 1997, Law No. 10,303, of October 31, 2001, Law no. 11,638/2007, of December 28, 2007 and Law no. 11,941/09, of May 27, 2009) is fundamentally a business corporation by legal definition, with its capital represented by previously outstanding shares. It is, in itself, a business corporation having as purpose to earn profits to be distributed to its shareholders as dividends or actually as interests over own capital.

Sociedade anônima is identified by a name, and the chosen name must be preceded or succeeded by the expression "*Sociedade Anônima*", in full or abridged (S/A), or preceded by the word "*Companhia*", in full, or "*Cia.*", abridged. Besides, in the corporate name, it is possible to use a proper name, the name of the founder or the name of someone who one wishes to homage. The corporate name can describe the corporate purposes or the activity carried out, but this description is not mandatory.

There are two kinds of *sociedades anônimas*: a publicly held company which obtains funds through public offers and subscriptions and is supervised by the Brazilian

Securities Commission (CVM), and a closed company which obtains capital from its own shareholders or subscribers, having the option of a simpler accounting and administration system.

The capital stock is represented by securities called shares. Depending on the rights or advantages conferred to their holders, the shares may be common, preferred or fruition shares.

Common shares entitle its holder, besides the essential rights, to the right of vote, whereas preferred shares, which grant special rights to its holder, may restrict or suppress the right of vote. Fruition shares result in the right to continue upon the amortization taking part in the corporate income from the paying off of common or preferred shares, without reduction in capital.

By means of a Shareholders' Agreement, the shareholders can enter into an agreement among themselves as regards the purchase and sale of their shares, to establish pre-emptive rights for their acquisition, and also as to the manner in which they exercise their voting rights. The obligations set forth in the Shareholders Agreement are enforceable by specific performance and must be respected by the Company.

Sociedade Anônima may be managed by a Board of Directors and by a Management Board or only by a Board of Directors, depending on what law or the By-laws determine.

The Management Board is a collegiate decision-making body which is mandatory in publicly held and authorised capital corporations and optional in closed corporations and must be comprised of at least three (3) members, which must be shareholders, individuals, residing or not in Brazil.

The Board of Directors is the executive body of the *sociedade anônima*. Its responsibility is to represent the company and to practice all such acts as are necessary for its regular operation. It is composed of at least two directors, who may or may not be shareholders, and who must be individuals, necessarily residing in the country, and who may be elected for a maximum term of three years.

The shareholders are entitled to perform the inspection through an Audit

Committee.

The Audit Committee is the body which polices the company's accounts and administration. Its operation may be permanent or temporary. Its installation is based on the need of the company to establish a rigorous control over the actions of the administration. Whenever installed, it is composed of at least three and, at most, five members, with an equal number of substitutes, who may be shareholders or not, elected by the General Meeting. In special cases, there may be specific representations for a certain type of shareholders.

5.1.2. Sociedade Limitada

Sociedade Limitada is governed by Decree No. 1052 to 1087 of the Civil Code and subsidiarily by the Law of Sociedades Anônimas, and may adopt the form of *sociedade simples* or *sociedade empresária*, according to the corporate purpose, as well as, its definition of business company.

Sociedade limitada is organised through the Articles of Association and has limited liability partners. Since every partner has its responsibility limited to the value of their shares, all of them are jointly liable for the payment of the capital stock, while it is not paid in full.

The company, under the New Civil Code started to have an organic structure, whose corporate bodies are the Meeting of Shareholders, the Management and the Audit Committee all of them fixed by the partners in the articles of association themselves. The meeting of shareholders is the collegiate decision-making body comprised by the corporate chart, which must always meet whenever the law or the articles so require. The management will be carried out by one or more individuals, shareholders or not, indicated in the articles of association, whereupon the term, established or not for the mandate will be set forth.

The capital stock is divided into corporate shares. The share represents the amount in money, credits, rights or assets by which the shareholder contributes for the formation of the company's capital. The shares must be registered and are not represented by credit securities. As the ownership and the number of quotas are written in the Articles of Association, any transfer of title over the shares will require an amendment to such Articles. At the meetings of shareholders, changes that result in modification to the articles

of association or reorganization act the corporate status of the company will depend on favourable votes comprising three-fourths (3/4), at least, in the capital stock.

5.1.3. Rules that are Common to Sociedades Anônimas and to Sociedades Limitadas.

Corporate operations involving the Transformation, Merger, Consolidation or split up can be formalized both by *sociedades anônimas* and *sociedades limitadas* governed by Articles 1.113 to 1.122 of Law No. 10,406, of January 10, 2002 (Civil Code) besides articles 220 to 234 of special Law No. 6,404, of December 15, 1976 (Law of *sociedades anônimas*).

The transformation is the transaction in which a given company, without dissolving it, has its corporate type transformed into another, and in this process, it must observe a form corresponding to that of the new type.

The merger is the transaction through which one or more companies are absorbed by another, which succeeds them in all their rights and liabilities.

The consolidation, in its turn, is the transaction through which two or more companies amalgamate, with a view to forming a new company which will succeed them in all rights and liabilities, since they are extinguished.

Finally, the split up is the transaction by which the company transfers parts or the totality of its net equity to one or more companies, established for this purpose or otherwise, resulting in the extinction of the divided company, if it has passed on all of its net equity, or reducing its capital, if it has passed on only part of its net equity.

5.1.4. Other Corporate Types and Forms of Association

Due to the unlimited liability vested to them, the other company types are not commonly used but may become attractive under certain business circumstances. Thus, we will briefly comment on those which are sometimes used.

5.1.5. Empresa Individual de Responsabilidade Limitada – EIRELI

The newest corporate form, created on July 11, 2011 by the Law no. 12.441 is the

Empresa Individual de Responsabilidade Limitada – EIRELI.

The Law, which introduced the article 980-A and the sole paragraph of article 1.033, both from the Civil Code of 2002, provides for constitution of a Sociedade Limitada in which a single person holds the total quotas of the corporate capital, necessarily paid-up in an amount at least higher than one hundred (100) times the highest minimum wage in effect in the Country. To the "empresa individual de responsabilidade limitada" there shall be applied, as the case may be, the rules set forth for the sociedades limitadas.

5.1.6. Sociedade em Comandita simples, or por ações

Sociedades em comandita, have two classes of partners, those with unlimited liability, who are responsible for the corporate management and representation acts, which are called *comanditados* and *comandatários*, who have the responsibility of being bound only for the amount of their interest share, represented by corporate shares [quotas], in *sociedade em comandita simples* and, by shares in *sociedade em comandita por ações*.

In *sociedades em comandita simples*, the participation of the *comanditados* partners is also represented by corporate shares, but, in relation to its liability, the rules of *sociedade em nome coletivo* apply. So, the responsability of the partners is ilimited and solidary.

> **5.1.6.1.** *Sociedade em comandita por ações* is governed by articles 1090/1092 of Brazilian Civil Code and by a special chapter of the Law of companies by shares and has, for both types of partners, its corresponding interests represented by shares.

5.1.7. Sociedade em Nome Coletivo

This corporate type is characterized by the unlimited and joint liability of all partners that comprise the company.

Thus, there is only one class of partners: the joint parties. Although, they are joint partners among themselves, such partners respond for corporate obligations, on a subsidiary basis. Thus, their assets cannot be executed, unless after the assets of the company have been depleted.

Responsibility for the management of the company falls on all of the partners, as long as the Articles of Association does not specifically determine which partner will have this responsibility. If such delegation exists, this partner will have the exclusive right to use the firm or corporate name.

The name of the *sociedade em nome coletivo* is provided with the name or corporate name comprised by the name of one, some or all partners, adding to it the expression "& *Cia*." when there is no express reference to the names of all partners.

5.1.8. Sociedade em Conta de Participação

Sociedade em conta de participação is comprised by two classes of partners, one of which is the ostensible partner and the other is the participant partner, and the *sociedade em conta de participação* is an unincorporated company, that is, it does not have a corporate status even if registered with some Public Registry.

As the *conta de participação* has as purpose a certain undertaking, the duration of the company is for a determined period of time, or which can be determined, aiming at executing certain specific transactions that form its purpose.

Besides the ostensible partner, there is the class formed by the participant partners, which contribute for the capital or other contribution needed for the undertaking, being exclusively responsible before the ostensible partner, pursuant to the corresponding articles of association, and becoming creditors thereof pursuant to the articles. In case of bankruptcy of the ostensible partner, the participant partners become creditors thereof with no priority or preference rights.

The organization of a *sociedade em conta de participação* is not subject to many formalities in addition to the articles of association, and may further be proved by all means of evidence admitted by Brazilian legislation. It is, therefore, a company existing only between the parties, but not in relation to third parties, as those deal exclusively with the ostensible partner, who respond before them, with effects from its structure.

The Management of a *sociedade em conta de participação* falls exclusively upon the ostensible partner, since it is the one responsible for the company's business, and it

must, upon its closing, or at the contractual periodicity, presents the corresponding accounts to the participant partners.

5.1.9. Consórcio

In the etymological meaning of the word, *consórcio* means union, combination, association. However, in the meaning attributed to it by the legislation on *sociedades anônimas*, *consórcio* is a manner of companies gathering aiming at the development of a specific project, without excluding their legal character.

The *consórcio* is formed by means of an agreement between two or more companies, but its formation does not bring a new legal entity into existence. The parties preserve, therefore, their corporate identity, pooling their efforts to achieve certain objectives.

Although such type of gathering is based on an agreement, it does not have corporate existence, wherefore the companies that form a *consórcio* only bind themselves under the terms of the agreement executed among them, each party being liable for its specific obligations as established therein, without any assumption of joint liability before third parties, observing a single exception in case of the effects of the employment relation, according to the Labour Laws Consolidation (CLT).

The *consórcio* agreement must be approved by the signatory companies at a general meeting, in case of *sociedades anônimas*, or the corresponding competent authorities, if the signatory entities are not *sociedades anônimas*.

The *consórcio* agreement executed by the companies must contain the following covenants:

- the name of the *consórcio*, if any;
- the objectives of the *consórcio*;
- the duration, address and venue of the agreement;
- a determination of the participant's liabilities and obligations, as well as the specific considerations;
- the rules for the receipt and distribution of results;
- the management and accounting policies, as well as a representation of the participating companies and administrative charges, if applicable;

- the manner in which the parties' decisions will be made, as well as the number of votes each participant will have; and
- the contribution each participant will make towards the expenses of the project, if applicable.

The agreement and its subsequent amendments must be filed before the Commercial Registry with jurisdiction over the territory in which its head office is located. When the documents are filed, the Commercial Registry issues a certificate which must be published in the Official Gazette of the Union or the State, and in a widely circulated newspaper.

5.2. Registration Process

Brazil has two kinds of public registers for companies: a) the commercial registry service – intended for the filing of the actions of business companies (besides the registration of individual partnerships and the inscription of subordinates of the individual partner and other assistant agents), made by the State Commercial Registries, which are bodies of state jurisdiction; and, b) the civil registry service, intended for the the acts of *sociedades simples*, is made by the Civil Registries of Legal Entities which are bodies with jurisdiction at the places to which they belong, due to their corporate head office and jurisdiction.

5.2.1. The Commercial Registry

The Commercial Registry, which has as executive bodies the State Commercial Registries (one per unit of the Federation), is obligatory for those exercising business activities (businesspersons and business corporations), and which, thus have the professional exercise of the economic activities of production or circulation of goods and services, exercised upon the organization of the company's characteristic production means.

Besides the *Sociedades Anônimas*, which are held to be business companies by operation of law, the following companies are also business companies: a) *Sociedade em Nome Coletivo*, b) *Sociedade em Comandita Simples or por ações* and c) *Sociedade Limitada*, provided that their purpose contains activities considered to be corporate-like (economic activities of production or circulation of goods or services performed through an organization which is characteristic of companies) and thus, must obligatorily file their corporate acts with the Commercial Registry belonging to the State where they have their corporate head office and jurisdiction, as

well as those Boards of Trade of the States where they may open branches;

Thus, the corporate type chosen by the company, the clear and accurate wording of its corporate purpose and the characterization of its corporate status will guide those interested to the respective registrations with the State Registry or Civil Registry Office of Legal Entities.

The request for the filing of the Articles of Association of *sociedades anônimas* must be accompanied, by the following documents:

- Acts of Incorporation (Public Deed or the Minutes of a General Incorporation Meeting), listing the particulars of the subscribers and proof of payment of the whole capital stock;
- the bank (Banco do Brasil S.A.) deposit slip proving that an amount equivalent to at least ten percent (10%) of the capital to be paid in cash has been paid by the subscribers;
- By-Laws signed by all subscribers;
- a Subscription Chart certified by the founders or by the Secretary of the General Meeting, mentioning full name, nationality, marital status, profession, residence and the place of domicile of subscribers, in addition to the number of subscribed shares and the amount paid;
- a power-of-attorney granted by a foreign resident shareholder, signed before a Public Notary in its country of origin, legalised at the Brazilian Consulate, translated by a public translator in Brazil and registered at the Public Notary's Office;
- documents proving the existence of the partners resident or headquartered abroad;
- a photocopy of the Identity documents of the elected directors and board members;
- forms with data on the company and its shareholders, duly filled out, accompanied by proof of payment of filing fees.

The filing of the Incorporation documents and subsequent amendments of other commercial companies must, in the same manner, be presented to the Commercial Registry with jurisdiction over the place of the company's head office, by way of a petition signed and dated by any partner, by an attorney or a person duly authorised.

Generally the request to file with the Commercial Registry the acts of incorporation of other commercial companies must be accompanied by the following documents:

- three original counterparts of the Articles of Association signed by all the partners and two witnesses;
- Extract or certificate, when the articles of association has been entered into by a public deed;
- a certified photocopy of each partner's identity card;
- a power-of-attorney granted by the foreign resident partners signed before a Public Notary in their country of origin, legalised at the Brazilian Consulate, translated by a public translator in Brazil and registered at any Brazilian Deeds and Documents Registry Office;
- a document as a proof of existence of the foreign partner in its country of origin;
- a personal declaration signed by each partner or manager of the society that he is not prevented from engaging in commercial activities, which may be made in the articles of association themselves or in a separate document;
- forms with data on the company and its partners, duly filled out, accompanied by proof of payment of filing fees.

5.2.2. The Civil Registry of Legal Entities

Sociedade simples, defined as that company which has not adopted the structure of a *sociedade anônima*, or if adopting other types, it does not engage in commercial activities, must register its organizational acts at the Civil Registry of Legal Entities.

To accomplish its registration, the *sociedade simples*, must file a petition with the Civil Registry, accompanied by the following documents:

- the organizational act or corresponding amendments to the articles of association, duly signed by its partners;
- certified photocopies of the Identity documents of the partners;
- a proxy granted by foreign resident partners, signed before the Public Notary of his country of origin, legalised at the Brazilian Consulate, translated by a public translator in Brazil and registered at the Public Notary's Office in Brazil.

The *sociedades simples*' Articles of Association may only be filed at the Civil Registry of Legal Entities, if they have been duly certified by a lawyer.

PUBLICLY-HELD COMPANIES

6.1. General

Law 6.404/76 (also known as the Brazilian Corporations Law) makes a distinction between "closed" and "open" companies. Open (or publicly-held) companies must necessarily take the form of a corporation and their securities are admitted for trading on the securities market, allowing them to raise funds from the public.

Because publicly-held companies are permitted to raise funds through public offerings of their securities, they are subject to a series of specific obligations imposed by law and by regulations issued principally by the Brazilian Securities and Exchange Commission (*Commissão de Valores Mobiliários* – the "CVM").

The CVM, which was created by Law 6.385/86, is a federal agency linked to the Treasury. The purpose of the CVM is to regulate, develop, control and supervise securities markets in Brazil. With the changes introduced by Law 10.303/01, the CVM's jurisdiction was enlarged to include the Commodities and Futures Markets, the orga-

nized over-the-counter market and securities transactions clearing and settlement entities. The CVM is an independent agency that operates under a special regime. Although it is linked to the Treasury, the CVM is not subordinate to the minister. The CVM has independent administrative authority, with its own financial resources and budgetary powers. The CVM's commissioners have a fixed mandate and cannot be removed at will.

One of the CVM's purposes is to protect investors. Protection of investors, through various control and supervisory mechanisms, is ultimately aimed at stimulating investment of savings in stocks and the financial markets.

Thus, while in privately-held companies there is great freedom to establish rules for the operation of the company that will best serve the shareholders' interests, because publicly-held companies can seek funds from the investing public, they are subject to a number of restrictions that reduce the shareholders' flexibility in establishing the rules that will govern the company.

Publicly-held companies can register with the CVM in order to have their securities admitted for trading on the stock exchange or on the over-the-counter market, in addition to meeting the registration requirements imposed by the stock exchange or over-the-counter institutions.

Only publicly-held companies may issue depositary receipts (DRs), which are certificates representing shares in the company. DRs are traded on foreign markets, enabling the company to raise funds of foreign investors, in their original markets.

In the last few years, the Brazilian Corporations Law has undergone a series of small corporate, tax and accounting reforms. Law 11.638/07 and Law 11.941/09 amended the Brazilian Corporations Law to introduce due accounting rules for valuation of assets and liabilities, and for the recognition of costs, expenses and revenues, in order to bring Brazilian accounting rules into line with international standards. In addition, the Laws gave the CVM greater independence with respect to accounting standards, with powers to issue accounting rules that are mandatory for publicly-traded companies and optional for privately-held companies.

Law 12.431/11 recently made further amendments to Brazilian Corporations Law. The amendments include (i) the possibility of remote participation in sharehol-

ders' meetings, (ii) more flexible rules for the issue of debentures, and (iii) the end of the requirement that members of the board of directors be shareholders of the company.

6.2. Securities Market

The sector of the Brazilian financial system referred to as the "Securities Market" includes a variety of transactions involving securities issued by publicly-held companies, such as shares, debentures, subscription bonuses and promissory notes for public distribution. Aside from these securities, Law 6385/76 lists all the types of securities that may be traded on the Securities Market and that are subject to the CVM's jurisdiction.

Transactions involving securities issued by publicly-held companies may be carried out on the stock exchanges or in the over-the-counter markets (organized or not), with the CVM as the main regulatory agency.

Stock exchanges, which are governed by the Resolution no. 2.690/00 of the National Monetary Counsel, may be formed as association or corporations and, between other related obligations, shall establish a place or system appropriate for the buying and selling of bonds and/or securities in a free and open market, especially organized and supervised by the stock exchange itself, its members and regulatory authorities.

The organized over-the-counter market, is a securities trading system where securities issued by publicly-held companies that are not registered on the stock exchanges are traded. The trading system is maintained by a self-regulatory entity charged with supervising and inspecting market participants and the trades made on the market. Registration of assets for trading on the organized over-the-counter market is simpler than registration for trading on the stock exchanges and, in practice, stocks traded on the organized over-the-counter market have less liquidity than stocks traded on the stock exchanges.

When publicly-held companies are not registered with either a stock exchange or on the organized over-the-counter market, their securities may be traded on the "unorganized" over-the-counter market, where trades are made directly between securities brokers, without the supervision of a self-regulatory entity.

6.3. Management

Publicly-held companies are required to have a two-tiered management structure, composed of a board of officers and a board of directors, unlike privately-held companies, in which a board of directors is optional.

The board of directors is a deliberative body, with powers to supervise the company's business and to establish its internal structure. The board must have at least three directors, all elected at the general annual meeting of the shareholders of the company. Directors may be non-residents, but with the amendments recently made by Law 12.431/11, they are no longer required to be hold at least one share in the company, although they are permitted to be shareholders. However it is still usual to find many By-Laws which repeat the former Law and, doing so, pursue to require that the members of the Board of Directors are shareholders of the company. Non--resident directors must appoint a representative who is resident in Brazil to receive service of process in legal proceedings based on Brazilian companies legislation.

The Brazilian Corporations Law gives holders of voting shares in a publicly-held company that represent at least 15% of the total number of voting shares the right to elect and remove one member (and alternate) of the board of directors, in a separate vote at the annual general meeting of shareholders.

The Brazilian Corporations Law also provides for a separate vote by holders of preferred shares without voting rights or with restricted voting rights that represent at least 10% of the capital of a publicly-held company, to elect and remove one member (and alternate) of the board of directors, provided they have not exercised any right to elect a member of the board of directors provided for under the company's bylaws.

In both cases, the shareholders must show that they have held the 15% of the voting capital of the company, or the 10% of the total capital company, uninterruptedly during at least the three months prior to the general meeting for election of directors.

Furthermore, if the holders of voting shares and the holders of preferred shares without voting rights or with restricted voting rights are unable to attain the percentages required for a separate vote to elect one member (and alternate) to the bo-

ard of directors, the two groups may join to elect a single member (and alternate), provided that their aggregate shareholdings represent at least 10% of the capital of the company.

The board of officers is an executive body. With powers to conduct the day-to-day business, the board of officers has exclusive authority to represent the company before third parties. The board of officers is composed of at least two members, and all officers must be resident in Brazil, although they do not need to be shareholders of the company. The officers are elected by the board of directors. Up to one-third of the members of the board of directors may also serve as officers.

In order to have their securities traded in the stock exchanges or over-the-counter market, publicly-held companies must have, in addition to a board of directors, an investor relations officer to be responsible for providing information to members of the public who have invested in the company, to the CVM and, if the company is registered with the stock exchanges or organized over-the-counter market, to those entities, in addition to ensuring that the company's registration is up to date, in accordance with CVM Instruction no. 480/09.

Finally, publicly-held companies must create a fiscal council, to advise on matters related to governance of the company. The fiscal council is the instrument available to the shareholders to inspect the management of the company. The council may function permanently, or only when requested by the shareholders.

6.4. Periodic Filing Requirements and Other Information

Publicly-held companies are required to disclose and/or communicate various types of information related to their business.

On January 1, 2010, CVM Instruction no. 480/09 came into effect, replacing CVM Instruction 202/93. The new Instruction establishes rules for registration of issuers of securities traded on regulated markets and the filing requirements applicable to those issuers.

Under CVM Instruction 480/09, all information related to an issuer is consolidated in a single document, the Reference Form (*Formulário de Referência*), which must be updated regularly, replacing the old Annual Information Form. Thus, when

making a public offering of securities, the issuer need only prepare a supplementary document on the securities being offered and the features and conditions of the offering, and together the offering document and the Reference Form will provide investors with the information found in a traditional prospectus.

The CVM Instruction 480/09 classifies securities issuers according to the type of securities admitted for trading. "Category A" issuers are authorized to list any type of securities for trading on regulated markets, while "Category B" issuers are only authorized to list for trading securities other than shares, depository receipts, and securities that are convertible into, or give rights to, shares or depositary receipts. The main difference between these two types of issuers is the quantity of information required by CVM to be released to the issuers' shareholders and to the market.

Once a publicly-held company's securities have been registered with the CVM, the registered company must provide periodic and event-related information to the CVM, by means of the electronic system available on the CVM's webpage (CVM Instruction No. 480/09).

The information that must be submitted on a regular basis, at the times and in the form established by regulation, consists of:

- the issuer information form (*formulário cadastral*);
- the reference form (*formulário de referência*);
- financial statements;
- the standardized financial statements form (*formulário de demonstrações financeiras padronizadas – DFP*);
- notices of call to the annual general shareholders' meeting;
- all the documents necessary for the exercise of voting rights at annual general shareholders' meetings;
- a summary of the decisions made at annual general shareholders' meetings;
- the minutes of the annual general shareholders' meetings; and
- the quarterly information form (*formulário de informações trimestrais – ITR*)

In addition to the information listed above, Category A issuers are also required to submit information related to certain events or facts, at the times and in the form established by regulation, such as:

(i) notices of call to meetings of debentureholders and to extraordinary and special shareholders' meetings;
(ii) the minutes of meetings of debentureholders and of extraordinary and special shareholders' meetings;
(iii) the minutes of meetings of the board of directors, when the minutes contain resolutions intended to produce effects against third parties;
(iv) the minutes of meetings of the audit committee (*conselho fiscal*) at which opinions are approved;
(v) the evaluation reports required under art. 4 §4, art. 4-A, art. 8 §1, art. 45 §1, art. 227 §1, art. 228 §1, art. 229 §2, art. 252 §1, art. 256 §1, and art. 264 §1 of Law 6404 of 1976 and under regulations issued by the CVM;
(vi) shareholders' agreements;
(vii) statements of material fact;
(viii) share trading policies;
(ix) debenture deeds;
(x) any other information that may be requested by CVM.

Items (i), (ii), (vii), and (ix) also apply to Category B issuers.

At the same moment that CVM issued enact CVM Instruction 480/09, which has detailed the information to be provided by the issuers of securities, is has also enact CVM Instruction 481/09 which has widen even more the amount and quality of information of mandatory release by publicly-held companies. Such additional obligation granted investors more elements to instructs their vote on the shareholders' meetings.

In this regard, by means of the CVM Instruction nº 481/09, the CVM started to require that publicly-held companies release detailed information about the matters that will be considered at each general shareholder's meeting, when such meetings are summoned. Those information are expressly provided in the referred instruction and they differ accordingly to the matter to be discussed, for example, information related to capital reduction, capital increase, issuance of debentures, acquisition of control and withdrawal rights.

With respect to the release of the so called "Material Fact", CVM Instruction no. 358/02 defines as material any or fact related to the business of a company (including any decision by the controlling shareholder and any resolution adopted by the

shareholders in general meeting or by any of the management bodies of the company) that could influence (i) the quoted price of securities issued by the company; (ii) the decision by investors to trade in the company's securities or to continue holding them; (iii) the decision by investors to exercise any rights attached to their ownership of the company's securities.

CVM Instruction no. 358/02 gives examples of events that may constitute a material fact:

- changes in control of the company, including changes in control resulting from the signing, amendment or termination of shareholders' agreements;
- the signing, amendment or termination of shareholders' agreements to which the company is a party or which have been entered in the company's books;
- authorization for trading securities issued by the company in any domestic or foreign market;
- a decision to apply for cancellation of the company's registration as a publicly-held company;
- merger, consolidation or spin-off involving the company itself or related companies;
- transformation or dissolution of the company;
- renegotiations of debt;
- approval of stock option plans;
- changes in the rights and privileges attached to securities issued by the company;
- share splits and reverse splits and the issue of share dividends;
- acquisition of shares to be held in treasury or for cancellation, and the sale of shares so acquired;
- signing or termination of agreements, or failure to close a deal, when the expectation of closing the deal is public knowledge;
- any change in the projections disclosed by the company;
- filing for judicial arrangement with creditors, petition or confession of bankruptcy, or the bringing of any lawsuit that could affect the financial situation of the company.

The CVM may require a publicly-held company to disclose, correct, amend or republish information related to a material fact whenever the CVM believes that it is necessary.

Likewise, both the CVM and the stock exchange or over-the-counter market on which the company's securities are admitted for trading may require the company's investor relations officer to provide further information to clarify communications and/or disclosures made in connection with a material fact.

Exceptionally, a publicly-held company may omit to disclose information required under periodic filing and other requirements, including material fact disclosure requirements, if the controlling shareholders or the management of the company conclude that disclosure of the information would put a legitimate interest of the company at risk, provided the information is not leaked and there is no unusual variation in the quoted price or trading volume of the securities issued by the publicly-held company or related to it. In such cases, the company must submit to the CVM a statement of the reasons that led it to believe that disclosure would put a legitimate interest of the company at risk.

The basic information contained in the company's registration with the CVM must be kept up to date and the CVM must be informed of any change in that information.

The information must not only be submitted to the CVM but also be kept available to security holders at the investor relations department of the company. The CVM also makes the information available to the public, with the exception of information classified as confidential by the company.

The means of publication of required information by publicly-held companies are also regulated. The information must be published in the official journal (*Diário Oficial*) issued by the federal or the state governments, depending on where the company is established, and in a widely-circulated newspaper issued in the same city as the company's headquarters. The company must use the same newspaper for all publications, and any change in the newspaper the company uses must be notified in advance to the shareholders in the extract of the annual general meeting.

6.5 – Public Tender Offer ("OPA")

Publicly-held companies are required to make a public tender offer (*Oferta Pública para Acquisição de Ações*, called an "OPA"), in accordance with the terms of the Brazilian Corporations Law and CVM regulations, in the following cases:

(i) public tender offer for cancellation of registration for listing of shares on regulated securities markets, which must be made by the controlling shareholder or by the company itself, with a view to acquiring all the shares issued by the company (art. 4 §4 of the Brazilian Corporations Law and CVM Instruction no. 361/02);

(ii) public tender offer to increase shareholdings, which must be made when the controlling shareholder's interest reaches a percentage that, under CVM regulations, impedes the market liquidity of the remaining shares. The offer must be for all the shares of the affected class or type. (Art. 4 §6 of the Brazilian Corporations Law and CVM Instruction no. 361/02); and

(iii) public tender offer for transfer of control, which constitutes a condition for the validity of any transfer, direct or indirect, of control of a publicly-held company. The offer must be made by the shareholder who acquired control, and cover all shares issued by the company that have full and permanent voting rights (art. 254-A of the Brazilian Corporations Law and CVM Instruction no. 361/02).

At the end of 2010, CVM Instruction 361/02, which governs public tender offers, was amended by CVM Instruction 487/10. According to the CVM, the changes were motivated principally by the need to adapt the public tender offer rules to a scenario in which public tender offers to acquire control of publicly-traded companies are becoming more frequent. The amendments are also intended to update the provisions of CVM Instruction 361/02 in light of the experience acquired by the CVM in public tender offers since the Instruction was issued in 2002.

The highlights of the changes made by CVM Instruction 487/10 are:

(i) more specific rules on the offeror's confidentiality obligations prior to making the offer, and the procedures to be followed if information on the offer escapes the offeror's control;

(ii) adaption of the auction rules for public tender offers for control, prohibiting (a) third party intervention in the auction for acquisition of a smaller number of shares than sought by the offeror, and (b) any increase in the auction

price by the offeror when a competing offer is made; as well as a substantial increase in the quantity and quality of information to be disclosed in the case of a public tender offer for control, by the offeror, the target company, its management and its main shareholders, especially on transactions involving shares and derivatives during the period of the public tender offer; and

(iii) fine-tuning of the provisions on the evaluation reports to be obtained by the offeror in some types of public tender offers, regarding the work expected and the liability of the valuators.

Generally speaking, the public tender offer is made to all holders of the same type and class of shares covered by the offer, by publishing a notice at least once in the widely-circulated newspaper normally used by the company to publish its communications.

If at the end of the public tender offer for cancellation of registration procedure less than 5% of all the shares issued by the company remain in the market, the shareholders in general meeting may authorize redemption of the shares for the price established in the public tender offer, and so withdraw them from circulation.

The public tender offer must be carried out by means of an auction on the stock exchange or organized over-the-counter market on which the shares covered by the offer are admitted for trading; if they are not admitted for trading, the offer may be carried out on a stock exchange or organized over-the-counter market chosen by the offeror.

6.6. Primary and Secondary Public Offerings

Publicly-held companies may make public offerings for distribution of securities in the primary and secondary markets, subject to the requirements established under applicable legislation, and particularly CVM Instruction 400/03.

An offering is a primary offering when the issuing company offers the securities for distribution to the public in order to raise funds. A secondary offering occurs when one or more of the issuer's shareholders offers all or part of the securities they hold to the public. Primary and secondary offerings often occur simultaneously.

Any public offering of securities in Brazilian territory must be submitted for prior registration with the CVM. Among the registration requirements established in CVM Instruction 400/03 that merit particular attention are those related to the prospectus, which must contain information on the offer, the offered securities and the issuing company and its financial situation. The prospectus must be written in readily accessible language and the information it contains must be complete, precise, accurate, current, clear, objective and necessary, so that investors may make an informed decision regarding the investment.

The use of advertising materials in connection with the offer depends on prior approval by the CVM. In no circumstances may information that is different from or inconsistent with the prospectus be presented to potential investors.

Depending on the specific characteristics of the offer, the CVM may waive registration of the offer, or certain registration requirements, such as publication, deadlines and other procedures established under the regulations, as the public offering set forth in CVM Instruction 476/09.

Publicly-held companies that have already carried out a public offering of their securities may file Securities Distribution Programs with the CVM, in order to facilitate the grant of registration for future offerings.

To carry out a public offering, the offeror must engage an underwriter to place the securities with the public. The offeror may authorize the underwriter to distribute a supplementary lot of securities, if demand is greater than expected, at the same price as the initial lot of securities. The prospectus must set out the limits for the supplementary lot, which may not be larger than 15% of the number of securities initially offered.

In addition, the offeror may, at its own discretion, increase the offering by up to 20%, without making a new application for registration or modifying the terms of the original registration.

The CVM has the power to suspend (for up to 30 days) or cancel an offering that is being carried out contrary to application legislation or the terms of the offering's registration, or that is illegal, contrary to CVM regulations or fraudulent.

6.7. Differentiated Listing on BM&FBOVESPA S.A. – Bolsa de Valores, Mercadorias e Futuros ("BM&FBOVESPA")

BM&FBOVESPA's "Differentiated Levels of Corporate Governance" are a set of rules of conduct for companies, their managements and their controlling shareholders that BM&FBOVESPA considers important for increasing the value of shares and other assets issued by publicly-held companies.

There are currently four special listing segments on BM&FBOVESPA for securities issued by publicly-held companies. The listing level depends on the issuing company's adherence to the Differentiated Levels of Corporate Governance: (i) Level 1 Corporate Governance ("Nível 1"); (ii) Level 2 Corporate Governance ("Nível 2"); (iii) BM&FBOVESPA's New Market ("Novo Mercado"); and (iv) The New Entrants Market ("BOVESPA MAIS").

Voluntary adherence by a company to these rules, and the consequent adoption of corporate governance practices in addition to those applicable to all companies by law, allows the company to be listed on Level 1, Level 2 or the New Market, depending on the degree of its commitment to BM&FBOVESPA, or on BOVESPA MAIS, where the company is listed on the organized over-the-counter market administered by BM&FBOVESPA.

Corporate governance consists of a set of principles and practices that seek to minimize potential conflicts of interest between those who supply capital to the company and those responsible for its management. Three pillars support an efficient corporate governance mechanism: (i) the rules of conduct of the company, which may be established by law or by contract (corporate governance as such); (ii) the level of transparency in material information communicated to the public (disclosure); and (iii) the means used to ensure that these rules are effectively complied with (enforcement).

Adherence to BM&FBOVESPA's Differentiated Levels of Corporate Governance brings various benefits to all involved. For investors, it allows (i) more accurate pricing of shares; (ii) an improvement in the process of monitoring and inspecting the company's business; (ii) greater security as to their rights in the company; and (iv) reduction of risks associated with the investment. For companies, it allows: (i)

an improved institutional image; (ii) increased demand for its shares; (iii) increased value of its shares; and (iv) lower cost of capital.

A publicly-held company may enter any of the BM&FBOVESPA listing levels by signing a participation contract that binds it to comply with the set of corporate governance rules for the selected level, which are contained in listing regulations issued by BM&FBOVESPA (the Nível 1 Listing Regulations, the Nível 2 Listing Regulations, the Novo Mercado Listing Regulations, or the BOVESPA MAIS Listing Regulations).

In 2010, BM&FBOVESPA submitted new Listing Regulations for Nível 1, Nível 2 and Novo Mercado to the CVM for review. The CVM gave full approval to the regulations, and they came into effect on May 10, 2011. Companies that had listed securities prior to May 10, 2011 are required to amend their corporate bylaws to bring them into compliance with the time periods established in new regulations.

The main practices currently required by BM&FBOVESPA for listing on each of the Differentiated Levels of Corporate Governance are described below:

In order to be listed at Nível 1, companies must undertake, chiefly, to comply with a set of rules directed to improvement in the information made available to the public and in the dispersion of shares. The principal Nível 1 practices are:

- the company must maintain a free float representing at least 25% of the company's capital;
- it must adopt mechanisms that favor dispersion of the company's capital when public offerings are made;
- it must meet additional requirements when preparing prospectuses for public offerings of securities;
- it must not issue participation certificates;
- it must improve the company's financial statements, quarterly informational filings, and reference form, particularly by including a note in the quarterly informational filings on transactions with related parties, containing the information required under the accounting rules applicable to the annual financial statements, and by describing the shareholdings, by kind and class of share, of all shareholders that hold 5% or more of each kind and class of the company's sha-

res, either directly or indirectly, up to the level of individual persons (provided the company holds that information);
- it must hold an annual public meeting with analysts and other interested parties, to disclose information on the company's financial situation and its projects and outlook;
- it must comply with disclosure rules in transactions involving assets issued by the company and held by the controlling shareholders;
- it must disclose the terms of contracts between the company and related parties;
- it must make available an annual calendar of corporate events;
- it must have a unified term of no more than two years for all members of the board of directors;
- the positions of Chairman of the Board of Directors and Chief Executive Officer must not be held by the same person, except in cases of vacancy; and
- it must prepare and disclose its code of conduct.

To obtain a Nível 2 classification, in addition to adopting the Nível 1 practices, the company must adhere to a much more ample set of corporate governance rules, which include the grant of additional rights to minority shareholders. The principal Nível 2 practices are:

- the company must have a board of directors composed of at least five members, of whom 20% must be independent directors;
- it must ensure that all common and preferred shareholders are given the same price obtained by the controlling shareholders when selling control of the company, on the same terms and conditions;
- it must give voting rights to preferred shareholders on some matters, such as transformation, merger, consolidation or split-up of the company and approval of contracts between the company and other members of the same group;
- the company's bylaws must not contain provisions that (a) limit the number of votes of any shareholder or group of shareholders to percentages less than 5% of the total number of voting shares, except in the cases provided for in the regulations, (b) establish supermajorities for matters that must be submitted to the shareholders in general meeting, or (c) prevent shareholders from voting in favor of the exclusion or amendment of provisions of the bylaws, or impose burdens on shareholders who vote in favor of exclusions or amendments;
- the company's board of directors must publish a position statement on any public tender offer for shares in the company, setting out the reasons for the board's position;

- it must make a public tender offer for all shares in circulation, for at least their economic value, if the company cancels its registration as a publicly-traded company or leaves the Nível 2 listing segment; and
- corporate conflicts must be submitted to the Arbitration Chamber for resolution.

A company's securities may be listed on the New Market if the company adheres to the rules for Levels 1 and 2 and, in addition, it undertakes to ensure that the company's capital is composed exclusively of common shares.

BM&FBOVESPA MAIS is a new segment of the organized over-the-counter market created to increase the opportunities for entering BM&FBOVESPA available to new publicly-held companies. In order to be listed on BM&FBOVESPA MAIS, the company must adhere to advanced corporate governance practices, similar to the rules applicable to the New Market, which ensure greater transparency and more shareholder rights. BM&FBOVESPA MAIS is intended to assist new entrants through a strategy of gradual access to the capital markets, building up their exposure in the market and supporting their evolution in terms of transparency, shareholder base and liquidity.

REGULATORY FRAMEWORK OF LOCAL CAPITAL MARKETS

7.1. Relevant Laws Affecting Local Capital Markets

The key law dealing with securities market in Brazil is Law No. 6385, as of December 7, 1976, as amended ("Securities Law"). In addition, Law No. 6404, as of December 15, 1976, as amended ("Corporation Law"), contains important provisions for the regulation of the securities market in Brazil.

The Securities Law regulates the overall operation of the securities market in Brazil, including public distribution of securities, the listing of securities for trading in stock exchange and/or over-the-counter market ("OTC"), disclosure requirements, financial intermediation, brokerage, clearing, types of securities admitted for trading and types of companies whose securities can be traded in the Brazilian securities market. The

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Securities Law has also created the Brazilian Securities Commission ("CVM"), granting it regulatory and police powers over the Brazilian securities market.

The Securities Law is regulated by resolutions, circulars, instructions, opinions, deliberations and other rules issued by the National Monetary Council ("CMN"), Central Bank of Brazil ("Central Bank"), CVM, stock exchanges and organized over-the-counter market ("Organized OTC") entities.

7.2. Local Regulatory and Supervisory Authorities

7.2.1. The National Monetary Council

Pursuant to the Securities Law, CMN is incumbent to with respect to the Brazilian securities market (1) define the policy on the organization and operation of the securities market, (2) regulate the use of credit in the securities market, (3) determine general rules to be followed by CVM in exercising its functions, (4) define the activities CVM has to jointly execute with the Central Bank, (5) approve CVM's personnel and regulation applicable to CVM's personnel, and (6) establish the compensation of CVM´s employees, including its president, officers and key personnel.

7.2.2. The CVM

CVM is an autarky bound to the Ministry of Finance and managed by a president and four officers, who are appointed by the President of Brazil after being approved by the Brazilian Senate for a five-year mandate out of individuals that have spotless reputation and acknowledged expertise in the securities market.

CVM is responsible for regulating the Securities Law and Corporation Law in accordance with the policy defined by CMN, and for permanently overseeing the disclosure of market-related information, their participants and values traded in the market.

In addition, CVM is incumbent to regulating and overseeing (1) the issuance and distribution of securities in the securities market, (2) the negotiation and intermediation in the securities and derivatives markets, (3) the organization, operation of and transactions carried out by the stock and commodity futures exchanges, (4) the management of portfolios and custody of securities, (5) the audit of publicly-held

companies and (6) the services of securities advisor and analyst, whether these services, whenever applicable, are carried out by participants of the securities distribution system: (a) financial institutions or other companies that are engaged in distributing securities, (b) companies that are engaged in purchasing outstanding securities with the purpose of reselling them on its own account, (c) companies and individuals that intermediates trading of securities, whether in stock exchanges or in the over-the-counter market, (d) stock exchanges, (e) entities of the Organized OTC, (f) commodity futures brokerage firms, (g) special traders and commodity futures exchanges, and (h) securities clearing houses.

CVM may impose administrative penalties on individuals and entities that violate the Securities Law, Corporation Law or any other law or regulation CVM is responsible for enforcing. The main penalties CVM may impose include: (1) warnings, (2) fines, (3) suspension or revoking of authorization or registration for exercising activities CVM is responsible for regulating and overseeing, (4) temporary suspension for up to twenty years from the officer, director or fiscal council position of a publicly-held company, participant of the securities distribution system or other entities that require authorization or registration with CVM for operating, (5) temporary prohibition for up to twenty years for a publicly-held company, participant of the securities distribution system or other entities that require authorization or registration with CVM operating to carry out certain activities and transactions, and (6) temporary prohibition for up to ten years from acting, directly or indirectly, in one or more types of transactions in the securities markets.

Penalties imposed by CVM do not affect the breaching party's civil and criminal responsibilities.

CVM is a member of the Council of Securities Regulators of the Americas (*Conselho de Reguladores de Valores Mobiliários das Américas*, or "COSRA"), International Organization of Securities Commissioners ("IOSCO"), Ibero-American Institute of Securities Markets (*Instituto Iberoamericano de Mercado de Capitais*, or "IIMV") and Southern Common Market – Mercosur (*Mercado Comum do Sul – Mercosul*).

CVM has entered into memoranda of understanding for sharing information and legal assistance with the securities regulators in the following countries: United States (the U.S. Securities and Exchange Commission and Commodity Futures Trading Commission), Argentina, Australia, Bolivia, Canada/Quebec, Cayman Is-

lands, Chile, China, Equator, France, Germany, Greece, Hong Kong, Israel, Italy, Luxembourg, Malaysia, Mexico, Paraguay, Peru, Portugal, Romania, Russia, Singapore, South Africa, Spain, Thailand and Taiwan.

7.2.3. The Central Bank

Pursuant to Law No. 4595, as of December 31, 1964, as amended, the Central Bank is responsible for implementing CMN's policies concerning monetary policy, exchange controls, regulation of financial institutions, control of foreign capitals and any other matters related to the securities market CMN determines that fall under Central Bank regulatory powers.

The Central Bank is managed by a president and eight officers, who are appointed by the President of Brazil after being approved by the Brazilian Senate for an indefinite mandate out of individuals that have spotless reputation and acknowledged expertise in economic-financial matters.

7.2.4. Self-Regulation

Self-regulatory entities, typically stock exchanges and Organized OTC entities, are subject to CVM's oversight. Self-regulatory entities are incumbent to overseeing their members and ensuring compliance with applicable rules and regulations. In addition, there are pure self-regulatory entities, as the Brazilian Financial and Capital Markets Association (*Associação Brasileira das Entidades dos Mercados Financeiro e de Capitais* – ANBIMA, or "ANBIMA").

7.2.4.1. The Stock Exchanges

Among the stock exchanges' attributions are the organization, maintenance, registration of and overseeing transactions involving securities. Therefore, stock exchanges may establish additional rules to those from CVM.

The main Brazilian stock exchange is the BM&FBOVESPA S.A. – *Bolsa de Valores, Mercadorias e Futuros* (the "BM&FBOVESPA"). A number of securities may be traded at BM&FBOVESPA – (1) securities, (2) rights, (3) indexes, (4) derivatives, (5) governmental bonds and (6) other negotiable instruments issued by private entities – as long as a previous authorization is granted by Central Bank and/or CVM, as the case may be.

BM&FBOVESPA offers a "home-broker" system, allowing investors to deliver their orders through the internet to their brokers, who, in turn, are connected to electronic systems of BM&FBOVESPA.

In December 2000, BM&FBOVESPA launched the New Market (*Novo Mercado*), Level 2 (*Nível 2*) and Level 1 (*Nível 1*), special listing segments of the stock market that are addressed to companies that accept being submitted to stricter corporate governance rules and disclosure standards than those imposed by the Brazilian law.

New Market is the listing segment that requires the adhering companies to comply with the highest corporate governance standard than Level 2 and Level 1's. New Market's adhering companies (or their controlling shareholders, as the case may be) undertake, among others, to (1) keep their capital stock represented only by common shares with voting rights, (2) keep at least 25% of their shares in the free float, (3) offer to all shareholders the same terms and conditions as were obtained by the controlling shareholders in case of sale of the controlling stake (100% tag along), (4) launch a tender offer to repurchase their shares from all shareholders for at least the economic value, in case of delisting or cancellation of the agreement with BM&FBOVESPA that formalized the company's adhesion to the New Market, (5) keep a board of directors composed by at least five members, being 20% independent members, with a two-year mandate at most, (6) provide annual financial reports prepared in accordance with an international accepted standard, (7) disclose more complete financial reports, including quarterly reports containing related party transaction-related information and consolidated reports reviewed by an independent auditor and (8) disclose in a monthly basis the trading with securities by its officers, executives and controlling shareholders.

Level 2 imposes similar obligations as New Market does, provided that, for example, adhering companies to Level 2 may have their capital stocks represented by common shares with voting rights and preferred shares with restricted or no voting rights. Under certain circumstances, preferred shares are granted with voting rights, such as for approval of merger and acquisition transactions involving the company and agreements between the controlling shareholder and the company whenever these decisions are incumbent to the shareholders' meetings.

Level 1 determines to the adhering companies, among others, to (1) keep at least 25% of their shares in the free float, (2) disclose more complete financial reports,

including quarterly reports containing related party transaction-related information, (3) provide annual financial reports prepared in accordance with a international accepted standard, and (4) disclose in a monthly basis the trading with securities by its officers, executives and controlling shareholders.

BM&FBOVESPA had also created the BOVESPA MAIS, a special listing segment with the purpose of turning the stock market more accessible mainly to small- and medium sized companies. In general, the BOVESPA MAIS listing rules are similar to the New Market's, provided that, for example, the adhering companies to BOVESPA MAIS may have their capital composed by preferred shares, which, however, cannot be traded.

Custody and clearance of transactions involving securities are carried out by a clearing department of BM&FBOVESPA, and are concluded, as a general rule, on the 2nd and 3rd business days following the respective transaction date (financial and physical settlement, respectively).

7.2.4.2. The Organized OTC Market

The Organized OTC market is a trading environment managed by institutions authorized by and subject to the oversight of CVM, and that offers a trading system and determines self-regulatory rules and mechanisms.

