

Doing Business in Brazil



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1. INTRODUCTION

1.1. Highlights of Brazil - 2005-2006 Edition

PricewaterhouseCoopers

1.1.1. 2005 - Continued but modest growth

The exceptionally favorable conditions in the world economy which drove the high performance of the emerging market economies in 2004 persisted in 2005. From a Brazilian standpoint, these economic conditions included a vigorous expansion of world trade, high commodity prices, and abundant liquidity at low interest rates in the foreign markets. Despite this favorable environment, the Brazilian economy grew only about 2.2%, contrasting with the average growth of some 6% for the emerging market economies. This relatively modest performance was due to three main domestic problems during the year.

The first was the need to reduce inflation to the target rate of 5.1%, leading the Brazilian Central Bank to apply a very tight monetary policy. The basic real (net of inflation) interest rate remained at around 14% per year for most of the year, comparing with real rates close to zero in the financial centers of the US and Europe. Although the rate of inflation fell from 7.6% in 2004 to 5.8% in 2005, close to the Central Bank's target rate, the cost of the policy was substantial in terms of a weaker consumer demand and stagnant investment expenditures by the business community.

The second problem was the political crisis, triggered by widespread charges of corruption against key officials in President Lula's Government and his party (PT), which dominated much of the year and promises to continue in the first months of 2006 and up to the October general elections. The evidence collected by the Congressional Inquiry Commissions during 2005 polarized the attention of the media and public opinion, and at various moments in time threatened to lead to an institutional crisis and the impeachment of President Lula himself. Although the premature end of the Lula Government now seems to be out of the question now, the crisis paralyzed both the administration and the Congress, and shattered the coalition supporting the government. Despite the fact that the economy and the financial markets have seemed to be more or less immune to the political crisis, uncertainty about the immediate future increased and led to a more cautious attitude by the markets affecting business investment plans. As a result, gross domestic investment closed the year at just about the same level as 2004.

The third problem was the continuing appreciation of the Brazilian real throughout the year, resulting both from the short-term capital inflows, driven by the large interest rate differential in the domestic financial market, and by the extraordinary trade (and current account) surplus resulting from the expansion of exports. In fact, the 15% appreciation of the real against the US dollar in 2005 seemed to be an efficient mechanism to reduce inflation closer to the 5.1% target, but it also reduced the competitiveness of Brazilian exports. In the second half of 2005, it became clear that exports of manufactured products were losing their strength. In addition, the appreciation of the exchange rate contributed to the financial difficulties faced by the agribusiness sector, the leading export sector in the last five years.

The real-dollar exchange rate has appreciated by whatever criterion it is measured, although the amount of the appreciation is subject to controversy. A reasonable measure of the appreciation would be to compare the current exchange rate with the (inflation adjusted) average rate which prevailed in the 6-year period since Brazil adopted free-floating in January 1999. Under this measure, inspired by the purchasing power parity rule, the Brazilian real would be overvalued by some 20%, i.e., almost equivalent to the full appreciation of 2004-2005. If this measure is correct, the exchange rate should eventually adjust itself to the equilibrium rate, but the timeframe for that to happen is uncertain. At this point, given the strength of the Brazilian balance of payments and the liquidity conditions in the worldwide economy, the best guess is that this catch-up will be gradual and slow.

Brazil's indicators of international solvency and liquidity continued to improve in 2005, resulting from the 22% increase in exports (Brazilian exports doubled in the last 5 years). The ratio of the foreign debt to exports fell to 1.7 against 3.9 in 2001, helped also by the steady decline in the country's foreign debt (see table below). On the other hand, the record high trade surplus of US\$ 44.5 billion (and the current account

surplus of US\$ 15.5 billion) allowed the Central Bank to increase its net international reserves from US\$ 27.5 billion in 2004 to US\$ 46.5 billion in 2005. At the end of the year, the government announced the advance payment of its US\$ 15.4 billion debt to the IMF. In spite of this payment and the continued involvement of the Central Bank in buying foreign exchange in the market, the exchange rate appreciated 15% in 2005. The Brazilian sovereign risk premium reached the lowest level ever by the end of the year (close to 300 basis-points), reflecting the improvement of the external indicators. The main rating agencies upgraded Brazil's ratings in 2005 and would probably have done more if the domestic political crisis had not increased the uncertainty about the future of the Government and its economic policies. In fact, the main external indicators of the Brazilian economy would have already qualified the country as investment grade were it not for the weakness of the domestic indicators.

Fiscal policy maintained its course, aiming at a steady reduction of the public debt-to-GDP ratio through a primary surplus targeted at 4.25% of GDP. Nevertheless, the exceptionally high real interest rates practiced by the Central Bank in the year hindered a reduction of that fiscal indicator, which remained stable around 52% of GDP. Despite the responsible fiscal policy of the last five years, the quality of the fiscal adjustment is still very poor. It has been based on an increase in tax revenues, on top of an already excessive tax burden approaching 37% of GDP (against an average of 20% for the other emerging market economies), and the virtual disappearance of public investments. This means that government current expenditures (consumption plus transfers) have maintained their unchecked upward trend relative to GDP. Perhaps the main political challenge of the coming years for Brazil will be the introduction of new legislation leading to a steady reduction of government current expenditures relative to GDP as a necessary step to reform the inefficient Brazilian tax system.

1.1.2. Outlook for 2006

The economic perspective for 2006 is favorable for Brazil, but uncertainty will increase in the aftermath of the political crisis and continue up to the October general elections. On the external front, it is expected that the world economy will continue its expansion of the last three years, although the outlook of higher interest rates will translate into less liquidity for emerging market economies and perhaps lower prices of commodities. However, the Brazilian Government no longer requires external financing and is therefore much less vulnerable to the trends in the international financial markets.

On the domestic front, it is likely that growth in 2006 will be driven by domestic rather than external demand. This expectation results from the fact that exports which have been the main engine of domestic growth in 2004 - 2005 will slow down primarily due to the large appreciation of the Brazilian real. On the other hand, it is expected that inflation will remain close to the Government target of 4.5%, paving the way for a steady decline of domestic interest rates, which in turn will foster domestic consumption and investment. It is also likely that Government expenditures will increase above the normal trend in an election year. Overall, a growth rate of around 3% seems feasible for the year.

Two scenarios for the presidential elections of 2006 are being considered, depending on Lula's remaining electoral strength after the political crisis that overwhelmed his administration in 2005. If Lula remains as a major candidate, with good chances of winning, a scenario of polarization between the PT and the PSDB is likely, similar to the 2002 elections. In that case, political uncertainty is minimized since both candidates and their policies (whoever the PSDB candidate is) are well known. If Lula loses most of his popularity with the crisis, as current opinion polls seem to indicate, and becomes a weak candidate, a scenario of fragmentation is likely in which other major parties besides the PSDB seize the opportunity of having their own presidential candidate. In that case, political uncertainty is maximized, since alternative (less known) policy agendas may come to the scene. Whatever scenario prevails, however, there is a reasonable confidence that Brazil is sufficiently mature to pursue sound policies in the future. That confidence explains why the political crisis has caused so little damage to the economy in 2005.

1.1.3. Principal economic indicators

(certain 2005 figures are estimated)

	2005	2004	2003	2002	2001
GDP (US\$ billion at average exchange rate)	802	606	507	459	510
GDP growth (% p.a.) – indexed local currency	2.2	4.9	0.5	1.9	1.3
Unemployment rate (% of labor force)	9.5	9.6	10.9	10.5	10.6
General price index - IGP-DI (% p.a.)	1.6	12.4	7.7	26.4	10.4
Consumer price index - IPCA (% p.a.)	5.8	7.6	9.3	12.5	7.7
Exchange rate at year-end (R\$/US\$)	2.30	2.72	2.95	3.53	2.32
Exchange rate change (% p.a.)	(15.4)	(7.8)	(16.4)	52.2	21.0
Public sector deficit (% of GDP)	3.6	2.5	3.7	10.3	5.2
Public sector debt (% of GDP)	51.7	51.7	57.2	55.5	52.6
(in US\$ Billion)					
Exports	117.5	96.5	73.1	60.4	58.2
Imports	73.0	62.8	48.2	47.2	55.6
Trade balance	44.5	33.7	24.9	13.2	2.6
Current-account balance	15.5	11.7	4.1	(7.6)	(23.2)
International reserves	61.0	52.9	49.3	37.8	35.9
Foreign direct investment	13.0	8.7	9.9	14.1	24.7
Total foreign debt	205.0	220.1	235.4	227.7	226.1

1.2. The Brazilian Legal System

Edgard de Novaes França Neto
- Advocacia Novaes França

1.2.1. Brazil is politically organized under the form of a federative republic comprised by a juridical system that consists in the indivisible union of the states, municipalities and federal district, where, pursuant to an express provision of the Federal Constitution, are located the highest governmental administration entities of the country, distributed, namely, among the Executive Branch: the Presidency of the Republic and ministerial bodies; the Legislative Branch: National Congress, comprised by the Federal Chamber, which has a variable, proportional representation of the population by the federal deputies, and the Federal Senate, which has a fixed proportional representation of the States by their Senators; and the Judiciary Branch: the Supreme Court (STF).

1.2.2. The Brazilian legislative system is established according to the Federal Constitution, which is the maximum legal statute and as such preserves the basic rights and legal assurances to Brazilian and foreign citizens, provides on the political-administrative organization of the Federative Republic of Brazil, defines the scope of the basic duties of the Executive, Legislative and Judiciary Branches, provides on the tax system, the economical-financial and social system and attributes to the States to individually organize and govern themselves by their own constitutions and state laws, consistent with the basic principles established in the Federal Constitution, attributing to the municipalities authority to legislate only on issues of local interest.

1.2.3. Brazil adopts a codified legal system, e.g. Civil Code, Tax Code, Criminal Code, etc. that authorizes through constitutional authority defined to this extent in regard to specific legal matters, the issue of laws by the Federal Government (federal laws), the States (state laws) and by the Municipalities (municipal laws), always through a mechanism operated by the respective Executive and Legislative branches within their authority, the Federal Government's authority to legislate also prevailing over the authority of the States and Municipalities to do so, in order to prevent the issuance of laws that are concurrent or conflicting with each other on the several matters.

1.2.4. For a basic, better understanding thereon, the Federal Constitution expressly determines that the Federal Government has exclusive legislative authority to legislate normally on issues in the fields of civil, commercial, criminal, procedural, election, agrarian, maritime, aeronautical, space, labor, expropriation, water, power, information technology, telecommunications, radio-broadcasting, currency system, exchange, credit, insurance, foreign commerce, mines, nationality, citizenship law, etc.

1.2.5. The court decisions must always follow a correct application of the current laws, being certain that the court precedents do not vest the nature of law under the Brazilian legal system, consisting merely in an informative element for the court ruling, which in the event of not existing specific legal provisions to support it, shall be based on analogy, customs and the general principles of law.

2. IMPORT & EXPORT

Maria Gabriela Duva
- Veco Consultants Ltda.

2.1. Import

All individuals or companies that are engaged or intend to engage in foreign trade must be enrolled with the **REI** – Registry of Exporters and Importers and apply for registration to process their operations in the **SISCOMEX** - Integrated System of Foreign Trade.

As exporters abroad, the manufacturers, a trading company, concessionaire or other may be contacted by any means, as this contact aims a definition and selection of the product, its price, guarantees, terms of payment, etc. It should be noted that the documentation involved since the beginning of the contact characterizes proof of all that is been negotiated. It is always necessary for the importer, before formally ordering the product to request the data that effectively define the operation.

Completed this phase, the parties should then adopt the proper instrument to define the rights and obligations undertaken, which is the purchase and sale agreement. Since it is not usually drafted, the importer must request to the exporter abroad the remittance of a document that formally sets out the deal with the precise identification of the parties, the product and the agreed price. The **pro forma invoice** is the most widely used document for this purpose; upon its signing by the exporter or its duly appointed legal representative it formally establishes the obligations that it assumed in the deal. Based on this invoice, the importer, after a thorough analysis as to whether to accept the conditions that concern the deal, will place a request through an **order**, which, upon its signing, will formally bind it to the deal.

The contents of the pro forma invoice must indicate all the information that is necessary to legalize the deal, particularly:

- a) **The parties: the exporter** (complete name and address) and **the importer** (complete name and address);
- b) **the product: specification of the goods** (with respective NCM code to assert the applicable administrative treatment to the product, the tax treatment (tax rates of the Import Tax (I.I.), Tax on Industrialized Products (IPI) and Sales Tax (ICMS), international treaties and other tax issues); indication of the **manufacturer** of the product (complete name and address) or the **Country of Origin** and **Country of Shipment**.
- c) **the price:** the "**unit sale price** " and the "**total sale price**". Whenever possible indicate also the "**total price of the products at the site of shipment**". The condition of sale must be expressed according to the negotiated **Incoterms** term.
- d) **the form of payment** that was negotiated (remittance without draft, invoice or letter of credit), the **agreed term of payment** (prepayment, cash payment or installment payment; in the latter case indicate the effective term for payment and the financier, if any) and the corresponding **currency**. Usually, the international conditions of payment are basically:
 - d.1) **Prepayment:** the importer agrees to remit the amount related to the purchase and after the exporter receives this amount, the products will be shipped. Course of developments:
 1. - Pro forma invoice or equivalent document
 2. - Registration of the Import License, if the case so requires
 3. - Grant of the Import License, if the case so requires
 4. - Prepayment
 5. - Shipment
 6. - Remittance of Documents
 7. - Customs Clearance

d.2) **Invoice:** the exporter sends the products and only after they are received the importer proceeds with the payment thereof. Under these conditions, there are three options:

a) **Remittance without draft:** the exporter sends the products abroad and subsequently receives the corresponding amount. Course of developments:

1. - Pro forma invoice or another equivalent document
2. - Registration of the Import License, if the case so requires
3. - Grant of the Import License, if the case so requires
4. - Shipment
5. - Remittance of Documents
6. - Customs clearance
7. - Exchange liquidation
8. - Transfer of funds
9. - Receipt thereof by the Exporter

b) **Cash Payment or Cash Payment against Documents:** the products are sent by the exporter and against the delivery of the documents accompanied by a draft or bill of exchange to a bank which will arrange to deliver them to the importer, in its country, against payment. Course of developments:

1. - Pro forma invoice or another similar document
2. - Registration of the Import License, if the case so requires
3. - Grant of the Import License, if the case so requires
4. - Shipment
5. - Delivery of Documents to Bank
6. - Remittance of Documents
7. - Presentation of Documents for Acceptance or Payment
8. - Payment or Acceptance
9. - Customs clearance
10. - Transfer of funds
- 11.- Receipt by Exporter

c) **Installment Payment or Installment Payment against Documents:** the exporter arranges the shipment of the products abroad and after they are shipped also arranges the documents accompanied by the instrument of credit (draft or bill of exchange) and delivers them to a bank. The bank then remits the documents and the draft abroad and upon the acceptance of the draft delivers the documents to the importer, who then arranges the clearance of the products. Course of developments: same as in the Cash Payment.

d.3) **Letter of Credit or Documentary Credit:** in this type of payment the payer is not the importer but rather a bank designated in the document. A Letter of Credit shall only exist if the operation is conducted between banks, which, naturally, use their own jargon, namely:

Borrower - usually it is the importer who requests to a bank, normally in the importer's country, the opening of the credit document;

Drawer - the bank that is usually established in the country of the borrower, which opens the credit document and undertakes to commit to its payment, provided that the exporter or seller abides by the conditions established in the document;

Adviser - the bank, established in the country of the exporter or seller, to which the document opened by the drawer is remitted. The adviser reviews and represents to have reviewed it and by doing so renders the Letter of Credit a trustworthy document for the exporter;

Beneficiary - the exporter or seller, who must perform the conditions established in the Letter of Credit and, on the other hand, receive the value stated therein;

Negotiator - the bank designated by the beneficiary to deliver the documents and, consequently, to make the payment of the deal. The negotiator is usually confused with the adviser.

As may be noted, the credit separates the payment from the buyer. The payment of the amount related to the deal is thence, by way of the credit, a responsibility of the issuing bank and not of the purchaser.

Main points to assert in a review of a Letter of Credit:

- a. - Drawer and/or confirmer
- b. - Beneficiary
- c. - Value, currency, place of payment and term
- d. - Irrevocability
- e. - Products
- f. - Type of sale and type of carrier
- g. - Transferability
- h. - Transshipment
- i. - Divisibility or partial shipments
- j. - Validity or expiration
- k. - Documents

Course of developments:

1. - Pro forma invoice or another similar document
2. - Registration of the Import License, if the case so requires
3. - Grant of the Import License, if the case so requires
4. - Proposal of Opening
5. - Confirmation of Credit
6. - Notice to Exporter
7. - Shipment
8. - Negotiation
9. - Receipt by Exporter
10. - Remittance of Documents and Debit Institution Bank
11. - Presentation of Documents for Payment or Support
12. - Payment or Support
13. - Customs Clearance

d.4) **Liquidation of Exchange for Cash Payment or Installment in up to 360 days**

Cash Payment (Invoice or Letter of Credit) effected before customs clearance of the products imported directly from a foreign country on a definitive basis;

Installment payment in up to 360 days (Invoice or Letter of Credit): a copy of CI related to the customs clearance for consumption and nationalization of the special or atypical products must be presented to the negotiating bank. The CI may be waived if the payment will be made in up to 60 days.

d.5) **Registration of Financial Operation (ROF):** importer's statement on the participants of the deal, the financial conditions and the term of payment (principal, interest and charges), the manifestation of the creditor on the conditions of the deal and the other data required for the transaction.

Remittances and Transfers: subsequent to the approval of the ROF the following foreign remittances may be carried out, without registration of the schedule of payment: cash advancement and cash payment, amounts related to guarantee deposit and other charges whereby estimated payment is prior to the clearance of the products.

d.6) **Simplified Exchange:** the authorized banks may proceed with operations of simplified exchange in payment of products cleared through Simplified Statement of Importation (DSI).

International credit cards: the use of credit cards issued in Brazil in the name of Individuals (personal card) or Companies (corporate card) resident or domiciled in Brazil, observing the credit limit established for each customer by the credit card administrator for the coverage of expenses incurred abroad is allowed.

The Tax treatment of Imports into Brazil does not only cover the Import Tax, which is a selective tax that is levied over the entry of foreign products in the customs jurisdiction. It also includes other taxes that, although their triggering event is not the entry of products into Brazil, which consists in the registration of the Import Permit (DI), ultimately burden the import.

Tributes and other duties that burden imports into Brazil:

Import Tax - I.I.: levied on foreign products, the triggering event thereof is the entry of any such products into customs jurisdiction;

Tax on Industrialized Products - IPI: levied over industrialized products, its triggering event is customs clearance of the products of foreign origin;

Tax on the Circulation of Merchandise and Services - ICMS: levied, in import operations, upon the entry of products imported from a foreign country, even in the event the products are intended for consumption or to comprise the facility's assets, its triggering event being customs clearance by the importer (individual or company);

Storage and Foremanship Fees: the foremanship service carried out in an organized port or air cargo terminal is paid on a unit basis (tonnage, cubature, quantity and nature of the volume). The remuneration of the foremanship services in the ports or air cargo terminals shall be based on fees established for each organized port or air cargo terminal;

Fee for use of the Integrated Foreign Trade System - SISCOMEX: it is not subject to the existence of a tax due and it is paid upon the registration of the Import Permit (DI). The tax is debited automatically to the account, agency and bank indicated by the importer in the corresponding Import Permit.

Charge for Commerce Protection: as defined by law, it consists in an amount in Brazilian currency that aims to eliminate unfair practices (dumping or subsidies).

Contribution for Intervention in the Economic Domain - Cide: levied over the import of crude oil and by-products, natural gas and its by-products and combustible ethyl alcohol. Its triggering event is the import operation and it is paid thru automatic debit in a bank account.

2.2. Export

The reasons that lead a company to decide to direct their products to the international market are several and differentiated, but, basically manufacturers, trading companies, concessionaires or any another entity may be contacted as exporters.

In order for companies established in Brazil to participate in the international market under conditions that are equal to those of exporters of other countries there are tax incentives whose primary purpose is to reduce the tax burden borne by the products, making them competitive abroad in terms of price.

Main tax incentives extended to exports:

IPI and ICMS tax exemption;

Suspension of IPI and ICMS;

Maintenance of IPI and ICMS tax credits;

Exemption COFINS (Contribution for the Funding of Social Security);

Exemption of PIS (Social Integration Program) contribution;

Recovery and maintenance of PIS credits;

Drawback - allows the industrial or commercial company to import products intended for transformation, processing or aggregated into a new product that must necessarily be exported.

Documents Used in Export Operations:

1. - Registration of Exports - RE: issued through SISCOMEX, valid for 60 days, before clearance by customs and shipment of the products to the foreign country, it consists in a set of information on the commercial, exchange, financial and tax aspects of the export operation;

2. - Simplified Export Registration - RES: used only in exports that have a value of up to US\$ 10,000.00, it is also issued through SISCOMEX prior to the shipment of the products and customs clearance thereof, consisting in an alternative to the RE;

3. - Statement for Customs Clearance of Exports - DDE: issued through SISCOMEX subsequent to the issue of the RE or RES, but prior to the exit of the products to abroad, it formally documents the commencement of the customs clearance period of the export in physical and/or documentary aspects, informing the presence and the location of the products;

4. - Simplified Export Statement - DSE: used in exports that have a value of up to US\$ 10,000.00 it is issued through SISCOMEX in replacement of the DDE, prior to the shipment of the products. It dispenses the issuance of the RE or RES and characterizes the commencement of the customs clearance period for exportation;

5.- Export Attestation Slip - CE: upon completion of the export operation of exportation with the electronic entry in the System recorded by the inspector of the Federal Revenue attesting the shipment of the products to abroad, the SISCOMEX system issues an RE statement that legally proves an effective export;

6. - Pro-forma invoice: document prepared by the export company containing data and information on the product, price, term of delivery, terms of payment and sale, etc. It is void of any legal value.

7. - Commercial Invoice: it is one of the most important documents of the export, its presentation being indispensable for the importer to clear products by the customs authorities of its Country. It states the commercial conditions of the export, such as: description of the products, quantity, weight, value in the foreign currency, sale conditions (Incoterms), terms of delivery and the negotiated payment conditions;

8. - Draft or Bill of Exchange: it consists in an instrument of credit that represents the export operation for the receipt of the corresponding payment; it may be accepted and protested and also used in discount operations (financing);

9. - Packing List: issued by the exporter prior or after shipment, it lists the cargo that will be shipped, separated by volumes and the contents thereof, however it does not mention any values;

10. - Bill of Lading, Airway Bill: issued, dated and signed by the transport carrier, formally documenting the date of the shipment of the products to abroad and it also defines who is the legal owner;

11. - Certificate of Origin - ALADI: document filled in by the exporting company and issued (signed) by the National Confederations of Industry, Commerce and Agriculture or by entities credentialed by them, in support of the export of Brazilian products benefited by lower import taxes in the ALADI member countries;

12. - Certificate of Origin - Mercosur: document filled in by the export company and issued (signed) by the National Confederations of Industry, Commerce and Agriculture, Trade Associations, Trade Centers and Chambers of Commerce, in support of the export of Brazilian products benefited by lower import taxes in the MERCOSUL member countries;

13. - Certificate of Origin SGP – Form A: document filled in by the exporting company and issued (signed) by the authorized Banco do Brasil agencies, in support of the export of Brazilian products benefited by lower import taxes in developed countries members of the SGP - General System of Preference;

14. – Phytosanitary Certificate: document issued by authorities of the Ministry of Agriculture, prior to the shipment of the products, it aims to attest and prove the healthiness and quality of the vegetal and animal products exported;

15. - Consular Invoice: required by a few, rare countries, it is similar to the commercial invoice, in most cases it must be legalized by the Consulate of Brazil established in the importer country;

16. - Exchange Agreement: given that no company is allowed to have a bank account with funds of a currency other than the Real, it consists in a purchase and sale agreement between the export company and a bank authorized by the Central Bank of Brazil to carry out exchange operations, whereby the “products” that is negotiated is the foreign currency. Thus, even though the export is expressed in foreign currency, the exporting company always receives the corresponding amount converted into Reais;

17. – Simplified Purchase and Sale Bank Invoice: applicable only in exchange operations of up to US\$ 10,000.00;

18. - Registration of Sale - RV: issued through SISCOMEX, it must be registered immediately in the system following the closing of the sale of the products negotiated in the stock market (commodities);

19. - Registration of Credit Operations - RC: issued through SISCOMEX, always prior to shipment, in the operations of exports financed with a term of more than 180 days;

20. - Sales Receipt (Nota Fiscal): the same sale receipt (*nota fiscal*) that is used in the domestic market, it is always issued in Portuguese and in Reais (R\$) in the name of the import company.

In addition to the foregoing, other documents may be required, depending on the product, the country of destiny or the importer.

Export Tax: a few rare products are subject to payment of the Export Tax in Brazil when destined abroad;

Other taxes that are levied over exports:

Social Contribution on Profit - CSSL;

Income tax - IR;

Service tax – ISS

Social charges.

Forms of Carrying Out Exports: with and without exchange coverage:

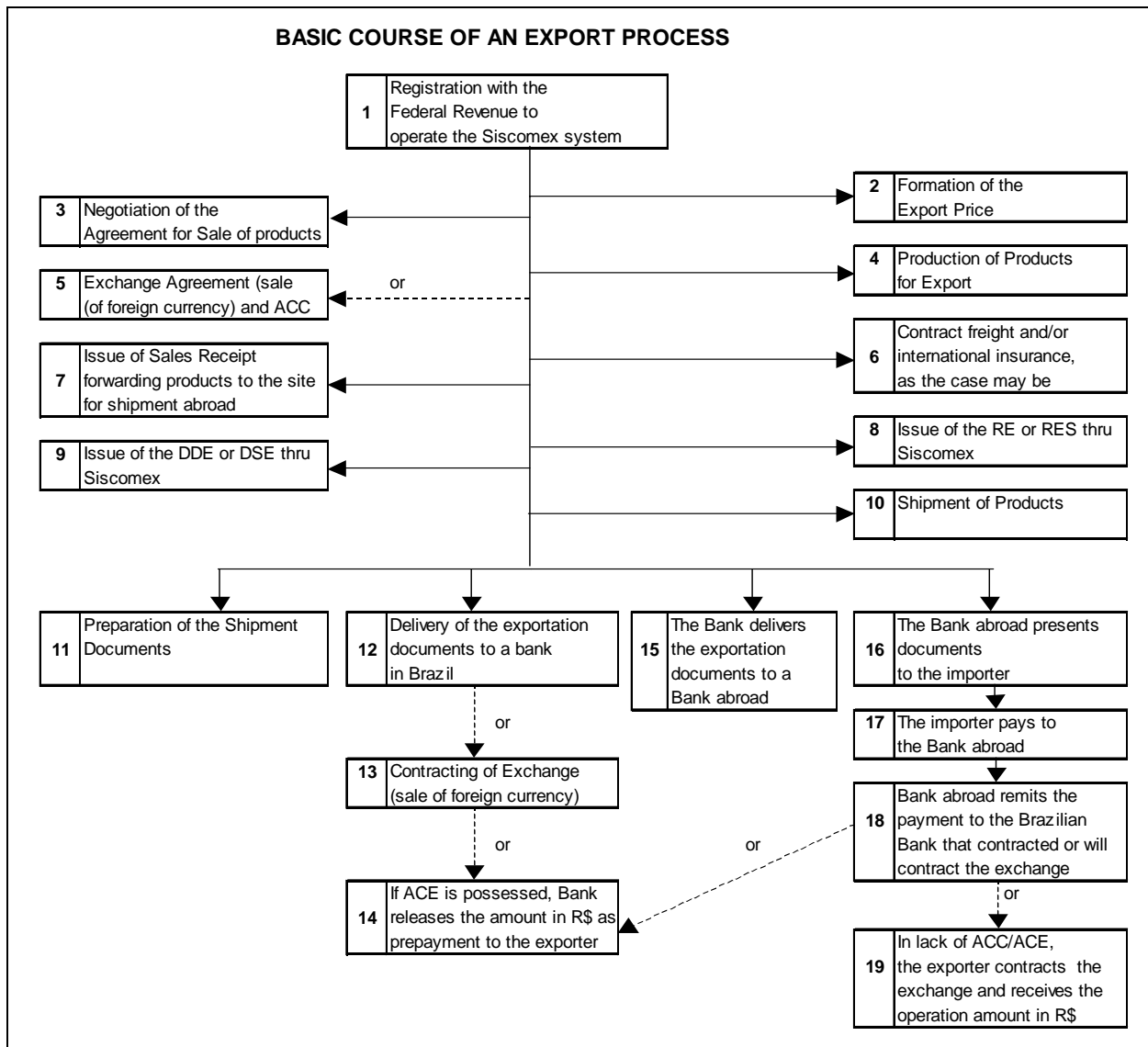
Temporary Export: consists in the exit to abroad of a national or nationalized product, subject to its re-importation in up to one year, extendable for an equal period, in the same state from where it was exported or subsequent to its submission to a fix, repair or restoration process;

Exportation in Consignment: operation that enables exporters to ship abroad products that will be submitted to tests and demonstration of its qualities, with the purpose of approaching, easing, stimulate and render feasible the export thereof;

Exportation for Use and Consumption on Board: the supply of beverages, foods, fuels, lubricants and any other products that are intended for the consumption and use on board ships and aircraft irrespective of the carrier’s flag are considered exports;

Export in Reais: as an exception to the rule, exclusively applying to the companies that are headquartered in cities located on the Brazilian borders with Argentina, Uruguay, Bolivia and Paraguay, may export to these countries against payment in Reais;

Customs Clearance of Exports: this consists in the official procedure thru which the customs inspector of the Federal Revenue personally checks the physical and documentary aspects of the product for export with the intention to authorize and legalize its exit abroad, characterizing an export for all effects;



Forms of Payment

Given that the payment of the operation is the final counterpart to the delivery of the product, the form of payment is thus indispensable for materializing the deal. The exporter must be aware that the grant of credit is inversely proportional to the risk level. Therefore, the exporter should analyze several factors with sufficient diligence since they will directly influence in the selection of the terms of payment that will be formally established in the export proposal, among which the following may be listed:

- The economical-financial status of the importer;
- Economical, social and political aspects of the import country;
- Nature, characteristics and particularities of the product;
- Context of the product in the local and global markets in terms of quality, competitiveness and offer level;
- Reputation and tradition of the importer and/or of the purchaser country in the international trade market;
- Commercial practices adopted by the purchaser country and/or of the product;

- Seniority and/or regularity of the importer in commercial transactions;
- Position of the trade balance, the payments balance and of the currency reserves of the import country.

After this analysis the exporter will be able to calculate the risk of the operation and define the terms and form of payment that it will propose to the importer.

Prepayment: the importer pays partially or in whole the subject amount under the deal to the exporter, prior to commencing the production or shipment of the products abroad;

Invoice: following the shipment of the products the exporter delivers the export documents to the bank that negotiated the exchange in Brazil, which immediately sends to its foreign branch for the delivery thereof to the importer, against payment or acceptance of the draft. The exports carried out through this form of payment may be invoiced in two forms:

- Cash payment, with or without draft/bill of exchange;
- Installment payment, with or without draft/bill of exchange, in up to 180 days.

Letter of Credit: in regard to the **term of payment**, the letters of credit are also divided in:

- Cash, with or without draft/bill of exchange;;
- Installment payment, with or without draft/bill of exchange, in up to 180 days.

As regards their **nature**, the letters of credit may be issued with the following features, elected upon free agreement between the importer and the exporter:

1.- Revocable - may be changed or cancelled by the issuing bank at the importer's request, at any time and without previous notice to the exporter, provided that the shipment documents have not yet been delivered to the negotiating bank;

2. - Irrevocable - cannot be changed or cancelled by the importer, except upon the express agreement of the negotiating bank and mainly of the exporter;

3. - Transferable - allow the exporter to transfer its credit to other companies, which, however, do not have the power or right to carry out a new transfer;

4. - Non-transferable - the exporter is not allowed to transfer its credit to other companies;

5. - Confirmed - the payment is warranted, additionally, by a third bank, usually first class and established in another country;

6. - Divisible – allow partial shipments, with equally partial payments;

7. - Restricted - specifically define which bank will negotiate the export documents;

8. – Trans-shipment - allows the loading or unloading of the product to different or the same means of transport in the course of the trip, provided that the route is covered by the same bill of lading.

Particularities:

- Only the letters of credit received through the adviser bank possess legal validity and guarantee of payment. Letters of credit sent by the importer via fax, email, letter or telex, though bearing a letterhead and signed by the banks and involved companies, is **void** of validity.
- The exporter shall put all of its efforts to facilitate the activities carried out by the negotiating bank.

- The letter of credit represents a guarantee to both the exporter and importer.
- Occurring anticipation of the shipment of the products the exporter must be attentive to the maximum term of validity of 21 consecutive days, counted as of the date of the shipment, to deliver the export documents to the negotiating bank, even if the term established in the letter of credit for negotiation of the documents exceeds such 21-day term.
- The letter of credit is unilaterally irrevocable only in regard to the importer, since if the exporter intends to revoke it, it shall suffice to not ship the products and allow the agreed periods to expire.
- To expedite the billing operation the exporter may indicate the bank established abroad of its preference that will issue the invoice, thus preventing the delay of payment of the draft.
- The International Chamber of Commerce - CCI, thru the Uniform Customs and Practice for Documentary Credits, known as 500 UCP or Brochure 500, defines the rules and operation of the letters of credit.
- A document is considered "clean" when it does not contain any notes regarding the products or packaging, particularly in regard to the bill of lading.
- The International Chamber of Commerce - CCI, thru the Uniform Rules for Collection, known as 522 URC or Brochure 522, regulates the collection operations.
- A "clean" collection is the act of collecting from abroad based only on financial documents, unaccompanied by commercial documents.

The international trade field is of primary importance to both the less developed countries and the countries that have reached a higher level of development. Thus, poor and rich countries indistinctly struggle to obtain in foreign trade the resources that allow growth of its exports and import of consumables, which are indispensable to the social progress and improvement of the life standard of its population.

3. SALES REPRESENTATION, DISTRIBUTION AND PURCHASE AND SALE WITH RESERVE OF OWNERSHIP AND/OR OTHER GUARANTEES

Charles Wowk
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3.1. Sales representation and distribution agreements

3.1.1. Brief definition of sales representation (*agência*)

The sales representation (*agência*) or commercial representation (*representação comercial*) is the contract whereby a company or individual acts as an intermediary in certain deals on behalf of another party, with exclusivity in a certain territory, on a non-sporadic basis and without an employment relationship, agency proposals or orders to ultimately inform same to the party that it is representing.

The main legal characteristics of the sales representation relationship derive from this definition, namely: a) business activity; b) non-sporadic nature of the representation services; c) mediation in the realization of certain deals; d) the agent's autonomy to act.

This definition pursues from the joint analysis of article 1 of Law 4886/65 and article 710 of the recently enacted Brazilian Civil Code, being worthy to note that both rules are harmonious and complete each other, being clear the legislator's intention in the new Civil Code (article 721) to maintain effective Law 4886/65, applying it, as applicable, to the sales representation agreements and also to the distribution agreements.

3.1.2. Brief definition of distribution

The distribution agreement is the contract whereby a party undertakes the obligation to resell, with exclusivity (unless convened otherwise), on its own behalf, upon the payment of a fee, the products of a certain manufacturer in a certain territory.

This type of contract may be considered to be a species of the commercial concession gender. The main difference is that the distribution, due to its generality, allows the sub-distribution; hence, the distributor authorized by the distribution agreement, may adopt its own network of sub-distributors to set up the placement of the product in the consumer market, however such sub-distribution arrangement must abide by the rules determined by the manufacturer.

The distributor deals in its own name, as quoted above. It purchases the products to resell them with exclusivity in a certain territory, the manufacturer assuming, on the other hand, to not sell them to another dealer in the same territory. If it does so, it will be obligated to pay a fee to the distributor.

3.1.3. The new rules concerning sales representation and distribution contracts

As previously stated, the sales representation agreements (*contratos de agência*) were defined in a special law in Brazil in 1965, enacted as Law 4886/65, subsequently amended by Law 8420/92, with very broad and clear rules on the relations between agents and manufacturers. These rules were furthered in the new Civil Code.

Inversely, the distribution contracts always presented a huge legal vacancy, lacking more specific rules for this type of contract, at least until 2002.

In principle, in addition to the General Principles of Law, the regular rules on obligations established in the former Civil Code applied to the distribution contracts.

Some judges applied by analogy to the distribution contract a law that specifically addressed the commercial concession between manufacturers and distributors of land vehicles (Law 6729/79, as amended by Law 8132/90).

As of January 2003, pursuant to the enactment of the new Brazilian Civil Code, which introduced specific provisions on the distribution agreements and also certain novelties regarding the sales representation contract.

In the new Civil Code (articles 710 up to 721), the distribution contract is regulated jointly with the sales representation contract, receiving a similar treatment, being conceptualized as follows:

According to the specific definitions established in the new Code, through the representation contract a person undertakes on a non-sporadic basis and without dependency, the obligation to promote, on behalf of another person, upon payment of a fee, the realization of certain deals in a certain territory, the distribution being characterized when the agent has at its disposal the object to be negotiated (article 710).

Hence, the main difference between the sales representation and distribution contracts is that in the latter the distributor has the disposability of the object that is being negotiated. Such disposability must be construed as a genuine purchase for resale and not plain possession.

As quoted above, although they are addressed in the same chapter in the new Civil Code, the sales representation and the distribution contract are not identical. Both concern the contracting of mediators engaged in the distribution of the proposing party's products. However, in the sales representation, these products continue to be at the level of the proposing party's disposal, which is bound directly to the customers, the agent being entitled to a commission for the sales representation services that it provided. In the distribution arrangement, inversely, the products are transferred to the distributor's patrimony, and accordingly the customer contracts the purchase of the product with the distributor and not with the proposing party. The fee that is paid to the distributor is not a commission, but instead the profit that results from the difference between the purchase and the resale prices.

As regards the limits of the representative's and distributor's acts, article 711 establishes, vis-à-vis the best legal theory, the freedom to establish an exclusivity clause, and provides that, in the absence of such a clause, dual exclusivity shall be presumed, which consists in that the proposing party cannot designate, simultaneously, more than one representative or distributor, in the same territory and with the same duty, nor may the latter undertake business of the same type on behalf of other proposing parties.

3.1.4. Termination of the contractual relationship

Generally, contracts may be terminated for five different reasons: a) due to a previously existent defect that renders it void or subject to cancellation; b) pursuant to its performance, with the fulfillment of all the contractual obligations; c) due to negligent non-performance, in which event it is unilaterally or mutually terminated; d) pursuant to voluntary non-negligent non-performance, in which event it is unilaterally or mutually terminated; e) pursuant to involuntary, non-negligent non-performance, in which event the contract is lawfully terminated (as occurs, for example, in force majeure cases).

One of the most controversial issues in regard to the several forms of termination concerns the unilateral termination without cause of the contract. In the other forms the contract is terminated for a certain reason, either pursuant to its performance, non-performance, expiration or by the parties' intention.

The unilateral termination without cause has more complex characteristics since the contractual relationship is terminated at one of the contracting parties will. Thus, special considerations should be devoted to it.

In principle, the initiative of terminating the contract is not required to be supported by any reason. Though it is a legal means to terminate a contract that has an indefinite duration, the parties are aware that the contract

may be terminated at any time upon a plain statement of such an intention, but that in certain contracts the party that terminated it without cause is subject to indemnifying the other party for losses and damages.

This is due to the fact that certain contracts, such as the sales representation and distribution agreements, that then in general aspects reflect the submission of one party (the representative or distributor) to conditions imposed by the other (the manufacturer).

It is, therefore, imperative upon the courts to reestablish the stability between the parties, mitigating the distributors' vulnerability.

The representative and the distributor may suffer losses in the event of any early termination of the contract without cause.

In regard to the sales representation agreements, the Special Law still in effect was already clear in its provisions thereon, establishing an indemnity to the representative equal to 1/12 of the entire compensation that the representative earned in the period in which it was engaged as a sales representative.