A number of securities may be traded at the Organized OTC market – (1) shares, (2) debentures, (3) audiovisual certificates of investment, (4) quotas of closed-end investment funds, including real estate funds and credit rights investment funds, (5) warrants, (6) indexes representing share portfolios, (7) put and call options over securities, (8) subscription rights, and (9) subscription receipts. The CETIP S.A. – Balcão Organizado de Ativos e Derivativos is an Organized OTC entity that also operates as custody and clearing house.

7.2.4.3. Associação Brasileira das Entidades dos Mercados Financeiro e de Capitais – ANBIMA

ANBIMA is a private regulatory agent that currently represents more than 340 institutions, including commercial, multiple and investment banks, asset managers, brokerage firms, securities underwriters and investment advisors.

On June 1, 2011, ANBIMA approved a new self-regulatory code ("ANBIMA Code"), establishing certain disclosure standards to be followed by its members while coordinating public offerings of securities in the Brazilian market. ANBIMA Code establishes operational standards similar to those established in more mature countries in terms of capital markets organization.

ANBIMA Code has the purpose of establishing full disclosure standards that the activities of financial institutions in the Brazilian capital market have to be based on. While setting forth additional requirements than those prescribed by Brazilian law, the self-regulatory regime regulated by the ANBIMA Code equates to modern self-regulatory regimes in the world, creating uniform rules for the public distribution of both debt and equity securities in the primary and the secondary markets. Pursuant to the ANBIMA Code, financial institutions acting as coordinators are also responsible for the contents of prospectuses and Brazilian 10-K-like forms (*formulários de referência*). These entities have to conduct independent diligences with the purpose of disclosing material information that affects the issuer, its securities and other facts that are important for an investment decision making.

The ANBIMA Code also establishes comprehensive rules for the minimum content of the prospectuses and Brazilian 10-K-like forms (*formulários de referência*), namely: (1) information concerning risk factors, with no mitigations, (2) description of the main aspects concerning issuer's industry, (3) description of issuer's business and its policies over corporate governance, environmental protection and social responsibility, (4) management's discussion and analysis of financial condition and results of operations of the issuer over the last three fiscal years, (5) information concerning issued and to be issue issuer's securities, (6) relevant administrative and judicial proceedings that affect the issuer, (7) related party transactions, including those with the underwriters, and (8) description of underwriters' businesses.

7.3. Definition of Securities

In Brazil, the concept of securities is formal and statutorily defined. Pursuant to the Securities Law, securities include (1) shares, debentures and warrants, (2) coupons, rights, subscription receipts and splitting certificates that underlies shares, debentures or warrants, (3) security certificates, (4) certificate of debentures, (5) quotas of security investment funds or any asset investment clubs, (6) commercial papers,

(7) future agreements, options and other derivatives, which underlying assets are securities, (8) other derivatives agreements, regardless of the underlined assets, and (9) if publicly offered, any negotiable instrument or collective investment agreement that grants participation, partnership or remuneration rights, including those resulting from rendering of services, which consideration comes from the work of an entrepreneur or third parties.

The following are expressly excluded from the definition of securities and, therefore, are subject to Central Bank's oversight: (1) instruments representing federal, state and local government's public debt and (2) exchange instruments issued by financial institutions, except debentures.

7.4. Offer and Distribution of Securities in Brazil

7.4.1. Concept of Public Offer and Distribution of Securities

Public offering of securities in Brazil is subject to the restrictions imposed by the Securities Law. Any such offering is subject to prior registration before CVM.

Pursuant to the Securities Law and CVM Ruling No. 400, as of December 29, 2003, as amended (*Instrução CVM 400*, or "CVM Ruling 400"), it is deemed to be an act of public distribution and, therefore, subject to prior registration before CVM any sale of, agreement, promise or offer to sell or subscribe for and acceptance of a sale or subscription request for securities of a publicly-held corporation that contains any of the following characteristics: (1) the use of sale or subscription lists or receipts (*boletins de venda ou subscrição*), pamphlets, prospectuses or advertisements that are addressed to the public by any means or media whatsoever, (2) the solicitation of undetermined investors by employees, representatives, agents, individuals or legal entities, whether members of the Brazilian securities distribution system, (3) the negotiation in stores, firms or establishments open to the public destined, partially or totally, to undetermined investors, or (4) the use of oral or written publicity, including letters, announcements or notices, especially by means of mass or electronic communication.

Registration before CVM is intended to provide adequate and accurate disclosure of information about the issuer and the securities offered. However, the registration does not make any representation about the risks of the issuance and, therefore,

does not preclude the sale of securities in poorly managed or unprofitable companies, for example.

CVM Ruling 400 innovated by allowing CVM to dismiss registration in certain offerings or certain registration requirements (including publications, terms and procedures). For its decision-making process, CVM has to take into consideration (1) the publicly-held company category, (2) the unitary value of the securities or the total value of the offering, (3) the plan of distribution for the securities, (4) whether the offering occurs in more than one jurisdiction, (5) the characteristics of the exchange offer, (6) the public addressed by the offering, or (7) whether the offering is addressed solely to qualified investors.

In addition, CVM Ruling 400 allows publicly-held companies that have already gone through a public offering to file before CVM a securities distribution program under which public offerings will be launched in the future after running into a fast-track proceeding. The distribution program has to have a two-year period at most, and has to be updated at least once a year.

CVM Ruling 400 also sets forth automatic registration of public offerings of securities of Brazilian well-known seasoned issuer ("WSKIs"). A company is considered to be a WSKI if it meets all of the following requirements: (1) its shares are publicly traded for at least three years, (2) it timely complied with its disclosure requirements in the last 12 months and (3) the market value of its outstanding shares is at least R$5 billion based on the closing price of the last day of the quarter preceding the date the application for registration is submitted to CVM.

CVM Ruling No. 471, as of August 8, 2009 (*Instrução CVM 471*, or "Instruction CVM 471"), introduced a simplified proceeding for registration of public offerings of securities that can be used by (1) publicly-held companies, (2) investment funds, or (3) foreign companies (or similar) sponsoring Brazilian Depositary Receipts – BDR programs. Applications for registration of IPOs of shares, share certificates or BDRs cannot use this simplified proceeding. Based on CVM Ruling 471, CVM and ANBIMA entered into on August 20, 2008, an agreement authorizing ANBIMA to proceed on previous analyses and provide technical reports related to applications for registration of public offerings by the simplified proceeding.

In addition, the CVM Ruling No. 476, as of January 16, 2009, as amended (*Instrução CVM 476*, or "CVM Ruling 476") exempts from registration public offerings of a number of securities – such as commercial papers, banking credit instruments not issued by financial institutions, debentures unconvertible or non-permutable for shares, quotas of closed-end investment funds, certificate of real estate or agribusiness receivables, and certificates representing agribusiness credit rights. In order for an issuer to benefit from the exemption from registration under CVM Ruling 476, sale efforts under the public offering of its securities has to be restricted, being addressed to 50 qualified investors, at most, and the securities offered cannot be subscribed or acquired, as the case may be, by more than 20 qualified investors.

7.4.2. Registration Process

Public distribution of securities in Brazil may only be made by companies that are registered with CVM as publicly-held companies. In addition to the registration with CVM prior to a public distribution, securities of a company have to be admitted for trading on a stock exchange or non-organized or Organized OTC.

7.4.3. Registration of the Issuer as a Publicly-Held Company

Pursuant to CVM Ruling No. 480, as of December 7, 2009, as amended (*Instrução CVM 480*, or "CVM Ruling 480"), application for registration as a publicly-held company has to be submitted to CVM together with the following documents: (1) copy of the minute of the shareholders' meeting approving the application for registration, (2) copy of the minute of the board of directors' or shareholders' meeting, as the case may be, electing the investors relation officer, (3) copy of the by-laws, (4) Brazilian 10-K-like form (*formulário de referência*), (5) informational form (*formulário cadastral*), (6) audited financial statements over the last three fiscal years, (7) audited financial statements that were prepared only for registration purposes, if a material change occurred in the issuer's equity structured vis-à-vis the latest annual financial statements or the issuer was incorporated in the same fiscal year the application for registration is submitted to CVM, (8) management comments on the differences between latest annual financial statements and those prepared in accordance with item 7 above, as the case may be, (9) copies of the minutes of all shareholders' meetings held on the last 12 months, (10) copies of the shareholders' agreements or similar agreements that are filed at the issuer's head office, (11) copy of the agreement for rendering share electronic registry services (*contrato de pres-*

tação de serviços de ações escriturais), (12) standardized financial statements form (*formulário de demonstrações financeira padronizadas – DFP*) over the last fiscal year, (13) policy on disclosure of information, (14) quarterly information forms (*formulário de informações trimestrais – ITR*) over the first three quarters of the ongoing fiscal year, (15) copies of the instruments formalizing issuer's directors and officers investiture, (16) policy on share trading and (17) statements relating to the securities held by issuer's directors, officers, fiscal council members and any member of any corporate body either with technical or advisory functions that were created by the by-laws.

7.4.4. Requirements for Public Distributions of Securities

Public offering of securities, either on the primary or on the secondary markets, must be previously authorized by CVM. For such, the leading underwriter and the offerors have to apply for registration and deliver to CVM the following documents: (1) copy of the underwriting agreement and any amendment thereto, (2) copies of the adhesion instruments to the underwriting agreement, (3) copy of the price stabilization agreement, (4) copy of any other related-offering agreement, (5) copy of the standard subscription bulletin (*boletim de subscrição*) or the acquisition receipt (*recibo de aquisição*), (6) copies of drafts preliminary or final prospectus, as the case may be, (7) copy of the minute of the shareholders' or board of directors' meeting that approves the offering, (8) copy of the drafts notice to the market (*aviso ao mercado*) and notices informing about the beginning and ending of the offering (*anúncio de início* and *anúncio de encerramento*, respectively), (9) copy of the standard security certificate or copy of the agreement for rendering share electronic registry services (*contrato de prestação de serviços de ações escriturais*), as the case may be, (10) debentures issue deed and rating reports from rating agencies, if applicable, (11) statement that registration of the company as a publicly-held company is updated with CVM, if applicable, (12) evidence that any other legal and regulatory formalities were met, (13) evidence that the registration fee was paid, (14) statements of the offerors and leading underwriter that the information contained in the prospectuses are true, (15) statement of the stock exchange or Organized OTC that the issuer's securities are admitted for trading thereon, and (16) other information or document required by CVM.

CVM has 20 business days as of the filing of these documents to either grant registration or comment on the application package. This 20 business-day period

may be interrupted only once if CVM requires additional information about the application for registration. Offerors have up to 40 business days to address CVM comments, which can be extended for additional 20 business days and/or interrupted for up to 60 business days by reasoned request from the offerors. As of the date offerors deliver to CVM the application package that incorporates CVM's comments, CVM will either grant registration or comment on the new application package within 10 or 20 business days, depending on whether the application package was changed as result only from CVM's comments or not. If CVM understands that its comments were not completely addressed yet, it will grant 10 business days for the offerors address its comments before denying registration.

7.4.5. Issue of Depositary Receipts: Access to the Foreign Capital Markets

Brazilian companies may access foreign capital markets to raise funds through the issuance of equity securities by establishing a depositary receipt program. Depositary Receipts ("DRs") are certificates evidencing shares or other stock-related securities issued by a Brazilian publicly-held company.

The implementation of a DR program requires the appointment of a non-Brazilian depositary, which will issue the DRs abroad based on the underlying shares that are under its name in Brazil, and a Brazilian custodian, which will be designated by the depositary to custody the shares underlined by the DRs.

The DR program may either be sponsored or not by the Brazilian publicly-held corporation. The establishment and operation of a DR program requires the prior approval of CVM and the Central Bank. Registration with CVM is required to ensure the same level of disclosure to the holders of both DRs and the underlying securities. Registration with the Central Bank is required for the transfer of funds from and to Brazil.

After the registration of the DR program with CVM and the Central Bank, shares held by Brazilians or foreigners may be at any time deposited with the custodian for the issuance of the corresponding DRs abroad. Foreign investors may sell the DRs abroad or request the cancellation of the DR and sell the underlying shares in Brazil.

7.4.6. Access to the Brazilian market by Foreign Companies through BDR Programs

Foreign corporations may trade their securities in the Brazilian stock market through security certificates issued by Brazilian institutions, which will represent the securities issued by foreign publicly-held companies ("BDRs"). The establishment of BDR programs must be previously approved by CVM and the Central Bank.

BDRs may be issued either in a sponsored program, which has three different levels, or in a non-sponsored program. In either case, the issuer of the underlying securities must be subject in its jurisdiction to the oversight of an agency with similar functions as CVM and which has executed a cooperation agreement with CVM.

7.5. Tender Offers for Shares of Brazilian Companies

7.5.1. Take-Overs through Tender Offer

Pursuant to the Corporation Law, the acquisition of the controlling stake of a Brazilian publicly-held company may be made in cash or through exchange with shares. If they are carried out by a share exchange transaction, the tender offer must be previously registered with the CVM.

The tender offer must address a number of voting shares to ensure control over the company, and must be intermediated and guaranteed by a financial institution.

The tender notice (*edital*) has to inform, among others, the identity of the acquirer, the number of shares it proposes to acquire, the price and other payment conditions, the proceeding and other terms and conditions the tender offer.

If until recently the large concentration of shares with voting rights held by the controlling shareholder resulted in the fact that virtually all transfer of control were made through private transactions, currently, we can identify a fact known as "spread control", resulted from the increase of publicly-held companies that have a shareholding structure where no single shareholder or shareholders group holds the majority of the voting capital. This fact allows that the controlling stake be purchased in the market through tender offers, with no previous negotiation with their principal shareholders.

7.5.2. Going Private – Delisting Tender Offer

The controlling shareholder or the publicly-held company may at any time make a tender offer for the acquisition of all outstanding voting and non-voting shares with the purpose of delisting the company.

Under a delisting tender offer, the shareholders are called to (1) sell their shares to the controlling shareholder or the company, as the case may be, and (2) express their opinion in favor of or against the delisting.

The delisting is subject to the acceptance of the offer or agreement with the delisting by shareholders representing more than 2/3 of the outstanding shares, which, for this purpose, are considered to be the shares held by holders that have expressly agreed with the delisting or voluntarily accepted the offer.

If, after the conclusion of the delisting tender offer, less than 5% of company's shares remains in the free float, its shareholders, gathered in a shareholders' meeting, may approve the redemption of these shares by the value offered under the tender offer as long as it is deposited at a banking institution authorized by the CVM.

7.5.3. Voluntary Tender Offer

A controlling shareholder of a Brazilian publicly-held company is required to launch a tender offer if it acquires more than 1/3 of each type and class of outstanding shares.

The tender offer must be previously approved by CVM and subject to the acceptance of a maximum or minimum number of shares. The tender notice (*edital*) must contain the following information, among others, (1) terms and conditions of the offer, (2) whether the tender offer is a condition of any transfer of control and, if so, the type of condition, (3) reasons and goals of the offer and (4) whether the controlling shareholder intends to delisting the company.

Furthermore, if the controlling shareholder makes a new tender offer within two years at a price higher than the one paid to those who accepted the first tender offer, such earlier sellers must be reimbursed for the balance of the prices between the first and second tender offers.

If within one year of the tender offer any event occurs that leads to exercise of the withdrawal right, the shareholders who sold their shares in the tender offer, but would have the right to withdrawal if they had not sold their shares, will be entitled to any positive difference between the withdrawal price and the price paid at the time of acceptance of the offer.

In the event the offer has the purpose of acquiring more than 1/3 of the free float or result in the acquisition of more than 1/3 of the free float, the rules established for delisting tender offer must be followed.

7.6. Investor Protection Rules

7.6.1. Disclosure by Publicly-Traded Companies

Publicly held companies must disclose quarterly information forms (*formulário de informações trimestrais – ITR*) and annual financial statements standardized financial statements form (*formulário de demonstrações financeira padronizadas – DFP*). The ITR must be accompanied by special review report from the independent auditors and DFP must be subject to a full audit. In addition, pursuant to CVM Ruling 480, the informational form (*formulário cadastral*) must be always kept up to date. The publicly-held company must send to CVM the updated version up to seven business days after the fact that gave cause to the informational form (*formulário cadastral*) change in. The Brazilian 10-K-like form (*formulário de referência*) must be (1) delivered up to five months after the closing date of each fiscal year, (2) updated upon the application for registration of a public offering or (3) updated up to seven business days after the occurrence of certain situations, among which (a) replacement of directors, officers or member of fiscal council of the issuer, (b) issue of new securities, even though are privately subscripted, (c) change of the direct or indirect controlling shareholders, (d) variations on shareholding positions equal or higher than 5% of the same type or class of the issuer's shares, and (e) consolidation, share consolidation (*incorporação de ações*), merger or spin-off involving the issuer.

The reporting company must also publish notices of certain facts (*Fato Relevante*) whenever any act of fact that may materially affect the trading of securities takes place.

7.6.2. Disclosure by Shareholders of Publicly-Traded Companies

Any shareholder, including direct or indirect controlling shareholders and shareholders with powers to elect directors and members of the fiscal council, must notify the publicly-held company whenever there is a 5% increase or reduction in their holdings of any type or class of shares of the company. The notice must contain information about the number of shares purchased or sold, price at which the securities were acquired or sold, reasons and objectives related to the acquisition and a statement by the purchaser regarding the existence of any agreement related to the exercise of voting right or to the transfer of securities issued by the company. The investor relations officer of the publicly-held company is responsible for pass along those information to CVM and stock exchanges or Organized OTC entities where the securities of the company are admitted for trading.

7.6.3. Market Manipulation and other Fraudulent Practices in the Securities Market

The CVM also aims to prevent the following to occur in the securities market: (1) price manipulation, (2) creation of artificial demand, offer or price conditions, (3) adoption of unfair practices and (4) fraudulent transactions.

Price manipulation results from use of any process or means to, directly or indirectly, increase, maintain or decrease security prices, inducing the market to buy or sell such securities.

Artificial demand, offer or price conditions are those created as a result of transactions participants or intermediaries directly or indirectly cause, by willful misconduct or omission, with the purpose of changing the flow of purchasing and selling orders.

Fraudulent transactions is characterized by the use of any mechanism or device intended to mislead third parties with the purpose of obtaining illicit economic advantages for the parties involved in the transaction or for any other party.

Unfair practices are those that result in an unfair dominant position of one party vis-à-vis the other market participants in the trading with securities.

Breach of these rules is deemed to be a serious offense by CVM regulations, and may subject the violators to administrative penalties. Furthermore, an investor who

is damaged by that prohibited conduct has the right to an indemnification for losses and damages suffered.

7.6.4. Insider Trading

"Insiders" are defined as controlling shareholders, officers, directors, fiscal council members and any member of any corporate body either with technical or advisory functions that were created by the by-laws. Pursuant to CVM rules, insiders may not use information relating to a material act or fact to which they had privileged access due to their position to obtain for themselves or other persons any advantage through the trading of securities.

Although not defined as insiders, the following individuals and entities are subject to the same restrictions: brokers, dealers and other members of the distribution system and whoever, due to his/her position or function or for any other reason, has knowledge of material information prior to its disclosure to the market. Family relationships are taken into account in determining insider status.

Insider trading is also considered a serious offense by CVM regulations, subjecting the participants to penalties. Furthermore, where an investor has been injured by insider trading in the purchase or sale of securities, such investor has the right to indemnification for the losses and damages suffered.

7.7. Money Laundering Law

Law No. 9613, as of March 3, 1998, as amended (the "Money Laundering Law") provides for criminal offenses of money laundering or concealment of assets, rights and valuables.

The Money Laundering Law presents several obligations for legal entities engaged in the securities industry, including stock and commodities exchanges, Organized OTC, banks, brokers, dealers, asset management companies, branches and representatives of foreign financial institutions.

The obligations imposed on these individuals and entities by the Money Laundering Law include (1) to identify and maintain data on all clients, (2) to keep a file on all transactions performed by such clients which exceed certain esta-

blished limits, (3) to comply with all requests of the Financial Activities Controlling Council (the "COAF"), as determined by the relevant courts, and (4) to develop and implement internal controlling systems to monitor and detect transactions which may constitute money laundering such, for example, operations involving amounts not in consistency with the financial situation of the parties, trades which repeatedly cause losses or profits to one of the involved parties and negotiations involving amounts substantially above market conditions.

7.8. Civil Remedies

7.8.1. Securities sold in violation of the registration and/or prospectus requirements

Where an investor has purchased a security which was sold in violation of the registration and/or prospectus requirements of the Securities Law, the following remedies are available (1) an action for the recovery of damages based on Law No. 7193, as of December 7, 1989, which may be commenced by the Office of the Public Prosecutor ex officio or upon the request of CVM, and (2) an action for the recovery of damages based on Article 186 of the Brazilian Civil Code which may be commenced by a person who has been injured by any action or omission of an individual or company.

Investors may also recover damages against anyone who has been engaged in fraudulent transactions or transactions involving artificial conditions of demand, price manipulation or inequitable practices.

Derivative actions for misleading information or omissions may be brought against the issuer's administrators (directors and officers) based on Articles 155 and 157 of the Corporation Law. Any shareholder may initiate a derivative action if the board remains inactive for more than three months after a decision taken by the shareholders' meeting. Shareholders representing 5% or more of the company's capital may initiate a derivative action, despite a decision of the shareholders' meeting to the contrary.

Any investor may also sue issuers, underwriters and intermediaries if their concurrence in the act which inflicted damage on, such investor can be proven.

7.8.2. Insider Trading

Where an investor has been injured by insider trading in the purchase or sale of securities, the remedy available is an action based on Instruction CVM No. 8, as of October 8, 1979, and Article 147, 182 e 186 of the Civil Code.

7.8.3. Fraudulent Brokerage Activities and Handling of Brokerage Accounts

7.8.3.1. Excessive or Unfair Profits or Commission

Where an investor has been injured by fraudulent brokerage practices in the purchase or sale of securities, such as the undertaking of excessive or unfair profits or commissions, the remedies available include an action for injuries based on Article 186 of the Civil Code or Articles 18 et. seq. of the Brazilian Consumer Protection Code.

7.8.3.2. Operating While Insolvent or Not in Sound Financial Condition and Other Losses Caused by Intermediaries

If an investor has been injured by a broker who was operating while insolvent or otherwise not in sound financial condition and other losses caused by intermediaries, the remedies available include an ordinary action under Article 186 of the Civil Code.

7.8.4. Class Actions

Class actions in Brazil are restricted to environmental matters and certain other specific situations that do not include securities matters. However, the Public Prosecutor may commence actions on behalf of and for the benefit of investors under Law No. 7913, as of December 7, 1989.

7.8.5. Waiver of Rights

Investors acquiring a security may, in principle, waive their rights under the Securities Law, rules and regulations. However, such waivers may be disregarded by a judge if not conspicuously communicated to investors or if such waiver is deemed to contravene fundamental principles of investor protection. Consumer protection

provisions are considered a matter of public order and, accordingly, nominally may not be waived. For the same reasons, private agreements do not preclude actions brought by CVM or any stock exchange.

7.8.6. Procedural Requirements

7.8.6.1 Jurisdiction

The state courts generally have jurisdiction over civil suits seeking a remedy for a securities violation.

7.8.6.2 Venue

In general, the courts of the domicile of the defendant are competent to hear any case proposed based on the Securities Law.

7.8.6.3 Statute of Limitations on Actions and When It Begins to Run.

Under Article 205 of the Brazilian Civil Code an action is subject, in general, to a 10year statute of limitation.

TAX SYSTEM

8.1. General Features

The current Federal Constitution, which was promulgated on October 5, 1988, allocates taxing power among the Union, the States and Municipalities.

Tributes in Brazil are divided into taxes, betterment fees, social contributions, other contributions and compulsory loans. Each level of government is allotted specific taxes which are listed in the Constitution.

Fees are levied based on police power (regulatory fees) or they are the counterpart of specific and divisible public services actually rendered or made available to the citizens (service fees).

Betterment fees (which are not commonly levied) are collected from the owners of real state that benefits from public works.

Contributions can only be levied by the Federal government. These contributions are: (a) social contributions; (b) to intervene in the economic domain, (c) in the interest of professional or economic categories and (d) to finance social security.

Compulsory loans can also be levied, but only by the Federal government. Compulsory loans can only be collected in case of urgent public investment and in case of relevant national interest or to defray extraordinary expenses resulting from public calamity, war or imminence thereof.

Unless otherwise expressly specified in the Constitution, the creation and collection of tributes must obey some fundamental constitutional rules, among which deserve to be mentioned:

- The rule of legality – (in accordance with which a tribute may only be levied or have its rate increased by a law voted by Congress);
- The rule of equality – (in accordance with which taxpayers who are in an equivalent situation must be treated alike taxwise);
- The rule of irretroactivity – (in accordance with which tributes cannot be levied on events that occurred before the enactment of the law that created new tributes or increased the rates or base of computation of existing one.
- The rule of precedency – (in accordance with which taxes cannot be collected in the same fiscal year in which the law that created them or increased their rates was published nor within ninety day as from the referred date; and contributions can be collected in the same fiscal year, but must respect the term of ninety days);
- The rule of non-confiscation – (in accordance with which tributes cannot be confiscatory).

8.2. Federal Taxes

Brazilian residents are subject to taxation on a worldwide basis, that is, they must submit to taxation in Brazil all income earned, regardless of its source (domestic or foreign).

8.2.1. Individuals Income Tax (IRPF)

Income received by resident individuals from domestic legal entities is generally subject to withholding income tax at a progressive rate that varies from 0% to 27.5%, depending on the amount of income received.

On its turn, income received from foreign entities (as well as from resident or non-resident individuals) is subject to income tax under a system known as "carnê-

-leão", in which case tax is calculated and paid monthly by the individual on its own, pursuant to the same progressive rates mentioned above.

Capital gains obtained by resident individuals on the transfer or disposal of any rights and assets are generally subject to income taxation in Brazil at a 15% flat rate, regardless of whether such right or asset is located in Brazil or abroad. Gains obtained by non-resident individuals are only subject to taxation in Brazil if derived from the transfer of rights or assets which are located in Brazil. In case a non--resident individual acquires residency status, gains derived from rights and assets he had acquired while a non-resident are only subject to taxation in Brazil if such rights and assets are located in Brazil; that is, gains obtained by resident individuals on the sale of rights or assets located abroad that were acquired while such individual was a non-resident are exempt from taxation in Brazil.

8.2.2. Corporate Income Tax (IRPJ)

Brazilian legal entities may apply three methods to verify the calculation basis of the Corporate Income Tax, namely real profit, presumed profit and arbitrated profit.

The election of the real profit or the presumed profit method is discretionary, however, the real profit method is mandatory for legal entities: (i) whose total annual revenues in the prior year exceed R$48,000,000.00; (ii) which have income or gains obtained abroad through foreign branches and/or representative offices (income derived from export of services or goods are not deemed to be obtained abroad); (iii) which are financial institutions or have similar operating activities; (iv) which carry out factoring activities; or (v) which are entitled to specific tax benefits and exemptions.

Under the real profit method, the tax is calculated on an annual or quarterly basis on profits before taxes, duly adjusted in accordance with the provisions of the applicable tax legislation. Any tax losses incurred in the tax period may be carried forward and offset against taxable income earned in subsequent periods, up to a limit of 30% of the taxable profit of each subsequent period.

If the legal entity opts for payment based on yearly profits, said profits will be calculated from the profit-and-loss statement drawn up in December, covering the

results for the entire calendar year, but the tax must be pre-paid monthly. The monthly pre-payment may be reduced or suspended if the taxpayer has accounting evidence that the pre-paid value until that month exceeds the tax value calculated based on the real profit.

The entity which opts for the real profit method is subject to Corporate Income Tax at the rate of 15%, plus a 10% additional rate on income exceeding R$ 20,000.00 per month.

Under the presumed profit regime, the tax is calculated on a quarterly basis, at the same rates applied under the real profit method (mentioned above) over a profit margin calculated through the application of a percentage of the gross revenue of the legal entity, without any adjustment or deduction. Such percentage varies depending on the taxpayer's activities; the presumed profit percentage may range from 8% (commercial/industry operations) to 32% (service providers).

The arbitrated profit basis is applied only in exception cases, such as when the tax authority finds frauds signs at the company tax informs, or for some reason (such as fire and robber) the company can not provide the relevant information to the respective tax authority. In this method the profits are arbitrated considering all information of sales, bank operations, and others sources that can provide a company profits estimative.

8.2.3. Simplified Regime of Taxation – SIMPLES

Under simplified and unified regime of taxation known as SIMPLES, the amount of all taxes is determined by means of the application of one unique rate over the entity's gross revenue; such rate varies according to the amount of the gross revenue (the rates grow as the revenue) and the nature of the entity's business activity.

Because of its simplicity, SIMPLES is seen as a sort of "tax incentive". Because of that, legal entities must fulfill several strict requirements to be enabled to apply it. The main requirements are: (i) annual gross revenue must be lower than R$ 2,400,000.00; (ii) the legal entity cannot be constituted as a corporation (Limitadas are allowed); (iii) only natural persons may hold its quotas (no legal entities are allowed as quotaholders); (iv) none of its quotaholders may be domiciled

abroad; (v) none of its quotaholders may hold quotas of another entity also subject to SIMPLES if the global revenue of both is higher than the R$ 2,400,000.00 limit; (vi) the legal entity cannot be dedicated to the interstate or intercity passenger transportation, or to the rendering of services of intellectual, scientific or artistic nature etc.

8.2.4. Tax on Manufactured Products (IPI)

IPI is levied on the output and on the importation of manufactured goods. IPI is a value-added tax; the amount of tax due may be off- set by the credits arising from the tax imposed on the purchase of raw materials, intermediary products and packaging materials. However, such mechanism is not applicable to credits related to fixed assets. Rates are assessed on the value of manufactured goods as they are imported or output from domestic plants, and vary in accordance with the nature of goods; the average rate is 10% which may be increased or lowered by the tax administration. IPI is not levied on exports.

8.2.5. Import Tax (II)

II is levied on imports of goods into the Brazilian territory. II rates vary in accordance with the nature of the goods and its classification under the Mercosur Common Nomenclature (NMC), which usually ranges from 0% to 35%. The II is not a recoverable tax.

8.2.6. Tax on Financial Transactions (IOF)

IOF is a tax on credit transactions, foreign exchange transactions, insurance transactions, transactions with securities, and transactions with gold as a financial asset. The IOF rates range from 0% to 25% and there are circumstances of exemption or non-levy of the respective tax, according to the objectives of the monetary, foreign exchange and fiscal policies.

8.2.7. Rural Property Tax (ITR)

ITR is an annual tax levied on the ownership of rural real estate property. ITR rate ranges from 0.03% to 20%, depending on the region and the utilization of the property.

8.2.8. The Tax on large fortunes (IGF)

IGF has not been created yet. There is great uncertainty among tax specialists on which standard should be taken to define the concept of large fortunes.

8.3. State and the Federal District Taxes

8.3.1. State value-added tax (ICMS)

ICMS is the main State tax and is imposed on operations regarding the circulation of goods, including importation, and on interstate and intermunicipal transportation and on communications services. ICMS is a value-added tax which allows the taxpayer to record input tax credits from the ICMS paid on the purchase of raw materials, intermediary products, packaging materials. Credits related to fixed assets are admitted with restrictions. ICMS is not levied on exports.

8.3.2. Inheritance and Gifts Tax (ITD)

ITD is a state tax levied on transmission of real properties, title, credits, shares, quotas, equity, securities and other assets of any nature, as well as the rights related thereto, by way of donation or inheritance. ITD rates rage from 0% to 8% of the fair market value of the transferred asset or right.

8.3.3. Tax on Vehicles Ownership (IPVA)

IPVA is a tax assessed annually on the ownership of automobile and motorcycles.

8.4. Municipal Taxes

8.4.1. Services Tax (ISS)

ISS is a municipal tax levied on the supply of services. The list of relevant services subjected to ISS is found in Complementary Law. ISS rates range from 2% to 5%, depending on the domicile of the company which provide the services and the type of service that is provided. ISS is generally levied by the municipality in which the company that provides the services is established, however in some situations, ISS is levied by the municipality where the service is provided.

8.4.2. Municipal Real Estate Transfer tax (ITBI);

ITBI is a municipal tax levied on transfers of ownership of Brazilian real properties and rights upon onerous *inter vivos* transactions. Its tax calculation basis is the value of the transaction or the market value appraised by the Municipality, whichever is higher. Municipalities are allowed to appraise and update the real estate value through market research.

In general, ITBI is not levied on the transfer of real properties as a result of capital contribution or corporate reorganizations. Notwithstanding, the transfer of real property or related rights by incorporation to capital contribution of a legal entity shall be subject to ITBI if the business purpose of the transferee entity comprises the purchase and sale or lease of real estate properties.

8.4.1. Tax on the Ownership of Urban Real Estate Property (IPTU);

IPTU is levied on an annual basis. IPTU tax basis is the market value of the real property. If the real property does not fulfill the basic requirements of social purpose set forth by the Municipality's directive program, the tax authorities in charge for this tax may impose a higher rate.

8.5. Contributions

8.5.1. Social Contribution on Net Profits (CSL)

CSL is levied on profits before income tax ascertained in accordance with commercial law, adjusted as set forth in the law. CSL's rate for non-financial entities is currently is 9% (15% for financial entities). Entities which opt for the presumed method are subject to a presumed basis of 12% or 32%.

8.5.2. Contribution for the Financing of the Social Security (COFINS) and Contribution for the Social Integration Program (PIS)

PIS and COFINS are contributions imposed monthly on gross revenue earned by legal entities. There are two regimes for PIS and COFINS. In general, companies that opt for the presumed profit method are subject to the cumulative regime of PIS and COFINS, while companies that opt for the real profit method are subject to the non-cumulative PIS and COFINS regime.

With few exceptions, under cumulative regime, PIS and COFINS levy at a 3.65% combined rate on the revenues from sales and services and under the non-cumulative regime PIS and COFINS levy at a 9.25% combined rate on the gross revenues.

The legislation on non-cumulative regime of PIS and COFINS is very detailed. For the purpose hereof, it is possible to mention that the cost items that can be used as credits against PIS and COFINS to be paid are the following: (ii) assets acquired for resale; (ii) assets and services used in the service rendering or in manufacturing assets and goods for sale, including fuel and lubricants; (iii) electric energy used by the establishments of the legal entity; (iv) lease of buildings, machinery and equipments paid to legal entities (i.e., leases paid to individuals do not generate PIS and COFINS' credits); (v) machinery, equipments and other assets incorporated to the fixed asset to be used in the service rendering or in manufacturing assets and goods for sale; (vi) buildings and improvements on real estate owned by the taxpayer or by third parties used in the taxpayer's activities; (vii) returned goods and assets, provided that the correspondent sale revenue had been taxed in previous months; (viii) storage and freight paid on sales, provided that such expenses had been incurred by the seller.

PIS and COFINS are also due on importation of goods and services at a combined rate of 9,25%, with few exceptions. The amount paid is usually recoverable as input tax credit if the taxpayer assesses PIS and COFINS under the non-cumulative regime.

8.5.3. Contributions on business payroll

In general, Brazilian legal entities' business payroll are subject to the following contributions: Social Security Contribution ("INSS") at a 20% rate; Contribution to the Institute of Commerce Social Service ("SESC") at a 1.5% rate, Contribution to the Brazilian Small Business Services Support ("SEBRAE") at a 0.6% rate, Contribution to the National Institute of Colonization and Political Agrarian Restructure ("INCRA") at a 0,2% rate, Contribution to the National Industrial Apprenticeship Service ("SENAI") at a 1% rate, Contribution to the Education Salary ("SE") at a 2.5% rate, and to the Working Accidents Contribution ("RAT") which rates range from 1% to 3% (that is, taxes on payroll are due at a combined rate from 26.8% to 28.6%).

8.6. Foreign Investors

The tax treatment of the income derived by foreign investors in Brazil will depend on the regime adopted for purposes of BACEN's registration.

There are two main routes for making foreign investments in Brazilian companies, namely: (i) in accordance with Law n. 4,131/62, as Foreign Direct Investment by means of direct acquisition of equity interests of companies (4,131 Regime); or (ii) under Resolution BACEN n. 2,689/00, as portfolio investment (2,689 Regime).

Foreign investors are generally taxed in Brazil on a source basis, through withholding taxes. In general, foreign investors are subject to the following rules:

8.6.1. Tax Haven Jurisdiction

Law n. 11,727/08, introduced a new concept of tax haven to the Brazilian legislation, acknowledging the difference between Favorable Tax Jurisdictions and Privileged Tax Regimes.

On June 7, 2010, Brazilian Revenue Services set forth two separate lists: (i) the first one sets forth the updated list of countries and dependent territories/areas that are deemed not to impose income tax or to impose income tax at a maximum rate lower than twenty per cent, or not to grant access to information regarding the corporate structure of legal entities or their ownership (so called "black-listed jurisdictions"); and (ii) the second one set forth the list of what would be deemed Privileged Tax Regimes (so called "grey-listed jurisdictions").

According to Brazilian tax rules, the following jurisdictions are considered black-listed jurisdictions: Andorra, Anguilla, Antigua and Barbuda, Netherlands Antilles, Aruba, Ascension Island, Commonwealth of the Bahamas, Bahrain, Barbados, Belize, Bermuda, Brunei, Campione D'Italia, Channel Islands (Alderney, Guernsey, Jersey and Sark), Cayman Islands, Cyprus, Singapore, Cook Islands, Republic of Costa Rica, Djibouti, Dominica, United Arab Emirates, Gibraltar, Grenada, Hong Kong, Kiribati; Lebuan, Lebanon, Liberia, Liechtenstein, Macau, Madeira, Maldives, Isle of Man , Marshall Islands, Mauritius, Monaco, Montserrat Islands, Nauru, Niue Island, Norfolk Island, Panama, Pitcairn Island, French Polynesia; Queshm Island, American Samoa, Wes-

tern Samoa, San Marino, Saint Helena Island, St Lucia, the Federation of Saint Kitts and Nevis, Island of Saints Peter and Miquelon; Saint Vincent and the Grenadines, Seychelles, Solomon Islands, St. Kitts and Nevis, Swaziland, Switzerland (currently suspended from the list by ADE RFB n.11/10), Oman, Tonga, Tristão da Cunha, Turks and Caicos Islands, Vanuatu, Islands Virgin, British Virgin Islands.

According to Brazilian tax rules, the following jurisdictions are considered Privileged Tax Regimes: Holding companies incorporated under Danish law with no substantial economic activity; Holding companies incorporated under Dutch law with no substantial economic activity (currently suspended from the list by ADE RFB n.10/10); International trading companies incorporated under Icelandic law; Offshore companies incorporated under Hungarian law; LLCs settled under U.S. state law, held by non-residents and not subject to federal income tax in the U.S.; *Entidad de Tenencia de Valores Extranjeros* incorporated under Spanish law (currently suspended from the list by ADE RFB n. 22/10); International trading companies (ITC) and international holding companies (IHC) incorporated under Maltese law.

8.6.2. Capital gains

Capital gains realized by non-residents on investments registered with the Brazilian Central Bank are subject to a 15% withholding income tax rate, or 25% if the beneficiary is resident or domiciled in black-listed jurisdictions.

8.6.3. Dividends

Dividends based on profits ascertained as of January 1, 1996 paid out or credited by corporations are no longer subject to income tax (either at the source or as part of the taxpayer's return), whether paid out to individuals or corporations domiciled in Brazil or abroad.

8.6.4. Interest

Interest paid to nonresidents is subject to withholding income tax on a 15% rate, or 25% if the beneficiary is resident or domiciled in black-listed jurisdictions.

8.6.5. Interest on Net Equity (JCP)

JCP is subject to withholding income tax at the rate of 15%, or 25% if the beneficiary is resident or domiciled in black-listed jurisdictions. Differently to what occurs with the amounts paid as dividends, JCP paid or credited are deductible expenses in the calculation of taxable income of the paying company.

8.6.6. Treaties to Avoid Double Taxation

Brazil is signatory of several bilateral tax conventions to avoid double taxation of income and capital which in principle follow (though with some important deviations) the Organization for Economic Co-operation and Development (OECD) model convention.

Brazil has conventions to avoid double taxation of income and capital in force with the following countries: Argentina; Austria; Belgium; Canada; Chile; China; Czech Republic; Denmark; Ecuador; Finland; France; Hungary; India; Israel; Italy; Japan; Korea (South); Luxembourg; Mexico; Netherlands; Norway; Peru; Philippines; Portugal; Slovakia; South Africa; Spain; Sweden; and Ukraine.

8.6.7. Transfer Pricing

As of January 1, 1997 a number of rules were introduced in income tax law to regulate transfer pricing in deals carried out by resident individuals or corporations with non-resident parties regarding importation and exportation, and payment of interest abroad. These rules apply to deals which involve the following situations: (i) a domiciled corporation that carries out business with non-domiciled related parties; (ii) a domiciled corporation which carries out business with a related or unrelated party domiciled in black-listed jurisdictions or Privileged Tax Regimes.

8.6.8. Thin Capitalization

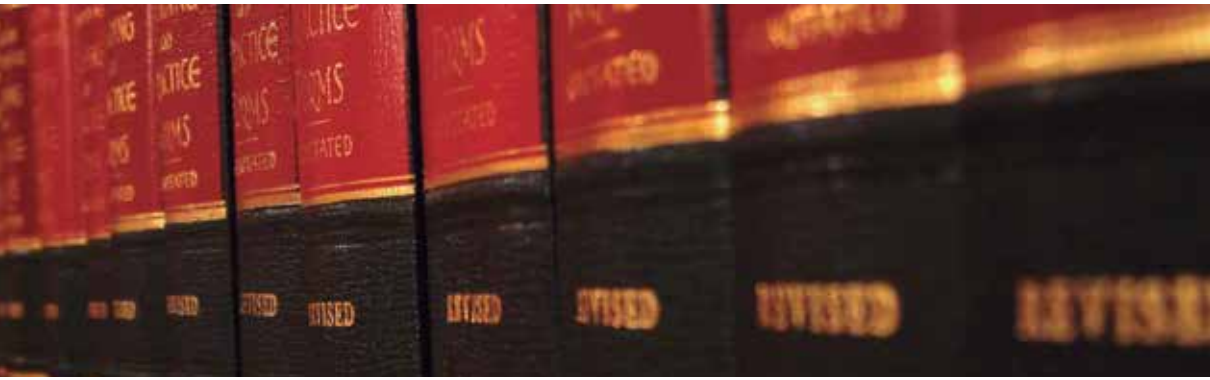
Under Brazilian thin capitalization rules, interest paid to related parties, domiciled or incorporated abroad, may be deductible on an accrual basis for Corporate Income Tax only if (i) indebtedness shall not exceed twice the amount of their participation in the net equity of the Brazilian entity, considering each debt separately or all combined; and (ii) indebtedness with individuals or legal entities resident,

resident or domiciled in favorable taxation or under privileged tax regime, shall not exceed thirty per cent of the net equity of the Brazilian entity, considering each debt separately or all combined.

8.6.9. Financial and Capital Market

Nonresidents that invest in Brazilian financial and capital market under 2,689 Regime are subject to a more favorable tax treatment: (i) income arising from swaps, investment funds and non-deliverable forward agreement effected outside the Brazilian stock exchange are subject to taxation at a flat rate of 10%; (i) fixed income investment and income arising from financial transactions effected outside the Brazilian stock exchange are subject to a 15% rate; and (iii) capital gains derived in the stock exchanges, commodity exchanges, futures exchanges and others alike, are exempt from taxation.

Brazilian law prevents the above mentioned more favorable tax treatment from applying to foreign investors which are residents or domiciled in black-listed jurisdictions.



ANTI-TRUST LEGISLATION

For almost thirty years, Brazil had an antitrust law that although greatly inspired by the U.S. regulatory model was in fact inoperative. The mechanisms created to enforce Law no. 4,137, of September 10, 1962, were swept in the bureaucratic system of the government.

In 1990 and 1991, however, Laws nos. 8,002 and 8,158 helped to focus on a new set of issues such as the establishment of a new economic order, as well as the protection of free competition and of the consumers' rights. It was in this scenario that Law no. 8,884 was enacted on June 11, 1994.

The powers of the antitrust enforcement agency CADE (Administrative Council of the Economic Defense), formed in 1962, were strengthened.

As a government agency under the Ministry of Justice, CADE is now better equipped to carry out its constitutional duties. CADE, assisted by the Secretary of Economic (SDE), and the Secretary of Economical Follow-up (SEAE) exerts its powers of administrative control, as provided for in Law no. 8,884 (as amended by Law no. 10,149, of December 21, 2000), on behalf of the community, and as such considers to have jurisdiction over any acts performed outside the country which may have any consequences in Brazil. The Law deems it a domestic

company any foreign company which has any subsidiary, branch, agency, office, representative or the like in Brazil (article 2, § 1o, with wording given by Law no. 10,149/2000). Therefore, as provided in § 2o of the same article, the foreign company shall be notified of all procedural acts, independently of any power of attorney or any contractual or statutory provisions, in the person responsible for its branch, agency, subsidiary or any other establishment in Brazil.

Law no. 8,884/1994 specifically states these authorities' jurisdiction over any and all individuals and legal entities, whether public or private, organizations and joint ventures, including those of a temporary nature, or without legal personality. The antitrust Law also sets forth the instances where there will be individual liability of the officers, severally or jointly with the company itself. In addition, Section 18 admits, under limited circumstances, the theory of disregard of the legal entity (piercing the corporate veil).

Among those acts contrary to the economic order and therefore prohibited by the antitrust law are, for instance, to limit or impair any free competition; to control any relevant market of goods and services; arbitrary increase of profits and the abusive exercise of economic power. Furthermore, the following acts are contrary to the Brazilian legal system now in force: any price fixing agreements between competitors; market sharing covenants; any obstacles created to new competitors attempting to enter the market; dumping; restraints on the trade of certain goods to increase prices; and fixing of any excessive prices. The Law also lists at least twenty-four different kinds of infringement to be carefully examined, whenever considering any business association or combination of efforts. The penalties can be, based on the nature of the infringement, the number of times it has occurred, and the economic situation of the infringer. They may reach thirty percent of the company's total gross sales in the preceding year, together with fines ranging from 10% to 50% of the amount of the transactions, that can be charged in double in case of recurrence. Moreover, it is worth mentioning that there are other penalties which could be imposed such as prohibition to do business, to enter contracts or request fiscal or legal incentives from government-owned companies.

The unexcused non appearance of the defendant or third parties, when notified to render oral explanations, in the course of preliminary investigations or of administrative procedures, shall subject the absentee to a fine from R$ 500,00 (five hundred reais) to R$ 10.700,00, (ten thousand and seven hundred reais), taking

into consideration his financial situation (article 26, § 5o, wording given by Law no. 10,149/2000). Moreover, the defendant may be subject to a penalty from R$ 21.200,00 (twenty-one thousand and two hundred reais) to R$ 425.700,00, (four hundred and twenty five thousand and seven hundred reais), taking into consideration his financial situation, in case he may impede, obstruct or in any other way raise difficulties to the accomplishment of any investigation, be it in the administrative procedure or in its preliminary phase (article 26 – A, introduced by Law no. 10,149/2000).

Another innovation created by Law no. 10,149/2000, relating to the above mentioned penalties, is the possibility to obtain and execute a lenient settlement with authorities, through which individuals or the legal entities responsible for the violation to the economic order will be exonerated from any punitive action by the public administration or at least obtain a reduction from one to two thirds of applicable fine, should they decide to collaborate with the investigations and the administrative procedure (article 35-B).

We should also note that CADE, SDE and SEAE procedures may be initiated based on any third-party claim. CADE's decisions are, from an administrative standpoint, unappealable, which means that the aggrieved party may refer only to the judiciary power if it wishes to pursue further legal actions.