It further established the compulsory 30-day prior notice of termination or the payment of an indemnity equal to 1/3 of the commissions that the sales representative earned in the three months that precede the termination without cause.

In this regard the new Civil Code changed the prior notice period established in the Special Law and now requires the represented party to provide a 90-day prior notice to the sales representative in the case of termination without cause.

The new Code raised a single doubt that has not yet been clarified: do only the indemnities already established in the Special Law for the cases of termination without cause of the sales representation agreements continue to exist or is it possible for the representative to claim any additional indemnity? This doubt shall only be clarified in the course of time upon the review of actual cases but, in principle, in the absence of specific provisions in the new Civil Code, apparently only the indemnities foreseen in the Special Law continue to exist.

As regards the distribution agreement, there have always been doubts as to the obligation of the indemnity, as well as the determination of the amount thereof. What rules apply? These doubts triggered many court disputes before Brazilian courts. In the vacancy in the law, doubts existed as to the fitness or not of indemnity in the case of termination without cause and the amount thereof.

Excepting understandings to the contrary, the new Civil Code apparently clearly provides that heretofore it is required to indemnify in the case of unilateral termination, without cause and that is harmful to the distributor.

Indemnification was also expressly established in the case of indirect termination, i.e. when the proposing party reduces the fulfillment of the orders up to the point that the continuity of the contract becomes unfeasible, uncomfortably compelling the distributor to terminate it.

As regards the indemnity amount, the new Civil Code apparently was not intended to pacify the issue. It refers the matter, in articles 718 and 721, to a special law that, in the case of distribution, does not exist.

Therefore, at least in the short term, it would appear that the solution that has been adopted up to the enactment of the new Civil Code, i.e. liquidate the obligation through indemnification for losses and damages, with the corresponding determination of the damages, will continue to be applied.

It should be emphasized that the understanding of such damages has been broadened to cover, in addition to the expenses incurred with installation facilities, with the inventory held by the distributor and the labor rights of the employees that are dismissed pursuant to the termination of the distribution agreement, the

distributor's goodwill as well, i.e. the distributor's capacity to lure new clients, which the proponent or the new distributor that the proponent may appoint will benefit from.

Without prejudice to the cases of termination without cause, the new Civil Code also establishes in regard to the distribution agreement that, if the contract has an indefinite term of duration, any party thereto may terminate it upon a 90-day prior notice, provided that a period proportional to the nature and the magnitude of the investment required has elapsed.

In such event, having elapsed the prior notice period proportional to the business and not existing any disagreements between the parties, it would appear that there is no reason for the distributor to claim any indemnity.

We deem that these are the main aspects of the sales representation and distribution agreements.

3.2. Purchase and sale with reserve of ownership and/or other guarantees

3.2.1. Introduction

The purchase and sale transaction is one of the oldest and most important institutes of Brazilian law. In this regard, it should be noted that in the course of time this institute has been consolidated as the most common and regular means of closing deals, which demonstrates its importance both under the legal and economical viewpoints.

It is a fact, however, that commonly the seller, particularly in international transactions, is vulnerable in this type of deal inasmuch that the distance poses difficulties to adopt measures to protect its interests.

Hence, this essay aims to suggest options to attempt to mitigate this vulnerability condition, demonstrating the types of guarantees that are established in Brazilian law, thus mitigating the risks associated with an international purchase and sale transaction.

3.2.2. Purchase and sale on credit with reserve of ownership

3.2.2.1. Definition and application

A reserve of ownership (*pactum reservati domini*) occurs when the seller, in a purchase and sale agreement, by rule involving unchangeable, movable property, reserves to itself the ownership of the property sold up to the occasion of the full payment of the price. Accordingly, the buyer only acquires the ownership of the property upon the payment of the price, as of which occasion the transaction will be fully valid.

In this type of purchase and sale the purchaser promptly assumes the indirect possession of the property sold, the acquisition of the ownership thereof being subject to the payment of the last installment. This infers that the transfer is not definitive but rather conditional. It consists in a preceding condition whereby the uncertain and future event is the full payment of the price. Hence, the transfer of the ownership of the property is conditioned to the implementation of the condition, i.e. the full payment of the convened price.

3.2.2.2. The debtor's options in the event of breach

This type of contract affords a full guarantee to the seller as it enables to withhold the ownership of the sold property until the price is fully paid, hence if the price is not fully paid the buyer will not acquire the ownership thereof and the seller may elect to either claim the price or repossess the property through a repossession suit.

Thus, in the event the buyer does not pay the installments due, the seller may:

- a) claim the payment of the installments that are overdue and that fall due in the future (Code of Civil Procedure – CPC, article 1.070), through a debt collection suit;
- b) consider the contract terminated and claim the repossession of the property (CPC, article 1.071, paragraph 3) proposing the suit with a preliminary claim of seizure and legal custody of the property, granted without need of hearing the buyer beforehand, so to prevent the buyer from hiding, selling or deteriorating the property. Upon repossession of the property, the seller is required to return to the buyer the installments that were paid, less depreciation (Law no. 1.521/51, article 2, X; Code of Civil Procedure, article 1.071, paragraphs 1 and 2). If the buyer has already paid more than 40% of the price, the buyer shall have a 30-day term to pay the overdue installments, arrears interest, adjustment for inflation and charges, thereby regularizing its arrears status.

3.2.2.3. Liability as to the property

It is a prevailing understanding that the buyer bears the risks associated with the property since, although the seller retains the ownership thereof, as of the execution of the contract the possession of the property is transferred to the buyer, who uses and benefits from its use, merely as a possessor, and may in addition to perform the acts appropriate to preserve its rights, inclusively resorting to, if necessary, property injunctions to defend the property against interferences of third party or even of the seller, also extract from the property all the benefits that the property is capable of affording.

3.2.2.4. Effects against third parties

The contract with reserve of ownership must be recorded with the Public Registry of Deeds and Documents. By doing so, in abidance by the principle of publicity, the due registration of the contract will prevent a third party that purchases the property from the original buyer from alleging in its benefit that it was not aware of such contract. Hence, the registration of the contract produces *erga omnes* effects not only between the contracting parties but also against any third party buyer.

3.2.2.5. Requirement for characterizing arrears status

Articles 525, 526 and 527 of the Civil Code determine that the seller may only enforce the reserve of ownership clause after characterizing the buyer's arrears status, by protesting the instrument or court notification. Upon the characterization thereof, as previously stated the seller may file either a suit to collect the overdue or not yet matured installments or to repossess the property that it sold.

3.2.3. Other types of purchase and sale guarantees

3.2.3.1. Chattel mortgage

The chattel mortgage consists in the transfer by the buyer to the creditor of the conditional property and indirect possession of an irreplaceable chattel, to secure its debt up to the fulfillment of the principal obligation (i.e. payment of the secured debt).

Thus, this consists in a relationship comprised by two legal relationships: a relation of obligation that expresses the debt and another represented by the guarantee in which the mortgagor transfers the property to the mortgagee, who receives it not to have it as its property but rather with the purpose of returning it to the mortgagor with the payment of the debt.

The chattel mortgage is widely used in commerce as it enables the payment in a lump sum of chattels with a third party's resources (usually a financial institution). The conditional property and indirect possession of

the property is transferred to the latter, the debtor remaining with the direct possession and vesting the status of depositary thereof until the debt is fully paid.

Under Brazilian law the chattel mortgage is questionable in contracts between private parties, many finding that this type of guarantee is only appropriate in transactions that involve a financial institution.

3.2.3.2. Mortgage

The mortgage is the property right (binding the subject property) over real estate property, a ship or aircraft that, although not delivered to the creditor, secure to it, with a preferred right, the fulfillment of the obligation.

Note that the mortgage is a guarantee right, i.e. it is characterized by its ancillary nature since it depends on a principal obligation, i.e. the obligation assumed by the debtor, which it is intended to secure.

In Brazilian law there are two principles that regulate the mortgage, namely: the principle of specialization and the principle of publicity.

As regards the first, it should be stressed that the mortgage applies solely to the property specified in the deed of the property or mortgage deed. The mortgaged property must be described in detail, with all its particularities such as geographical location, enrollment number, borders and other data that enable to identify precisely the property that is being secured by mortgage.

As regards the second principle, it should be stressed that the publicity is attained through the recording of the mortgage with the relevant Real Estate Registry. It is the enrollment that provides the publicity disclosing to all that the real estate given as guarantee is subject to a mortgage, thus preventing any third party allegation of non-awareness of the mortgage on the property.

In the lack of regarding the mortgage with the Real Estate Registry, the right over property will be a personal, unsecured right. Notwithstanding the lack of enrollment, the mortgage vests onto the mortgagor the right to file a collection suit, though it does not protect the creditor against any bona fide third parties.

3.2.3.3. Commercial pledge

In broad terms, the pledge may be defined as a property guarantee right that is constituted by way of the effective transfer of possession that, as a guarantee of the debt provided to the creditor or its representative, by the debtor or its representative, of a chattel that may be transferred (article 1.431 of the Civil Code).

It is important to emphasize that Brazilian law establishes several types of pledges, each having its own characteristics. The commercial pledge is the type that is addressed hereunder.

Initially, it is important to emphasize that in the commercial pledge the property that is pledged remains in the possession of the debtor, who must safeguard and preserve it. Under this guarantee the debtor holds the property on behalf of the creditor.

The commercial pledge is constituted through a public or private instrument recorded with the Real Estate Registry that has jurisdiction over the place where the pledged property is located (article 1.448 of the Civil Code). When the obligation consists in cash, a bond may be issued.

The pledge may consist in machinery, appliances, materials, instruments that are installed and operating, with or without the accessories thereof, livestock used in the livestock industry; salt and the goods destined to the salt exploitation activities; pork industry products, livestock destined to the industrialization of meat and its by products; raw materials and industrialized products (article 1.447 of the Civil Code).

The debtor cannot modify the property that was pledged or change its status without the creditor's express consent (article 1.449 of the Civil Code).

If the property is transferred upon authorization it should be replaced by the same type of property, which will be subrogated under the pledge (article 1.449 of the Civil Code).

As a general rule, in any pledge whereby the possession of the pledged property remains with the debtor the creditor has the right to check the status of the pledged property and to inspect it wherever it is located, *per se* or its designee (article 1.450 of the Civil Code).

Hence, without any doubt a commercial pledge may be constituted as a property guarantee over a chattel, which shall be maintained in the event it is ancillary to a purchase and sale agreement while the buyer's obligations persist.

3.2.4. Personal guarantees

In addition to the foregoing guarantees, there also exist the so-called personal guarantees, which may be established in the contract, such as the collateral (*fiança*) or an instrument bound thereto such as, for example, an exchange bond or a promissory note issued by the buyer and/or a third party.

Thus, without prejudice to the responsibility and the property guarantees that may be granted to the seller, collateral guarantees may also be offered, either by the buyer or the partners of the buyer or of third parties unrelated to the transaction, thus securing the options of course of action by the seller in the event of contractual breach.

Hence, these are the most commonly adopted types of guarantees that may be established as ancillary guarantees in purchase and sale agreements, intended to further protect the seller.

4. INTELLECTUAL PROPERTY

4.1. Trademarks

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Identification marks that may be registered as a trademark

Under the Brazilian Intellectual Property Law – Law 9.279/96 – a unique, visually perceivable identification mark, used to identify the origin of certain products or services may be registered as a trademark.

Thus, in Brazil, the marks that are perceived only by the senses of hearing, smell, taste and touch cannot be protected as a trademark.

Moreover, any markings that fall under the prohibitions set out in article 124 of Law 9.279/96, namely markings that: are contrary to morality and proper costumes; copies or resembles the main element of a trade name or corporate name of a third party; is generic, necessarily, commonly, popularly used marks or that plainly describes the product or service that it is intended to identify; is a symbol or expression used as a publicity slogan, or that copies or resembles a third party's registered trademark; etc. cannot be registered as a trademark.

Types of trademark registrations

In Brazil, trademarks may be registered under the following types: (i) word mark (comprised only of words); (ii) composite mark (comprised of devices + words or stylized letters); (iii) device mark (device only); and (iv) tri-dimensional (tri-dimensional devices – e.g. the form of a product or packaging).

Applicants

The applicant may be an individual or a Brazilian or foreign company, and is required to prove that it is legally and actively engaged, directly or through companies that it controls directly or indirectly, in the business activity in regard to which it claims protection for the products or services that will be identified by the trademark. The applicant through an affidavit that is submitted jointly with the trademark registration application attests the fulfillment of this requirement.

Priority right

In case the trademark application that is being filed in Brazil has already been filed in a country that has entered a bilateral agreement with Brazil or an international treaty along with Brazil, the applicant may be warranted a priority right, provided that the applicant timely files the application within the filing deadlines established therein.

According to article 4 of the Paris Convention, in which Brazil is one of the signing countries, the period for the applicant to claim a priority right over a trademark is six months. This secures to the trademark owner the filing date of the application in the home country, and any occurrence within the period comprised between the original filing and the filing in the country where the priority right is claimed will not hinder its registration in Brazil.

The priority right must be claimed and proven in accordance with article 127 of Law 9.279/96.

Protection vested by the trademark registration

By rule, trademarks are protected under certain products and services classes and, in accordance with the principle of the specificity of trademarks, trademarks that are similar or even identical to other trademarks may coexist to identify products or services that are totally unrelated, having in view that the trademark protection is limited to the extent of the applicant's business activities.

In this regard, it should be emphasized that particularly in regard to the widely known trademark (*marca de alto renome*), in Brazil it vests special protection in all fields of business, as established in article 125 of Law 9.279/96.

The notorious trademark (*marca notoriamente conhecida*) also vests special protection, however limited to the corresponding field of business and irrespective of its prior filing or registration in Brazil, as provides article 126 of Law 9.279/96 and article 6 *bis* (I) of the Paris Convention.

Brazil adopts the attributive trademark protection principle, according to which ownership and the exclusive right to its use in Brazil are acquired solely upon a validly issued registration with the Brazilian Trademark Office (*Instituto Nacional da Propriedade Industrial – INPI*). Accordingly, the applicant of a pending trademark registration application holds merely the expectancy of a right, however evidently the applicant will vest a first-to-file right since in the INPI's analysis of the application it shall take into consideration the first applicant based on the filing date, time at which it was filed, etc.

It is important to note, however, that Law 9.279/96 also establishes the right of preference (article 129, paragraph 1), in which the party that in good faith used in Brazil, on the priority date or the filing date of the other party, an identical or similar mark to identify identical or similar products or services, for at least six months, may claim the preference of its right of prior use.

A trademark registration is valid in Brazil for ten years, as of its grant, and may be extended, indefinitely, for successive ten-year periods.

The applicant and the owner of a trademark registration are further warranted the right to (i) assign its registration or application, (ii) license its use and (iii) zeal for its material integrity or reputation, in accordance with article 130, items I, II and III of Law 9.279/96.

Registered trademark use requirements

The mere grant of the trademark registration may not mean tranquility or unattainable and unchangeable rights, even if it was granted without any vice that could otherwise render it void. This is because in Brazil the trademark registration owner is granted a five-year grace period, as of the grant date, to initiate its use, following the elapse of which, in case use has not commenced, the owner will be subject to an administrative cancellation proceeding aimed to cancel the registration on the grounds of lack of use of the trademark. It is important to note that the trademark must be used precisely in the form under which it was granted.

Even if use of the mark commences following the five-year grace period, if it is interrupted for five consecutive years the registration shall be subject to forfeiture (cancellation for non-use). A third party that has a legitimate interest therein may open the forfeiture proceeding.

Both the trademark registration owner and the licensee, if any, may prove the effective use of the trademark, thereby preventing its forfeiture.

Trademark licensing

As regards the licensing of trademarks, a license may be granted by the trademark registration owner or by the applicant, vesting on the licensee all powers to defend the trademark. The trademark license must be recorded/registered (*averbada*) with the INPI so that it may produce legal affects against third parties.

However, it is important to note that, according to Law 9.279/96, for the purposes of validity of evidence of use, the registration of the license agreement with INPI is not required.

Crimes committed against trademark registrations

It should be emphasized that, in Brazil, trademarks are protected not only under civil law, but also under criminal law, in which the violation subjects the offenders to penalties that may range from one month to one year of detention, in accordance with articles 189 and 190 of Law 9.279/96 (a proposed bill intends to increase the penalties up to 4 years of detention).

The following conducts are defined as criminal offenses that are subject to the penalties established in Law 9.279/96:

- Copy, without the owner's authorization, in whole or partially, a registered trademark or imitate it in a way that may be misleading;
- Change a third party's registered trademark that has already been placed on a product that is being marketed;
- Import, export, sell, offer or expose for sale, hide or keep in inventory (i) a product identified by an illegally copied or imitated trademark, in whole or partially, owned by a third party, (ii) a product of its manufacture or trade, concealed in a bottle, recipient or package onto which is placed a third party's legitimate trademark.

Geographic indications

It is also important to note that the Brazilian Intellectual Property law also protects geographic indications, i.e. the place or designation of origin.

The place of origin is defined as the geographical name of the place that has become known due to the extraction, manufacture or production of a certain product or the supply of a certain service.

The designation of origin is defined as the geographical name that has become known due not only to the extraction, manufacture or production of a certain product or supply of a certain service, but also to the human and natural factors of such place influence on the quality or unique feature of the product or service.

4.2. Patents

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Brazilian Industrial Property Law was amended by Law 9.279/96 (which became effective on May 15, 1997), being grants legal protection thereunder to all types of inventions, inasmuch that it eliminated several prohibitions that were established in the former law.

Under the TRIPS (Trade-Related Aspects of Intellectual Property Rights) provisions, the inventions related to foods, chemical-pharmaceutical products, medicines, production processes based on biological material such as microorganisms, biological material and genetically modified microorganisms that were not formerly patentable were thenceforth susceptible of being patentable pursuant to the enactment of Law 9.279/96.

Law 9.279/96 still establishes the exclusion of certain matters that cannot be patented in Brazil, such as, for example, commercial principles or methods, in addition to operation or surgery techniques and methods, as well as therapeutic or diagnosis methods applied to the body of humans or animals.

Types of patents and patentability requirements

Brazilian law established two types of patents: Invention Patents and Utility Models.

In these two types of patents an examination on the merits conducted to assert the following patentability requirements:

- (i) Novelty: when the invention does not fall within the state of the art.
- (ii) Inventive activity and inventive act:
 - a. Inventive activity in the case of patents of invention: The invention features inventive activity whenever, when, for a person skilled in the art, it does not derive in an evident or obvious manner from the state of the art.
 - b. Inventive act in the case of utility model patents: The utility model features inventive act whenever, when, for a person skilled in the art, it does not derive in a common or usual manner from the state of the art.
- (iii) Industrial application: The invention and the utility model are deemed susceptible of industrial application when they may be used or produced in any type of industry.

In further regard to the patentability requirements, Law 9.279/96 establishes the so-called “grace period” according to which the invention may be disclosed before the patent application is filed with the Brazilian Trademark & Patent Office (*Instituto Nacional da Propriedade Industrial – INPI*) without jeopardizing the novelty requirement.

Once filed with the INPI, the patent application will be kept on hold until its publication, which shall occur in 18 months as of the filing date or priority date, if any, and the applicant must request the examination of the application within 3 years as of the filing date, for the INPI to examine whether the patentability requirements are met and issue its opinion, official action to fulfill a requirement, allow or reject the application.

If the application is allowed, the applicant must pay an issuance fee for the issuance of the Letter-Patent. The Letter-Patent of an invention patent is valid for 20 years and 15 years for the utility model, always counted as of the filing date.

Law 9.279/96 further establishes that the applicant must pay annuities as of the 3rd year, counted as of the filing date, which will be due up to the expiration of the patent, if granted.

Protection conferred by the patent

Law 9.279/96 clearly defines the patent violations and confers to the patent owner the right to prevent an unauthorized third party from manufacturing, using, placing for sale, selling or even importing the subject matter protected by the patent, also being considered a crime the use of means that are equivalent to the patent’s subject matter.

Furthermore, Law 9.279/96 introduced indirect violation to facilitate the inhibition of use of the patent’s subject matter by a third party. Accordingly, the patent owner confers the right to prevent third parties from contributing to the practice, by other parties, of conducts that are defined as patent violations.

Moreover, in the cases of violation of patented process rights, the burden of proof is reversed and the accused party must prove that its product was obtained through a manufacturing process other than the process protected by the patent.

In addition to the provisions of the law, it should be mentioned that, despite of the low number of lawsuits involving patents, the Brazilian court rulings have been revealing a trend of decisions in favor of the patent owner, thus rendering a patent to be a valuable asset in trade activities in Brazil.

As concerns the steps to be taken by a patent owner against a potential offender, the first step usually consists in a warning letter. In regard to legal action, there are suitable lawsuits at the civil law level, aiming through injunction the immediate cease of the competitor's conduct of manufacturing, selling, imports or exports of matter that violates the patent owner's right, as well as to condemn the offender to indemnity the losses and damages that were suffered, in addition to the criminal suit to condemn the offenders for crime against intellectual property rights.

As aspect to be considered in regard to the patent violations in Brazil is that Law 9.279/96 establishes some exceptions to patent owners' rights, being allowed use on a private, non-commercial basis; use for experimental purposes, related to studies or scientific or technological research; the preparation of a medicine according to a physician's prescription, in individual cases; and in the cases related to living matter, the non-profit use of a patented product as an initial source of variation or propagation to obtain other products.

Compulsory license

Law 9.279/96 also establishes the possibility of obtaining a compulsory license of a patent in any of the following events:

- (i) The owner exercises the rights conferred by the patent in an abusive way;
- (ii) The owner commits abuse of the economical power;
- (iii) The subject matter protected under the patent is not exploited in Brazil by way of manufacture or incomplete manufacture of the product or by lack of full use of the patented process, in which case the license must be claimed after a three year period has elapsed since the patent was granted;
- (iv) Commercialization does not meet the needs of the market;
- (v) Dependency of another patent;
- (vi) National emergency;
- (vii) Public interest.

In the events quoted in (i) and (ii), the party that claims the compulsory license has the burden to prove the abuse committed by the patent owner.

In the event quoted in (iii), Law 9.279/96 provides that, in the event of economical unfeasibility, the local manufacture may be replaced by import of the patented product, however opening the possibility of parallel import by third parties.

In further regard to the event quoted in (iii), it should be noted that, depending on its interpretation, Law 9.279/96 may or might not be fully in conformity with the TRIPS, as this treaty establishes that "patent rights shall be exercisable without discrimination as to the place of invention, technological field and the fact that the goods are imported or manufactured locally".

On the other hand, another way to interpret this issue is based on the Paris Convention, which establishes that "Each country of the Union shall be free to adopt legislative measures that determine compulsory licenses to prevent abuses that could result from the exercise of the exclusive right that is afforded by the patent, such as, for example, the lack of its exploitation". Thus, considering that the Paris Convention establishes the compulsory licensing for the lack of exploitation, and the fact that the TRIPS determines that the Paris Convention provision quoted above must be respected by the members of this treaty, it may be construed that there are no inconsistencies in Law 9.279/96 in this regard.

As regards item (iv), it establishes that even if the patent owner explores the object protected under the patent, it will be subject to a compulsory license if it does not fulfill the market's needs. Such license may be requested after a three-year period following the grant of the patent.

In the cases of dependence on the patent provided in item (v), the subject matter of the second patent must consist in a substantial technical progress in regard to the first patent, being foreseen the possibility of a cross-license in the event the compulsory license is granted to the owner of the second patent based on the dependence of patents.

In regard to the cases foreseen in items (vi) and (vii), having in view that Law 9.279/96 does not clearly define "national interest or emergency" this matter was regulated by Decree 3.201 of Oct. 6, 1999, supplemented by Decree 4.830 of Sept. 4, 2003.

According to this Decree, a patent may be compulsorily licensed in cases of national emergency or public interest, in the latter case only for non-profit public use, provided that declared as such by the Government, when it is asserted that the patent owner, directly or through its licensee, does not fulfill the related needs.

In further regard to this Decree, it should be mentioned that in the cases in which a compulsory license is granted, in the cases in which the unfeasibility to manufacture the object of the patent by a third party or by the Government is demonstrated, the Government may import the patented product, giving priority to the product that was placed in the market directly by the owner, or with the owner's consent. Considering that this measure entails the possibility of importing products manufactures by third parties (presumably from countries where there is no patent protection) and that this would go beyond the provisions of Law 9.279/96, this Decree could be challenged in court on the grounds of unconstitutionality.

Further, this Decree establishes the obligation of the patent owner to provide the required and sufficient information for reproducing the patented object and the other technical aspects applicable to the case under penalty of nullity of the patent. This measure, however, is not foreseen in Law 9.279/96 and, thus, such obligation could also be challenged in court.

Finally, in regard to the compulsory licenses, it is necessary to emphasize that despite of these provisions established in Law 9.279/96 and in the Decree quoted above, there is no record of patents that were compulsorily licensed by the Government; these provisions were established to force price cuts in the pharmaceutical field.

Registration of industrial designs

Law 9.279/96 grants to the author the right to a registration of an industrial design that affords ownership over the "ornamental plastic form of an object" that provides "a new visual result and unique in its external configuration and that may be used as a type of industrial manufacturing".

The registrations of industrial designs are issued without an examination on the merits therefore, in a few months (in average 2 to 3 months) as of the filing of the application and are valid for 25 years, at maximum.

Upon the issuance of the industrial design registration, the owner may immediately enforce its rights, inclusively to take court action against any violators. However, considering that the registration is granted without a formal analysis, it is advisable to, following the grant of the registration, to request the INPI to formally analyze it. After obtaining a favorable opinion issued after the formal analysis is completed (in approximately 1 to 2 months), the owner's position in regard to third parties is strengthened considerably.

In view of the celerity in the process of grant and analysis of the Industrial Design Registrations, the protection of products in Brazil in this category has been demonstrated to be an excellent competitive tool.

4.3. Technology

One of the areas of great interest in the intellectual property field is the subject technology (non-patented), having in view that Brazil, being a country in development, is continuously receiving new technologies from abroad with the purpose to improve its economical capacity. It is through technology supply agreements that the Brazilian and foreign parties negotiate and regulate these interests.

Technology Transfer/Supply Agreements

As of the beginning of the '70s, the promotion of the entry of technology into Brazil was regulated locally, and the Brazilian Patent and Trademark Office (*INPI - Instituto Nacional da Propriedade Industrial*) was designated as the governmental authority authorized to scrutinize the technology supply agreements and the other contracts that involved intellectual property rights (i.e., patent licenses, trademark licenses, franchise agreements, technical support agreements, etc.).

Through, particularly Law 5.648/70 and Normative Act no. 15/75, the INPI adopted an extremely interventionist position in the technology supply agreements, which ultimately caused the contract registration process to be time lengthily, with official requirements that the INPI issued out of its self-established rules and interpretations.

In the '90s the deregulation of the Brazilian economy was initiated, thus allowing a progressive entry of new technologies originated from the developed countries. Pursuant to article 50 of Law 8.383/92, it became possible to remit payments between a subsidiary and its parent company (controlled and controlling companies) under technology supply agreements (and other intellectual property licenses as well) that had been executed between parties and registered with the INPI and with the Central Bank of Brazil – BACEN after December 31, 1991. The remittance of payments between a branch company and its parent company continues to be not allowed under Brazilian law.

Pursuant to the enactment of Normative Act no. 120/93 and Law 9.279/96 (the Brazilian Intellectual Property Law), the INPI assumed a more liberal position in the recording/registration of the technology supply and intellectual property licensing agreements.

Although the INPI's authority is currently limited, by law, to an analysis of the formal aspects and to the validity of the intellectual property rights that are involved in the recordal/registration of contracts proceedings, the INPI establishes its own interpretation criteria without prior notice and continues to issue official requirements. This fact renders the INPI's registration proceeding to be slow and bureaucratic.

Outlined below are certain clauses established in technology supply agreements that are not accepted by the INPI:

Return to Supplier (foreign company) of know how received by the Supplied Company (Brazilian company) and cease of use of the technology upon the expiration/termination of the supply agreement. The INPI does not accept the concept of "technology license" but instead only the concept of transfer of technology. Accordingly, in the INPI's viewpoint, once the technology has been transferred to the Brazilian company, the latter incorporates it and thus it can no longer be returned.

The remittances of payments that pursue from contracts between companies that have common stock holders, in which the supplier (domiciled abroad) holds directly or indirectly the control of the voting capital of the supplied company (established in Brazil) cannot exceed the limits of tax deduction established in the Ministry of Finance's Ordinance (*Portaria*) no. 436/58.

The INPI does not accept retroactive payments in the technology supply agreements. Retroaction is allowed only up to the date on which the application for registration of the contract is filed with the INPI, i.e. the start date of the validity of the registration certificate will be the date of submission of the contract for registration

with the INPI. The royalties may then only be computed as of such date and remitted after the contract has been registered with the Central Bank – BACEN. This understanding pursues from the INPI's construction of the Federal Revenue - SRF Decision no. 9/2000.

As provides article 211 of Law 9.279/96, the technology supply agreements must be registered (recorded) with the INPI. The purposes of the registration of these agreements are: (i) to enable the remittance of payment to foreign countries, observing the currency exchange and tax laws; (ii) enable the tax deductions of these payments, observing the tax laws; (iii) validity against third parties.

The INPI will grant a term of validity of, at maximum, five (5) years to the registrations (and, consequently, for the remittance of royalties) of the technology supply agreements, extendable for an additional five (5) years, upon justification of the need for continuity to receive the technology. This understanding is based on article 12, paragraph 3 of Law 4.131/62.

Other Intellectual Property-related contracts

In addition to technology supply agreements, contracts that have as a subject matter the licensing of intellectual property rights must be recorded (registered) with the INPI. According to Normative Act no. 135/97, the following types of contracts may be recorded with the INPI:

Patent License Agreements;

Trademark License Agreements;

Supply of Know How Agreements;

Technical and Scientific Assistant Agreements; and

Franchise Agreements (Law 8.955/94).

Pursuant to the recording/registration of the relevant contract with the INPI, its registration with the Central Bank (BACEN) is required to enable the foreign remittance of royalties, and also for the purpose of the tax deduction of these payments.

The tax deduction limits are established in the Treasury Department Ordinance (*Portaria*) no. 436/58, and range from 1% to 5% depending on the product involved. In the case of contracts between controlling and controlled companies, these deductibility limits shall be the same for the remittance of royalties, according to the INPI's interpretation of article 50 of Law 8.383/91.

In the case of trademark licenses, the tax deductibility limit is 1% of the net sales revenues of the contractual products, provided that the use of the trademark does not pursue from the use of a patent, manufacturing process or formula (item II of Ordinance 436/58). Accordingly, the INPI does not allow the foreign remittance of royalties through a trademark license if there exists simultaneously a patent license and/or a technology supply agreement related to the same products.

The intellectual property rights-related agreements shall only be effective against third parties after they have been registered with the INPI. In addition to enabling the foreign remittance and tax deductibility of royalties, in the case of non-gratuitous contracts, the registration of these contracts generates the following effects:

a) Warranted exclusivity as to the right granted to the licensee, in the case of exclusive licenses; and

b) Legitimate the licensee to figure as a party in lawsuits related to trademarks and patents, severally or as a co-plaintiff or co-defendant along with the licensor, if the contract so allows.

It should be noted that, under the current law the registration of trademark or patent licenses is not a condition for the purposes of validating the use of a trademark or patent by a third party, provided that the owner proves that the user holds an authorization therefor.

Software Agreements

As regards software agreements, only the contracts for the supply of software program technology are required to be registered with the INPI in order to produce effects against third parties (article 11 of the Software Act – Law no. 9.609/98). In order to enable the remittance of royalties under this type of contract, its recording with the INPI and registration with the Central Bank (BACEN) are required.

The sole paragraph of article 11 of the Software Act provides that for the registration of a contract for the supply of software program technology the supplier must provide complete documentation to the party to which the technology is supplied, particularly the notes on the source code, description memorial, internal functional specifications, diagrams, flow charts and other technical data required to absorb the technology.

In regard to software licenses, they are not required to be submitted to the INPI's scrutiny, and the remittances of the related royalties may be done directly through a commercial bank authorized by the Central Bank (BACEN) to perform such operation.

Taxation

As to the taxation of technology transfer and other intellectual property related agreements between national and foreign companies, the following events of levy might apply: withholding tax ("IRF") – 15%; economic domain intervention contribution ("CIDE") – 10%, with possibility of credit on patent and trademark license agreements; service tax on the import of services ("ISS-Importação") – maximum duty rate of 5%; Contribution for the Social Integration Programs on the import of foreign products or services ("PIS/PASEP-Importação") – 1.65%; Contribution for the Financing of the Social Security System by Importers of Foreign Goods or Services from Abroad ("COFINS-Importação") – 7.6%; Tax on Financial Operations ("IOF") – rate reduced to 0%; Temporary Contribution on Financial Movement ("CPMF") – 0.38%.

Constitutionality and effective application of some of the above taxes remain questionable, and might be subject to revision by the Brazilian Judiciary Power.

4.4. Technical support

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In addition to the technology supply agreements, the INPI also records (registers) contracts or invoices related to technical support services (SAT).

In regard to technical support, there are doubts as to the types of technical services that may be recorded with the INPI. The INPI is inclined to adopt the following criteria for the recording: (i) whether the services are of a technical nature; (ii) whether the services are intended for the supplied company's core business; (iii) whether the services characterize a transfer of technology.

According to information provided in the INPI website (www.inpi.gov.br), Technical Support Services nature contracts or invoices "that establish the conditions for obtaining planning and programming methods, techniques, as well as research, studies and projects intended for the performance or supply of specialized services" may be recorded.

The www.inpi.gov.br website further provides a list of the activities/services that are not required to be recorded with the INPI since they do not characterize a technology transfer, namely:

- Purchase agent agreements, including logistics services (shipment supporting services, administrative work related to customs clearance, etc.);
- Product processing;
- Homologation and certification of quality of Brazilian products intended for export;
- Financial consulting;
- Consulting in the trade field;
- Legal consulting;
- Consulting for participation in bids;
- Economical feasibility studies;
- Marketing services;
- Services performed abroad without the presence of technicians of a Brazilian company and that do not generate any documents and/or reports;
- Software maintenance services without the arrival of technicians in Brazil, provided, for example, through a "help-desk";
- Software license without the supply of complete documentation, particularly notes on the source code, in accordance with article 11 of Law 9.609/98;
- Purchase of a single software copy;
- Distribution of software.

The INPI recently dispensed the requirement for registration of technical services related to software when no transfer of the source code occurs/occurred.

The application for the recording (registration) of the contract or invoice related to the supply of technical support services must contain a description of the services, the supply period, indication of the price of the service in worker/hour or worker/day, the number and class of the technicians involved and the number of hours/days worked that may be approved by the INPI.

The same comments that were set out related to the technology supply agreements in regard to the purposes of the registration, timeframes and limits established for remittance and tax deduction apply to this contract category. As an exception to the rule, the INPI has been accepting the retroactivity of the payment for a technical service already supplied or due before the date of filing of the recordal application.

Finally, it should be noted that the Research and Development (R&D) sharing agreements – so-called “cost-sharing” contracts, are no longer recorded by the INPI pursuant to Normative Act 135/97, which revoked Normative Act 116/93 (which allowed the recordal of cost-sharing agreements).

As regards to the taxation of services that may be recorded with the INPI, in addition to the CIDE contribution, the Sales Tax - ISS, according to Complementary Law LC 116/2003, as well as the PIS/COFINS contribution, according to Law 10.865/2004 (the constitutionality of which is also questionable)

have recently become due by the Brazilian company (contractor or intermediary of the service) consequently significantly burdening the import of services.

Income Tax is also due on the services price, being however possible to select the party responsible for the tax burden, according to article 725 of the Income Tax Regulation (RIR) - Decree 3.000/99.

4.5. Copyrights

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4.5.1. Copyrights (Authorship rights and co-related rights)

Initially, it is important to clarify in regard to the appropriateness of the definition of this institute, particularly the differences established by the best legal scholars, that the expressions “copyrights”, “copyright” and “author’s right” are commonly used as synonyms without any classification strictness. Notwithstanding, following the direction of Brazil’s specific legislation thereon, namely, Law 9.610 of Feb. 19, 1998 (LDA) the expression “copyright” or “copyrights” shall be adopted hereunder as the gender of which are species the “author’s rights” and the “co-related” author’s rights related thereto (article 1 of the LDA).

In addition to the industrial rights, the copyrights are inserted in the Intellectual Property regime, which regulates the so-called “intellectual rights”. These are rights that are incidental to the human creations that are expressed in sensible, aesthetic or useful forms, thus having an aesthetic or practical purpose.

Accordingly, Intellectual Property is the field of law that is split in the study and regulation of copyrights and industrial rights or industrial property rights, entailing the generation of two different, specific protection legal systems.

Copyright law governs the relations that pursue from the creation and use of intellectual work that have an aesthetic purpose, aimed at the transmission of knowledge or at sensitizing and amusing the human being, while Industrial Property is dedicated to the protection of creations that have a utility aspect intended to satisfy material interests (inventions and utility models that are the subject matter of patents, trademarks, advertising symbols or slogans, geographical indications of origin, corporate names and other intangibles of corporate use).

4.5.2. Concept and legal nature

Legal scholars provide several definitions for Copyright, being worthy to hereby transcribe the teachings of some of them.

In summary, Carlos Alberto Bittar¹ finds that:

“(…) the Authorship Law or Copyright Law is the field of Private Law that regulates the legal relationships that pursue from the creation and economical use of aesthetic intellectual work included in the literature, arts and in the sciences”.

Antônio Chaves² defines Copyright as:

“(…) the set of rights that the law attributes to every intellectual creator over their literary, artistic or scientific work, that have an original aspect: of extra-pecuniary nature, in principle, without limitation of time; and of patrimonial

¹ Bittar, Carlos Alberto, Direito de Autor, 4ª edição, revista, ampliada e atualizada, conforme a Lei nº 9.610, de 19 de fevereiro de 1998, e de acordo com o novo Código Civil, por Eduardo C. B. Bittar, Rio de Janeiro Forense Universitária, 2003, pág. 8.

² Chaves, Antonio, Criador da Obra Intelectual, Direito de Autor: natureza, importância e evolução, Editora LTR, São Paulo, 1995, págs. 28 e 29.

(property) nature, to the author, throughout the author's life, extended to the legal successors during the period established therein.

There are two different scopes of attributions in Copyright law: on one side, those that pertain to the so-called moral right, which consists in the right of recognition to the paternity of work, in the right of unprecedented, in the right to the integrity of its creation, in the right to modify the work, to finish it, to oppose against its modification by others, etc; further, those of patrimonial nature that consist in the exclusive right to remove from its production all the benefits that it may generate, principally by the publication, reproduction, representation, performance, translation, recital, adaptation, arrangements, dramatization, adaptation to cinema, broadcasting, television, etc."

The concept of Antonio Chaves is very complex and it is possible to extract considerations on the hybrid nature of this field of Law.

Originally, Copyright Law was considered to be intimately related to Civil Law, being inserted in this field of law. Currently prevails the understanding that it is scientifically autonomous, being considered a special field.

Several theories arose in the course of History on the legal nature of Copyright Law, whose definition constitutes a classical problem that dates back to the eighteenth century. Among these theories stand out the two main lines of thought that conflicted in the last century: the monist theory and the dualist theory.

The monists found that Copyright Law had a unique nature, that it was a field of law exclusively related to property (although intellectual) or of a field of law exclusively related to personality. The English and German scholars adopted the property theory while the personality theory was adopted by the French jurists.

The dualists, on the other hand, defended the dual nature of the Copyright Law, comprised of rights that have moral nature in addition to rights of patrimonial right. This theory was adopted initially by the French and Italian jurists among others of Latin origin.

With the development of the scientific progress and of the legal studies these theories were gradually abandoned and were revealed to be insufficient to clarify the specificities of the subject field of law.

Currently, having been overcome the theoretical debates concerning the classification of Copyright Law as being a field of property law or of personality law, the understanding that has solidified is that it is a sui generis field of law that results from the inter-relation of rights of moral nature and of rights of patrimonial (property) nature. It is not a field of pure and plain property law nor of personality law, vesting features of both personal aspects and of pecuniary nature and, thus, constitutes a new class of private rights.

The hybrid nature of Copyright Law results from several factors and of peculiar structural elements, such as the special nature of intellectual work and of the regulation that provides on its protection, which is determined by this special nature. Therefore, this requires that it be considered an autonomous field of law that should be regulated by specific legislation.

While the intellectual work constitutes simultaneously an expression of the spirit and personality of its author, establishing with it an inseparable link, it is also considered a good that has an economical value and as such subject to exploitation. Thus, Copyright Law has faculties of moral and patrimonial value, split into these two strips of law that due to their nature and purpose are nevertheless intimately linked forming an inseparable set.

Hence, Copyright Right is a special field of law intended to defend both the personal and patrimonial bondages of the author with the work, under a proper legal regulation apart from the codes, as occurs in several other current legal systems.

The scientific autonomy of this field of law is justified by its specificity, which has peculiar characteristics that distinguish it from the other private law fields, easily identifiable by scholars, court rulings and legislation at the domestic and international levels.

As regards the regulatory evolution in Copyright Law, in Brazil a relevant milestone was the enactment of the (now revoked) copyright law no. 5.988 of Dec. 14, 1973. Until then the matter was regulated in the Civil Code of 1916 under the title “Literary, Scientific and Artistic Property” (articles 649 and 673).

This new field of law is gradually acquiring didactic autonomy, although there are still only a few colleges that offer the course independently and systematically.

4.5.2.1. Features of Copyright Law

As previously stated, Copyright Law has moral and patrimonial components related to the bondages of the author with his/her work that are identified as moral and patrimonial rights.

These two features of the Copyright Law, each having its own characteristics and functions, are interconnected and complement each other for the protection of the author in regard to the creation, materialization and use of the work, constituting the unified and inseparable contents of such right.

4.5.2.1.1. Author’s Moral Rights

The author’s moral rights are intended to protect the creator’s personality, in recognition of his/her efforts and creative results, which is the true expression of the author’s personality. In this regard it should be noted that the moral aspect of the author’s right is inherent to the author due to the fact that the author’s work per se has invaluable economical value. Therefore, these rights are constituted by the intimate ties of the creator with his/her work for the defense of his/her personality.

These rights originate from the creation of the intellectual work and last throughout the entire life of its existence, producing legal effects in view of the primary function of maintaining the ties between the work and its creator. Hence, there are moral rights that are transmitted to the author’s successors.

Certain moral rights arise simply with the materialization of the work (such as the right to unprecedented, right to paternity, right to nomination) while others arise merely through the disclosure of the work to the public (right to integrity, right to change and right to claim authorship of the work).

As basic features of these rights the following stand out: personal property (individual exclusivity), non-transferability and non-negotiability, non-perpetual duration (surviving the author’s death and, inclusively, the expiration of the author’s patrimonial rights, whereupon the work falls under public domain), unlimited statute of limitation (court judgment may be claimed at any time), non-attachment (not subject to court restraints) and non-waiver, being void any contractual clause that negotiates such rights. Further, such rights are transferred by succession, except those that are personally bound to the creator, which under Brazilian law (Law 9.610/1998) are the rights to change and retire the work from circulation.

Any contract that involves the author’s moral rights is void for offense to the rules of public order that regulates them.

Article 24 of the Copyright Act (LDA) lists the author’s moral rights, among which the following stand out: right to paternity of the work (right to link the author’s name to the work), right to unprecedented (right to not disclose the work), right to nomination (right to designate, pseudonym or any other symbol that identifies its authorship), right to the integrity of the work (right to prevent any changes or practice of any right that could affect the author’s honor or reputation), right to change, right to retire the work from circulation (or right to repentance) or the right to cancel any form of use previously authorized, in the case of the last two provided that the use or the circulation implies in an offense to the author’s reputation or honor, excepting, when applicable, third party indemnities. These conditions involve both subjective and substantive aspects and there is no uniform jurisprudence thereon.

4.5.2.1.2. Author's Patrimonial (Property) Rights

The author's patrimonial rights substantiate the defense of the author's interest in the economical use of the intellectual work by any and all possible means. They also arise from the creation of the work and are expressed through its disclosure to the public.

Such rights pursue from the monopoly of use granted to the author to exploit the work on an exclusive, temporary, relative and limited basis.

Thus, the author's patrimonial rights constitute the author's exclusive faculty to use and benefit from the work, wholly or partially, and to dispose of it, gratuitously or not, transfer it to third parties, wholly or partially, while alive or through succession. Therefore, they constitute exclusive rights inasmuch that only the author may exercise such options. Pursuant to this exclusive right the prior and express authorization of the author is required for third parties to use the protected intellectual work for any economical purpose.

According to article 3 of the Copyright Act (LDA) the author's patrimonial rights are considered rights over movable assets, precisely so that they may be disposed of. Contrary to the author's moral rights they are property rights that may be transferred and are temporary, attachable (with the legal exceptions established in article 76 of the LDA) and extinguishable by statute of limitations.

Hence, the author's patrimonial rights may be negotiated on a temporary or definitive basis. Through the negotiation of such rights, i.e. the authorized use thereof by third parties, the author may obtain the economical benefits of his/her intellectual creation, which ultimately consists in one of the main purposes of Copyright Law.

In this regard it should be stressed that the patrimonial rights are independent among each other and, consequently, so are the different types of use of the intellectual work. This principle established in article 31 of the Brazilian Copyright Law (LDA) is very important, since it leads to conclude that the negotiation of a patrimonial option does not imply in the necessary negotiation of another. The logical application of this principle lies in the issue of the restrictive interpretation of the transactions that involve copyrights (article 4 of the LDA) to the extent that remain with the author the patrimonial rights that were not expressly transferred to the other party or the types of use of the work not foreseen or non-existent at the time when they were negotiated.

As examples of the author's patrimonial rights stand out the copying right (pursuing from the indirect disclosure of the work to the public by way, for example, of print, recording, picture, mechanical, cinematographic or magnetic recording (reproduction by communications satellite), representation right (pursuing from the direct disclosure of the work to the public) by way, for example, of public recital, public performance, dramatic acting, radio broadcast by audio speakers), among others.

4.5.3. International Law

Intellectual property has a cosmopolitan, universal, exceptional and immaterial nature that cannot be found by customary means and criteria. It is the only private law field that has this international aspect and it is treated differently based on the Convention of Bern, which will be further addressed below.

Copyright Law has always required international recognition in order to provide the protection that is intended. Due to the development of the modern means of communication the need for international protection has increased.

Briefly commenting on the historical background, in the past Copyright Law was not acknowledged as it is now consecrated. It was in the Middle Age, more precisely with the discovery of the printing press and, therefore, vis-à-vis the possibility of multiplying printed texts that the decisive cornerstone for the birth of Copyright Law occurred. At that time were created the privileges that were extended by the monarch to the

editors, which consisted in authentic temporary monopolies for the economical exploitation of the work. There were no references to the author's rights although the authors were already claiming protection.

Thus, in view of the insufficiency of the system and the authors' claims for compensation for the exploitation of their work, Queen Anne of England enacted in 1710 the first law that recognized the right, designated the *Statute of Anne* or the *Copyright Act*.

Subsequent laws vested certain rights to the authors, such as the *Federal Copyright Act* of 1790 and the French laws of 1793.

The French Revolution, landmark of the individual rights, inspired the recognition of another aspect of the author's right, namely, its moral aspect. In fact, it was German scholars that first expressed it through the concept of the offense of falsification, irrespective of the grant of privilege thereon. Subsequently, French law consolidated it. Thenceforth, national laws begun to regulate copyrights and intellectual property.

The difficulty of revealing the legal nature of copyrights was reflected in the national laws and in the international treaties. Pursuant to the arising of codes, this problem was aggravated since it was unknown where to regulate them.

Since the beginning two different legal systems that regulate copyrights conflicted with each other: the Anglo-Saxon system, which designates the author's right as a *copyright* and the European system, which refers to the *droit d'auteur* or *diritto d'autore* (author's right).

The *copyright*, whose origin is linked to the appearance of the printing press, preceded the author's right, which corresponds solely to the economical exploitation of the work. The *droit d'auteur*, on the other hand, appeared a few centuries later inspired by the principles of the French Revolution and then spread throughout Europe and later Latin America, including Brazil.

Thus, the *copyright* system adopted in the Anglo-Saxon countries privileges the patrimonial components of the author's right whereby the European system, of French origin, is adopted in the countries of Roman tradition, standing out thereon the privileges of moral and personal aspects of the Authorship Law.

However, the legislators' efforts to regulate the matter in their countries were unsatisfactory. The lack of protection in some countries and the differences in the systems posed hindrances to the efficiency of the protection. Thus, they sought international protection comprised by substantial and procedural rules. In fact, Copyright Law was a matter that accounted for extensive mobilization at the international level.

In this context the international community's efforts that sought protection for both the moral and patrimonial aspects of the intellectual work culminated in the appearing of the first major international agreement on copyright – the Bern Convention of 1886 – the principles of which continue to be contemporaneous and effective. Following several amendments, it continues to be the instrument that is used as a reference to international Copyright Law and inspired the subsequent international treaties thereon.

Considered jointly, the Bern Convention and the Paris Convention of 1883 (which regulates industrial property) reflects the dual model that found that Intellectual Property is split into two parts. This duality was adopted by the Brazilian Civil Code of 1916, which separated industrial property and copyrights. However, this historical division was eliminated in 1967 pursuant to the creation of WIPO (World Intellectual Property Organization) which originated the contemporary model according to which Intellectual Property is a single set of complex rights. Similar to the Paris Convention, the Bern Convention is currently managed by WIPO.

It is worthy to also emphasize the Universal Convention of Geneva of 1952, the draft of which was led by the U.S. and adhered to by most of the countries that signed the Bern Convention, including Brazil. It is managed by UNESCO and was last amended in 1971.

Other international treaties on copyrights followed, such as the Rome Convention of 1961 for the protection of interpreter or performing artists, phonogram producers and broadcasting organizations, managed by

UNESCO, WIPO and IWO; the Convention for the protection of producers of phonograms against the non-authorized copying of their phonograms, signed in 1972 in Geneva and administrated by WIPO; the Convention for protection of signals transmitted by communication satellites signed in Brussels in 1974; and the Convention of 1967 that created WIPO.

Finally, it should be noted that the inclusion of Intellectual Property issues in the Uruguay Round of GATT (*General Agreement on Tariffs and Trade*) - an important venue where international trade issues are discussed, resulting in the creation of the World Trade Organization (WTO), led to the birth in 1994 of **TRIPS**, an agreement on the trade-related aspects of intellectual property.

The TRIPS agreement, an annex of the agreement on the organization of the WTO, was approved in Brazil by Decree no. 1355 of 1994 and contributed to a great advance in the legal treatment, internationally and domestically, of intellectual property as a whole.

Specifically in regard to Copyright Law, the main innovation introduced by TRIPS consists in the protection to computer programs, recognizing same internationally as literary work, in accordance with the Bern Convention.

4.5.4. Brazilian Codified Law

Attempts to draft a civil statute to regulate authorship rights in Brazil failed in the Imperial era and even after Brazil's independence the printing privileges continued effective for a long period.

In the Criminal Code of 1831, however, protection was afforded to the moral aspects of the Copyright Law by establishing the falsification offense.

Another previous law is worthy to indicate, namely the law that instituted the courses of law, dated 1827, providing to the university professors privileges over their classes.

Amidst the failure of several projects to regulate Copyright Law, Law no. 496 of 1898, inspired on the proposal of Medeiros and Albuquerque, was enacted and defined and warranted the author's rights. As of then, several laws appeared on the matter, parallel to the international movement in this direction.

The main advance in this area occurred with the introduction of the Civil Code of 1916, which dedicated a chapter titled "Literary, Scientific and Artistic Property" (articles 649 to 673) in the section on Property Law, following the guidance that then prevailed.

In regard to the Brazilian Constitutions, all of them afforded protection to Copyright Law, except the Constitutions of 1824 and 1937. The Constitution of 1988, currently effective, consolidated the treatment of the matter, elevating the author's rights to the level of basic rights, referring thereon in its article 5, items XXVII and XXVIII.

The Constitution of 1988 reconfirmed the author's exclusive right over his/her work and brought a major conquest to Brazilian law by attributing specific treatment to the *direito de arena*, which constitutes the right to the entirety of the event (and not over the individuals' participations). In this regard stands out the so-called "Pelé Law" (Law 9615/1998), which contains general rules on sports, formerly regulated by the "Zico Law" (Law 8672/1993).

As previously stated Law 5.988 was introduced in 1973 to regulate the author's rights in Brazil, to attend the claims of Brazilian scholars to exclude the treatment thereof by the Civil Code and consolidated in a separate statute.

As of this law, other legal statutes were drafted on copyright law matters, at times amending certain provisions, though this was not a period of major legislative production. Law 5.988/1973 was effective for

more than twenty years and after several proposals and intensive lobbying it was expressly and totally revoked by the current law, i.e. Law 9.610 of Feb. 19, 1998 (“LDA”).

Law 9.610/1998 introduced several conquests in the treatment of the matter, notwithstanding the appropriateness of certain criticism to its text. Reflecting the concern to preserve the direction followed since the Bern Convention, it maintained the pioneering institutes of the previous law and the constitutional principles introduced by the Constitution of 1988, to the extent that despite of certain exclusions, its innovative aspect is due particularly to the systematization and updating of the former law. It should be stressed in this regard that it maintained the dual aspect of the author’s rights, pursuant to the set formed by its patrimonial and moral components.

It should be emphasized that the secondary and complementary rules to Law 9.610/1998 that were not revoked, even though tacitly, continue effective. Furthermore, the provisions of the Civil Code remain as a basic reference that may be applied in the cases of omissions in the special law.

It should also be stressed that the following statutes on author’s rights continue effective in Brazil: the aforesaid Conventions of Bern and Geneva, enacted, respectively, by Decrees nos. 75.699 and 76.905, both of 1975, the TRIPS agreement, enacted by Decree no. 1355 of 1994, articles 184 to 186 of the Penal Code, as amended by Law 10.695 of 2003; articles 524 to 530 of the Code of Penal Procedure, among other internal laws and international treaties to which Brazil adhered.

4.5.4.1. Law 9.610 of Feb. 19, 1998

It is important to comment some of the important themes and rules addressed in the new law.

As previously mentioned, Law 9.610/1998 regulates the author’s rights and rights related thereto, as established in its article 1.

4.5.4.1.1. Treatment to foreigners

Article 2 of Law 9.610/1998 establishes that the foreigners resident abroad are warranted the protection of their authorship rights in accordance with the agreements, conventions and treaties effective in Brazil. The sole paragraph thereof establishes that it applies to the nationals or foreigners that reside in a country that warrants to Brazilians or persons resident in Brazil reciprocity in the protection of author’s rights or the like.

4.5.4.1.2. Important definitions

Article 5 of this law establishes certain definitions that may guide the interpretation as to their applying, which however is criticized by some scholars. In this regard, it should be noted that it did not define the important concept of plagiarism a very common practice whose prevention and punishment are in the core of the entire copyright legislation.

4.5.4.1.3. Authorship and Ownership

The protection of the intellectual work by Copyright Law originates from the creation thereof, which is understood as the insertion in the material world of an original form. Thus, in principle the author is the creator of the work that results from an individual’s intellectual efforts.

However, in regard to the protection of author’s rights, the word *author* may entail several doubts as to its real meaning: is the intellectual author of the work the original owner thereof or its current owner?

There are situations in which each of these concepts are suitable, which we shall heretofore clarify in general terms.

The principle established by article 1 of Law 9.610/1998 is that the author is the individual that created the literary, artistic or scientific work, i.e. the one who gave origin to work pursuing from the spirit. This is, therefore, the general rule as to the authorship of the intellectual work protected by Brazilian Copyright Law.

Accordingly, authorship does not depend on any condition, whether age, status or mental condition, the intellectual creator may be a minor-aged, an Indian, compulsive spender, mentally ill, though the exercise of the author's rights is always subject to the rules established in Civil Law.

As regards the foreign author, his/her protection is regulated by article 2 of the law, as set out in the foregoing section 4.5.4.1.1.

The sole paragraph of article 11 consecrates an exception by establishing that legal entities may be holders of copyrights in the cases established in that law.

Thus, exceptionally, legal entities may be holders of copyrights, either originally through creation or by a derived course, in the cases of transfer of rights, as shall be further clarified below.

There is no hindrance in Brazilian law for a legal entity to have rights and obligations and this may be extended to copyrights provided that the limitations are observed, including the physical phenomena of the creation, which will always be held by the individual creator. This is the position that is adopted in the laws of several countries.

The *collective work* is a typical example of original ownership that may be attributed to a company. Article 5 of the aforesaid law defines it in item VIII "h" as "*the work created at the initiative, organized by and under the responsibility of an individual or company, who publishes it under its name or trademark and that is formed with the participation of several authors, whose contributions merge into an autonomous creation*".

The author's patrimonial rights over the collective work are held by the organizer, whether an individual or company, protection being warranted to the individuals' participations, including the corresponding remuneration, according to article 17 of the law. It is even recognized in Brazil that in the case of collective work the company also holds moral rights as an author. However, Brazilian law is not clear in this regard enabling discussions among scholars thereon.

Movies and soap operas are typical examples of collective work, which are characterized by the non-severability of the several contributions, which justifies the recognition of the creative and intellectual work of the organizer, usually a company. However, there are cases where it is possible to separate the different contributing work without affecting the work individually and the rights over the whole, in which case shall be recognized also the right of the corresponding creator (texts of the soap operas, song tracks of movies, etc.).

In the section that regulates the use of the intellectual work and phonograms, Law 9.610/1998 has a specific chapter on the use of the collective work in its article 88.

It should also be clarified that the ownership of copyrights may be original or derived. The author of the work, being understood as such the individual that created it, shall always be an original owner, as well as the company in the case of work created collectively. Thus, we may note that original ownership does not always coincide with authorship.

The ownership of the author's work may be transferred to a third party either voluntarily by the author or the original owner or pursuant to the author's death. Thus, the derived owner is the party that acquires, through agreement (edition, license, assignment or grant contracts, for example) or by way of succession (according to the civil law that regulates the matter), the copyright rights over the intellectual work, in whole or partially, despite of not having participated in the creation thereof.

Note that the transmission of rights is limited to the author's patrimonial rights, with the single exception of the author's moral rights, which are transmitted through succession.

It is important to clarify that derived ownership does not relate to derived work, whose author is considered an original holder of authorship rights, as quoted in item IV.1.6.1. below.

4.5.4.1.4. Registration

In Brazil authorship rights protection is inherent to creation, born with the expression of the idea under a certain form. Hence, it does not depend on any registration, as provides article 18 of Law 9.610/1998. Thus, the registration of intellectual creation is optional and it may be registered with the relevant public registries in accordance with article 19 thereof.

Though the registration of the work is merely declaratory and does not constitute a right, it is recommended to do so whenever possible since it will suffice as proof or, at least, solid indication of authorship or ownership.

4.5.4.1.5. Term of Protection

It should be stressed, first, that the author's moral rights are perpetual and some of them may be transmitted to the successors (article 24, paragraph 1 of Law 9.610/1998).

By rule, the author's patrimonial rights, including posthumous work³, are protected for seventy years as of January 1st of the year subsequent to the author's death, observing the order of succession established in the new Civil Code (article 41 thereof).

In the case of work created in co-authorship that has an inseparable nature the 70-year term is counted as of the death of the last of the surviving co-authors, adding to the rights of the survivor the rights of the co-author that died and did not successors (article 42 of the new Civil Code).

As regards the anonymous or pseudonymous work⁴ the 70-year term is counted as of January 1st of the year subsequent to its first publication (article 43 of the new Civil Code).

There is also a specific provision regarding the start date to count the protection period of the patrimonial rights over audiovisual and photographic work, which is seventy years as of January 1st of the year subsequent to the first disclosure (article 44 of the new Civil Code).

Accordingly, upon the expiration of the protection period covering the author's patrimonial rights, according to the law, the intellectual work falls in public domain and may be freely used for economic purposes by third parties.

Moreover, the work of deceased authors that do not have successors and also the work of unknown authors, observing the legal protection afforded to the ethnical and traditional knowledge, are of public domain, in accordance with article 45 of Law 9.610/1998.

4.5.4.1.6. Intellectual work

³ Entende-se por obra póstuma aquela que é publicada após a morte do autor, nos termos do artigo 5º, inciso VIII, e, da Lei nº 9.610/1998.

⁴ De acordo com as definições estabelecidas no artigo 5º, inciso VIII, letras b e c, respectivamente, da mesma da Lei nº 9.610/1998, respectivamente, obras anônimas são aquelas em que não há indicação do nome do autor, por sua vontade ou mesmo por ser desconhecido, enquanto que obras pseudônimas são aquelas em que o autor se oculta por identificar-se por nome fictício.

4.5.4.1.6.1. Definition

Copyright law exists and is justified to protect intellectual work, of aesthetic nature (and not of a utility nature). In this context, Copyright Law is intended to regulate the relations between the creator and his/her work pursuant to both the creation per se and also the circulation of the work (non-severability between the moral and patrimonial aspects of this right) vis-à-vis all who in a given way interact with it, such as the State, the community as a whole, the user and the economical exploiter. There is a non-dissolvable line between the work and its creator, Copyright Law being the result of this bondage.

The jargon that is used is also broad, thus several expressions are considered synonyms to designate this aesthetic work: creative work, intellectual work, creation, etc.

Article 7 of Law 9.610/1998 defines the type of work that is protected by copyright law:

“Article 7 – The intellectual work protected hereunder consists in **spiritual creations expressed by any means or affixed in any type of supporting means, tangible or intangible, known or that may be invented in the future,** such as:
(...)”. (our emphasis)

We may extract from this definition the basic principle that Copyright Law does not protect the idea but only the exteriorized form of a creation, emanated from the human spirit, which may be affixed to a material or immaterial support media.

Thus, it may be concluded that the intellectual work, always of an aesthetic purpose, may be determined by two conditions: (i) the form by which it is expressed, resulting from the exteriorization of the creative contents in a certain support media, and (ii) the originality of this form of expression.

In regard to the originality requirement, it is important to clarify that although there is no reference thereon in the copyright law, there is a prevailing understanding among scholars as to its aspect of relativity. In the field of copyright law absolute novelty is not required, but rather that the work has some originality, that is, creative, distinctive elements that distinguish it from the other previously existent work.

It should be emphasized that copyright protection always requires that the intellectual work falls within the protection period established by the law.

It should be emphasized that the protection of the intellectual work is not subject to any subjective analysis on its value or merits. Thus, work may be protected by copyright provided that it is an original aesthetic creation, exteriorized in a form, even if it is not strictly classified as literary, artistic or scientific work, as recognized inclusively in the TRIPS Agreement.

Pursuant to this review of the requirements that characterize work that may be protected by Copyright Law, it should be stressed that there are creations that cannot be protected under copyright law, emphasizing first the work that has merely a utility aspect, which is subject to protection under intellectual property law.

Article 8 of the law lists the creations that cannot be protected as a copyright, such as for example ideas, normative procedures, texts of treaties or conventions, laws, decrees, regulations and court rulings.

It should also be stressed that the work may original or derived according to its autonomy in regard to another preexistent. Original work is the work that is created independently of any other while the so-called derived work depends on the other from which it originates through intellectual creation processes, such as transformation, complementation and reduction. Typical examples of derived work are the translation and adaptation (article 5, item VIII “g” of the copyright law).

As they originate from another creation pursuing from the use of preexistent intellectual work, the prior and express authorization of the author/owner of the original work from which it was generated is required (article 29), except if it is in public domain. In any event, fulfilled the requirements, they are considered new and original work that is covered by copyright protection.

4.5.4.1.6.2. List of Examples

Law 9.610/1998 establishes in its article 7 a list of examples of intellectual work protected therein, whether original or derived. The list cannot be exhaustive in view of the broadness of the scope of Copyright Law, which can cover an infinite number of aesthetic creations that vest a minimum of originality.

In addition to the general rules the law specifically treats certain types of work protected therein, some of which shall be heretofore commented.

Plastic Arts Work:

The protection afforded to plastic arts pursue from public interest, given its unquestionable cultural and historical value.

Article 77 of the law provides on the use of the plastic arts work and establishes as a general rule that the sale of the object in which it is materialized transfers only the right to exploit it, remaining with the author the right to copy it.

The law establishes in its article 78 the assumption of an onerous authorization for the author to copy the plastic arts work, which must always be in writing.

Thus, the author's patrimonial rights over the plastic arts work are held by the author or holder of the right. In the case of sale and in the lack of an express provision to the contrary, the owner/buyer of the object in which the work is materialized shall only have the right to exhibit it, not to copy it. For any other form of use of the work, the author/holder's prior authorization must be obtained, having in view that the types of use of the intellectual work are independent from each other.

The foregoing legal provisions are perfectly in line with the general rule of article 37 of the law, which determines that unless agreed otherwise and in the cases foreseen, the acquisition of the original or copy of the work (of any nature) does not transfer to the buyer any patrimonial rights of the author.

Photography work:

Photography work falls under the class of artistic work and may be protected under copyright law, despite of resulting from the combination of art and technique.

Article 79 regulates the use of this type of this type of work:

“Article 79 – The author of photographic work is entitled to copy and offer it for sale, observing the restrictions for exhibition, copying and sale of portraits and without prejudice to the author's rights over the photographed work, in the case of legally protected plastic arts.

Paragraph 1 – The photograph, when used by a third party, shall clearly indicate the author's name.

Paragraph 2 - The copying of photographic work that is not fully in accordance with the original is prohibited, unless previously authorized by the author”.

The paragraphs of article 79 refer to the photographer's moral rights: right to nomination and to the integrity of the work, only the photographer being entitled to change it or authorize any changes to it by a third party.

In regard to this special regime of protection it is worthy to quote the valuable lessons of the late jurist Carlos Alberto Bittar⁵:

“Furthermore, the use is subject to special rules precisely because when the subject matter is a human being the rights of the person that was portrayed must be respected and, on the other hand, the practice of the use of copying by photographs also affects other areas of the field of arts (such as paintings, sculptures, architecture).

⁵ Bittar, Carlos Alberto, op. cit. , pág. 75.

Thus, as regards the photographic work, the author is usually entitled to the copying and offer for sale thereof, but in regard to portraits, the restrictions as to exhibition, copying and sale must be observed in view of the rights of the person that was portrayed. In the case of photographs of decorative art, the photographer's rights should be exercised without prejudice to the rights of the author of the copied work (article 79), the conciliation being subject to a prior agreement between the parties, respecting always the moral aspects of the original work".

It is important to emphasize that the new law did not maintain the assumption established in article 56 of the former law regarding that the delivery of the negatives implied in the transfer of the author's rights over the photograph.

As concerns the remuneration for the use of photographs this is an issue that the parties must agree, being quite common the execution of contracts thereon, particularly in the case of photographs used in advertising.

Architecture and Engineering Work:

Item X of article 7 of Law 9.610/1998 expressly includes among the work protected therein "*the projects, sketches and plastic works related to geography, engineering, topography, architecture, landscaping, scenery painting and science*".

It should be clarified that the subject projects are not to be mistaken with the pure and plain project mentioned in item I of article 8 of the law, which is excluded from copyright protection.

As regards the architectural work, there is controversy as to its aesthetic or utility nature, appearing to be more adequate to consider its dual functional aspect.

Precisely because of such duality, it is understood that the building per se cannot be protected by copyright. Thus, the architect, in principle, cannot object to any changes in the project thereof when his/her work is built, being entitled, however, to reject the paternity of the changed work during or after the construction is completed, as provides article 26 of the current law, consecrating the mitigated moral right of the author-architect.

Note that despite of the provisions of the copyright law, the architectural creations are regulated by a proper statute.

Engineering projects are also protected under Copyright Law, as well as architectural projects, and may be registered with the proper registry (CONFEA – Federal Council of Engineering and Architecture).

Computer Programs:

The copyright protection to computer programs was consolidated in article 7, item XII of Law 9.610/1998. However, Paragraph 1 thereof establishes that such programs are the matter of specific legislation and the provisions of such law, as applicable, must be observed.

Thus, Law 9.609, also dated February 19, 1998, was introduced in Brazil to provide specific protection to computer programs, which are promptly referred to in article 2 thereof as literary work protected by the copyright and co-related rights legislation effective in Brazil, observing always the provisions thereof. Therefore, considering the existence of specific legislation that regulates computer programs, Law 9.610/1998 applies only on a secondary basis.

Among the provisions of Law 9.609/1998, the text of which, it should be emphasized, is criticized by scholars, it is worthy to emphasize article 11, which establishes in order for technology transfer of computer program contracts to be effective against third parties it is necessary to register them with the Brazilian Industrial Property Department (INPI), which is the governmental agency that grants registration for trademarks and patents, among other attributions.

Data Bases:

Data bases began to receive legal protection in Brazil as of the introduction of Law 9610/98. The previous legislation (Law 5988/73) did not expressly provide thereon. The new law included data bases in the article that establishes the work protected thereby, jointly with the compilations, anthologies, encyclopedias and dictionaries. Such protection is outlined in Article 87, which establishes that the data base owner has an exclusive right over the form of expression of the structure of the corresponding base. Additionally, paragraph 2 of Article 87, item XIII, determines that such protection does not include the material data per se and is understood without prejudice to any author's rights that subsist in regard to the data or material contained in the work.

The data bases may be defined as being a compilation of data, work and several other independent materials, systematically organized based on certain criteria, for specific purposes.

It is important to stress that the legal protection of a data base does not fall on the *software* that is used to create it or on the operation of the base, or its contents or even less on the work (individually protected) which it may be a part to. The protection is afforded to the structural form, to the base's architecture, to the form by which it is organized.

It should be noted that not all data bases may be protected under copyright law. It is necessary that it contains creativity and originality, i.e. that they are not protected while merely a compilation of information, but instead when such elements are organized, set out and systemized in a creative and distinct manner.

Hence, in regard to the data base that has merely informative contents that cannot be protected as a copyright, the rules that regulate contracts and trade secrets, for example, may apply but not the rules that apply to copyright protection.

Anyway, even copyright protection is insufficient to warrant the protection that the market requires currently to prevent unfair competition, to avoid that third parties avail the investment made by a third party to design a certain data base.

The convenience of a *sui generis* protection for data bases is currently being discussed in Brazil, including precisely what copyright protection cannot cover: the data base contents, aiming to protect the investment made by the base owner.

According, the Directive of the European Community of March 1996 establishes a *sui generis* 15-year protection period to the creators that prove to have made a substantial investment, in quality or quantitative aspects, to obtain, verify and store information to form the data base, and it vests on such creators the right to protection against the extraction and/or re-use of the whole or a substantial part (evaluated on a quantitative or qualitative basis) of the data base contents.

The *DataBase Investment and Anti-Piracy Act* (U.S., May 1996) also stimulated investment in the production and distribution of new data bases, aiming to protect investment in the production and distribution of these new bases. Thus, it prevented the non-authorized extraction, use or re-use of the data base contents so to protect the investment in technology based on the efforts and the costs disbursed to organize same.

The aforesaid provisions adopt the so-called *industrious collection* or *sweat of the brow* theory, according to which the copyright is attributed as a reward for the arduous work of collecting information.

Envisaging harmonization of the laws of Europe and of the U.S., the EC submitted a proposal to WIPO – Worldwide Intellectual Property Organization (WIPO'S Proposed Treaty on Data Base, Geneva, Dec. 1996 – following the 1996 Directive) for a *sui generis* protection of the data bases. According to this proposal the creator would have the right to authorize or prohibit the use or extraction of the data base's contents.

4.5.5. Co-related Rights

The author's so-called co-related rights are those held by artists, interpreters and performers of work and by the producers of phonograms, video grams and radio broadcasters. This right is attributed to them pursuant to their role of assistants in the production, creation or broadcasting of intellectual work protected by copyright.

According to Articles 89 et seq. of Law 9610/98 the co-related rights also have two components (moral and patrimonial) and their holders have the right to impede the use of their interpretations/performances, etc. that lack prior authorization.

The term of duration of patrimonial co-related rights is seventy years (Article 96 of Law 9610/98) counted as of January 1st of the year subsequent to affixture (phonograms), transmission (broadcasting by radio broadcasters) and the performance and public recital in the other cases.

For the purpose to exercise their co-related rights the law attributes the option to the holders to associate, without a profit purpose, with the purpose of managing these rights collectively.

It should be stressed that in regard to co-related rights it is not necessary that the interpretation is affixed on a material media for characterize a co-related right; simply the non-authorized transmission of the interpretation constitutes a violation thereof.

4.5.6. Contracts in Copyright Law

Law 9610/98 establishes as a general rule for interpretation of the copyright transactions:

“Article 4 – The transactions involving copyrights shall be interpreted restrictively”

The author's moral rights (listed in Article 24 of Law 9610/98) cannot be negotiated by the author (article 27 of Law 9610/98), among which stand out the right to nominate (article 24, II), i.e. the right to be announced as the author of the work in any use thereof; and the right to oppose changes that may hinder or affect him/her, as the author, to his/her reputation or honor (article 24, IV of Law 9610/98). These two types of moral rights, though not negotiable, are inherited by the author's successors, in accordance with article 24, paragraph 1 of Law 9610/98.

Further, as regards the transmissibility of the copyright, Article 49, I of the aforesaid law establishes that the “full transmission covers all of the author's rights except those of moral nature and those expressly excluded by the law”.

The author's patrimonial rights, as established in Article 28 et seq. of the current Law, consist in the negotiable contents of the copyright, which correspond to the author's exclusive right to use, fruition and dispose of his/her work:

“Article 28 – The author has the exclusive right to use, fruition and dispose of the literary, artistic and scientific work.”

The contractual transmission of the copyrights follows the provisions of Articles 49 to 52 of Law 9610/98, upon fulfillment of the following requirements:

- a) as to form – the total and definitive transmission of copyrights operates solely through a written contract;
- b) as to term – the maximum period of duration of any type of contractual transmission is five years in the absence of any contractual clause in writing; in the case of assignment of future work the assignment will cover at maximum five years, also being reduced to five years the term of duration of the assignment always when indefinite or higher, also decreasing in the same proportion the price convened.

- c) as to territoriality – unless expressly established otherwise, the assignment is valid solely in the country where the contract was signed; and
- d) as to consideration – the total or partial assignment of copyrights is presumably onerous.

In further regard to Articles 49 to 52, it should be stressed that the copyright assignment agreement may be annotated in the corresponding registrations depending on the nature of the work, which shall indicate as essential elements the subject matter and conditions for exercising the right in terms of time, place and price.

Note that the copyright may be assigned by contract or non-contractually. The non-contractual transmission is the succession that includes both the patrimonial rights and some of the moral rights, as previously reviewed hereinabove.

As concerns the types of contractual transmission, it is important to mention that the intention of Law 9610/98 in regard to the transactions involving author's rights is to protect the author and, therefore, no transmission of rights is presumed or considered implicit and the contracts must always be carefully drafted so that any work may be used or copied. The most common types of contractual transmission of copyrights are:

- a) total assignment – the assignment and transfer contracts consist in the transfer of all of the author's patrimonial rights. Note, however, that the cases of use must (in this type of transmission, and in all other types as well) be expressed fully in the written agreement, in view of the restrictive interpretation of the copyright contract determined by the Copyright Law (LDA) in Brazil.
- b) partial assignment – this type involves the transfer of one or more possibilities of fruition of the work from the holder of such right to another. The principal right is thereby burdened onerously, amputated of one of the prerogatives of its use.
- c) license – the license agreement consists in a limited grant of use or copy, analogous to the lease of material objects, that may be exclusive or not, according to the provisions of articles 49 to 52 of the LDA (Law 9610/98). Thus, the license is a means for attributing a possibility of use of the object, without its transmission occurring, and without onerously burdening the author's patrimonial right. Thus, it creates a new active legal situation favorable to the licensor, with the corresponding obligation assumed by the holder of the author's patrimonial right, which is not transformed by effect of the agreement.

Further, there exists rules for contracts typical or related to certain types of work, such as the contract for editing intellectual work (articles 53 to 67) or contracts related to theater plays, musical plays and phonograms (articles 68 to 76), plastic arts work (articles 77 and 78), photography work (article 79) and audiovisual work (article 81).

Among the typical contracts specified in Law 9610/98 stands out the Edition Contract as an example, considering that it was the type of contract that the law dedicated the most attention, regulated by Articles 53 to 67 thereof.

In a broad sense, such contract refers to any and all type of copying. In a strict sense it refers solely to the type of edition related to graphic art work. The regime of Law 9610/98 appears to settle a general regime, a treatment of edition in a broad sense, being reasonable to consider that the edition regime could be, in practical terms, a base contract for the others types that establish the copying of work.

4.5.7. Work at order

Law 9610/98, currently effective, differently from the revoked copyright law of 1973, does not have a specific rule on the protection of the work generated under a work at order arrangement. In the former law it was assumed, in the case of lack of a contract, that the author's patrimonial rights over the work at order was divided into equal parts (*i.e.* condominium) between the author and the orderer.

The absence of any rule thereon leads to the conclusion that, in the absence of a contract regulating the ownership of the author's patrimonial rights, the totality of the rights is attributed solely to the author and the remuneration paid by the orderer shall be considered solely as compensation for the author's services, but not for the transfer or license of the use of the copyrights related to the work. In such a case the maximum that the orderer may do is a limited use of the work, in accordance with article 49, VI of Law 9610/98:

“Article 49 – The author's rights may be fully or partially transferred to a third party, per se or through his/her successors, on a universal or singular basis, personally or through representatives especially empowered, through licensing, concession, assignment or other means allowed by the law, observing the following restrictions:

(...)

VI – in the absence of specification as to the type of use the contract shall be interpreted restrictively, being understood as limited solely to the one that is indispensable for accomplishing the contract's purpose.”

Hence, the importance of the orderer to assert that any work to be created under a work at order arrangement is supported by a specific contract that provides on the transfer of author's rights. For each worker or service supplier it is recommendable to have a contract in writing, signed by the parties and two witnesses, establishing a clause on the transfer of the work already created (if any) and to be created. In view of the several restrictions that exist established in articles 49 and 50 of Law 9610/98, several precautions should be adopted in the contracts, as set out above.

4.5.8. Copyright Law Protection Measures

The measures for Copyright Law protection are established in several Civil Law provisions, which apply in regard to both the aspects of patrimonial and personal rights, and in specific provisions adopted in the Copyright Law.

As well explained by Carlos Alberto Bittar⁶, with the concern of improving the effectiveness of the measures to protect author's rights, the law established in Law 9.610/98 the measures thereon foreseen in the civil law: *“among the several types of legal measures that apply to the author's rights, are preventive measures (registration of the work for copyright purposes), guarantee (e.g. the use of property claim instruments), preservation (e.g. seizure of falsified materials) and indemnity for damages caused (by indemnification for material and moral damages, compulsory disclosure of the author's name or destruction of falsified materials that were seized)”*.

4.5.8.1. Civil and Penal Law Levels

I.7.1. – At the civil law level, the copyright protection is established in articles 102 et seq. of Law 9610/98, which foresee civil penalties to the violation of such rights, establishing inclusively in the sole paragraph of its article 103 the strict criteria of payment by the offender of the price of three thousand copies in the cases where it is not possible to learn the number of copies that constitute the fraudulent edition.

At the penal level, Law 10.695 was recently introduced and it amends and added a paragraph to article 184 and a new wording to the Penal Code.

On the other hand, these changes constituted an advance to the treatment of the violations to the author's rights and co-related author's rights in Brazil, particularly in regard to the following amendments:

- a) adoption of the penalty of 2 to 4 years of incarceration (in paragraphs 1, 2 and 3), characterizing such crimes as having a greater offensive potential;
- b) the inclusion of the violation of co-related author's rights of artists and phonogram producers, which until then characterized an illegal criminal act;

6 BITTAR, Carlos Alberto. “Direito de Autor”. Forense universitária

- c) the typifying of the public offer via cable, fiber optic cable (etc) of work (paragraph 3) establishing as a crime what Law 9610/98 had found as a civil illegality, and covering violation acts performed with the support of new technologies, inclusively through the Internet;
- d) insertion of the concept of indirect profit, and no longer only the intention of profit, which ultimately induced the interpretation that only the direct profit would characterize the crime.