Law no. 8,884/94 also provides for the obligation to submit to CADE's approval any transactions that may hinder any free competition or result in dominance of a certain market. Submission may be effected prior to completion of the transaction or within a maximum term of 15 (fifteen) working days immediately thereafter (from January 1st, 2001, the fee is equivalent to R$ 45.000,00, (forty-five thousand reais). CADE's prior approval is usually preferable if we take into account the complexities and undesirable consequences of an "a posteriori" submission, including a potential unwind of an action or series of actions already implemented.

It is important to note that, for article 54 purposes, one must consider acts that may prejudice free competition or result in market domination, and so must be submitted to CADE for approval, the amalgamation of companies or group of companies resulting in a market share of over twenty percent, or if any of its participants has registered an annual gross invoicing equivalent to R$ 400.000.000,00 (four hundred million reais). CADE, however, through its Digest N° 1, published in the Official

Gazette dated October 18, 2005, understood that for the application of the criteria established in the aforementioned article 54, it is important only the amount of the annual gross invoicing exclusively ascertained in the Brazilian territory by the parties of the operation submitted to its approval. This understanding is very important since it avoids the submission of several transactions to CADE only for the fact that the annual gross invoicing abroad of one of the relevant parties is equal or higher than R$ 400.000.000,00,(four hundred million reais).

Article 54 evidences that many acts of amalgamation may be approved, once certain circumstances of fact and law are duly justified (increase of productivity, better quality, technology improvement, no direct damage to the existing competition, and above all, clear benefits to consumers as a result of price reduction). At last, CADE may condition its consent to certain undertakings by the interested parties which shall otherwise incur penalties for non-compliance.

On August 19, 1998, CADE issued Resolution no. 15 (partially revoked by Resolution no. 45, dated March 28, 2007), which details the information and documents required to be attached to an application, be it made before or after the judicial act. The list of required data is very comprehensive and may present some difficulties to the submitting party, since some documents refer to international levels.

On its final part, Law no. 8,884/94 provides for, under certain circumstances, the possibility of taking over violating companies, by means of a judicial order, and thereafter nominating an intervenor to manage them.

A Bill intended for the modification of Law no. 8,884 (Bill no. 3,937), is being processed before the Brazilian Congress, its approval being expected to occur still in 2011. Among the proposed dispositions are the inclusion of "commercial practices" as potential violations of the economic order; elimination of the possibility of CADE to change the percentage of 20% as criteria for presumption of dominance, according to the sector of the economy; adjustment of the amount of fines; and notification prior to the completion of mergers (preliminary investigation) rather than the current notification of 15 working days after the operation.

LABOR LAW IN BRAZIL

Labor Law in Brazil was influenced by transformations in Europe characterized by the various countries concern in creating law to protect workers, and particularly the commitment made by the country with the International Work Organization, which combined with important domestic factors – such as the government labor policy and the industrial upsurge – triggered the creation of a series of laws.

Only in 1943, the Consolidation of the Brazilian Labor Laws (CLT) was created to group the few laws existing at that time in addition to the institutes developed by legal scholars.

The CLT is the primary legal system that rules labor relationships, accounts for more than nine hundred articles.

Among the chapters forming CLT there are the following norms:

General Work Tutorship Norms

- identification of position;
- duration of work, minimum salary and annual vacation;
- occupational medicine and safety;

Chapter 10

Special Work Tutorship Norms

- special provisions about work duration and conditions;
- nationalization of work;
- woman and minor work protection;

Individual employment contract norms

Workers' Union and trade organization norms

- workers' union and trade institution, classification and contribution;

Collective bargaining agreement norms

Furthermore, the CLT comprises the whole labor judiciary system and related agencies, and also sets forth the rules for labor proceedings in Brazil.

Although CLT was enacted in 1943, the Brazilian legal system was modernized throughout the years and various laws were created to rule important issues, such as strikes or laws that only brought new wording to some CLT's articles.

With the enactment of the Federal Constitution (FC) in 1988, in addition to the labor norms duly consolidated, new labor rights were created or improved.

The labor rights provided for by the Federal Constitution, the CLT, and specific labor laws are the following:

1) minimal salary;

2) at most 8 daily working hours and 44-hour weekly working hours;

3) meal and rest break of 15 minutes when the daily working hours are over 4 hours and less than 6 hours, and 1 hour at least and 2 hours at most when the daily working hours are over 6 hours.

4) salaries not decreased;

5) unemployment insurance;

6) 13th salary;

7) profit and/or results sharing;

8) additional pay for overtime up to the limit of 2 overtime hours paid with an accrual of 50% on the ordinary hour, or with an accrual of 100% for work done on Sundays and holidays (such percentages may be even higher, as per the collective bargaining agreement);

9) annual vacations of 30 days and accrual of one third allowance, as provided for in the Federal Constitution;

10) maternity leave of 120 days;

11) paternity leave of 5 days;

12) prior notice of 30 days in the even of dismissal for cause or resignation;

13) retirement (on time of contribution, age, disability);

14) approval of application of collective norms;

15) Workers ' Compensation Fund (FGTS);

16) right to strike;

17) provisional tenure for members of Internal Commission for Accident Prevention (CIPA), employees carrying a disease or who suffered employment-related accident and the pregnant employee, etc.;

18) tips;

19) commission;

20) family allowance;

21) transport pass;

22) daycare aid;

23) unhealthy work-conditions allowance at 10%, 20% or 40% on the minimum salary in effect;

24) risk premium at 30% on the salary;

25) reduction of nighttime work and night premium at 20% on the salary when the work is done from 10 p.m. to 5 a.m. of the following day;

26) transfer allowance at 25% of the employee's salary;

27) paid weekly rest;

28) unemployment insurance; among others

There are also other sources of law which the Brazilian Labor Courts must respect:

a) Collective Bargaining and Collective Labor Agreements;

b) Superior Labor Court (TST) Jurisprudence Statements;

c) Norms issued by the Ministry of Labor and Employment (MTE); and

d) Agreements developed by the International Employment Organization ratified by Brazil.

In addition to the labor rights listed above (items 1 to 28), the collective agreements (Collective Bargaining and Collective Labor Agreements) may provide for other employees rights such as: health care plan, food aid, food voucher, etc. Such collective bargaining agreements may also provide for rights more advantageous in relation to those provided for in law, such as overtime payment above the additional payment set forth in law (50% and 100%), prior notice of over 30 days, etc.

FOREIGN WORK IN BRAZIL

The Ministry of Labor, through the Immigration Coordination (CGIg), has the specific competence and authority to grant work authorization for foreign nationals to work in Brazil, according to Law #. 6.815 dated of 19 August of 1980.

Immigration matters involve a high degree of discretional powers of the authorities. As one knows, immigration and work permit granting for foreigners are fields closely connected to the sovereignty of a country and reflect policies adopted by the government and reciprocity treatment.

Therefore, the application for a visa does not create any right to be granted with such visa, it constitutes a mere expectation only.

There are different types of visas defined by the Brazilian Law, whose eligibility depends on each specific situation and purpose of the trip. Therefore, not all of them allow foreigners to work in Brazil. Generally, there are no restrictions concerning the nationality of the applicant or if the applicant has any spouse or children under 18 years old.

Chapter 11

The law establishes 7 (seven) categories of visas:

- Transit
- Tourist
- Temporary
- Permanent
- Courtesy
- Official and
- Diplomat

The most commonly used categories of visas are the tourist, temporary and permanent visas.

11.1. Visas for Short-Term Business Visitors and Tourists

Individuals from some countries will require a visa to travel to Brazil on short-term business or for tourism. Business visitors or tourists traveling on these types of visas must not work or render any kind of technical assistance service, nor receive remuneration for services from any source in Brazil.

The Business visa may be obtained at the Brazilian Consulate having jurisdiction over the place of residence of the applicant. The application for a business visa generally consists of the following:

Support Letter from the company that is requesting the business trips (either the foreign or the Brazilian company) stating the following:

- The purpose of the trip and the activities the foreigner will perform while in Brazil
- Names, addresses and telephone numbers of business contacts in Brazil
- Date of arrival and anticipated departure
- Guarantee of financial and moral responsibility for the applicant for the duration of the visit

The Business visa allows the foreigner to participate in meetings, conferences, fairs, and seminars, to visit potential clients, to research the market and to perform similar activities. As previously mentioned, foreigners holding this visa shall

not work in Brazil, subject to the assessment of a fine to the company employing foreigners bearing the inappropriate visa, as well as to deportation of the foreigner.

Tourists' visa applications usually only requires a round-trip airline ticket and proof of capability of financial support during the visit in Brazil. This type of visa only supports tourism purpose trips, subjecting the company that employs foreigners holding this visa to the same penalties above mentioned.

If a visa is required by the country to which the applicant is going after Brazil that visa must already be included in the passport, prior to requesting the Brazilian visa.

The visa is generally issued within 24 hours. This type of visa may be valid for a period up to 90 (ninety) consecutive days from the date of first arrival in Brazil. It may be used for multiple entries during that period. An extension for a further period up to 90 (ninety) days may be obtained from the Immigration Authorities in Brazil, prior to expiration of the visa. In any case, the foreigner may only remain in the country for 180 days within a 365-day period (not calendar year).

11.2. Temporary Work Visas

For individuals coming to Brazil on a temporary basis for working purposes, there are several types of visas that may be applicable according to each specific situation or circumstance. We highlighted below the main characteristics of the applicable visa for the most common situations:

(1) **Professionals with Employment Contract with Brazilian Entity**. This visa is eligible to individuals coming to Brazil to work for a temporary period employed at a Brazilian company in a position requiring special knowledge. The visa may be valid for no longer than 2 years initially, and may be renewed for an additional 2 year period. This type of visa will require proof that the candidate has at least 1 (one) year experience in the activity he/she will perform in Brazil if he/she has a college degree, or 2 (two) year experience if he/she does not have a college degree. The foreign national must evidence a degree of proprietary knowledge, specialized skills, distinguished professional experience or managerial/executive-level skill that are not readily available within Brazil's domestic labor market. The Brazilian company must meet the "2/3 rule", by which 2/3 of total number of workers of the company and equivalent

salary shall belong to Brazilian citizens, and shall present also information regarding the Brazilian company, including the company's salary structure, as well as regarding the candidate's salary abroad and in Brazil, which shall be approximately 25% higher than his/her last salary abroad, provided that he/she shall receive at least part of the salary in Brazil.

(2) **Technicians without Employment Contract with Brazilian Entity**. This visa is eligible to individuals coming to Brazil to render technical assistance services or transfer of technology, according to a Technical Assistance or Transfer of Technology Agreement executed by a foreign company and a Brazilian company. Technical visas are not appropriate for foreign nationals coming to the country to develop managing, administrative and financial activities. In case the companies are not affiliated, the Agreement must be registered before the INPI – Brazilian Patent and Trademark Office prior to the visa applications. In this case, the technicians shall not be employed by the Brazilian company and shall receive his/her entire remuneration exclusively from a source abroad. The sponsoring company shall be responsible for all medical expenses of the candidate as well as for his/her dependants while the candidate works in Brazil. Work permit granted on such grounds may be valid for 1 (one) year and may be extended for another year, provided that the required conditions for the visa extension are met. In case of emergency, this visa may be granted by the Brazilian Consulate with jurisdiction over the individual's residence for a non-extendable period of 30 (thirty) days respected a 90 day grace period for a second application. Emergency is defined as fortuitous situations that bring imminent risks to life, environment, assets or that may generate production or service rendering interruption for the Brazilian company.

(3) **Artist and Sports persons**. The request for this visa must be submitted to the Brazilian Labor Ministry by the Brazilian organization, which is sponsoring the event for which the individual's services will be required. Visa application requires information about the event and respective contract.

(4) **Foreign Journalists**. This visa is eligible for foreign journalist working on a temporary basis in Brazil as the correspondent of a foreign communication company, which will support the visa application. The candidate must not receive his/her salary in Brazil. The visa should be requested directly at the Brazilian Consulate abroad with jurisdiction over the individual's residence.

(5) **Crew Members under charter, service rendering contracts and lease agreements**. Visa application requires authorization of the ship to operate under national waters, and report from the Marine Department. Copy of the respective contract. Part of the crew shall be formed by Brazilian nationals.

(6) **Research Scientists**. This visa is eligible to foreign professors, technicians, scientists and researchers that intend to perform its activities in a public or private school or university or a research entity. A letter of support from the entity who is sponsoring the visa will be required upon application. Visa application requires Admission Term or Labor Contract with the school, university or research entity.

(7) **Social Assistance**. The temporary visa may be granted up to 2 (two) years to foreigners coming to render religious or social assistance to Brazilian entities, as volunteers. The foreigners may not receive remuneration for temporary volunteer work in Brazil.

The applicant for any of these types of visa, except for the Foreign Journalists and Social Assistance types of visas, shall previously obtain a Work Authorization from the Brazilian authorities. It is an administrative act, which comes under the competence of the Ministry of Labor, as an exigency of the Brazilian Consular Authorities, according to the national legislation, to obtain a concession of permanent and/or temporary visas, for foreign nationals wishing to work in Brazil. Upon approval, the work authorization shall be published on the Federal Official Gazette, and the designated Consulate shall be notified, so that the foreign national may apply for the visa issuance.

11.3. Other Temporary Visas

There are other types of visas applicable to foreigners coming to Brazil for purposes other than work. Note that the visas listed below do not allow its bearer to work in Brazil or receive any remuneration from a Brazilian source. We highlighted below the main characteristics of the applicable visas for the most common situations:

(1) **Mission of Studies and Religious Mission**. The candidate must not receive any compensation in Brazil. This visa may be granted to religious persons for specific mission in Brazil for up to one year.

(2) **Student**. This visa is obtained by students at the Brazilian Consulate having jurisdiction over the place of residence of the applicant. The student must not work or receive any compensation in Brazil. Foreign students under exchange program are required to present documents from the school and foreign exchange students program.

(3) **Trainees**. This visa is eligible to foreigners who intend to come to Brazil for a trainee program during the 12 month period after graduation, with no labor relation to any Brazilian entity. Visa application requires proof of graduation within the last 12 months, as well as proof that any kind of remuneration shall be paid exclusively from abroad. This visa may be granted for a maximum period of 1 year.

(4) **Internship Programs**. This visa is eligible to foreign individuals admitted to an internship program, including employees of foreign companies in internship program in the Brazilian subsidiary, with no labor relation to any Brazilian entity. Visa application requires Commitment Term executed between the intern, the Brazilian institution and responsible control entity. This visa may be granted for a maximum period of 1 year.

(5) **Health Treatment.** This visa is eligible to foreign individuals who intend to come to Brazil for health treatment purposes. Visa application requires medical recommendation and proof of the means for payment of the health treatment.

11.4. Permanent Employment Visa

The Permanent visa may be issued, basically, under four circumstances: (i) family relation to a Brazilian national (marriage, children); (ii) retirement; (iii) appointment to the representation and managing position of a Brazilian company (Statutory Director); or (iv) foreign investor – individual.

(1) **Family Reunion**. In case the candidate is married to a Brazilian citizen or has a Brazilian child he/she shall be eligible for applying for a permanent visa at the Brazilian Consulate abroad, before coming into the country, or at the Ministry of Justice if the candidate is already in the country. In this case, the candidate shall be allowed to work in Brazil.

(2) **Retirement**. The permanent visa is also eligible for individuals that have already retired in his/her home country and intend to transfer his/her permanent residence to Brazil. The individual must provide evidence that he/she may transfer to Brazil at least a minimum amount of R$6.000,00 (six thousand reais) on a monthly basis. Foreign retirees with more than 2 (two) dependents must make an additional transfer, in foreign currency, of R$ 2.000,00 (two thousand reais) per extra dependent.

(3) **Foreign Officers**. The permanent visa may also be issued in the case of a foreign company that has a branch or subsidiary in Brazil, and wishes to transfer an officer to the Brazilian company. Therefore, individuals who will be permanently transferred to Brazil to work for a subsidiary or branch of a foreign-owned company in the capacity of officer may apply for a permanent employment visa. To apply for a permanent visa for its officer, the foreign company must have made an investment, at least, in the amount equivalent to R$600.000,00 (six hundred thousand reais) or higher for each foreign officer, manager or executive appointed. Alternatively, the minimum investment requirement can be brought down to R$ 150.000,00 (one hundred and fifty thousand reais) per foreign officer, manager, director or executive, in case the company undertakes to create at least 10 (ten) new job positions for Brazilian citizens during the two years following the company´s settlement or the hiring of such officer, manager or executive. Also, the individual must be appointed to a position in the Brazilian Company's bylaws, conditioned to the visa approval, and shall be confirmed in the position once he/she is granted with the visa. If the foreigner is appointed to act as an officer in more than one company of the same economic group or conglomerate, he/she shall be previously authorized by the Ministry of Labor.

(4) **Foreign investor** – individual. The permanent visa may also be granted to individuals who invest, at least, R$150,000.00 (one hundred and fifty thousand reais) in a Brazilian company, either existing or recently formed. Exceptionally, the Ministry of Labor may grant a permanent visa to the individual who invests an amount lower than R$150,000.00 (one hundred and fifty thousand reais), provided that he/she presents a detailed business plan, for the 5 (five) following years, committing the Brazilian company to create, at least, 10 (ten) new job positions for Brazilian nationals, among other obligations.

In addition, persons who have been employed in Brazil in a temporary capacity (regardless of whether the company is Brazilian or foreign owned) for a period of four years, may apply to convert their status to permanent. To obtain permanent employment authorization for an individual working in Brazil on a temporary basis for four years, application must first be made to the Ministry of Justice at least 30 (thirty) days prior to the completion of the four-year term.

11.5. Registration upon Entry into Brazil

All foreign who enter in Brazil holding a Temporary Work visa or a Permanent visa must register with the Federal Police/Ministry of Justice and obtain the foreigners ID card within 30 (thirty) days of arriving in Brazil. This rule applies only to alien residents in Brazil, immigrants, and temporary residents coming for employment. Artists, sportspersons, tourists or short-term businesspersons are not required to register.

Temporary work visa and permanent visa holders shall also register before the taxpayer registry office (Federal Revenue) for taxation purposes, provided that the worldwide remuneration shall be taxed according to the Brazilian tax legislation.

Furthermore, professionals employed by a Brazilian company shall also obtain the so-called "Labor Card" in order to comply with Brazilian labor legislation.

Proof of registration with Brazilian authorities shall be provided to the Ministry of Labor within 90 days counted from the entrance in Brazil.

Foreign individuals bearing permanent and temporary work visas for Professionals with Employment Contract with Brazilian Entity shall be subject to taxation in Brazil upon entrance. All other temporary visa holders shall be subject to taxation in Brazil after 183 days of stay.

The work visas originally granted are bound to the entity that sponsored it. The change of employer is subject to the approval by the Ministry of Justice and the Ministry of Labor.

Upon definitive exit from Brazil and repatriation, the foreigner shall present to the Federal Revenue the so-called "Declaration of Final Departure" and request the

cancellation of the taxpayer registration in order to cease levy on the individual remuneration. The sponsoring company must inform the Ministry of Labor whenever the foreigner leaves the position and is repatriated in order to cancel his/her visa and registration.

11.6. Travel in Advance of Permanent or Temporary Employment

Individuals needing to conduct strictly business in Brazil prior to obtaining employment authorization and the appropriate visa, may do so by obtaining a short-term business visa. However, they shall not work in Brazil or receive any remuneration locally until the employment authorization and visa are issued. Furthermore, individuals must obtain permanent or temporary visas outside of Brazil at the Brazilian Consulate with jurisdiction over the individual's residence.

11.7. Employment of Spouses/Children

Accompanying spouses and children are allowed to remain in the country as a dependent of the visa holder for as long as his/her visa is valid. However, spouses and children are not permitted to engage in employment or any work activity while residing temporarily in Brazil, but they shall be authorized for employment if converted to permanent resident status.

ACQUISITION OF REAL ESTATE IN BRAZIL

12.1. Introduction

Under Brazilian law, issues relating to property are governed by the law of the country where the property is located (*lex rei sitae*). Issues regarding real estate property situated in Brazil are governed primarily by the Brazilian Civil Code ("BCC").

The BCC classifies assets by a physical criterion. Therefore, assets can be divided into two broad categories: movable and immovable. Movable assets are those that can be moved by external forces or by themselves, without causing their own destruction or devaluation.

Immovable assets are those that are by nature immovable or fixed to the soil, and cannot be partially or totally removed without causing their own destruction or devaluation; that is, without change in its substance. Immovable property encompasses land together with its surface, as well as everything that has been naturally or artificially incorporated thereto.

Brazilian law further considers certain rights as being immovable assets for legal purposes. This is what happens with rights *in rem* over

immovable property, government stock incorporating an inalienability clause, and the right of an heir to inherit property through hereditary succession, even if the heritage is comprised only of movable assets.

As to the use of the subsoil, the general rule is that the owner of the soil should also own the subsoil. Therefore, the owner will be able to make vertical constructions up to a certain depth – a reasonable depth that could be useful for him (for instance, to build a basement or a subterranean garage.) However, the owner cannot prevent third persons from engaging in activities at certain depths that do not put the owner at risk, especially if those activities are carried out for the benefit of the society (for example, drilling to install subway rails, passageway of subterranean conduit devices, etc.).

The BCC does not consider land property to include mines, products from the subsoil, natural resources, such as hydroelectric power, and archeological discoveries and other assets referred to in the applicable law. Therefore, the BCC provides specific limits as to the ownership of land and the elements of the subsoil (natural resources and hydroelectric power), which belong to the Federal Government. For that reason, the exploitation of mineral resources and hydroelectric power requires federal authorization or license.

A similar rule to that applicable to the subsoil governs the use of air space. The property owner is free to make vertical constructions on the land, as long as he does not disobey the limitations provided for by law (*e.g.*, zoning rules). The property owner may also bar any third party construction on its land or any work that may cause damages or danger. Nevertheless, it is not possible to bar activities that occur at certain heights if they do not pose any risk to the proprietor's safety (such as plane routes, electrical aerial cables of a safe height, etc.).

Foreign individuals or foreign companies have the right to acquire real estate property in Brazil under the same conditions that apply to national individuals or companies. However, it is important to mention that according to Ordinance No. 1005, issued by Brazil's Internal Revenue Service on February 8, 2010, as amended by Ordinance No. 1.097, issued on December 13, 2010, non-resident individuals or entities must enroll with the General or Corporate Taxpayer Registry prior to the acquisition of any real estate assets located in the national territory. Furthermore, special conditions may apply to foreign

individuals or to foreign companies, referring to the purchase of property located near the coast, frontiers or certain specific areas designated as being of national security.

Foreign individuals or foreign companies can also acquire rights *in rem* related to immovable property. Rural areas can be acquired by foreign individuals or foreign companies, according to the applicable law, and will be discussed in greater detail in item 12.3.3.

12.2. Possession and Ownership

With respect to real estate properties, two broad types of rights exist: the right of possession and the right of ownership:

(i) The right of possession: The right of possession is a consequence of the agent using the land as if he were its owner. From the moment the agent acts on his own behalf and his normal conduct is that of an owner, he will be entitled to the right of possession. The *right of possession* therefore is a personal right to exercise certain powers typical of property such as: the right to claim, maintain or recover the possession of property; the right to receive its fruits (including rents and other incomes from the property); the right to be indemnified for necessary improvements carried out; and the right to retain the object.

The possession of property ends when the power exercised over the asset or the faculty to perform one of the legal powers related to the property of the land ceases, even if against the owners' will. This occurs when the land is forfeited by abandonment, by transference, by loss or destruction of the property, by its becoming ineligible for purchase or sale, by a third party taking possession of the property, by the non institution, in due time, by the possessor, of the applicable claim to maintain or reinstate the possession, and also by *constituto possessorio* (*i.e.*, when someone who legitimately entitles the right of possession transfers such right to another person, but the asset remains in his power, although in the name of the acquirer).

(ii) The right of ownership is the most important of all property rights and is defined by the BCC as the right of an individual to *use*, *enjoy* and *dispose*

of his goods, and to *recover* them from whoever may have taken possession of them unlawfully. It is an absolute and exclusive right, which may, however, belong to several persons at the same time, in relation to the same property, as in a co-ownership or *condominium*, which is when each of the co-owners of an asset has all the property rights in relation to a fractional part of such an asset.

The right of ownership will be *full* if all the legal powers that are of its very nature (to use, enjoy, dispose of the asset and to recover it from whoever unlawfully possesses it) are concentrated in the hands of the same agent. It will be *limited* when any of such powers are in the hands of another person. Note, however, that when it comes to joint ownership (*condominium*), in principle, there is no *limited* ownership, but rather *full*. In the joint ownership, each co-owner is entitled to an undivided fractional interest in the asset. As a rule, the powers deriving from the ownership can be exercised at the same time by all the co-owners.

The right of ownership may be restricted due to public interest or in respect for the property rights of third parties, as in the following situations:

- the expropriation of real estate properties by the government (ownership of private property is transferred to the expropriating authority against payment of fair and previous indemnity);
- the restrictions relating to the division of urban land (zoning) such as, for example, those restrictions to the construction of buildings, establishing of industrial plants in critical pollution zones, etc., imposed by the law of the municipality where the property is located;
- the restrictions imposed in the interest of national security, such as the restrictions on the sale of private land in the coast or within 150 kilometers of the national frontier; and
- the restrictions to the right of the proprietor to freely dispose of his goods, arising from the status of insolvency, bankruptcy or judicial recovery of the proprietor, in order to protect the creditor's rights.

12.3. Acquisition and Loss of Ownership

12.3.1. General Provisions

According to Brazilian law, ownership of real estate property is constituted upon the registration of the instrument of transfer which formalized the acquisition of the property at the appropriate Real Estate Registry of the locality where the property is situated.

However, an instrument that involves real estate property that has not been duly registered at the respective Real Estate Registry will only become a binding instrument between the parties involved in the sale agreement and, thus, will not be enforceable against third parties.

Real estate property is acquired by the registration of the act which transferred the property, for whatever reason, such as: (i) transmission of the property by an "*inter vivos*" act; (ii) by accession (which is the enlargement of the land caused by, for example, the alteration of a parcel of land displaced due to natural forces); (iii) by adverse possession (which is the acquisition of ownership by the possessor who, although not being the owner, has had the possession of the property for a certain period of time, as stipulated by law); and (iv) by inheritance.

The principle of priority is an underlying principle of the registration system. According to this principle, the person who first obtains the register has the priority.

Likewise, any act which modifies, extinguishes, transmits or creates rights related to immovable property must be registered with the competent Real Estate Registry, such as: (i) court orders which divide previously undivided land among different owners; (ii) court orders issued during the winding-up of a decedent's estate or the division of property, awarding immovable property to creditors in payment of the estate's debt; (iii) public auctions and adjudications; and (iv) separation, divorce and annulation orders which involve the settlement of property or rights *in rem* related to immovable properties.

The main grounds for extinguishing real estate ownership are:

(i) Expropriation, which is an unilateral act of public law by which individual ownership is transferred to the relevant government authority, upon payment

of fair and previous compensation by said authority, due to considerations of public interest;

(ii) Transfer, which is the transmission to a third party by any means via an *inter vivos* or *causa mortis* act, either for payment or as a gift, etc.);

(iii) Waiver (for example, when the heir renounces his rights of inheritance); and

(iv) Abandonment or destruction of the property.

12.3.2. General Remarks and Requirements for the Purchase of Real Property

In the commercial trade, the most usual form of acquisition of real estate property in Brazil by means of *inter vivos* transactions is the contract effectuated between the purchaser and the seller by means of a sales agreement.

If a property is acquired by a single buyer (not in a *condominium* situation), then the buyer has absolute title to that area of ground. In case of multiple ownership (as it is the case of a condominium), each owner can exercise all the rights of ownership, except those incompatible with the indivisibility of the property (for example, the property cannot be sold without the approval of all owners, and the selling price must be divided among them).

Law No. 4,591/64 used to govern the *condominium* made up of blocks of apartments and/or offices, where several apartments and/or offices are built on a single piece of land, each one being an autonomous and independent unit and a portion of the land. In this case, the indivisibility mentioned before is not applied. The BCC imposed radical amendments to Law No. 4,591/64, but the concept remains the same. One of the BCC's innovations which should be highlighted is the new discipline of application of fines on co-owners who fail to comply with their duties (such as: to cooperate in joint expenses, not to make constructions that compromise the safety of the real estate, not to use their individual areas in a way that may disturb the peace, etc.).

Besides the specific requirements related to transactions involving immovable property, Brazilian law requires, as for any other type of contract, that the parties of a

sale agreement be capable of performing such a transaction. They must be of legal age (majority), be mentally healthy, or, if not capable, they must be duly represented to perform such a transaction.

It is also advisable that any real property acquisition is preceded by an analysis of the situation of the real estate and of its current owners, in order to avoid that facts not acknowledged by the purchaser jeopardize the transaction and even result in annulment or ineffectiveness of the juridical transaction. Therefore, it is advisable to obtain and analyze the: (i) copy of the updated real estate record and 20-years clearance certificate and clearance certificate regarding liens and claims; (ii) fiscal clearance certificates relating to the real estate (IPTU, for example); (iii) fiscal clearance certificates relating to the owners of the real estate; (iv) clearance certificates issued by the local courts in order to verify the existence of lawsuits involving disputes on the real estate and that may compromise the owner's assets (hindering, as a result, the alienation of the real estate or resulting in the reversal of the transaction).

12.3.3. Acquisition of Rural Property by a Foreign Person or a Foreign Legal Entity

Pursuant to Brazilian Law (Law No. 4,504/64), *rural property* is classified as every rustic construction of continuous area, regardless of its location, which is devoted to agricultural, agro-industrial, or cattle-raising exploitation, either by the private sector or through public policies to enhance land value.

A foreign individual residing abroad is precluded from acquiring rural property in Brazil. Such restriction does not apply only to legitimate succession (*i.e.*, if the foreigner is called upon to acquire the rural property as a legal heir of the previous owner).

According to the laws currently in force, foreigners who have permanent residence in Brazil:

(i) Are free to acquire or lease one (1) rural property not exceeding three (3) modules of indefinite exploitation (MEI). The MEI is an area measurement unit crafted by the Instituto Nacional de Colonização e Reforma Agrária – INCRA for geographic zones with uniform socioeconomic and ecological

characteristics, according to the type of rural exploitation they are best suited for; and

(ii) Cannot acquire or lease rural real estate exceeding fifty (50) MEI.

Similar restrictions as those applicable to foreign individuals with permanent residence in the country are applied to foreign legal entities.

The legislation provides that:

(i) Foreigners who have permanent residence in Brazil can only acquire or lease rural property if the purpose is the implementation of agricultural, cattle-raising, industrial or colonization projects. In addition, in case of foreign entities, such projects must be specified in the company's by-laws. These projects must be approved by the Brazilian Ministry of Agriculture, Livestock and Supply (MAPA) and, depending on the type of project (industrial, colonization, agricultural, etc.), other federal government bodies in charge of the respective activities may be called upon to review the application as well; and

(ii) Congress must authorize the acquisition or lease of areas exceeding a hundred (100) MEI.

Additionally, the total area acquired or leased by foreign entities or individuals shall not exceed 25% of the total area of any given municipality. Also, foreigners of the same nationality (including the foreigners who control Brazilian entities) cannot hold more than 40% out of such 25%-municipal area.

All the restrictions described above also apply to transfers of rural real estate as a result of transactions involving corporate restructuring (such as mergers, spin-offs, acquisitions, change in the corporate control, etc.).

Any transaction made in violation of the foregoing restrictions is null and void.

The President of Brazil may, upon specific decree, authorize the acquisition of rural property beyond the provisions of the current law, in cases where such property is the object of priority projects involving the country's development plans.

The acquisition of rural property by Brazilian companies with foreign equity control is a subject that has generated strong discussions since mid-2010.

The 6th Constitutional Amendment of 1995 revoked Article 171 of the Brazilian Federal Constitution that allowed differential treatment to companies incorporated under the Law of Brazil, as if they were Brazilian companies with Brazilian capital whose direct or indirect control would be held by individuals, Brazilian residents or not, which means, with equity control held by foreigners. Since then, there had been no further discussions in respect of the legality of the acquisition of rural properties by Brazilian companies with foreign equity control.

Nevertheless, the Federal Attorney's Office issued an opinion in August 2010 arguing that Article 1 of Law No. 5,709/71, which subjects Brazilian companies with foreign equity control to the same regime imposed to foreign companies, is compatible with the language of the Constitution. After being approved by the President of Brazil this opinion became mandatory on all bodies of the Federal Administration, whose officers are obliged to comply with it.

Due to this new scenario, Brazilian companies with foreign equity control are also subject to the same regulatory framework as that imposed on the foreign companies.

12.4. Taxation

12.4.1. Inter-Vivos Transfer Tax – ITBI

The *Inter-Vivos* Transfer Tax ("ITBI") is a tax assessed by the municipalities that is payable when real estate property or rights *in rem* to any real estate property (except those in guarantee), or the assignment of rights for the acquisition of property, are transferred on a remunerated basis for any reason whatsoever. For example, the rate established by the Municipality of São Paulo, varies from 0,5 to 2%.

ITBI is not assessed when the transfer of real estate property or rights to any such property takes place as payment of the company's capital or as the result of a merger, consolidation, spin-off or liquidation of the legal entity, unless, if in any of the above mentioned cases, the legal entity's predominant activity is the purchase and sale of such assets and rights, the lease of real property or the commercial lease of real estate property, in compliance with the applicable provisions of the municipal law.

12.5. Real Estate Investment Funds – Financial Instrument

Real Estate Investment Funds were established to provide funds for developing real estate ventures for subsequent sale, letting or leasing. The Real Estate Investment Funds have been governed by Brazilian legislation since the 90's, first by Law 8,668/93, updated by Law 9,779/99. Ordinance N. 472/2008 of the Brazilian Securities and Exchange Comission ("CVM") with wording given by Ordinance nº 498/2011, rules the constitution, administration, operation, public offer of quotas and disclosure of information of Real Estate Investment Funds.

Real Estate Investment funds are currently being used for the purposes of raising funds for the construction of several shopping centers and large scale infrastructure projects throughout Brazil. Previously, pension funds were directly investing in real estate projects, but currently they are investing indirectly, by purchasing shares of property investment funds.

Both individuals and corporations that are resident or domiciled abroad are entitled to acquire such shares, provided that the funds resulting from the investment are duly registered with the Central Bank of Brazil, thereby enabling the return of the respective investment and the gains resulting therefrom abroad. In accordance with prevailing legislation, the earned incomes and capital gains resulting from investments on Real Estate Investment Funds and earned incomes and capital gains resulting from the alienation of quotas are subject to a withholding tax (IR) at a rate of 20%.

Environmental Legislation

13.1. Legislation

The Brazilian environmental legislation is one of the most advanced in the world. The Federal Constitution devotes Chapter VI to this matter, providing that all Brazilians have the right to an ecologically balanced environment, for general and integral use, with the Government and society having the duty to protect it and conserve it.

The States and Municipalities also have the authority to legislate on environmental matters. The federal legislators thus attributed a regional character to this subject in the Federal Constitution.

The Federal Government, however, has exclusive authority to legislate with regard to waters, energy, mining, biotechnology and nuclear activity.

According to the Federal Constitution, it is the duty of the State to:

- Preserve and recover species and ecosystems;

- Preserve the variety and the integrity of the genetic heritage, supervising the entities involved in genetic research and manipulation;
- Provide environmental education at all scholastic levels, offering guidance with respect to the need for conservation of the environment;
- Define the territorial areas to be protected;
- Require an environmental impact study for the installation of any activity that could cause significant degradation of the environment.

In addition to the Federal Constitution, the following norms are worthy of emphasis:

(a) Federal Legislation

- The 1940 Criminal Code (Decree Law nº 2,848 of December 7, 1940);
- The Forestry Code (Law n. 4.771 of 1965)
- The Environmental Crimes Law (Law nº 9,605 of 1998): Establishes the administrative and criminal penalties applicable to conduct and activities that are harmful to the environment, such as deforestation, operations without proper environmental permits, emission of pollutants above the limits permitted by the law, etc.;
- Law nº 6,938 of 1981: Provides for compensation to be paid to parties adversely affected by actions that are harmful to the environment;
- Law nº 7,347 of 1985: Establishes the Public Civil Suit for damages to the environment, to consumers, to property and rights involving artistic, historical, esthetic, tourist and scenic value;
- Decree nº 99,274 of June 6, 1990: Provides for Environmental Protection Areas (APA) and the National Environmental Policy;
- Decree nº 3,179 of 1999: Provides regulations for the Environmental Crimes Law;
- Law nº 9,960 of 2000: Establishes prices to be charged by IBAMA and creates the Environmental Inspection Fee – TFA;
- Law nº 11,105 of 2005: Known as the Biodiversity Law, provides regulations for article 255 of the Federal Constitution, establishes norms for supervision of activities involving Genetically Modified Organisms (OGM) and creates the National Bio-security Council (CNBS).

(b) State Legislation

- State Constitutions

(c) Municipal Legislation

- Organic Law of the Municipalities

In case of divergence between environmental legislations, the one which offers environmental protection of the highest standard, that is, the one with the most restrictive character should prevail.

13.2. National Environmental Policy

Created in 1981, it recognizes that legal protection of the environment requires decentralized actions by which the States and Municipalities become the entities responsible for implementation of measures and arrangements.

13.3. Environmental Bodies and their functions

The protection of the environment is accomplished, at federal level, by the following government bodies:

- **National Environmental Council – CONAMA:** A norm-creating, consulting and deliberating board.
- **Ministry of Environment**: Coordinates, supervises and controls the National Environmental Policy.
- **Brazilian Institute for the Environment and Renewable Natural Resources – IBAMA:** Executive body which inspects business activity on a national level.

Federal bodies, foundation and other local agencies such as CETESB (Companhia de Tecnologia em Saneamento Ambiental) in the State of São Paulo and INEA (Instituto Estadual de Meio Ambiente), in the State of Rio de Janeiro.

13.4. Definitions

(a) Environmental Damage: This is the damage done to environmental resources and the consequent degradation, adverse alteration or harm to the ecological balance.

(b) Environmental Impact Study and Report (EIA/RIMA): A study and respective report the purpose of which is to evaluate the alterations in the physical,

chemical and biological characteristics of the environment, caused by any type of material or energy resulting from human activities, and which could directly or indirectly affect the health, welfare and safety of the population.

(c) Pollution: This is the degradation of the quality of the environment resulting from activities which directly or indirectly harm the health, welfare and safety of the population. Registration in the Federal Technical Registry, administered by IBAMA, of all and any activities potentially polluting or which utilize environmental resources is obligatory.

(d) Environmental Protection Area (APA): This is an area, generally extensive, with a low level of human occupation, with abiotic, biotic, esthetic or cultural attributes, especially important for the quality of life and the welfare of human populations. Its basic purpose is to protect biological diversity, control the process of occupation and assure sustainable use of the natural resources. It can be established in a publicly- or privately-owned area by the Federal Government, states or municipalities, without the need for expropriation of the land.

13.5. Environmental Permit

The issuance of an environmental permit is an administrative action by means of which the environmental entity (federal, state or municipal) with jurisdiction establishes the conditions, restrictions and measures of environmental control to be adhered to by the company and its partners, for the installation, expansion, operation of enterprises or activities that utilize natural resources and that are considered as actually or potentially polluting, or that could cause degradation of the environment in any way.

Some activities, due to the environmental impact they cause or may cause, require a Pre-Permit (LP) to be obtained beforehand.

IBAMA has the authority to grant an environmental permit when the enterprise has a regional or national impact, provoking adverse alterations in the physical, chemical and biological characteristics of the environment. Nevertheless, the state environmental body has the authority to grant environmental permits to enterprises and activities situated in more than one municipality, or whose environmental

impact goes beyond the territorial limits of one or more municipalities.

Should the enterprise or activity cause a local environmental impact, that is, only within the municipal limits, the municipal bodies have the authority to grant the permit or not. Some municipalities, because of their administrative structure, transfer the authority to grant permits to the state body.

Resolution 237 of 1997 of CONAMA establishes the activities and enterprises which are obligatorily subject to the obtaining of environmental permits:

- Extraction and handling of minerals;
- Non-metallic mineral products industry;
- Metallurgical industry;
- Mechanical industry;
- Transportation material industry;
- Lumber industry;
- Paper and cellulose industry;
- Rubber industry;
- Leather and fur industry;
- Chemical industry;
- Plastic material products industry;
- Textile, clothing, shoe and fabric products industry;
- Food and beverage products industry;
- Tobacco industry;
- Various industries;
- Civil construction works;
- Public utility service (power and wastes);
- Transportation, terminals and warehouses;
- Tourism;
- Agricultural and cattle raising activities;
- Use of natural resources.

The administrative procedure for environmental permits relates to the following permits:

(a) Pre-Permit (LP): Issued during the planning phase of an activity, it comprises the basic requirements to be satisfied by the design project for the location, ins-

tallation and functioning of the activity, based on the rules for land use, industrial zoning and city planning legislation.

(b) Installation Permit (LI): A document issued after the analysis of the detailed design project of the enterprise and the presentation of design plans which demonstrate the fulfillment of the requirements imposed by the pre-permit, solutions adopted to neutralize, mitigate or offset environmental impacts and environmental control procedures. The obtaining of this permit authorizes the carrying out of the approved design plans.

(c) Operating Permit (LO): A document which authorizes the start of the activities of a specific industry or enterprise, after checking the correct functioning of the pollution control equipment.

CONAMA may also require the presentation of specific permits according to the nature of the activity or enterprise, as for example:

- Authorization for suppression of vegetation;
- Authorization for use of Permanent Conservation Areas – APP;
- Concession for use of water resources;
- Exploitation of mineral resources;
- Production and utilization of nuclear minerals and utilization of nuclear energy;
- Enterprises for generation and transmission of electric power;
- Enterprise for prospection, exploration and refining of petroleum;
- Use of areas belonging to the Federal Government;
- National historical and artistic heritage;
- Indigenous populations and areas;
- Afro-Brazilian culture;
- General coordination of conservation units; and
- Prior evaluation and recommendation by the National Health Foundation – FUNASA.

In accordance with Law 9,960 of 2000, all the costs of the services involving the granting of permits, environmental analysis and preparation of EIA-RIMA (Environmental Impact Study and Environmental Impact Report) are to be borne by the applicant, even in the event the permit is not granted. The amounts, which may be paid in installments, refer to each one of the services performed by the government

body with jurisdiction and are proportional to the environmental impact caused by the activity.

For further information, please visit: www.ibama.gov.br, www.inea.gov.br or www.cetesb.sp.gov.br.

13.6. Protection and Environmental Liability

Actions by citizens and companies which are harmful to the environment generate liability in the administrative, civil and criminal areas, as established by the Environmental Crimes Law. All conduct causing damage must be compensated for, even when it is tolerated by legal standards, as is the case of emission of polluting wastes.

(a) Civil Protection

Civil liability for environmental damage is extra-contractual, objective and of a joint nature, based on the Federal Constitution (article 225), on Law nº 6,938/81 (article 14) and on the Civil Code (article 942).

- Extra-contractual, because it does not depend on any link between the parties;
- Objective, because it does not depend on the guilt of the agent and
- Of a joint nature, because it can involve more than one person.

(b) Administrative Protection

Based on the duty of the Government to conserve the environment, whether it be by means of policing power (inspection) or by means of regulatory power (creating and revoking laws and norms), various measures of an administrative nature can be adopted, as for example the official recognition of the historical value of government or private property, prohibiting its modification; the requirement for presentation of an environmental impact report; restrictions and limitations of the right to build, among others.

When a violation is identified, a formal notification of environmental violation is prepared, citing the legal rule that has been violated and immediately afterwards, heard in an appropriate administrative proceeding.

The Environmental Crimes Law, regulated by Decree nº 3,179 of September 21, 1999, established the list of administrative penalties applicable to conduct and activities which are harmful to the environment:

(a) Warning;

(b) One-time or daily fine, of up to R$ 50 million;

(c) Apprehension, destruction, disabling or suspension of the sale of the products utilized in the violation;

(d) Prohibition, suspension or demolition of the irregular works or activity;

(e) Obligation to pay compensation for the damages caused;

(f) Restriction of rights;

(g) Suspension or cancelation of registration;

(h) Refusal of license, permit or authorization for irregular companies;

(i) Loss, restriction or suspension of tax incentives and benefits, as well as financing from governmental establishments offering credit; and

(j) Prohibition of contracts with the Government for a period of 3 years.

(c) Criminal Protection

Conduct and activities considered to be harmful to the environment will subject the violators, whether they are individuals or companies (with personal involvement of the partners, administrators, directors, members of the board, agents, proxies, managers or auditors) to criminal and administrative penalties, in addition to the obligation to provide compensation for the damage caused.

It is recommended that the contractors specify the civil liability for material damages in their contracts with subcontracted companies, in order to make them liable for any damaging conduct.

The Environmental Crimes Law establishes the crimes and their respective punishments. For individuals, penalties depriving them of their freedom, restricting rights and fines are applicable; for companies, penalties restricting rights, fines and performance of community services are applicable.

(d) Jurisdictional Protection

By means of a public civil suit, instituted by Law nº 7,347 of 1985, it is possible to protect environmental values, making violators liable for damages caused to the environment and to property possessing artistic, esthetic, historical, tourist and scenic value.

The legitimate parties to bring this type of suit are the Public Prosecution Service, the Public Defender Office, the Federal Government, States, Municipalities, Quasi-Governmental Companies, Governmental Companies and Foundations, in addition to Non-Governmental Organizations (NGOs).

Section 6 of article 5 of Law nº 7,347/85, which governs public civil suits involving liability for damages caused to the environment, established that the government bodies may sign with interested parties a commitment for adjusting their conduct to conform with the legal requirements, establishing penalties and which will have the effect of an extrajudicial executive document, called Conduct Adjustment Declaration TAC).

Generally, violations of environmental legislation are susceptible of negotiation with the Public Prosecution Service, the body responsible for the protection of the environment and application of punishments in the criminal arena. However, it is necessary to obey certain conditions with regard to the seriousness of the violation committed.

Other law suits may also be brought, with a view to the protection of the environment and the development of sustainable activities and enterprises. This is the case of the Popular Suit, the Individual or Collective Injunction and the Direct Unconstitutionality Suit.

BIDDING – THE CONTRACTING OF WORKS , SERVICES, PURCHASES AND TRANFERENCES BY THE PUBLIC ADMINISTRATION

Chapter 14

14.1. Introduction

Bidding is the formal procedure that allows the Government to select the best contractor to render services for construction projects and to supply and acquire goods. Through bidding, Public Administration selects the most advantageous proposal for a contract of its interest.

The Public Administrator must adopt the bidding process and observe the principles related thereto. The Brazilian Federal Constitution establishes in article 37, clause XXI, that works, services, purchases and tranferences of any of the Executive Powers, the States, the Federal District, and Municipalities shall be contracted by public bidding proceedings that ensure equal conditions to all bidders with the exception of the cases specified in law, when direct contracts may take place.

Article 175 of the 1988 Constitution demands bidding for providing public services by concession and/or permission, to which Law no. 8.987/95 applies as well as the alterations of Law no. 9.648/98. It should be noted that the permission, classically a discretionary, precarious and revocable administrative act, was not subject to bidding, a demand which began to be required by the constitutional text. For this reason Law 8.987/95, when regulating the subject, determined its formalization through an administrative adhesion contract, maintaining the contract's precarious and unilaterally revocable characteristics via the granting power.

Law no. 8.666 of 6/21/93 and the extensive alterations to it in Law no. 12.349 of 12/15/10 concern the previously mentioned clause XXI of article 37, establishing the general norms for the Administration's bidding and contracts.

Bidding modality is a specific way to conduct the bidding process according to criteria previously defined by law. The main factor to consider in choosing the adequate manner of bidding is the estimated value of the contract to be signed. There are, however, hypotheticals in which the object's complexity will prevail over the contracting value.

Regardless of the manner adopted, the supremacy of public interest over the private, will always be observed in order to obtain the most efficient result for the Public Administration and the maintaining of the economic-financial balance, understood as the initially agreed upon relationship by the parties between the contractor's obligations and the compensation by the Administration for fair remuneration for the contracted work or service.

14.2. Modalities

The modalities of bidding are stated in art. 22 of Law no. 8.666 of June 21, 1993; the creation of new modes or the combination of those when contracting is forbidden. These are: (i) competition; (ii) pricing; (iii) invitation; (iv) contest; and (v) auction. Besides these modalities, the federal legislature added bidding, governed by Law no. 10.502 of July 17, 2002.

Competition is used in purchases or tranferences of fixed assets, concessions for use and rendering of services or construction of public works in cases in which the values exceed R$ 1,500,000 (one million five hundred thousand reais) as well

as for works and services of engineering that exceed R$ 650,000 (six hundred fifty thousand reais).

This modality is used in international biddings when the organ or entity does not have an international suppliers' record, a hypothetical that allows for adopting the pricing modality.

In competition the bidding procedure is more complex and likewise requires proof of capacity to carry out the minimum standards of the bidding announcement in the qualifying phase, which is when the commercial proposals wil have already been received.

Pricing, quite similar to competition, is the modality through which the evaluation of the interested parties takes place beforehand, as these should be registered before the receipt of commercial proposals. The limits of contracting are R$1,500,000 (one million five hundred thousand reais) for works and services of engineering and $ 650,000 (six hundred fifty thousand reais) for purchases and diverse services of engineering

Invitation in the modality in which parties interested in the activity pertinent to the object of bidding are invited, whether registered or not, and a minimum of 3 (three) are chosen. The other registered parties may request participation in the procedure. Within the bidding modalities, invitation is that which involves services of lower value, with a maximum of R$ 150,000 (one hundred fifty thousand reais) for works and for engineering works and R$80,000 (eighty thousand reais) otherwise.

Contest is the process by which technical and artistic works are selected, among any interested parties and payment is remitted either by award or remuneration to the winners.

Auction is the modality reserved for the transference, to any interested party, of assets that are of no use to the public authorities, blocked assets, pawned assets or assets derived from legal processes or given in payment, for the best price (bid) offered to the administration above the minimum value of evaluation.

Finally, *Bid* was instituted to regulate contracts that supply common goods or services, or of goods or services provided occasionally or regularly with no value limi-

tation. Such contracts are made in public session by means of proposals of written prices and verbal bids, with the aim of obtaining the most economic, safe and efficient purchase. Conducting a bidding through the use of information technology resources is permitted (electronic bidding). However, this modality excludes the contracting of works and services of engineering, lease or real estate transference.

Regardless the bidding modality, the principles of legality, neutrality, morality, publicity and efficiency must always be obeyed with the objective of selecting the proposal which is the most advantageous to the Public Administration, ensuring equality of conditions to all participants before the announcement as well as establishing standards of technical and economic qualification, as well as maintaining the effective conditions of the proposal

14.3. Authorization, Concession and Permission for Public Service

The Federal Constitution, in art. 21, clause XI and XII, establishes that the following services should be administered by the Union: (i) telecommunication and radio services; (ii) services related to electrical energy and to the energy use of waterways; (iii) air and aerospace navigation and airport infrastructure; (iv) railway and waterway transport services between Brazilian ports and borders; (v) interstate and international highway services; and (vi) services related to sea, river and lake ports.

The performance of these services may be carried out directly or by means of authorization, concession or permission. The Union is authorized to delegate the provision of these services, mainly through concession or permission, to private legal entities that are that are competent to carry out such tasks.

Authorization is the unilateral, discretionary administrative action through which the Public Authorities delegate to the private sector the performance of public service, but which can be revoked at any time by the Public Administration.

The concession of the service occurs via a formal administrative contract, settled through the modality of bidding, which aims to legalize the delegation/transference of the rendering of a service of the Public Authorities to a company or a consortium that, in turn, will assume the risks of the business for the duration of the contract, and be remunerated by the users of the services. The aforementioned

contract further aims to satisfy the conditions of regularity, continuity, efficiency and moderation of tariffs in the provision of the services.

The rules on public service concession are included in Law no. 8.987/95, with the alterations introduced by Law no. 9.648/98. Law no. 9.472/97 and its alterations by Law no. 9.986/00 concern the concession of telecommunication services.

The granting of public service, as previously emphasized is a simple, discretionary and precarious action of unilateral delegation by the Public Authorities, through a contract of adhesion that may be revoked at any time or to which the Public Authorities can impose new conditions upon the grantee.

14.4. Qualification

To institute the bidding procedure, the Public Authorities will publish a deed justifying the convenience of said granting, defining the objective, area and duration of the contract, and the announcement of the bidding will be published thereafter.

The establishment of the bidding procedure occurs, however, through bidding notice; neither the Administration nor the bidders may neglect internal bidding law, which concerns the principle of obligation to the bidding instrument, governed by article 3rd of the Bidding and Contracts Law.

The party interested in participating in the bidding should: fulfill the demands stated in the announcement and the specific pertinent registry requirements of each modality; present the legally required documentation, which aims to evaluate the legal, technical, economical, financial and internal revenue qualification of the participant.

If the bidding announcement permits the formation of a consortium, each company that composes it must present all the above-mentioned documentation as if it were an individual bidder.

With the requirements fulfilled, the bidders will present their proposals in compliance with the demands established in the announcement. Any person can obtain certificates concerning actions, contracts, decisions or opinions related to the bidding or to the concessions or permissions.

It should be stressed that the Biddings Law, in article 34, prescribes the possibility of maintaining a *record* register for habilitation purposes, with a maximum validity of one year, containing the documents of those interested in participating in biddings. These receive a Record Register Certificate that enables them to participate in pricings, and replaces the qualification documents referring to other modes, according to paragraph 2 of article 36 of that legal text.

Judgment of the proposals will examine the following criteria: (i) lowest price, the Administration will determine the bid most advantageous, that the winning bidder will be that which presents a proposal in accordance with the specifications of the announcement and which offers the lowest price; (ii) the best technique; (iii) technique and price; or (iv) highest bid or offer, in cases of transference of assets or concession or the right of real use.

In case of equality of conditions between two of more proposals, after analyzing all the established conditions in the bidding notice, the selection will be made though a drawing, in a public session registered in the minutes, to which all bidders will be summoned.

Law n. 12.349 of December 15, 2010 created the margin of preference for manufactured goods and services that meet the Brazilian technical standards, in other words, preference for products and services of national origin.

The preference margins are up to 25% and determined, via decree, by the Interministerial Commission for Public Procurement, established by the Decree No. 7546 of August 2, 2011, which regulated the application of preference margins.

14.5. Waiver and Non-Requirement of Bidding

Three relevant situations exist where bidding is waived by law: (i) low value of the object of the bidding; (ii) situations of emergency due to public calamity, war, and/or serious disorder; or further, (iii) purchase or lease of real estate, which for motives relevant to its selection—e.g. the geographic location of the real estate—make bidding impossible. These, along with twenty-eight other reasons are listed in article 24 of Law 8.666/93 and characterize the hypotheticals of *direct contracting*.

Non-requirement occurs, as stated in article 25 of Law 8.666/93, due to the impossibility of conducting a bidding because of the unviability of competition among the supposed participants, caused by the exclusive manufacturing or commercialization by one supplier (brand preference being forbidden), by notorious specialization of professionals or companies in hiring specialized technical services, or for the contracting of a highly-acclaimed professional.

14.6. Administrative Contract

A contract is mandatory in cases of competition and pricing, as well as waiver or non-requirement whose prices are within the limits of both modalities and and will contain clauses that define: (i) the parties; (ii) objective; (iii) field and duration; (iv) form and conditions of the provision of services; (v) parameters defining the quality of service; (vi) price of the service; (vii) criteria of contractual readjustment; (viii) rights, guarantees and obligations of the users; (ix) projections of expansion and modernization; (x) form of inspection; and (xi) contractual penalties.

Physical-financial schedules for the execution of the works may be included, as well as guarantees of the fulfillment of obligations in the cases of contracts related to the concession of public service preceding the execution of the public work.

The grantor may contract third parties for the development of inherent, accessory or complementary activities which will be governed by private law. The contracting of third parties will not exclude the grantee from the responsibility for all damages caused to the granting party, to the users or to third parties. Providing this is stated in the contract, authorized by the grantor and preceded by competition, sub-contracting is also permitted.

14.7. Guarantees

The demand for guarantees is a common requisite in contracts of services, works or purchase. This is not a mandatory demand, but should be foreseen in the bidding notice for it to be possible and legitimate. With exceptions foreseen by law (article 56 of Bidding Law), guarantee will be bond or insurance guarantee or bank guarantee, at the criteria of the contractee, providing the amount corresponding to the insurance does not exceed 5% (five percent) of the total value of the contract.

14.8. Inspection and Extinction of Administrative Contract

The granting power is charged, in order to defend the interest of consumers, with the power and duty to inspect the execution of the contract, form inspection commissions that will have access to any information relative to the administration, accounting, technical, financial and economic resources of the grantee and may intervene in the concession.

Every acquisition and public work presupposes the delivery of the object in the manner agreed upon, as well, every concession or permission presupposes adequate provision of service to the full satisfaction of the users under the principles of continuity, efficiency and safety, among others. Non-compliance to such principles may allow penalties and contract dissolution.

Further hypotheticals for the dissolution of the contract are: the end of the period of duration; the seizure of the service by the grantee for reasons of public interest; incapacity; total or partial non-performance of the service; rescission, annulment, or bankruptcy or dissolution of of the company, or bankruptcy or incapacitation of the titleholder in the case of an individual company.

If the contract clauses are breached by the Contractee, the sanctions prescribed by the Bidding Law and the bidding notice are applicable. If non-compliance is caused by the contracting party, a special judicial action will be applied so that the contract may be rescinded and the injured party duly compensated.

14.9. Other Contractual Figures

To optimize public resources and promote expediency in administrative contractual proceedings, the Government of the State of São Paulo authorized, through Decree no. 45.085/2000, the use of the system of electronic contracting or *on-line* purchase, as this is commonly known, for the acquisition of materials and services for the State.

Electronic auction is a bidding modality the judgment criteria of which is that of the best offer and which is applicable in contracts whose value does not exceed R$80,000.00 (eighty thousand reais), in which case, according to art. 24 of Law

8.666/93, there would be no need for bidding. Any company, which is previously and duly registered in the system can participate in the online auction. Law 10.520/2002 comprises the regulations regarding this modality.

There are further, *management contracts*, arising from the new text in the Constitutional amendment 19/1998 to article 37, section 8th of Federal Constitution, seen as decentralization techniques, through which goals and objectives to be achieved are established and whose execution is subject to Public Administration inspection and sanction.

Through the *lease contracts* Public Administration transfers management of a public service to a private entity that will explore it at its expense and risk, placing a public property at its disposal.

Finally, it is necessary to mention the Partnership Terms signed between Public Authorities and qualified entities such as civil association of public concern, in compliance with the provisions of law 9.790, enacted 03/23/99. Such an instrument aims to form a cooperative link between the parties for the execution of activities of public interest. Public resources may be transferred to an entity thusly qualified. When such activities imply delegating public administration services, *public--private partnerships* (PPP) take place.

On December 30, 2004, Federal Law no. 11.079 was enacted, governed by Decree 5.385/2005. It instituted general standards for public-private partnerships bidding and contracting, within the sphere of Public Administration. Law no. 12.409/2011 set the limit for the federal fund to finance such PPP's at R$ 6,000,000,000 (six billion reais).

The above-mentioned law defines PPP as an administrative contract of concession in a sponsored or administrative modality .

There are generally four models of PPP financing : (I) traditional model of sub--contracting and procurement by the public sector; (II) model in which the public sector finances the project but the actual work is completed by a private partner; (III) the model in which design, construction, operation, exploration and financing are all completed through concessions. This is the most common model used; (IV) model by which everything is owned and operated by the private sector.

These models provide a spectrum ranging from the first in which the public sector assumes all responsibilities and liabilities to the fourth wherein the private sector assumes full responsibility and liability. Most PPP are constituted as either II or III whereby the responsibilities and liabilities are shared based upon the particular partners' strengths and weaknesses. These models allow projects to proceed with minimal support from public funding programs and government resources. This aspect also allows for greater expediency in implementation as projects need not depend on approval from governmental budgetary oversight.

It should be noted, finally, that the mere contracting of a public work and common concession, i.e. delegation of public services or construction works, does not constitute PPP, thus the norms contained in Biddings and Contracts Law (8.666/93) and by Laws of Concessions (Law 8.987/95 & 9.074/95) apply.

PRIVATIZATION, CONCESSIONS AND PARTNERSHIPS WITH THE GOVERNMENT

Chapter 15

This chapter addresses the legal instruments that may allow the private sector to assume activities usually performed with exclusivity by the government. We will analyze the privatization and concession of public services arrangements. In addition, other forms of partnership between the Government and private entities will also be analyzed.

Privatization is generally defined as the act by means of which the government transfers to a private entity the control of state-owned companies. This is normally achieved via a public bidding process where interested parties may bid for the acquisition of the offered government shares. A privatization may involve a simultaneous transfer of equity control and delegation of public services to be rendered by the relevant company (in which case the delegation is effected by means of the execution of a concession agreement).

The *concession* is the act by means of which the government transfers to a private entity the rendering of a public service and the private entity accepts to undertake it on behalf of the State but at the private party's own risk. The concessionaire (the entity to whom the concession is granted) is paid by charging a tariff to the users of the services. The grant of the concession also requires a previous public bidding process.

A partnership, in its turn, is a broad term used to designate an association between the government and private entities to pursue a specific goal of public interest, such as the construction of a public building, the rendering of public services, or even both. Partnerships differ from concessions essentially as to the form of payment due by the government to the private entity: while concessionaires are paid through the tariffs charged for the services, the partners, on the other hand, may charge tariffs or receive directly payments from the government. In some cases, the private partner may receive a combination of both (tariffs and direct payments).

Therefore, once concludes that the principle of free-will governs concessions: the concessionaire undertakes its activity assuming all associated risks, and its profits will depend exclusively on its own performance. Contrariwise, in partnerships the risks are shared between the government and the private partner, since private partner will secure its compensation from a combination of end-user tariffs and direct government payments.

15.1. National Privatization Program ("Programa Nacional de Desestatização – PND")

Brazil's National Privatization Program was established by Law n. 8.031, of April 12, 1990, which was further replaced by Law n. 9.491, of September 9, 1997. The regulation of the National Privatization Program was brought by Decree n 2.594, of May 15, 1998. This is the legal basis that regulates the sale of companies, including financial institutions, controlled directly or indirectly by the Federal Government, as well as the transfer, to private initiative, of the rendering of public services provided by the Federal Government or its controlled entities.

The National Privatization Board ("Conselho Nacional de Desestatização – CND") is the highest authority responsible for conducting the privatization process according to said statute. CND is formed by State Ministers who report directly to the President of the Republic.

The National Bank for Economic and Social Development (BNDES) has also an active role as the Privatization Fund Manager, providing administrative and operational support to the CND, retaining consultants and specialized services as necessary for carrying out the privatization, as well as contacting stock exchanges and securities authorities, among other duties.

Up until now, most privatizations have been carried out by means of public auctions at the Brazilian stock exchange. These auctions must follow the requirements of Law n. 8.666, of June 21, 1993, which regulates Article 37, XXI, of the Federal Constitution and establishes the rules for the public bidding process. This federal act was successively amended to include new requirements for, *inter alia*, bid invitations and methods, payments and guarantee forms. These amendments were mainly made by Law n. 8.883, of June 8, 1994, by Law n. 9.648, of May 27, 1998, by Law n. 11.196, of November 21, 2005, and by Law n. 12.349, of December, 2010. This legislation is constantly changing and there is already another Bill under scrutiny by the Congress to improve the provisions of the public bidding procedures.

An important development for the Brazilian Privatization Program was the General Telecommunications Act (Law n. 9.472, of July 16, 1997), which regulates the Constitutional Amendment n. 8, of August 15, 1995, allowing the private sector to provide telecommunications services. Before that, the Brazilian Congress had already adopted Law n. 9.295, of July 19, 1996, which stated that concessions for the exploitation of mobile telephony, classified as a "restricted public service", should be granted, by means of a public bidding procedure, to Brazilian companies, with at least 51% of their voting capital controlled, directly or indirectly, by Brazilian nationals.

The Privatization Program applies not only to the sale of state-owned companies and concessions of public services controlled by the Federal Government, but also to those entities and services under the auspices of the regional (state) and local (municipal) administration. Each state and municipality has powers to establish their own specific program and, therefore, the privatization of state or city-owned companies is made considering particular local regulations. In this regard, the state of São Paulo has carried out one of the most successful privatization programs in Brazil. Since the publication of its privatization act, São Paulo has transferred to private investors the execution of public services of distribu-

tion of natural gas (both in metropolitan regions – performed by COMGÁS, and country areas – performed by Gas Brasiliano and Gas Natural), as well as power generation (Paranapanema and Tietê, which resulted from CESP's partial spin-off) and distribution of electricity (CPFL and Eletropaulo, two of the largest Brazilian electricity distributors).

15.2. Public Services Concession

Law n. 8.987, of February 13, 1995 (Concessions Act), regulates Article 175 of the Federal Constitution and establishes requirements for concessions of all public services, with exception of radio and TV broadcasting services. This statute was later amended by Law n. 9.074, of July 7, 1995, and by Law n. 11.196, of November 21, 2005. The most important provisions of the Concession Act are regulated by Decree n. 2003, of September 10, 1996, and by Decree n. 1.717, of November 24, 1995, which established new rules for the approval and time extension of public service concessions, including electrical energy concessions. The Concessions Act expressly requires a public bidding process for the granting of a concession to a private entity.

15.3. Major industries privatized or in process of privatization

Some of the most important economic activities under state control are either already privatized or currently undergoing privatization in Brazil, including the following:

- generation, transmission and distribution of electricity and gas;
- petrochemicals;
- highways, railroads, sea and flight transportation;
- telecommunications;
- ports, airports, aerospace infrastructure, road construction, dams, canal locks, dry docks and containers;
- financial institutions;
- sanitation, water treatment and supply, waste treatment; and
- mining and metallurgy.

15.4. Evolution and Results of the Privatization Program

According to latest BNDS 2009 Activity Report[1], between 1990 and 2009 the Government was able to conclude 71 privatizations, totaling more than US$ 100 billion in revenues from these deals. This amount was gathered not only by the sale of state-owned companies but also by the transfer of their previous debts to the acquiring private parties.

Among the former state-owned companies there are: CSN (the national steel mill); CVRD (the Brazilian largest mining company), Mafersa (a manufacturer of railroad equipment); Escelsa, Light, CERJ, CEEE (partial), CPFL, Eletropaulo, Gerasul, COELBA, CESP (major companies in the electricity sector); TELEBRÁS System (virtually all telephony companies); COMGÁS and CEG (gas distribution companies); and RFFSA (the national railway line). In addition, all of major steel companies (i.e. Usiminas, Cosipa, Acesita and CST), petrochemical companies (i.e. Poliotelinas), fertilizer companies (i.e. Ultrafertil), Embraer (the world's fourth largest aeronautical company), Banespa and Meridional (state banks) have also been totally or partially privatized.

Despite inevitable delays and obstacles, the National Privatization Program initiated during the 1990's resulted on considerable achievements to the Public Administration. The Federal Government alone received, between 1997 and 2000, with the privatization of the electricity and telecommunications sectors, approximately US$ 70 billion and the participation of foreign capital has reached approximately 40% of such amount.

The sell off of the mining and transportation giant CVRD (former denomination of Vale S.A. – today's second biggest mining company in the world) and of Telebrás, the main operator of the telecommunications system, were the largest privatizations ever in Latin America, attracting worldwide interest and have significantly contributed to boost foreign investment in Brazil.

During 2010 the exclusion of VALEC from the PND was one of the main highlights of the privatization sector in Brazil, as the state-owned company is responsible

1 http://www.bndes.gov.br/SiteBNDES/export/sites/default/bndes_pt/Galerias/Arquivos/conhecimento/pnd/PND_2009.pdf – accessed on 21 July 2011.

for considerable investments on the north-south railway construction project. On 2011, the Brazilian government intends to continue the national privatization program, with focus on expanding and improving the country's electricity grid and also to keep privatizing portions of Brazilian highways.

15.5. Public-Private Partnership

The Law n.11.079 was published on December 31, 2004, introducing the Public--Private Partnerships ("PPP") to Brazilian law. The PPP Act was further amended by Law n. 12.024, of August 27, 2009, and by Law n. 12.409, of May 25, 2011. The new legislation was putted in place as the Government intended to obtain approximately US$ 13 billion in private investments, both local and foreign, in basic infrastructure, particularly in transportation and sanitation.

The new regime for transferring the execution of public services to the private sector is applicable to and may be used by all entities of the direct public administration, as well as by the special funds, governmental agencies, foundations, public companies and other entities controlled by the Federal Government, states and municipalities.

Additionally to the common concession of public services, explained above and regulated by the Concessions Act (Law n. 8.987/95), it was created two other modalities of public services concessions: the sponsored concession (concessão patrocinada) and the administrative concession (concessão administrativa).

The sponsored concession is the concession of public service and public work in which the payment due to the private partner involves, besides the tariffs paid by the users of the services, complementary remuneration provided by the public partner. In its turn, the administrative concession is the services agreement in which the Public Administration is the direct or indirect user (*v.g.* construction, operation and management of public buildings), even if it involves execution of works or supply and installation of goods.

The difference between the new modalities of concession and the common concession, which is still in place as mentioned above, consists exactly on the payment due to the private entity by the Public Administration. Therefore, when the concession does not involve any remuneration from the Public Administration, it will not be a PPP contract, but a common concession.

The referred law also establishes limits for contracting Public-Private Partnerships. For instance, it does not allow contracts (i) under the amount of R$ 20 million; (ii) with a duration shorter than 5 years; or (iii) with the sole purpose of supply of workers, supply and installation of equipments or execution of public works or construction.

The administrative contract regulated by the PPP Act shall have its duration compatible with the amortization of the investments made by the private partner. Therefore the duration cannot be shorter than five (5) nor longer than thirty-five (35) years, including a possible time extension. For the execution of these contracts it will be demanded the creation of a Specific Purpose Company, with the exclusive scope of implementing and managing the PPP project.

The greatest innovation brought by the new legislation was the creation of a R$ 6 billion Fund (composed of shares of public and private companies, real estate, money, etc.). This fund will guarantee that the public sector will duly pay its obligations, assumed when hiring the private sector. The fund's assets will be used in case a lawsuit for payment is filed against the contracting Public Partner.

Another point that must be stressed is the possibility of arbitration in case of dispute resolutions that may arise in a PPP contract. This is the first time ever that any Brazilian Act permits the Public Administration to proceed and participate in arbitration procedures.

One of the main goals of the government for the PPPs is to allow and to rush the construction of the works that are necessary for the sustained development of the country. In accordance, it was necessary to include new mechanisms into the public bidding procedure to make it effective. One of the new provisions determines that the project will only go to the bidding stage after the issuance of the preliminary environmental permit. Obtaining environmental permits is nowadays considered as one of the main obstacles to current infrastructure projects.

In addition to the Federal legislation, Brazilian states have also enacted regional acts aiming at projects under their jurisdiction. As a consequence, it is possible to find, under state law, new forms of guaranties, such as the creation of public companies solely responsible for signing and managing PPP contracts. The main states that already published their own acts are São Paulo, Minas Gerais, Santa Catarina, Bahia and Rio Grande do Sul.

It is interesting to note that, according to recent estimates, Brazil will need investments of more than R$ 100 billion to comply with the commitments to host the 2014 World Cup and the 2016 Olympic Games. In this initial appraisal were included improvements on the transport sector, generation and power distribution, sanitation works, ports and airports, amongst others. It is expected that the PPPs will play a decisive role in attracting such investments, what will also depend greatly on the pace that the Brazilian government will apply to the related procedures.

TELECOMMUNICATIONS

16.1. Telecommunications in Brazil – Brief Overview

Law 4117/62, of 27 August 1962, edited the Brazilian Telecommunication Code ("CBT") which, for more than 35 years, regulated telecommunications services throughout the country and authorized the constitution of the Brazilian Telecommunications Company *Empresa Brasileira de Telecomunicações S.A.*, known as EMBRATEL.

In 1972, Law 5792, of 11 July, authorized the creation of the mixed ownership company TELEBRÁS (*Telecomunicações Brasileiras S.A.)* to promote, through its subsidiaries and associated companies, the exploitation of public telecommunication services in Brazil and abroad. TELEBRÁS, its subsidiaries and associated companies formed the so-called TELEBRÁS SYSTEM, which eventually also incorporated Embratel.

In 1995 the process of liberalization of the Brazilian telecommunications market was initiated, with the publication of Constitutional Amendment Number 08/95, of 15 August 1995 ("EC"), which allowed the Federal Government to open the exploitation of all tele-

communications services to privately owned companies by means of authorization, concession or permission.

Soon after, Law 9265/96, of 19 July 1996 (the "Minimum Law") fully deregulated and liberalized value added services, flexibilized the conditions for the exploitation of satellite communications and services not opened to the public and organized the licensing process for B-Band mobile cellular services ("SMC").

In 1997, Law 9472/97, of 16 July 1997, known as the General Telecommunications Law ("LGT"), created the Brazilian National Telecommunications Agency (Agência Nacional de Telecomunicações – "ANATEL") and established criteria for the privatization of the State concessionaires, as well as other rules concerning liberalization and competition within the telecommunications markets.

The LGT determines that networks shall be organized in the form of free circulation integrated highways, imposing mandatory interconnection between all networks supporting services offered to the public ("collective interest services"), guaranteeing their integrated operation and conditioning the property rights with respect to the networks to the duty of compliance with their social role. In this way, interconnection is a major instrument for convergence.

LGT also provides legal definition of value added services which expressly declares that such services are *not* telecommunications services, and classifies the value added service provider as a user of the underlying telecommunication service or network.

Therefore, with exception of data transmission itself any internet services are outside ANATEL's jurisdiction and may be rendered free from any regulatory constraints.

In mid-1998, the TELEBRÁS System underwent a complete restructuring process that included the privatization of its subsidiaries. A large investment flow was steered toward expanding telecommunications services in light of new technologies.

For the effect of competition in the fixed telephony market, the fixed switched telephone service was separated into three different service modes, which were the

object of distinct licenses. The national territory was divided into four Regions, and the number of competitors admitted for each service modality, during the period between the privatization until 31 December 2001, was limited to two companies per Region – the concessionaire and its mirror-company (General Plan of Grants, approved by Decree Number 2534/98, of 2 April 1998).

The rendering of the local telephone service was attributed to one concessionaire and one mirror-company (duopoly system), in each service area correspondent to Regions I, II or III. The rendering of national long distance services was assigned to two "regional" companies (the concessionaire and the mirror company) per Region I, II and III, and to two "national" companies (the concessionaire and its "mirror" company), exploiting the service throughout the entire Brazilian territory, i.e. Region IV. International long distance licenses were granted to the two "national" companies, originating calls throughout the entire national territory (Region IV).

The duopoly system, a marked characteristic of this first phase of the opening of the telecommunications sector was intended to grant companies time to establish and consolidate themselves in the market before the beginning of free competition, in the year 2002. During the transition period between the destatization of the TELEBRÁS SYSTEM companies and total liberalization of fixed and mobile telephony markets, competition was restricted to the dispute between concessionaire companies and mirror-companies in the fixed telephony market and between Band A and Band B concessionaires in mobile telephony.

As of 2002, the second phase of the liberalization of the Brazilian telecommunications began, with the elimination of limits to the number of service operators. Nevertheless, ANATEL has the right to impose such limits as well as other legal-administrative restrictions in exceptional cases, when it is technically impossible or when the excessive number of competitors may negatively affect the rendering of a service of collective interest.

16.2. Development of Mobile Telephony

The exploitation of mobile telephone services was initiated by the TELEBRÁS System carriers (under the frequency sub-level named A Band). Its organization as a regulated mobile cellular service (*serviço móvel celular* or "SMC") occurred in 1996, following EC Number 8/95, with the aim of auctioning the B Band.

Initially exploited through concessions, with the entry in force of the LGT, SMC began to be exploited exclusively under the private regime, through previous authorization.

The publication of the LGT gave rise to the substitution of the pre-existing regulation, norms and rules on mobile communications by the new rules edited by ANATEL, which were gradually implemented since the year 2000, and are known as Personal Mobile Service rules ("Serviço Móvel Pessoal" or SMP).

In the period between 2001 and 2003, up to three additional mobile licenses per region, corresponding to Bands C, D and E were auctioned. The interested companies were permitted to bid for SMP authorizations in each of the three regions, and were permitted to acquire licenses for all three regions. However, the acquisition of more than one authorization within the same region was forbidden.

Any company organized and based in Brazil, even if under foreign control, may hold an SMP license.

The new rules enlarging the operational areas caused major mergers and acquisitions. Mobile telephony in Brazil has experienced rapid growth, especially with pre-paid cellular phones. Nowadays, the technology most widely employed is GSM, followed by CDMA and TDMA.

16.3. Regulatory Agency for Telecommunications (ANATEL)

The regulatory agency for telecommunications is the National Telecommunications Agency – ANATEL, which has administrative independence, absence of hierarchical subordination and financial autonomy.

Basically, ANATEL is empowered to: *(i)* issue rules on the licensing, rendering and use of the telecommunication services under the public regime (the so called universal services); *(ii)* establish, control and supervise the tariff structure regarding each mode of services rendered under the public regime; *(iii)* execute and manage concession contracts; *(iv)* issue rules concerning the provision of telecommunications services under the private regime; *(v)* control, prevent and repress legal infractions against the economic order regarding telecommunications, without

prejudice to the competency of the Administrative Council for Economic Defense ("CADE"); *(vi)* manage the radiofrequency spectrum and the use of satellite orbits; *(vii)* define the service modalities based on their objectives, scope of rendering, form, means of transmission, technology employed and other attributes; *(viii)* supervise the rendering of the services and apply administrative sanctions to transgressors of the telecommunications rules.

16.4. General Telecommunications Law

The Brazilian Telecommunications Code was revoked by the LGT, except in regards to certain criminal rules and in regards to provisions connected to broadcasting.

The LGT provides rules on the following institutional aspects: *(i)* organization of telecommunications services; *(ii)* creation and functioning of the regulatory agency; and *(iii)* fundamental principles of Telecommunications Law in Brazil.

Telecommunications services are organized to provide free, wide and fair competition among companies exploiting such services, being subject to the general legal rules of protection of the economic order. Acts carried out by the service provider that can affect, in any way or form, free competition and free initiative are prohibited.

The LGT defines interconnection as "the connection between functionally compatible telecommunications networks, allowing users of one network to communicate with users of another or access services available in it" (article 146, sole paragraph, LGT). Interconnection is carried out through freely negotiated contracts between the interested companies. In the lack of an agreement, ANATEL may only intervene if provoked by one of the parties.

16.5. Telecommunications Services Regime

The organization of the telecommunications sector established by the LGT is based on a system of limits and restrictions to service operators. The exploitation of any telecommunications services or networks is generally conditional on obtaining a license granted by ANATEL, with the exception of some specific situations in which a mere communication to ANATEL is required. Licenses are still granted according to different modalities of services as defined by ANATEL.

In this way, the exploitation of telecommunications services is conditioned to previous *(i)* concession or permission; *(ii)* authorization; or *(iii)* communication to ANATEL.

The LGT adopts two distinct criteria for the classification of services. The first criterion is related to the extent of the commercial offer of the services, classifying them as: *(i)* collective interest services; or *(ii)* restricted interest services.

Collective interest services are those which must be made available to any interested person under non-discriminatory conditions. On the other hand, restricted interest services are intended for the use of the provider itself, or are offered to classes of users, in a selective manner, at the providers' discretion.

LGT's second criterion classifies services according to the legal regime under which they are rendered: public services and private services.

Telecommunications services rendered under the public regime are those whose existence, universalization and continuity are an obligation or competency of the Union. The fixed switched telephony service commercially offered to the use of the public in general, or STFC, is the sole telecommunications service established by LGT as a legal duty of the Union. Therefore, the single telecommunications public service, subject to universalization and continuity obligations, is the STFC for the end user. This competency must be executed through delegation, by means of a concession contract.

Telecommunications services rendered under the private regime are those in which the rendering of the service results from the free economic initiative of the private sector, through a simple authorization by ANATEL and with mere requirement of expansion and attendance.

The concession of services is the object of an administrative contract executed by ANATEL, through competitive bidding, without exclusivity. Concessionaires' revenues come from billings, and they are subject to the business risks. The maximum term of the concession is of 20 years with the possibility of a one-time-only renewal or extension for an equal period. In January 2006, the concession contracts were renewed and shall be revised by ANATEL within 05-year periods, in order to establish new conditions, new universal service obligations and quality parameters.

Retail prices of STFC under the public regime are subject to price caps. ANATEL may submit the concessionaires to an unrestricted tariff system, if there is general and effective competition among the providers.

In fact, STFC may also be provided by other carriers than concessionaires under the private regime, thus not subject to universal service obligations.

The exploitation of the service under the private regime is based on the constitutional principles of economic activity, its main guidelines being free and broad competition among service providers, consumer's rights and incentive to the technological and industrial development of the sector.

Prices charged by the service providers under the private system are unrestricted. Nevertheless, any harmful act against competition as well as economic power abuse shall be repressed.

The exploitation of the service under the private regime shall depend on a prior act of authorization by ANATEL and will allow for the right to use the frequency associated therewith. There is no limit to the number of authorizations to be granted by ANATEL for the exploitation of services under the private regime, except in case of technical limitation or when the excessive number of competitors may have negative effects upon the rendering of collective interest services. In these exceptional situations in which it is necessary to limit the number of service authorizations, the granting of an authorization may be preceded by a competitive bidding, as occurs with the granting of SMP licenses.

The right to the use of radiofrequency, under exclusive nature or not, shall depend on prior grant by ANATEL, issued through an authorization, linked to the concession or authorization for the exploitation of telecommunications service. The authorization for the use of radio frequency in connection with the rendering of a service under the public regime shall be for the same term as the term of the concession to which it is associated. Although the authorization for the exploitation of services under the private regime does not depend on a term, the right to use radiofrequencies thereto is subject to a term of up to 20 years, which can be extended once for an equal period.

The transfer of the right to use radiofrequencies may only occur with the transfer of the concession or authorization to which it is linked.

Basic consumer's rights have been reinforced in the STFC regulation recently enacted by ANATEL applicable to all STFC providers, concessionaires or not. For the SMP users, the basic consumer's rights shall be reinforced in the new rules announced to be issued by Anatel.

16.6 The Transfer of Control of Telecommunications Companies

The transfer of the controlling interest in telecommunications services providers in Brazil is regulated by LGT. ANATEL, with the scope of fostering effective competition and preventing economic market concentration, has the legal power to establish restrictions, limits or conditions for obtaining and transferring concessions and authorizations.

One of the most important "ex ante" merger control rule is Resolution 101/99 of ANATEL, which establishes criteria and concepts in view of supervising changes of control or transfer of controlling interest that might tend to economic concentration.

Under the terms of said legal provision, the controller is the individual or legal entity who, directly or indirectly: *(i)* participates in or appoints a person or member of the Management Counsel, the Board of Directors or other body with equivalent attribution, of another company or of its controller; *(ii)* holds statutory or contractual veto over any matter or decision of the other; *(iii)* is sufficiently empowered to block the installation of a qualified quorum or decision required by force of statutory or contractual provision, with regard to the decisions of the other, *(iv)* holds shares of the other, of a class which grants separate voting right.

Furthermore, this legal provision deems a company to be an affiliate of another if it holds, directly or indirectly, at least 20% of the voting stock of such other, or if at least 20% of the voting stock of both companies are held, directly or indirectly, by one same individual or legal entity.

Said Resolution also establishes that the legal transaction which results in the partial or total transfer, by the controller, of the controlling interest over the service provider, shall represent a transfer of control.

Finally, any changes to the corporate structure of the company that could represent a transfer of control must first be submitted to ANATEL, especially when: *(i)* the

controlling entity or one of its members withdraws or when such entity's voting participation or its controlling entity drops below five percent; *(ii)* when the controlling entity ceases to hold the majority of the company's voting stock; and *(iii)* when the controlling entity, through any form of agreement, totally or partially assigns to a third party the powers to effectively manage the company's corporate activities or business operations.

16.7. Taxes of the Telecommunications Sector

Law no. 9.998 of 17 August 2000 created the Fund for Universalization of Telecommunications Services – "FUST", the purpose of which is to provide funds to cover the portion of costs arising from the accomplishment of universal service obligations that cannot be recovered with the efficient exploitation of the service. As of the year 2001, the operators began paying 1% of their gross revenues arising from telecommunications services, excluding the taxes ICMS, PIS and COFINS, to finance said fund.

To avoid double imposition on both inputs and outputs of telecommunications services, Law no. 9.998 allocated the tax basis on retail revenues arising from end--users services, exempting wholesale minutes to other carriers (interconnection) and leased lines fees. However, this legal tax system of exemption was modified by a recent interpretation of the Agency (in charge of administering the FUST) which included in the tax basis any and all inputs. This administrative modification of the law is being challenged both in the administrative and judicial spheres. The outcome of the discussion shall impact all telecommunications service providers.

The Telecommunications Supervision Fund ("FISTEL") was created by Law no. 5070/66, of 07 July 1966, and restated by LGT, for the purpose of covering the costs incurred in by ANATEL in the supervision of telecommunications services. All concessionaires and authorized companies must pay the Installation Inspection Fee ("TFI") as of the issuance of the certificate of operation of the telecommunications station. The TFI value is established pursuant to a table provided by ANATEL and varies according to the number of antennas and equipment in use. In addition, they must pay the Operation Inspection Fee ("TFF"), which is due annually and calculated at 50% of the values fixed for the TFI.

Law no. 10.052 of 28 November 2000 instituted the Fund for Technological Development of Telecommunications ("FUNTTEL"), which was created with an initial

budget of R$ 100 million originating from the Fund for Inspection of Telecommunications ("FISTEL"). FUNTTEL funded with 0.5% of the gross revenues arising from telecommunications services plus 1% of amounts collected by authorized institutions, through telephony based events. Its purpose is to finance telecommunications technological research developed by small and medium -size companies so as to increase the competitiveness of the Brazilian telecommunications industry.

Furthermore, telecommunications services are also subject to ICMS (equivalent to the Value Added Tax in E.U.), a state tax foreseen in the Federal Constitution.

16.8. Incentives

The law offers the providers of telecommunications services incentives for the development of telecommunications-related products, through specific credit, tax and customs policy instruments.

In this sense, the Brazilian government, though having practically eliminated one of its special importation regulations – the "ex-tariff" – still maintained certain important benefits for several different components intended for the telecommunications field, which used to be subject to import duties at a rate of up to16%.

Law no. 10176, of 11 January 2001, extended until 31 December 2000 the exemption of the Tax on Industrialised Products ("IPI') rates on the items set forth in said Law. As of that date, the exemptions were converted into reductions of the applicable IPI rates. The percentage of reduction will be gradually reduced until 31 December 2009, when full rates shall apply.

16.9. The Future of Telecommunications Services

The main development awaited in the telecommunications sector refers to the choice of the Digital TV standard to be adopted in Brazil. As yet there is no decision as to the standard to be adopted. The criteria for the choice of the digital television standard are still to be enacted by the National Congress and such choice is a priority for the government. The model to be chosen must support mobile reception, portability, multimedia and interactivity, aiming at digital inclusion, revitalization of the broadcasting sector and of the national industry, optimization of the radiofrequency spectrum and contribution to the convergence of telecommunications services.

With the aim of enhancing competition, the Agency enacted new rules on the switched fixed telephony services, on the provision of leased lines and on a mandatory cost accounting system, introducing in the Brazilian regulatory framework the European concept of significant market power ("SMP"). Other obligations including "ex ante" obligations, such as the duty to build out network where the concessionaires do not have spare leased lines for rental, are expected to be imposed upon the concessionaires. The Agency has also announced measures concerning the regulation of numbering, portability, resale and the possibility of using technologies such as WLL, cable and Power Line Networks for new services delivery models.

Another priority for the government regards solving legal issues related to spending the universal service funds, which includes an announced amendment of the General Telecommunications Law.

A package of bills aiming at the harmonization of paid TV and broadcasting legislation in view of the digital inclusion is awaited.

A major debate regarding the delivery of contents by telecommunications operators and the scope of the constitutional foreign capital restriction regarding broadcasting is currently taking place in view of the clause included in the new concession contracts, in force as of January 1, 2006 whereby content-related services must observe the foreign capital restriction established in the Brazilian Constitution for broadcasting.

A bill regarding the powers of Brazilian regulatory authorities is currently under discussion by the National Congress. Such bill can significantly change the Agency's powers with regard to their competency for granting telecommunications service licenses and for controlling and preventing infractions against fair competition.

ELECTRIC ENERGY

17.1. Introduction

The Brazilian energy sector went through extensive and meaningful changes in the decade of 1990 implemented by ex-president Fernando Henrique Cardoso's[1] government, being remarkable the redefinition of the government's role, gradual implementation of an economic model based on free competition and massive private investments in the sector.

The changes started in 1995, when Amendment no. 6 to the Federal Constitution was approved. Such Amendment eliminated the concept of Brazilian companies of national capital, thus permitting the entry of foreign capital in the sector, including for acquisition of concessionaire entities. In 1995, Laws no. 8,987 and 9,074 were enacted: they were considered a landmark in the energy sector as they defined

1 President Fernando Henrique was in office for two terms, from 1995 to 1998 and from 1999 to 2002. The significant changes in the energy sector took place during his first term in office.

the discipline of the grants for exploration of electric energy and served as basis for making new concessions and privatizations of concession holders of public services and the definition of the ruling applicable to the new agents of the sector. [2]

In 1996, as per Law 9,427, the National Electric Energy Agency – ANEEL, an independent agency, was created to regulate the sector. Thereafter, Law 9,648 was enacted, bringing important elements for implementation of the new model of the Brazilian electricity sector.

The new model basically pursued the gradual liberalization of the energy sector activities based on concessions or authorizations for provision of services of generation and distribution of electric energy to private corporations and on privatization of concession holders, under the autonomous and independent regulatory agency's supervision and regulation, therefore giving emphasis to the investment of the private sector as well as competition among the entities that provide the relevant services.

However, the model was only partially implemented. Between 1995 and 2002 there were many new concessions of generation. However, approximately 70% of the distributors and only 20% of the generation sector were privatized.

In 2001, the country suffered a supply crisis in the energy sector, which led the government to take many steps to curtail energy spending and foster the generation of energy, which, in turn, led to the enactment of Law 10,438/2002, that introduced new regulations. At that time, problems inherent to the sector were broadly put up for discussion with society and it became clear that the model, its benefits notwithstanding, demanded some adjustments.

In January 2003, President Luiz Ignácio Lula da Silva took office and, in light of the new Government policy, in July of the same year the Ministry of Mining and

2 The Brazilian privatization process was based on Law 8,031/90, which created the National Privatization Program, Law 8,666/93 ("Bids Act"), which defined the applicable bidding procedures, Acts 8,987 and 9,074/95, which establish the general ruling for concessions, Law 9,427/97 which created ANEEL and established the guidelines for concession of electric energy public services, Law 9,648/98, which, *inter alia*, provides for the restructuring of the energy sector and the privatization of ELETROBRÁS and its subsidiaries (ELETROSUL, ELETRONORTE, CHESF and FURNAS).

Energy (MME) announced the new basic guidelines for a new regulatory model for the energy sector. On December 11th, 2003, the rules of the new model were enacted through Provisional Measures (MPs) nos. 144 and 145, which later became, respectively, Laws 10,848[3] and 10,847 on March 15th, 2004, and considered the milestones of the regulations for the present model.

Among the important changes heralded by the present model is the attribution of broader powers to the MME, by transferring attributions from the Agency to the Ministry. Moreover, two new distinct trade environments for contracting electric energy were formally introduced: the Free Trade Environment and the Regulated Trade Environment, being this under the "Pool" regime, in which all generation and distribution concession holders obligatorily participate. The Chamber of Electric Energy Trade ("CCEE") was created to suceed MAE (initials, in Portuguese, for the Electric Energy Wholesale Market), which had been established in the former Administration, with attributions to do the accounting and liquidation of operations not covered by bilateral contracts. The new model features a strict planning of the sector that shall be exercised by the MME, with support and subsidy of the Empresa de Pesquisa Energética (EPE), created by the Law 10,847/2004, and by the control of the sector's activities, to be enforced by the referred ministry.

17.2. The Sector Agents

The incentives to competition have, however, reinforced the deeply need to the restructuring of the energy sector, occurred in two steps, as described above, comprising the definition (i) of the agents responsible for the regulation and operation of the new Brazilian electrical system; (ii) of the basic characteristics that such system should have so as to make it feasible to implement an efficient and competitive model, and (iii) of the contractual models applicable to the sector.

The CNPE – Conselho Nacional de Política Energética[4], the President's counseling body, was created with the purpose to suggest to the Brazilian President rational policies and specific measures, with the purpose of providing the adequate use of

3 Law 10,848 was regulated through Decree 5,163/04 later amended by Decrees 5,249/04, 5,271/04 and 5,499/05.

4 The CNPE was created by Law n. º 9,478/1997.

the energy resources, ensure the supply of industrial material in the most remote or with difficult access areas, review the energy matrices on a regular basis, establish guidelines to specific programs, among other purposes.

There was the creation by Law 9,427/96 of the specific regulatory entity, ANEEL[5], as a quasi-governmental agency linked to the MME[6], with its own jurisdiction and income, and of the National Operator of the Energy System ('ONS' – Operador Nacional do Sistema Elétrico), a private corporation, a non-profit organization, created by Law 9,648/98 and composed by agents of the energy sector and by free consumers, according to the relevant legislation.

In summary, it rests with ANEEL "to regulate and fiscalize the generation, transmission, distribution and commercialization of electric energy" (Law 9,427, art. 2)[7], while the ONS is essentially responsible for the "activities of coordination and control of the operation of generation and transmission of electric energy in the interconnected systems" (Decree 2,655/98, art. 25).

In 2004, ANEEL and MME's attributions were amended. The MME[8] received significant powers regarding the decisions of the questions related to the energy sector. The ANEEL became responsible for the promotion of the bidding, preserving its authority to monitor the concessions, the pricing regulation and the regulation of the eletric energy's commercialization.

The coordination and controlling of the generation and transmission of the interconnected system continued to be executed by the ONS, a private corporation, no

5 Created by Law 9,247/1996, which attributions was later modified by Laws 9,648/1998, 9,649/1998, 9,986/2000, 10,438/2002 and 10,848/2004

6 The Law 10,683/2003 defined the subjects within the MME's jurisdiction. For example: geology, mineral and energy resources, hydraulic energy use, mining and metallurgy, oil, fuel and electric energy, including nuclear. Also, rural energizing and agro energy, including rural eletricity, when based on resources related to the National Eletric System.

7 State Agencies. The Law 9,427/1996 authorized ANEEL to decentralize its activities to the Brazilian States. The decentralization has been done by means of cooperation agreements with regulatory state agencies, created by laws. The activities delegated are supervision, ombudsman and mediation between consumers and concession holders, with purpose to streamline the respective actions. ANEEL transfer a share of the resources obtained with the Supervision fee to the state agencies.