These changes certainly mean a contribution to the combat of piracy, which are tuned to Law 9610/98 and to the international treaties thereon, although the effectiveness of such provisions clearly depends on the authorities' will to apply same.

Another relevant aspect of such amendments was the understanding that the full copying of intellectual work does not constitute a crime in the case it is for the private use of the copier, that does not aim a profit, directly or indirectly (paragraph 4). Such practice characterizes, according to Law 9610/98, an illegal civil act, which demonstrates that the legislator advanced by treating with less strictness the private use (and without a direct/indirect profit purpose) of intellectual work.

4.6. Domain name

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4.6.1. Registration before FAPESP

The registration of domain names system was created in Brazil in 1998, according to which FAPESP (*Fundação de Amparo à Pesquisa do Estado de São Paulo*) was delegated authority to provide “.br” registration services, as provides Resolution 001 of April 15, 1998 issued by the Managing Committee (CG).

The registration of a domain name with the “.br” extension is applied for through filling out the electronic application form found at FAPESP’s website www.registro.br. The application for registration of a domain name may be filed by any organization that is legally established in Brazil as a company or individual that has a contact in Brazilian territory. However, there are special requirements for the registration of certain top level domain names (TLD, abbreviated *DPN*, in Portuguese). For example, the case of registration of the “.com.br” DPN, which requires the applicant to inform its corporate registry/taxpayer registration number (CNPJ). The other requirements for the registration of other DPNs may be asserted in FAPESP’s website.

It should be emphasized that a foreign company that intends to register a domain name with FAPESP must have an attorney in fact legally established in Brazil and be registered in the registry’s system. Subject to this registration, the company will receive an identification number that it must indicate in the registration application form, in replacement of its CNPJ registration number, which is requested to companies that are established in Brazil.

In addition to such registration, a foreign company that intends to register a domain name in Brazil must submit the following documents:

- (i) power of attorney, duly legalized in the company’s country of origin, granting powers to the attorney to file an application for the domain name;
- (ii) affidavit attesting the company’s line of business, duly legalized in the country of origin, stating its corporate name, address, telephone number, corporate purposes, the activities in which it is engaged, name and title of its legal representative; and
- (iii) affidavit, duly legalized in the country of origin, attesting the company’s commitment to establish its operations in Brazil, on a permanent basis, within 12 months as of the date on which this document is submitted to FAPESP.

Note that it is necessary to legalize such power of attorney and affidavits before the Brazilian Consulate in the country of origin and, further, to submit the sworn translations thereof, copies of the attorney-in-fact’s CNPJ or CPF identification card, and a statement by the attorney-in-fact informing the ID of the foreign company’s contact.

In the event the empowered attorney does not have a registered entity in the FAPESP system, then such registration must be arranged by providing the complete identification particulars of the attorney: CNPJ or CPF number, corporate name or the individual’s name, full address, phone number and ID of the contact party.

Pursuant to the submission of the application form by e-mail and the submission of the required documents, FAPESP will conduct a search to assert whether a similar domain name already exists or whether the claimed domain name is **identical** to a notorious or well-known trademark, according to a list held by FAPESP based on information thereon provided to it by the Brazilian Trademark Office (*Instituto Nacional da Propriedade Industrial – INPI*). If the domain name is identical to another already existent or to a

trademark that is considered notorious or well-known (and that is included in the aforesaid list), then FAPESP will reject the application and no administrative appeal may be filed against such rejection decision.

FAPESP exempts itself from any liability in regard to any violation of a third party's intellectual property rights, inasmuch that it does not carry out any investigations jointly with the INPI to assert whether the claimed domain name has already been registered as a trademark by another party. The only search that FAPESP carries out is the search quoted above.

Upon FAPESP's acceptance of the application for registration of the claimed domain name, which issues in a few seconds, the applicant must pay fees for its registration and for its ongoing validity.

It is important to quote that the registration of a domain name implies in agreement with the clauses of the adherence contract imposed by FAPESP, which establishes the parties' obligations. We draw attention to clause 3, which establishes the obligations of the domain name's owner⁷, the lack of compliance with which shall lead to the cancellation of the domain name.

Further, we emphasize the provisions of Resolution no. 001 of April 15, 1998 issued by the Managing Committee of the Internet in Brazil, which establishes in its article 7 the extinction of the right to use a registered domain name in the Internet that has a ".br" extension, entailing its cancellation⁸.

We further emphasize that as of April 4, 2002 the maximum limit of 10 domain names per person, i.e. per CNPJ or CPF number, no longer exists. Currently, a company or individual may register as many top level domain names (DPN) as it wishes.

However, the restriction to the registration by the same entity of the same expression as a domain name under different, generic top level domain names (DPNs) continues effective. This is intended to maintain the richness of the field of names and enable the co-existence of homonyms under different DPNs. However, certain combinations are allowed. For example, the same owner may own "company.com.br" and "company.tv.br" domain names, but cannot own simultaneous registrations for "company.com.br" e "company.ind.br" domain names.

It is important to stress certain points regarding the process of the release of a domain name. When a domain name is found to be in a release process it is likely that this is due to the lack of payment by the owner of the fees required for the registration or due to the non-use of the domain name in the period established by FAPESP.

Thus, during the release period the parties that are interested in the registration of the domain name may, in the period determined by FAPESP, submit their candidacy for its registration.

Upon the expiration of the period to submit candidacy, the domain names that were not claimed or that were claimed by only one individual or company shall be automatically made available for registration to the first

⁷ III. DUTIES OF THE APPLICANT

The following are duties of the APPLICANT:

- Keep its information particulars updated;
- Keep the assigned DNS servers of the domain name properly operational, according to the use policy published in the website;
- Submit the documentation upon request by REGISTRO.BR;
- Pay the annual fee to maintain the domain name in the period established for the payment thereof.

⁸ Article 7 – The right to use the domain name registered in the Internet under the extension ".br" shall be extinguished, entailing its cancellation, in the following events:

- I – express waiver by the owner, through a proper instrument;
- II – non-payment of the fee for registration and/or for the maintenance thereof, within the periods established for the payment thereof;
- III – lack of regular use of the domain name during a continuous 180-day period;
- IV – non-compliance with the rules established in this Resolution and its Appendixes.
- V – pursuant to court order;

Sole Paragraph – In the events set out in "II" and "IV", the owner shall be notified to comply with the requirement in up to 30 days, upon the expiration of which, in the event of non-compliance, the registration shall be cancelled.

interested party. If several claims for registration were submitted in the course of the release process, then a new release process will be opened until a claim is submitted for the domain name.

It is important to note that, up to this date, FAPESP has not yet adopted any alternative dispute resolution procedure. Thus, any controversy or dispute involving domain names that have the “.br” extension must be submitted to a court.

4.6.2. Resolution of Conflicts involving Trademarks and Domain Names

Without doubt, the Internet has become one of the most efficient communication channels between companies and their customers, enabling in most cases the latter to purchase products or contract services without leaving the office. Hence, many companies have been investing considerably to reflect, in the virtual world, all the prestige that they have obtained in the traditional trade channels.

To this effect, one of the first steps that the companies take is to register a domain name with FAPESP. Through such electronic address the consumer may access the website of the company and purchase the products or contract the services that are desired.

Not rarely, the companies that pursue a virtual address decide to register as such their trademarks that are familiar to the consumer. Some of these companies are unpleasantly surprised when they learn that their trademarks have already been improperly registered in the name of third parties.

In fact, FAPESP copied the system that was adopted by the U.S. registration authorities, which is based on the first-come, first-served principle⁹. Accordingly, the owner of the domain name shall be the party that first registers it before such authority, even if such domain name reproduces a duly registered trademark of a third party.

In applying for the registration of a certain domain name before FAPESP, the applicant must attain solely to the fulfillment of the formal requirements that FAPESP established. FAPESP’s role is restricted to checking whether such requirements have been met in order to grant the domain name that the applicant claimed, without even conducting a prior assertion (though only superficial) of the legitimacy of the applicant to apply for the registration of a certain expression as a domain name.

Granted the registration, FAPESP claims its exemption as to any and all liability for both the improper use of the domain name and for the improper registration of trademarks by third parties¹⁰. Furthermore, it should be noted that when FAPESP adopted the U.S. system’s principle of priority to secure the registration of a domain name, it disregarded the resolution of disputes by arbitration procedure that was adopted by the U.S. and developed by the ICANN (Internet Corporation for Assigned Names and Numbers), which has played a key role in the settlement of disputes that involve domain names.

Given that the owner of a registered trademark cannot obtain, either through an administrative proceeding before FAPESP or through an arbitration proceeding, the cancellation or assignment of the domain name that was registered detrimental to its intellectual property rights, the only option that it will have is to resort to court action. Currently, it is being discussed whether FAPESP should or not be included as a co-defendant in the lawsuit, but its inclusion would imply in the transfer of the authority (jurisdiction) to process and rule the case by a civil court to a federal government treasury court.

⁹ Article 1 of Resolution 001/98 of the Managing Committee reads: “*Article 1 – The Registration of Domain Name shall adopt as a criterion the principle that the right to a domain name shall be vested on the first applicant that fulfills, in the filing of the application, the requirements for the registration of the domain name, according to the conditions established in this Resolution and its Appendixes.*”

¹⁰ Paragraph 3 of article 1 of Resolution 001/98 of the Managing Committee reads: “*Paragraph 3 – The applicant is exclusively liable for the selection of the domain name that was claimed and its proper use, and upon the filing of the registration application exempts the Managing Committee and the registrar, if it is another party, against any and all liability for any damages pursuing from its authorized use, being accountable for any court or non-court action that may arise pursuant to the violation of rights or damages caused to any third party.*”

The cases involving the violation of trademarks in domain names have already become common before the Brazilian courts, which have already established important precedents, some of which we shall heretofore address.

In most of the cases the Brazilian courts have ruled privileging intellectual property rights in detriment of the acts of piracy committed by those who, without demonstrating any right or legitimate interest in the registered expression, obtain the registration of a domain name. As examples, we hereby transcribe two summaries of rulings of the Court of Appeals of the State of Rio de Janeiro (TJRJ):

“Interlocutory Appeal. Regular track, cognizance suit. Rejection of claim for advance judgment. Grant of the effect to the appeal to suspend the appealed decision, by granting advance judgment. Fulfillment of the requirements for such grant. Evidence of major losses posed by the use, in the Internet, of domain names that match trademarks that were registered by the plaintiffs. Non-existence of significant damages or of the irreversibility of the grant effects to the defendant. Appeal granted. Advance judgment already awarded with the effect of suspending the appealed decision, which should be upheld.” Our emphasis. (Interlocutory Appeal – AI no. 2000.002.04140, 12th Court, Ruling dated Dec. 11, 2001)

“Intellectual property matter. Cognizance lawsuit aimed at terminating the use of a domain name in the Internet. Conflict between domain name registered with FAPESP and, on the other side, other domain names also registered with FAPESP and word and word + device trademarks applied for before the Brazilian Trademark Office (INPI), all having the expression “IG” as their main and characteristic element. Claim for injunction foreseen by article 209, paragraph 1 of Law 9279/96 (the Intellectual Property Law), originally rejected by the lower court, followed by the rejection of the effect to the appeal to suspend the appealed decision. The lower court decided to accept the claim and ordered, following the transition of the decision to the status of a definitive decision, to issue an order to FAPESP to cancel the registration of the “ignoticias.com.br” domain name. The defendant in the interlocutory appeal filed an appeal, which was accepted with the effect to suspend the appealed decision and for the reexamination thereof by the lower court. Continuity of procedural interest in the ruling of the AI appeal, vis-à-vis the possibility of grant of the injunction originally rejected. Existence, based on the elements contained in the records of the appeal and pursuant to the analysis of the decision issued in the cognizance suit, of the conditions for the grant of the claimed injunction. Fulfillment of the requirements of demonstration of the right and of the risks associated with unfair competition practices, capable of damaging the reputation or the decisions of the appellant that filed the Interlocutory Appeal, pursuing from the establishing of confusion in regard to the products and services. Interlocutory appeal accepted with the grant of injunction for the defendant of the Interlocutory Appeal to abstain, until the ruling of the appeal, from using the “ignoticias.com.br” domain name, subject to a daily fine equal to 20 minimum monthly wages, ordering FAPESP to take the proper steps.” Our emphasis. (Interlocutory Appeal no. 2001.002.12221, 3rd Court, Ruling dated Aug. 13, 2002)

In a recent and interesting ruling of the TJRJ, the Principle of Specificity¹¹ (which governs Brazilian trademark law) was adopted to assess the conflicts involving a trademark and a domain name. It found that the third party, who registered the other party’s trademark as a domain name, did not violate the trademark rights of the lawful owner thereof since it was engaged in a totally unrelated field of business, not representing any risk to the consumer:

“Intellectual property matter. Trademark. Registration before the Trademark Office (INPI). Principle of Specificity. Article 123 of the Intellectual Property Law. An Internet access provider that registered a domain name before FAPESP does not practice unfair competition against a company engaged in the field of sale of household electrical appliances and the like, that previously registered a similar expression before the Trademark Office (INPI). Totally unrelated lines of business, the trademark not consisting in this case a well-known trademark (as defined in article 125)” Our emphasis. (Appeal no. 2002.001.21172, 17th Court, Ruling dated Nov. 13, 2002)

Hence, we may note that although the resolution of conflicts that involve trademarks and domain names is becoming evermore common in the rulings of the Brazilian courts, the rulings of the cases that have been submitted thus far have privileged the owners of the intellectual property rights.

¹¹ According to which a registered trademark is protected under the products or services class in which its registration was granted and in the other products or services classes related thereto.

4.7. Genetic Resources, Traditional Knowledge and Biotechnology

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4.7.1. Biodiversity and Genetic Resources

With regard to the legal protection of biodiversity and genetic resources the Convention on Biological Diversity (CBD)¹² must be reviewed as it introduced important concepts and established minimum parameters to be observed by the member countries in the regulation of the matter.

The CBD, which was drafted in the so-called “ECO92” (meeting held between Chiefs of State in Rio de Janeiro, Brazil) was characterized by the concern with *sustainable development*, which consists in the development that meets the current needs without jeopardizing future generations.

According to the CBD “biological diversity” means “*the variety of live organisms of all origins, covering, among others, the terrestrial, marine ecosystems and other aquatic ecosystems and the ecological complexes to which they are integral parts, covering, further, the diversity within the species, among species and of ecosystems*” and the “genetic resources” mean the “*genetic material of real or potential value.*”

Among the targeted purposes, may be quoted:

- 1) the conservation of the biological diversity and traditional knowledge;
- 2) the sustainable use of the components thereof, respecting traditional cultural practices; and
- 3) the fair and equitable sharing of the benefits that result from the use of the genetic resources.

Being Brazil one of the fifteen “mega-biodiversity” countries, holding approximately 22% of the entire biodiversity of the planet and an immense cultural diversity (parties, traditions, arts and rituals) and, further, having evolved into a major agricultural producer in the foreign market, it is now a party to the main agreements on environmental protections and sustainable development, such as the Kyoto Protocol, recently approved on the Global Leading Countries Meeting on Sustainable Development (so-called RIO+10).

Internally, a set of laws, projects and programs are creating more efficient instruments to enable the transition to a new model of sustainable development.

Brazil’s biodiversity is estimated to be worth US\$2 trillion. Irrespective of whether this estimate reflects the reality, what is known is that the global social-economical interests converge over biodiversity as it constitutes a source for the feeding of the world’s population and of the active ingredients in the production of medicines.

4.7.2. Traditional Knowledge and Access to Genetic Resources

It is important to stress that in the study of this matter must be dismantled the stereotypes of traditional meaning “old”, “ancient” as this word in no regard invokes such meanings. Here, traditional concerns the cultural particulars of each community, which pursue from practices adopted by the community to solve a certain problem and which solutions are transmitted from generation to the next generation.

In referring to Traditional Knowledge (TK), the first vision that comes to mind is that of Indians, huts and settlements. Without discrediting the Indian community and despite that they hold slightly over 10% of Brazilian lands, with communities that total approximately 350,000 individuals, the other traditional and non-traditional communities that contributed to the growth of the Brazilian Traditional Knowledge should not be forgotten.

¹² Signed in Rio de Janeiro on June 5, 1992 and internally adopted in Brazil through Decree no. 2.519 of March 16, 1998

Thus, the traditional communities are comprised by Indians, natives, Azoreans, backwoods inhabitants, palm-tree area natives, *jangada*-type rafters, swampland natives, pastors, *quilombo* fugitive slaves, Amazon area cross-bred natives, non-Amazon cross-bred races, ranchers/cowboys, small fisherman and producers, while the non-traditional communities are comprised by farmers, vacationers, salespersons, government workers, entrepreneurs, employees, owners of palm processing companies or of other resources, lumberjacks.

Given that the Brazilian communities are more closely akin to the contents of this article, it is important to mention their main features:

- dependency and consequential in-depth knowledge of nature and nature's cycles, generating a better use of the natural resources and consequential improvement of the subsistence activities;
- notion of territory where the social group reproduces economically and socially;
- reduced accumulation of capital;
- importance of the family and of the relations of relatives;
- importance of symbols, myths and rituals (associated with hunting, fishing and mining activities);
- use of simple technologies, with a low environmental impact; and
- minimum political power.

What, then, would be Traditional Knowledge? The Worldwide Intellectual Property Organization (WIPO)¹³ finds that: “*Traditional Knowledge consists in the innovations and creations of traditional basis that result from the intellectual activity in the industrial, scientific, literary or arts fields.*”

The search for protection instruments more efficient than those that currently exist in Brazilian law is merely beginning. Therefore, the possibility of adopting a *sui generis* protection system has not been deeply discussed, not being feasible in the opinion of international organizations such as WIPO and UNESCO (United Nations Educational, Scientific and Cultural Organization) the use of the known protection mechanisms as they would solve only a part of the problem, leaving other aspects unprotected.

Through such research the study group of WIPO concluded that the literary and art work may be protected under copyright Law; the technical creations by the Principle of Repression of Unfair Competition and by patents; the aesthetic and functional creations are afforded protection under Copyright and Industrial Design law, and, finally, the communities' identification signs would be protected as trademarks and geographical indications of origin, all of which mechanisms already exist in Intellectual Property law.

In his statements made in meetings held in Manaus, Maranhão and in Rio de Janeiro, Nuno Pires de Carvalho, a WIPO consultant, listed the characteristic elements of the Traditional Knowledge that are not included in the foregoing protection mechanisms, this being, inclusively, the justification for adoption of a *sui generis* protection system. Such elements are four, namely:

- 1) Holistic Element, pursuing from the culture, spirituality and practice of this Knowledge;
- 2) Adaptable Element, in view of its ongoing evolution;
- 3) Complementary Element, since they are cultural identifiers and have an economical function; and
- 4) Pragmatic Element, as its production is no systematic.

In this regard the aforesaid WIPO consultant mentioned the main questions in the attempt to fit the TK into the mechanisms currently adopted to protect Intellectual Property, to which questions answers have not yet been found: is there novelty in the subject matter of the right?; who would be the author and owner of such right?; what would be the period of protection; how would the right be acquired, would this right be exercisable and could it be cancelled?

In addition to a *sui generis* protection system, WIPO recommends the creation of modern data bases, such as those already implemented by Venezuela, China and India, which position is being defended by Brazil.

¹³ Concerning the Exploratory Missions on Intellectual Property and Traditional Knowledge of April 2001 (www.wipo.org).

Brazilian laws:

For several decades the Brazilian government is expressing concern with the protection of the cultural patrimony of Brazil and has taken important legislative initiatives. The most recent are quoted below:

Legislation	Subject Matter
State Law no. 1.235/97 of the State of Acre	Provides on the instruments of control of the access to the genetic resources of the State of Acre.
State Law no. 388/97 of the State of Amapá	Provides on the instruments of control of the access to the biodiversity of the State of Amapá.
Decree no. 3.551/00	Establishes that the registration of cultural assets of immaterial natural that constitute Brazilian cultural patrimony operates through a specific system of books, always quoting the historical context of the asset and its national relevance for the memory, identity and formation of Brazilian society. Accordingly, at the initiative of the Ministry of Culture, the National Program of Immaterial Patrimony was created and contains 4 books: Book of Registration of Knowledge (for the knowledge and form of doing rooted in the daily activities of the communities), Book of Registration of Festivities (for the rituals and parties), Book of Registration of the Forms of Expression (for the literary, musical, plastic arts, scenery and amusement arts) and Book of Registration of Sites (for the places where collective cultural practices are reproduced). As regards the Traditional Knowledge, Folklore and Handcraft, it would be possible to catalogue it in the aforementioned books, eternalizing the description of celebrations, religious or non-religious ceremonies, rituals, musical, literary and art work.
Provisory Act (MP) no. 2.186-16/01	Provides on the access to genetic resources and to associated traditional knowledge on the sharing of benefits and the access to technology, transfer of technology derived from its use, among other provisions.
Decree no. 3.945/01	Regulates article 10 of MP 2.186-16/01: Defines the composition of the Council of Management of the Genetic Patrimony, which affords the possibility of registering the Traditional Knowledge associated to the genetic patrimony.

As may be noted in the foregoing table, Provisory Act (MP) no. 2.186-16/01 provides on the access to genetic resources and to the *associated* traditional knowledge, among other provisions. It is important to clarify that the traditional knowledge may or may not be associated to the genetic resources and, if affirmative, shall be regulated by this Provisory Act.

In this regard, we resorted to the MP to define the concept of “associated traditional knowledge”: *“information or individual or collective practice of an Indian or local community, having a real or potential value, associated to the genetic patrimony.”*

The local community that creates, develops, holds or preserves the knowledge thenceforth has the right to: be recognized the origin of the access to the knowledge in all of the publications, usages, exploitations and disclosures (inclusively being mandatory to mention the origin in any patent applications); prevent non-authorized third parties from exploiting the knowledge; receive benefits for the economical exploitation of the knowledge by a third party.

As a curiosity, inasmuch that the traditional knowledge not associated to the genetic resources, such as e.g. folk expressions, is not the subject matter of this article, the protection thereof has been widely discussed and considered the possibility of attributing copyright protection or to create a protection system through the cataloging of the 4 Books of the Ministry of Culture, in accordance with Decree no. 3.551/00.

More specifically in regard to the access, the MP introduces important definitions: “access to genetic patrimony” means *“the obtaining of a sample of a component of the genetic patrimony for the purposes of scientific research, technological development or bio-prospection, aimed at its industrial or other type of application”* and “access to the traditional associated traditional knowledge” means *“obtain information on the knowledge or individual or collective practice associated to the genetic patrimony of an Indian or local*

community, for the purposes of scientific research, technological development or bio-prospection, aimed at its industrial or other type of application”.

Therefore, it may be concluded that the human genetic patrimony is not covered by this MP.

The access is subject to authorization by the Management of Genetic Patrimony Council and the use, sale and benefiting (which are subject to inspection, restrictions and sharing of benefits) are subject to Federal Government authorization, being prohibited the access for practices that are hazardous to the environment, human health and for the development of biological and chemical weapons.

The Provisory Act (MP) further determines the equitable sharing of the benefits derived from the exploitation of a component of the genetic patrimony and of the associated traditional knowledge (through a “Contract for Use of Genetic Patrimony and Sharing of Benefits”, the parties to which would be the owner of the public or private property or the representative of the Indian community or local community and the official Indian authority, on one side, and the national entity authorized to access and the intended organization. The benefits may consist in: profit sharing, payment of royalty fees, access and transfer of technology, licensing, free of charge, of products and processes and training of human resources.

In the event the economical exploitation of the product or process has been developed based on a sample of a component of the genetic patrimony or on associated traditional knowledge accessed in violation of the provisions, the violator shall be subject to payment of an indemnity equal to at least 20% of the gross revenues obtained with the sales of the product or of the royalties paid by third parties to the violator through a licensing of the product or process or for the use of technology, whether protected or not by intellectual property law, in addition to the applicable administrative and criminal penalties.

The venue for solution of conflicts in the “Contract for Use of Genetic Patrimony and Sharing of Benefits” must necessarily be Brazil.

We stress that this Provisory Act (MP) has been heavily criticized, especially by the scientific community, which claims a simpler path for the national researcher to collect samples and information without violating the law.

The position adopted by the Brazilian government has been expressed in the main international venues. In December 2001, for example, 23 Indian curing doctors (*pajés*) representing Brazilian Indian tribes met in São Luís, Maranhão, to draft a letter that was subsequently presented in the Second Meeting of the Intergovernmental Intellectual Property Related to Genetic Resources, Traditional Knowledge and Folklore Committee, which was held in the headquarters of WIPO in Geneva, Switzerland. The following part of such letter stands out: *“As traditional Indian tribes that live in several ecosystems, we have knowledge on the handling and sustained use of this biological variety. This knowledge is collective and does not consist in a product that may be sold as any common object in the market.”*

Even if the protection of biodiversity and the economical exploitation thereof is urgently required, the preservation and the conservation of this patrimony is foremost an issue of humanity and survival of future generations, being indispensable the immediate creation of a data base to catalogue the natural and cultural riches.

4.7.3. Biotechnology and Protection of the Associated Creations

Biotechnology congregates techniques that enable the use of live organisms or parts of live organisms, modified or not, to generate new products with specific purposes.

The impact of biotechnology has been felt mainly in the fields of agriculture and health, of both humans and animals. New vegetable varieties, drugs and vaccines and also research in the field of embryology and reproduction of animals have brought a new dimension to the field of biotechnology.

The analysis of genomes has been used to isolate and characterize genes apparently involved in biological processes controlling features of great economical importance in plants, animals and microorganisms. Accordingly, plants that are genetically modified resistant to plagues and that have a capacity of producing drugs and biopolymers may be obtained.

The social-economical importance of biotechnology may be demonstrated by the value associated with its global market, estimated at more than US\$ 50 billion per annum. According to data collected by EMBRAPA (Brazilian Agricultural/Livestock Breeding Research Institute) in agriculture alone there is a potential market of US\$ 30 billion per annum.

The biotechnological inventions result from high investments, specialized infrastructure and detailed regulatory approval and in order to encourage such inventions a protection system is needed.

In this regard, Brazil broadly protects the creations that result from biotechnology: biotechnology inventions are patentable, provided that specific requirements are met and new plant varieties may be registered with the National Protection of Plant Variety Service (SNPC). It should be emphasized that health-related products are pending regulation by the Brazilian Federal Health Surveillance Department (ANVISA).

Brazilian legislation:

The protection of inventions began in Brazil in 1809 and patent protection was afforded to the authors of industrial inventions or discovery in 1882. Since then the law has been continuously amended (totaling five bills and an industrial property code).

Currently, patent protection is regulated by Law 9.279/96. Two specific articles thereof Article 10.IX and Article 18.III) outline the protection for inventions that result from biotechnology and/or derived from access to genetic resources:

“Article 10 – The following are not considered an invention or utility model:

IX – the whole or part of live, natural beings and biological material found in the natural environment or isolated there from, including the genome or germ plasma of any natural living being and the natural biological processes.

Article 18 - The following cannot be protected by a patent:

III – the whole or part of living beings, except genetically modified microorganisms that fulfill the three requirements of patentability – novelty, inventive function and industrial application – established in article 8 that do not consist in a plain discovery.

Sole Paragraph - For the purposes of this law, genetically modified microorganisms are organisms that, except the whole or part of plants or animals, that express through direct human interference in its genetic structure, a feature that is normally not attained by the species under normal conditions.”

As regards new plant varieties, Brazilian law provides protection since 1945, as mentioned in Article 3.I of Decree-law 7.903 of Aug. 27, 1945 (as amended by Decree-law 8.481 of Dec. 27, 1945):

“Article 3 – The protection of industrial property is provided through:

(a) the grant of a patent privilege to inventions, utility models, industrial designs or models, new plant varieties;”

In 1997 the so-called “Plant Variety Law” was introduced to protect new plant varieties similar to UPOV (abbreviation in French for “International Convention for the Protection of Plant Varieties”) more specifically the version of 1978 of the UPOV convention, Brazilian law adopting some of the provisions of the 1991 UPOV version. It should be emphasized that Brazil became a member of UPOV in March 1999 (adhering to the 1978 version of this Convention), and its adherence was confirmed by Legislative Decree no. 28 of 1999.

The regulation of the aspects related to bio-safety, such as the use of genetic engineering and release into the environment of genetically modified organisms must abide by Law 8974 (the so-called the “Bio-Safety Law”). It should be emphasized that the regulation of these aspects has not yet assured the release of the plantation and sale of the crop of genetically modified plants in Brazil – this still being a controversial theme.

The following table indicates the current legislation:

Legislation	Subject matter
Law 9.279 of May 14, 1996	Regulates industrial property-related rights and obligations.
Law 10.196 of Feb. 14, 2001	Amends and adds provisions to Law 9.279 of May 14, 1996 which regulates industrial property-related rights and obligations, among other provisions.
Law 9.456 of April 25, 1997	Institutes the right to Plant Variety Protection, according to the provisions established therein.
Law 10.711 of Aug. 5, 2003	Provides on the National System of Seeds and Seedlings, among other provisions.
Law 8.974 of Jan. 5, 1995	Regulates sections II and V of Paragraph 1 of Article 225 of the Federal Constitution, establishes rules for the use of genetic engineering techniques and release into the environment of genetically modified organisms, authorizes the Executive Branch to create, at the level of the Presidency of the Republic, the National Bio-Safety Technical Committee, among other provisions. (Amended by <u>Provisory Act (MP) 2.191-9 of Aug. 23, 2001</u>) (Regulated by <u>Decree 1.752 of Dec. 20, 1995</u>) (See <u>Internal Regulation of CTNBio</u> and <u>Decree 3.871 of July 18, 2001</u>)
Law 10.688 of June 13, 2003	Establishes rules for the sale of the production of soybean of the crop of 2003 among other provisions.

The Brazilian background and international treaties on biotechnology scenario:

The Brazilian laws currently effective do not object the protection, by industrial property law, of inventions in the biotechnology field, as previously stated. A comparison between Brazilian law and TRIPS (abbreviation for Trade Related Aspects of Intellectual Property Rights Agreement, introduced by the World Trade Organization – WTO) does not reveal any inconsistency between the two texts, more specifically the comparison of articles 10 and 18 of Law 9.279 and the clauses of the TRIPS agreement.

The TRIPS agreement prohibits legal exclusions of the protection of any technology field, except for a few specific cases. In the biotechnology area the exclusion of patent protection by the member countries may apply to inventions (as established in section 5, Article 27 of TRIPS) that:

- a) conflict with public order or morality, inclusively to protect the life and health of humans, animals or plants, or to prevent major damage to the environment;
- b) diagnosis, treatment and surgery of animals or humans methods;
- c) animals or plants that are not microorganisms;
- d) essentially biological processes for the production of animals and plants, except non-biological or microbiological processes.

Another very important issue regarding patent protection in the biotechnology area concerns the patents of inventions that derive from the access to genetic resources and associated traditional knowledge. This matter is specifically addressed in Provisory Act (MP) no. 2186-16, previously quoted in paragraph 2 above, which determines that the patent applications for processes or products obtained from a sample of a component of the genetic patrimony must inform the origin of the genetic material or traditional knowledge.

Provisory Act (MP) 2186-16 aims to harmonize patent law and the purposes of CDB. Several aspects related to the applicability of this MP are being discussed however no national consensus thereon has been reached yet. In this regard, it should be stressed that this paper does not aim to discuss these different aspects, but rather solely address the current Brazilian scenario involving biotechnology and its inter-dependence with biodiversity, genetic resources and the traditional knowledge associated thereto.

Finally, despite of the protection of Traditional Knowledge and biodiversity being an issue of sovereignty that contributes to define the position that Brazil occupies in the international market scenario since the sums that will circulate with the prospection of its genetic resources and subsequent sales is already being estimated, the preservation and conservation of this patrimony is foremost an issue of humanity and survival of future generations.

4.7.4. Practical Recommendations for the Corporate Use of Biotechnology

4.7.4.1. Genetic resources and Associated Traditional Knowledge:

- Abidance by the provisions of Provisory Act (MP) no. 2.186-16/01:

The participation of a foreign company in an expedition for collection of sample of genetic component on-site and to access associated traditional knowledge will only be authorized when jointly with a Brazilian governmental entity, with the coordination of the activities carried out compulsorily by the latter and provided that all the organizations involved conduct research and development activities in the biological and related areas.

When there is a perspective of use on a commercial scale, the access to a sample of component of the genetic patrimony, in on-site conditions, and to the associated traditional knowledge shall occur only after the Contract for Use of the Genetic Patrimony and Sharing of Benefits has been executed. And whenever there is a perspective of commercial use of a product or process that results from the use of a component of the genetic patrimony the prior execution of such contract will be required.

The access to technology and the transfer of technology between the Brazilian research and development organization, whether governmental or private, and the foreign entity may be implemented, among other activities, through scientific research and technological development; constitution and training of human resources; exchange of information; exchange between the Brazilian research entity and the foreign-based entity; consolidation of scientific research and technological development facilities; economical exploitation, on a partnership basis, of a process or product derived from the use of the component of the genetic patrimony; and by establishing a joint venture of the technological base.

- Abidance by the rules established in the State laws of Acre and Amapá, in the event of interest to access the genetic resources of these States.

4.7.4.2. Patent Protection in the Biotechnology field and Protection of New Plant Varieties Through the Plant Varieties Law:

- Abidance by the exclusions of patentability established in Articles 10.IX and 18.III of Law 9.279:

Materials found in the environment, even if isolated there from, are not patentable. However, new formulas and or compositions, vesting inventive aspects and that have an industrial application containing such inputs may be patented.

Another very important aspect in the patent protection of biotechnology concerns the exclusion of parts of live beings, according to Article 18.III. Animal or plant cells, even though functioning as microorganisms are considered by the Brazilian Industrial Property Institute (INPI) as parts of live beings and, therefore, are not patentable. Thus, in inventions that include cells that operate as microorganisms and the processes for obtaining products associated there with, only such processes and products are patentable.

- Abidance by the exclusions of patentability of plants established in Law 9.279 and the protection of new plant varieties according to Law 9.456 (Plant Variety Law):

In further regard to the exclusion of plant protection (the whole or parts of live beings), a quite confusing situation may be found with regard to the plant varieties that have not yet been included in the list of protection of the Plant Variety Law.

According to Article 4 of Law 9.456 (Plant Variety Law), more specifically Paragraphs 2 and 3 thereof, the protection of plant varieties is progressive.

Article 4 – The new plant variety or the essentially derived plant variety that derives from any other plant gender or species may be protected.

(...)

Paragraph 2 – The entity responsible for the protection of the plant varieties shall disclose, progressively, the plant species and the corresponding minimum description elements that are required for the opening of protection applications, and also the corresponding limit dates for the effects of item I of the preceding paragraph.

Paragraph 3 – The disclosure referred in the preceding paragraph shall be consistent with a scale of species, in accordance with the following schedule, expressed in cumulated total protected specie:

I – on the date of effectiveness of the regulation of this Law: at least 5 species;

II – after 3 years: at least 10 species;

III – after 6 years: at least 18 species;

IV – after 8 years: at least 24 species.

Hence, new plant varieties that are not yet in the list of species that may be protected as plant varieties will also not be protected by patent in Brazil under the system introduced by Law 9456/97. Up to this date, the Brazilian government has officially recognized the following plant varieties:

Pineapple plant (*Ananás comossus (L.) Merrill*), Pumpkin, Lettuce (*Lactuca sativa L.*), Cotton (*Gossypium hirsutum L.*), Amarilis, Anturius, Rice (*Oryza sativa L.*), Aster (*Aster L.*), Oats (*Avena spp*), Banana plant (*Musa spp.*), Potato (*Solanum Tuberosum L.*), Begonia Elatior (*Begônia x hiemalis Fotsch*), Brachiaria (*Brachiaria brizantha, B. decumbens, B. Ruzizienses and hybrids, Brachiaria humidicola and B. dictyoneura and hybrids*), Bromelia (*Guzmania spp*), Coffee (*Coffea spp*), Calancoe, Sugarcane (*Saccharum sp*), Paspalum grass (*Panicum maximum Jacq.*), Napier grass (*Pennisetum purpureum Schum. and interspecific hybrids with Pennisetum spp*), Onion, Carrot (*Daucus carota L.*), Barley (*Hordeum vulgare L.*), Cimbidium, Clove, Chrysanthemum (*Chrysanthemum spp.*), Estatice (*Limonium Mill., Goniolimon Boiss. and Psylliostachys (Jaub. & Spach) Nevski*), Eucalyptus (Gênero: Eucalyptus, Sub-gender: Symphyomyrthus, Sections: Transversaria, Exsertaria, Maidenaria), Beans (*Phaseolus vulgaris L.*), Gerbera (*Gérbera Cass.*), Emerald or Japanese grass (*Zoysia japonica Steud. L.*), Saint Anthony grass (*Stenotaphrum secundatum (Walt.) Runtze L.*), Gipsófila, Guandu (*Cajanus cajan*), Hibiscus (*Hibiscus rosa-sinensis*), Hypericum (*Hypericum L.*), Lilly, Apple (*Malus spp*), Macrotiloma, Mango (*Mangifera indica L.*), Millet (*Pennisetum glauculum L. R. BR.*), Corn (*Zea mays L.*), Strawberry plant (*Fragaria L.*), Pear (*Pyrus communis L., Pyrus L.*), Poinsetia, Okra, Rose plant (*Rosa L.*), Soybean (*Glycine max (L.) Merrill*), Solidago (*Solidago virgaurea L.*), Sorghum (*Sorghum spp*), Wheat (*Triticum aestivum L.*), Triticale (*x Triticosecale Witt*), Grape vine (*Vitis spp*) and African violet (*Saintpaulia H. Wendl.*).

5. LEASING TRANSACTIONS

Leasing (“Arrendamento Mercantil”)

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5.1. Introduction

This paper provides an overview of the main types, characteristics and rules applicable to leasing transactions under Brazilian law, addressing as well the general aspects of this type of commercial contract and the tax aspects related to domestic and cross-border leasing transactions.

5.2. Leasing

Leasing was introduced in Brazil by Law No. 6099 of September 12, 1974¹⁴ (“Law 6099/74”). Although it is officially known as *arrendamento mercantil* in Portuguese, the English term is frequently used in Brazil. In general, leasing transactions may be divided into two large groups, subject to specific regulations: local or domestic leasing transactions and cross-border leasing transactions.

5.3. Domestic leasing transactions

(A) General Comments

5.3.1. Domestic leasing transactions are basically regulated by Law 6099/74 and by Resolution No. 2309, published by the Central Bank of Brazil (Central Bank) on August 28, 1996 (Resolution 2309/96). These transactions are entered into between a company domiciled in Brazil (as lessor) and an individual (or company) also domiciled in Brazil (as lessee). The subject matter of these transactions is the leasing of goods acquired by lessor in accordance with lessee’s specifications for lessee’s use.

5.3.2. The companies that intend to figure as lessors in leasing agreements must be authorized by the Central Bank and organized as corporations (*sociedades anônimas*). Resolution 2309/96 specifies the following companies authorized to engage as lessors in leasing transactions: (i) companies primarily engaged in leasing transactions; (ii) multi-service banks that have a leasing department; and (iii) financial institutions authorized to enter into leasing transactions with the seller of the goods or with companies affiliated to such seller.

5.3.3. Articles 5 and 6 of Resolution 2309/96 basically define two types of domestic leasing transactions: finance lease and operating lease (which in Brazil includes a purchase option).

5.3.4. Domestic finance leases must have the following basic features: (i) the leasing payments and other amounts stipulated in the agreement (owed by lessee) should be sufficient for lessor to recover the cost of the leased goods during the lease term and to have a return on the investment made; (ii) maintenance expenses related to the leased goods should be borne by lessee; and (iii) the price freely agreed for exercise of the purchase option should be stated and may be the residual value or even the market value of the leased goods.