8 The MME has the duties to draft concession plans, to establish directions for bidding procedures and to hold the bid for granting concession.

longer authorized by ANEEL, but by the Granting Power instead, supervised and regulated by ANEEL.[9]

Most of the Brazilian electric sector is *interconnected*, where its own agents operate in a coordinated manner seeking efficiency of the productive process. This coordinated operation, implemented back in the 70's, was directed by 'GCOI' (Coordinating Group for the Interconnected Operation) during a long period of time, and it is currently executed through generation dispatches, being part of the attribution of the ONS.

The Empresa de Pesquisa Energética – (EPE)[10] (an energy research company) and the Câmara de Comercialização de Energia Elétrica (CCEE)[11] (Chamber of Commercialization of Electric Energy) were created. EPE was created to be a public corporation of research and planning subordinated to MME and the studies and researches carried out by the entity will subsidize the formulation, planning and implementation of MME's actions. CCEE was created to suceed MAE[12] (extinguished by the present framework), as a private legal entity, a non-profit organization, under authorization of the Granting Power and regulation and supervision by ANEEL, with the purpose of making it feasible the commercialization of electric energy. CEEE is obligatorily composed of the sector's agents, including free consumers. ANEEL was responsible for instituting the Trading Convention that established the conditions for the trading of electric energy and CCEE's basic organization, operation and attributions, as well as the trading rules and procedures.[13]

9 Law 10,484/04 amended articles 13 and 14 of Law 9,648/98. From the 5 ONS's officers, 3 are appointed by the MME, including the President.

10 The creation of EPE was authorized by Law 10,847/2004

11 The creation of CCEE was authorized by Law 10,847/2004

12 MAE was created (Law 9,648/98) and initially based on the so-called Market Agreement (Acordo do Mercado), a multilateral adhesion agreement executed by agents of the energy sector (voluntary or obligatory participants in MAE, according to the provisions of Decree 2,655/98 and applicable ANEEL Resolutions), for processing the free purchase and sale operations of electric energy, with emphasis in the short-term operations ("spot market"). Subsequently, the creation of MAE was authorized according to Law 10,433/2002, as a private legal entity submitted to ANEEL's authorization, regulation and supervision. MAE, therefore, used to oversee the commercial and financial discipline of the purchase and sale of electric energy transactions. On the other hand, the dispatch and delivery of the contracted energy were mostly coordinated and made by the ONS.

13 The Trading Convenction was regulated by Decree 5,177/04 and ANEEL's Regulatory Resolution 109 of 10/26/04

Within MME, the Comitê de Monitoramento do Sector Elétrico – CMSE[14] (Monitoring Committee of the Energy Sector) was also created with the attribution of accompanying and evaluating on a permanent basis the continuity and safety of the electric energy supply across the country.

Finally, it shall be pointed out ELETROBRÁS – Centrais Elétricas Brasileiras S.A., a publicly traded company, with 52,45% of its stocks owned by the Brazilian Government, 12,3% by BNDESPar, 4,2% by FND and over 30% of the stocks negotiated at the Stock Exchanges of São Paulo, Madri and New York, acting like a Brazilian Government agent. It is the holding company of the energy concession holders under federal control (CHESF, FURNAS, ELETRONORTE, ELTROSUL, etc.), stockholder of Itaipu Binacional with 50% of the stocks, minority stockholder of some state companies of eletric energy under control of the States, as well as manages "funds" made up of resources provided by RGR, CCC, and CDE, and manages the purchase and sale operations of PROINFA, finances public and private eletric energy ventures and commercializes, in Brazil, the eletric energy produced by Itaipu Binacional.

17.3. The Activities and Agents of the Sector

In 1995, the traditional activities of generation, transmission and distribution and the respective concessions were re-defined so as to organize the Brazilian electrical system and to start a process of liberalization of the sector.

The basis of the model was the fostering of competition. Thus, with a view to making offer and demand more flexible, new agents have entered the sector:

(i) the electric energy Trading Agents and the Importing Agents;

(ii) a new category of producers of electric energy: the *Independent Producer*, defined as the legal entity or a consortium of corporations that receive a concession or authorization to explore electric energy for full or partial commercialization at its account and risk (*i.e.*, without the existence of a captive

14 Created by Decreet n.º 5,175/2004, the CMSE – Comitê de Monitoramento do Setor Elétrico's maind purpose is to avoid the lack of supply of the eletric energy market. Therefore, it must follow the consumer market's evolution, the development of the works programs, identifying the expert, environmental, commercial and institutional difficulties that may affect the regularity and security of the supply.

market as it happens with the concession holders of the electric energy public service and without establishing tariffs);

(iii) the so-called '*free consumers*', who may choose their supplier of energy, which group is foreseen to progressively increase along the years.

A competition takes place in the generation and commercialization activities that require a minimum level of regulation, while transmission and distribution, considered to be natural monopolies, are strictly regulated.

On 2004, the new rules have redefined the trading of energy between these agents, especially the one regarding the generation and distribution system.

According to the Federal Constitution, it has been attributed to the federal government, which holds the hydraulic energy resources, the competence to explore directly or by means of concession, permission or authorization "the electric energy services and plants and the energy utilization of the water courses".[15]

Thus, in the Brazilian energy sector, the activities of generation, transmission, distribution and commercialization are considered severally, including for purposes of granting and contracting of the relevant services.

We summarize below the rules in relation to such activities:

17.3.1. Generation

Differently from other countries, 93% of the Brazilian generation capacity is hydraulic. Generation is deemed as transformation of electric energy into any other form of energy.

The rules for granting hydroelectric and thermoelectric exploration take into account the type of exploration (rendering of public service, exploring as Indepen-

15 Art. 21, XII, "b" of the Federal Constitution.

dent Producer or as a Self-Producer[16]) as well as the capacity of the hydraulic and thermoelectric resources.

17.3.2. Transmission

Transmission is the public service transportation, in high-tension, of the electric energy produced in the generating plants to consumer centers. As Brazil predominantly has hydraulic energy resources, its plants are built where there is a hydroelectric energy potential, usually in locations far from consumer markets, for which reason the country has one of the most modern transmission networks of the world and with a high number of interconnections. Such interconnected transmission network is named Interconnected Electrical System Network ("Rede Básica do Sistema Elétrico Interligado") or National Interconnected System (Sistema Interligado Nacional – SIN). To the regions of Brazil that are not covered by the interconnected transmission lines, we give the name of Isolated Systems ("Sistemas Isolados").

It is the interconnected system that, from a structural viewpoint, permits the contracting of the supplier of energy through the assurance of free access to the agents of the sector and free consumers to the concession holders' (or permission holders') systems of the public services of transmission and distribution, against the payment of the transportation cost involved.

It should finally be pointed out that the transmission service is exploited only under the regime of public service concessions, and it is undoubtedly one of the most regulated segment of the sector.

It is important to point out that, according to Law nº 12,111, of December 9, 2009, regulated by Decree nº 7,246, of July 28, 2010, the transmission installations intended for the international interconnection, connected to the Interconnected Electrical System Network, became, after January 1, 2011, object of public service concession by means of bidding, preceded by International Treaty.

16 Law 9,074/95 and later amendments and Decree 2003/96 established the rules for the activities of the Independent Producer and of the Self-Producer of electric energy. The Self--Producers, meaning the individual or the legal entity or the consortium of corporations that receive a concession or authorization to produce electric energy for its own use and is entitled, with a specific permission, to trade on such same basis its electric energy surplus in an eventual and temporary manner.

17.3.3. Distribution

Distribution is the public service of electric energy transportation through low tension by a multi-lined network and provided from the terminals of the transmission lines (where the reduction of tension is made) to end consumers.

The agreement for concession of distribution services guarantees to distributors the supply of power to captive consumers, which are those located in their concession area. So, the so-called captive consumers are those that are not entitled to purchase from another supplier other than the local distributor. On the other hand, potentially free consumers are those who, in accordance with their load and tension (at present, consumers in a tension equal to or higher than 69 kV, with a demand higher than or equal to 3 MW), although located in the area of concession of the distributor, may choose the supply of electric energy from another supplier, freely establishing the relevant contract conditions. Free consumers are those who have exercised this option. The distributor has also the obligation to clear the access to its distribution facilities, through the reimbursement of transportation costs.

17.3.4. Commercialization

Beginning with enactment of Law 9,648/98, the commercialization has specific titles and it may be carried out separately from other activities of the sector by means of an authorization. Therefore, besides the commercialization activities developed by the producers and distributors, there are the suppliers, meaning the companies do not have physical assets, but may purchase and sale energy to free consumers and distribution companies, and carry out electric energy importation and exportation operations.

17.3.5. Unbundling

According to Law 10,848/2004, the generation concession holders and authorized parties of the interconnected system can no longer control or be associated with companies that are engaged in activities of distribution. On the other hand, distribution companies can no longer accumulate the activities of generation and transmission, and sell energy to free consumers, except to the consumer units located in their area of concession, perform activities alien to the object of the concession, as well as have direct or indirect interest in other companies, with a few exceptions. The generation and transmission activities may continue to be vertically integrated.

The above-mentioned law establishes a term in order for the companies to implement the separation of activities.

17.4. Contracting in the Energy Sector

The present model has significantly changed the rules for trading energy. It has created two environments for trading energy: the Free Trade Environment (*Ambiente de Livre Contratação* – "ALC") and the Regulated Trade Environment (*Ambiente de Contratação Regulada* – "Pool"). All the agents have to trade the energy of the interconnected system either in the ALC or in the *Pool*.

The purchase of electric energy by concession holders, permission holders and authorized entities of the public service of distribution of electric energy of the Interconnected System and the supply of electric energy to regulated market must be made in the Pool. Therefore, all energy sales to distributors must be made in the Pool and through auctions, and the distributors must fully guarantee its market through a regulated trade.

In such system, the purchase and sale is carried out by bilateral contracts called Energy Trading Contract in the Regulated Environment (*Contrato de Comercialização de Energia no Ambiente Regulado* – "CCEAR"), entered into between each concession holder or authorized party of generation and all the distribution companies. The contracts may be of the quantity of energy or of the available energy type. The distributors must offer guaranties and the contracting will be made through a bid carried out by ANEEL, which can directly hold them or through CCEE. Additionally, the supply tariffs shall be strictly regulated in such environment and must be ratified by ANEEL.

The contracts for the purchase and sale of energy executed in the Pool shall necessarily involve long-term supplies: for existing undertakings, which already hold a concession or authorization (named "old energy") term of supply of at least 3 years and up to 15 years and, for new undertakings (named "new energy"), a term of supply of at least 15 years and up to 35 years. According to the MME, this will ensure a stable flow of return to the investors and also will contribute to finance the expansion works of the sector.

The Independent Producers (both hydroelectric and thermoelectric), the Self-Producers that sell their surplus may participate in the Pool, in the ALC, or in both simultaneously. If they participate in the Pool and start to contract energy in

such environment, they shall be subject to all of its rules, whereas their activities in ALC will continue to their own account and risk.

In the ALC, the only operations to be held will be the purchase and sale of electric energy involving the concession holders and authorized agents of generation, traders, importers of electric energy and free consumers.

Trading in the ALC must be duly carried out by bilateral contracts freely negotiated by the parties, according to the rules and specific trading procedures, and CCEE will only be in charge of the registration and the liquidation of the contracts entered into therein. CCEE shall be in charge of registration of all the contracts for the sale of energy among the trading agents, generators, distributors, free consumers, including the Itaipu contract, initial contracts, among others. CCEE shall also be in charge of the liquidation of purchase of energy in the short term market (not covered by bilateral contracts), and CCEE shall set forth the price of liquidation of differences that shall be valid for these operations.

Free consumers may purchase energy only from the public service concession holders, the independent producers, the self-producers with excess energy, the suppliers, the importers and the distributors of their concession area. Therefore, the distributors were no longer permitted to sell energy to free consumers, except those located within its concession area.

It has been established that contracts registered with the CCEE do not imply the actual delivery of electric energy and that the energy sales by any sector's agent must be guaranteed by its own generation or by energy purchase and sale agreements. In the new model, any controversies among CCEE's participants shall be resolved by arbitration.

In the present model, the concessions and authorizations for generation expansion are obtained through auctions carried out by MME (except for the small facilities). In these auctions the full sale (or almost all of it) of the energy to be produced is ensured.

By the enactment of Law nº 12,111/2009, the purchase of energy by the distributors of Isolated Systems became to be necessarily preceded by auction, as it already happens in the National Interconnected System – SIN.

17.4.1. Transmission and Distribution

Taking the transmission and distribution activities separately, mention should now be made to the specific contracts.

As regards transmission, the lines comprising the Interconnected Electrical System Network are made available to ONS by the transmission concession holders through Contracts of Provision of Transmission Services, and ONS then enters with the respective interested parties into Contracts For Use of Transmission Systems as the representative of such concession holders. The other transmission installations that do not comprise the Basic Network are available directly to the users by the transmission concession holders and the respective contracts are entered into with ONS' intervention. In both cases, it is still necessary to execute the Connection Contract with the respective transmission concession holder to establish the responsibility for the implementation, operation e maintenance of the connection installations.

As to the distribution segment, the Contract for Use of Distribution System (CUSD) and the Contract for Connection to the Distribution System (CCD) must be executed with the local distribution concession or permission holder. ANEEL fixes the tariffs for the use of the transmission installations and the tariffs for the use of the electric energy distribution systems, according to the applicable resolutions.

It must be pointed out that one of the great achievements of the former model, held by the present model, was the guarantee of free access of the agents of the sector to the transmission and distribution lines and the establishment of rules for this access.

17.5. Planning

The sector's activities' planning and controlling is one of the foundations of the present model. EPE will carry out studies and researches that will subsidize the formulation, planning and implementation of MME's actions for a national energy policy.

The MME shall establish the list of the new enterprises that may be subject to bid and shall confirm the amount of electric energy to be contracted for meeting all the needs of the national market, as well as the list of new generation enterprises that will be part of the bid process for contracting energy.

On the other hand, now the energy generation and distribution companies, the traders and the free consumers have the duty to inform MME on the amount of energy to meet the needs of its market or its load.

17.6. Conclusion

The present framework was created by the Government as the institutional arrangement necessary to accomplish the following main objectives: (1) lower tariffs; (ii) increased quality of services; (iii) assurance of continuous supply; (iv) just return to investors as an incentive to service expansion; and (v) universalization of access.

With scarce public funds, attracting private investments to the sector shall be one of the challenges for the present model, in order to ensure the economic and social development of the country.

THE REGULATION OF FINANCIAL INSTITUTIONS AND LEASING IN BRAZIL

Chapter 18

18.1. Financial Institutions

The legal basis for the regulation of the Brazilian financial and banking sector is contained in Article 192 of the Federal Constitution, in the law governing financial institutions (Law No. 4,595 of December 31st, 1964), and related legislation (such as Law No. 4,728 of July 14, 1965, which regulates the capital market and establishes measures for its development, Law No. 6,385 of December 7, 1976, which provides for the securities market and establishes the Securities Commission (CVM) and Law No. 4,131 of September 3rd, 1962, which regulates foreign investment in Brazil and remittance of funds abroad). In addition to the mentioned laws, it is to be noted that monetary authorities issue normative rules such as the Resolutions of the National Monetary

Council (CMN) and the Circulars and Circular-Letters of the Central Bank of Brasil (BACEN).

The national financial system is composed of CMN, BACEN, Banco do Brasil S.A., Banco Nacional do Desenvolvimento Econômico e Social (BNDES), and other private and public financial institutions. Among these institutions, CMN is the highest monetary authority, responsible for the establishment of monetary and credit policies, including matters relating to foreign exchange, and the regulation of the operations of financial institutions in general.

BACEN, in its turn, is responsible for complying and causing compliance with normative rules issued by CMN as well as implementing obligations contained in law, such as: exercise credit control in all its forms, control foreign capital, carry out rediscount and loan transactions to banking financial institutions, act as depository for the government's gold and foreign currency reserves and special drawing rights, supervise all financial institutions, impose all penalties prescribed by law, issue operation licenses to financial institutions and establish conditions for the instatement into office and exercise of management positions in private financial institutions.

18.2. Main Financial Institutions

18.2.1. Public Sector

In Brazil, the Federal and State Governments control some commercial banks and financial institutions, which main purpose is to foster economic development, especially in the agriculture and industry sectors. In addition to performing commercial banking activities, state development banks also act as independent regional development agencies.

The banks controlled by the Brazilian government include Banco do Brasil, BNDES, as well as other public sector development, commercial and multiple service banks. Banco do Brasil, controlled by the Federal Government, provides a full range of banking products to both public and private sectors and it is the largest commercial bank in Brazil. BNDES, a development bank controlled by the Federal Government, is primarily engaged in the provision of medium and long-term financing, being the main agent for the Federal Government investment policies.

The financing is provided to the private sector, mainly to industrial activities, either directly or through other public and private financial institutions. Other public sector development, commercial and multiple service banks include Banco da Amazônia and Banco do Nordeste do Brasil S.A., as well as commercial and multiple service banks controlled by State Governments.

18.2.2. Private Sector

The private financial sector includes commercial banks, multiple-service banks, investment, finance and credit companies, investment banks, brokerage firms, credit cooperatives, leasing companies, insurance companies, and other entities. In Brazil, the largest participants of the financial market are financial conglomerates involved in commercial banking, investment banking, financing, leasing, securities dealing, brokerage, and insurance activities. There are different types of private-sector financial institutions in Brazil, which includes the following:

(a) Multiple-Service Banks: private or public financial institutions that carry out banking and ancillary transactions through the following portfolios: commercial, investment and/or development, real estate credit, leasing and credit, financing and investment. Such transactions are regulated by the same laws and regulations applicable to the institutions related to each of these portfolios (the development portfolio may only be transacted by a public bank). The Multiple-Service Bank must be composed of at least two portfolios, one necessarily being a commercial or investment portfolio, and organized as a Brazilian corporation (*sociedade anônima*). The institutions with commercial portfolios may raise funds by means of at sight deposits. The corporate name of multiple-service banks shall include the expression "Bank" (CMN Resolution No. 2,099, of August 17, 1994).

(b) Commercial Banks: private or public financial institutions primarily engaged in funding (at short and medium terms) the commerce, industry, service supplier companies, individuals and third parties in general. The raising of funds by means of at sight deposits – freely transferable – is the typical activity of commercial banks which may also raise funds through time deposits and other means permitted under current regulations. Commercial banks shall be organized as a Brazilian corporation and their corporate name shall include the expression "Bank" (CMN Resolution No. 2,099/94).

(c) Investment Banks: private banks specialized in temporary equity interest transactions and production financing providing fixed and working capital and management of third parties assets. These banks do not offer bank accounts and raise their funds by means of time deposits, on-lending of national or foreign funds and sale of participation (*quotas*) in funds managed by them. The main operations are funding of working capital and fixed capital, subscription or acquisition of securities, interbank deposits and on-lending of foreign loans. Investment banks shall be organized as a Brazilian corporation and include the expression "Investment Bank" in their corporate name, pursuant to CMN Resolution No. 2.624, of July 29, 1999.

18.3. Main Requirements for the Functioning of Financial Institutions in Brazil

In accordance with the provisions of Law No. 4,595/64 and further applicable rules, the operation of financial institutions in Brazil shall observe, among others, the following requirements:

(a) Financial institutions must obtain the prior approval of BACEN and, in case of foreign entities, a further approval from the Executive Branch by means of a Decree.

(b) Except for the investment financial institutions, private financial institutions may only hold interest in the equity of another company upon the prior authorization of BACEN. The application for such authorization must include the reasons to justify such request, and the authorization shall be expressly granted by BACEN, except in case of underwriting guarantees pursuant to the general conditions established by CMN.

(c) Financial institutions may only own real estate if they occupy such property and use them for the development of their activities. If a real estate is received in satisfaction of a debt, the financial institution must dispose of such real property within one year, extendable for additional two identical periods at BACEN's discretion.

(d) The financial institutions must observe, as a rule, an exposure limit per client of 25% of its Reference Equity in credit and leasing transactions, as well as

in the rendering of guarantees, including in relation to credits arising from transactions with derivatives (CMN resolution No. 2,844, of July 29, 2001).

(e) Financial institutions shall not grant loans to any company which holds more than 10% of their share capital, except in certain exceptional circumstances, limited and subject to the prior approval of BACEN.

(f) Financial institutions shall not grant loans to any company in which they hold more than 10% of the share capital, except in the case of acquisition of debt securities issued by their leasing subsidiaries.

(g) Financial institutions shall not grant loans to their executive officers, members of the management or advisory boards, statutory audit committees or other bodies similar thereto, or to their respective spouses or relatives up to the 2nd degree.

18.4. Minimum Standards for Capitalization of Financial Institutions

CMN Resolution No. 2,099, of August 17, 1994 (as amended), adjusted with some modifications the Brazilian banking regulations to the risk-weighted capital adequacy rules of the Basel Accord. At the same time, CMN Resolution No. 2,099/94 established minimum capital requirements for financial institutions, based on their relevant activities. Supervening regulations established more rigorous solvency rules which, in general, established more restrictive criteria than the provisions of the Basel Accord. The following minimum capitalization indexes were established by CMN Resolution No. 2,099/94:

I. Seventeen million, five hundred thousand reais (R$ 17,500,000.00): commercial banks and commercial portfolio of multiple-service banks;

II. Twelve million, five hundred thousand reais (R$ 12,500,000.00): investment banks, development banks, and corresponding multiple-service bank portfolios and saving banks (*caixa econômica*);

III. Seven million reais (R$ 7,000,000.00): credit, financing and investment companies, real estate credit companies; leasing companies and corresponding multiple--service banks portfolios;

IV. Four million reais (R$ 4,000,000.00): foster agencies;

V. Three million reais (R$ 3,000,000.00): mortgage companies;

VI. One million five hundred thousand reais (R$ 1,500,000.00): securities brokerage companies and securities dealership companies, that manage investment funds of the types regulated by BACEN – except for investment funds in quotas of investment funds – or investment companies authorized to carry out matched transactions, as well as firm commitment underwriting of securities for resale, margin account and/or swap transactions through assumption of any rights and liabilities with counterparties;

VII. Five hundred and fifty thousand reais (R$ 550,000.00): securities brokerage companies and dealership companies engaged in activities not mentioned in the previous item;

VIII. Three hundred and fifty thousand reais (R$ 350,000.00): foreign exchange brokerage companies; and

IX. Two hundred thousand reais (R$ 200,000.00): institutions providing credits for small business owners and small enterprises.

As for institutions with branch, principal place of business or headquarters, and at least ninety percent (90%) of its operating establishments located outside of the States of Rio de Janeiro and/or São Paulo, the levels of the paid-up capital and net equity required shall be reduced by thirty percent (30%), except for foster agencies and institutions providing credits for small business owners and small enterprises.

In order to carry out transactions in the foreign exchange market, the amounts of the paid-up capital and net equity of commercial banks, multiple-service banks, investment banks and foster agencies by six million and five hundred thousand reais (R$ 6,500,000.00).

Besides the minimum capital and net equity requirement, financial institutions shall maintain an amount of adjusted net equity compatible with the degree of risk in its asset structure, in accordance with the classification of risks established in CMN Resolution No. 2.099/94.

CMN Resolution No. 3,398, of August 29, 2006 states that, in the event of non-compliance with the minimum capital requirements and operating limits, BACEN shall convene the legal representatives of the financial institution and, if necessary, their controlling partners, to report on the measures that shall be adopted in order to fix the situation. The financial institution must submit for BACEN's approval, a settlement plan containing the adjustment measures that shall be adopted and timetable for implementation, which shall not exceed six months, renewable at BACEN's discretion for additional two identical periods.

18.5. Foreign Investment in Brazilian Financial Institutions

Article 52 of the Act of Transitory Dispositions of the Federal Constitution establishes that the incorporation of new branches of financial institutions headquartered abroad and the increase in the equity interest of Brazilian financial institutions by individuals or entities residing or domiciled abroad is possible only when such investment results from an international treaty, from reciprocity or from the interest of the federal government. Such foreign investments are subject to registration with BACEN, in the same manner as applying to foreign investments in other sectors of the economy, according to Law No. 4,131/62.

It must be noted that foreign financial institutions may only be established in Brazil by means of a Decree of the Executive Branch and will be subject to the same prohibitions or equivalent restrictions applicable to Brazilian banks established (or which intend to be installed) in the country of origin of such foreign financial institution.

18.6. Leasing

Leasing transactions are governed by Law No. 6,099 of September 12, 1974, as amended, and CMN Resolution No. 2,309, of August 28, 1996

Brazilian leasing companies. Only leasing companies authorized to operate by BACEN may perform leasing transactions and enter into leasing agreements in the Brazilian market. The regulations as to foreign investments in leasing companies are the same as those already described for financial institutions in general.

In order to be authorized to perform leasing transactions, a company must be organized as a corporation (*sociedade anônima*). The company must meet minimum

capital requirements determined by CMN. The activities of leasing companies are restricted to leasing, and its corporate name shall necessarily include the expression "*Arrendamento mercantil*" (leasing).

The minimum term established in law for financial leasing transactions in Brazil vary from two to three years, depending on the useful life of the asset. Consideration for lease transactions and other lease payments must be stipulated in Brazilian currency and may de adjusted according to floating interest rates, or as per the variation of internal market funding costs, or in US dollars, or another currency, in the case of operations with funding originating abroad.

The aforementioned regulations regarding minimum term and adjustments to lease consideration and other lease payments do not apply to operating lease agreements and other rental agreements. Operating lease transactions are exclusive for multiple-service banks with a leasing portfolio and leasing companies, and are governed by CMN Resolution No. 2,309/96. Rental agreements are governed by the Brazilian Civil Code.

International Leasing. The cross-border leasing transactions, both financial and operating, are currently governed by BACEN Resolution No. 3,844, of March 24, 2010, and BACEN Circular No. 3,491, of March 24, 2010. Such regulations establish that (i) a cross-border financial leasing transaction between a lessor domiciled abroad and a leaseholder in Brazil, that have a payment term longer than 360 days, and (ii) a cross-border operating leasing transaction between a person or legal entity resident, domiciled or headquartered abroad and a person or legal entity resident, domiciled or headquartered in Brazil, with a term longer than 360 days, are subject to the registration before BACEN.

Contracts for financial or operating cross-border leases may provide for capital assets, real property and assets, new or secondhand, owned by foreigners, observing the current rules then applicable to import of goods into Brazil.

For purposes of registration at BACEN, cross-border operating leases shall comply with the following rules: (i) the lease payment shall consider the leasing cost of the asset/good and associated services necessarily to make it available to the leaseholder, and the aggregate total amount of the lease payments cannot exceed 90% of the price of the asset/good; (ii) the contractual term shall be no longer than 75% of the

useful life of the asset/good; (iii) the price for exercising the purchase option shall be equivalent to the market price of the asset/good; and (iv) the contract cannot provide for the payment of a guaranteed residual value.

With regard to cross-border financial leases, the following rules shall apply: (i) the total term of the transaction shall be limited to the useful life of the asset/good; (ii) the consideration shall be compatible with the international market prices; (iii) the fixed payment installments shall be distributed in the contractual term as to guarantee that the proportion between the amount already paid abroad and the total amount of the lease payments does not exceed the proportion between the elapsed term and the total term of the transaction; and (iv) the contract shall contain a clause providing for the purchase option or the renewal of the contractual term.

In accordance with BACEN Resolution No. 3,844/2010 and BACEN Circular No. 3,491/2010, for purposes of registration of i cross-border leasing transactions with BACEN, the useful life of an asset/good shall be that informed, as the case may be: (i) by the manufacturer, with regard to new assets/goods; (ii) by the manufacturer or specialized organization, Brazilian or foreign, in the case of used assets/goods; or (iii) by specialized company, with regard to real property.

INTERNET AND ELECTRONIC COMMERCE

Chapter 19

19.1. Internet

The Brazilian Internet Steering Committee (*Comitê Gestor da Internet no Brasil*) – CGI.br was created in 1995 by the Inter-Ministerial Ordinance (*Portaria Interministerial*) 147 of the Ministry of Communication and of the Ministry of Science and Technology. In its inception, CGI.br had as its main assignments:

- monitor the availability of Internet services in the country;
- coordinate the allocation of IP (Internet Protocol) addresses and the registration of domain names; and
- establish strategic, technical and operational recommendations for the Internet in Brazil.

In 2003, Presidential Decree 4,829 modified CGI.br's assignments and created new rules of operation for the Committee. Following

this legislative change, the main roles and responsibilities of CGI.br became the following:

I. establish strategic directives related to the use and development of the Internet in Brazil;

II. establish guidelines for the organization and management of Domain Name registration and allocation of IP addresses;

III. sponsor studies, propose research and development programs related to the Internet and recommend procedures, technical and operational standards for network security and Internet services;

IV. coordinate actions related to policy and procedure proposals to regulate Internet activities.

In order to carry out its activities, CGI.br created a civil, not for profit entity called "Information and Coordination Center Dot BR" (*Núcleo de Informação e Coordenação do Ponto BR*) – NIC.br. The creation of this legal entity gave CGI.br greater autonomy, facilitating the implementation of its activities, such as the collection of fees for domain name registrations.

Currently, the Civil Regulatory Mark (*Marco Civil*) is the main legislative initiative in Brazil regarding the Internet. The *Marco Civil* seeks to establish rights and obligations of users, service providers, portals and other Internet players. The principles of this initiative are:

- the preservation of records and other connection data to enable tracking of criminal acts committed on the Internet;
- network neutrality;
- the privacy of user data;
- the liability for acts practiced online and content published on the Internet.

19.2. Domain Name

The domain name is used to identify and locate computers on the Internet. The domain name registration in Brazil is carried out by NIC.br, by delegation of CGI.

br (CGI.br Resolution 01/05). The registration of domain names is governed by the provisions of CGI.br Resolution 08/08.

The above mentioned resolutions provide that the right to the domain name is given to the first to file the request (provided legal requirements are met). Domain names that use profanity or names reserved or belonging to or held by the CGI.br NIC.br, or those likely to mislead or induce third parties to error, such as widely-known (*marca de alto renome*) or well-known marks (*marcas notoriamente conhecidas*) (except when required by the holder) are not subject to registration.

The domain name must not infringe third party intellectual property rights. Thus, the holder of a particular trademark registered with the National Institute of Industrial Property (INPI) may oppose its use as a domain name by third parties. Unlike the trademark registration with the INPI, the registration of domain names with NIC.br does not have a constitutive nature. It is only a managerial registration, aiming to avoid duplicate names and to enable the technical procedures that make the Internet address accessible.

The domain name registration may be canceled, among other situations, for breach of the CGI.br rules, breach by foreign companies of the commitment to establish its business in Brazil within twelve months from the date of a statement to this end made to CGI.br, or by court order (article 9, CGI.br Resolution 08/08). Domain names have been the subject of several lawsuits, most of which claiming the cancellation, suspension or transfer of the domain name to the complainant, as well as restraining the defendant from using such domain name.

Brazil is implementing an administrative mechanism to resolve disputes related to domain names ".br", called the Administrative System of Conflicts of Internet (*Sistema Administrativo de Conflitos de Internet*) or SACI-Adm. The purpose of the system is to solve disputes between the holder of a domain name ".br" and any third party who disputes the legitimacy of that registration. The SACI-Adm's scope is limited to determine whether the registration status is maintained, transferred or canceled. The holder of the domain name accepts to submit a dispute to the SACI-Adm through the contract governing the registration of domain names ".br".

19.3. Intellectual Property

The provisions of the Brazilian Copyright Law (Law no. 9.610, of Feb19, 1998) and of the Brazilian Software Law (Law no. 9.609, of Feb 19, 1998) apply to works of authorship comprised in the electronic commerce environment (texts, sounds, drawing, photographs, computer programs, etc). At least four types of intellectual property work may be found in the media currently used for electronic commerce: (i) computer programs, (ii) multimedia works, (iii) websites, and (iv) electronic data base.

Computer programs enjoy the protection granted by the Software Law and by the Copyright Law. Multimedia work, which encompasses several forms of expression, enjoys the protection granted by the Copyright Law, through the provisions related to each of its forms of expression. The website is also granted protection by said Law, to the extent that the Law will protect each work of authorship incorporated therein (graphic expressions, sounds, computer programs, etc.). Electronic databases are granted protection by the Copyright Law where, by virtue of the disposition, selection or format of its contents, it constitutes a work of authorship; protection is not granted to a database where such requirements are not met. Issues on whether extra protection is needed for covering other forms of creative work incorporated in the website (e.g, structure and business methods), as well as for the contents of a database (data considered *per se*), have been the subject of discussion of specialists, and still lack adequate legal support in Brazil.

19.4. General Aspects of Electronic Commerce

Electronic commerce is the purchase and sale of products or the rendering of services on a cybernetic environment. It refers to electronic information exchanged among three basic groups of participants: businesses, governments and individuals.

M-Commerce and T-Commerce stand among the most recent forms of electronic commerce. M-Commerce relates to commercial operations performed through mobile devices (cellular phones, palmtops, among others) and T-Commerce is equal to e-Commerce through digital television connected to the web, working as a communication device for the buying and selling of any product, by touch of a remote control.

Electronic commerce in Brazil shows signs of developments and, as a result of its development, in May 2001 a "Brazilian Electronic Commerce Chamber" ("Câmara Brasileira de Comércio Eletrônico") was created, aiming at the promotion, representation and defense of the collective rights of companies, entities and associates involved in trade activities and electronic transactions.

Following this trend, the governmental services dealing with information technology have also grown in importance in the political scenario, especially regarding investments and planning. In October 2000, the "Electronic Commerce Executive Committee" was created with the purpose of drawing up guidelines, and coordinating and promoting activities for the implementation of "Electronic Government", to render services and provide information to citizens.

Electronic government service (e-Gov) is an electronic tool used in the government–government (G2G), government-business (G2B), and government-citizens (G2C) relationship, which brings important changes on the way government and society relate. It demands investments in technological infrastructure so as to provide the minimum necessary security to guarantee to citizens the right to privacy and transparency of their Government. Examples of online programs offered in said sites are: federal electronic bids, the public bids, the "Government Network", "Portal Minas", "Electronic Auction" and "Comprasnet", among other services rendered by State and Municipal governments.

19.5. Legal Aspects of Electronic Commerce

Currently, there is no statute in Brazil dealing specifically with e-commerce. Experts and Government are presently discussing whether the matter will require legislation to a major or a minor extent. They agree, however, on the necessity to adopt specific legislation for the sake of legal certainty to businesses carried out in the virtual world.

At the present, some bills are being reviewed in the Brazilian Congress which deal with electronic commerce, such as: no. 1.589/99 (that it will be discussed jointly with Bill n. 1483/99), n. 6.965/02 and n. 7.093/02 (that will be discussed joinlywiht Bill n. 4.906/01) and no. 3.303/00 (that it will be discussed jointly with Bill n. 3016/2000), of the House of Representatives, and the Bill no. 672/99 and no. 4.906/01, of the Senate.

Bill no. 1.589/99, prepared by the Special Committee on Computer Law of the Brazilian Bar Association – São Paulo branch, is inspired on the proposal for a Directive of the European Community (today enacted under no. 1999/93/CE) as well as on the suggested provisions set out in the Model Law on Electronic Commerce (1996) of the United Nations Commission on International Trade Law – UNCITRAL. Bill no. 1.589/99, in short, addresses the following topics: (i) ruling out the need of special prior authorization for the offer of goods or services in the electronic environment; (ii) requirement of proper identification of the offeror, the host, the access provider and the security systems used for recording the electronic agreement; (iii) rules of utilization of private information; (iv) security and certification in transactions; (v) liability of the intermediary, carriers and hosts of information; (vi) applicability of consumer protection laws to consumers; (vii) legal effect of electronic signatures and electronic documents; (viii) publicly-issued and privately-issued electronic certificates; (ix) liability of notaries public in connection with electronic certification; (x) electronic records; (xi) powers of the Court system to authorize, regulate and supervise the practice of the certification business; (xii) powers of the Ministry of Science and Technology to regulate the technical features of certifications; (xiii) administrative and criminal penalties.

Bill no. 3.303/00 regulates the national operation and use of the internet, addressing the following new rules, among others: (i) classification of the service provider as a seller of value added service to the telecommunications service (ii) creation of security mechanisms, users database before the services providers, and proper means to identify illegal activities on the internet; (iii) registration and coordination of domain names by the Brazil Internet Managing Committee ("Comitê Gestor da Internet do Brasil"); and (iv) creation of the Internet Ethics Council ("Conselho de Ética da Internet").

Bill no. 672/99 was presented just a few months after Bill no. 1.589/99 and features nearly all of the provisions of the mentioned UNICITRAL Model Law. More concise than the other, it deals with the following points: (i) granting legal effect to data messages; (ii) equalizing an electronic message to a printed message; (iii) equalizing electronic authentication methods to a signature; (iv) authentication of information in the electronic environment; (v) obligations related to retaining electronic messages; (vi) lawfulness of binding statements and contracts made by electronic messages; (vii) principles applicable to identifying the sender and the addressee, and to determining the time and place of messages.

Finally, Bill no. 4.906/01 rules electronic commerce within Brazilian territory, pointing out the necessity to standardize the rules related to the electronic commerce in an international level, setting out provisions for application of legal requirements to electronic messages and communication of electronic messages, including the execution and validity of contracts executed on a virtual environment.

19.6. Brazilian laws on virtual transactions

Considering the lack of specific legislation addressing the legal issues arising out of virtual transactions, electronic commerce shall be governed by the existing rules of law applicable to brick-and-mortar businesses and practices in the country, either by direct application or by resorting to analogy. The relevant parts of the Brazilian Law for the Introduction of the Civil Code also apply, in view of the international nature of electronic commerce.

19.6.1. Rules applicable to contract formation

Just as any other legally binding promise – the enforceability of which requires but a party capable of entering into a legal obligation, a lawful object and a format which is prescribed or not barred by law –, legal obligations carried out in the electronic environment may be regarded as valid where such requirements are met, in the light of the Brazilian Civil Code.

In this sense, the electronic contracting between present parties shall be considered executed when offer and acceptance are effected immediately (online), applying, in this case, article 428, I, of the new Civil Code/2002. On its turn, electronic contracting between absent parties shall occur when offer and acceptance are sent by email and parties are not connected online, applying, in this case, article 434 of the new Civil Code.

19.6.2. Governing Law and jurisdiction

Article 435 of the new Brazilian Civil Code establishes that the contract shall be deemed entered into at the place where the offer has been presented. Brazilian Law on the Introduction to the Civil Code states, in its article 9, that obligations arising out of a contract shall be governed by the laws of the country in which they were entered, and also that said obligations shall be deemed entered into

in the offeror place of residence. Thus, an electronic commercial agreement between parties located in different countries shall be ruled according to the laws of the country of residence of offeror. In other words, if an offer is made by a company or a person resident abroad, and is accepted by a company or a person resident in Brazil, the governing law shall be that of the foreign country and, conversely, if the offer is made by a company or a person resident in Brazil, and is accepted by a company or person resident abroad, the governing law shall be the Brazilian law.

The matter of jurisdiction competent to resolve conflicts arising out of electronic contracts has not been addressed by a statutory law in Brazil. The absence of borders and physical references on the internet makes it difficult to identify the competent court. Bill no. 672/99 adopts the basic provisions of the UNCITRAL Model Law, which, regarding jurisdiction, states that the place of remittance or receipt of an electronic message shall be deemed the parties physical location, unless (i) the addresser and the addressee do not have a physical location where, for purposes of jurisdiction, their usual residence shall be considered, or (ii) the contracting parties have more than one address, in which case the place most related with the transaction shall be considered.

The general international jurisdiction of Brazilian courts, where the contract is entered into by parties located in different countries, is governed by articles 88, 89 and 90 of the Code of Civil Procedure, which states that the Brazilian courts shall be competent when: (i) the plaintiff, regardless of its nationality, is domiciled in Brazil, (ii) the obligation is to be performed in Brazil, and (iii) the lawsuit arises in connection with a fact occurred or an act performed in Brazil.

Thus, in electronic contracts executed between two companies located in different countries, where offeror has headquarters in a foreign country and does not have offices or branches in Brazil, the governing law shall be that of the foreign country. If, however, the obligation arising out of the contract is to be performed in Brazil, Brazilian courts shall be competent to adjudicate the dispute.

19.6.3. Rules applicable to documentary evidence

According to the Brazilian Code of Civil Procedure, all morally and legally acceptable means may be used to prove the truth of facts.

The new Civil Code/2002 establishes, in article 225, that any electronic reproduction of facts or things is able to make proof of them, provided that the other party does not claim a lack of accuracy. Therefore, should the other party dispute the electronic evidence, expert examination of said evidence shall be required. However, matters related to the possibility of alteration of content of electronic documents and the uncertainty about its authorship remain without specific legal ruling.

19.6.4. Rules applicable to the responsibility of suppliers of goods or services

Liability in connection with goods and services sold through electronic means is subject to the same rules applicable to other methods of commerce.

In particular, where they are sold to consumers, the respective electronic transactions will be subject to the rules of the Code of Protection and Defense of Consumers – Law no. 8.078/90. The code is applicable where the matter at issue is a consumer transaction, which is determined by the presence of the so considered consumer (individual or legal entity that acquires products or services as end user) and of the supplier of goods or services (individual, legal entity or unincorporated entity, whether national or foreign, that conducts business of, for instance, manufacturing, assembly, creation, construction, transformation, import, export, distribution or commerce of products, or performs services) in a business transaction.

The provisions of the Code of Protection and Defense of Consumers apply to consumer transactions over the Internet, especially in connection with: (i) the right to information about the seller and the features of the offered good or service; (ii) protection against unfair business practices and misleading advertising; (iii) database and records of consumers; (iv) the right to repudiation, and (v) the binding nature of the offer.

The provisions of the Code of Protection and Defense of Consumers are not applied to business-to-business transactions, whether effected through the internet or by electronic mail (electronic data interchange), once the company is not considered the end consumer.

Article 9, 2nd paragraph , of the Brazilian Law on the Introduction to the Civil Code, establishing that obligations arising out of or in connection with the contract

shall be deemed arisen in the place where the offeror resides, applies to cross-border consumer transactions. Therefore, should the offeror company be domiciled abroad, and have no branches or offices in Brazil, the consumer will not be entitled to protection of the Brazilian Code of Protection and Defense of Consumers, where the governing law shall be that of the offeror´s country.

It should be pointed out that there is some controversy on the matter, as there are cases on international consumer transactions, according to which, where the supplier has a branch in Brazil, claims based on the Brazilian Code of Consumer Protection may be filed against said branch, in view of the joint and several liability applied to consumer transactions.

19.6.5. Spam

Sending undesirable e-mails is forbidden by the Brazilian Code of Protection and Defense of Consumers, as it establishes that the supplier may only deliver or send products upon prior consumer´s request. Suppliers which send spams are subject to penalties according to articles 6t V, and 84, of the Brazilian Code of Protection and Defense of Consumers. Presently, some "spam" related bills are under discussion by the Brazilian Congress: Bill n. 21/04 e o n. 36/04 (that it will be discussed jointly with Bill 367/03), Bill 2766/03 and 757/03 (about 'sending spam by cell telephone') and Bill n. 2186/03 (that it will be discussed jointly with Bills of Law n. 1483/99, 2423/00, 3731/04, 3872/04 and 2423/03).

19.7. Tax legislation related to electronic commerce

Electronic commerce implies a variety of transactions with repercussions on taxation, a matter of worldwide concern.

Taxation on the supply of goods through electronic commerce consists of Tax on Sales and Services (ICMS), even where the products are imported, as established by article 155, paragraph 2, IX, of Brazilian Federal Constitution.

As to the services of internet access, there is controversy as to which tax shall apply – whether ICMS, or ISSQN, or neither of them – case law being that ICMS does not apply on internet access services, which are not considered a communication service (Brazilian Supreme Court, RE nº 456.650/PR,

6/24/2003[1]). Such matter is relevant due to tax rate differences, of up to 20%, since the ICMS rate for electronic transactions can reach 25%, while the ISSQN maximum rate is of 5%.

Brazilian Federal Constitution grants to Municipalities the competence to create taxes on certain services (ISSQN) not considered within the scope of ICMS. However, the internet access services were not included in the list annexed to Complementary Law no. 116/03, which define the services subject to ISSQN. Therefore, besides not being taxed by ICMS, the internet access services are not deemed taxable events for purposes of ISSQN, once they are not within said lists.

It should be pointed out, however, that Bill nº 3.303features the classification of internet providers as service providers, as defined in the Brazilian Code of Protection and Defense of Consumers.

19.8. Electronic documents as probative material in court

The purpose of the present paper is to briefly evaluate the citizen's ability to use technological developments to demonstrate facts in court. Does the constitutional principle of Right to Defense allow the party to use the newly created contractual techniques deriving from telematics? The answer to this question shall be the main concern of this paper.

19.8.1. General Theory of Proof

The proof is the means used by litigators to convince the judges of a certain fact in his or her favor, in the course of a court dispute. Most of the litigation cases require decision on questions of fact. As a rule the judge's access to such facts depends on evidence. At least on a theoretical level, the probability to reach a fair decision is proportional to the availability of probative mechanisms.

1 This was confirmed by subsequent decisions (MC 10388/SP, Ministry Luiz Fux, DJ 20/02/06, Resp 736607/PR, Ministry Francisco Falcão, j. 25/10/2005; Resp 511390/MG, Ministry Luiz Fux, j. 19/05/2005).

The final addressee of the evidence is the judge. The decision must be made in accordance with the evidence presented in the process (art. 128 of the Brazilian Code of Civil Procedure). The judge shall decide according to the "formal truth" principle and not the "real truth". The purpose of this rule is to avoid arbitrary decisions.

During the probative phase of the procedure, the judge's action must be extremely careful and seek broad access to every means necessary to a clear and grounded analysis and formation of his decision. The Brazilian Constitution might be invoked, should the judge deny the litigator's right to produce evidence (art. 5, LV). The judge, based on legal criteria (rational persuasion), is supposed to reconstruct the facts discussed, in order to qualify the manner of their witnessing. The judge is free to analyze facts. However, such liberty does not mean that the judge may act arbitrarily.

With regard to the means of evidence, the Brazilian legal system does not present a limited number of allowed evidence, but admits *"all legal means, as well as those morally acceptable, even if not particularly specified in this Code"* (Art. 332 of Brazilian Code of Civil Procedure). Brazilian regulations accept even the so-called "non-typical" or "nameless" evidence. It does, however, repudiate the "illegitimate" evidence, i.e., illegally produced or contrary to the law.

The documentary proof is defined as the thing it represents, reproducing a certain expressed idea or a past event. As ideas and events are both regarded as "fact" in court, a document is the representation of a fact. As a representative thing, the document does not exist in the natural state – it is formed necessarily from its author's action, and therefore takes a certain material form or means.

Documents may be written or not, may be public or private. They can also be grouped according to their origin, authenticity, means of formation (direct or indirect; written or graphic), content (descriptive or constitutive) and form (formal or not), etc. A document is deemed to be "ad solemnitatem" whenever its form is of the essence of the act, and "ad probationem" when it works as a mere evidence of the act or of its effects. Public documents, provided that they are signed by public officials (to whose acts faith is given), are assumed authentic (*juris tantum*), unless their falsity is proven.

As far as private documents are concerned, it is controversial whether they are fully enforceable, due to the diversity of forms in which they appear. For instan-

ce, for a private document written and signed or merely signed, the law assumes that the representations it contains are true. However, if its signature is questioned in court this assumption must be removed (art. 388, I of Brazilian Code of Civil Procedure), until the interested party proves its authenticity. Litigators may argue the falsity of a public or private document, with the purpose to have it judicially declared. The private document may be written by the party who signed it or by others. Occasionally the document is not signed. Traditional legal authors regard the signatory as the writer of the document. The signature is not required only in documents which, by nature, are not normally signed, such as commercial books.

A number of questions about "electronic documents" and their enforceability as evidence arise from this analysis. The use of electronic means in the constitution of legal acts represents the progressive replacement of handwritten signatures by electronic pulses or transmissions. The author's signature does not necessarily follow the document. It is replaced by codes or confidential passwords.

19.8.2. Electronic documents among types of documentary evidence

The traditional concept of documentary proof has to give room to a new form of expression, which is neither oral nor written, but digital[2]. A document stands for a declaration, a representation of a present or past event. Digital documents are not different, except with regard to the form of perception by the viewer/addressee, which is not immediate. In other words: for the representation to become understandable, it is necessary to resort to an electronic device, an intermediary that allows the analyst to understand the declaration contained in the document.[3] Within the wide range of documents, the electronic one ranks among the indirectly representative documents. A digital document is therefore any object which is able to transmit the representation of a present or past event, by means of interaction with an electronic device[4].

2 Graziosi, Andrea, "Premesse ad una teoria probatoria del documento informático", in Rivista Trimestrale di Diritto e Procedura Civile, Anno LII, n. 2, jun/98, Milano, Giuffrè, p. 487.
3 Graziosi, Andrea, op. cit., p. 491.
4 Graziosi, Andrea, op. cit., pp. 491 and 492.

19.8.3. Representative Support

The content of an electronic document is dependent on a representative support, i.e., an object bearing the digital declaration (floppy disk, magnetic tape, compact disk, etc.). The representative support is a subject related to the legal requirements of preservation of documents.

In principle, some legal authors considered the magnetic support (representative support) to be the original of the document[5], and not the information it contained on a digital form. This position seems to be overcome by new concepts, according to which the support is a mere means of preservation of the document, whose essence lies on its content.

In the 80s[6], some Western European countries such as Belgium and France, deemed as a copy the transcription or the printing on paper of the content of the electronic document. Notwithstanding, this did not mean that the copies (seen here as the printed content of an electronic document on a paper support) could not be used in court. A better interpretation of the French regulations points out that the use of a "faithful and reliable copy" is allowed, provided that the original is lost or not recoverable (art. 1.348, "a", French Civil Code).

Since the 80s, European authors and legislation have been through a number of important transformations. Today, the support is no longer deemed to be the original of the document. Directive 97/7 of the European Union for the distance commerce regulates contracts between consumers and suppliers through means of distance communication and in the absence of the party or of the parties[7]. The Directive, considering the lack of security in the preservation of data in magnetic support, and aiming at the protection of the contracting parties, requires that the declarations made in distance marketing contracts be confirmed in writing or any other durable means (art. 5). Preservation of electronic documents is a subject of concern to both the European Union regulations and legal authors. In 1.998, the *Prospective UCC (Uniform Commercial Code)*, Bill of the Uniform Commercial Code for the

5 Amory, Bernard e Poullet, Yves, "Le droit de la preuve face a l'informatique et a la télématique", in Revue Internationale de Droit Comparé, n. 2, apr/jun/ 1.985, pp. 340/341.

6 Amory, Bernard e Poullet, Yves, op. cit., p. 341.

7 Silva, Ricardo Barretto Ferreira da e Paulino, Valéria in "Relevant issues in conducting commerce on the Internet", paper presented on the 10th Annual Conference on Legal Aspects of Doing Business in Latin America, 1.998, pp.10/11.

EU, already mentioned the word *record* instead of *writing* (art. 2B). For the purposes of the UCC, the term *record* means the information printed on a tangible means or filed on an electronic means or any other recoverable means in an intelligible way[8].

19.8.3.1. Procedural issues of proof

The analysis of the probative value of the electronic document – and its acceptability in Court – is divided into three main aspects: proof of existence of the document; proof of the origin of the declaration therein contained; proof of the content thereof.

19.8.3.2. Proof of existence of an electronic document

If telematics advantage lies on speed, it may be said that its inconvenience is fugacity. Proof of existence of the document may be sometimes hard to produce. And Brazilian regulations determine that proving the existence of the document is a burden to the one who claims it (art. 333, I and II of Brazilian Code of Civil Procedure – CPC).

In Brazil, the general rule is the liberty in the use of the different methods of producing evidence, either listed or not in the statutory law (art. 332, CPC). However, this rule admits a few exceptions, for instance, the agreements involving a certain amount.

Italian legal authors usually accept for probative purposes the declarative document (which encompasses the electronic document) as equivalent to the private document (art. 2.702 of the Italian Civil Code)[9]. The cases in which the private document has probative effects are listed in the same article.

Common Law countries recognize, in turn, two fundamental rules that seem to represent a barrier to the proof of existence of an electronic document: the *hearsay*

8 Selected Provisions and Comments from Proposed Article 2B – September, 1997, p. 14, apud Silva, Ricardo Barretto Ferreira da e Paulino, Valéria, op. cit., p. 15. There are new directives of European Union about this subject: Directive 21/2002 – (electronic communications); Directive 65/2002 (commerce of banking services at a distance); Directive58/2002 – (privacy at electronic communications).

9 Graziosi, Andrea, op. cit., p. 501.

rule and *best evidence rule*[10]. The examination of these two rules will allow us to understand how this legal system deals with the issue.

Due to the hearsay rule, witness proof is only accepted if it arises from a direct and personal contact of the witness with the facts he or she states. In the application of this rule to written documents, a document could not be deemed a proper means of proof, if the author is not present to witness to it. As in electronic documents several individuals handle the original information, it is clear that such rule is an obstacle to the proof of existence of the document.

According to the best evidence rule, a document is in principle valid as a means of proof only if presented in its original version. The electronic document takes a digital form and its representative support alone is materialized. As a consequence, the best evidence rule hinders the proof of existence of the electronic document, since it is non-material.

There are however a number of exceptions to the *hearsay rule* and to the *best evidence rule* . Some samples are the British *Civil Evidence Act* of 1.968 and the North--American *Business Records Exception*, to be further analyzed.

19.8.3.3. Origin of declaration and electronic signature

Another subject of interest is the identification of the author of the declaration. It is closely connected to the digital signature issue, to be further reviewed in detail. As a matter of fact, the mere insertion of a name at the end of an electronic document cannot be equal to the traditional signature. The latter has peculiarities (mainly those regarding handwriting of the signatory), which render it unique and hard to be forged.

The commercial practice has brought some solutions to the problem. A secret code (password) is a source of identification of the user generally adopted in electronic transactions. The weakness of the method lies on its inability to identify the individual physically. This would require the use of techniques for remote recognition of certain characteristics of the individual, such as fingerprints or voice.

10 Amory, Bernard e Poullet, Yves, op. cit., p. 335.

The developments of the information technology have been followed by new and modern methods for recognition of the "author" of the electronic document. What is today called electronic signature is a special digital procedure of controlling the origin of electronic documents. A cryptographic system has been accepted as a proof similar to that of the traditional signature[11]. The user of the electronic system is provided with a couple of asymmetric keys – one is private, and the other is public. Both have an alphanumerical code, but the private key has a secret code known only by the user. The code corresponding to the other key is of public domain and belongs to a list accessible to the other users. The two keys are compatible and reciprocally identifiable. Therefore, the system of digital signature or electronic signature is rendered feasible[12].

For probative purposes, the electronic signature is deeply different from traditional signature. The latter is a directly representative documentary evidence. The judge can therefore directly assess the evidence. The digital form requires a different procedure: the verification of the origin of the declaration depends on the intervention of an electronic device. Thus, the electronic signature is not directly representative evidence. Consequently, the proof of declaration contained in the electronic document is documentary, but the proof of its origin is *constituenda13*, i.e., it is evidence to be made.

19.8.3.4. Proof of the content of the document

Are the electronic documents reliable as a means of proof? Can we trust documents, which may be manipulated, knowing that such manipulation may leave no traces?

There are two kinds of risk regarding electronic documents: the errors and the frauds. The errors may have different sources: human, technical or external. Most of the human-source errors are due to inadequate data manipulation. Errors of an external nature are due mostly to the environment (bad weather conditions, for example). The technical-source ones derive, as a rule, from the bad functioning of software or hardware. The fraud differs from the error because a fraud is a willful act.

11 Graziosi, op. cit., "l'apposizione della firma digitale integra un atto di volontá, giuridicamente rilevante, di assunzione di paternitá della dichiarazione cui si riferisce".
12 Graziosi, Andrea, op. cit., p. 507.
13 Graziosi, Andrea, op. cit., p. 510.

Problems of frauds involving electronic commerce are not easy to solve. Some legal authors propose the creation of new crimes, with severe penalties. In Brazil, Bill of Law No. 84, 1999, created by Luiz Piauhylino, has already been approved in the *Câmara dos Deputados* (Chamber of Deputies), and is going through procedure in the Federal Senate under bill of law No. 89/03 and Bill of Law n. 407/2005 (about 'hackers' and 'crakers').

19.8.4. Legislative initiatives

In Great Britain, the above-mentioned *Civil Evidence Act* (1.968) was a pioneer statutory law. It regulated the electronically produced evidence, stating the minimum requirements for court acceptance. The requirements included a certificate of identification of the document, which should be signed by the responsible for its content before it is presented in court.

In the United States of America there is the *Uniform Business Records as Evidence Act* and the *Uniform Rules of Evidence*, also enacted in the 60s. They contemplate an exception to the hearsay rule and to the best evidence rule, according to which the electronic evidence would be acceptable for contents of commercial nature. The *Business Records Exception*, as it is named, admits electronic documents regardless its author's witnessing.

In France, the Parliament has converted court interpretation into law, according to which a written document is not always required, in case of material impossibility. (Law dated July 12th, 1980).

One of the most complete and modern regulations on the subject is the Italian law No. 59 of 1.997. It provides a detailed discipline for the admission of electronic documents as means of proof, contemplating cryptographic signature, digital copies, etc.

Recent regulations in Brazil demonstrate improvements regarding electronic documents. Law 9.800, May 26th, 1.999, authorizes litigators to send electronic documents and applications/pleadings via facsimile, for certain procedures. Instruction No. 1.077, October 29nd, 2.010, of the Federal Tax Department, regulates its own Virtual Call Center ("e-CAC"). Law 10.259, 2001, authorizes the courts to use and receive eletronic documents. Rule n. 1 (called "Resolução"), from Brazilian Supre-

me Court, that regulates the eletronic procedure on law suits at that Court. Rule n. 6 (called "Emenda Regimental") from Brazilian Supreme Court, that authorizes litigators to quote from decisions taken from the Courts internet site.

Some bills are being reviewed in the Brazilian Congress: ; Bill of Law 5.732/2005 and 1692/2003 (about the use of e-mails); Bill of Law 7.316/2002 (about electronic signature). Law 11.419, 2006, regulates the eletronic procedure on law suits.

Our Courts are progressively adapting to the new legislation. For instance, in July of 2003, four federal small claims courts developed a paperless lawsuit, in which all claims and documents are exchanged through email. Some kind of actions and appeals are already scan at the Federal Court (of the 4th region) and develops according to the eletronic procedure. On the other hand, some brazilian Courts still do not allow eletronic documents to be used. The Brazilian Superior Court of Justice, for example, only recognizes the validity of the electronic document if: (i) the electronic archive was correctly received by the Court and (ii) if the originals documents had been delivered timely, in terms of Law 9.800, May26 th, 1.999[14].

Decree No. 3505, June 13, 2000, which implemented the Information Security Policies in bodies and offices of the Federal Public Administration, was one of the first Brazilian rules to address an issue related to electronic communications. Later, Decree No. 3587, September 5, 2000 (revoked by art. 6 of Decree No. 3996, October 10, 2001) established rules for the Public Key Infrastructure of the Federal Executive Power (ICP-Gov), aiming to create and use the digital signature, by means of asymmetric cryptography.

In the private sphere, Provisional Measure 2200-2, August 24, 2001, implemented the Brazilian Public Key Infrastructure (ICP-Brasil), to ensure the authenticity, integrity and legal validity of electronic documents, of support applications and of applications using digital certificates, as well as to carry out safe electronic transactions.

14 Resp 594.352/SP, Resp 594.352/SP, REsp. n.º 525.067/ES, j. 19.02.2004. In oposite sense: Appeal nº 11.960/RJ), from Superior Court of Justice.

19.8.4.1. Provisional Measure 2200-2, August 24, 2001, and other bills of law in Brazil.

According to Provisional Measure 2200-2, 8/24/01, ICP-Brasil is an organization made of a politics-managing authority (Administrative Committee – connected to the *Casa Civil da Presidência* – Chief of Staff´s Office) and certifying authorities (responsible for issuing electronic certificates, taking measures to establish the identity of people or of organizations applying for the certificate).

Even though the said Measure does not impose the use of digital certification for purposes of validating electronic documents, the rule attributes *relative assumption of authenticity to digital signatures contained in a document electronically certified by an AC (Certifying Authority), which is connected to the Administrative Committee of ICP-Brasil (art. 10, paragraph 1).*

Should the parties wish to use another certifying authority (not connected to the administrative Committee) to authenticate their electronic documents, it is essential that the wish to accept that authority for certification purposes be established in the contract, for its legal validity before third parties. This is recommended by art. 10, paragraph 2 of the Measure. Such procedure makes the document legally valid, for instance, in a process that uses it as evidence.

The above-mentioned Measure has had three editions, after it was approved, resulting in the PM No. 2200-2/2001. Its approved overrode several bills of law which were going through procedure in the National Congress. They address the same subject, some are even more complete than the Measure, such as Bill of Law No. 4906/2001. Not only does it deal with digital signature and electronic certification, but it also addresses, in a more comprehensive way, the relations and responsibilities arising from Electronic Commerce.

Bill of Law 7316/2002 (*Secretaria de Assuntos Parlamentares* – Department of Parliamentary Issues of the Presidency) is also worth mentioning. Based on Directive 1999/93/CE of the European Community, it fills the gaps of Measure 2200, addressing issues like civil liability of the certification service providers, procedures to be followed in case of bankruptcy of a certifying authority and the legal validity of certificates issued abroad.

Such bill also distinguishes the categories of "electronic signature" and "qualified electronic signature" (which has the same legal and probative value of the handwritten signature, provided it meets the requirements provided for in that rule), as well as those of "certificate" and "qualified certificate".

19.8.5. Conclusions

Brazilian regulations are progressively taking into account recent developments in technology, in order to seek adequate ways to solve new issues. Accordingly, along with the Provisional Measure 2200, there are two things to consider when it comes to the legal and probative value of electronic signatures. On the one hand, there is the advanced electronic signature that produces, by force of law, the same legal effects as a handwritten signature. On the other hand, the legal and probative value of an electronic signature cannot be refused, provided it is admitted by the parties as valid, or accepted by the person to whom it was opposed. In such case, its legal value arises from the parties' will.

While a lot of work lies ahead to be done, it is important to stress the evolution of overcoming the barrier of legislation and court decisions.

As an old saying goes, law is never up to scientific evolution. This explains why statutory laws regulating scientific issues are supposed to be broad and general, giving some room for adjustments.

The electronic document is fully acceptable as probative material, not being an exception to the rule of art. 332 of our Civil Procedure Code, as long as individual guarantees and public order principles are respected.

Moreover, the Brazilian legislation has certainly adopted a system which can ensure security and validity to operations carried out electronically, by means of the Public Key Infrastructure, implemented by Provisional Measure 2200-2/01.

Information Technology

20.1. Information Technology in Brazil

The traditional configuration of hardware and software is no longer sufficient to define the industry. The concept of information technology (IT) includes, in addition to hardware and software elements, networks, multimedia and specialized labor. For purposes of this Part, the expression "information technology – IT" will be used encompassing all these meanings.

From a technical standpoint, hardware comprises the physical elements of the computer, while the software comprises the logical ones. Under Brazilian Law, the software is protected by Law 9609/1998, the Software Law, and may be protected by Law 9279/1996, the Industrial Property Law, or by Law 11484/2007, which provides the protection of original layout-designs of integrated circuits, when such hardware or integrated circuit topography meets the legal requirements to be protected.

The first government initiatives in the IT industry date from the early 1970s. In April 1972, Presidential Decree 70370 created the Commission for Coordination of Electronic Processing Activities (*Comissão*

de Coordenação das Atividades de Processamento Eletrônico) – CAPRE. CAPRE was subordinated to the then Ministry of Planning and General Coordination and had as main tasks the control of government and private computers, the advice on purchases and leases of equipment for the government, the coordination of training programs and the proposition of measures to finance data processing businesses.

CAPRE was succeeded by the Special Secretariat of Informatics (*Secretaria Especial de Informática*) – SEI[1], whose main objective was to develop an IT policy for Brazil. This transition also marks a significant administrative change in the objectives of state intervention in the IT industry. When CAPRE was created the government's main concern was to control and learn how to use IT resources. SEI's main directive, on the other hand, was to drive local technology development.

In this context of change, Law 7232 was enacted in 1984 to regulate the national IT policy. At the time, restrictions on imports, production, operation and trade of IT goods and services were the means for the country to achieve expertise in IT. And this expertise was expected induce Brazil's development.

In order to implement the Law, the government imposed the restrictions above mentioned and created tax and financial incentives to favor Brazilian companies with national capital[2], especially for the manufacture of hardware products. The result of this policy was an IT market restricted to the Brazilian companies with national capital that had no interest in invest in technology development, offering to the customers obsolete goods and services.

This scenario changed drastically with the enactment of Laws 8191/1991 and 8248/1991. These Laws reduced substantially the restrictions on imports, production, operation and trade of IT goods and services. And in 1995, Constitutional Amendment 6 ended the privileges to Brazilian companies with national capital. A new order for the development of the IT industry in Brazil was set.

Under the new policy, the federal government created tax incentives for the production of IT and automation goods in Brazil, especially in the Manaus Free Trade

1 Created by Decree 84067 of October 8, 1979.

2 Companies exclusively, permanently, effectively and unconditionally under the control of individuals resident and domiciled in the Brazil.

Zone (*Zona Franca de Manaus*)[3]. To be eligible to benefit from these incentives, the manufacturers should add locally value to their goods and comply with basic production processes approved by the Ministry of Science and Technology (MCT), in addition to investing in the research and development of IT related activities.

Also in the 1990s, the development of the IT industry in Brazil led to the creation of governmental programs to promote the exportation of software. The National Program of Software (*Programa Nacional de Software* – SOFTEX) was created and the implementation of this program was under the coordination of the Council for Technological Development (*Conselho Nacional de Desenvolvimento Tecnológico National* – CNPq). In 1994, SOFTEX was considered a priority by MCT's Ordinance 200/1994. The Brazilian Society for the Promotion of Software Export (*Sociedade Brasileira para Promoção da Exportação de Software*) was organized as a non-governmental entity to perform, promote, encourage and support innovation activities and scientific and technological development in the creation and transfer of technologies for software products targeting foreign markets.

In addition to tax benefits, the IT industry is eligible to receive funds from the federal government. The Information Technology Industry Fund (*Fundo Setorial de Tecnologia da Informação* – CT-INFO/CATI), which was created as a branch of the National Fund for Scientific and Technological Development (*Fundo Nacional de Desenvolvimento Científico e Tecnológico* – FNDCT), is one of Brazil's most important industry funds. The managers of this fund are the Financier of Studies and Projects (*Financiadora de Estudos e Projetos* – FINEP) and CNPq. The funds of CT-INFO/CATI come from the transfer of a percentage of gross revenues by companies that benefit from tax incentives established by Law 8248/1991. As other industry funds in Brazil, the funds from the CT-INFO/CATI are invested in IT companies whose projects' are qualified in public tenders.

The Laws 10973/2004 and 11196/2005 were enacted to promote technological innovation in Brazil and have been widely used by IT companies. The Law 10973/2004, also known as the Innovation Law, establishes incentives for innovation and scientific and technological research. The Innovation Law intends to link academic re-

3 Later amendments of the Laws and their regulation extended the incentives to companies established in the Amazon area, and the Northeast and Mid-West regions of Brazil.

search and the market demands, through cooperation agreements entered by academic research centers (e.g. universities' research centers) and companies. And the Law 11196/2005, known as the "Lei do Bem", provides for tax incentives for technological innovation.

20.2. Legal Protection

Brazil is a signatory of the Trade Related Aspects of Intellectual Property Rights – Agreement (TRIPS)[4]. As such, the provisions of TRIPS are enforced as minimum standards for intellectual property protection and guided the enactment of intellectual property laws.

In terms of intellectual property protection and trade secret, the most important Brazilian legislation for the IT industry comprehends the Software Law, the Industrial Property Law and Law 11484/2007. For purposes of this section, only some of the provisions prohibiting unfair competition practices of the Industrial Property Law will be reviewed.

Software

According to the TRIPS and the Berne Convention[5], computer programs are protected under copyrights laws. In Brazil, the Law 9610/1998 (Copyrights Law) will apply to software in the absence of specific provision in the Software Law.

Under the Software Law[6], a computer program is protected for a period of 50 years from the 1st of January of the year subsequent of its release, or from the date of its creation, whichever occurs first. The legal protection of computer programs in Brazil does not require previous registration and is also granted to foreigners domiciled abroad, provided that the country of origin of the software grants equivalent rights to Brazilian citizens and foreigners domiciled in Brazil.

Unless as otherwise provided under agreement, the copyrights of software developed by employees, service providers or public servants as a consequence of their

4 Legislative Decree 1355/1994.
5 Legislative Decree 75699/1975.
6 Complemented by Decree 2556/1998.

respective contracts will be the property of their employers, customers or government entity. On the other hand, the respective authors will own the copyrights of software developed without connection to the respective employment and services contracts, and without use of resources, technical information, trade and industrial secrets, materials, premises or equipment of their employers, customers or government entity, as the case may be.

The registration of software in Brazil is not mandatory for its legal protection. However, the owner of the software's rights may register its code with the National Institute of Industrial Property (*Instituto Nacional da Propriedade Industrial* – INPI)[7]. According to article 3, paragraph 1 of Law 9609/1998, the registration application must contain identify the software's author and owner, if different, a description of the program's features and other data considered sufficient to identify the software (i.e., portions of its source code). All data provided to INPI for the registration will be kept in secrecy and disclosed only when required by court order or if requested by the registry holder.

Brazilian Software Law provides in articles 7 and 8 that the company licensing the software in Brazil must establish a technical validity term for each version of the software. During such term the licensor shall make available to end users all services that such version of the software may require (support and maintenance, consulting, etc.). The technical validity is not a product warranty but rather a statement of the software version's lifetime. Such term must be clearly stated in the software license agreement, tax invoice, media or package.

With regard to reseller, distribution and other agreements granting to Brazilian citizens or companies domiciled in Brazil the rights to resell, distribute or to sublicense software developed abroad, article 10 of the Software Law states that will be null and void contractual provisions (i) establishing limits for the production, distribution or marketing of the software in violation of current regulations, or (ii) release either contracting party from liability in connection with software defects and flaws, or infringement of third party's copyrights.

In addition to civil law violations, most software infringements are also criminal offenses under Brazilian Law, subjecting the offenders to the imprisonment from

7 The INPI Resolution 58/1998 establishes the specific procedures for software registration.

six months up to two years or a fine. In the event of infringements consisting in the reproduction of software in violation of third party's copyrights for sale or the sale, display for sale, acquisition, concealing or keeping in deposit for purposes of trade, the violator will be subject to imprisonment from one up to four years and a fine.

The Law 9609/1998 also establishes relevant rules in connection with the collection of taxes levied in software-related transactions, the period of time during which evidence of payments made to software's owners outside Brazil must be kept on file and the registration of software technology transfer agreements.

Layout-Design of Integrated Circuits

The protection of integrated circuits' (IC) layout-designs (topographies) under Brazilian Law is also based on the principles provided under international treaties, especially the TRIPS.

According to Law 11484/2007 the protection of IC's layout-designs[8] depend on prior registration with the INPI, which will be granted to an original topography that is not common to technicians, experts or manufacturers of ICs at the time of its creation. The IC's layout-design will be protected for 10 years from the date of filing[9] or the date of the first commercial exploitation wherever in the world it occurs, whichever occurs first.

The registration of a layout-design grants to its right holder the exclusive right to its exploitation as well as the rights to impede third parties to (i) reproduce, in whole or in part, the layout-design, including by incorporating it in an IC, (ii) import, sell or otherwise distribute for commercial purposes a protected topography or an article incorporating such an IC only in so far as it continues to contain an unlawfully reproduced layout-design.

8 For purposes of Law 11484/2007, integrated circuit means a product in final or intermediate form, with elements of which at least one is active and with some or all of the interconnections on a fully formed piece of material or in its interior and whose purpose is to perform an electronic function. The topography of integrated circuits is defined as a series of related images, built or coded in any form or manner, representing the three-dimensional configuration of the layers of an integrated circuit, and in which each image represents, in whole or in part, the geometric arrangement or arrangements of the surface of the integrated circuit at any stage of its design or manufacturing.

9 Date when the registration application was filed with the INPI.

For purposes of Law 11484/2007, the following actions will not be deemed infringement of the rights to the layout-design granted under such Law: (i) acts carried out by unauthorized third parties for purposes of analysis, evaluation, education and research; (ii) acts for the creation or exploitation of a layout-design resulting of the analysis, evaluation and research of a protected layout-design, provided that the resulting layout-design is not substantially identical to the protected one; (iii) acts consisting in the import, sale or otherwise distribution for commercial or private purposes of ICs or products incorporating such an IC made available in the market by the right holder of such IC's layout-design or with its consent; and (iv) acts described in (ii) of the preceding paragraph where the person performing or ordering such acts did not know and had no reasonable ground to know, when acquiring the IC or article incorporating such an IC, that it incorporated an unlawfully reproduced layout-design.

The infringement of layout-design rights are also deemed crimes under Brazilian Law and the perpetrators will be subject to imprisonment from one to four years and fine, in the event the of reproduction, import, sale, keeping in stock or distribution for commercial purposes of a protected layout-design or of IC incorporating such layout-design.

The Law 11484/2007 establishes the Support Program for Technological Development of the Semiconductor Industry (*Programa de Apoio ao Desenvolvimento Tecnológico da Indústria de Semicondutores – PADIS*) and the Support Program for the Development of Technological Equipment Industry for Digital TV (*Programa de Apoio ao Desenvolvimento Tecnológico da Indústria de Equipamentos para a TV Digital – PATVD*). Both programs consist of tax benefits for the development of layout-designs and the production of ICs in Brazil.

Protection of Undisclosed Information

The protection of confidential information in Brazil follows the principles set forth in article 39 of the TRIPS. As such, any person shall have the right to prevent information lawfully within its control from being disclosed to, acquired by or used by others without its consent in a manner contrary to honest commercial practices, provided that such information: "(i) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (ii) has commercial value because it is secret;

and (iii) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret."

In addition to a contractual breach (when confidential information is disclosed under the terms of confidentiality agreement), the following violations of secrets are also deemed unfair competition practices and crimes under the Brazilian Industrial Property Law: (i) unauthorized disclosure, exploitation or use of confidential knowledge, information or data for use in manufacturing, trading or performance of services, except those of public knowledge or common for an expert on the subject, that the perpetrator had access during a contractual or labor relationship, even after termination of such contract; (ii) unauthorized disclosure, exploitation or use of knowledge or information mentioned in (i) obtained by unlawful means or accessed through fraud; (iii) unauthorized disclosure, exploitation or use of test results or other undisclosed data obtained through considerable efforts and that were presented to government entities as condition of the approval for the marketing of products. These crimes subject the perpetrator to imprisonment from three months to one year, or fine.

20.3. Tax Benefits

The IT industry enjoys several tax benefits throughout the country. They vary from simple services tax reduction for software development and licensing to complex, production-based benefits for the manufacture of hardware products. For purposes of this section, however, the focus will be tax benefits originally created by Law 8248/1991.

The most important federal tax benefits currently applicable to the local manufacture of IT goods are[10]: (i) accelerated depreciation of new machines, equipment and instruments used in the manufacturing process; and (ii) reduction of the excise tax (*Imposto sobre Produtos Industrializados* – "IPI") for companies developing or producing IT goods and services that invest in research and development (R&D).

10 Law 8248 also provides for a non-tax benefit consisting of a preference in purchases of agencies and entities of the federal government, foundations established and maintained by the government and other organizations under the direct or indirect control of the federal government. Such preference is granted, in order of preference, in favor of goods and services incorporating Brazilian-developed technologies, or in favor of goods and services produced according to a basic production process.

The reduction of IPI for these companies is the following:

IPI Reduction	Period
80%	From January 1st 2004 through December 31st 2014
75%	From January 1st 2015 through December 31st 2015
70%	From January 1st 2016 through December 31st 2019

The reduction of IPI for companies located in the Amazon area (subject to SUDAM – *Superintendência de Desenvolvimento da Amazônia*), Northeast region (subject to SUDENE – *Superintendência de Desenvolvimento do Nordeste*) and Mid-West region[11] is the following:

IPI Reduction	Period
95%	From January 1st 2004 through December 31st 2014
90%	From January 1st 2015 through December 31st 2015
85%	From January 1st 2016 through December 31st 2019

In addition to the IPI reduction in the final products, the law allows the companies to use IPI credits obtained in the purchases of raw materials, intermediary products and packing materials used in the manufacturing of the IT goods.

The list of products and services eligible to these benefits has changed several times along the past 20 years. The current list encompasses the following products and services: (i) electronic components for semiconductors, optical-electronics, as well as respective raw materials that are electronic in nature; (ii) machinery, equipment and devices based on digital technology for the collection, processing, structuring, storage, switching, transmission, recovery or presentation of information, their respective electronic raw materials, parts, components and media for the operation; (iii) software, machines, equipment and devices that process information and respective technical documentation; and (iv) technical services related to goods and services described above.

11 Companies based in the SUDAM, SUDENE and Mid-West areas are subject to specific regulations, usually more favorable than those applicable in other parts of Brazil.

Also, portable computers (including tablets), low capacity digital processing units and products developed in Brazil are subject to specific tax regulations and IPI benefits.

With respect to software, it should be clarified that the IPI benefits are only applicable to the software embedded in hardware and that are not separately licensed.

To enjoy these benefits the company submit a basic production plan ("PPB") for the approval of the MCT, in addition to other legal and financial information. In short, the PPB must clearly state the manufacturing process, establish a quality control program and a profit sharing program for employees. The applicant company cannot have outstanding and undisputed debts related to federal taxes and social contributions, and the labor severance fund (FGTS).

In addition to the above requirements, the company applying for the benefits must invests in its own R&D program in Brazil at least 5% per year of the company's gross revenues with the sale of IT goods and services in the domestic market less the taxes levied on such sales and the acquisition cost of products benefited by such incentives. A portion of the R&D funds must be invested in projects with:

Investment Amount	Beneficiaries
no less than 1%	Research centers or institutes, or Brazilian educational entities certified by *Comitê da Área de Tecnologia da Informação* ("CATI").
no less than 0.8%	Research centers or institutes, or Brazilian educational entities certified by CATI, with head offices or main campus located within the SUDAM area, SUDENE area and Mid-West region, except the Manaus Free Trade Zone.
no less than 0.5%	FNDCT.

The R&D investment percentages decreases as the IPI benefits decrease. And the R&D investment is not required by companies with gross annual revenues below R$ 15 million.

COMMERCIAL REPRESENTATION AND DISTRIBUTION AGREEMENTS

Chapter 21

Among the contracts existent in Brazilian law, there are two that play a key role for foreign businessmen and investors: commercial representation and distribution.

In these contracts, the hired part acts as an intermediary, assuming the responsibility to promote business transactions in the account of the one who hired them.

In general, if the parties relationship should involve an intermediation performance by the Distributor on behalf of its Contractor's products, and not an obligation to buy the products for resale, this will be a "Commercial Representation" contract (also Agency contract)

governed by Law no. 4.886[1]. However, should the Distributor keeps in storage the merchandise, the agreement may be deemed to be a Distribution contract, which is regulated by Brazilian Civil Code.

Nevertheless, it is important to notice that if the parties' distribution relationship is linked to products considered as "Automotive Vehicles" under Law no. 6.729, these parties are forbidden to regulate their contract by any Law other than this one, being null and void any provision in contrary.

We will now proceed to the peculiarities of these contracts.

21.1. COMMERCIAL REPRESENTATION (AGENCY)

Commercial Representation in Brazil is governed by Law N. 4.886, of December 09, 1965. According to this Law, Commercial Representation is defined as the intermediation activity, performed on a permanent basis by any person or company[2] committed to act in the market of products or services on the behalf of one single company or of several companies[3]. Nevertheless, the recently enacted Brazilian Civil Code (Law N. 10.406, of January 10, 2002) has ruled on the subject and named the Commercial Representation as "Agency".

Therefore, the Commercial Representative (or Agent) will perform its duties by gathering buying proposals from prospective customers and sending them for the approval of the represented company. In case of acceptance of the proposal, the Commercial Representative will be entitled to a previously and contractually agreed upon percentage of the transaction ("commission") This payment is conditioned to the effective payment performed by the customer, except if the contract sets forth the right to commission independently of the buyer's payment. Besides, the Agent will be entitled to receive the commission for all sales in the area contractually defined for the performance of its intermediation activities, unless otherwise set forth in the agency contract.

1 On the other hand, there are some eminent Brazilian Scholars, such as José Alexandre Tavares Guerreiro, who accept the possibility of Law no. 6.729 to govern Distribution Contracts, in addition to those which deal with the automotive vehicles as defined by that specific Law.

2 which is named by Brazilian Law as "Representante Comercial" (in English : Commercial Representative) or as "Agente" (in English: Agent)

3 The representation of just a single company would depend on whether an "exclusivity provision" is present in the contract signed by the parties.

It is also set forth in the above mentioned Laws that every Agent is obliged to be registered before the Commercial Representatives Council of the Brazilian State where the respective activities take place, bearing in mind that these Councils have a regulation power concerning the profession. Also, the Agent shall have its acts of incorporation duly registered in the State Companies Register (which, in Portuguese, is called "Junta Comercial").

Furthermore, pursuant to section 27 of the Law No. 4.886/1965,, the contract must be in writing, and must contain, in addition to the specific provisions agreed upon by the parties, the topics set forth in that section, such as: (i) general conditions of the representation; (ii) indication and features of the products; (iii) duration of the contract; (iv) indication of the area, or areas where the representation will be performed, as well as the allowance (or not) for the represented company to perform direct sales of its own in the indicated area, or areas; (v) granting (or not) the exclusivity of the selling area (total or partial); (vi) commission in favor of the Commercial Representative and its payment schedule, conditioned (or not) to effective collection of the buyers' payments; (vii) exclusivity (or not) of the representation on behalf of the represented company'; (viii) indemnity to be paid to the Commercial Representative in case of unjustified termination of contract, which cannot be less than the equivalent of 1/12 of the total retribution paid to the Commercial Representative throughout the duration of the contractual relationship.

It is very important to emphasize that despite the provision found in section 1 of Law no. 4.886[4], due to the strong enforceability of Brazilian Labor Law, there is a serious risk that represented company should have to respond labor claims from its Commercial Representatives[5] -- except if the representative is a company.

Thus, so as to avoid such claim and its heavy economic burdens, it is of crucial relevance that the represented company includes the following restrictions in all its Commercial Representation Contracts : (i) Commercial Representative must always be established as a company formed by at least two partners; (ii) Represented Company must avoid giving orders directly to the partners of representative com-

4 which foresees that there is no labor relationship between the contracting parties

5 based, among other allegations, on the legal presumption of a labor relationship, which requires the concomitance of personalty, salary dependence, habitualness and subordination.

pany or to its personnel and these same orders must restricted to the performance of the obligations of representative[6].

21.2. DISTRIBUTION AGREEMENTS

The Distribution Agreements in Brazil may be divided in two similar but not identical categories:

(a) Commercial Distribution Agreements, and

(b) Ordinary Distribution Contracts.

21.2.1. Commercial Distribution Agreements

The first of the above mentioned categories is governed by Law no. 6.729 of November 28, 1979 (amended by Law no. 8.132 of December 26, 1990) and is restricted to the relations maintained between Automotive Vehicles and Spare Parts Producers (Auto Makers) and their Distributors (Dealers).

Pursuant to Section 2 of Law no. 6.729, land automotive vehicles such as automobiles, trucks, buses, agricultural tractors, motorcycles and similar are ruled by its provisions, what leads us to conclude that other sort of automotive vehicles, such as boats and non agricultural tractors, are excluded from the scope of its provisions, therefore belonging to the second category, the Ordinary Distribution Contracts, which will be commented opportunely.

According to Law no. 6.729 (section 3), the Commercial Distribution Agreements, concerning the Dealer's role, comprise: (i) the trade of the automotive vehicles described in section 2; (ii) their spare parts[7]; (ii) the technical assistance to the customers; (iii) the free concession for the use of the Maker's trademark.

Among the provisions of section 3 of Law no. 6.729 we also find the possibility of the Commercial Distribution Agreement to set forth the prohibition of the trade of new

6 as foreseen in the contract and Law no. 4.886 and the Brazilian Civil Code as well.
7 made or furnished by the respective makers

automotive vehicles produced by other makers[8]. On the other hand, the Dealers have the right to trade new spare parts made or furnished by third parties, taking into consideration the binding to the so called "fidelity level"[9]. Besides, the Dealers are entitled to trading second hand automotive vehicles and original spare parts produced by any other maker, as well as other merchandises and services compatible with the Agreement.

In section 5 of Law no. 6.729 we find the basic provisions which must be present in all Commercial Distribution Agreements, enumerated such as follows: (i) definition of the operational area where the Dealer shall perform its activities[10]; (ii) minimum distances between the different establishments of Dealers[11];

Also, the Dealer Company commits itself to trade the maker's automotive vehicles and spare parts, as well as to give the technical assistance to customers, in accordance with the respective Commercial Distribution Agreement. Nevertheless, the Dealer is forbidden, personally or through third parties, to perform such activities outside its delimited operational area[12].

Despite the fact that operational area is defined in the Commercial Distribution Agreement on behalf of the Dealer, section 6 of Law no. 6.729 allows the Maker to hire a new Dealer, as long as the market in operational area shows proper conditions to do so, or when a vacancy from a terminated agreement occurs[13].

The Commercial Distribution Agreement must also contemplate, in accordance with section 7 of Law no. 6.729, a binding "Automotive Vehicles Quota" to be acquired by the Dealers and which is to be defined taking into account the following

8 in Brazil, it is very common to find such prohibition in agreements of this kind.

9 which is defined in Section 8 of the Law no. 6.729 as the minimum quantity of the maker's spare parts which the Dealers are obliged to acquire, according to the provisions foreseen in the "Category Convention"

10 which can be reserved to more than one Dealer, except in the cases of exclusivity granted to a specific Dealer

11 in accordance with the criterion of marketing potentials

12 In any case, the consumers should always be entitled to freely choose any Dealer in order to purchase the goods produced by the maker, whereas, on the other hand, the Dealer has the right to be reimbursed for any technical assistance given to a customer who has purchased the product from another Dealer.

13 But, in any of those events, Law no. 6.729 prohibits any new contracting which may jeopardize the Dealers who are already contracted, although it grants no right of preference to the Dealer which is already established in that particular operational area, once the new contracting is proved feasible in terms of market prospects in that operational area.

items: (i) the estimate of the maker's production[14]; (ii) the "quota" must correspond to a part of the estimated production[15]; (iii) the contracting parties must agree on the Dealer's "quota"[16]; (iv) the quota's definition must not take into account the Dealer's inventory[17] and is to be revised annually[18].

Section 10 of Law no. 6.729 mentioned above opens for the contracting parties the possibility of including in their Commercial Distribution Agreement an obligation on the Dealer's part to maintain in its inventory a previously stipulated amount of products, proportional to its new products trade flow or rotation[19].

In section 12 of Law no. 6.729, there is a prohibition to the Dealer to sell new Automotive Vehicles to others rather than the final consumers. That is due to the fact that the Law does not admit the sale for purposes of resale, except in the following cases: (i) trades between Dealers linked to the same Maker limited to 15% and 10% of the "Automotive Vehicles Quota" of Trucks and of other Automotive Vehicles, respectively; (ii) International Trading.

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14 per product and committed to the internal market, in the subsequent annual period, and in accordance with the prospects of the market

15 composed by a diversity of different and independent products

16 in consonance with the Dealer's business capacity and trading performance as well as its operational area marketing possibilities

17 as foreseen in section 10 of Law no. 6.729

18 if no necessary adjustment has been made before then, due to eventual differences between the maker's present production and that which was previously estimated.

19 Nevertheless, whenever a Commercial Distribution Agreement establishes such minimum inventory obligation for the dealer, the latter is entitled to limit it such as follows:
(a) For Automotive vehicles in general : 65% of the monthly correspondence to the annual quota foreseen in section 7 of Law no. 6.729 and commented above;
(b) For Trucks: 30% of the monthly correspondence to the annual quota;
(c) For Tractors: 4% of the total annual quota;
(d) For Spare parts:
d.1) for Implements:5% of all sales accomplished in the last 12 months;
d.2) for other components: any agreed value which cannot be superior to its acquisition price from the maker relating to the Dealer's 3 last months retail sales.

If the Commercial Distribution Agreement contemplates a minimum inventory provision, besides the Dealer's right to have the above mentioned limits respected, it is also set forth in Law no. 6.729 that :
(1) Concerning Automotive Vehicles, Trucks and Tractors: every six months there must be a comparison between the above cited "Automotive Vehicles Quota", foreseen in section 7 of Law no. 6.729, and the Dealer's actual market conditions at that time as well as its trade performance for the purpose of reducing its minimum inventory limits;
(2) In the event of products' being altered or breaching of their deliverance, the maker shall be obliged, in a maximum period of one year from the event, to buy back the Dealer's inventory of auto parts (except for the implements) by the present price offered to all Dealers, or, alternatively, have it replaced by new products, at the Dealer's discretion.

Furthermore, under Law no. 6.729, the Maker is bound to preserve the equality of prices and conditions of payment among all Dealers which, in turn, are free to establish their own prices to the consumers.

Despite the respect owed to the Dealers' operational area by the Maker, the latter can perform "Direct Sales of Automotive Vehicles" in the following cases:

(1) Independently of Dealer's performance or request: (i) to the Public Administration or Diplomatic Representations; (ii) to consumers considered as "Special Buyers" by the "Category Convention".

(2) Through the Dealers: (i) to Public Administrations or Diplomatic Representations; (ii) to Automotive Vehicles Fleet Owners; (iii) to consumers considered as "Special Buyers" by the "Category Convention", when so requested by a specific Dealer.

Anyway, the level of direct sales and its repercussion on the Dealers' "Automotive Vehicles Quota" must be always present in the "Category Convention" and any kind of act which may lead to the Dealers' subordination or may interfere in their business management is expressly prohibited.

In accordance with sections 17 and 18 of Law no. 6.729, the previously mentioned "Category Convention" is inherent to the Commercial Distribution Agreement and may be defined as a General Agreement, which must be made between the civil entities representing the Makers and the respective Dealers' National Category. Likewise, this "Category Convention" will have legal enforcement between the signing parties as well as regulation power over their relationship, in accordance with and subordinated to Law no. 6.729.

Furthermore, pursuant to Law no. 6.729 all Commercial Distribution Agreements must always observe a standard written form and its content must be in accordance with sections 20 and 21, which foresee that the written term of the agreement will always have the following provisions: (i) specification of products; (ii) definition of the operational area; (iii) minimum distances between each dealers' establishments; (iv) dealer's quotas; (v) requirements concerning dealer's financial condition, management, equipment, specialized personnel, facilities and technical capacity; (vi) undetermined duration of the agreement which can only be termina-

ted in accordance with Law no. 6.729 provisions, contemplating the possibility of an initial duration of at least five years[20].

Finally, the Commercial Distribution Agreement may be terminated in the occurrence of the following events: (i) by consensus between both parties; (ii) by the sending of the written notice mentioned above in case of an initial five-year agreement; (iii) by initiative of the innocent party, in the event of breach of contract, infringement of Category Convention or of Law no. 6.729[21].

Still, if Maker sends to Dealer the written notice in order to terminate the initial five-year agreement mentioned above, under section 23 of Law no. 6.729 the Maker would be bound to: (i) buy back the whole Dealer's inventory of automotive vehicles and spare parts by the price offered to Dealers on the day of such indemnity payment; (ii) buy all Dealer's equipment, machinery, tools and plant (except for the real estate), by their market price, as long as their acquisition has been either determined by the Maker or not opposed by it right after receiving a written notice from the Dealer informing about these acquisitions. On the other hand, if Dealer gives the termination notice foreseen in section 21 of Law no. 6.729, according to section 23 of the same Law, the Maker will not be granted any indemnity whatsoever

Regarding Commercial Distribution Agreement of undetermined duration, the consequences of its termination are set forth in sections 24 up to 27 of Law no. 6.729 as follows:

(1) Termination caused by the Maker: (i) Maker must buy back the whole Dealer's inventory of new automotive vehicles and new spare parts by the price offered to consumers on the day of the agreement's termination; (ii) Maker must buy all Dealer's equipment, machinery, tools and plant (except for the real estate), by their market price; (iii) Maker must also pay an indemnity to the Dealer, corresponding to 4% of its last gross invoicing of goods and services projected for the next 18 mon-

20 After these five years' period the agreement will automatically become one of undetermined duration, unless a written termination notice is sent to the other party at least 180 days before its termination.

21 It is also foreseen in section 22 of Law no. 6.729 that the termination based on the events described in this item must always be preceded by gradual previous penalties. Also, in case of termination, the parties must be granted a minimum 120 days period after termination so as to fulfill any pending operations.

ths, plus three months per each five years of the agreement's duration, based on the last two years previous to termination[22].

(2) Termination caused by the Dealer: dealer must pay an indemnity corresponding to 5% of the total value of all merchandises it has bought in the last four months previous to termination.

Regardless of which party may have caused the agreement to terminate, all values owed to the innocent party must be paid no later than 60 days from the agreement's termination day.

21.2.2. Ordinary Distribution Contracts

Unlike Commercial Distribution Agreements, the so called Ordinary Distribution Contracts have no specific Law governing the parties' relationship. As a matter of fact, this sort of contract is governed by the general provisions found in the Brazilian Civil Code[23].

Because of that, the contracting parties are free to regulate their relations, almost exclusively, by means of the contract, taking into account only the previously mentioned general provisions on obligations set forth in the Civil Code[24].

22 Maker must also pay to Dealer an additional indemnity if so foreseen by the Commercial Distribution Agreement or by the Category Convention.

23 Section 710 up to section 721

24 It is worth mentioning that if the contract has no provision on its respective duration, it is legally assumed that it shall be undetermined and its termination will be possible at any time by means of a simple 90 days notification.

INTERNATIONAL CONTRACTS – INTELLECTUAL PROPERTY

Chapter 22

22.1. General Aspects – International Contracts

With the advances of economic globalization and the rapid development of the means of communication and logistics experienced in recent decades, the market integration process and the internationalization of companies has become a clear, complex and irreversible phenomenon in the 21st Century. As a result of Latin America's, and most specifically Brazil's, recovery, the volume of international contracts, in general, signed in our country has been increasing significantly every year. In this sense, it immediately becomes necessary to underscore the essential particularities of an international contract and who distinguishes it from a domestic one. Indeed, a contract will always be considered international when one of its elements is subject to or is connected to another legal framework. In other words,

it is precisely the presence of these multi-connected international elements that are commonly called connection or cross-border elements, which will imply the possibility of applying more than one legal framework to govern a specific legal contract relationship. This element may be, for example, depending on the case, the domicile of the contracting parties in different countries, or the site for complying with the contract obligation, or even the location of the asset that is the object of the commercial transaction.

Therefore, observe that in essence an international contract requires more than one competent State with the possibility of applying its own domestic law to the same contract, due to the presence of one or more elements of connection. Thus the need for contracting parties in any contract relationship, of an international nature, to immediately define which of two or more legal frameworks connected to that specific contract will regulate the referred to contract relationship. This shows that the choice of a country's law that will be applied to an international contract starts with the principle of autonomy of the parties' will, which grants their freedom to determine the applicable law as well as the terms and conditions that will govern the referred to international contract, as long as the limits of public order, good customs and sovereignty of each State are respected, of course.