5.3.5. Domestic operating leases must have the following basic features: (i) the payments to be made by lessee should include the cost of leasing the goods as well as the services required to put such goods at the disposal of lessee, and the present value of the payments cannot exceed ninety percent (90%) of the goods

¹⁴ The provisions of Law 6099/74, as amended by Law No. 7132 of October 26, 1983 (“Law 7132/83”), which provides for the tax treatment given to leasing transactions, could only be adopted after publication of the National Monetary Council rules via the Central Bank.

cost; (ii) the lease term should be shorter than seventy-five percent (75%) of the goods' useful life; (iii) the price for exercise of the purchase option should be the market value of the leased goods; and (iv) the lease does not contain a provision establishing the payment of a guaranteed residual value.

5.3.6. Leasing agreements must contain a number of indispensable conditions required by the Central Bank. Particularly important is lessee's right to three alternatives at the end of the lease term: (i) to renew the agreement; (ii) to return the goods; or (iii) to acquire the leased goods.

5.3.7. Article 8 of Resolution 2309/96 establishes the minimum terms for leasing transactions: a 2- or 3-year term for domestic finance leases (such term may vary depending on the useful life of the leased goods) or a 90-day term for domestic operating leases.

5.3.8. Article 13 of Resolution 2309/96 provides on sale and leaseback transactions. These transactions are entered into with the seller of the goods or with affiliates of the seller and can only vest the form of a finance lease.

(B) Taxation of domestic leasing transactions

5.3.9. Payments received by lessor under leasing agreements may be subject to the following taxes: (i) Corporate Income Tax (IRPJ); (ii) Social Contribution on Profit (CSL); (iii) Contribution to the Social Integration Program and Civil Servants Investment Program (PIS/PASEP); (iv) Social Security Financing Contribution (COFINS); and (v) Tax on Services (ISS). On the other hand, payments made by lessee will be subject to the Provisional Contribution on Financial Transactions (CPMF).

5.3.10. In principle, leasing transactions entered into between Brazilian-based companies are not subject to the Tax on Industrialized Products (IPI). However, if the lessor imported the leased goods or if lessor is a company equalized to an industrial facility, under the applicable law, IPI would be levied on the first exit of the goods from the lessor's facility.

IRPJ and CSL

5.3.11. Considering that leasing companies are required to determine actual profits ("*lucro real*"), IRPJ will be levied at the rate of 15% on the actual profits, and at an additional 10% on the portion of the profits exceeding R\$ 20,000.00, multiplied by the number of months of the corresponding ascertainment period. CSL will be levied at the rate of 9% on the net profits ascertained before IRPJ provisioning.

5.3.12. Likewise, payments made by lessee to lessor will qualify as expenses deductible from the IRPJ and CSL tax basis.

PIS and COFINS

5.3.13. Pursuant to Laws 10637 of December 30, 2002 (Law 10637/2002), 10684 of May 30, 2003 (Law 10684/2003) and 10833 of December 30, 2003 (Law 10833/2003) leasing companies are required to pay PIS and COFINS at the rates of 0.65% and 4%, respectively, on the gross income derived from leasing payments.

ISS

5.3.14. ISS is a municipal tax levied on certain services included in the list attached to Supplementary Law (LC) 116 of July 31, 2003. Leasing transactions are stated in item 15.09 of such list. The ISS tax rates usually vary between 2% to 5%, depending on the type of service and/or municipality in which the service supplier is domiciled or the service is supplied. Currently, the ISS tax rate for leasing transactions is 2% in the municipality of São Paulo.

CPMF

5.3.15. CPMF is levied at the rate of 0.38% on debits made to any bank account in Brazil held by an individual or company, and on any other transaction of funds established by the law. It is payable by lessee on the leasing payments.

5.4. Cross-border leasing

(A) General Comments

5.4.1. Cross-border leasing transactions are basically regulated by Law 6099/74, Central Bank Resolution No. 1969 published on September 30, 1992 (Resolution 1969/92), and Central Bank Circular 2731 of December 13, 1996 (Circular 2731/96). Resolution 2309/96, which provides on domestic leasing transactions, applies on a supplementary basis to cross-border leasing transactions.

5.4.2. Cross-border leasing transactions are those entered into with a foreign party that figures therein either as lessor or lessee. If a Brazilian party figures as lessor, such party must obtain the Central Bank's prior authorization to engage in leasing transactions.

5.4.3. The main types of cross-border leasing are finance leases, operating leases (rents), and sale and leaseback transactions.

(B) International finance leases

5.4.4. The major feature shared by all international finance lease transactions is the fact that after the minimum lease term has expired, lessee has the option to acquire the leased goods at its residual or market value. In addition, these transactions have the following features:

(i) the total amount of the agreed payments, including all charges, as well as the residual value, cannot exceed the value that the goods would have if they had been purchased through an import financing transaction; in any case, the proportionality between the term of the agreement and the useful life of the leased goods must be maintained;

(ii) the fixed payments established in the agreement must be distributed throughout the lease term, so that at any time during the agreement the proportion between the total amount already remitted and the leasing amount is not greater than the proportion existing between the period already elapsed and the total lease term; and

(iii) by the date of the certificate of delivery and acceptance of the leased goods, the total payments to lessor abroad may not exceed 15% of the amount of the transaction.

5.4.5. The minimum terms for international finance leases are: 2 years, when the useful life of the goods is equal to or less than 5 years; or 3 years, in other cases.

(C) International operating leases

5.4.6. Although the concept of leasing in Brazil is linked mainly to finance leases (with an option to purchase the leased goods), international operating leases have been widely used by companies in Brazil. The main feature of international operating leases is the absence of an option to purchase the goods by lessee.

5.4.7. There are no specific rules governing international operating lease transactions, which are contemplated by sparse rules and regulations issued by the Central Bank and the Foreign Trade Department (DECEX).

5.4.8. International operating lease (rent) transactions should also observe the following conditions: (i) the leased goods must be returned to lessor upon expiration of the agreement or the lease term may be extended, depending on the useful life of the leased goods; (ii) by the date of the certificate of delivery and acceptance of the leased goods, the total payments to lessor abroad may not exceed three leasing payments; (iii) the transaction may be subject to the *special temporary admission customs system*.¹⁵

(D) International sale and leaseback

5.4.9. Article 4 of Resolution 1969/92 allows leasing transactions between lessor-buyer domiciled abroad and lessee-seller domiciled in Brazil. The transaction value, however, must be lower than 75% of the cost of the leased goods, which must be purchased in cash by lessor-buyer.

5.4.10. International sale and leaseback transactions are also subject to the international finance leases rules. As a result, the provisions that apply to international finance lease agreements, such as mandatory clauses, minimum terms, tax treatment, also apply to international sale and leaseback transactions.

(E) Registration of cross-border leasing transactions

5.4.11. The import of goods into Brazil under an international finance lease or international operating lease is basically subject to the review and approval of the following governmental authorities¹⁶: (i) the Foreign Trade Office (SECEX); (ii) the Central Bank; and (iii) the Federal Revenue Office (SRF).

5.4.12. The first step to be taken by a Brazilian lessee that intends to enter into a cross-border leasing transaction and to import the leased goods is submit to SECEX information on the conditions regarding the intended leasing and the goods to be leased, in order to obtain an Import License (LI). This information is provided via the Integrated Foreign Trade System (SISCOMEX). After the terms of the transaction are approved by SECEX, the LI is issued to the importer. The LI number is indispensable for the registration of the transaction with the Central Bank.

5.4.13. After the LI is obtained, the next step is the registration and approval of the financial clauses and conditions of the leasing by the Central Bank, so that lessee may remit the leasing payments to lessor abroad. Circular 2731/96 addresses the Financial Transaction Registration (ROF), which must be obtained thru the Central Bank Information System (SISBACEN).

5.4.14. Pursuant to the issuance of the LI and the ROF, the import and customs clearance of the goods process may be initiated. For this purpose, the Import Declaration (DI) must be submitted via SISCOMEX. The DI will indicate the ROF and LI numbers, in addition to other information on the leased goods.

5.4.15. Registration of the DI with SISCOMEX, supported by other importing documents, will initiate customs clearance of the goods before SRF, with the subsequent issuance of the Import Certificate (CI), which is furnished to lessee and constitutes evidence of legal entry of the goods into Brazil.

5.4.16. After customs clearance, lessee must register the leasing Payment scheme with the Central Bank via SISBACEN. To obtain this registration, lessee must: (i) evidence the connection between the ROF and the DI; and (ii) inform the Central Bank the number of payments owed to the foreign lessor, as well as the respective due dates.

¹⁵ The Special Temporary Admission Customs System allows for the import of goods that should remain in Brazil for a fixed term, upon total suspension of the respective import duties or (partial) payment thereof ratably to the period such goods remain in Brazil.

¹⁶ The approval of such bodies is required for any and all cross-border leasing transactions; however, depending on the type of goods leased, further approvals and licenses may be required from other Brazilian agencies.

5.4.17. Finally, after registration of the payment scheme, lessee may remit the leasing payments as stipulated in the cross-border leasing agreement.

(F) Taxation of cross-border leasing transactions

5.4.18. Basically, the following taxes are levied on cross-border leasing transactions: (i) import duties due on the entry of the leased goods into Brazil; (ii) Withholding Income Tax (IRF); (iii) Provisional Contribution on Financial Transactions (CPMF); (iv) Tax on Services (ISS) (see item 5.4.27 below); and (v) Contribution to the Social Integration Program (PIS-Import) and (vi) Social Security Financing Contribution (COFINS-Import) on the Import of Foreign Products or Services (see item 5.4.21).

Import duties

5.4.19. As a general rule¹⁷ the import of goods into Brazil is subject to: (i) federal taxes, namely: (a) Import Tax (II); (b) Tax on Manufactured Products (IPI); and (c) PIS-Import and COFINS-Import; and (ii) a state tax designated Tax on Distribution of Goods and Services (ICMS), which are due upon the customs clearance of the goods.

5.4.20. The applicable II and IPI tax rates vary according to the tax classification of the product under the Mercosur Common Nomenclature (NCM) and are included in the Common External Tariff (TEC) used by Brazil and the other Mercosur member countries.

5.4.21. As a general rule, PIS-Import and COFINS-Import are levied at the rate of 1.65% and 7.6%, respectively, with some exceptions established in Laws 10865 of April 30, 2004 (Law 10865/2004) and 10925 of July 23, 2004 (Law 10925/2004).

5.4.22. The applicable ICMS tax rate also varies depending on the tax classification of the imported product and the State where the importing facility is located.

Withholding Income Tax (IRF)

5.4.23. According to Law 9959 of January 27, 2000, regulated by SRF Normative Ruling No. 252 of December 3, 2002, the amounts paid, credited, used, delivered or remitted abroad under agreements for leasing of capital goods entered into with foreign-based entities are subject to IRF at the rate of 15%, even if the lessor is domiciled in a country with a favorable tax treatment (tax haven). Exclusion of the value of each installment corresponding to amortization of the leased goods is permitted for the purpose of determining the IRF tax basis, as established in the corresponding leasing agreement.

5.4.24. The IRF tax rate in international operating leases varies according to the goods that are being leased. In the leasing of foreign ships, aircraft, containers, demurrage and others related to the use of port services, the IRF tax rate on the payments set forth in the respective agreements is 0%. In international operating lease of other movable goods the applicable IRF tax rate is 15%.

5.4.25. However, according to article 8 of Law 9779 of January 19, 1999, if the foreign lessor is domiciled in a country where income is not taxed or subject to taxation at a maximum rate lower than 20% (tax havens) the foreign remittances of payments under international operating lease transactions will be subject to IRF at the rate of 25%.

CPMF

5.4.26. As stated in item 5.3.15 above, the amounts paid by lessee under cross-border leasing transactions will be subject to CPMF at the rate of 0.38%.

¹⁷ As an exception to this rule, we may quote, for instance, the imports subject to the temporary admission customs system as mentioned above.

ISS

5.4.27. Supplementary Law (LC) 116, published on July 31, 2003, created a new triggering event for assessment of ISS on services (*e.g.*, leasing transactions) supplied from a foreign country. However, the constitutionality of said supplementary law may be questioned.

PIS-Import and COFINS-Import

5.4.28. According to article 8, paragraph 14 of Law 10865/2004, as amended by Law 10925/2004, the tax rates of both PIS-Import and COFINS-Import were reduced to zero on the amounts paid, credited, delivered, used or remitted to the individual or company resident or domiciled abroad, as leasing payments and rents for machines and equipment, vessels and aircraft used in the company's activities.

(G) Repossession of the leased goods under leasing agreements

5.4.29. In the event lessee defaults its obligations under the leasing agreement, the most appropriate legal action for lessor to promptly repossess the leased goods would undoubtedly be the filing of a repossession suit, which applies to both domestic and cross-border leasing transactions in which lessee is established in Brazil. In both cases, the concept of leasing applies, by which lessor keeps indirect possession of the goods, whereas lessee keeps only its physical possession.

5.4.30. It is extremely important that lessee be notified of its default before lessor pursues any judicial measures against lessee. Brazilian courts are almost unanimous in sustaining that lessee must be assured a formal opportunity to cure its default.

5.4.31. Two types of notices should be sent to lessee before a repossession suit is filed: (i) Notice of Default; and (ii) Notice of Termination.

5.4.32. In the Notice of Default lessor notifies lessee of its default on the obligations stipulated in the leasing agreement. If lessee fails to cure its default after receiving said notice, lessor should then send lessee a Notice of Termination, pursuant to which the leasing agreement is deemed terminated for lessee's default. After delivering such notice, lessor generally grants lessee a period to amicably return the goods. If the goods are not returned, wrongful possession will be characterized, constituting solid grounding for the repossession action.

5.4.33. Upon termination of the leasing agreement thru the Notice of Termination, lessor may repossess the goods thru a due legal process, which may follow the course of: (i) a summary (fast track) proceeding, if the proceeding is filed within one year from characterization of the wrongful possession; or (ii) regular (cognizance track) proceeding, if the proceeding is filed one year after the wrongful possession is characterized.

5.4.34. If the repossession suit is filed in up to one year from characterization of wrongful possession (summary repossession action) lessor may claim a preliminary injunction without need of hearing lessee in court, provided that the legality of the injunction claim is sufficiently demonstrated. If the facts underlying lessee's default do not convince the judge, the latter may order the hearing of both lessee and lessor. If lessor's arguments are found well grounded, a court order for repossession will be issued; otherwise, lessee will be allowed to submit its defense.

5.5. Conclusion

5.5.1. This paper has addressed the nuances and characteristics of the leasing transactions under Brazilian law. Leasing transactions, whether in the form of domestic or cross-border leasing, are very complex and thus should be properly and carefully structured so as to meet the parties' needs with the lowest tax impact,

in compliance with the applicable regulations, thereby easing the obtaining of the required authorizations and ensuring that the rights and obligations of the owner and/or lessor of the goods, as well as lessee, are duly protected and described in the documentation that supports the transaction.

6. PUBLIC BID PROCEEDINGS

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Public Bid Proceedings and Government Contracts

6.1. Introduction

This chapter outlines the procedures and main rules established in Brazilian law for contracts between private parties and Governmental Authorities, addressing the procedure that precedes the execution of any contract with the Government (the Bid Proceeding) and the rules that apply to the formal requirements and implementation of contracts between private parties and the Government (Governmental Contracts).

6.2. Bid proceeding

While contracts between private parties are governed by private law, in which the principle of the parties' free will to contract applies, in the contracts entered with the Government there are certain rules and principles inherent to the Government its activities that must be observed. Such basic rules are set out in Article 37 of the Federal Constitution, which provides that the Government is required to observe the "*principles of legality, impartiality, morality, publicity and efficiency*". Specifically in regard to the entering of contracts, article 37, XXI of the Constitution provides that "*public works, services, purchases and sales shall be contracted through a public bid proceeding that assures equal conditions to all bidders, with clauses that establish payment obligations, maintaining the conditions that were previously proposed by the bidder, pursuant to the law.*"

Therefore, the bid proceeding is a procedure that precedes the execution of any contract with the Government, through which the governmental entity offers to all interested parties, on equal conditions, the opportunity to submit bids to the Government – observing the conditions previously established in the bid invitation – among which it will select the most convenient.

(A) Regulations

The requirement for holding a bid proceeding before a contract may be entered with the Government is established in Article 37, XXI of the Constitution and regulated by Law 8.666 of June 21, 1993 (the "Public Bid Law")¹⁸. Further, another important regulation is Law 10.520 of July 18, 2002, which established the bidding rules for the reverse auction type bidding proceeding (*pregão*), that it is now mandatory for the acquisition of simple assets and services.

(B) Applicable principles

In order to fully comprehend both the bid proceeding and the rules that apply to contracts with the government, it is necessary to briefly address the main principles that apply thereto, which are established in both the Federal Constitution and in Law 8.666/93¹⁹:

¹⁸ As amended by Law 8.883 of June 8, 1994, Law 9.648 of June 27, 1998 and Law 9.854 of October 27, 1999.

¹⁹ Article 3 of Law 8.666/93: "The bid is intended to warrant the abidance by the constitutional principle of equality and to select the proposal that is most advantageous to the Government and shall be processed and strictly in conformity with the basic requirements of legality, impartiality, morality, equality, publicity, administrative honesty, binding to the bid invitation, objective awarding and of those related thereto."

(i) *Principle of equality* – This is a constitutional principle that is also established in the Public Bid Law, being one of the basic pillars of the public bid. According to this principle, all private parties have the right to participate in equal conditions in the bid and the corresponding bid invitation cannot establish discriminatory clauses or conditions that favor or imply in the favoring of one of the bidders to the detriment of the others.

(ii) *Principle of legality* – While Private Law is governed by the principle of the parties' free will to contract, which means that “*what is not prohibited is allowed*”, the government agent is only allowed to act within the limits that are established by the law, that is, only what is expressly established in the law is allowed. Accordingly, the principle of legality determines that the bid proceeding must strictly abide by the procedural rules established in Law 8.666/93, the Government not being allowed to change such procedural rules or establish participation or decision criteria different than the criteria established by the law.

(iii) *Principle of impartiality* – The principle of impartiality – which is closely bound to the principles of equality and objective awarding, establishes that all bidders must be treated equally in regard to their rights and obligations and that the Government must be guided by an objective criteria that supports its decisions. The Government cannot, therefore, take into account the personal conditions of the bidder or any advantages that the bidder may offer that are not foreseen in the law or in the bid invitation.

(iv) *Principle of morality (honesty)* – The principle of morality requires that the governmental administrator must abide by the standards of morality and proper costumes and that the administrator's conduct must envision primarily the public interest.

(v) *Principle of publicity* – The principle of publicity establishes that the bid proceeding must be public, in no event secret or confidential²⁰, and that any interested party may access the acts and decisions that occurred in the course of the proceeding.

(vi) *Principle of abidance by the bid invitation* – The principle of abidance by the bid invitation determines that the rules, conditions and awarding criteria established in the bid invitation must be abided by both the bidders and the Government in all phases of the bid proceeding, since the opening thereof up to the signing of the governmental contract related to the bid²¹. If, in the course of the bid the Government deems necessary to change any part of the Bid Invitation, then it will be required to restart the entire bid proceeding, re-publish the Bid Invitation and allow all interested parties to submit new bids.

(vii) *Principle of objective awarding* – Closely bound to the principle of abidance by the bid invitation, the principle of objective awarding establishes that the government's decisions on the qualification of the bidders and on the bidders' bids (proposals) must always be supported by objective criteria previously established in the bid invitation. Thus, this principle intends to evade discretionary decisions by the Government in the selection of the winning proposal, which must necessarily be the bid that best fulfills the requirements established in the bid invitation.

(viii) *Principle of formal procedure* – This principle compels the Government to abide by all rules and provisions established in the law and regulations for development of the bid proceeding and ensures compliance with the principles of equality and legality, to the extent that all the participating bidders “*have a subjective public right to the full compliance with the related proceeding*”²². Therefore, the principle of formal procedure is intended to ensure and monitor application of the other principles described above.

(C) Parties entitled to participate in bids – Domestic and international bids

²⁰ Article 3 of Law 8.666: “The bid proceeding shall not be private, being public and accessible to the public the procedural developments, except for the contents of the proposals until their opening”.

²¹ Article 45 of Law 8.666.

²² Article 4 of Law 8.666/9.

Any individual or company that fulfills the requirements for qualification established by the law and the corresponding bid invitation may participate in the bid. There are rules that apply to the participation of foreign companies in bid proceedings opened by governmental entities. In this regard, Law 8.666/93 establishes two types of bids, designated domestic bids and international bids.

The subject matter of national bidding procedures is necessarily to be performed in Brazil, and the respective payment must also be made in the country, in Brazilian currency. In addition to domestic companies, foreign companies may also be invited to participate in national bidding procedures when duly authorized to operate in Brazil under a presidential decree.²³

The international bids allow foreign companies that are not registered or operate in Brazil to participate in bids in which the subject matter of the bid is performed in a foreign country and the price proposals are established in foreign currency.

Law 8.666/93 also foresees the holding of bids for the purchase of products and services in which the payment thereof shall be made with financing extended by an international financial institution or a cooperation agency. In these cases the bid proceeding may be governed by rules established by such institutions or agencies²⁴, provided that they do not conflict with the Public Law provisions established by the Federal Constitution.

(D) Types of Public Bids

The public bid is a “gender” that has several types or “species”. Thus, the general bid rules apply to all types, but certain specific rules govern specifically the proceedings of each type of bid.

Law 8.666/93 establishes five types of bid proceedings²⁵: (i) competitive bidding; (ii) submission of prices; (iii) invitation; (iv) contest and (v) auction. On July 17, 2002, Law 10.520 introduced a new type of bid proceeding: (vi) the reverse auction (*pregão*). Each shall be addressed individually.

(i) Competitive bidding (*Concorrência*)

The Government adopts this type of bid proceeding particularly in contracts that involve large sums and also in highly complex works and services.

This type of bid is compulsory in the cases of: (i) purchase or sale of real estate, (ii) concession of use, (iii) concession of service, (iv) concession of public works, and (v) international bids, irrespective of the contract value²⁶. Further, the competitive bid may be adopted in the place of any other type, at the Government’s discretion²⁷.

(ii) Submission of prices (*Tomada de preços*)

²³ Article 1134 of the Civil Code: “The foreign company, regardless of its corporate purpose, may not, without the Executive Branch’s authorization, operate in Brazil, even through subordinated establishments; it may, however, excepting the cases established by law, be a shareholder of a Brazilian joint-stock company.”

²⁴ Article 42, paragraph 5: “In the performance of works, supply of services or purchase of products with resources provided by financing or donations extended by an official foreign cooperation agency or multilateral financing institution of which Brazil is a party, the conditions established under international agreements, protocols, conventions or treaties approved by the Brazilian Congress, as well as the rules and procedures adopted by such entities (...) may be accepted in the corresponding bid, provided that same are required for the extension of the financing or donations, which must also not conflict with the principle of objective awarding and that they are the subject of a grounded decision of the entity that performs the agreement, confirmed by the immediately higher-ranking authority.”

²⁵ Article 22 of Law 8.666.

²⁶ Article 23, paragraph 3 of Law 8.666.

²⁷ Article 23, paragraph 4 of Law 8.666.

The submission of prices is the type of bid in which companies that are previously registered with the Government as suppliers of a certain product or service are called to participate in a submission of prices type bid. In this type of bid the qualification of the bidders occurs when they register with the Government.

The maximum sum in the submission of prices bid established by Law 8.666/93 is R\$1.500.000,00 for works and engineering services and R\$ 650.000,00 for the contracting of other products or services. In contracts that exceed this limit a competitive bidding proceeding must be adopted.

(iii) *Invitation (Convite)*

The invitation is the simplest type of bid proceeding for contracts involving a sum of less than R\$150.000,00 for engineering works and services, and less than R\$ 80.000,00 for any other products and services.

In the invitation type bidding proceeding the Government must invite at least three companies to participate. Companies that were not invited may also participate, provided that they formally express to the Government their interest to participate and that they are registered as suppliers of the product or service that is the subject matter of the bid.

(iv) *Contest bidding (Concurso)*

The contest bidding consists in the type of bid held for the contracting of technical, scientific or artistic work, involving predominantly intellectual creation and a prize or compensation is awarded to the winning bidders²⁸ that have the best technique and not the lowest price.

Although it is classified among the types of bids, the contest has a special nature that differs from the others, considering that, though it is governed by the same principles of public disclosure and equality among the participants, certain formal requirements are dispensed.

(v) *Ascending-bid auction (Leilão)*

The auction is primarily intended, via formal and legal procedures, for (i) the sale of movable public assets of little or no utility to the Government, (ii) the sale of legally seized or attached property, or (ii) the sale of immovable public assets acquired as a result of a judicial proceeding or payment in kind²⁹.

In the other cases of sale of immovable properties the competitive type bid is mandatory³⁰.

(vi) *Reverse auction (Pregão)*

The reverse auction type bid proceeding is adopted by the Government for procurement of ordinary products and services, being defined as such those that are widely available on the market and whose performance and quality standards may be objectively defined in the bid invitation³¹.

This type of bid proceeding was recently consolidated in the Brazilian law. It is quite similar to the auction, however they differ in regard to the subject matter of the contract: while the auction is adopted to sell public property and obtain the highest offer possible, the reverse auction bid is adopted to purchase products or contract services at the lowest price.

(F) *Waiver and non-requirement for holding a bid*

Although the holding of a bid proceeding is required for the execution of contracts between the Government and a private party, the law foresees cases in which this requirement may be waived and the government may

²⁸ Article 22, paragraph 4 of Law 8.666.

²⁹ Article 22, paragraph 5 of Law 8.666.

³⁰ Article 17, I coupled with article 23, paragraph 3 of Law 8.666.

³¹ Article 1 of Law 10.520 of July 17, 2002.

contract directly, without previously holding a bid. These are the cases of: (i) waiver, or (ii) non-requirement for holding a bid.

The main difference between the two institutes is that in the waiver there is a possibility of competition that suffices to support the holding of a bid, however the law allows the option of its waiver. Such a decision is based on the discretionary power vested on the Government, though subject to the public interest.

For its part, bidding non-requirement applies when there is no possibility of competition, as there is only one entity to meet the demands of the Public Administration. In this case, bidding would be unviable and the Public Administration may enter into a contract directly with that private entity to meet the formers interests.

In the case of non-requirement, there is no possibility of competition as there is only a single party that fulfills the Government's requirements. Thus, the holding of a bid is unfeasible and the Government may contract directly with the single party that fulfills its requirements.

The law lists 20 cases of waiver of bid proceeding³² based on: (i) the low value of the contract, which does not cover the cost for holding a bid; (ii) exceptional circumstances (war, riot, emergency, public calamities, among others); (iii) the subject matter (purchase or lease of property intended for the Government's main activities, the installation or location of which condition its selection, purchase or restoration of art or historical objects, among others); and (iv) the party (purchase from a domestic governmental entity or of products or services supplied by a department or entity that comprises the Government and that was organized for such purpose, contracting of a Brazilian institution to engage in research, teaching or institutional development activities, among others).

The cases of non-requirement, on the other hand, pursuing from the unfeasibility of competition, occur in the cases³³ of: (i) purchases of materials, equipment or products that may only be supplied by an exclusive producer, company or commercial dealer, (ii) contracting of certain technical services of a unique nature performed by highly specialized professionals or companies³⁴, or (iii) contracting of artists acclaimed by specialized critics or public opinion.

(G) Procedure

The Government holds the bid proceeding to contract private services in the most advantageous and cost-effective way possible to the treasury. Thus, the final purpose of the procedure is always the execution of a contract.

Under administrative law, the expression "procedure" designates a series of preparatory acts conducive to the final purpose envisaged by the Government. According to this concept the bid is a procedure that requires a series of acts performed by the Government and the bidders, with the purpose of obtaining a final result consisting in the selection of the best proposal (bid) and awarding of the government (administrative) contract.

The bid proceeding commences with the disclosure of the opening of the bid through the publication of the bid invitation (*edital*), which establishes the requirements for participating, defines the subject matter of the bid and the contract conditions and invites all the interested parties to submit their proposals.

Upon the expiration of the deadline established in the Bid Invitation for the interested parties to submit documents and proposals commences the second phase of the proceeding, designated qualification³⁵. Thereupon, the Government receives in a public session sealed envelopes containing the bidders' qualification documents and their technical and commercial proposals. In this phase only the envelopes that contain the qualification documents are opened to examine exclusively whether they fulfill the requirements

³² Article 24 of Law 8.666.

³³ Article 25 of Law 8.666.

³⁴ According to the definition established in article 13 of Law 8.666/93.

³⁵ Article 43, I of Law 8.666.

to participate established in Law 8.666/93 and in the corresponding bid invitation. The qualifying of the interested party means, therefore, recognition that the bidder fulfills the requirements to compete in the bid.

Upon completion of the qualifying phase (inclusively with decision on any administrative appeals that might have been filed) the proceeding proceeds to its third phase, designated classification, whereby the Government decides on the technical and/or commercial proposals, classifying them in order of preference according to the objective criteria established in the bid invitation. The decisions are not discretionary, being bound to the criteria that the Government established, and it is based on the elements quality, performance yield, price, payment conditions, timeframes and other aspects related to the bid, and also the requirements established in the bid invitation, in line with what is determined in the principle of objective awarding³⁶.

The next phase is the confirmation followed by the awarding. The confirmation is the act of control in which the authority that is at a higher-ranking position than the authority that conducted the bid examines and confirms the bid proceeding. In such examination, if any irregularity is found in the proceeding, the cancellation, in whole or partially, of the proceeding shall be decreed. If all the rules established in the law and bid invitation we complied with, then the relevant authority holds powers to confirm it.

The awarding consists in the act whereby the Government, through the same authority that confirms the proceeding, awards to the winning bidder the subject matter of the bid. It is the final act of the proceeding, but is not to be mistaken with the effective execution of the contract. The Government shall call the winning bidder to sign the contract only after this act is performed.

(H) Cancellation or Revocation of the bid

The Government has the authority to suspend a bid proceeding at any time or even refrain from signing the government contract with the bidder that prevailed in the bid proceeding in two particular cases: (i) pursuant to the occurrence of an irregularity in the course of the proceeding --- cancellation of the bid --- or (ii) in the cases in which the performance of the subject matter of the bid is no longer satisfactory to the public interest due to a fact that prevails over the bid proceeding --- revocation of the bid³⁷.

In the event of cancellation, the invalidation of the bid or of a certain decision that was adopted in the course thereof pursues from an illegality. That is, in such an event, an irregular act is cancelled on the grounds of having been practiced in non-conformity with the applicable legal rules. It should be emphasized that the cancellation due to irregularity does not impose on the Government the obligation to indemnify the private party, except the *“duty to indemnify the contractor for what has already been performed by the date in which the cancellation is declared and for other losses that are properly proven”*.³⁸

On the other hand, revocation consists in the cancellation of the bid for reasons of public interest. It is, therefore, the governmental act through which the Government revokes the bid for circumstantial or convenience reasons, pursuant to the occurrence of a subsequent event that renders the performance of the subject matter of the bid undesirable to the public interest. A legal act is revoked, though undesirable and inconvenient to the Government.

(I) Administrative Appeal

Any act and decision of the Government that violates the rights of the private parties or that vest irregularities may be challenged before the Government, which has the duties of accepting any oppositions that are filed against its acts and of canceling any acts that are contrary to the law. This obligation pursues from article 5, item XXXIV “a” of the Federal Constitution, which warrants to all the right of submitting a

³⁶ Article 45 of Law 8.666: *“The decision of the proposals shall be objective and the bidding Commission or the party responsible for the invitation shall do so in accordance with the type of bid, the criteria previously established in the bid invitation and the elements exclusively referred therein, so to enable its evaluation by the bidders and by the entities that control it.”*

³⁷ Article 49 of Law 8.666: *“The relevant authority to approve the bid may only revoke the bid for reasons of public interest that pursue from a subsequent event that is duly proven, pertinent and that suffices to support such a decision, being incumbent to cancel the bid due to any irregularity, ex officio or at a third party’s request, upon a written and duly grounded opinion.”*

³⁸ Article 59, Sole Paragraph of Law 8.666/93.

motion to the Government “*to defend rights or against any irregularity or abusive conduct*”, and also pursues from the principle of legality, which compels the Government to cancel any illegal acts that it may have practiced.

The main instrument thru which the harmed private party may claim the Government to reconsider the decision that violated a right vested on the private party is generally designated administrative appeal.

Article 109 of Law 8.666/93 establishes the proceeding to be adopted in the event of the filing and decision of administrative appeals and oppositions that were filed against Government decisions. Specifically, hierarchical administrative appeals³⁹ may be filed against decisions that determine: (i) the qualification or non-qualification of the bidders; (ii) the decision on technical and/or commercial proposals; (iii) the cancellation or revocation of the bid proceeding; (iv) the rejection of the request for the applicant’s registration with the government, amendment thereto or the cancellation thereof, and (v) the unilateral termination of the government contract by the Government. In addition to the events expressly listed, any other type of decision issued in the bid proceeding that may harm the private party’s rights may be contested by way of a motion.

Law 8.666/93 establishes that the appeals that are filed against decisions that determine the qualification or disqualification of bidders or the decision on technical and/or commercial proposals will be stayed until a decision on the appeal is rendered. In any other cases the government authority may grant staying effects to the appeals, provided that supported by reasons of public interest.

6.3. Government contracts

This section outlines the main aspects of the contracts executed with the Government, emphasizing the faculties vested on the Government to which the private parties that contract with it are subject to, as well as the main conditions and clauses that are required to be included in such contracts. The government contracts are also regulated by Law 8.666/93 and subject to principles of administrative law that apply to the public bids.

(A) Legal regime and peculiar features

The first relevant aspect regarding the legal regime of government contracts is that they are governed by the principles of supremacy of the public interest over the private interest and the Government’s strict abidance by the public interest. These principles vests on the Government, as a contracting party, peculiar prerogatives that cannot be questioned or challenged by the private parties.

Therefore, unlike private contracts, in government contracts there is a vertical relation in which the private party is subject to certain rules imposed by the Government and to changes in the original conditions of the contract, providing, however, the economical-financial stability agreed between the parties is maintained.

Accordingly, the general features of the government contracts that stand out and that distinguish them from private law contracts are: (i) the presence of the Government in the contractual relationship; (ii) the contract is executed for a purely public purpose; (iii) there are compulsory special proceedings that are held prior to the contracting --- holding of a bid proceeding or of a proceeding that waives the holding of a bid proceeding; (iv) abidance by the substantial form determined by the law; (v) the contract has an *intuitu personae* nature, i.e. pursuing from the personal conditions of the contractor; and (vi) certain clauses of the contract may be unilaterally altered by the Public Administration to conform to public interest.

(B) Government Prerogatives

³⁹ *The administrative appeal must be filed in 5 business days as of the acknowledgment of the contested decision. Upon the filing thereof the other bidders shall be notified as to the filing thereof and shall have the opportunity to oppose it. Upon the expiration of the deadline for the filing of replies to the appeal the administrative authority that issued the decision may revert it or, in the event it is upheld, shall forward the records of the proceeding to the immediately higher-ranking authority, who shall have the authority to decide on the administrative appeal.*

Law 8.666/93 establishes that the Government may perform certain acts having an enforceable nature, and its prerogatives are ampler than in contracts entered into between private parties. These faculties are established in the so-called exorbitant clauses⁴⁰, which allow the Government to perform acts such as: (i) unilateral amendments (within certain extent and quality limitations) to the contract, to better suit the public interest, being however prohibited changes that imply in the change of the subject matter that was contracted; (ii) unilateral termination of the contract for reasons of public interest; (iii) survey the performance of the works or services; (iv) apply the administrative penalties for the complete or partial non-performance of the contract; and (v) in the cases of essential services, use temporarily movable or immovable property, personnel and services bound to the subject matter of the contract, in the cases established in the law.

The Government may change, within certain limits, the conditions for performing the contract by the private party, provided that such amendment aims at protecting public interests, the Government not being allowed to invoke its discretionary authority solely to jeopardize or punish the contractor.

(i) *Unilateral amendment and stability of the original economic and financial conditions*

The Government may amend the government contract unilaterally, without need of the private party's consent. However, Law 8.666/93 establishes that such amendments should occur in two particular cases⁴¹: to better adapt technical aspects of the contract to its objectives, or (ii) to change the contract value as a result of a quantitative increase or reduction in the subject matter, within the limits set out in law.

The Government may request amendments to the contracted subject matter, either in quality aspects (amendments to the project or its specifications, provided that they do not disfigure the subject matter of the contract) or in terms of quantity (increases or suppressions). The contractor is obligated to accept, in the same contractual conditions, any increases or suppressions that are introduced in the works, services or purchases of up to 25% (twenty-five percent) of adjusted original contract value and, in the specific case of restoration of buildings or equipment, up to 50% (fifty percent) for increases. Such amendments must be intended to better suit the public interest, pursuing from subsequent events.

However, the authority to unilaterally amend the contract is not absolute given the necessity to preserve the economical-financial stability between the parties, which consists in the proportionality of the burden borne by the contractor and the compensation thereof that were set when the contract was executed between the Government and the contractor. This means that, in the occurrence of any adjustments in the contractor's duties such as increases in the supply of services or shortening of the timeframes to perform the contract, the Government must, likewise, increase the contractor's compensation.

(ii) *Termination of the government contract*

Article 78 of Law 8.666/93 establishes the events of termination of government contracts, among which: (i) non-performance or delay to perform by the contractor; (ii) the subcontracting, total or partial assignment or transfer of the performance of the contract when not allowed under the bid invitation; (iii) the amalgamation, split or merger of the contractor without prior notice to the Government or changes in the corporate structure that pose difficulties to the performance of the contract; (iv) the repetition of defaults in the performance of the contract; (v) the declaration of the bankruptcy, civil insolvency or dissolution of the contractor; (vi) reasons of public interest, highly relevant and widely acknowledged; (vii) the interruption in the performance of the government contract at the order of the Government, for more than 120 days; (viii) a delay of more than 90 days in the payments owed by the Government; (ix) the non-release by the Government of an area, site, objects or materials that are needed to perform the contract; and (x) occurrence of fortuitous or force majeure events.

In the cases mentioned in (i) to (v) above the termination of the government contract may be unilaterally declared by the Government and the contractor shall not have the right to any indemnity for the termination

⁴⁰ Article 58 of Law 8.666/93.

⁴¹ Article 65, I of Law 8.666.

thereof (however the contractor is entitled to be indemnified for all of the work and services that were performed up to the termination of the contract).

In the cases of termination of the contract for reasons of public interest or the Government's failure to comply with its contractual obligations, which are mentioned in (vi) to (x) above, the Government shall be obligated to indemnify the contractor for all the losses that the contractor suffered, provided that properly proven. Hence, the contractor is entitled to claim, also, the return of the guarantee that it offered to the Government to warrant the performance of the contract, the payments owed up to the termination date and payment of demobilization costs⁴².

(iii) Monitoring performance of the administrative contract

More than an option or a right, the Government has the authority-duty of accompanying the contractor's activities, pursuant to the principle of the supremacy of the public interest⁴³. The permanent surveillance by the Government enables preventive control of the contractor's activities, allowing the adoption of precaution measures in the event the contractor commits any irregularities. The conditions according to which the surveillance will be performed may be established in the contract however this does not pose a restriction to the Government's prerogatives inasmuch that the Government has authority to exceed what was originally established in the contract on the grounds of public interest.

(iv) Imposition of penalties

In contracting with a third party the Government has the implicit power to impose and apply penalties for breach of the contract, the contractor being warranted its right to resort to court action.

As administrative penalties, warnings, fines for delays and compensatory fines (according to the contract), temporary impediment for the contractor to participate in public bids and impediment to contract with the Government for up to 2 years and the declaration of the contractor's lack of good standing in a proper administrative proceeding, may be applied. Law 8.666/93 also establishes the applying of criminal penalties to both the Government and the contractor that incur in certain defined illicit conducts during the course of the bidding procedures or during the execution of government contracts⁴⁴.

(v) Temporary use of products and services

In the case of essential services the Government may expropriate movable or immovable assets, personnel and services that are bound to the contract if there is any need to secure the administrative assertion of contractual breaches committed by the contractor, or in the event of termination of the government contract. Such expropriation is temporary and objective as it is intended to afford continuity to the services or works to resume the normal course of the contract.

(C) Contractor's rights and duties

The contractor's duty is to fully perform the obligations that were established in the contract, according to the clauses that were agreed and the rules established in the law. Moreover, the contractor is obligated to repair defects or incorporations that pursue from the performance, be accountable for the social security, labor, tax and commercial charges that pursue from the contract and for the damages that it caused directly to the Government or third parties.

The contractor is entitled to request the amendment of the government contract in the event of rupture of the economical-financial stability between the parties that existed when the contract was executed that pursues from the occurrence of unpredictable or predictable events, however of incalculable consequences, as

⁴² Article 79, paragraph 2 of Law 8.666.

⁴³ Article 67 of Law 8.666.

⁴⁴ Articles 89 thru 99 of Law 8.666.

determined in the Principle of Unpredictability and the *rebus sic stantibus* clause. Hence, the stability of the contract is an objective responsibility of the Government.

(D) Amendment or termination of the contract at the parties' mutual agreement

In addition to the faculties vested exclusively on the Government to amend the contract, it may also be amended at the parties' mutual agreement. Thus, in addition to the case of amendment to reestablish the economical-financial stability of the contract, Law 8.666/93 foresees the possibility of its amendment at the parties' free will when: (i) the replacement of the guarantee that warrants the performance of the contract is convenient, (ii) it is necessary to change the contract performance method; or (iii) it is necessary to amend the payment method.

Likewise, the contract may be terminated at the contractor's request or agreement between the Government and the contractor, provided that this is convenient to the Government and that this does not conflict with the public or community interests.

6.4. Conclusion

The foregoing is an overview of the procedure that the Government adopts to select the contractors with whom it will contract, and also on the general rules that govern the government contracts that pursue thereto. Regulated by Administrative Law, the contractual relation established between the contractor and the Government differs substantially from the contractual relationship between private parties, for which reason it must be strictly interpreted according to the provisions of the laws and, particularly, according to the rules established in Law 8.666/93.

7. REAL ESTATE PROPERTY LAW

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7.1. General aspects of real estate property law in Brazil

The Brazilian Federal Constitution expressly assures the right to own property⁴⁶. This right, however, is required to fulfill a social purpose⁴⁷.

In regard to real estate property, Brazilian law distinguishes urban property from rural property. And for this reason the Federal Constitution repeats and specifies the fundamental principle of the social purpose of the property to each of them separately, i.e. the social purpose of the urban real estate property⁴⁸ and the social purpose of the rural real estate property⁴⁹.

In general, the principle of the social purpose of the property should be taken as one of the guidelines of the economical and financial system adopted by Brazil⁵⁰.

As concerns the social purpose, the government may use the private property in a case of potential public threat, being assured a subsequent indemnity to the owner if any damages are caused⁵¹. However, the expropriation of the property requires a demonstration of the need or of the public utility or of the social interest thereof, upon a fair and prior cash indemnification⁵². Thus, the expropriation of urban real estate shall also be implemented upon a prior and fair cash indemnification⁵³. The same rule, however, does not apply to the rural real estate that is expropriated for agrarian reform purposes when such property is not being used for its social purpose⁵⁴. Note, however, that the small and mid-sized rural estate properties (provided that the owner does not own another real estate) and also the productive rural estate cannot be expropriated for agrarian reform purposes⁵⁵. The social purpose is attained when the rural property fulfills simultaneously the requirements of rational and adequate use of the land, adequate use of the natural resources available thereon and preservation of the environment, compliance with the laws that regulate labor relationships and that concern the exploitation that is beneficial to both the owners and the workers⁵⁶.

Also other basic rules of the Brazilian real estate property policy are already incorporated in the Federal Constitution, which contains specific chapters on the urban policy⁵⁷ and sets out the basic guidelines of Brazil's rural property policy. It should be quoted that Brazil still has serious social problems that reflect directly over the legal issues related to real estate property. In the larger urban cities they consist in issues related to urban planning, sanitation, housing, noise and environmental pollution that require solutions also at

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⁴⁶ Article 5, XXII of the Federal Constitution of Oct. 5, 1988. In the Brazilian Civil Code of 2002 the right to own property is regulated by articles 1228 through 1368.

⁴⁷ Article 5, XXIII of the Federal Constitution of Oct. 5, 1988.

⁴⁸ Article 182, Paragraph 2 of the Federal Constitution of Oct. 5, 1988.

⁴⁹ Article 186 of the Federal Constitution of Oct. 5, 1988.

⁵⁰ Article 170, III of the Federal Constitution of Oct. 5, 1988.

⁵¹ Article 5, XXV of the Federal Constitution of Oct. 5, 1988.

⁵² Article 5, XXIV of the Federal Constitution of Oct. 5, 1988, and in regard to the legislation hierarchically under the Federal Constitution, particularly Decree-law 3.365 of June 21, 1941; Law 4.132 of Sept. 10, 1962; Law 6.602 of Dec. 7, 1978; Decree-law 1.075 of Jan. 22, 1970; Supplementary Law no. 76 of July 6, 1993; Law 9.785 of Jan. 29, 1999; and Law 10.406 of Jan. 10, 2002 (Article 1228, Paragraph 3).

⁵³ Article 182, Paragraph 3 of the Federal Constitution of Oct. 5, 1988.

⁵⁴ Article 184 of the Federal Constitution of Oct. 5, 1988.

⁵⁵ Article 185, *caput* of the Federal Constitution of Oct. 5, 1988.

⁵⁶ Article 186 of the Federal Constitution of Oct. 5, 1988.

⁵⁷ Articles 182 and 183 of the Federal Constitution of Oct. 5, 1988, and at the sub-Constitutional level, particularly, Law 10.257 of July 10, 2001, regulating Articles 182 and 183 of the Federal Constitution, establishing general guidelines for urban policy, among other provisions (the City Statute) and for agricultural and rural property and agrarian reform (Articles 184 through 191 of the Federal Constitution of Oct. 5, 1988).

the juridical level. In the rural areas, the social problems that stand out relate to the fair distribution of the land, rational use of the land and its natural resources and also infrastructure issues.

7.2. Purchase of real estate property by foreigners

In this regard it is necessary to distinguish the purchase of urban real estate from rural real estate. Concerning the former, in principle there are no restrictions imposed ~~against~~ to foreigners. Thus, for example, a foreigner may purchase an apartment located in a Brazilian coastal town. This is also possible for other investment purposes such as, for example, the purchase of buildings or office space for rental. The situation changes, however, when a foreigner intends to purchase rural estate property in Brazil. In these cases the Federal Constitution imposes restriction to the purchase or rental of a rural estate property by foreign individuals or companies⁵⁸. Furthermore, there exists specific legislation that regulates the purchase of rural estate by a foreigner in Brazil⁵⁹. There are other restrictions regarding real estate located on the coastline, on the borders or in areas considered as national security areas⁶⁰. Such real estate is designated public property⁶¹ and includes, among others, river and lagoon islands at the borders with other countries; the seacoast beaches; oceanic islands and coastal islands⁶².

Often, the foreigner purchases real estate in Brazil to carry out an economical activity such as, for example, a hotel or beach resort, land development, construction of residential or business purpose buildings, etc. In such events it is indispensable that the foreigner abides by the specific laws that apply to these types of activities. Unfortunately, I have noticed that many foreign investors fail to do so. Consequently, their investment in practical terms is defective and this causes financial losses and wear out that could have been avoided through proper planning and advice. Another aspect that must be considered is the selection of competent and trustworthy administrators in the event the owner itself will not economically explore directly the property that was acquired. The contracts to retain such administrators and staff and also with any tenants, lessors or similar parties who are retained, must be well drafted so that there are no doubts as to the real nature of the contractual relationship between the parties. Not rarely a owner will find itself involved in court disputes in which, to the owner's surprise, what is being discussed is the ownership right per se. Especially in rural areas the *usucapião* (a type of acquisition of an ownership right through possession) is a frequent form of acquiring of real estate property and also in the urban areas the legislator is easing the acquisition of real estate property through *usucapião*⁶³. In this regard Brazilian law is quite different from Swiss law, where the acquisition of real estate property through *usucapião* is almost inexistent, though this legal institute is also regulated by law in Switzerland.

7.3. Basic rules for the acquisition of real estate

In this work the author limits himself to address the acquisition of real estate property between existing parties (*inter vivos*) by way of transcription of the deed of transfer of property with the relevant registry of real estate⁶⁴, which is the most important form of acquisition that is practiced, particularly when the purchaser is a foreigner. It should be emphasized that under Brazilian law the purchaser is not considered to

⁵⁸ As provides to this extent Article 190 of the Federal Constitution of Oct. 5, 1988.

⁵⁹ As provides Law 5.709 of Oct. 7, 1971, which regulates the purchase of rural property by a foreigner that resides in Brazil or by a foreign company authorized to operate in Brazil, among other provisions; Decree 74.965 of Nov. 26, 1974, (regulates Law 5.709 of Oct. 7, 1971, which provides on the purchase of rural real estate property by a foreigner that resides in Brazil or by a foreign company authorized to operate in Brazil).

⁶⁰ Article 20, Paragraph 2 of the Federal Constitution of Oct. 5, 1988, as revised by Amendment n. 46/2005; Law 6.634 of May 2, 1979, which provides on the Border Strip area, modifies Decree-law 1.135 of Dec. 3, 1970, among other provisions; Decree 85.604 of August, 1980, which regulates Law 6.634 of May 2, 1979, which provides on the Border Strip area.

⁶¹ Article 20 of the Federal Constitution of Oct. 5, 1988.

⁶² Articles 20, IV and 26, II of the Federal Constitution of Oct. 5, 1988.

⁶³ Regarding the real estate ownership right acquired through period of possession (*usucapião*) established in Brazilian law, may be quoted Newman Debs, *Aquisição e perda da propriedade - Usucapião: Roupagem dada pelo Novo Código Civil*, published in RT 811:24-34, 2003, among several other authors.

⁶⁴ Articles 1.245 - 1.247 of the Brazilian Civil Code of 2002.

be the owner of the real estate⁶⁵ until the deed of transfer of ownership is registered with the Real Estate Registry (*Registro de Imóveis*)⁶⁶. The deed of transfer states the cause of purchase, e.g. a purchase and sale agreement, which is the most common transaction in deals that involve real estate property⁶⁷.

In Swiss law, the *bona fide* purchaser may trust the contents of the registration recorded by the Real Estate Registry⁶⁸. In Brazilian law, the situation is quite different. Therefore, it is not advisable to examine solely the certificate of registration issued by the Real Estate Registry related to the property that is intended to be purchased. According to the type of real estate, it is necessary to apply for a considerable number of other documents and certificates, inclusively concerning the seller's status. Thus, it is advisable that an inexperienced purchaser retains a specialist to review all of the documentation concerning the real estate property that is intended to be purchased in Brazil. Only if the result of the review indicates to the purchaser that the risks are minimal (a risk-free deal is almost impossible), the transaction (e.g. purchase and sale agreement) should the deal be executed. The purchaser should always personally visit the real estate before signing a formal commitment⁶⁹.

Often, the buyer and seller execute beforehand a formal commitment (*instrumento particular de compromisso de compra e venda*)⁷⁰ prior to executing the final purchase and sale agreement⁷¹ on which occasion the full price of the deal is paid. This type of contract must be in the form of a public deed (*escritura pública*), which is drafted before a notary public (*cartório*). In the event the contract does not vest this form it is not valid and cannot be registered with the Real Estate Registry⁷². To secure the real estate property the buyer usually makes a down payment (*signal*). The seller must then present within a certain period all the documentation required by the buyer. If the documentation is incomplete or otherwise unsatisfactory, the buyer is entitled to receive the full amount of the down payment that it paid and the purchase of the real estate will not materialize.

In case the deal that is intended involves the purchase of urban or rural real estate, land or allotment, residential, commercial or industrial real estate, new or used real estate, real estate that is being built under an incorporation or condominium arrangement, real estate paid in a lump sum, installments or through third party financing, etc., specific rules apply to the individual case which the foreign buyer usually is not familiar with. Therefore, it is advisable to retain a specialist that is able to assist the foreign buyer in regard to the legal aspects pertaining to the deal.

Often the real estate property is negotiated with a real estate broker⁷³. In Brazil the fee (*comissão*) that is paid to the real estate broker is higher than the fee that is paid in Switzerland, depending on the type of real estate that is purchased, i.e. house, apartment, land, rural real estate (ranch, farm), beach house or apartment, etc. The seller usually pays the broker's fee, but the buyer could pay it in the event there is unquestionable proof that the initiative of procuring mediation was on behalf of the buyer, i.e. when the buyer retained the broker's services⁷⁴.

⁶⁵ Articles 79 - 81 of the Brazilian Civil Code of 2002 provides that the land and all that is naturally or artificially incorporated thereon are considered immovable property, as well as for legal effects: I – ownership rights on real estate property and the legal action that protect the same; II – the right to inheritance. On the other hand, the following does not lose the status of real estate: I – the buildings that, separated from the land but preserving their unity, are relocated to another place; II – materials that are temporarily segregated from a building that will be later redeployed thereon.

⁶⁶ Article 1.245, Paragraph 1 of the Civil Code of 2002.

⁶⁷ In regard to the purchase and sale agreement, refer to Articles 481 - 532 of the Civil Code of 2002. Considering the sale of real estate, Article 500 of the Civil Code distinguishes the sale *ad corpus* from *sale ad mensuram*. Regarding the interpretation thereof, as quotes Paulo Luiz Netto Lôbo, in *Comentários ao Código Civil*, Articles 481 to 564, vol. 6, Saraiva, São Paulo, 2003, pages 107 - 121.

⁶⁸ As provides Article 973 of the current Swiss Civil Code.

⁶⁹ In the case of real estate for residential purposes, for example, the buyer is advised to visit the site at different hours, asserting with the neighbors any inconveniences, the infrastructure and services, such as school, transportation, bakeries, supermarkets, etc.

⁷⁰ Regarding the commitment to purchase and sale, among many others, Leonardo Ferres da Silva Ribeiro, *Compromisso de compra e venda - Constitui-se, ou não, em contrato preliminar?*, published in RT 814:44-62, 2003.

⁷¹ Under Brazilian law, the committed buyer holds an ownership right in the purchase and sale commitment, provided that the contract fulfills the requirements established by the law. As provides Articles 1.417 and 1.418 and 1.225, VII of the Civil Code of 2002.

⁷² Articles 108 and 215 of the Civil Code of 2002.

⁷³ The brokerage agreement is regulated by Articles 722 - 729 of the Civil Code of 2002.

⁷⁴ As per the ruling of the Civil Court of Appeals 2º TACivSP, published in RT 814:252-259, 2003.

7.4. Real estate funds

The Real Estate Funds are regulated and controlled by the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários – CVM*) since it consists in a capitulation of public resources for investment⁷⁵. Hence, they characterize capital market instruments.

The quota of a real estate fund is a variable yield security. Its issuance for subscription occurs through a public offer and it may be sold or negotiated in the secondary market, i.e. it is not redeemable since the quota holder must sell it as if it were a share of an open capital company. Its yield is bound to the value of rents and the real estate valuation of the real estate bound to the Real Estate Fund. The foreigner, whether an individual or company, is allowed to invest in Real Estate Funds.

The Real Estate Funds are formed by groups of investors with the purpose of applying resources jointly in real estate development or in new real estate, usually directed to major investments such as shopping malls, hotels and other high-class commercial buildings. Currently, the investments are concentrated in institutional investors such as pension funds, insurance companies and incorporation companies.

The Real Estate Funds are always administrated by a Financial Institution under the surveillance of the CVM, upon the payment of an administration fee paid by the quota holder.

The Real Estate Funds are tax-free, including income tax, which is levied only on the financial revenues yielded through the allocation of the fund's cash availabilities in the distribution of dividends to the quota holders and over the capital gain that the quota holder obtains in the sale of its quotas. The current tax laws determine a withholding of 20% of the yield that was distributed and of the capital gain⁷⁶.

Sixty-two funds with a patrimony of R\$2.024 billion were registered with the CVM in May 2003.⁷⁷

7.5. Taxation of real estate property

Both the rural and urban real estate property are taxed in Brazil. Currently, the rural real estate property tax (ITR) is charged by the Federal Government⁷⁸. The tax rates of this tax are established in a manner to discourage the maintaining of unproductive properties and it is not levied on small rural properties provided that the owner exploits it, per se or with his ~~the owner's~~ family ~~or on~~ and the owner ~~that~~ does not own other real estate property⁷⁹. The urban real estate property tax (IPTU) is charged by the Municipality⁸⁰. It is controversial to what extent this tax may be progressive based on the real estate's nominal value (*valor*

⁷⁵ In regard to the legislation, refer in particular to Law 8.668 of June 25, 1993, which provides on the organization and the taxation of the Real Estate Investment Funds among other provisions; Law 9.779 of Jan. 19, 1999, which regulates the taxing thereof; Ordinance (*Instrução*) 205 of the Brazilian Securities and Exchange Commission (CVM) of Jan. 14, 1994, providing on the organization, operation and the management of the Real Estate Investment Funds; CVM Ordinance 206 of Jan. 14, 1994, which provides on the accounting rules that apply to the financial statements of the Real Estate Investment Funds; and also CVM Ordinance no. 389 of Jan. 14, 1999, which amends Article 27 of Ordinance no. 205.

⁷⁶ Source: Mr. Leônidas Zelmanovitz, CVM – Brazilian Securities and Exchange Commission.

⁷⁷ Source: Mr. Leônidas Zelmanovitz, CVM – Brazilian Securities and Exchange Commission.

⁷⁸ Article 153, VI of the Federal Constitution of Oct. 5, 1988

⁷⁹ Article 153, *caput*, Paragraph 4 of the Federal Constitution of Oct. 5, 1988. Further, in particular, regarding Laws: 9.393 of Dec. 19, 1996 providing on the Real Estate Property Tax (ITR), with regard to the payment of debt represented by Agrarian Debt Bonds among other provisions; 8.847/1994, which provides on the Rural Real Estate Property Tax (ITR) among other provisions; 8.022/1990, which amends the system of administration of federal revenues, among other provisions; and also Decree 4.382/2002, which regulates the taxing, surveillance, collection and administration of the Rural Real Estate Property Tax (ITR). A general, updated and complete overlook of the taxation of the rural real estate property in Brazil is addressed in the Federal Revenues website: <http://www.receita.fazenda.gov.br>.

⁸⁰ Article 156, I of the Federal Constitution of Oct. 5, 1988.

venal) and present different tax rates according to the place where it is located and its intended use⁸¹. If the urban real estate does not fulfill its social purpose for lack of fulfillment of the basic requirements of order of the city established in the directive program, its taxation will be stricter⁸². Note that the Federal Government has the authority to tax large fortunes⁸³. Up to this date, however, this has not yet been regulated.

Under Brazilian law, in addition to the taxation of property, real estate transferred through an *inter vivos* deal, for any reason and upon payment, naturally or by physical accession, and ownership rights over real estate, except guarantees, as well as the assignment of acquisition rights, are subject to the ITBI tax. This tax is levied by the Municipality⁸⁴ that has jurisdiction over the place where the real estate is located⁸⁵. However, this tax is not levied over the transfer of property or rights that are incorporated to the patrimony of a company through capital realization, or in the transfer of property or rights pursuant to an amalgamation, merger, split-off or extinction of a company, unless in these cases the main business of the buyer consists in the purchase and sale of such property or rights, real estate rental or leasing⁸⁶.

Another tax, which applies in the *causa mortis* transfer and donation of any property or rights (abbreviated ITCMD tax) is levied by the States and the Federal District⁸⁷. In regard to real estate and the corresponding rights, the State that has jurisdiction over the place where the real estate is located or the Federal District, if it is located there, shall be the competent authority⁸⁸. The maximum tax rate allowed is eight percent⁸⁹. In São Paulo, for example, Law 10.705 of Dec. 28, 2000 provides on the levying of the *Causa Mortis* Transfer of Real Estate Property Tax and Donation of Any Type of Property or Rights (ITCMD) current applies to this matter, which law is regulated by Decree 45.837 of June 4, 2001.

Finally, it should be emphasized that not only individuals that reside and are domiciled in Brazil but also those who reside abroad and own property and rights located in Brazil and that are subject to public registration, particularly real estate, must be enrolled with the Taxpayers Registry (*Cadastro de Pessoas Físicas – CPF*) of the Federal Revenue (SRF)⁹⁰. Likewise, both companies that are established in Brazil and those that are established abroad are required to be enrolled with the Corporate Taxpayers Registry (*Cadastro Nacional da Pessoa Jurídica – CNPJ*) of the Federal Revenue (SRF) upon the purchase of real estate in Brazil⁹¹.

Currently, the Brazilian Congress is discussing a broad reform of the tax system, which will reflect on the taxation of real estate property in Brazil.

7.6. Real estate lease

Brazilian law distinguishes the lease of urban real estate⁹² from the lease of real estate for agricultural or agrarian purposes, such as rural leases and the agricultural partnership⁹³. Thus, the urban lease covers all the

⁸¹ As provides Normative Ordinance (*Instrução Normativa*) SRF no. 200 of Sept. 13, 2002, specifically Article 12, Paragraph 4 thereof, but contrary the rulings of the Brazilian Supreme Court and in the State of São Paulo, 1.º TACivSP, Ap 1.212.358-7 – 8. CâM. – j. 18.02.2004, RT, 827:273-277, 2004.

⁸² Article 156, Paragraph 1 of the Federal Constitution of Oct. 5, 1988, with the harmonized wording provided by Constitutional Amendment no. 29/2000 to Paragraph 1, I and II.

⁸³ Article 156, VII of the Federal Constitution of Oct. 5, 1988.

⁸⁴ Article 156, II of the Federal Constitution of Oct. 5, 1988. Abiding precedent (*súmula*) no. 656 of the Supreme Court (STF) establishes the unconstitutionality of any law that establishes progressive tax rates for the *inter vivos* real estate property inheritance tax (ITBI) based on the property's nominal value.

⁸⁵ Article 156, Paragraph 2, II of the Federal Constitution of Oct. 5, 1988.

⁸⁶ Article 156, Paragraph 2, I of the Federal Constitution of Oct. 5, 1988.

⁸⁷ Article 155, I of the Federal Constitution of Oct. 5, 1988.

⁸⁸ Article 155, Paragraph 1, I of the Federal Constitution of Oct. 5, 1988.

⁸⁹ Article 155, Paragraph 1, IV of the Federal Constitution of Oct. 5, 1988; Senate Resolution no. 9 of May 5, 1992, which establishes a maximum tax rate for the *Causa Mortis* Property Inheritance and Donation Tax, referred to in Article 155, I “a” and its Paragraph 1, IV of the Federal Constitution.

⁹⁰ As provides Normative Ordinance (*Instrução Normativa*) SRF no. 190 of Aug. 9, 2002, and particularly Article 2, X “a” thereof.

⁹¹ As provides Normative Ordinance (*Instrução Normativa*) SRF no. 167 of June 14, 2002, specifically its Article 14, Paragraph 4.

⁹² Article 1, caput, of Law 8.245 of Oct. 18, 1991, which provides on the lease of urban real estate and the procedures related thereto.

real estate property that is intended for residential, trade, industry, educational, health, leisure, cultural, amusement, sport purposes, regardless of where it is located, when it is not intended for agricultural or agrarian exploitation purposes⁹⁴. Specific rules, however, apply to the real estate owned by the Federal Government, the States and the Municipalities, as well as the agencies and public foundation thereof⁹⁵; to the independent garage parking spaces or car parking spaces⁹⁶; to the space intended for publicity⁹⁷; to the flat hotels, residence hotels or the like, being considered as such those that supply regular services to the user and that are authorized to operate as such⁹⁸; to any type of leasing operation⁹⁹. Heretofore follow comments solely on some of the basic rules of urban leases of interest to the foreign investor.

A single law – Law 8.245 of Oct. 18, 1991, which provides on the lease of urban real estate and the related procedures, basically regulates the urban lease¹⁰⁰.

In regard to the urban lease, there is extensive jurisprudence in Brazil, most already consolidated. For this reason, it may be affirmed that in this matter the legal protection is significant. Less satisfactory is the length of time that elapses until the suits are ruled, particularly eviction suits based on the non-payment of rent and charges of the lease, which are the most common, in which the landlord claims the termination of the lease against the tenant, coupled with a claim for collection of the unpaid rents and charges of lease that are in arrears. However, the Judiciary's slow pace is not limited only to lawsuits involving urban leases.

Brazilian law distinguishes the residential lease¹⁰¹ from the non-residential lease¹⁰². It also establishes the temporary (vacation) lease¹⁰³ which is intended for the tenant's temporary residence, for leisure purposes, for holding courses, health treatment, construction work in the owner's property and other events that have a temporary nature and contracted for a period not longer than ninety (90) days, whether the real estate has furniture or not¹⁰⁴. In the temporary lease the law does not require certain guarantees in favor of the tenant that are generally established for leases, since the contractual relationship between the landlord and the tenant is short and predetermined.

In regard to the lease for residential purposes, there are differences between the lease for a certain period and for an indefinite period. In the latter, the tenant may terminate the lease upon written notice to the landlord at least thirty (30) days in advance¹⁰⁵. The same term applies in regard to the landlord¹⁰⁶. In the lease for a certain period, which is the rule, in principle the landlord cannot repossess the leased property¹⁰⁷. In the written lease agreements that have a term equal or longer than thirty (30) months, the agreement terminates upon the expiration of the term, without need of notification or notice¹⁰⁸. Since the landlord is free to do so, residential leases that have a 30-month term are common. Without prejudice to such contractual term, the lease agreement may always be terminated by mutual agreement¹⁰⁹ in the event of statutory or contractual breach¹¹⁰ pursuing from non-payment of rent and/or the other charges accruing thereon¹¹¹ and in the event of need of urgent repair¹¹². In addition to these cases, the current law foresees other cases, allowing,

⁹³ Articles 92 – 96 of Law 4.504 of Nov. 30, 1964, which provides on the Land Statute, among other provisions; Articles 13 – 15 of Law 4.947 of Apr. 6, 1966, establishing Agrarian Law rules and on the organization and operation of the Brazilian Agrarian Reform Institute, among other provisions; Decree 59.566 of Nov. 14, 1966.

⁹⁴ As quotes Gildo dos Santos, in *Locação e despejo*, 4. ed., RT, São Paulo, 2001, page 51.

⁹⁵ Article 1, Sole Paragraph, a) 1 of Law 8.245 of Oct. 18, 1991.

⁹⁶ Article 1, Sole Paragraph, a) 2 of Law 8.245 of Oct. 18, 1991.

⁹⁷ Article 1, Sole Paragraph, a) 3 of Law 8.245 of Oct. 18, 1991.

⁹⁸ Article 1, Sole Paragraph, a) 4 of Law 8.245 of Oct. 18, 1991.

⁹⁹ Article 1, Sole Paragraph, b) of Law 8.245 of Oct. 18, 1991.

¹⁰⁰ Rules on the leases of things are also established in Articles 565 - 578 of the Civil Code of 2002.

¹⁰¹ Articles 46 – 47 of Law 8.245 of Oct. 18, 1991.

¹⁰² Articles 51 – 57 of Law 8.245 of Oct. 18, 1991.

¹⁰³ Articles 48 – 50 of Law 8.245 of Oct. 18, 1991.

¹⁰⁴ Article 48, *caput* of Law 8.245 of Oct. 18, 1991.

¹⁰⁵ Article 6, *caput* of Law 8.245 of Oct. 18, 1991.

¹⁰⁶ Article 46, Paragraph 2 of Law 8.245 of Oct. 18, 1991.

¹⁰⁷ Article 4, *caput* of Law 8.245 of Oct. 18, 1991.

¹⁰⁸ Article 46, *caput* of Law 8.245 of Oct. 18, 1991.

¹⁰⁹ Article 9, I of Law 8.245 of Oct. 18, 1991.

¹¹⁰ Article 9, II of Law 8.245 of Oct. 18, 1991.

¹¹¹ Article 9, III of Law 8.245 of Oct. 18, 1991.

¹¹² Article 9, IV of Law 8.245 of Oct. 18, 1991.

exceptionally, the landlord to repossess the real estate leased by the landlord¹¹³. The tenant, on the other hand, also in the course of the lease period established in the lease may at any time return the leased property to the landlord, paying the fine established by the law¹¹⁴.

The lease that does not have the characteristics of the residential lease is considered a non-residential lease, but the lease is also considered to be a non-residential lease when the tenant is a company and the real estate is intended for use by the company's owners, directors, partners, managers, executive or employees¹¹⁵.

In the non-residential leases, as a general rule, the lease that has a predetermined term lawfully terminates upon the expiration of the term, without need of notification or notice¹¹⁶. On the other hand, the lease for an undetermined period may be terminated by the landlord, upon written notice, granting to the tenant a 30-day period to leave the property¹¹⁷. Special rules apply to the leases of real estate property used by hospitals, sanitary, official outlets, asylums, authorized health and school centers controlled by the Government, and also by duly registered religious organizations, in regard to which the lease agreement is subject to further restrictions¹¹⁸. Furthermore, in the lease of real estate intended for trade activities, and in the leases executed by industries and civil law, profit-purpose companies, the tenant has the right to renew the agreement in the cases established in the law¹¹⁹. Finally, Brazilian law establishes specific rules that apply to the relationships between storeowners and shopping mall entrepreneurs¹²⁰.

In practice, the landlord may require to the tenant, off the record, upon the execution of the corresponding lease agreement, in addition to the monthly rent, a certain amount in cash; or, further, the tenant may receive from the person to whom it is transferring its lease agreement a certain cash amount¹²¹. This consists in the charge of key money in the commercial lease¹²² which, according to the current legislation, in principle is forbidden, except in the lease of space in shopping malls and in the cases in which the tenant charges key money to the person to whom it transfers its lease agreement, which in this case characterizes a commercial lease¹²³.

Under Brazilian law, in principle the rent is freely convened between the parties, abiding by the raise criteria foreseen in the specific legislation. It is not allowed, however, to establish a rent in foreign currency and bind the rent amount to exchange variation or to the minimum monthly wage¹²⁴. Except in the cases of temporary (vacation) lease, the landlord cannot, in principle, require advance payment of the rent¹²⁵. On the other hand, the law establishes the lease guarantees that the landlord may require from the tenant¹²⁶. In the event the tenant is contractually obligated to also pay the taxes, charges and common expenses incurred by the condominium, which is common in most of the lease agreements, the landlord may charge such amounts jointly with the rent of the month in which they accrued¹²⁷.

The law regulates among other matters the tenant's right of first refusal to purchase the leased property in the event of its sale¹²⁸, indemnity for improvements that the tenant introduced in the course of the lease¹²⁹ and the tenant's legal status in the case of the sale of the leased real estate in the course of the lease agreement¹³⁰.

¹¹³ Article 47 of Law 8.245 of Oct. 18, 1991.

¹¹⁴ Article 4, *caput* of Law 8.245 of Oct. 18, 1991.

¹¹⁵ Article 55 of Law 8.245 of Oct. 18, 1991.

¹¹⁶ Article 56, *caput* of Law 8.245 of Oct. 18, 1991.

¹¹⁷ Article 56, Sole Paragraph and Article 57 of Law 8.245 of Oct. 18, 1991.

¹¹⁸ Article 53 of Law 8.245 of Oct. 18, 1991.

¹¹⁹ Articles 51 and 52 of Law 8.245 of Oct. 18, 1991.

¹²⁰ Articles 51 and 52 of Law 8.245 of Oct. 18, 1991.

¹²¹ Américo Luís Martins da Silva, *A cobrança de luvas na locação comercial*, RT 811:68, 2003.

¹²² Américo Luís Martins da Silva, reviewed quoted work, page 68.

¹²³ In this regard, Américo Luís Martins da Silva, reviewed quoted work, pages 67 - 77.

¹²⁴ Article 17 of Law 8.245 of Oct. 18, 1991.

¹²⁵ Article 17 of Law 8.245 of Oct. 18, 1991.

¹²⁶ Articles 37 - 42 of Law 8.245 of Oct. 18, 1991.

¹²⁷ Article 25, *caput* of Law 8.245 of Oct. 18, 1991.

¹²⁸ Articles 27 - 34 of Law 8.245 of Oct. 18, 1991.

¹²⁹ Articles 35 - 36 of Law 8.245 of Oct. 18, 1991.

¹³⁰ Article 8 of Law 8.245 of Oct. 18, 1991.

8. CORPORATE LAW

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In Brazil, corporate entities may adopt three different forms: foundation, association or company. The foundations and associations are established through the joining of efforts to attain common, non-profit purposes, while companies are incorporated for common, profit purposes.

The types of companies that are most commonly adopted in Brazil are the limited liability company and the corporation (*sociedade anônima*) since in both the partner's liability is limited in regard to the company and third parties. In addition, to the corporation and limited liability company, Brazilian law foresees other types of personified and non-personified companies, namely: (i) personified: limited liability company, corporation, non-profit company (*sociedade simples*), general partnership (*sociedade em nome coletivo*), limited partnership (*sociedade em comandita simples*), limited partnership by shares (*sociedade em comandita por ações*) and; (ii) non-personified: overt/covert partners partnership (*sociedade em conta de participação*) and consortium. It should be noted that the labor and capital partnership (*sociedade de capital e indústria*) type has been extinguished.

Formerly regulated by the Brazilian Commercial Code (Law 556/50) companies are now regulated by the recently enacted new Civil Code (Law 10.406/2002), which revoked the provisions of Law 556/50 and consolidated in a single piece of legislation civil law and commercial law, as shall be commented heretofore:

8.1. Limited Liability Company

The limited liability company is the type that is most widely adopted in Brazil. This preference has always been based on four aspects that result in economy and privacy to the partners, namely:

- (i) Limited liability of the partners;
- (ii) Simplified and flexible structure of this type of company;
- (iii) Non-existence of obligation to constitute a capital reserve provision and the results obtained may be freely distributed; and
- (iv) Non-existence of obligation to publish annual financial statements.

In the limited liability company the liability of the partners is limited to their participation in the company's subscribed capital. However, all partners are jointly liable until the capital is fully paid-up, for paying-up the full amount of the company's capital.

Contrary to the corporations, the limited liability company is not obligated to publish annually its financial statements. However, resolutions related to split-off, amalgamation, merger operations and a manager's resignation and capital reduction must be published in the Official Gazette (*Diário Oficial*) and in a major newspaper distributed in the jurisdiction of the company's head offices.

Pursuant to Law 10.406 of Jan. 10, 2002 (the "Civil Code"), which fully revoked Decree 3.708 of Jan. 10, 1919, the provisions that applied to limited liability companies were broadly amended. The new law unquestionably broadened the piece of legislation that applies to the limited liability company.

The structure of the limited liability company may be adopted by companies that have a business purpose or by professional organizations and/or non-profit companies.

The limited liability company is organized (incorporated) by means of an executed private instrument of organization (incorporation). It is necessary to define the following issues in the articles of organization, among others:

Partners

Brazilian law requires that the limited liability company must have at least two (2) partners, who, with a few exceptions established in the law depending on the company's purposes, are not required to be Brazilians, individuals or companies, residing or not in Brazil.¹³¹

It is required to state the name, nationality, profession and residence address, in the case of individuals, and/or the corporate name, nationality and head office address in the case of companies.

In the case of a foreign partner, it is required to be represented by an individual, Brazilian, residing in Brazil in accordance with the applicable legislation.

Corporate name

The articles of organization must state the company's name, which must indicate the company's main activity, ending with the word "Limitada" or its abbreviation "Ltda.";

Capital

The company's capital must be apportioned in quotas (having an identical or non-identical par value) and may be paid-up in cash, property or credits, provided that such type of paid-up is foreseen in the articles of organization.

With a few exceptions, there is no requirement for a minimum amount of the capital that must be paid-up in the original subscription or to submit proof of payment of the capital, or a minimum period for implementing the payment. It should be emphasized, however, that a new capital increase might only be carried out provided that the capital has been fully paid-up.

Administration

The company must be managed by an individual residing in Brazil, who may be a partner or non-partner depending on what the partners established in the articles of organization. The manager(s) may be appointed in the articles of organization or in a separate instrument.

A foreign individual may be a manager provided that he/she has obtained a residence visa.

The partners may establish restrictions to the acts that the local manager may perform and control the manager's decisions through proper mechanisms established in the articles of organization, in the issues that require the partners' prior approval.

It should be stressed that, pursuant to the new Civil Code, the managing partner or delegate manager no longer exist, having been replaced by the manager.

Other Basic Requirements

¹³¹In the case of non-resident individuals or companies, please refer to paragraph 8.9 below.

In addition to the foregoing requirements, the articles of organization must also indicate the address of the main offices, term of duration of the company, its capital and corporate purposes.

The limited liability company must also have corporate ledgers to record the minutes of board meetings, minutes and opinions of the company's audit committee, if any, and the minutes of the partners' meetings or assemblies.

Another basic aspect is the obligation to hold at least once annually, a partners meeting or assembly within four (4) months following the closing of the company's fiscal year, for approval of the accounting records and balance sheet (financial statements) and appointment of managers, if necessary.

If eleven (11) or more partners comprise the company, the decisions must be adopted solely by an Assembly, in accordance with the Civil Code. If the company is comprised by ten (10) partners or less, it may adopt the form of Partners Meetings, regulating it in its Articles of Organization.

A limited liability company achieves its own legal identity pursuant to the filing of its articles or organization with the registry of legal entities of the relevant Chamber of Commerce (*Junta Comercial*), when the company consists in a commercial company, or with the Civil Registry of Legal Entities when it consists in a non-profit company organized under the form of a limited liability company¹³².

8.2. Corporations

The corporations (*sociedades anônimas*) are regulated in Brazil by Law 6.404 of Dec. 15, 1976 (the "Brazilian Corporations' Law") which has been amended several times since it was enacted, its most recent amendment by Law 10.303 of Oct. 31, 2001 being the most important.

Corporations are commercial companies that have a stock capital, in which the shareholders' liability is limited to the total amount of the issue price of the shares subscribed or purchased by each shareholder.

The corporate name of the corporation must be followed by the words "Sociedade Anônima" or "S.A." or placing before its proper name the word "Companhia" or its abbreviation "Cia".

The corporations may be open or private. The open corporations have its stock negotiated in stock markets or floor markets, in order to obtain resources before the public to fund it, and it must be registered with the Brazilian Stock Exchange Commission (*Comissão de Valores Mobiliários – CVM*), a governmental agency responsible for the surveillance of open capital corporations.

The closed capital corporations are companies that do not negotiate its stock in stock or floor markets, not being subject to CVM surveillance and, consequently, it may adopt a form of operation and management that is more simple than those of the open capital corporation.

8.2.1. Incorporation

As a general rule, the following requirements must be fulfilled in order to incorporate a corporation:

- (i) subscription by at least two (2) shareholders¹³³ of all the shares that comprise the corporation's capital;
- (ii) down payment of at least 10% of the issue price of the subscribed shares, in cash;

¹³² Please refer to paragraph 8.11

¹³³ In the case of non-resident individuals or companies, please refer to paragraph 8.9 below.

- (iii) deposit with the Banco do Brasil S.A. or other bank authorized by the CVM, of the portion of the capital paid in cash; and,
- (iv) filing of the corporation's articles of incorporation with the registry of legal entities of the relevant Chamber of Commerce (*Junta Comercial*).

With a few exceptions, there is no minimum capital required for a corporation or even a deadline for it to be paid up. Further, the already existing corporation may be comprised by a single shareholder until its composition of shareholders is re-established in the Annual Shareholders Meeting that will be held in the year subsequent to the occurrence of the singularity, or in the case of incorporation under the form of a wholly owned subsidiary¹³⁴, under penalty of its lawful dissolution.

8.2.2. Wholly-owned Subsidiary

The wholly owned subsidiary is the corporation that has a single shareholder and which must, necessarily, be a Brazilian company incorporated in accordance with Brazilian law.

The wholly owned subsidiary may be originally incorporated through a public deed or conversion of an already existing company, in which case the founding shareholder thereof must acquire all shares of the existing company or incorporate them.