If the contracting parties do not establish a specific law to govern the international contract they enter into, and in the future a dispute emerges between the two, then the controversy in question will be resolved in accordance with the applicable law that results from applying internal norms of Private International Law (PIL) of the country qualified to judge the dispute and definitively resolve the conflict. It is worth observing that in face of a lack of choice of an applicable law for the international contract, with respect to Brazil, our domestic and indirect norms of Private International Law are stipulated in the Law of Introduction to the Civil Code – LICC (Decree-Law no. 4.657, of September 4, 1942).

However, it can be observed that in accordance with Brazilian legislation, there are two diverse norms: (i) the first deals with the situation in which the parties are present at the site where the international contract is elaborated, thus the head of Art. 9, of the LICC, determines that "*to qualify and govern the obligations, the law of the country in which they are constituted will apply*", that is, instituting the principle of lex loci celebrationis; and (ii) the second rule deals with the case of an international contract entered into by absent parties, for example, by letter, phone, or Internet. In

this case, the applicable law, in accordance with Paragraph 2, if art. 9, of the LICC will be the law of country of residence of the offering or proposing party, without taking into account where the contract was signed: "*The resulting obligation from the contract shall be constituted where the proposing party resides.*"

In general, these rules apply to all international contracts, regardless of their nature, including, as a result, international contracts for protecting intellectual property, which represents an element of great economic value for companies and for the States that do not stop discussing and entering into agreements aimed at a broader expansion of intellectual property rights protection, there including industrial property, which encompasses trademarks, inventions (patents) and industrial designs, as well as copyrights more related to the protection of literary, scientific or artistic works in different forms, such as: books, photos, paintings, music, choreography, drawings (including technical drawings), maps, sculptures, films and audiovisual material, etc.

In relation to the protection of copyrights, it is worth underscoring that it basically guarantees two different objectives, which are: (i) exercising of the so-called "moral right of the author", that is, a right inherent to author to claim paternity of his work and to guarantee its integrity, against any attempt at alteration or deformation of the original work; and (ii) exercising the so-called "economic right" of commercial exploration of his work, through expressed authorization to guarantee the legitimate use by third parties of all or part of his work in reproductions of the author's work for sale to the general public through the publication of books, recording of music, transmission of images, etc.

On the other hand, the legal protection of industrial property aims at guaranteeing that the trademark, for example, that identifies a product or a service provided by a specific company, after its proper registration at the competent entity, can no longer be used by any other person or company, becoming illegal to imitate or reproduce it, without the prior authorization of the owner, and where no unauthorized copy may be sold because it is illegal. The same occurs with patents and industrial designs. In Brazil, intellectual property is even included in our Federal Constitutions, which protects such assets in the terms of art. 5, paragraphs XXVII and XXIX, which stipulate, respectively:

"XXVII – the authors have the exclusive right of use, publication or reproduction of their works, which can be transferred to heirs for the period of time stipulated by law;"

"XXIX – the law will ensure the authors of industrial inventions the temporary privilege of their use, as well as the protection of industrial creations, of trademark ownership, of company names and of other distinguishing signs, considering the country's social interest and technological and economic development."

22.2. Brazil and International Intellectual Property Treaties

Concern about international legal protection of intellectual property rights is not recent. For some time, States have been trying to guarantee these rights are respected, impeding and repressing the illegal commerce of unauthorized copies to encourage regular, licit and productive licensing of trademarks, patents and, more recently, software. The first efforts for the international protection of intellectual property date back to the 19th Century with the Paris Convention of 1883 on Intellectual Property Protection, and then the Berne Convention of 1886 on the Protection of Artistic and Literary Works, with the former revised and updated later.

Brazil ratified the Paris Convention of 1883 the next year through Decree 9.233, of June 28, 1884 and later, on December 31, 1929, through Decree 19.056, it incorporated those alterations made by the first review of the Paris Convention, which occurred in The Hague, Holland, in 1925. In the second half of the 20th Century a new review was organized, resulting in the Stockholm Convention of 1967, ratified by Brazil through Decree 75.572, of April 8, 1975, and, a little later, through Decree 635, of August 21, 1992, Brazil incorporated articles 1 to 12 and art. 28, item 1, of the Stockholm text. One of Stockholm's great contributions was precisely in establishing the bases for the creation of the World Intellectual Property Organization (WIPO), of which Brazil is a member. Its fundamental objective is to promote and stimulate intellectual creation, guaranteeing protection of their rights and repressing unfair competition through cooperation between States, formulation of new treaties about the subject and inspiring the modernization of domestic legislation of different countries. WIPO has become a specialized agency of the United Nations (UN).

Brazil also ratified another important treaty related to the legal protection of intellectual property, the so-called "TRIPS" – *Trade Related Intellectual Property Rights*), signed in 1994, at the conclusion of the Uruguay Round negotiations which began in 1986, within the scope of the General Agreement on Tariffs and Trade (GATT)

that culminated in the creation of the World Trade Organization (WTO), of which the referred to agreement is an integral part its articles of organization. The TRIPS Agreement, among other themes, regulates the protection of intellectual property rights in terms of patents, copyrights, trademarks, geographic indications and industrial designs. TRIPS also establishes that the members of the World Trade Organization guarantee the protection of intellectual property as per the terms of the Paris Convention and other international agreements related to the subject. In Brazil, TRIPS (Annex 1C of the Treaty of Marrakech) was ratified through Decree no. 1.355 of December 30, 1994, which incorporated the final Minutes of the GATT Agreement's Uruguay Rounds for Multilateral Trade negotiations. Brazil also ratified other important international treaties that refer to the protection of intellectual property, such as: (a) Strasbourg Agreement Concerning the International Patent Classification; and (b) Patent Cooperation Treaty.

At the end of the 20th Century, Law no. 9.279 of May 14, 1996, went into effect in Brazil. It regulates rights and obligations related to industrial property and it also called the new Brazilian Intellectual Property Code, which regulated diverse aspects related to inventions, models of utility, product brands, trademarks and services and industrial designs. The referred to law also stipulates rules concerning crimes against intellectual property. This Law was later amended by Law no. 10.196 of February 14, 2001.

22.3. International Contracts on Intellectual Property

22.3.1. International Contract for Granting Copyrights to Literary Works

Copyrights are regulated in Brazil by Law 9.610/98 of February 19, 1998, which regulates copyrights in the country and guarantees foreigners who reside abroad the protection of their copyrights ensured in the agreements, conventions and treaties in effect in Brazil. Several aspects are addressed in the referred to law, such as rules related to reproduction, beginning of the protection of author's rights, as well as their extinction. In this regard, it is worth pointing out that in accordance with the rules adopted by most countries, a literary work, for example, becomes public domain seventy years following the year of the author's death. In consonance with this international tendency, Brazil currently adopts the same criteria, that is, the heirs of the author of the literary work lose their acquired copyrights

seventy years after his or her death, as indicated in article 41 of Law no. 9.610 of February 19, 1998.

The International Treaty for Granting Copyrights to Literary Works is a private instrument through which the author (owner of the copyrights, assignor) grants a third party, generally a publishing house (assignee) the rights to: promote the publishing of the literary work in any form and authorizes it to publish, distribute and sell it throughout the country or even in other countries that should be specified in the contract. Normally, this sort of contract will also establish a declaration by the assignor ensuring the work is original and that are no questions of any nature related to any violation of third party rights, or any onus or rights that impede assignment. Those obligations contracted by the contracting parties within the scope of this type of agreement also oblige their heirs and/or successors. Furthermore, the contract shall also establish the no subsequent change in the literary work may be made without the prior and expressed consent by the author, or his or her successors, as per the case.

The author shall reserve in contract the right to revise, prior to printing and publishing the work abroad, any translations made in order to guarantee the integrity and originality of the content of his creation. Another important aspect to be included in the contract is the clause concerning author remuneration, which in most cases is calculated over a sum that corresponds to a percentage of the each book's cover price. This remuneration is owed in accordance with sales actually made, numbered by the publisher in periodic account rendering reports that may be audited by the assignor. It is also necessary to define whether the assignee will be granted exclusivity of the work or not, actionable against third parties and against the author, who, depending on the extension of said exclusivity, may not reproduce it in any way.

22.3.2. International Agreement on Trademark Licensing

According to Brazilian legislation, a trademark is any distinctive sign that identifies and distinguishes companies, products and services for other analogous ones of diverse origins. It is worth underscoring that registration of the trademark at the competent body is fundamental since only the registration (the "registered trademark") guarantees the owner the exclusive right of use throughout the country in its respective line of economic activity. Likewise, its identification by the consu-

mer can add more value to the products and services it identifies. In Brazil, the competent entity for registering a trademark is the National Institute of Industrial Property (INPI), which is a Federal Autarchy tied to the Ministry of Development, Industry and Foreign Trade, in accordance with the Industrial Property Law (Law no. 9.279/96), the Software Law (Law no. 9.609/98) and Law no. 11.484/07 which aims at: (i) registering trademarks; (ii) granting patents; (iii) endorsing contracts for the transfer of technology and for franchises; (iv) registering computer programs; (v) registering industrial designs; (vi) registering geographic indications; and (vii) registering integrated circuit topography.

Regulations for registering trademarks are essentially foreseen in the Industrial Property Law (Law no. 9279/96) which stipulates trademark related rights and obligations, as well as all aspects of trademark law, including everything that can and cannot be registered as a trademark as per article 124. Since trademarks are intangible assets susceptible to registration and the object of ownership, they can also be the object of assignment or transfer. According to article 134 of Law 9.279/96, assigning a trademark can encompass request for registration as well as the registration itself, as long as the assignee also meets the legal requirements for requiring said registry. This assignment produces an impact starting with endorsement in the registration, made by formal petition to the INPI, which has the competence for such as per article 136, paragraph I of the referred to Law. The assignment will also only produce effects before third parties after publication of the endorsement deferment by the INPI. In accordance with Law 9.279/96, the Brazilian legislator is also seen to opt for the criterion of the universality of trademark assignment, according to which, in the case of transfer, all registrations and requests for trademarks equal or similar to the same activity shall be transferred in blocks.

Trademark licensing is a procedure through which rights of use for a specific trademark are assigned to third parties in order to add value to the product or service of the licensed company, through the instantaneous recognition by consumers of a brand in evidence, representing an essential element for winning over consumers and keeping them loyal. According to article 140 of Law no. 9.279/96, trademark licensing should be the object of a specific contract that "*will be endorsed at the INPI to produce effects in relation to third parties*". Therefore, it can be observed that only after endorsement of the licensing contract at the INPI will it produce effects before third parties. If the licensing contract is not endorsed at the INPI, the licen-

see could face various problems such as obsolescence of the trademark as a result of the impossibility of the licensee to demonstrate its use since only the owner of the trademark could do so as a result of the lack of endorsement at the INPI.

Besides the characteristic clauses of all international agreements, such as the governing law and courts, or the possibility of solving eventual controversies through alternative methods of dispute such as mediation and international commercial arbitration, the international trademark licensing contract should also contain information that clearly and unequivocally defines the trademark to be licensed and the criteria for use, a declaration by the licensee that it has the technical and industrial conditions to produce the licensed products in accordance with the licensor's models and specifications, set the quantities of licensed products to be produced, establish confidentiality criteria, the period for licensing trademark use, the financial consideration, expressed in percentages over sales values that refer to use of the licensed trademark, as per the case, whether when product design was developed by the licensee or the licensor, the form and currency of payment, rendering of accounts and eventual audits as well as the contract fine in case of any violation of criteria for licensed trademark use.

Finally, it is worth noting that in Brazil it is possible to register a trademark as Brazilian or foreign. In the case of foreign trademarks, it must be pointed out that they are registered in consonance with the criteria established by the Paris Convention, which defined a six month priority period counted from the date of the request in the trademark's country of origin, so the owner initiate the trademark's registration request in other countries that have also ratified the referred to Convention. In this sense, for a foreign trademark to be registered as such in Brazil, it is necessary to submit the trademark request made in the respective country of origin or its registration certificate to the INPI.

22.3.3. International Agreement on Patent Licensing

A patent is actually a title of ownership of an invention or a model of utility, granted by the State to inventors or other individuals or legal entities who are the legitimate owners of the rights to the invention, guaranteeing the owner exclusive rights to commercially explore his/her creation. As a counterpoint to patent protection, the owner agrees to describe all the technical content of the invention protected by the patent in details. The exclusive rights guaranteed by the patent refer to the right of

prevention so others cannot manufacture, use, sell or import the protected invention during the patent validity period.

The patent owner can economically explore and commercialize the patent *per se*. However, since the patent is property, it can be the object of sale or assignment through licensing to third parties to explore the object of the patent in question. This license can be granted by the owner of the patent, or by the heirs or successors. The license in question can also be exclusive when its owner becomes excluded from the right to commercial exploitation of the patent, or even a non-exclusive license, when the owner can grant several licenses to different individuals or legal entities, or even exploit the invention himself/herself. Granting of the license is the object of a specific licensing contract that, as per article 62 of Law no. 9.279/96, is subject to endorsement at the INPI.

As per the terms of Law no. 9.279/96, there are different types of licenses, such as: (a) the voluntary license, which guarantees the owner the right to license to third parties for the purpose of manufacturing and selling the product which is the object of protection; and (b) the compulsory license, which was instituted to avoid any abuses in exercising the right to exclusive commercial exploitation of the patent, such as, the lack of actual use of the invention. The referred to law specifically foresees the cases of granting compulsory licenses, especially: (i) exploitation insufficiency; (ii) abusive exercising; (iii) situations involving the abuse of economic power; (iv) dependence on patents; or (v) public interest or national emergency. This last provision gains particular importance after the creation of the World Trade Organization and the discussion in 2001, which resulted in the Doha Declaration, and that permits, in cases of extreme urgency, such as in face of epidemics that place human lives at risk, for a country to permit use of the patent, without prior authorization by the owner of the right. However, it can be observed that according to the same law, the compulsory license may not be granted if when the compulsory license is requested, the owner presents a justification for disuse of the patent for legitimate reasons; or proves the carrying out of serious preparations to begin exploiting the object of the patent; or justifies the lack of patent commercialization due to a legal order.

The international patent licensing agreement to be endorsed at the INPI, which aims at authorizing third parties, with or without exclusivity, to exploit a granted or requested patent, should include provisions related to: the number and ownership

of the patent granted or the protocol number when requested, but not yet granted; the granting of know-how; contract validity period; conditions for remuneration and royalty payment discipline, including the currency; technical assistance and training to licensee technicians; the country for license exploitation; confidentiality rules; patent use discipline, through the actual use of the licensed patent, manufacturing and selling products uninterruptedly in determined quantities; possibility of conducting audits on the part of the licensor; possibility of technical improvement of the product; fine in the case of non-execution of contract obligations, as well as the governing law and competent jurisdiction, or even an arbitration clause, establishing the commitment of the parties to submit eventual controversies to the alternative mechanism for solving international commercial arbitration disputes.

A foreign owner of a patent may request the respective patent in Brazil as per the periods and the terms of the Paris Convention. Since there is no international patent, each patent will be valid in the respective country of registration and protection due to the principle of patent independence. Thus, an international patent licensing agreement should, depending on the case, make reference to each of these national patents registered in different countries.

22.3.4. International Technology Transfer Agreement

Technology transfer operations aim at ensuring that scientific and technological development are accessible to individuals, companies or governments so they may exploit the technology in new products, applications, materials and services. Every time a technology transfer operation involves a Brazilian party, or an industrial property right registered in Brazil, this transfer will be regulated by applicable legislation and most especially, it will be governed by INPI Normative Act no. 135/97, which governs the criteria for endorsing and registering contracts that contain devices related to technology transfer and that, according to INPI, represent different types of contracts, such as: (i) trademark licensing; (ii) patent licensing; (iii) exploitation of industrial design; (iv) providing technology; (v) technical and scientific assistance; and (vi) franchise contracts.

It is worth observing that such contracts should be endorsed by INPI, including licensing contracts for exploitation rights (patents, industrial design and trademark use), contracts for acquiring technological knowledge (supply of technology and providing technical and scientific assistance services) and franchise contracts, so

that such contracts can produce effects not only between the parties, but also on third parties. This endorsement before the INPI is important for fiscal purposes as well and it permits the future transfer of royalties abroad.

International technology transfer contracts include certain clauses as per the type of technology transfer operation it involves. In practice, each of the diverse types of technology transfer contract has its own structure, and specific objectives, although there are also similarities among them, such as the definition of strict confidentiality rules and the possibility of establishing the remuneration of the owner of the rights abroad by payment of royalties, in percentages, which may be fixed or variable, depending on the case. But otherwise, the characteristics of each of these contracts differ according to their specific legal nature. For example, in terms of validity period, the duration can vary considerably from one type to another; for example, the duration of a patent licensing contract cannot exceed the duration of patent registration. Thus, the technology transfer contract models should respect these distinct specificities according to each type of technology transfer involved. Among the most used technology transfer modalities in Brazil, licensing contracts for trademarks and patents stand out, which have already been addressed. However, it is also necessary to mention another type of technology transfer which has been gaining more and more ground in Brazil: the business franchising contract.

In Brazil, the franchising contract is among those contracts nominated since Law 8.955 of November 15, 1994, went into effect, which regulates them. This Law regulated various aspects related to franchising, ranging from basic relations between a franchiser and the franchisee, rules for elaborating a franchising contract, and even the possible sanctions in the case of non-execution of some contract obligations. This contract is characterized by legal and financial independence enjoyed by the franchisee in relation to the franchiser, without any employment ties, except, of course, in the event there is evident dissimulation of the job contract. On the other hand, the franchiser is able to establish a true distribution network of products or services through contract terms and provisions that create little burden for it.

In general, the international franchise contract will introduce specific clauses from this business segment, such as: the definition of the intended franchise (product, service, industrial franchise…); its object; license for using the franchise trademark and/or patents inherent to the franchise; the franchisee manual containing all the rules for using the franchise, commercial practices, human resource policies and

criteria for elaborating accounting, customer service and criteria for promoting and employing the franchise trademark; rules for training the franchisee and its employees; norms concerning advertising and marketing of products and/or services; confidentiality clause; franchise and advertising fees; definition of royalty payments calculated as a percentage over franchisee sales, as well as its currency and payment terms; elaboration of periodic reports on sales, consumer behavior and market and competition evolution; restrictions regarding use of the trademark; insurance; non-execution of contract obligations, as well as fines and forms of indemnification due to violations of intellectual property rights; besides, of course, the clauses involving applicable law, courts and arbitration as an alternative mechanism for solving controversies.

INTERNATIONAL TREATIES

23.1. Overview

Treaties are written agreements executed between legal entities acting under International Law. Treaties may be entered into by and between States, between States and international organizations, or between the international organizations themselves, as long as the parties are represented by qualified agents. Said instruments seek to govern legal relations between the parties, which freely entered into them, and are aimed at producing legal effects at international level and achieving legal and legitimate goals. Under the rule of International Law, treaties are negotiated and concluded, so that the contracting parties are bound to fulfill and enforce their provisions.

From the Brazilian perspective, treaties and conventions are negotiated and signed by the Head of the Executive Branch, i.e. the President of the Republic, prior to their ratification at the international level. Pursuant to Art. 49, I, of Brazilian Federal Constitution of 1988, they should be submitted for the approval of the National Congress: first by the lower house (House of Representatives) and then by the upper

house (Federal Senate). After the issuance of a Legislative Decree by the Congress approving a treaty its text is submitted to the Brazilian President, who, in turn, issues a Decree incorporating the treaty to the domestic system, followed, thus, by enactment and publication of the international document within Brazilian legal system. Those coordinated steps are essential for Treaties to be enforceable within domestic law.

In parallel with the decision on approval by the National Congress, the Head of Executive Branch or Ministry of Foreign Affairs communicates the ratification to the depositary authority. Treaties are then registered with the UN Secretary General, which are then acknowledged by other countries, which is to say, by International Law.

23.2. International Trade

With regard to the multilateral trade system, Brazil is a member of the World Trade Organization, (WTO), which succeeded the primary framework of the old General Agreement on Tariffs and Trade (GATT) of 1947, according to the organization which was established by the Marrakesh Treaty of 1994.

Apart from its membership in the institutions of the modern international trade system, Brazil is one of the original signatory states of the 1944 Bretton Woods treaties, thus Member of the International Monetary Fund (IMF) and World Bank: It is also a founding Member and shareholder in the Inter-American Development Bank, and Observer State of the European Union, for which it maintains a Permanent Mission in Brussels.

In connection with its trade agenda in the last decades, Brazil has signed bilateral treaties with Austria, on 3/13/93, with the European Union, on 1/31/94, with Turkey on 04/10/95, with Uruguay, on 5/6/97, as well as supplementary arrangements with Peru, on 07/21/99, a protocol with Argentina, on 10/29/99, and an agreement with Costa Rica, on 04/04/2000. Further bilateral agreements are to be mentioned in this context: the Economic Cooperation Agreement with Hungary, signed on May 05, 2006; the Trade and Economic Cooperation Agreement with Kazakhstan, as of September 27, 2007; Economic and Industrial Cooperation Agreement with Czech Republic as of April 12, 2008; Cooperation on Economic, Scientific and Technological matters and Innovation with Greece, as of April 03, 2009; and Trade and

Economic Cooperation Agreement with Jordania, as of October 23, 2008; and the Memorandums of Understandings for Cooperation on Trade and Investments Promotion, concluded with Bolivia (November 11, 2003), Chile (August 23, 2004), and Colombia (as of June 27, 2005).

23.3. Intellectual Property

With regard to the international protection of intellectual property rights (patent, trademarks, industrial designs, copyright and related rights and further IPRs), Brazil was a founding member of the Paris Union for Protection of Industrial Property, established on 1883, and further has acceded to the 1886 Berne Union for Protection of Literary and Artistic Works (February 09, 1922).

Since 1975, Brazil has been a Member of the World Intellectual Property Organization (WIPO), and it is also signatory of the Paris Convention for the Protection of Industrial Property, including the Hague Revisions of 1935 and the Stockholm revisions of 1967 and Berne Convention for Protection of Literary and Artistic Works of 1886, including Paris Revision (1971).

Brazil is also a signatory party to the Patent Cooperation Treaty (PCT), concluded in Washington in 1970, which was then ratified and incorporated into Brazilian law. Further international intellectual property treaties, adopted under the auspices of WIPO or which are administrated by this Organization, were signed by Brazil, such as the Madrid Agreement on Indications of Source of 1896; the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961, Strasbourg Agreement of 1971, concerning the International Patent Classification; Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms of 1971 and the Nairobi Treaty on the Protection of the Olympic Symbol of 1981.

Since 1994, with the establishment of the World Trade Organization, Brazil became Member of TRIPS – Agreement on Trade-Related Aspects of Intellectual Property Rights (Annex IC of 1994 WTO Agreement), which was incorporated to Brazilian domestic law by the Decree No. 1.355/94. Under the provisions of TRIPS and the WTO Agreement, any international IP related disputes involving Brazil and WTO Members can be brought to the WTO Dispute Settlement Body (DSB), which has jurisdiction over disputes dealing with international trade related matters, inclu-

ding trade on goods, subsidies, dumping, non-tariff barriers, trade on services and intellectual property.

Within the field of bilateral relations on intellectual property, Brazil has signed several international treaties and agreements, for example: with Sweden (1955) for protection of industrial and commercial brands, with France (1983) concerning industrial property, with the former USSR (1982), for scientific and technological cooperation, with the United States (1957) and Italy (1963), concerning copyrights.

23.4. Taxes

Within the field of tax law related to international trade relations, Brazil signed, ratified and transformed into internal law, a variety of different international agreements "to avoid double income tax taxation" (international double taxation accords), examples of which that we may site are the agreements reached with: Germany (2006), Argentina (1982), Austria (1976), Belgium (1973), Canada (1986), Chile (2003), China (1993), Denmark (1974), Ecuador (1988), Spain (1976), Finland (1998), France (1972), Hungary (1991), India (1992), Israel (2005), Italy (1981), Japan (1967 and 1978), Luxembourg (1980), Mexico (2006), Norway (1981), Peru (2009), Philippines (1991), Portugal (2001), the Netherlands (1991), South Africa (2006), South Korea (1991), Sweden (1976 e 1996), Slovakia and the Czech Republic (1991), Ukraine (2006).

Furthermore, Brazil also signed international income tax exemption treaties for maritime and air transportation companies with the following countries: South Africa, Chile, France, Italy, England and Ireland, Switzerland and Venezuela. Due to these agreements, which are designed to prevent double taxation, Brazil applies reduced tax rates, pursuant to what is established in the aforementioned treaties, which runs contrary to ordinary rules established by Brazilian domestic legislation, for anticipated earnings, including interest relative to the acquisition of goods requiring long term financing. Those reduced tax rates are allowed, even when the paying source has undertaken the tax burden, due to the transactions concluded either in Brazil or abroad, with persons residing in Brazil or abroad.

Additionally, with the objective to develop projects and actions related to technical cooperation involving tax and customs administration matters, Brazil concluded a complementary treaty with Cuba, on 05/27/1998, which placed a priority on tax

administration and further aspects related to collection, procedures and systems within the tax administration relationship with banking networks; the adaptation or development of a revenue classification system and adaptation of information technology systems to manage collections, as well as network operation and information technology, by means of systems development.

23.5. Latin America

After the end of the Second World War, Brazil was a major player in shaping the institutional framework for the establishment of a free trade area in Latin America, acting as one of the founding Members of the Latin American Free Trade Association, the "ALALC" ("Associação Latino-Americana de Livre-Comércio"). This organization was created by the Montevideo Treaty, which was concluded by Argentina, Brazil, Bolivia, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela on February 18, 1960. Major goals of ALALC were the gradual establishment of a Latin American common market and the promotion of integration efforts at regional level.

On August 12, 1980, in Montevideo, the same ALALC Members states established the Latin American Integration Association, "ALADI", a regional organization which became operative in March 1981. According to Art.1 of the 1980 Treaty, ALADI Contracting Parties stressed that their concerns were "to move forward with the integration process undertaken to promote economic and social development, harmony and balance throughout the region". The 1980 Montevideo Treaty sets forth important principles regarding the integration process: i) pluralism: ii) convergence; iii) flexibility; iv) differential treatment; and v) multiplicity. Those principles significantly differ from the main contours of the trade liberalization schema set forth by the 1960 Montevideo Treaty which established ALALC.

In line with the tradition of free trade in the region, despite of the limited scope of the preceding ALALC and ALADI treaties, Brazil and Argentina later concluded important bilateral treaties, specifically designed for a fast growing bilateral common market area: the Development Integration and Cooperation Treaty, signed in Buenos Aires on November 29, 1988, twenty-four Protocols, followed by other bilateral agreements on specific topics, which include the Treaty for the Establishment of a Statute for Brazilian-Argentinian Bi-national Companies, dated as of June 6, 1990. As described in Chapter 23.6, further efforts on regional integration process

led to the establishment of MERCOSUR in 1991, according to the provisions of Asunción Treaty, which was concluded between Argentina, Brazil, Uruguay and Paraguay on March 26, 1991.

The main legal framework of ALADI provides three mechanisms for the establishment of preferential trade areas in Latin American region, basically: i) regional tariff preferences which are granted for products originating from a ALADI Contracting Party, based on tariffs applicable to exporting third countries; ii) regional scope agreements to be negotiated and conclude amongst Contracting Parties and iii) partial scope agreements between two or more ALADI Contracting Parties (see, for instance Resolution No.2 of the Council of Foreign Ministers, as of August 12 1980 on partial scope agreements concluded under ALADI umbrella). Regional or partial scope agreements are designed to cover tariff relief and trade promotion, as well as further policy aspects concerning the regional integration, such as economic complementation; agricultural trade; cooperation in financial, tax, customs and health matters; scientific and technological cooperation; environmental protection; pharmaceutical goods in transit; tourism promotion; technical standards and other areas. Under the framework of ALADI, Brazil has also signed multilateral agreements of economic nature with Argentina, Chile, Mexico, Uruguay and Venezuela, in 1995, and bilaterally, Economic Mutual Assistance Agreements ("ACE") with Chile (1996, 2006), Bolivia (1997, 2005), Mexico (2002) and a Limited Scope Economic Mutual Assistance with Suriname (2005).

Particularly with regard to partial scope agreements, Contracting Parties may negotiate several matters related to the regional integration process, such as (ii) rules on trade conduct: subsidies and countervailing duties; unfair trade practices; licenses and import procedures; and (ii) other rules on non-tariff matters: payments; financial cooperation; tax cooperation; animal and plant sanitary cooperation; customs cooperation; transport facilitation and state procurement.

In addition, within ALADI context, Contracting Parties had implemented several preferential systems, which are comprised of market opening lists and cooperation programs, such as in the fields of business, investment strategies, financing and technological support. ALADI Contracting Parties had also accorded preferential treatment to certain landlocked countries in the region (such as Bolivia, and Paraguay), by means of countervailing measures, aimed at favouring their entire participation in the regional integration.

Since Montevideo Treaty of 1980 is a "framework treaty", the institutional and normative development of the integration process amongst Latin American countries is further complemented and shaped by other multilateral regional agreements, treaties and organizations, such as Andean Community, MERCOSUR, G-3 Free Trade Agreement, UNASUL. In this sense, ALADI has established consensus on flexibility and convergence principles guiding the regional integration processes in Latin America, with the purpose to deep and enlarge a common economic area. This initiative is not carved out by a market oriented approach, but rather by a gradual and open development of the integration process.

23.6. MERCOSUR

The MERCOSUR Treaty, concluded on March 26, 1991 in Asunción, Paraguay, was intended to create a common market between Brazil, Argentina, Uruguay and Paraguay (the primary MERCOSUR State Parties), wherein the following objectives were established:

(a) the free circulation of goods, services and production factors amongst the State Parties, through the elimination of tariff and non-tariff related barriers between the countries;

(b) the establishment of a common external tariff and the adoption of a common relationship commercial policy, both at a regional as well as an international level;

(c) the coordination of sector related macro-economic policies among member nations, with respect to foreign trade, agriculture, industry, tax issues, foreign exchange, capital, services, customs policies, transportation and communication, as well as any other item upon which they may come to negotiate;

(d) commitment from the States Parties to harmonize their respective legislation, with the intent of achieving full integration.

MERCOSUR Associate States include Chile and Bolivia (both in 1996), Peru (2003), Venezuela, Colombia and Ecuador (the last three in 2004). By means the execution of Economic Mutual Assistance Agreements, the main objective is to establish a free trade zone throughout MERCOSUR and with each one of these countries,

upon which special tariff conditions will be applied. Some of these countries, like Chile and Venezuela, currently negotiate their adhesion to MERCOSUR and may become full members in the near future.

Five Annexes integrates the 1991 Asuncion Treaty establishing the MERCOSUR: I) Trade Liberalization Programm; II) General Origin System; III) Dispute Settlement; IV) Safeguard Clauses and V) Working Sub-Groups of the Common Market Group. The application of the Annexes provisions is made in connection with Article 3º of Asuncion Treaty. In this sense, it is important to remark that the 1991Treaty was further bolstered by the adoption of specific Protocols concerning said matters

The institutional framework of MERCOSUR is based on the rules set forth in the Asuncion Treaty and the 1994 Ouro Preto Protocol (Additional Protocol to the Asunción Treaty on the Institutional Framework of MERCOSUR of 1994), which stresses the objectives and principles of the organization particularly the implementation of a Custom Union as one of the stages for consolidating a Common Market.

According to Art.1 of the 1994 Ouro Preto Protocol, the institutional bodies of MERCOSUR are structured as follows:

(a) *Common Market Council ("CMC")* – the CMC is comprised of the Foreign Affairs or Economic Ministers (or the equivalent) of the MERCORSUR Parties. This is the highest institutional body with decision making powers within the framework of MERCOSUR, and the it is responsible for insuring enforcement and implementation of the provisions established in the Asuncion Treaty. The CMC is also the entity that represents MERCOSUR when negotiating and signing treaties and agreements with non-member states ("third countries"), with international institutions and other nations in general;

(b) *Common Market Group ("GMC")* – the GMC is comprised of four permanent members and four substitute members appointed by each member State, representing the following entities: I) Foreign Affairs Ministry; II) Economic Ministry (or the equivalent); and the Central Bank. The GMC is the executive body of MERCOSUR and responsible for implementing all the decisions which are taken by the CMC. Further tasks of GMC are the following: i) to supervise the activities of the MERCOSUR Trade Commission ("CCM") and

the administrative agencies, ii) to propose measures seeking to implement a trade liberalization program, iii)_to coordinate a macro-economic policy, iv) to participate in negotiations with international agencies and non-member States with respect to the signing of accords, and if necessary, to act in the solution of controversies within the scope of MERCOSUR, and v) to organize and coordinate the activities undertaken by the Working Sub-Groups;

(c) The *MERCOSUR Trade Commission ("CCM")* – the CCM is comprised of four permanent members and four substitutes, appointed by each one of the MERCOSUR member States, and coordinate by each one of the Foreign Affairs Ministers of each country. It is is responsible for insuring the enforcement of the mechanisms related to the implementation of a common commercial policy. The CCM is also the entity responsible for speaking on behalf of the member States with respect to any question raised with respect to the Common External Tariff and objections raised by the private sector;

(d) *Joint Parliamentary Commission ("CPC")* – this body is comprised of 64 (sixty-four) permanent members and 64 (sixty-four) substitute members. Each one of the member States appoints 16 (sixteen members), who should be members of their own respective National Congresses. In this sense, the CPC represents the legislative bodies of the State Parties of MERCOSUL. Within the scope of the MERCOSUR institutional structure, the CPC plays the role of consultative and decision making body;

(e) *Administrative Secretariat ("SAM") and the Economic and Social Consultation Forum ("FCES").* The SAM is responsible for publishing Official Bulletins for MERCOSUR and to insure the safekeeping of relevant documents. It is also responsible for giving publicity to the activities of the GMC. The FCES, in turn, is the entity that represents the economic and social areas of the MERCOSUR States, for which it is a consulting body; and

(f) *Working Sub-Groups ("SGT")* – The Work Sub-Groups are subject to theGMC authority. Its task is to manage survey studies that are of specific interest to MERCOSUR and to issue decisions and resolutions which will be subsequently overseen and monitored by the CMC. Currently, there are 15 (fifteen) working sub-groups, which are arranged in the following structure:

SGT No. 1 – Communication;

SGT No. 2 – Institutional Aspects;

SGT No 3 – Technical Rules and Conformity Assessment;

SGT No 4 – Financial Matters;

SGT No 5 – Transportation;

SGT No 6 – Environment

SGT No 7 – Industry;

SGT No 8 – Agriculture;

SGT No 9 – Energy;

SGT No 10 – Labor Matters, Employment and Social Security Relations;

SGT No 11 – Health care;

SGT No 12 – Investments;

SGT No 13 – Electronic Trade;

SGT No 14 – Accompaniment of Current Economic and Trade Circumstances; and

SGT No 15 – Mining.

By means the Decision CMC No. 23/05, the Common Market Council adopted the Protocol establishing the Parliament of MERCOSUR ("Protocolo Constitutivo del Parlamento del MERCOSUR"). Headquartered in Montevideo, the Parliament will serve as new body of the organization, representing the citizens of the region in an independent and autonomous manner. Thus, the Parliament is not a representative body of the Member States, but rather of MERCOSUR citizens. The first stage of

implementation started on December 31, 2006; in its second and last stage, from January 2014, MERCOSUR Parliament will be fully integrated by representatives elected by place a direct, universal and secret vote placed by the citizens of all Member States.

Proposed Evolving Reforms in MERCOSUR. The Decision CMC Nº 56/07 of the Common Market Council established the main guidance for an institutional reform of the organization: i) restructuring of the decision-making bodies of MERCOSUR and their affiliate bodies, including their competences; ii) enhancement of MERCOSUR dispute settlement system, as well as the strengthening of its institutional bodies; iii) improvement of the mechanisms related to transposition, entry into force and enforcement of MERCOSUR rules and regulations ; iv) establishment of a budgetary framework able to encompass both the budgetary requests made by MERCOSUR Secretariat and the Secretariat of the Permanent Review Court.

In addition, by means the Resolution GMC 06/10, the Common Market Group approved the creation of the High Level Meeting for the Institutional Analysis of MERCOSUR (RANAIM -"Reunión de Alto Nivel para el Análisis Institucional del MERCOSUR"). The objectives of the High Level Meeting are focused on the analysis of the main institutional aspects related to MERCOSUR and policy-making oriented proposals which are conducive to the enhancement of the integration process and strengthening of MERCOSUR institutions.

Tariffs and Trade within MERCOSUR. Since January 1, 1995, there are no longer any tariff barriers amongst MERCOSUR Parties. The large majority of products sold between the four countries – there are a few exceptions – are not subject to any customs taxes. Additionally, a Customs Union was established to become effective on January 1, 1995. As such, an instrument was created to make the member countries more competitive within the international market, the Common External Tariff (TEC).

Any request for amendment to current TEC rates are analyzed, at technical level, by the Technical Committee N.1 of the MERCOSUR Trade Commission (CCM); after internal public consultations take place, the CCM proceeds to a comprehensive analysis of the TEC related rates and submit them to Common Market Group for approval. Within Brazilian regulatory framework, the analysis of said requests is carried out by the Foreign Trade Division (CAMEX – Câmara de Comércio Ex-

terior) of the Ministry of Industry, Development and Foreign Trade. CAMEX is the domestic body in charge of transposing the TEC related amendments which have been approved by Common Market Group into Brazilian legal system, by means the enactment of specific Regulations.

As it takes place within the context of common market in European Union, the TEC should act as bedrock for MERCOSUR integration process. This tariff will cover the majority of the products imported from countries that are not MERCOSUR members, with the exception of those products which are listed as "sensitive" in their respective countries. In case of Brazil, for instance, sensitive goods are related to capital assets, information technology and telecommunications.

With the purpose of avoiding cash flow deviations within intra-block trade, MERCOSUR Parties established a common external tariff which should range between 0% and 20%, based on 11 taxable rate levels, increasing by twos. According to the Decision of the Common Market Council ("CMC") No. 22/94, a TEC of 14% (fourteen percent) was implemented for *capital assets*, applicable to Brazil and Argentina starting from January 1, 2001. On 2010, by Decision No. 60 of Common Market Group ("CMG"), the members of the Group for Productive Integration has their status before MERCOSUR updated and became part of the Common Market Group. This decision has affected the status of implementation of TEC related provisions by Paraguay and Uruguay. After that, according to Decisions No. 28/09 and 61/10, Uruguay and Paraguay, respectively, agreed to implement the TEC definitely by December 31, 2011.

Furthermore, pursuant to Decision CMC No. 34/2003, the Common Market Council introduced the "Common Importation System for Capital Assets not produced in MERCOSUR". The objective of importing these assets is to modernize the productive sector of the MERCOSUR States and to encourage investments within the region. Thus, two product lists were created: the *Common System List*, temporarily at a taxable rate of 0% (zero percent) and the *National Lists*, temporarily at a taxable rate of 2% (two percent), for products not accepted on the Common List.

The goods included in the aforementioned lists will remain protected from importation at different taxable rates for a minimum of 21 (twenty-one) and maximum of 27 (twenty-seven) months, from the date of their inclusion on the List, renewable for an equal period of time, upon the request made by a Party to the CMC.

In addition, by means Decision CMC No. 40/2005, the Common Market Council extended the initial deadline for this system to be into force from January 1, 2006 to January 1, 2011. From this date on, MERCOSUR states shall act in accordance with the operative systems for importing new capital assets.

MERCOSUR Parties are awaiting similar regulations for amendments to applicable TECs related to capital assets produced in the region, as those which were submitted by Party States to the Trade Commission by June 30, 2001. After several extensions, Decision CMC No. 40/2005 established the date of December 31, 2006 as the deadline for the High Level Group to examine the consistency and dispersion of the Common External Tariff constituted to present that TEC modification proposal for capital assets.

ith regard to *information technology and telecommunications assets*, Decision CMC No. 07/1994 establish the agreed schedule with regard to the date of convergence for relevant tariffs to January 1, 2006. A maximum common tariff of 16% (sixteen percent) was set to be in force from that date. Decision CMC No. 33/03 however sets forth that the Trade Commission should negotiate a *Common System for Information Technology and Telecommunications Assets*, which should be approved by the Common Market Group by December 31, 2005. Subsequently, Decision CMC No. 39/2005 not only extended this deadline through December 31, 2006, but it also agreed to institute another High Level Group to examine the consistency and dispersion of the common foreign trade. This High Level Group was equally mandated to prepare, until June 30, 2006, a proposal for a comprehensive review of TEC rates applicable to information technology and telecommunications assets. The tariffs will become effective as of January 1, 2009. The proposed changes should be put into practice following a convergence schedule to be in force starting from January 1, 2007. Until that stage, the Party States could apply a distinct taxable rate from the TEC in force – including 0% (zero percent), where it is the case – upon the realization of negotiations among the Argentina, Brazil, Paraguay and Uruguay.

However, with the creation of the Ad Hoc Group, for the sectors of Capital Goods and Information Technology and Telecommunications Assets (GAH BK/BIT), by the CMC Decision No. 58/08, those obligations were admitted by this new group. As a consequence of that, those members shall comply with a Common System for Information Technology and Telecommunications Assets non-Produced in MERCOSUR until December 31st, 2015,. Therefore it was established new deadlines for

the application of domestic rates on the imports of Information Technology related goods. As defined by the Decision CMC No. 57/10, Brazil and Argentina may apply a distinct rate, including 0%, until December 31st, 2015. Uruguay and Paraguay may apply 0%, as well, for IT goods originated from third countries, thus, outside from MERCOSUR, and 2% for the other cases, until December 31st 2018 and December 31st, 2019, respectively.

MERCOSUR State Parties undertook, pursuant to Decisions CMC No. 69/2000 and No. 33/2005, to fully eliminate, by December 31, 2007, special customs importation systems that had been unilaterally adopted by the Parties. This obligation does not include the Special Customs Areas, but merely the systems and benefits that imply total or partial exemption of customs rights that create tax burdens on the temporary or definitive importation of goods and that have not been subject to improvement and later exportation of goods from third party countries. The targeted products subject to these mechanisms will benefit from free trade within MERCOSUR market until December 31, 2007, provided that they fulfill the requirements set forth by MERCOSUR Origin System. Likewise, the Common Market Council has further established exemptions with regard to goods destined for specific activities pertaining to the execution, coordination or foment of scientific or technological investigations, and which are recognized as such by the relevant authorities in each Party, and are not subject to any TEC, pursuant to Decision CMC No.36/2003.

Decision CMC No. 68/00, by its turn, stipulates that MERCOSUR State Parties could establish and maintain a list of 100 (one hundred) items from the Common Legal Regime of MERCOSUR (NCM) as TEC exceptions, until December 31, 2002. MERCOSUR States may modify up to 20% (twenty percent) of the products on this exception list every six months, provided that it is duly authorized by the GMC in advance. According to the most recent decision on those matters, the Decision CMC No. 58/2010, until December 31, 2011, Brazil and Argentina may maintain the list of 100 (one hundred) items as exceptions to the TEC, Uruguay a list of 225 (two hundred and twenty five) and Paraguay a list of 149 (one hundred and forty nine).

Recently, MERCOSUL approved the Decision No. 56/2010, by which the State Parties approved the Duty Union Program. Until now this is the only major project on macroeconomics coordination within the Organization, which includes, for exam-

ple, Common Automotive Policy, Trade Economic Incentives, Common Trade Defense Strategy; Productive Integration and Simplification and Harmonization of Customs Procedures intrazone.

The Common Market Council approved and regulated the elimination of double charging and the distribution of customs earnings (Decisions CMC No. 54/2004 and No. 37/2005). Thus, goods imported or originated from third party countries that enter into the territory of the Party States starting on January 1, 2006 will receive treatment as commonly originated goods both with respect to its circulation along MERCOSUR borders, as well as their incorporation into productive processes, provided that they are applied (i) a TEC of 0% (zero percent) or (ii) a tariff preference of 100% (one hundred percent), for all four parties and simultaneously, and that they are subject to the same origin requirement, within the scope of each one of the agreements signed through MERCOSUR, without quotas or requirements for temporary origin, when they are originating from and the provenance of countries or groups of countries to whom this preference has been granted. A list of these products is included in Attachments I and II of said CMC Decision, and it will be periodically updated by the Common Market Council. The elimination of multiple TEC charges acts as solution to one of the main problems cited with respect to the customs system that is put into force in MERCOSUR.

The most recent decision on those matters is Decision CMC No. 10/10. According to that, double charging and the distribution of customs earnings shall be completed on December 31, 2016, after 3 (three) periods of incorporation of changes. This process, as previously remarked, is characterized by the gradual elimination of domestic tariff and regulatory constraints.

The advanced stage of the MERCOSUR consolidation mechanisms demonstrates that the integration process underway in Latin America, at least with respect to the Southern Cone, is no longer merely a theoretical project, rather it is an important step toward regional integration and cooperation. After 20 years of existence, MERCOSUR has proven that State Parties and Associate Members achieved positive and concrete results.

COMMERCIAL AND CIVIL LITIGATION

24.1. The jurisdiction in civil and commercial cases

The new Civil Code, enacted on January, 2002, which revoked the Civil Code of 1916 and the first part of the Commercial Code, is the most relevant source for judicial decisions involving commercial and civil matters. Nowadays, the Commercial Code regulates only the matters involving maritime commercial issues.

The civil and commercial litigation is presented to the State courts of general jurisdiction, consisting of an individual judge, and can always be reviewed, if the aggrieved party so wishes, by a State Court of Appeals. Brazilian Constitution does not contemplate trial by jury in commercial and civil cases.

The procedural rules are stated in a Civil Procedure Code, which is also a federal statute. By virtue of the federative system, the organization of the courts and the specific venue rules are contained in the State legislation. In general, the State courts are not specialized and bear jurisdiction regarding civil, commercial, criminal, and family cases.

Chapter 24

The general rule regarding the jurisdiction of a lawsuit is that it shall be brought before the court of the domicile of the defendant. This rule is applied both to individuals and corporations. The consent of the parties and the election of a different jurisdiction, such as that stated in a contract, is also accepted, if there is no specific rule in the legislation or this election is not declared prejudicial for the weakest part of the contract.

All court proceedings in civil and commercial cases are not confidential but public except when they involve family matters.

24.2. Costs of litigation

The litigating parties have to pay for the jurisdictional services, which vary from State to State. The general rule is that an initial payment shall be made by the plaintiff, usually calculated on a percentage of the amount disputed, and other payments in the event of appeals, by the party who presents the appeal.

Lawyers' compensation for the services rendered to their clients is usually established on the basis of a percentage of the amount disputed or to be recovered. This percentage results from an agreement between the lawyer and his client and is calculated taking into consideration a number of factors such as the amount of the expected recovery, the complexity of the work to be executed, the length of the lawsuit, the capacity of the client to pay and the competence and reputation of the lawyer. In most cases a retainer is negotiated and, in case of success, it is set off against the final fees.

Additionally, the Civil Procedure Code provides that all expenses incurred by a winning party be paid by the loser. This includes reimbursement of those fees charged for the jurisdictional services and the fees paid to experts, but also a payment to lawyers. The fees are arbitrated by the court according to the statutory rules, are due to the lawyer, and are independent of the compensation agreed between the lawyer and his client.

24.3. Initial Procedures

There are a number of different proceedings, but this paper will only describe the "processo ordinário" which is the most usual in contractual or tortious cases where are discussed values over 60 minimum salaries and where there is no other specific proceeding stated by the law.

A civil or commercial action begins when the plaintiff's lawyer files a petition before a court having jurisdiction over the case, according to the State legislation. The next step is the service of process to the defendant. This will be effected in general either by mail or by a court official. In both cases, a copy of the complaint shall be delivered to the defendant, who shall answer the claim in a short period of time (generally 15 days). When it is not possible to find the defendant, the service of process can be made by publication in a local paper.