8.2.3. Shares

The capital of the corporation is apportioned into equal fractions designated shares, which attribute to their owners the status of shareholders of the corporation. Depending on the rights and benefits that the shares vest to their owners and the form of their circulation, the shares are classified as common, preferred or fruition shares.

By definition, common shares are shares that vest onto their owners rights of a regular shareholder, the vote right being non-waivable, thus the owner thereof does not have any type of benefit or restriction in regard to the shareholder's rights.

The preferred shares, contrary to common shares, are always differentiated since they vest onto their owners certain advantages over the common shares established in the Articles of Incorporation. The preferred shares may be restricted in many ways, inclusively and most commonly, restricting the vote right in the corporation's resolutions.

The fruition shares consist in shares that replace the common or preferred shares, fully repaid. The repayment consists in the advancing to the shareholder the amount that the shareholder is entitled to receive as a capital reimbursement in the event the company is dissolved or liquidated, provided that such advancement cannot jeopardize the corporate capital.

The shareholder's identification is recorded in the corporation's books and through Subscription Bulletins of the corporation's Shareholders Meetings. The certificates of registration of shares may be held in custody by a financial institution authorized by the Brazilian Securities and Exchange Commission – CVM.

Brazilian law requires that the shares adopt the nominal form, pursuant to the exclusion by Law 8.021/90 of endorsable and bearer-type shares from Brazilian Law.

The nominal shares are recorded in the "Book of Registration of Nominal Shares" in the owner's name and pursuant to this registration ownership is generated. All shareholders that own nominal shares are known to the corporation, with the registration of their names in a proper book.

¹³⁴ Please refer to paragraph 8.2.2

The ownership of treasury shares (*açõe escriturais*) is registered in the books of the authorized financial institution. Certificates are not issued for the treasury shares and the owners thereof receive merely a statement of the so-called deposit of shares account.

Through shareholder meetings, the shareholders may regulate the purchase and sale of their shares, right of first refusal to purchase them, and depending on the obligations that are established in such shareholders agreements may be specifically enforced, provided that in accordance with Brazilian corporate law.

The Brazilian corporation may also have an authorized capital, which vests onto the company the possibility of, within a certain limit, increase its capital, with the issue of new shares, irrespective of amending the Articles of Incorporation. In this case, however, the company may have a Board of Officers (in regard to this subject, please refer to paragraph 8.2.3.2.1).

8.2.3. Bodies of the Corporation

The company's bodies that are responsible for the company's decisions and surveillance are: (i) Shareholders Meetings (ii) Board of Officers, (iii) Board of Directors, and (iv) Audit Committee.

8.2.3.1. Shareholders Meetings

The Shareholders Meeting is the company's supreme body and, pursuant to a regularly called and held meeting, it has authority to decide on the all of company's affairs and adopt any resolution that it deems fit to defend and develop the company's businesses.

The corporation's may hold Annual or Special Shareholders Meetings depending on the matters that the shareholders will discuss, established in the order or the day.

The Special Shareholders Meetings are held to discuss matters that do not fall under the exclusive authority of the Annual Shareholders Meetings, quoted above, including the amendment of the corporation's Articles of Incorporation.

All corporations are required by law to hold an Annual Shareholders Meeting on an annual basis within four months as of the closing of its corporate fiscal year, for the following purposes:

- (i) approve the administration's accounts, examine, discuss and vote on the company's financial statements;
- (ii) decide on the allocation of the net profits and distribution of the dividends;
- (iii) appoint the company's officers and members of the Audit Committee, if any; and,
- (iv) approve the adjustment of the monetary expression of the company's capital.

The officers must arrange the publication of the call notices to attend the Shareholders Meetings on at least three dates, in a major newspaper and in the local State or Federal Official Gazette. Any company will be released from the obligation to publish such call notice provided that all of the company's shareholders attend the Shareholders Meeting. However, irrespective of this, the minutes of the Shareholders Meetings must be published subsequently to their filing with the registry of legal entities of the relevant Chamber of Commerce (*Junta Comercial*).

The closed capital corporations that have less than twenty shareholders and a net equity of less than R\$ 1,000,000.00 (One Million Reais) are relieved of certain formal requirements, such as the publication of call notices, administration reports, etc., as established article 294 of the Brazilian Corporation's Law.

The officers must inform in up to one month prior to the date of the Annual Shareholders Meeting, through separate publications, that the following documents have been made available to the shareholders at the company's head offices, being also required to publish such documents in up to five days prior to its Annual Shareholders Meeting:

- (i) the administration's report on the company's affairs and the main event that were administrated in the previous fiscal year;
- (ii) copy of the financial statements; and
- (iii) the independent auditor's report, if any.

The Brazilian corporations are obligated, as well as the other types of companies, to keep at its head offices the commercial and tax ledgers in which are recorded its operations. In addition to these books, the Brazilian corporation is required to maintain the corporate books set out in article 100 of the Brazilian Corporation's Law ("*Lei das Sociedades Anônimas*") that are used to record the minutes of the company's bodies and record and transfer the securities that it issues.

8.2.3.2. Administration Bodies

The corporations may be managed by a Board of Directors (*Diretoria*) and by a Board of Officers (*Conselho de Administração*) or only by a Board of Directors if it is a closed capital company; the open capital and authorized capital companies are required to have both a Board of Officers and a Board of Directors.

8.2.3.2.1. Board of Officers

The Board of Officers is the company's deliberative body and has the attributions of adopting decisions and establishing internal regulations. It is comprised by at least three members who must be, necessarily, shareholders, individuals, residing or not in Brazil, appointed by the Shareholders Meeting, with a term of office of three years, at maximum, re-appointment being allowed.

The Board of Officers member appointed by the Shareholders Meeting shall be vested in their positions upon the signing of their statement of vest recorded in the relevant book and may be dismissed at any time. The vesting of a non-resident foreign member is subject to the appointment of an attorney-in-fact residing in Brazil to represent such member, having powers to receive service of process in any suits that may be filed against such member.

The Board of Officers is the company's body that has authority to establish the company's economical and financial policies and supervise the acts performed by the Board of Directors. The open capital companies, authorized capital companies and joint capital companies are required to have a Board of Officers.

The Board of Officers has authority to appoint and dismiss the members of the company's Board of Directors and in the case of the closed capital company that does not have a Board of Officers a Shareholders Meeting shall appoint the Directors.

8.2.3.2.2. Board of Directors

The Board of Directors is the company's executive body and the members thereof are the exclusive holders of the company's legal representation, i.e. the members thereof have the authority to run the company internally and represent it before third parties in any affairs and transactions required for its regular operation. It must be comprised by at least two Directors, who must necessarily reside in Brazil, and shall have a term of office of, at maximum, three years, re-appointment being allowed.

The Directors may be appointed and dismissed at any time by the Board of Officers, if any, or by the Shareholders Meeting. Up to one-third of the company's officers, if any, may be designated directors.

The directors shall assume their positions upon the signing of a statement of vest recorded in the company's relevant book.

8.2.3.3. Audit Committee

The Audit Committee (*Conselho Fiscal*) is the company's body responsible for surveying the company's officers. The Audit Committee has authority to accompany the company's activities, asserting the regularity of the procedures that were adopted and the deals that were carried out, analyzing and opining on the company's administration report and on the acts performed by the officers.

Its existence in corporations is mandatory, however its operation may be on a permanent or occasional, its assembly depending on the company's need, or not, to establish greater surveillance over the acts performed by the company's administrators.

It is assembled by at least three and at maximum five members, with equal number of substitutes, designated by the Shareholders Meeting, and may be, or not, shareholders.

Similar to the members of the Board of Directors, only individuals residing in Brazil may be appointed to the Audit Committee.

8.2.4. Arbitration

Law no. 10.303 of Dec. 31, 2001, which amended the Brazilian Corporation's Law, established that in the event of disagreement between the shareholders and the company (article 109, paragraph 3 of Law 6.404/76) or between the shareholders that control the company and the minority shareholders, such disputes may be submitted to a Panel of Arbitrators, provided that this type of dispute resolution is foreseen by the company's by-laws.

The open capital companies (see paragraph 8.2.5 below) listed as New Market companies according to the regulation issued by the São Paulo Stock Exchange – BOVESPA that applies to them are obligated to settle any and all dispute or controversy through an arbitration proceeding.

8.2.5. Open Capital Corporations

The Brazilian corporations that negotiate securities that they issue in stock exchange or floor markets are defined as open capital companies and are subject to special regulation by specific governmental authorities, more specifically by the Brazilian Securities and Exchange Commission – CVM, to which the closed capital (private) corporations are not subject.

In order that a Brazilian corporation may obtain resources from investors, it is required to obtain prior authorization from the CVM and submit to its surveillance.

One of the open capital corporation's obligations consists in the need to designate a liaison director for affairs with investors since this is one of the requirements that the CVM and the organized floor market determine in order to negotiate securities, such liaison being responsible for providing information to investors, to the CVM and to the stock exchange.

8.2.5.1. Securities

Securities are papers that are intended to obtain resources to finance the companies (open capital companies). Law no. 6.385 of Dec. 7, 1976 lists the types of securities, namely:

- (i) stock, debentures and subscription bonus;
- (ii) coupons, subscription rights and receipts and splitting certificates related to such securities;
- (iii) certificates of deposit of securities;
- (iv) debenture notes;
- (v) quotas of securities investment funds or organizations of investment in any type of assets;
- (vi) commercial notes;
- (vii) futures contracts and or derivatives whose underlying assets are securities;
- (viii) other derivatives independent of the underlying assets; and,
- (ix) when publicly offered, any papers or investment participation, partnership or remuneration contracts, including those pursuing from service supply agreements, the revenues of which result from the entrepreneur or third party's efforts.

8.2.5.2. The Securities Market

The open capital companies deal their securities through the securities market. The securities may be negotiated in stock exchanges, organized and non-organized floor markets.

The capital market is subject to scrutiny and surveillance by the Central Bank of Brazil – BACEN and, in regard to the segment of this market that corresponds to the papers issued by Brazilian corporations, to the CVM (the Brazilian Securities and Exchange Commission).

The stock exchanges are regulated by the National Monetary Council (*Conselho Monetário Nacional*). In addition to the company's registration with the CVM, the company must also obtain its registration with the relevant stock exchange so that it may negotiate its securities in such market.

The floor market covers all the capital market operations that are carried out outside of the stock exchanges, and may be organized or not. The organized floor market is the capital market segment that covers the operations that are realized through a system that is maintained and regulated by an entity authorized to operate by the CVM. The non-organized floor market concentrates the capital market operations that are realized outside of the stock exchanges and organized floor market entities.

8.2.5.3. Periodic information and other information

All open capital companies are required to periodically submit to the CVM and to the stock exchanges information on the transactions that it realized with the company's securities, including, without limitation, financial information and statements, quarterly information (ITR), minutes of shareholders meetings and several acts performed by the company that are deemed a relevant act or fact, being understood as such all information that may significantly influence the quotation of the company's securities or investors' decisions.

The tender offer of shares operations must also be informed to the CVM, stock markets or organized floor market where the company's securities are negotiated.

All the disclosures mentioned above must be published in the official press and a major newspaper in the jurisdiction of the head offices and made available to the shareholders and the public, except any information that is confidential or that could affect the company's interests, in which case the company must submit to the CVM a justification for the non-disclosure of such document.

8.2.5.4. Definition of Public and Private Offer and Floating of Securities (“OPA”)

CVM Instruction no. 361/02 defines tender offer as the offering for the purchase of an open capital company's stock, in any number of offered shares. Any offer that adopts any means of advertisement for a purchase offer, including mail, electronic ads or purchase efforts, i.e. whenever the company resorts to the public to negotiate its stock and securities shall be considered a tender offer.

The company is required to obtain a prior registration of tender offer with the CVM so that it may publicly offer and float securities and so to assure proper disclosure as to the issuer and the securities that it intends to sell.

8.2.6. Corporate Governance

The Corporate Governance in Brazil is a system that guides and monitors the companies, not only corporations but also the limited liability companies, non-profit companies and any other type, so to provide greater transparency and attract investors, improving its relations with its shareholders or minority partners, customers, collaborators, suppliers or creditors.

In the recent past Brazilian companies have adopted this system mainly in order to optimize the company's performance and ease access to the company's capital.

8.3. Other Types of Companies

Although they consist in types of companies that are not commonly adopted in Brazil, the following types of companies are intended for certain specific purposes and therefore shall be heretofore briefly addressed:

8.3.1. Personified Companies

8.3.1.1. Non-profit companies (*Sociedade Simples*)

Pursuant to the new Civil Code (Law 10.406/2002) the law no longer distinguishes the civil company and the commercial company that were classified as such depending on their corporate purposes. The companies are now classified as non-profit companies and commercial companies.

The non-profit companies consist in the collective organizations (*cooperativas*) and professional entities that are engaged exclusively in an intellectual, scientific, literary or artistic activity in which the exercise of the profession does not consist in a feature of a business-oriented structure (article 966, sole paragraph).

The non-profit company may be organized in the form of a general partnership (*sociedade em nome coletivo*), plain partnership (*comandita simples*) or limited partnership (*comandita limitada*), as the partners so elect. If none of these types are adopted, the non-profit company shall be subject to the rules that specifically apply thereto.

In the non-profit company any amendment to the basic elements of its articles of organization (i.e. partners, corporate name, purposes, head offices, term of existence, capital, stockholding, management and the partners' liability) shall always require the partners' unanimous approval.

8.3.1.2. General Partnership (*Sociedade em Nome Coletivo*)

Only individuals may be partners in this type of company and they shall have joint and unlimited liability in regard to the company's liabilities and they shall manage the company.

Thus, a non-partner individual cannot be appointed to manage the company, though the partners may establish that only one or some of them will manage the company and act on behalf of the company.

The partners may also establish that the liability will be limited among them, in the company's articles or by a unanimous agreement, being however unlimited in regard to third parties.

The general partnership shall adopt a corporate name comprised by the name of one or more partners, under which it will operate. In addition to the specific provisions set forth in the Civil Code, the rules that apply to the non-profit company shall apply on a supplementary basis to the general partnership.

8.3.1.3. Limited Partnership (*Sociedade em Comandita Simples*)

The main feature of this type of company is the existence of two types of partners: the partners that have joint and unlimited liability for the company's liabilities and the partners whose liability is limited to the value of their quotas. The first type of partners must always be individuals, designated *sócios comanditados*, while the second type may also be companies, designated *sócios comanditários*.

The first type (*sócios comanditados*) shall be the managers of the company and may delegate to the *sócios comanditários* certain powers for a specific purpose.

The articles of organization must always indicate who are the *sócios comanditados* and who are the *sócios comanditários*. The subsequent vacancy of a partner of one of these types in this type of company shall not dissolve it, which would occur only if such vacancy is not eliminated in a 180-day period. In such period, if it is a case of vacancy of a *sócio comanditado*, the *sócios comanditários* may appoint a non-partner administrator engaged on a provisory basis.

The rules that apply to the general partnership (*sociedade em nome coletivo*) shall apply to the limited partnership where compatible therewith.

8.3.1.4. Limited Partnership by Shares (*Sociedade em Comandita por Ações*)

This type of company is similar to the Brazilian corporation (*sociedade anônima*) and is governed by the provisions that apply to it set forth in the Civil Code, excepting the specific provisions duly established in the Brazilian Corporation's Act (*Lei das Sociedades Anônimas*). Its capital is apportioned into shares that represent the partners' stake held therein.

The main difference between this type of company and the *sociedade anônima* consists in the fact that this type of company may not have, in any hypothesis, a board of officers (*conselho de administração*) given that the officers of the limited partnership by shares must necessarily be shareholders vested in the position of Directors and have personal, supplementary, unlimited and joint liability with the other officers for the company's obligations that were undertaken under their tenure.

The administration partners shall be designated directors or managers and they may be appointed in the company's articles. Their tenure is indefinite and may only be dismissed by a resolution of partners representing two-thirds (75%) of the company's capital.

The company's corporate name may also adopt the form of a trade name (*firma*), as quoted in paragraph 8.3.1.2.

The partners meeting may only approve certain matters with the directors' or managers' consent, such as amendment to the company's core business, extension of the company's term of existence, capital increase or reduction, issuance of debentures or beneficiary parties.

Similar to the *sociedade anônima*, the general partnership by shares' capital may be comprised of common or preferred shares. It may be an open capital company for the purposes of obtaining resources in the capital market, in which case it must obtain its registration with the CVM.

8.3.1.5. Labor and Capital Partnership (*Sociedade de Capital e Indústria*)

Law 10.406/2002 extinguished the labor and capital partnership. Notwithstanding, the rules that apply to the non-profit company allow this company to have a labor partner, i.e. partners whose contribution consists merely in supplying labor.

8.3.2. Non-Personified Companies

8.3.2.1. Overt/Covert Partners Partnership (*Sociedade em Conta de Participação*)

Although designated as a type of company, the overt/covert partners partnership does not have its own legal identity and does not require articles of organization to be incorporated, the incorporation of which may be proven by all means allowed by law.

There are two types of partners in this company: an overt partner and a participant partner (formerly designated covert partner). The overt partner is the only partner that will carry out the company's business activities, manage the company and contract, in the overt partner's name, with third parties, being accountable therefor on a personal and unlimited basis. For this reason, the partners have joint and unlimited liability in this type of company.

The participant partner is liable only in regard to the overt partner, according to the company's articles, which may or may not be subject to registration with a public registry. However, the participant partner is jointly liable for the obligations undertaken by the overt partner on behalf of the company in the event the participant partner acts jointly with the overt partner, whether in pre-contracts or in the proper contract negotiation.

The rules that apply to the non-profit company shall apply on a supplementary basis to the overt/covert partners partnership, to the extent that same are compatible.

8.3.2.2. Common Company

The common company is the company that has not been regularly registered before the relevant authority and is also known as irregular company, though its existence may be proven by any means. The company's assets are accountable for the managerial acts practiced by any of its partners, unless the partners establish otherwise and which will only be effective against the third party that is aware or should know this condition.

All the partners of the common company are jointly and unlimitedly liable for the company's liabilities, being excluded from the order of preference the party that contracted on behalf of the company, in addition to being subject to the other penalties that pursue from such irregularity.

8.4. Foreign Company

A foreign company may only regularly operate in Brazil, whatever its purposes may be, even if through subordinated entities (subsidiaries, branches) after obtaining authorization from the Brazilian Federal Government's Executive branch. The authorization application must be addressed to the Ministry of Development, Industry and Foreign Trade, and it is processed and analyzed by the National Department of Registry of Trade Activities – DNRC, which is subordinated to the aforesaid Ministry.

The procedure of application for authorization to open a subsidiary or branch of a foreign company in Brazil should not be mistaken with the procedure of incorporation of a Brazilian company with the participation of foreign companies as partners, even if such partners are majority partners.

The application should be submitted with documents that attest, in general terms, the foreign company's incorporation in conformity with the laws of the home country, authorization to open a subsidiary in Brazil and the appointment of a legal representative that resides in Brazil.

All the documents required by the law must be notarized by the relevant authorities and legalized by the Brazilian Embassy or Consulate that has jurisdiction over the location of the foreign company's head offices, translated in Brazil by a sworn translator and recorded with the Public Registry of Deeds and Documents.

Following the approval of the application and the issuance of the presidential decree, the company must publish the documents that supported the application in the official press and then obtain the registration of the subsidiary with the Chamber of Commerce (*Junta Comercial*).

Resources must be remitted from abroad to pay-up the subsidiary's capital, which will be used to carry out its operations. It is important to note that Brazilian law considers the Brazilian subsidiary to be an extension of the parent company and, therefore, its liability in regard to third parties may affect not only its own capital but also the capital of the parent company located abroad.

Further, it is required to have at all times a legal representative residing in Brazil, empowered to settle any issued that involve the subsidiary and receive service of process.

The Brazilian government must always approve any amendments to the foreign company's articles or by-laws in order to be effective in Brazil. It should be emphasized that the foreign company must publish in Brazil the financial statements and/or acts of its administration bodies that are published in its home country pursuant to the legal requirements effective in the home country, under penalty of cancellation of its authorization to operate. Moreover, it must also publish the subsidiary's financial statements.

8.5. Consortium

Under the current legislation, the consortium is intended to facilitate the operation of joint enterprises without need of incorporating another company. It may be comprised of corporations (*sociedades anônimas*) and/or other types of companies. Since it does not consist in a new company, the consortium does not have its own legal identity, sufficing to draft a contract establishing the clauses for the businesses that will be carried out and to implement the enterprise.

The consortium company does not have joint liability and each member is accountable for the obligations that it undertook, unless expressly established otherwise in the consortium agreement. It also does not have a corporate capital, however the members may constitute a fund to implement the enterprise or for the payment of routine expenses. The consortium usually designates a leader that is engaged in the guidance, representation and management of the consortium.

If it desires, the consortium may adopt a name and the contract must describe the subject enterprise of the consortium, its term of existence, address and venue. The contract should also establish the conditions to receive income and the apportioning of the results.

The consortium agreement must be registered with the registry of legal entities of the Chamber of Commerce (*Junta Comercial*) so to protect the members against any risks that may pursue from the qualifying of the enterprise. Following such filing, it must publish the filing certificate in the official press and in a major newspaper.

8.6. Joint Ventures

The joint ventures are comprised by companies that seek, pursuant to negotiated operations, to attain a common venture. The main purpose of the companies that join efforts in this form is to carry out new projects and business opportunities by joining specific know how and technical cooperation between them.

The partners of joint ventures may be domestic and/or foreign companies, which contribute for the progress of the enterprise through mutual cooperation. Usually, the foreign company partners supply technology and financial support to the Brazilian companies that lead in the local market.

Though the joint ventures usually vest the form of a company comprised of capital, there are no rules that instruct as to its incorporation and it may be a corporation (*sociedade anônima*) or a limited liability company, instrumentalized by a formal agreement (contract).

The joint venture agreement is intended to establish a deep relation between the participants to attain common business goals, implying or not in the contribution of capital or the organization of a new company. There are no rules in regard to the participation of the companies in the formation of the capital, which may be differentiated according to the interest of maintaining stock control.

8.7. Conversion, Merger, Amalgamation and Split-off

According to the law, there are four types of corporate operations that may change the structure of commercial companies and that have an important role in the corporate reorganization, namely: conversion, merger, amalgamation and split-off.

Prior to the enactment of the new Civil Code, only the Brazilian Corporation's Law established the rules that applied to these operations and were adopted by all types of companies. Pursuant to the new Civil Code, the personified companies, including the limited liability company now have specific rules, though, essentially, the new provisions are very similar to the provisions that were established in the Brazilian Corporation's Law.

It is important to stress that the submission of clearance certificates (*Certidões Negativas de Débitos*) that are specifically required in the subject operation, provided by the main governmental authorities, is required to effectively implement conversion, merger, amalgamation or split-off operations, including capital reduction for any reason.

8.7.1. Conversion

The conversion is the operation that the company undertakes, regardless of dissolution or liquidation, to convert from one type of company to another.

The conversion is intended to fulfill the convenience of the partners and is defined as an operation that changes the company's legal structure, not entailing the dissolution or liquidation of the company that was converted. The partners that, at the time when the company was organized, selected a certain type of company may find that the type that had been selected no longer fulfills the business interests and, accordingly, approve its conversion into another type of company. Though usually, as previously quoted, the types of companies that are most common are the limited liability company and the corporation (*sociedade anônima*) any type of limited or unlimited liability company foreseen by the law may be converted (i.e. non-

profit company, general partnership, limited partnership, limited liability company, limited partnership by shares and corporation (*sociedade anônima*).

Considering that the existing corporate structure and, in certain cases the degree of liability of the partners changes substantially pursuant to the conversion, such matter must be submitted for approval by all of the company's partners, unless the articles or by-laws of the company that will be converted provides otherwise. In the event such company's articles or by-laws does provide on conversion, the required approval quorum is three-fourths (75%) of the capital in the case of limited liability companies, or absolute majority in the case of the corporation (*sociedade anônima*). The partners or shareholders that disagree with the conversion may withdraw from the company (withdrawal right).

8.7.2. Merger

The legal definition of merger is the operation through which one or more companies are absorbed by another, which succeeds it/them in all of its/their rights and obligations. We may extract from this definition that the absorbed company is always extinguished since its assets and liabilities are entirely transferred to the surviving company that will succeed in its rights and obligations. Hence, there will always be at least two companies involved in a merger, one of which is absorbed and the other that incorporates the former, which may or not adopt the same legal structure.

Both the partners of the merging and of the merged companies must approve the operation conditions, in the form required for each type of company (shareholders or partners meeting/assembly or amendment to articles/dissolution of the company's articles). In addition to the approval of the merger, the partners of the merging company must also designate the experts that will appraise the merged company's net equity. Though the extinction of the merged company is a logical consequence of the merger, the merging company must declare the extinction of the merged company.

The draft of a protocol and justification of the merger is indispensable. This document establishes the conditions and the reason for the merger.

The merger also requires, whatever the type of company may be, an appraisal report of the merged company's net equity since it will be entirely absorbed by the merging company. The appraisal of the net equity may be based on book values or market prices.

It should also be noted that if the company that will be merged or restructured is an open capital company, the merging company (successor) must also be an open capital company.

8.7.3. Amalgamation

In the amalgamation operation two or more companies are unified, forming a new company that succeeds them in all of their rights and obligations. Accordingly, the companies involved are extinguished and a new company is formed.

- (i) Similar to the merger, the amalgamated companies must approve the operation as required in each type of company (minutes of shareholders or partners meetings/assembly or amendment to articles/dissolution of the company) with the purpose of approving the protocol and designate the experts that will appraise the net equity of the other companies.

Following the draft of the appraisal reports, the partners of the companies involved must approve them, being prohibited their approval of the report that concerns the company in which they are a partner therein. Following the approval of the appraisal reports, the partners must approve, on a definitive basis, the amalgamation and the consequential organization of the new company.

It shall be incumbent upon the administrators of the newly organized company to file its articles of organization along with the other documents related to the amalgamation before the registry of legal entities of the relevant Chamber of Commerce (*Junta Comercial*).

If the operation involves a Brazilian corporation (*sociedade anônima*) a protocol and justification of the amalgamation, establishing, respectively, the conditions and the reasons for the amalgamation.

8.7.4. Split-off

The split-off may be defined as the operation through which a company transfers a part of its assets to one or more companies, whether it is organized specifically for such purpose or not. A complete split-off occurs when the all of the split company's assets are absorbed by other companies and a partial split-off occurs when only a part of the assets are conveyed. In the first case the split company is extinguished; in the second case, the split company's capital will be reduced proportionally to the net equity that is transferred.

The current Civil Code provides sparsely on the split-off, though references are made to this type of corporate operation. Any omissions should, therefore, be covered by the provisions of the Brazilian Corporation's Law.

The company that absorbs a part of the assets of the split company succeeds it in all of the rights and liabilities that are related thereto. The non-related liabilities and rights shall continue to be held by the original company. In the case of a full split-off, since the split-off company is extinguished, it will be succeeded by the companies to which its net equity is transferred proportionally to the extent of such transfers.

The split-off shall be approved as required for each type of company (minutes of shareholders/partners meeting/assembly or amendment to articles/dissolution of the company).

When a part of the company's net equity is split-off for the organization of a new company, it will be necessary to draft the articles of organization of the new company. In the case of absorption of the split-off assets by a company that already exists, the provisions of the Brazilian Corporation's Law shall apply.

The appraisal report is indispensable in the split-off operation so to assert the value of the split-off net equity.

8.8. Holding Company

Under Brazilian law, a holding company is a Brazilian company that has as its corporate purpose participation in the capital of other personified companies or non-personified companies for the effects of stock control. It is a company that holds a stake in another company.

The holding company may be organized under any form (e.g. limited liability company, corporation or general partnership by shares). When it is not engaged in any activity other than the participation in other companies, it is defined as a pure holding company, therefore being a non-profit company – except if it is organized under the form of a corporation (*sociedade anônima*) and is engaged in other types of trade or financial operations in addition to holding a stake in other companies, in which case it is defined as a multi-purpose or operational holding.

The holding company is widely adopted in Brazil. Mid and large-sized corporate groups adopt the form of the holding company to organize their stock control, submitting the entire group of companies under their indirect control, thus establishing a pole of integration of command among the companies, which ultimately enables greater organization and, most importantly, a better use and harmonization of the group's activities.

8.9. Partners' and Administrators' Liability

The partners may have limited or unlimited liability for the company's liabilities, depending on the type of company and in accordance with the Civil Code. The rule adopted in Brazilian corporate law is that the partners are not liable for the liabilities of business companies, given that, as a general rule, since the companies have a legal identity its assets are separated from those of its partners and, therefore, the partners are not accountable for the company's liabilities. The general rule of the secondary liability of the partners for the company's liabilities pursues therefrom, i.e. the partner's property cannot be held accountable for the company's liabilities if the company's assets are not exhausted beforehand. However, there are certain exceptions, as addressed heretofore.

The partners that have unlimited liability are obligated to be held accountable with their own property on a secondary basis for the company's liabilities, irrespective of their equity interest. Therefore, after all the company's assets are liquidated, the liability shall fall onto all the property of the company's partners that suffices to fully cover the liabilities that the company undertook.

Even in the companies organized under the form of a limited liability company, it is important to stress that for the specific effect of paying up the company's capital, the partners' are jointly liable, which means that any single partner may be required at random to fulfill the legal obligation to pay-up the company's capital. Thus, the partner's liability will only exceed the stake held in the company if the company's capital has not been fully paid up and up to the amount thereof. In such event, the partners will be jointly liable up for paying up the full amount, although their liability is still limited.

The partners of the general partnership (*sociedade em nome coletivo*) the *sócios comanditados* type partners of the limited partnership (*sociedade em comandita simples*), the overt partners of the overt/covert partners partnership (*sociedade em conta de participação*) and the director shareholders of the limited partnership by shares (*sociedade comandita por ações*) have unlimited liability in regard to the company's liabilities.

The *sócios comanditários* of the limited partnership, the partners of the limited liability company, the partners of overt/covert partners partnership, the shareholders of the Brazilian corporation (*sociedade anônima*) and the shareholders of the limited partnership by shares (*sociedade comandita por ações*) have limited liability and are accountable for the company's liabilities up to the limit of their equity interest held in the company.

In regard to the company's administration it should be emphasized that pursuant to the new Civil Code, the managing partner or delegate manager no longer exist, having been replaced by the administrator.

In the companies where the partners have unlimited liability, such partners will be the company's administrators. In the limited liability company the partners may designate individuals that are not partners as the company's administrators, provided that such appointment is foreseen in the company's articles of organization.

The non-partner administrator may in representing the company have restricted autonomy, according to the powers expressly established in the company's articles. In the absence of provisions thereon, the administrator shall have full authority to perform all acts that are compatible with the company's purposes.

The administrators, whether partners or not, must always perform their duties with zeal, diligence and loyalty, observing the limits established in the company's articles or the applicable laws. If in the performance of the position, they unintentionally or intentionally cause damages to the company or third parties they shall be liable for indemnifying such damages.

Finally, it should be stressed that if the company is used as a means to commit a fraud or is abusively used to perform acts that cause damages to third parties, the partners – whether administrators or not – may be held directly accountable, both personally and property-wise, under the principle of disregard of the company's legal identity.

8.10. Public Registry Of Commercial Companies And Civil Registry Of Legal Entities

As previously quoted, the companies are classified as commercial companies and non-profit organizations. Commercial companies are those that carry out professionally a manufacturing or service business, while the latter are the collective organizations (*cooperativas*) or professional entities that are engaged exclusively in an intellectual, scientific, literary or artistic activity in which the exercise of the profession does not consist in an element that characterizes the type of the company.

The business administrators and commercial companies are subject to registration with the public registry of companies (*Registro Público de Empresas Mercantis*), which is carried out by the Chambers of Commerce (*Juntas Comerciais*) and the non-profit companies (*sociedades simples*) are subject to registration with the Civil Registry of Legal Entities (*Registro Civil das Pessoas Jurídicas*). Pursuant to such registry the corporate documents related to these companies vest authenticity, legal protection and validity, their publication being an essential requirement to protect the interests of third parties.

Under Brazilian law, a company only achieves a legal identity after its articles of organization or by-laws are registered with the relevant authorities, namely the Chambers of Commerce (*Juntas Comerciais*) or the Public Registry Offices of Legal Entities (*Cartórios de Registro de Pessoas Jurídicas*), as the case may be.

The registration of commercial companies is a service that is processed identically throughout Brazil by the National Commercial Registration System (*Sistema Nacional de Registro Mercantil – SINREM*), comprised by the National Department of Trade Registration (*Departamento Nacional de Registro do Comércio – DNRC*) and the Chambers of Commerce (*Juntas Comerciais*) in each of Brazil's States. The relevant Chamber of Commerce is determined based on the state in which the company's head offices are located.

In the case of non-profit companies (*sociedades simples*), they are registered by the Public Registry Offices/Agencies of the Civil Registry of Legal Entities (*Cartórios/Ofícios de Registro Civil de Pessoas Jurídicas*) and their jurisdiction is determined according to the district (*município*) in which its head offices are located.

8.11. Dissolution, Liquidation and Extinction

The dissolution of the commercial companies and non-profit companies is regulated by the Brazilian Corporation's Law (*Lei das Sociedades por Ações*) or by the Civil Code, depending of the type of company and the dissolution may be a full or partial dissolution (with the withdrawal of one of the company's partners) and implemented in two ways: through a court or non-court procedure. If the partners agree that the business has become unfeasible they may dissolve the company through non-court action but if only a minority is interested in dissolving the company the dissolution must be carried out through court action.

The reasons for dissolving a company are: (i) the partners' will; (ii) expiration of the company's term of existence; (iii) bankruptcy; (iv) single partner; (v) impossibility to attain the company's purposes; or (f) expiration of the authorization to operate.

Note that the limited liability companies, the non-profit companies and the other types of companies foreseen in the Civil Code that carry on with only one partner (single partner) for more than 180 days shall be lawfully considered extinct. In regard to the corporation (*sociedade anônima*), if the shareholders meeting asserts that the company has only a single shareholder, the plurality of shareholders must be reinstated until the Annual Shareholders Meeting that will be held in the subsequent year, under penalty of its dissolution.

8.12. Partner, Attorney-In-Fact, Corporate Taxpayer Registration (CNPJ) And Individual Taxpayer Registration (CPF)

Individuals or companies that join to form a new company under its proper legal identity and join efforts and resources to attain the goals that they convene to pursue vest the capacity of partners. Their main obligation

is to pay up the subscribed capital and participate in the company's losses according to the limits of their responsibility (limited or unlimited), which is determined based on the type of company.

The partners have the following rights, among others:

- (i) participate in the company's results;
- (ii) administrate the company or inspect its administration;
- (iii) withdraw; and.
- (iv) vote in the company's resolutions.

There are no restrictions to the participation of individuals or foreign companies (non-residents) in the Brazilian company's capital, with a few exceptions in which the business may be performed only by native or naturalized Brazilians or participation is prohibited to foreign investors, such as in, for example, the following areas:

- (i) health plans;
- (ii) coastal navigation;
- (iii) cable TV service;
- (iv) mining and hydraulic power;
- (v) road cargo transportation, and,
- (vi) national airlines.

Foreign partners, whether individuals or companies, are required to have in Brazil at all times an appointed attorney-in-fact empowered to receive service of process in any suits filed against the foreign party. Usually, in addition to the powers to receive service of process, powers are granted for the attorney to represent the partner before government authorities, departments and agencies; sign corporate documents and instruments; or further to perform rights and comply with obligations imposed on the partners, among others.

Further, the individuals and companies that reside and are domiciled abroad that are partners of a Brazilian company must be duly registered with the Federal Revenue. Both individuals and companies are required to appoint an attorney-in-fact specifically empowered to file an application for enrollment with the Corporate Taxpayers Registry (*Cadastro Nacional de Pessoa Jurídica – CNPJ*) and to represent the grantor before the Federal Revenue.

Ordinance (*Instrução Normativa*) no. 312/03 issued by the Federal Revenue (*Secretaria da Receita Federal – SRF*) extinguished the need to present a power of attorney granted by the foreign company to an individual residing in Brazil, which was previously required under Ordinance no. 200/02 when the application for enrollment with CNPJ is submitted through the CADEMP (the Central Bank of Brazil's electronic registration system, also known as "SISBACEN"). However, despite of such non-requirement of a power of attorney, the lack of indication of the CPF (individual taxpayer enrollment number) of the individual that is responsible in regard to the corporate taxpayer registry (CNPJ) of the foreign company may cause problems in regard to the issuance of certificates by the SRF and also in regard to other official documents.

This obligation applies not only for the purposes of participation in a company, but also to enable a foreign company to purchase in Brazil the following items:

- (i) real estate;

- (ii) vehicles, ships and aircraft;
- (iii) bank accounts;
- (iv) investments in the financial market;
- (v) investments in the capital market; and,
- (vi) in the case of realizing or contracting operations of (a) acquisition of intangibles with a term of payment of more than 360 days; (b) financing; (c) financed import; (d) foreign leasing operations; (e) plain leases, lease of equipment and contracting of shipment; (f) importation of products without exchange coverage intended for paying up capital held in Brazilian companies; (g) cash loans granted to residents in Brazil; and (h) foreign investments in Brazil.

9. BRAZILIAN EXCHANGE CONTROL / CENTRAL BANK

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9.1. The Brazilian Exchange Market

There used to be only one official exchange market in Brazil. It was ruled by the Central Bank of Brazil (“Central Bank”) and subject to a fixed exchange rate established by the Central Bank. In 1988, the Brazilian exchange market was split in two segments: the Free Exchange Market, also known as the commercial exchange, and the Floating Exchange Market, also known as the tourism exchange.

With the intention of making the rules applicable to the control of exchange market in Brazil more flexible, the National Monetary Council decided with Resolution No. 3,265, of March 04, 2005, to unify both exchange markets by extinguishing the Free Rate Exchange Market and the Floating Exchange Market and creating the so-called New Exchange Market.

According to article 1, solely paragraph of Resolution No. 3,265/2005, “the Exchange Market includes buying and selling of foreign currencies, transactions in national currency between residents or companies established in Brazil and residents or companies established abroad and transactions with gold-exchange vehicle, realized by financial institutions authorized by the Central Bank of Brazil to operate in the exchange market.

9.2. Foreign Capital in Brazil

Law No. 4,131, of September 03, 1962 (the Foreign Capital Law) as amended, regulates foreign investment in Brazil. This law requires that foreign investments in Brazil must be registered with the Central Bank to enable foreign remittance of profits and/or interest on equity, repatriation of foreign capital invested in Brazil and also the registration with the Central Bank of reinvestment of profit and/or interest on equity.

Article 1 of Law No. 4,131/1962, establishes that the goods, machines and equipment that enter Brazil without an initial disbursement of currency, intended for the production of products or services and also the financial or monetary resources that enter Brazil for use in economical activities, owned by individuals or companies that reside, are domiciled or headquartered abroad, are considered foreign capital.

The Brazilian government seeks to progressively encourage foreign capital investments in Brazil and is eliminating restrictions to foreign capital in certain areas of the Brazilian economy. We hereby quote some of the areas of the economy that are still subject to certain foreign capital restrictions:

- Exploitation and use of deposits, mines and other mineral resources and of hydraulic power potentials;
- Companies engaged in the exploitation, research and production of oil and gas;
- Coastal navigation for the transport of products, with some specific exceptions;
- Ownership and administration of journalistic, TV and radio broadcasting companies (limited to 30% of the voting capital. The participation of foreigners in such companies can only be in an indirect way through a company founded under Brazilian law with headquarters in Brazil);
- Investment on cable TV service (limited to 40% of the voting capital);
- Opening of industries of interest to the national security and practice of certain activities at the border areas;
- Purchase of rural real estate by foreigners, if located in areas considered reserved for national security reasons;
- Investment in foreign airlines (limited to 1/5 of the voting capital);

- Roadway transportation of cargo (limited to 1/5 of the voting capital); and
- Health plans, except for some specific cases.

9.3. Registration of Foreign Investment with the Central Bank

Today the registration of foreign investments is an electronically made declaration. The electronic registration statement, module RDE-IED (Electronic Registration Statement – Direct Foreign Investment) is effectuated through the Central Bank’s computerized system, abbreviated “SISBACEN”.