The defendant shall seek a lawyer to defend him, who will submit to the court a response to the allegations of the plaintiff. This petition may confirm or deny the facts and may also give a different interpretation to them as well as also will discuss the legal basis of the plaintiff. The plaintiff will then file another petition called Reply, expressing his answer to the defendant's factual and legal points. The judge will then request the parties to state the evidence they wish to produce before the court. Following that, if the parties can compromise about the rights discussed in the lawsuit, the court must hold the reconciliation hearings, when the judge will try to have the parties come to a settlement to dismiss the case.

In the event that the reconciliation is not successful and the case has conditions to proceed the judge must render an interlocutory decision, which is a preliminary judgment by the court of all procedural formalities and issues raised by the parties, except the merits of the case per se. The judge can, at this point, for instance, dismiss the case if he finds that some statutory prerequisite is not present (as standing to sue, interest to sue, and cause of action) or if he deems that the defendant is not answerable in respect of the claim. The judge will also decide on the kind of evidence he will admit to be produced by the parties.

24.4. Evidence

As will be observed, the whole process and specifically the production of evidence is entirely conducted by the judge presiding the case. In principle, documentary evidence is presented to the court together with the complaint. The defendant will also present his documentary evidence together with his answer. As a general rule, other documents pertaining to the case, which will become relevant during the development of the case, can always be presented by the parties at any point in time, provided the other party is given the right to comment on it.

The evidence, other then documentary, to be produced in the next step is the report or reports by experts, such as those rendered by an accountant, an engineer, a medical doctor, an appraiser or any other specialized professional. The judge will appoint the court's expert and the parties will forward to him questions to be answered in writing. The parties have also the right to appoint assistant experts of their own choice to answer the questions and to make comments on the report of the court's expert.

The next step is the hearings, which will take place on a date determined by the presiding judge, after the parties have had the opportunity to discuss thoroughly the documentary evidence and after the expert's reports have been examined by the parties.

The parties previously submit to the judge a list of the witnesses they want to be examined. During the hearings, the judge will first examine the witnesses and then give the lawyer of the parties the right to pose questions. Referred questioning shall not be conducted directly to the witness, but rather to the judge, who may repeat, restate or refuse such questions. Also an important feature is that either party can give testimony, but in this case the party is not considered a witness. Only witnesses are under oath. All hearings are transcribed to a written form.

The decision of the case should take place immediately after the hearings if the parties do not submit a brief commenting on the testimonies and all evidence produced. The presiding judge will then re-examine all the records of the case and after sometime hand down his decision.

As one can see, in the Brazilian system, for the "processo ordinário", there is no trial in the sense of an uninterrupted event where all evidence is produced. In fact, the evidence is produced step by step and is progressively incorporated into the dossier of the case and the findings are focused on the formation of the conviction of the judge.

24.5. The Decision

The decision of the judge is in writing and contains a description of the parties and the issues involved, a summary of the claim and of the answer, a brief description

of the facts, and his opinion in respect of each of the issues and the judgment. The decision may award a party an indemnification, may order a party to take an action or may even declare which is the right interpretation of a clause of a contract.

24.6. Provisional Remedies

When the plaintiff's lawyer files a petition, he may, in specific cases, ask for an advance relief ("tutela antecipada"), which seeks to anticipate the effects or part of the effects of the final decision. The plaintiff shall prove that his claim is prima facie evident and that he can suffer an irreparable damage or a damage of difficult reparation.

The plaintiff may also ask for this advance relief during the course of the proceedings, when one or more than one issue becomes uncontested.

In the Brazilian legal system there is also the provisional remedy ("medida cautelar"), which can be filed before or after the main lawsuit. In both cases, plaintiff seeks to protect a right, which can be damaged if a provisional measure is not granted. In this proceeding, the judge may grant a provisional measure if present both the *fumus boni iuris* and the *periculum in mora*.

24.7. Appeals

The Brazilian system allows many sorts of appeals to both final and interlocutory decisions; the latter ones encompass those that do not dismiss the case.

Recently, an alteration of the Civil Procedure Code was enacted. Such amendment restricted the possibilities of interlocutory appeals. Now, the party can appeal to an interlocutory decision, if a serious damage of difficult reparation exists, such as the non-admission of the appeal to a final decision. The party can also appeal whenever this legal requirement is not satisfied. Nevertheless, in these instances (which are very uncommon), the judicial appeal will not be forwarded immediately to the court, but will be confirmed in the legal briefs of the appeal and will be analyzed by the time of the decision of the appeal.

When the decision is not final, the appeal, in general, does not suspend the process. The same lawyer may proceed with the case in all superior courts.

The appeals are judged by a panel of a State court composed of an even number of judges. They may revise the decision in respect to the law and the facts.

The parties may appeal further to the superior federal courts, which are the Superior Court of Justice and the Supreme Court. If the party claims violation of a treaty, a federal law or conflicting interpretation of federal law by other State courts, he can appeal to the Superior Justice Tribunal. If it is claimed a violation of the federal constitution, he can appeal to the Supreme Court. Both these appeals can be proposed at the same time but they are very restricted.

No discussion of the facts is admitted and only the legal issues are subject to be reviewed in the superior federal courts. The superior federal courts also sit in panels. The appeal to the superior federal courts does not suspend the process and the party can initiate the enforcement proceedings.

24.8. The Enforcement of a Judgment

After the winning party has a final judgment he will have the right to start the "executory action" to enforce the judgment in his favor. The "executory action" will start when the plaintiff's lawyer files a petition before the same court that has decided the merits of the case.

A few years ago an alteration of the Civil Procedure Code was enacted in order to make the enforcement of the award briefer.

The plaintiff will state the amount he claims to be paid but, in many cases, the judgment has just stated that damages have to be paid and on which basis they have to be calculated, and, therefore, the actual recovery will have to be determined by a discussion of the parties in respect to the basis of the calculation of the recovery. The debtor will be then notified through his counsel to pay the debt. At this moment, the defendant that does not agree with the amount of the debt may file objections he deems necessary, but in any event he must either deposit with the court the amount due or give an asset to be attached for the guaranty of the execution of the judgment.

In case an award adjudicates that a certain or uncertain asset must be delivered by the defendant, the judge will determine measures that assure a practical result

equivalent to payment. In case it refers to positive or negative covenant, the judge will set a deadline for the defeated party to comply with the decision. In both instances, no impugnation is admissible and the debtor will be able to defend himself only incidentally.

In case of an executory action, whenever the debtor does not pay the debt and does not appeal within 15 days as of the notification to his attorney, the compensation award will be increased by 10% (ten per cent). In this case, the creditor will be allowed the opportunity to appoint the assets owned by the debtor that he wishes to be attached.

Once the attachment and the valuation of the asset are recorded, the debtor will once again be notified through his attorney in order to, if desired, submit an impugnation.

This impugnation does not affect the enforcement proceedings, unless the judge, based on his conviction, determines otherwise. Even in instances where a suspensive effect is granted to the impugnation, the enforcement can temporarily proceed, if the creditor presents a guarantee in the amount of the debt.

If at the end the defendant is not able or is not willing to pay the recovery or to perform the action required by court, the attached property shall be evaluated and disposed of by the creditor or in a public auction and the money is used to pay the winning party.

The Brazilian legal system does not have any criminal sanction against debtors. Only alimony debtors and negligent bailee may be imprisoned if they do not pay their debts.

24.9. Collection Proceedings

The collection of bills of exchange, promissory notes bills, debentures, checks, and other documents defined by the law as "título executivo extrajudicial" is made by an "executory action" (execução contra devedor solvente).

The proceeding seeks the expropriation of the debtor assets in order to pay the creditor. In this sense, the debtor has to deposit the disputed amount in court

or present property to be attached in order to be able to discuss the collection of the debt.

When the creditor has a credit represented by a document which does not have all legal formalities, it may file a "monitory action" (ação monitória), in order to be granted a declaration that this document is a "titulo executivo judicial".

Dumping in Brazil

25.1. Introduction

Globalization caused the antidumping regulations to be increasingly used these last few years, being atool often resorted to by national companies as to protect their domestic markets. Despite the strong economic implications surrounding the issue, dumping and antidumping are looked at here from the perspective of the current Brazilian laws and regulations (Law n° 9019 and Decree n° 1602, dated August 23, 1995), on the grounds of Article VI of the General Agreement of Tariffs and Trade ("GATT").

Therefore, we will first of all discuss the legal concept of dumping and its core elements. It is important to underline that "antidumping" rules may be used by companies to mitigate or even avoid dumping events, due respect being given to the fact that imposed duties may never exceed the calculated dumping margin.

Because dumping is usually mistaken for other actions for trade protection, such as subsidies and compensatory measures, we will briefly describe the parameters that allow us to tell one from the other.

We will additionally present a description of the "antidumping" process and its termination or suspension, including termination reques-

Chapter 25

ted by third parties petitioners, at governmental request in the event of national interest or execution of price agreement by the company being accused of dumping.

25.2. Concept and Core Elements of Dumping

Legally speaking, dumping is the exportation of products at lower prices than those usually used for the exporting company's like products sold in its domestic market. However, although the very difference in price is regarded as an unfair business practice, in order for such a difference in price to be rendered unacceptable it must be harmful or threat the national industry.

Therefore, the following are the core elements of dumping:

(a) Export price lower than that found in the exporter's domestic market. Exportation at prices lower than those found in the exporter's domestic market is intrinsic to dumping, this being sufficient element to characterize the act but insufficient to render it unacceptable. The following prices are taken into account when considering prices for comparison in the calculation of the dumping margin: (i) "ex works" price, that is, free of taxes; and (ii) cash price.

(b) The comparison of these two prices determines the dumping margin that is the difference between the price found in the exporting market and the export price, calculated by means of a fair comparison, i.e. any differences in marketing conditions must be eliminated by making adjustments.

Like product. Definition of like product found in applicable laws and regulations is somewhat subjective and unclear, which makes an accurate discussion rather difficult. According to laws and regulations, like product is an "identical product, a product equal in all respects to the product of reference, or, in the absence of such a product, another product that might not be exactly the same product in all respects but shows very similar characteristics to those of the product of reference." From the Brazilian laws and regulations it is possible to see that the like-product concept is a quite broad one and affords authorities investigatinf dumping practice great flexibility.

(c) Damage to the national industry. According to the laws and regulations, damage is both the property damage and any threat of material damage to the domestic

industry, whether as yet established or delay in its implementation. The Brazilian laws and regulations set some tangible parameters to determine damage, such as: (i) volume of dumped imports; (ii) effects of said imports on the like product price in Brazil; and (iii) resulting impact on the domestic industry. Said determination also includes an objective analysis of the following amounts: (i) volume of dumped imports; (ii) market share of dumped product imports in the overall import volume and consumption; (iii) price. For the determination of threatened damage, the following aspects will be taken into account: (i) significant growth of product imports; (ii) sufficient idle capacity or imminent substantial increase of foreign producer's productive capacity; (iii) imports at prices that cause a drop in domestic prices or prevents a price increase; (iv) stocks.

(d) Causal connection between damage and the dumping. In a dumping investigation, the authority seeks to determine whether or not and to what extent dumped imports are responsible for any damage caused to the domestic industry, taking into account other factors known to have possibly caused damage within the same timeframe.

Our intention here is to establish the difference between dumping other trade protection mechanisms, specially safeguard measures and subsidies.

As provided in GATT's Article XIX, the so-called safeguard measures are emergency tools employed to protect the Brazilian industry and avoid any damage resulting from increased import volumes. Unlike the dumping, safeguard measures aim at protecting the national industries irrespectively of any unfair business act and are usually taken when the Brazilian industry shows no competitiveness as compared to foreign products. We must underline that dumping and safeguard measures are different figures, including as far as imports of a certain product by the complainant State are concerned.

On the other hand, subsidies consist of advantages conferred by a State to certain companies or sectors that end up reducing artificially their production costs.

Another mistake commonly seen is the dumping and "underselling" and predatory price. However, they are distinct insofar "underselling" consists of sale at a price lower than the cost price, which is not characteristic of dumping that, in turn, is the export at a lower price than the price found in country of origin, whether or

not such prices are higher or lower than the cost prices. On the other hand, predatory price consists of sale of products at low prices for the purpose of wiping out competition; such mechanism does not exist in dumping. Additionally, the basic difference between dumping and those two other practices is that the latter should be protected by national competition laws, while dumping is a foreign trade issue.

25.3. Investigating Dumping in Brazil

A dumping investigation in Brazil is started by the filing of a written petition by national producers or business associations containing allegations of possible dumping practices of a certain company or companies in their exports into Brazil.

Said petition must include sufficient evidence of dumping, damage and causal connection between these two. Should the allegations on the petition fail to be clearly substantiated, it will be cancelled.

For a petition to qualify for review, it must also include the following information: (i) petitioner's identification, indication of volume and market share in the home production (ii) estimated volume and share in national production of like product; (iii) list of known domestic producers of like product, who are not represented in the petition and, if available, indication of volume and their market share in overall production, as well as statement in support of petition; (iv) full description of product allegedly imported at dumping prices, name of country of origin or exporting country or countries, identification of each exporter or foreign producer known and list of product importers; (v) full description of product manufactured in Brazil; (vi) sale price in the exporting country (regular price); (vii) representative export price or, should it be unavailable, representative price at which product is first sold to an independent buyer located within the Brazilian territory; (viii) information on the development of volume of allegedly dumped imports, effect of such imports on like product prices in home market and negative impact of imports on the national industry.

Once accepted, the merits in the petition will be reviewed and an investigation is initiated.

The petition will be rejected and the proceeding cancelled in the following events: (i) dumping or damage caused thereby is insufficiently substantiated or no reaso-

nable justification for investigation; (ii) petition is not prepared by the domestic industries[1] or on its behalf; or (iii) domestic producers, that expressly support the petition, represent less than 25% of the national overall production of like product.

Investigations must be complete within one year from the opening date, subject to an additional six-month extension under special circumstances. The dumping period shall be the nearest twelve-month period possible to the opening date of investigation and may be, under special circumstances, less than twelve months but never less than six months. On the other hand, time for the determination of damage shall be sufficiently long as to allow adequate assessment but never less than three years, and shall mandatorily include a dumping investigation time.

During the processing phase where facts will be determined, interested parties[2] will have enough opportunity to submit, in writing, any evidence that might be relevant to the investigation. For that purpose, additional or complementary information may be requested or accepted, in writing, and hearings may be scheduled. However, appearance at such hearings is not mandatory.

Should the information required fail to be presented to the Brazilian authorities by any of the parties concerned, the preliminary or final opinion may be prepared on the basis of the best information available, i.e., data provided. Additionally, special treatment to information provided and indicated as confidential by the parties may be requested, provided that such a request is duly supported, and such information shall kept separately.

As an important document in a dumping investigation, a dumping investigation questionnaire will be forwarded to all interested parties, who will have 40 days (subject to an additional 30-day extension) to return them duly completed. Questionnaires should be accompanied by a defense petition contesting the ini-

1 Any petition supported by producers whose aggregate production volume represents over 50% of home production of like product will be deemed to have been filed by the national industry or on its behalf. Those elements are critical to the commencement of an investigation.

2 Interested parties are: (i) home producers and any association representing them; (ii) importers and any association representing them; (iii) exporters and any association representing them; (iv) the exporting country's Government.

tial petition and the Opinion issued by DECOM notifying the opening date of an investigation.

Prior to the completion of proceeding, but never before sixty days from the starting date of investigation, national authorities may impose temporary measures on imports under investigation, provided that (i) all parties have expressed their opinions about the petition; (ii) dumping and damage to the domestic industry is affirmatively determined on a preliminary basis and authorities decide that such measures are necessary to prevent any damage in the course of investigation.

Following publication of preliminary determination of damage and dumping by the Brazilian authorities, the exporter may willfully undertake satisfactory obligations to adjust prices or cease importing at dumping prices. Should SECEX accept and CAMEX approve such an undertaking, the dumping proceeding may be terminated or suspended with no imposition of duties. The investigation, however, may carry on should exporter or any authority deem desirable.

Acceptance or rejection of any price agreement is at the sole discretion of Brazilian authorities, which does not free them from the obligation to duly justify any rejection. However, although the national industry is not required to formally voice its opinion on the issue, SECEX commonly asks for it.

Prior to preparing the final opinion, a hearing is held by SECEX to inform the parties of critical facts supporting the opinion, and the parties will have fifteen days to voice their opinions with respect thereto. Upon expiration of said fifteen-day period, the finding of facts phase of process will end and no other information received as from such closing date will be taken into account.

Investigation may be closed and "antidumping" duties may or may not be imposed, which translates as "a rate imposed on the imports carried out at dumping prices, for the purpose of counteracting their hazardous impact on the Brazilian industry"[3]. Accordingly, an investigation will be closed and "antidumping" measures will not be imposed if: (i) no sufficient evidence exists of dumping or damage resulting therefrom, (ii) dumping margin is "*de minimis*", (iii) volume of imports object

3 Manual of Business Protection, prepared by SECEX, page 24.

of actual or potential dumping is insignificant. Alternatively, investigation will be closed and "antidumping" measures will be imposed if SECEX understands that dumping, damage and causal connection between them exist.

National authorities may, then, impose "antidumping" duties and indicate the amount, which will never exceed the calculated dumping margin. We draw the attention to the fact that the Brazilian laws and regulations allow collection of set "antidumping" duties on products that have been shipped for consumption up to ninety days prior to the application of provisional "antidumping" measures whenever there is: (i) history of dumping causing damage, or importer was or should have been aware that producer or exporter is engaged in dumping behavior and it could cause injuries; and (ii) damage is caused by great volumes of imports of a given product at dumping prices in the relatively short period of time.

The "antidumping" duties and price agreements proposed by exporters will remain in full force only for as long as the need to mitigate dumping and resulting damage exist. However, such duties will cease to exist five years maximum following its imposition, subject to extension provided that evidence exists that extinction of such duties could result in dumping again and damage to the national industry.

The "antidumping" process may additionally be closed by petitioner or Brazilian authorities. In fact, the petitioner may, at any time, request closing of process, however SECEX may determine the continuation of investigation. Additionally, under special circumstances, decide in view of national interests for the suspension of duties application.

25.4.Conclusion

Based on the foregoing, it is clear that the "antidumping" is a new process and more and more has been used in Brazil.

The Brazilian regulation, which is based on GATT and WTO agreements, has many details and allows the parties to dispute other parties' opinions and voice their own on the matter and requires the submission of detailed evidence. However, the novelty of the theme brings about many surprises to authorities and professional dealing with the matter.

CUSTOMER RIGHTS IN BRAZIL – LEGAL FRAMEWORK AND ENFORCEMENT

Chapter 26

26.1. Development of the Law

The Brazilian Constitution of 1988 states that customer protection is a fundamental right of every citizen (art. 5, XXXII). A fundamental right is the one essential to the human being, without which one cannot achieve anything, live or fully develop. Other fundamental rights are life, freedom, equality, etc.

Because it is a fundamental right, customer protection is unalienable (cannot be sold or transferred), and not subject to waiver (one cannot previously waive such right).

The Brazilian Federal Constitution of 1988 also establishes that customers´protection is a principle of economical system (art. 170, V).

In order to obey a constitutional provision, that determined that a "Consumer code" be issued, on September 11, 1990, the "Código de Proteção e Defesa do Consumidor" ("Consumer protection and defense code", per literal translation) was finally issued.

The Brazilian Consumers´code is a federal law (Law n. 8.078, from 09/11/1990) that is mandatory and applicable nationwide.

26.2. General Definition

The definition of "customer" in Brazil and its protection is much wider than it may seem in a first anlaysis. The idea of customers´protection involves many elements, that, not seldom, do not have a legal definition. Determining such definition is something that Courts and Judges are in charge of.

Therefore, some basic definitions are important:

Customer: every individual or corporate body that purchases or uses some commodity, product or service as a final consumer (art. 2, Consumers´Code). That means that customer is not only the individual who purchases a refrigerator at a department store, but also the company which purchases groceries for its employees.

However, the definition of customer also implies the idea of "final consumer". The understanding of what a "final consumer" is resulted from many cases brought in Courts. It has been decided that a final consumer is the customer who is not a professional, who purchases or uses some commodity, product or service for its own use or its family´s. That means, the one who purchases something in order to use it, and not the one who uses such service or product as a raw material in order to turn it into a new product and sell it in the market.

It is important to remind that the Brazilian Statute of customers rights also has a provision in order to establish three cases in which people are considered a customer. That means that although, at a first sight, such people would not be included in the legal definition, the law considers them as such: *a)* the community of people, although not able to be determined, when they are a party to a consumer relationship; *b)* all the victims of an accident resulted from a consumer relationship, in case of liability from a defective product or service and *c)* everyone, whether

determined or not, who are subject to face commercial practices in a consumer relationship.

Supplier/ Manufacturer: every individual or corporate body, public or private entity, national or foreign, as well as other bodies that develop activities of production, assembling, creation, construction, transformation, import, export, distribution or trade of products, commodities or render of services. As explained, the idea is the widest as possible, in order to encompass all posibilities of supplying or rendering services.

It is important to say that "Supplier" is a general term with different types such as the one who produces, assembles, creates, manufactures, builds, transforms, imports, exports, distributes, trades or renders services. When the Statute of customers rights uses the expression "Supplier", it is meant all types. On the other hand, if a specific type is mentioned, all others are excluded.

Product/ Commodity: any asset,whether fixed or not, material or immaterial.

Service: any activity supplied in the consumers´market, upon payment, including banking activities, financing, credit and insurance, except activities derived from a labor relationship. To be considered as a product, no payment is demanded. However, in order to define something as a service, payment is demanded, even if indirectly.

26.3. Scope

Considering that nowadays we live in a "consumer community", the consumer legislation gets more and more important and covers a wide range of everyday relationships. Due to easy acces to credit, increase of marketing and difficulties to bring claims before Courts, such consumers´relationships have become more litigious. Because of that, the "Consumers´Code" must be deeply learned and informed.

The Brazilian Statute of customers rights is very broad and rules the offer and advertisement of products and services; the contractual steps and phases; the collection of debts; the consumers´ motions and response in Court; the crimes against consumers´relationships; as well as the quality of services and products and prevention and recovery of damages.

The offer and advertisement bind the supplier in a way that everything that is promised and advertised must be observed. The Statute of customers rights does not forbid advertisement, but it does establish cases in which advertisement is considered harmful to the customer and also rules cases in which advertisement is considered abusive, which shall be punished once it is considered a crime.

The contractual protection towards customers is a great concern of the Statute. In order to avoid any harm to customers, the Statute establishes that contracts and agreements regarding consumers´relationships cannot be drafted and written in a way to make its comprehension difficult. There is also a provision that determines that contractual clauses must be interpreted in the most favorable way to customer.

The supplier may offer a contractual warranty to customer, besides the legal warranty. In order to do so, the warranty term must be in written and make it clear what the warranty consists of, the term and where it can be claimed. It is important to have in mind that all contractual warranty gets into effect after the legal warranty has expired.

The contractual phase is strictly ruled by the Statute, that forbids abusive clauses and practices.

Collecting debts must be done in respectful way, avoiding embarrassing situations to the customer.

The judicial protocol in favor of customers brings the possibility of "inversion of the burden of proof". That means the manufacturer has to produce evidences that the customer is not right.

The legal statute also rules and defines some crimes, with penalties from detentions to fines. Such crimes may be committed by an individual or a corporate body and in the latest case, the Director, Manager or legal representantive of such corporate body who allows the supplying, offer, sale, or maintenance of goods or rendering of services in any way that is prohibited by the legal statute. In all cases, the constitutional principle of the "due process of law" is observed.

Protection to customers should not be seen as a restraint to business, but as a need of modern world. Also, someone can be a supplier in a certain relationship, and

can also be a customer in other, which shows how universal the statute of Customer rights is.

26.4. Enforcement

Interpreting and applying the Brazilian Customer law can be a hard job and is subjcet to many academical and Court discussions. Notwithstanding, the statute is in effect and must be observed, otherwise there might be civil, administrative and even criminal sanctions.

As a consequence, manufacturers and service providers must be very careful with their product/ work output, in order to avoid conflicts and restraints to their commercial activities.

As it can be seen, legal protection to customers is present from the pre-plant phase to shelf exhibition, and there is no step in the industrial process that is not covered by such legal statute.

26.5. Trends

The customers rights Statute in Brazil is compatible with the most modern laws of the world. The local legislator, however, has also considered typical problems and particularities, in order to issue a statute in accordance with local needs.

Ever since the statute was issued, many amendments were performed, which shows a great concern with the most current issues.

Understanding customer rights in various jurisdictions will help business people to integrate bettter, faster and in a profitable way.

Arbitration and Recognition and Enforcement of Arbitration Awards and Foreign Judgments in Brazil

Chapter 27

27.1. Subject Matter and Applicable Rules

According to Law no. 9,307/96 (Brazilian Arbitration Law), individuals and entities which are legally qualified to enter into agreements may resort to arbitration to settle disputes concerning certain eligible rights. Eligible rights are those that can be the object of a settlement by the respective parties.

The applicable rules that will regulate the subject matter submitted to arbitration may be freely established by the parties. They

may include general principles of law, custom, usage and the rules of international commerce.

An arbitration clause inserted into an agreement, i.e., a provision stating that any and all disputes arising under said agreement shall be resolved by arbitration, is legally binding to the parties. The Brazilian Arbitration Law provides for a special proceeding which entitles a party to demand in court the institution of the arbitration, should the other party fail to comply with the arbitration clause.

27.2. Arbitration Proceedings

The parties may by mutual agreement define the procedure for selection of arbitrators. Alternatively, the specific rules of an institutional arbitration organization or specialized entity may be adopted. The arbitrator is competent to rule on matters of fact and of law. The arbitration award rendered within the Brazilian territory is not subject to appeal or validation by the judiciary.

Arbitration is deemed to have been instituted when a sole arbitrator accepts his or her appointment, or when all arbitrators accept their appointments. The parties may put forward their claims through their attorneys but will be at liberty to designate other persons to represent or assist them in the arbitration proceedings.

As between the parties and their successors, an arbitration award will produce the same effect as a decision rendered by a judicial body. Therefore, an award entered against a party constitutes a legal basis for the filing of summary collection proceedings. An arbitration award must include the following items:

I. a report, containing the names of the parties and a summary of the dispute;

II. the grounds for the decision, which shall describe the questions of fact and of law involved and, if applicable, expressly indicate that the arbitrators have ruled based on equity;

III. the ruling, where the arbitrators will decide the issues submitted to them and establish a time limit for compliance with their decision, if applicable; and

IV. the date and place of the award.

27.3. Recognition and Enforcement of Foreign Arbitration Awards

Brazil has ratified the Geneva Protocol of 1923 on arbitration clauses, as well as the United Nations Convention of New York of June 10, 1958 on the recognition and enforcement of foreign arbitration awards.

The Brazilian Arbitration Law establishes that a ratification proceeding before the Superior Court of Justice (STJ) is the only condition for recognition and enforcement in Brazil of a foreign arbitration award.

The request for ratification to be filed by the interested party shall be accompanied by (i) the original arbitration award or a certified copy thereof, duly notarized by the Brazilian Consulate and translated into Portuguese by a sworn translator in Brazil, and (ii) the original agreement to arbitrate or a certified copy thereof duly translated into Portuguese by a sworn translator.

Pursuant to the Brazilian Arbitration Law, the ratification of a foreign arbitration award shall follow the same rules of the Code of Civil Procedure and the Internal Rules of the STJ regarding the ratification of foreign judicial awards.

According to Resolution no. 9 of the STJ, the ratification of a foreign arbitration award shall not be subject to retrial or re-examination of the merits of the original arbitration proceedings.

In order for a foreign arbitration award to be ratified by the STJ, the following conditions must be verified:

I. the parties to the arbitration agreement must have legal capacity;

II. the arbitration agreement must be valid under the laws of the jurisdiction chosen by the parties or, if the agreement is silent, under the laws of the jurisdiction where the award was rendered;

III. the defendant must have been given proper notice of the appointment of arbitrators or of the arbitration procedure, and the defendant must have been given full opportunity to defend its case;

IV. either the arbitration award must not have exceeded the terms of the arbitration agreement, or it shall be possible to divide the award so as to consider solely that portion within the limits of the arbitration agreement;

V. the commencement of the arbitration proceedings must have been in accordance with the arbitration agreement;

VI. the arbitration award must be binding upon the parties and its effects must not have been invalidated or suspended by a court in the jurisdiction in which it was rendered;

VII. under Brazilian law, those matters submitted for arbitration must be eligible for dispute resolution through arbitration;

VIII. the arbitration award must not offend Brazilian public policy, national sovereignty or good morals.

When confirmed by the STJ, the arbitration award becomes eligible for enforcement through the competent Brazilian court.

27.4. Foreign Judgments

Foreign judgments may be recognized and enforced in Brazil, irrespective of the existence of reciprocity from the part of the country from which such judgment is originated or a specific international treaty or convention between the country of origin of the judgment and Brazil. In order to be enforceable in Brazil, however, a judicial award rendered in another country must be ratified by the Brazilian judiciary.

Pursuant to the Federal Constitution of 1988, Section 105, (i), the STJ is responsible for the analysis and decision as to the ratification of foreign judgments. The matter is governed by the provisions of the Introductory Law to the Civil Code, which contains private international law interpretation rules, by the Code of Civil Procedure and by Resolution no. 9 of the STJ.

In the process of ratification of a foreign judgment, the STJ shall verify whether the formal procedural requisites have been fully complied with, in all instances until final judgment.

For purposes of Brazilian Law, judgment is the decision of a civil, commercial or criminal nature rendered by a judge or a court, abiding by the due process of law, and which is not subject to any further appeal.

Provided that these basic conditions have been fulfilled, the STJ shall verify the compliance of the foreign judgment with the following requisites, according to Section 5 of Resolution no. 9 of the STJ, ultimately based on the provisions of Section 15 of the Introductory Law to the Civil Code:

- *the foreign decision shall be rendered by a competent judge:*

The STJ will not check whether the foreign judge had jurisdiction over the matter, as this could result in improper interference in the foreign country's sovereignty.

In fact, what shall be examined by the STJ is whether the case, in view of Brazilian Law, falls within the exclusive jurisdiction of Brazilian courts. By way of example, ratification of a judgment regarding a real property located in the Brazilian territory would not be admissible, since Section 12, paragraph 1, of the Introductory Law to the Civil Code, provides that "only the courts of Brazil" shall have jurisdiction over such matters.

- *the parties must have been served proper notice of process, or a default judgment has been legally rendered*:

Service of process is the act whereby a party is called to respond to a legal suit filed against it. It ensures the right of full defense and shall have been made in accordance with the guidelines set forth by the laws of the place in which the judgment was rendered. Should the defendant be domiciled in Brazil, service of process shall have been made by means of a rogatory letter.

- *the judgment must be final and in proper form for its execution at the place where it was rendered:*

For the purposes of expediting enforcement proceedings it is advisable, insofar as possible, to produce evidence that the decision is final, by means of a certification by the competent judge, stating that no further appeal is admissible in any degree of jurisdiction.

- *the foreign judgement must be authenticated by the nearest Brazilian consulate and must be submitted to the STJ with a sworn translation thereof.*

- *the foreign judgment will not be eligible for confirmation if it is contrary to national sovereignty or public order, in accordance with Section 6 of Resolution no. 9 of the STJ:*

This is the only aspect concerning the essence/merits of the foreign judgment which is subject to assessment by the STJ.

Ratification is obtained by means of a legal proceeding instituted by the foreign plaintiff before the STJ, which shall then issue an order directing notice of process to be served on the defendant, who will be entitled to challenge the request of ratification.

The STJ shall only acknowledge challenges by the defendant if they relate to: (i) the authenticity of the documents produced by the plaintiff, (ii) the construction/interpretation of the foreign judgment, or (iii) the compliance with the statutory requirements regarding ratification or relative to the filing of the request, in accordance with Section 9 of Resolution no. 9 of the STJ.

Once ratification of the judgment is obtained, the foreign judgment becomes eligible for enforcement through the competent federal Brazilian court.

INTERNATIONAL ASPECTS OF BRAZILIAN JURISDICTION

Chapter 28

28.1. General Jurisdiction of Brazilian Courts

The Brazilian Federal Constitution (CF) states that the Judiciary Branch, the Executive Branch and the Legislative Branch are independent and coordinated powers of the Union (CF, Article 2). The Constitution also states that no actual or threatened lesion to a right shall be excluded from consideration by the Judiciary (CF, Article 5, n. xxxv). Jurisdiction to adjudicate is deemed a matter of sovereignty.

Due to the federative structure of the Brazilian State, the Judiciaries of the federated states are granted power to adjudicate also by the State Constitutions. In addition, the Code of Civil Procedure (CPC), a national statute, reads that civil jurisdiction is exercised by judges in the entire national territory (CPC, Article 1). The Code of Civil Pro-

cedure also states that civil cases shall be adjudicated by courts of law according to their respective competence, without prejudice to the right of the parties to submit their disputes to arbitration (CPC, Article 86).

The limits of the Brazilian jurisdiction in relation to other jurisdictions are established by Brazilian laws in all cases where Brazil is the forum State. In other words, Brazilian courts will abide by the standards of the *lex fori*, which is the Code of Civil Procedure. In this regard, the Code of Civil Procedure draws a clear distinction between concurrent jurisdiction (CPC, Article 88), and exclusive jurisdiction (CPC, Article 89). In the case of concurrent jurisdiction, the Brazilian Judiciary may exercise its jurisdictional power whenever (i) the defendant is domiciled in Brazil, regardless of his or her nationality, or (ii) the obligation has to be fulfilled in Brazil; or (iii) the action originates from a fact occurred or an act performed within Brazil. In the case of exclusive jurisdiction only Brazilian courts may exercise jurisdiction (i) to adjudicate cases related to real estate property, and (ii) to conduct the probate and dictate the succession of assets situated in Brazil, whether or not the deceased was a foreigner and has lived outside Brazilian territory.

28.2. Choice of Forum

Brazilian case law is generally hesitant on party autonomy regarding the choice of a foreign forum. Opinions of the Superior Court of Justice (STJ) can be found in both directions. Some Justices understand that parties may not, merely by expressing their will in a contract, dispose of the jurisdiction of a Brazilian court, because the rules on jurisdiction of a State are directly founded on the national sovereignty and therefore are not subject to party autonomy. As a result, parties are free to modify the internal territorial competence, but may not modify the extent of national jurisdiction[1]. Some Justices, however, understand that there is no prohibition to provide for the choice of forum in an international contract[2].

1 REsp 804306/SP, 3ª T., Rapporteur Min. Nancy Andrighi, DJ 3/9/08; Resp 498835/SP, 3ª T., Rapporteur Min. Nancy Andrighi, DJ 29/5/05; Resp 251438/RJ, 4ª T., Rapporteur Min. Barros Monteiro, DJ 8/8/00.

2 REsp 1177915/RJ, 3ª T., Rapporteur Min. Vasco Della Giustina, DJ 13/4/10; Resp 242383/SP, 3ª T., Rapporteur Min. Humberto Gomes de Barros, DJ 21/3/05; REsp 505208/AM, 3ª T., Rapporteur Min. Carlos Alberto Menezes Direito, DJ 13/10/03.

In view of the still undefined position of the Brazilian highest court for infra-constitutional cases on this matter, a clause establishing the choice of a foreign forum in international contracts signed with parties domiciled in Brazil, or having an obligation to be performed in Brazil, or yet if there is an act or a fact which may be performed or may occur in Brazil, should be carefully negotiated and cautiously drafted.

28.3. Judicial Cooperation

Brazilian laws are generally favorable to cooperation with the courts of other States. The Introductory Law to the Brazilian Rules (formerly the Introductory Law to the Civil Code) (LIDB) establishes that Brazilian courts shall proceed with the judicial acts requested through a letter-rogatory issued by a competent foreign court, provided that an *exequatur* has been granted to same (article 12, 2nd. para, LIDB).

Following the Constitution, an *exequatur* to the letter-rogatory must be granted for the performance, by a Brazilian court, of service of process on a defendant resident in Brazil, as well as for the obtainment of evidence. Constitutional Amendment n. 45, of 2004, has shifted the competence for the granting of an *exequatur* from the Federal Supreme Court (STF) to STJ (CF, article 105, I, "i"), and new procedural rules for such proceedings have been recently established[3]. The Chief Justice of STJ shall notify the defendant about the request contained in the letter-rogatory, and defendant may impugn the request if an offense to Brazilian public policy is found, or if formalities have not been properly complied with.

Besides the statutory rules on judicial cooperation that apply to any foreign State, there are also bilateral treaties signed between Brazil and a number of States, such as France (2000), Spain (1991), Italy (1995), besides agreements established under the auspices of Mercosur. Those treaties are not identical in tenor, but many of them contain provisions that expedite, to a certain extent, the acts that have to be performed in order to obtain the *exequatur* from STJ[4].

3 See full text of Resolution nº 9, of May 4, 2005, of the Presidency of the Superior Court of Justice, at http://bdjur.stj.gov.br/dspace/handle/2011/368.

4 For the full text of the bilateral treaties on civil matters, see http://portal.mj.gov.br/data/Pages/MJ4824E353ITEMID2D7208F92A0D4C76BE42D6CF48034A17PTBRNN.htm

Multilateral treaties have also been signed by Brazil in regard to judicial cooperation with countries that have special political or economic ties with Brazil. Such is the case of the countries of the American continent – South, Central and North –, united under the Organization of American States (OAS), and the countries forming part of the Common Market of the South (Mercosur).

OAS member-States have entered into a series of agreements on private international law (the CIDIP's), some of which deal with judicial cooperation. This is the case of the Inter-American Convention on Letters-Rogatory (CIDIP-I, Panama, 1975)[5] and its Additional Protocol (CIDIP-II, Montevideo, 1979)[6], both promulgated in Brazil in 1996.

According to those treaties, notifications and service of process may be required by the initiative of the parties, through the court system, through consular or diplomatic agents, and through the central authorities of the requesting and the requested States.

The main innovation introduced by the Convention on Letters-Rogatory was the use of central authorities as intermediaries between the courts of the countries involved, making it possible to convey the requests for cooperation in a less formalistic procedure than that normally employed by national courts and diplomatic channels. A certain degree of uniformization of procedural rules has also been achieved by that Convention, so that the requirements for the processing of letters-rogatory will be approximately the same in the countries where it is in force. However, certain of its provisions have been deemed unenforceable, such as the one that provides for a direct communication between the courts of neighboring countries, which cannot be applied in Brazil due to the constitutional rules that impose the granting of an *exequatur* by STJ as a condition for processing the letter-rogatory.

The granting of an *exequatur* to a letter-rogatory does not imply the automatic re-

5 For the full text of the Convention, see http://portal.mj.gov.br/services/DocumentManagement/FileDownload.EZTSvc.asp?DocumentID={B3528D72-25A3-40D8-A60D-AFFA08757DA8}&ServiceInstUID={D4906592-A493-4930-B247-738AF43D4931}

6 For the full text of the Additional Protocolo, see http://portal.mj.gov.br/services/DocumentManagement/FileDownload.EZTSvc.asp?DocumentID={A31FDE64-540B-4850-B3BE-DE29A5C87BDA}&ServiceInstUID={D4906592-A493-4930-B247-738AF43D4931}

cognition of the jurisdiction of the requesting court, neither does it mean an obligation to recognize or to enforce the foreign judgment that may be given by the foreign court.

The procedures for the accomplishment of the request contained in the letter--rogatory will follow the rules of the requested State, but they may follow any special request made by the requesting State, provided that it is not incompatible with the public policy of the requested State. In any case, the requested State may refuse to accomplish the letter-rogatory where it deems that the request is in manifest violation to its own notions of public policy.

A multilateral treaty dealing with judicial cooperation exists also in the framework of Mercosur – the Protocol of Las Leñas, of 1992[7], containing rules that facilitate the accomplishment of letters-rogatory among the States parties to Mercosur. The Protocol of Las Leñas deals with service of process, notifications and similar acts, as well as the obtainment of evidence. It provides that the letter-rogatory must be accomplished *ex officio* by the requested authority, except where a public policy issue is present. It also states that the accomplishment does not imply the automatic recognition of the jurisdiction of the requesting court. The procedures follow the rules of the requested State, and central authorities are the preferred intermediaries between the Judiciaries involved.

The Protocol of Las Leñas waives the obligation to post a bond in guarantee for court costs and attorneys fees, normally required from a foreign party litigating in Brazil.

28.4. Recognition and Enforcement of Foreign Judgments in Brazil

Recognition and enforcement of foreign judgments has long been part of the Brazilian laws. In the present legal framework, it is contemplated by the Federal Constitution of 1988 as amended (article 105, I "i"), by the Introductory Law to the Brazilian Rules (article 15), by the Code of Civil Procedure (articles 483 and 484),

7 For the full text of the Protocol of Las Leñas, see http://portal.mj.gov.br/services/DocumentManagement/FileDownload.EZTSvc.asp?DocumentID={5634D9E8-ADA4-4E2E-8496-2F9D9A5EDB64}&ServiceInstUID={D4906592-A493-4930-B247-738AF43D4931}

and finally by the Resolution n. 9 of the STJ[8].

According to the applicable rules, in order for a foreign judgment to be enforced in Brazil, (i) it must have been proffered by a competent court, (ii) defendant must have been served notice of process, (iii) it must be *res judicata* and ready for execution in the State of origin, (iv) it must have been translated by a Brazilian sworn public translator, and (v) it must have been recognized by the Superior Court of Justice.

The procedure for recognition of a foreign judgment by STJ requires that the interested party file a petition requesting such recognition, together with a copy of the foreign judgment as well as any other documents necessary for the understanding of the request, all of which must be duly translated and authenticated.

Where a foreign judgment is incompatible with Brazilian public policy, it may not be recognized; however, if incompatibility is only partial, it may be partially recognized. Anticipatory or interim measures may also be granted in proceedings for recognition of a foreign judgment, so as to avoid that the defendant may frustrate the purpose of the recognition during the time that the process of recognition will take.

If the defendant wishes to contest the request for recognition of a foreign judgment, the only admissible arguments will be the authenticity of documents, the understanding of the judgment and the abidance by the requisites of Resolution n. 9. No discussion on the merits of the judgment will be allowed, except for public policy matters.

Once it is recognized by STJ, the foreign judgment may be executed in a court of first instance having federal jurisdiction.

In order to overcome the uncertainties and peculiarities of the various national laws on the recognition and enforcement of foreign judgments, bilateral and multilateral treaties have attempted to create a set of uniform conditions for such purpose. Brazil has entered into a number of international instruments related to the recognition and enforcement of foreign judgments and arbitral awards, both at the level of OAS member-States and of Mercosur.

8 See note 3 *supra*.

The Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards[9] was signed in Montevideo in 1979 and promulgated in Brazil in 1997. This Convention grants extraterritorial validity, in the other States-parties in which it is in force, to the foreign judgment or award given in civil, commercial and employment proceedings in any of the States- parties, provided that (i) it is considered authentic in the State of origin, (ii) the judgment and its accompanying documents have been translated to the language of the State of recognition, (iii) it has been certified in the form required by the laws of the State of recognition, (iv) it has been proffered by a court competent in the international sphere, according to the laws of the State of recognition, (v) the defendant has been served notice of process in a form substantially equivalent to that accepted by the laws of the State of recognition, (vi) the parties have had the opportunity to submit their defense, (vii) the judgment is final or has the effect of *res judicata* in the State of origin, and (viii) the judgment is not manifestly in disagreement with public policy principles and norms of the State of recognition.

The Convention on Extraterritorial Validity exceeds in bureaucratic requirements, but is totally silent on how to ascertain the international jurisdiction of the State of origin. In view of such omission, another convention was subsequently drafted – the Inter-American Convention on Competence in the International Sphere for the Validity of Foreign Judgments[10] –, which was signed in 1984, but not yet ratified by Brazil. This convention has been criticized for its narrow scope of application, which possibly accounts for the fact that so far it has been ratified by only two States of the region (Mexico and Uruguay).

Given the confusing status of the inter-American conventions on recognition of foreign judgments, the States-parties to Mercosul have dealt with the matter again in the Protocol of Las Leñas, of 1992. The remarkable innovation contained in such instrument regarding the recognition of foreign judgments is that the request may be processed by means of a letter-rogatory, instead of by a petition filed directly in Brazil by the party requesting the recognition, thus allowing the process to start in the country of origin, and be conducted through the respective central authorities.

9 For the full text of the Convention, see http://www2.mre.gov.br/dai/arbitral.htm.

10 For the full text of the Convention, see http://www.oas.org/juridico/portuguese/treaties/B-50.htm

It should be pointed out, however, that recognition by the Superior Court of Justice has not been dispensed with.

Although Brazilian laws do not accept *lis pendens* in a foreign jurisdiction as preclusive of the jurisdiction to adjudicate of Brazilian courts (CPC, art. 90), *lis pendens* is deemed an impediment for the recognition of a foreign judgment under the Protocol of Las Leñas, if the pending action has been brought in the State of recognition prior to the action in which the foreign judgment has been proffered (article 22).

As a complement to the Protocol of Las Leñas, member-States of Mercosur also defined the conditions for the assumption of international jurisdiction in contractual matters, through the Protocol on International Jurisdiction in Contractual Matters[11] signed in Buenos Aires, in 1994, and promulgated in Brazil in 1996.

28.5. Jurisdiction of International Arbitration Tribunals

Brazilian Arbitration Law – Law nº 9,307, of 1996[12] – accepts and endorses international arbitration as an effective means of resolving disputes involving rights of an economic nature, and parties having the capacity to dispose of their own rights. No restriction exists in regard to the use of arbitration rules of foreign or international arbitral institutions, which is left to the discretion of the parties entering an arbitration agreement.

Despite the liberty of the parties to international agreements to establish the mechanism of dispute resolution of their choice, an arbitral award issued outside the territory of Brazil requires recognition by the Brazilian Superior Court of Justice, just as does a judgment of a foreign court of law. The procedure for obtainment of such recognition is quite the same as for a judgment made by a State court of law, and is regulated also in Resolution n. 9, of 2005, issued by the STJ.[13]

In addition to the provisions of the Brazilian Arbitration Law, the rules of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958

11 For the full text of the Protocol, see http://www2.mre.gov.br/dai/matcontratual.htm
12 For full text, see http://www.planalto.gov.br/ccivil_03/leis/l9307.htm
13 See Note 3 *supra*.

(New York Convention), which has been ratified and promulgated in Brazil in 2002[14], also apply to the recognition of foreign arbitral awards in Brazil.

Case law on the recognition of foreign arbitral awards by the Federal Supreme Court (formerly the competent tribunal for such recognition) along the past years has been generally favorable, particularly as of the entry into force of the Arbitration Law of 1996, which dispensed with the *double homologation* that prevailed until then[15]. Upon becoming competent for the recognition of foreign arbitral awards in 2004, the Superior Court of Justice has also shown a favorable attitude towards international arbitration involving parties domiciled in Brazil[16], in compliance with the established interpretation of the New York Convention.

14 For the full text, see http://www.planalto.gov.br/ccivil_03/decreto/2002/D4311.htm

15 See SE 5206 AgR/EP – ESPANHA, Rapporteur Min. Sepúlveda Pertence, Tribunal Pleno,12/12/2001; SEC-5828/NO, Rapporteur Min. Ilmar Galvão, Tribunal Pleno, 06/12/2000; SEC-5847/IN, Rapporteur Min. Maurício Corrêa, Tribunal Pleno, 01/12/1999

16 See SEC 802 / EX, 2005/0032132-9, Rapporteur Min. José Delgado, CE – Corte Especial, 17/08/2005; SEC 856 / EX, 2005/0031430-2 Rapporteur Min. Carlos Alberto Menezes Direito, CE – Corte Especial, 18/05/2005