The foreign investment registration through the SISBACEN system must be applied for by the representative of the Brazilian company that receives the investment or by the representative of the investor within thirty (30) days as of the date of the event that generated it, observing the provisions of Central Bank's Ruling (*Circular*) No. 2,997/2000 and other applicable rules.

The companies that receive the foreign investments must keep the documents that support the statements that were submitted to the Central Bank for five (5) years as of the date of each statement submitted in the RDE-IED module.

The investment will be registered in the currency of the country of origin of the funds and in the case of investment made through the import of goods without exchange cover, at the price indicated in the commercial invoice issued by the exporter and according to the register module Financial Operation Register (“ROF”) of the system RDE, duly linked to the relevant Importation Declaration, in the currency stated in the corresponding ROF.

Brazilian Monetary Council's Resolution No. 2,883, of August 30, 2001, establishes that the failure to comply with the term for the registration of the investment with the Central Bank shall subject the Brazilian company to fines that may total R\$125,000.00 (article 1, IV, of referred Resolution), per transaction.

9.4. Direct Foreign Investment

The remittance of funds to Brazil as a capital contribution does not require prior authorization of the Brazilian authorities and the resources may be transferred to Brazil whenever the Brazilian company may need them. In order to access the funds, the Brazilian company must convert them into Brazilian currency. In order to proceed with the conversion, the Brazilian company must previously obtain an access password to access the SISBACEN system and it must be duly registered with the Central Bank. The foreign investor must be duly registered with the Registry of Corporate Entities (“CNPJ”) in case of foreign companies, or with the Registry of Individuals (“CPF”) in case of individuals.

The direct foreign investments may be realized through a foreign remittance that must be converted to Brazilian currency for the purposes of (i) pay-in the equity interest of a non-resident held in the capital of companies established in Brazil; or (ii) for payment of the acquisition of paid up shares/quotas held by residents. The funds intended for paying-in the equity interest of Brazilian companies, which relate to the conversion of credits that may be remitted abroad and the import of tangibles that entered Brazil without exchange cover may also be registered as investment under the RDE-IED module.

Central Bank's Ruling (*Circular*) No. 2,997/2000 also introduced the investments in Brazilian currency made by foreign investors. This type of investment may be registered through the SISBACEN system, in the RDE-IED module, provided that the resources originate from the bank account of a non-resident held in Brazil, in accordance with the rules in effect, by the investor domiciled or headquartered abroad. The dividends, interest on equity, the reinvestments and capital repatriations attributed to the quotas/shares generated by a foreign investment in Brazilian currency can be remitted abroad in accordance with the applicable law.

9.4.1. Investment through Import of Goods without Exchange Cover

The import of goods without exchange cover consists of the import intended for paying up capital of a Brazilian company and, therefore, does not require any payment of the good by the importer. This type of import operation requires the prior authorization of the Foreign Trade Department (*Secretaria de Comércio Exterior* - “SECEX”) and of the Central Bank and is subject to registration in the Foreign Trade Integrated System (*Sistema Integrado de Comércio Exterior* - “SISCOMEX”). This system integrates the government authorities that are directly involved in the foreign trade operations, namely the Federal Revenue Department (*Secretaria da Receita Federal*), SECEX and the Central Bank. Subsequent to registration in the SISCOMEX system, the operation must be registered in the module ROF of the system RDE.

Article 33 of Central Bank's Ruling (*Circular*) No. 2,731, of December 13, 1996, establishes that the registration of imports without exchange cover in the ROF registry implies in undertaking the commitment to incorporate the goods to the company's fixed assets during a five-year period.

Further, the pay up of a foreign equity interest by way of capitalization of an imported good without exchange cover must be implemented within ninety (90) days as of the customs clearance thereof.

The rules quoted above apply only to the import of new goods. The import of used goods is subject to a more restrictive exchange control rules imposed by the Central Bank and by SECEX. In these cases the prior authorization of SECEX is required and the process requires the submission of reports obtained from abroad attesting the good's remaining useful life, among other documents.

The contribution of goods as capital at values corresponding to importations without exchange cover of intangible goods is subject to previous authorization by the Central Bank of Brazil, when admitted by the laws in force.

9.4.2. Investment through Conversion of Credits Remittable Abroad

Amounts due by the Brazilian company and remittable abroad in accordance with the Brazilian legislation can be converted into investment by the foreign creditor. The Central Bank's Ruling (*Circular*) No. 2,997/2000 provides that, “for the purposes of this Regulation, conversion into a direct foreign investment is considered to be the operation through which credits that may generate foreign remittances, based on the rules in effect, are applied by the non-resident creditor to acquire or pay-in an equity interest in the capital of a company established in Brazil.”

The Brazilian company, supported by an irrevocable statement signed by the creditor abroad confirming its agreement with the conversion of the credit into investment, must contract with a commercial bank the closing of symbolic/simultaneous exchange operations. Through such operations the funds are symbolically remitted abroad for the payment of the debt and, at the same value, the funds symbolically enter Brazil as a capital contribution.

In case of conversion of amounts subject to taxation, like interest accrued over loans and importations, the company must present the tax payment evidence (specially of the withholding income tax) to the commercial bank in charge with the symbolic/simultaneous exchange operations. The external credits, after being converted into investment, must be registered as foreign investment in module RDE-IED of SISBACEN within thirty (30) days.

9.4.3. Reinvestment of Profits and/or Interest on Equity

The profits and/or interest on equity payable by the investor partner or shareholder established abroad may be reinvested in their Brazilian company or in a third Brazilian company. The reinvestment is registered in the SISBACEN system, RDE-IED module, in the currency of the country of the investor. In the case of an investment in Brazilian national currency, the reinvestment shall be registered in Brazilian national currency.

In the calculation of the foreign currency amount to be registered as a reinvestment, the Central Bank allows to adopt the exchange rate used in commercial operations effective on the date of the corporate document that establishes the capitalization of the profits and/or interest on equity.

9.4.4. Remittance of Profits and/or Interest on Equity

The remittance of profits to partners or shareholders that reside abroad is subject to two prerequisites: (i) the foreign investments made by the partners/shareholders must be duly registered in the SISBACEN system; and (ii) the Brazilian company must yield a profit.

The remittance of profits shall have the destiny registered in the module RDE-IED according to the partner's/shareholder's deliberation. In accordance with Law No. 9,249/1995, the profits generated by Brazilian companies as of January 01, 1996 are not subject to withholding income tax in the foreign remittance. However, the distribution of profits generated up to January 01, 1996 is subject to withholding income tax at a quote of 15% or 25% (in case of Japan 12,5%).

Law No. 9,249/1995, also foresees the possibility of payment or credit of interest on equity to investors, provided that the Brazilian company has yielded accrued profits or profits in the current period. The total amount of the interest on equity that may be paid or credited to the partners cannot exceed 50% of the accrued profits or of the profits in the period yielded by the company.

Interest on equity intends to remunerate the investment on the basis of the equity. Opposite to dividends, the amount deliberated by the partners/shareholders for the payment of interest on equity is a tax-deductible expense under the Brazilian law. The payment or credit of interest on equity to the partner/shareholder is taxed by the withholding income tax at the rate of 15%. If the beneficiary of this payment is located in a tax haven, the income tax rate is increased to 25%.

9.4.5. Capital Repatriation

The expression "capital repatriation" traditionally means, in exchange operations, the foreign remittance of an amount that stems from the sale of foreign equity interest held in companies established in Brazil under the form of direct investment or from the capital reduction for reimbursement of the partner or, further, from the company's liquidation in Brazil. The capital that may be repatriated is up to the amount of the foreign currency indicated in the registration, observing the par value of the Brazilian company's stock/quotas and also, when applicable, the proportionality rule.

The amount that exceeds the registered amount, observing the proportionality rule, characterizes a capital gain in terms of exchange. Therefore, the amount exceeding is considered as capital gain and causes withholding income tax. In case of the selling of the participation, the value of the equity of the company shall be considered in the moment of the repatriation of the foreign investment. A valuation report could be requested, in case the selling value, although not less than the value of the registered foreign investment, is higher than the value of the equity.

9.5 Investments in the Capital Market

The Brazilian legislation allows the investment in the capital market by individuals or legal entities, by means of the acquisition of shares and other securities. These investments, designated "portfolio investments," when performed by people who are not residents in Brazil, are subject to the registration with the Brazilian Central Bank and with the Brazilian Securities Commissions ("CVM").

According to the laws in force, nonresident investors, whether individually or collectively, are individuals or legal entities, funds or other collective investment entities, with residence, head office or domicile abroad.

Currently, the investment of nonresident investors is allowed in the local market. Prior to their operations, the nonresident investors must indicate one or more attorneys in fact in Brazil, which will be responsible, among other functions, for the provision of information and registrations with the Brazilian Central Bank and the CVM. The attorney in fact required by law is not the same individual required by the tax law, although, in practice, he/she also assumes that function.

The nonresident investor must, by means of its attorney in fact, obtain the registration with CVM. Referred registration may be electronically performed. Additionally, the amounts invested in Brazil as "investment in portfolio" must be subject to registration with the Central Bank, carried out electronically. The initial RDE and its updates constitute an obligatory requirement for any remittances abroad, which must be performed prior thereto.

In the remittances abroad resulting from income, repatriation and capital gain, the intervenient bank is responsible for the analysis of the documents to be submitted, which must evidence the income distribution, the property and the sale of assets that generated them, as well as the withholding of the due taxes.

In accordance and subject to the applicable legislation, the investments in the Brazilian stock market are subject to a tax special regime, save certain exceptions.

9.6. Loans

9.6.1. Foreign Currency Loans

Loans contracted in foreign currency extended to Brazilian companies must be electronically registered with the Central Bank in the SISBACEN, ROF module. The payment conditions of the principal and the interest rates cannot be considered excessive according to the Central Bank's policies in force at the time of the loan.

The Brazilian company must register electronically in the ROF system the financial terms and conditions of the loan so that it may convert into Brazilian currency the funds that were disbursed abroad by the creditor. The registration in the ROF must be supported by a written statement of the foreign creditor attesting the terms and conditions of the loan.

Although the payment of the principal of foreign loans by the Brazilian company is not subject to taxation, the payment of interest accrued thereto is subject to withholding income tax at the rate of 15%. The 15% tax rate applies to most countries, except Japan, which is subject to a lower tax rate of 12.5%. In the case of beneficiaries located in tax havens, the tax rate is 25%. Both the Brazilian company that contracted the loan and the creditor company established abroad may bear the tax burden. If the Brazilian company is responsible for the withholding, the tax basis is increased to 17.65% (in the case of taxation at 15%) and 33.33% (in the case of tax havens). A preferential treatment is generally given to foreign governmental entities.

Brazilian Decree No. 4,494, of December 03, 2002, establishes that foreign currency loans that mature in up to ninety (90) days are subject to the Financial Operations Tax (*Imposto sobre Operações Financeiras - "IOF"*) at the rate of 5%. This tax applies over the principal amount of the loan and is levied in the closing of the exchange contract for the entry of the funds into Brazil. Loans that have a term of payment of more than ninety one (91) days are currently subject to a 0% IOF tax rate.

Pursuant to Resolution No. 3,217, of June 30, 2004, the Central Bank thenceforth allowed the early payment of obligations with foreign parties, such as foreign currency loans. The prepayment of the obligations addressed in Resolution No. 3,217/2004 must be notified to the Central Bank at least thirty (30) days in advance, through the SISBACEN, ROF module.

The prepayment may only occur upon the foreign creditor's consent, expressed in a written statement attesting its agreement to receive the related payment before the maturity date that had been originally established.

9.6.2. Loans in Brazilian Currency

The loans in Brazilian currency are carried out through the International Transfer of Reais. The inflows and outflows of funds related to loans in Brazilian currency shall be made through a nonresident bank account, the so-called CC5, held by the foreign creditor with a Brazilian bank.

Further, according to the Central Bank's Ruling (*Circular*) No. 3,027/2001, loans in Brazilian currency must be registered with the SISBACEN, ROF module.

An innovation introduced by Resolution No. 3,265/2005 is the possibility of paying obligations of any nature that are denominated in Brazilian currency in the corresponding amount in foreign currency, through the New Exchange Market. The payment of loans in foreign currency, which were originally closed in Brazilian currency, is therefore possible through a conversion of the debt in Reais into foreign currency, realized through an exchange operation between the owing company and a Brazilian commercial bank.

9.6.3. Loans extended by Brazilian entities to foreign entities

Another innovation introduced by the Brazilian Monetary Council's Resolution No. 3,265/2005, is the possibility for a Brazilian entity to extend a loan in foreign currency to a foreign entity. Currently, Central Bank's prior approval or registration with its electronic system are not necessary.

To implement this transaction, the parties shall execute an agreement setting forth the terms and conditions of the loan. Open maturity dates are not permitted.

9.7. Brazilian Investment Abroad

9.7.1. Investment by a Company

The Brazilian companies are authorized to acquire equity interest in foreign companies or subscribe capital without authorization from the Central Bank.

The Brazilian investment abroad must be realized based on documents which prove the legality and the economic foundation of the operation. Further, the applicable tax rules must be respected. The commercial bank is obliged to survey compliance to these conditions.

Furthermore, individuals and legal entities resident, domiciled or headquartered in Brazil must maintain the documents supporting the remittance at the disposition of the Central Bank for a period of five (5) years. The documents must cover the legal formalities and identify clearly all signatures.

It is possible to reinvest, including in other assets, amounts transferred as investment, as well as profits generated abroad, always in compliance with the purpose allowed in the applicable legislation.

Currently, it is possible to provide stock or goods held in Brazil by Brazilian companies as a capital contribution to foreign companies. Likewise, foreign investors are authorized by the Central Bank to contribute stock that they hold in a foreign company or goods held abroad for a capital increase in Brazilian companies, subject to the provisions of the applicable legislation.

9.7.2. Investment by Individuals / Stock Purchase Plan

Individuals employed by Brazilian companies comprised of foreign economic groups may carry out remittances abroad in order to acquire securities, whether or not factionary, which represent shares issued by the leader company of the group abroad, or quotas of investment funds constituted outside Brazil with the

sole purpose of acquiring shares of the mother foreign company in programs exclusively developed for employees.

The remittances may be performed by the employee or by the Brazilian company responsible in Brazil for the shares acquisition plan, consolidated or not, and, in case the remittance is carried out by the Brazilian company, the following documents must be submitted to the commercial bank: list duly referenced (with number and date) containing the name of its employees, the indication of the relevant individual taxpayers' registration numbers and the amount of the remittances per individual; and documents containing the employee's authorization for the company to make the remittance on his/her behalf.

9.8. Exchange Control in Remittance to and from Abroad for the Payment of Services

The import of service operations that involve the transfer of technology, licensing of intellectual property rights and the production of scientific know-how are subject to registration with the Brazilian Trademark & Patent Office ("INPI") and Central Bank (through the ROF registration system), so that it is possible to: (i) remit payments abroad; and (ii) enable the use of the amounts paid as a deductible expense in income tax reports.

On the other hand, the contracts of professional services supplied by foreign companies involving services other than those quoted above are not subject to registration with the INPI and Central Bank. The remittances related to payments under these agreements must be converted by a commercial bank authorized to operate in the New Exchange Market. In order to close the exchange operation, the Brazilian company must submit to the commercial bank the services supply agreement executed between the parties, accompanied by the translation thereof to Portuguese, the related commercial invoice, as well as the evidences of payment of the due taxes on such transactions. It is important to point out that the commercial bank may ask for any other document considered necessary for the analysis of the legality and the economic foundation of the operation.

By rule, the export of services supplied by Brazilian companies to foreign entities are subject to the closing of the exchange contract and cannot be subject to payment abroad directly to the exporter of the service or to third parties.

9.9. Exchange Control in Imports and Exports

The imports with a term of payment of more than three hundred and sixty (360) days are subject to registration with the Central Bank, in the ROF module.

Law No. 10,755, of November 03, 2003, establishes a fine imposed to the Brazilian importer in the event that: (i) it contracts an exchange agreement or makes a payment in Reais without observing the terms and other conditions established by the Central Bank; or (ii) it fails to pay the import in up to one hundred and eighty (180) days following the first day of the month subsequent to the month established for the payment of the import, as stated in the Import Declaration or in the ROF, when the import is financed.

The exports by Brazilian companies are subject to the contracting of the exchange operation in the legal term. The exchange operations must be executed and linked to the corresponding export registrations with SISCOMEX within two hundred and ten (210) days, counted as of the corresponding date of shipment, except in the cases of financed exports that are subject to Registration of Credit with SISCOMEX or paid through simplified exchange agreement. The lack of receipt of the sales amounts from abroad may subject the Brazilian export company to certain penalties, ranging from restrictions to export (obligating the exporter to receive the export resources in advance of the shipment) to fines for omitting the exchange coverage in the export.

Aiming to encourage the entry of strong foreign currencies into Brazil, the Brazilian government prohibits payments or credits abroad directly to the exporter or to third parties.

9.10. Declaration of Assets Maintained Outside Brazil

Individuals (Brazilians or expatriates considered as residents for fiscal purposes) and legal entities resident, domiciled or headquartered in Brazil must prepare and submit to the Central Bank a list of the assets and rights they hold outside of Brazil, which total amount is equal or higher than US\$100,000.00 or the equivalent in other currencies (this value normally varies each year).

The following assets held abroad must be reported to the Central Bank: deposits in bank accounts held abroad, loans, financing transactions (of export of goods and/or services), leasing, direct investments, portfolio investments, financial derivatives investments, and other investments, including investments in real estate and other assets.

This declaration must be effected and submitted to the Central Bank on an annual basis. Individuals or legal entities which do not declare the requested information or provide false information are subject to sanctions established by the Central Bank that could include fines up to R\$250,000.00.

9.11. Enrollment of Individuals and Foreign Companies with the Registry of Individuals (CPF) and Registry of Corporate Entities (CNPJ)

Pursuant to the Brazilian Federal Revenue Department's Ordinance (*Instrução Normativa*) No. 568, of September 08, 2005, the individuals and companies established abroad that own property and hold rights in Brazil that are subject to public registration are required to enroll with the Individual Taxpayers' Registry (CPF) and with the General Taxpayers' Registry (CNPJ), respectively.

Note that the new foreign investors in Brazil – whether individuals or companies – that have not yet enrolled with the CPF or CNPJ may be impeded from enrolling with the RDE-IED module of the SISBACEN system and, thus, be prevented from closing exchange operations related to the inflow or outflow of funds from Brazil and to register amendments to its corporate documents in such system.

10. EMPLOYMENT OF FOREIGNERS IN BRAZIL

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The legal status of foreigners in Brazil is regulated by Law 6.815 of August 19, 1980, which is regulated by Decree 86.715 of December 10, 1981. Additionally, other regulations exist at a lower hierarchy level issued by the *Conselho Nacional de Imigração – CNIg* (National Immigration Council), authority responsible for establishing the national immigration policies.

According to Law 6.815/80, there are seven types of visas that may be granted according to the purpose of the trip and the activities that will be performed in Brazil:

1. transit;
2. tourist;
3. temporary;
4. permanent;
5. courtesy;
6. official;
7. diplomatic.

The Ministry of Foreign Affairs has exclusive authority to grant these visas, by way of rule through the Brazilian diplomatic bodies abroad. In some cases, however, the grant of the visa is subject to a prior authorization by another Brazilian authority, particularly the Ministry of Labor and Employment, through its *Coordenação-Geral de Imigração – CGIg* (Immigration General Coordinator).

The tourist, business, temporary and permanent visas are the types of visa that are most commonly used by the business community.

10.1. Tourist or Business Visa

The tourist visa and the business visa (also called Temporary Visa – Type II) have different purposes: the first is appropriate for leisure and entertainment trips, while the second is appropriate to enable foreigners that come to Brazil exclusively in the interest of their companies, to offer their products, become familiar with the Brazilian market and close or formally enter contracts, enabling to participate in meetings, conferences, exhibitions and seminars, visit potential clients and conduct market surveys.

The work that is performed with a tourist or business visa in benefit of a Brazilian company, whether paid locally or not, subjects the company to a fine and to the compulsory departure of the foreigner from Brazilian territory.

Both the tourist and the business visas allow a stay in Brazil of up to 90 days and may be extended only once for the same period, within Brazil. Thus, these types of visas enable a stay in Brazil of up to 180 days in a 365-day period.

The need to obtain these visas was waived by Brazil for nationals of certain countries, such as the South American countries and most of the European countries, on the basis of reciprocal treatment. In this case, “business” or “tourism” should be marked in the entry and exit card, depending on the purpose of the trip.

10.2. Temporary Visa

There are seven types of temporary visas, namely:

- I – Study mission or cultural trip;
- II – Business trip;
- III – Artist or athlete;

IV – Student;

V – Work;

VI – Newspaper, magazine, radio, television or foreign news agency correspondent;

VII – Minister of religious confession or member of a consecrated life institute and of a religious congregation or order.

All may be extended to the legal dependents of the visa holder, who however are expressly prohibited from engaging in a paid labor activity in Brazil.

Among these types, we emphasize items II (see comments above) and V. The temporary work visa, also called “Temporary Work Type 5”, may be granted in several situations, the most common being:

10.2.1. Local Hire

Brazilian companies may hire foreigners that have a special professional expertise on a temporary basis, the obtaining of this visa being a pre-requisite for the effectiveness of the labor agreement.

The company must basically fulfill two conditions: for each foreigner that is hired there must exist at least two registered Brazilian employees and the ratio between the total of the salaries that are paid to foreigners and Brazilians must have the same proportion. The foreigner is required to have completed the college course, post-graduation “stricto sensu” (master’s degree or doctorate) or, if not, to have at least nine years of school education. Further, the foreigner must have professional experience related to the duties that the foreigner will have in Brazil of at least (i) one year after completion of the college course or (ii) two years in their absence. In the case of foreigners holding a master’s degree or doctorate related to the activities which will be carried out in Brazil, no professional experience is needed.

Furthermore, the gross monthly salary of the foreigner is an aspect that will also be considered, not being allowed a reduction in the value thereof in comparison to the value of the salary that the foreigner received abroad before coming to Brazil and the value offered to the mission in Brazil.

The period of stay under this visa may be of up to two years, with a possibility of extending it for up to two years and its conversion to a permanent visa.

The foreigners that obtain this type of visa cannot have managerial duties, since such duties are allowed only to those that obtain a permanent visa. Furthermore, they are legally bound to the company that applied for the visa and may only work for another company upon the prior and express authorization of the Ministry of Justice.

10.2.2. Technical Services

This type of authorization is intended for technicians who will not have an employment relation with the Brazilian company that retains such services. It is based on the contractual relation between two companies, one being Brazilian (which applies for the visa) and a foreign company, concluded through one of the following documents:

- a) instrument issued by the Federal Revenue, in the case of purchase and sale of equipment with technical support;
- b) instrument signed with the identification of the parties, in the case of technical cooperation between companies of the same corporate group, duly proving the association relation;
- c) instrument executed in foreign currency, between the Brazilian Central Bank and a foreign company;
- d) agreement or convention.

This visa may be valid for up to one year. The validity period may be extended provided that the contract that supports is still fully effective and the requirements set forth by the Brazilian government are met.

Emergency cases

In existing a situation that puts at risk life, the environment, the patrimony or that causes interruption in the production or supply of services, the Brazilian consulates are authorized to grant the temporary visa type 5 without the Ministry of Labor and Employment's agreement, with a maximum validity of 30 days, extension not being allowed. Once this type of visa has been granted to a foreigner a 90-day grace period must be observed for a new application.

In the emergency cases other than the foregoing situations, or in which more than 30 days are needed, it is possible to apply to the Ministry of Labor and Employment, through a simplified process, for authorization to issue a non-extendable work visa valid for 90 days.

10.2.3. Trainees

There are also specific requirements for the grant of a work visa to trainees. The foreigner must have completed a college or professional specialization course in the subject field of business in the twelve months preceding the visa application. Further, there must exist reciprocity treatment given to Brazilians abroad or be expressly allowed in the laws of the country of the interested applicant.

It is important to note that the exercise of any type of paid work in Brazil is prohibited: any payments, in this case, must be paid by a source located abroad.

The term for stay under this visa is up to 1 year and cannot be extended.

10.3. Permanent Visa

The permanent visa is granted, by way of rule, to foreigners that intend to reside in Brazil on a definitive basis. It may also be granted to the whole family unit comprised by the legal dependents, and there are no restrictions for them to engage in paid work activities.

The main cases for its grant are:

10.3.1. Legal Representatives

Intended for foreigners that come to Brazil to have managerial powers and to act as legal representatives of a Brazilian company.

The main requirement for the grant of this type of visa is the investment of an amount equal to, at least, US\$ 200,000.00 for each foreign executive, duly proven by a registration of an investment in foreign currency recorded before the Central Bank of Brazil. Alternatively, it is possible to prove the existence of an investment amounting US\$50'000.00 and a plan to hire at least 10 new employees over the next two years

It is indispensable that a Brazilian company/institution has been established, which will apply for the work visa. The appointment of the foreign officer in a corporate document, with its filing with the Commercial Register, is also required.

The foreigner's compensation is also an extremely important factor since it reflects directly the foreigner's professional expertise, and will be analyzed by the Ministry of Labor and Employment according to strict criteria.

For up to 5 (five) years, the foreigner shall be legally bound to the Brazilian company that applied for the foreigner's visa. Hence, the prior authorization of the Brazilian immigration authorities is required for both

the exercise of a new position foreseen by the by-laws, in the same company, and for the exercise of a new position foreseen by the by-laws, in another company of the corporate group.

10.3.2. Entrepreneurs

As occurs in other countries, Brazil also wishes to attract entrepreneurs that may contribute to Brazil's economy, and inclusively simplified the documents that are required for this type of application and renewal, and also reduced the minimum investment of US\$200,000.00 to US\$50,000.00.

A Brazilian company must be organized, in which the foreign entrepreneur will be a partner and administrator (this last condition may only be met after the permanent visa has been obtained, and this must be expressly stated in the company's by-laws). Furthermore, an investment of an amount equal to at least US\$50,000.00 – which must be recorded in the Central Bank of Brazil's electronic registration system, along with a brief description of the activities that will be performed – is required. This is due to the purpose of the grant of this type of visa, which is to develop certain sectors of the Brazilian economy.

In view of the importance of employment to the Brazilian economy, even if the foreign entrepreneur does not have capital that suffices to invest US\$50,000.00, a work permit (and, therefore, a permanent visa) may also be granted in the event the entrepreneur's business and investment plan foresees the creation of at least 10 jobs in the course of the next five years. In this case, the National Immigration Council will analyze the application.

It should also be noted that, in the case of Argentine or Uruguayan entrepreneurs, the international treaties on this matter, which establish a different process, must be considered.

The period of validity of the visa and of the work permit shall be five years, and the type of visa to be granted shall be the permanent type visa.

Upon the expiration of the term, an application for renewal must be filed and the renewal of the status of resident shall be done through the exchange of the foreigner's identification card (RNE) before the Immigration Police. For this purpose, it is required to prove that the applicant continues to be an investor in Brazil and that the business in which the applicant is engaged is a productive activity, through the submission of the company's by-laws, its income tax statement and also the RAIS tax report related to the last five years.

10.3.3. Bank Representatives

According to the Central Bank of Brazil regulations, financial institutions or the like that are established abroad may open agencies in Brazil for commercial contacts and to relay information of interest to the parent company or to affiliates established abroad. Such representation may be carried out by a Brazilian company or by a Brazilian or foreign individual.

In the case of a foreign individual, a permanent visa may be granted with the Ministry of Labor and Employment's authorization, for a period of five years. For this purpose it is an essential requirement to have obtained registration with the Central Bank.

10.3.4. Retirement

Foreigners that have already retired may apply for a permanent visa directly before the Brazilian consulate abroad, being required to prove the possibility to remit on a monthly basis to Brazil a sum equal or higher than US\$ 2,000.00. If the applicant has more than two dependants, an additional US\$ 1,000.00 must be remitted to each dependant that exceeds the two dependants.

10.3.5. Marriage with a Brazilian citizen or children born in Brazil

Brazilian law covers foreigners married to a Brazilian citizen or that have children born in Brazil. They may obtain permanent resident status through a proceeding that is initiated before a Federal Police precinct that has jurisdiction over the place where the applicant resides, which is completed in approximately ten months. During the period of scrutiny in this proceeding, the applicant may remain in Brazil until the Ministry of Justice's decision thereon issues.

In the case of marriage with a Brazilian citizen, the permanent visa may be applied for abroad before the relevant Brazilian consulate, before the couple's residence is transferred to Brazil.

10.4. Registrations and Recordings upon Entering Brazil

Those that hold a temporary visa type I (study mission or cultural trip), IV (student), V (work), VI (journalist) and VII (religious leader) must register themselves before the Federal Police Department in thirty days as of their first entry subsequent to the obtaining of the visa.

The foreigner that obtained a work visa will only be working in a regular status after such registration (article 48 of the Foreigners' Statute). Thus, the plain existence of an application for the work visa, or even its approval, does not suffice if the visa has not yet issued and the registration before the Federal Police Department has not been accomplished.

Further, it is also required to enroll with the Registry of Individual Taxpayers (*Cadastro de Pessoas Físicas*) of the Ministry of Finances, for the purpose of identification of the individual as a taxpayer, considering that all the payments that are made to the foreigner, including by a source established abroad, is subject to taxing according to Brazilian law. On a daily basis, it is a document that is as important as the identity card (RNE) as it is required in many situations (even in purchases at a supermarket) and also, particularly, to open a bank account.

Finally, the worker's Employment and Social Security Record (CTPS) is a mandatory document required for foreigners that come to Brazil under a labor agreement, so the worker may be registered as an employee of the Brazilian company. The lack of registration or an incorrect registration may lead to the future denial of an application for extension of the validity of the work visa.

11. TAXATION (TAXES, FEES AND CONTRIBUTIONS)

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LOCAL TAXATION - INTRODUCTION

Historically, Brazilian tax legislation is complex. Despite of the government's efforts to reduce and simplify the Brazilian tax system there still exists a large number of pulverized rules currently in force. This chapter briefly addresses the main taxes that are levied in the businesses conducted with Brazil, as well as the most important aspects related to the taxation of the individual's income in Brazil, which also affects non-residents and, more particularly, the expatriates.

11.1. Corporate Income Tax ("IRPJ")

Brazilian companies are subject to Corporate Income Tax ("IRPJ"), which is levied over the net profit at the rate of 15%, and in the event the net profit exceeds R\$ 240,000.00 per annum it shall be subject to an additional 10%.

According to Law No. 9,430 of Dec. 30, 1996 the taxpayer may elect to calculate the IRPJ on an annual or quarterly basis.

If the IRPJ is calculated quarterly, it may also be paid on a quarterly basis. Over the profit ascertained in the quarter applies a 15% tax rate, plus a surcharge of 10% over the net profit that exceeds R\$ 60,000.00 per quarter.

If the IRPJ is calculated on an annual basis, the taxpayer advances the monthly payments of the IRPJ, calculated based on an estimated profit. To a large number of companies the monthly estimated profit corresponds to 8% of the total monthly gross revenues plus capital gains and other income and positive results obtained by the company, which percentage ranges between 8% and 32% according to the field of business in which the taxpayer is engaged. A tax rate of 15% applies over this tax basis, plus an additional 10% over the estimated profit that exceeds R\$ 20,000.00 per month. In the case of electing the annual calculation method and making advance monthly payments, at the end of the period the company must pay the amount due or apply for the return of the difference between the amount paid monthly and the amount calculated based on the annual profit.

Another method that is adopted to calculate income tax consists in the estimated method, in which the income tax is calculated quarterly and, for most of the fields of business, the tax rate is 8% of the gross revenues, however the rates that apply to calculate the estimated profit range from 8% to 32% according to the business in which the company is engaged (e.g. 32% in most cases). The following tax rates apply over the estimated profit: 15% income tax plus an additional 10% over the amount that exceeds R\$ 60,000.00 per quarter. If the estimated profit method is adopted to calculate the income tax the taxpayer is not subject to adjustment of the annual income tax that is asserted.

However, the possibility of adopting the estimated profit method is subject to the fulfillment of certain conditions, such as: (i) the profit asserted in the preceding period cannot exceed R\$ 48,000,000.00; (ii) the profit, capital gains or other gains cannot have a foreign origin; (iii) financial institutions or similar organizations, as determined in Brazilian law, cannot adopt the estimated profit method for income tax purposes; (iv) companies cannot be beneficiaries of tax incentives granted under Brazilian law (e.g. tax exemption or reduction of income tax); (v) companies cannot have paid income tax calculated based on a monthly estimate; and (vi) factoring companies cannot adopt the estimated profit method.

Up to 1998 the companies that belong directly to foreign companies could not adopt the estimation method, but this restriction ended in 1999.

The Tax Loss generated in a certain period may be offset with the taxable income of the following period, provided that limited to 30% of the taxable income (e.g. for each R\$ 1.00 of profit, R\$ 0.70 are subject to taxation, irrespective of the tax loss then existent). The tax loss may be maintained indefinitely, without legal limitation.

Before 1996 any dividends and profits distributed to non-residents were subject to withholding income tax ("IRRF") at a 15% tax rate, except in the case of distribution to residents in Japan pursuant to a treaty between Japan and Brazil establishing a maximum tax rate of 12.5%.

According to Law No. 9,249 of Dec. 26, 1995 the profits accrued after Jan. 1, 1996 are no longer subject to the IRRF in the distribution thereof. The profits and dividends accrued before Jan. 1, 1996 continue subject to IRRF at the rates current in the year in which they were generated.

11.2. Interest on Own Capital

Law No. 9,249/95 determines that a Brazilian company may pay or credit interest on own capital provided that the company has a cumulated profit or accrued in the period. The total amount of interest that may be paid or credited cannot exceed 50% of the company's profit accrued in the period or cumulated profit. The basis for calculating the interest on own capital constitutes the company's net equity, excluding the reserves for reappraisal of assets or rights that were not computed in asserting the real profit and the basis for calculating the social contribution over the net profit.

The interest is established based on the long-term interest rate controlled by the government ("TJLP") and calculated on a *pro-rata* basis. The expenses with interest on capital are considered deductible operational costs for income tax and social contribution on the net profit purposes. A 15% IRRF rate applies over the interest paid, asserted by the partners or capitalized.

11.3. Withheld Income Tax ("IRRF") in Foreign Payments

In Brazil the payments made to non-residents are usually subject to withheld income tax. Up to December 31, 1998 the payments made to non-residents for services supplied to Brazilian residents and to non-resident individuals as remuneration were subject to the regular levy of withholding income tax at the rate of 15%. As of Jan. 1, 1999 article 7 of Law No. 9,779 of Jan. 19, 1999 increased the tax rate of the withheld income tax from 15% to 25%. Such 25% tax rate over the payment of supply of services does not apply to the interest on loans and other types of payments, which are not classified as services and are subject to specific legislation. The rate that applies to the payment of loans and others continues to be 15%.

Further, pursuant to the introduction of a new Contribution for Intervention in Economic Domination ("CIDE") on Jan. 1, 2002 by Law No. 10,332, the income tax rate that applies to technical, administrative assistance services and other similar payments that don not involve transfer of technology was reduced to 15% and the payments remitted abroad related to these services are subject to CIDE at the rate of 10%.

Article 8 of Law No. 9,779/99 increased the former withheld income tax rate of zero or 15% to 25% in all payments of income, with a few exceptions, made to non-residents domiciled in countries that do not tax income or that tax at a maximum tax rate that is less than 20%. The Federal Revenue ("SRF") listed some countries that are considered, for Brazilian taxation purposes, as places that have lower taxes – the so called "tax heavens" - (Ordinance IN/SRF No. 188/02). Such countries include Andorra, Anguilla, Antigua, Dutch Antilles, Aruba, Bahamas, Bahrain, Barbados, Barbuda, Belize, Bermudas, Cyprus, Costa Rica, Djibouti, Dominica, Cayman Islands, Channel Islands (Jersey, Guernsey and Alderney), Cook Island, Gibraltar, Granada, Hong Kong, Madeira Island (Portugal), Maldives, Man Island, Marshall Islands, Mauritius Islands, Turks and Cayco Islands, British Virgin Islands, Lebanon, Lebuan, Liberia, Liechtenstein, Luxembourg,

Malta, Macau, Monaco, Montserrat, Nauru, Niue, Nevis, Oman, Panama, San Marino, Samoa Islands, Saint Lucy, Saint Vincent, Seychelles, Singapore, Tonga, United Arab Emirates, U.S. Virgin Islands and Vanuatu. Thus, for example, the interest payable on loans to countries that are considered tax heavens are currently subject to 25% withholding income tax, except if a legal provision exists regulating the withheld income tax that specifically applies over the type of loan that was contracted.

11.4. Social Contribution on Net Profit

In addition to Corporate Income Tax (IRPJ) the Brazilian companies are subject to the payment of the social contribution on the net profit ("CSLL"). The current tax rate is 9%. However, there exists a 1% bonus for tax regularity for companies that in the last five years **did not**: (i) be requested to pay such taxes by the tax authority; (ii) hold debts whose requirement to pay has been suspended; (iii) be enrolled as a tax debtor; (iv) make payments or pay taxes in arrears; or (v) are in default or in arrears with the payment of charges.

CSLL is levied separately from the IRPJ given that the CSLL is paid to the social security and not to the federal government, to whom the IRPJ tax is paid.

The tax basis of the CSLL is the net profit specifically calculated for the CSLL payment purposes. Similar to IRPJ, the taxpayers may elect to calculate the CSLL on an annual or quarterly basis. In the event the calculation of the CSLL is on an annual basis, the payments must be made based on an estimate. Law No. 9,316 of Nov. 22, 1996 establishes that the CSLL can no longer be deducted from the net profit for the purposes of calculating IRPJ.

The negative tax basis of the CSLL (tax loss for CSLL purposes) may be used to offset the taxable profit in the subsequent periods, limited to 30% of the taxable profit in each calculation period. Similar to what occurs in regard to the tax loss for IRPJ purposes, the negative tax basis of the CSLL may be used to offset a future taxable income, without a legal limit for the expiration of these amounts.

Provisory Act (MP) no. 219/2004, converted into Law No. 11,051/04, introduced a new system of credit over the amount of the CSLL due, which corresponds to 25% of the cost of depreciation of goods intended to the fixed assets for use in the industrial process that were acquired in the period of October 1, 2004 up to December 31, 2005. Note, however, that Provisional Measure No. 255/05, converted into Law No. 11,196/05, postponed this final term until December 31, 2006. These credits may be used as of the initiation of the operation up to the end of the fourth calendar year subsequent to this event. The amount of these credits shall accrue to the CSLL amount due as of the year subsequent to the end of the period in which this benefit may be used, to the extent that the credits mechanism indeed generates a deferral of the CSLL due. This act is aimed at fostering investment in the installation and modernization of the Brazilian industry.

11.5. Social Contributions on Revenues ("PIS" and "COFINS")

The Contribution for the Financing of Social Security ("COFINS") and the Social Integration Program ("PIS") contributions currently apply at the rates of 7.6% and 1.65%, respectively, over the revenues of Brazilian companies.

The form of calculating the COFINS was changed in February 2004 and the form of calculating PIS was changed in December 2002, aiming to avoid the accumulation of this contribution by way of grant of credits in the acquisition of goods and services needed in the company's activities.

Under the new form of calculation of PIS and COFINS, the taxpayer is entitled to the credit related to the contribution pursuing from the operations of: (i) acquisition of goods for resale, including the expenses with storage of goods and freight in sales, in case it represents a cost supported by the seller; (ii) acquisition of goods and services for use as input materials in the manufacture of products intended for sale or used in the supply of services, including the expenses with storage of goods and freight in sales, in case it represents a cost supported by the seller; (iii) consumption of electric power by the facilities of companies; (iv) payment

of leases of buildings, machines and equipment to companies for the use thereof in the company's operations (v) acquisition of machines and equipment for the use thereof in the manufacture of products intended for sale and of other goods incorporated to the fixed assets; (vi) buildings and betterments in third party real estate property and (vii) return of goods.

This form does not apply to the cooperative organizations, immune or exempt companies, companies taxed by income tax based on the estimated profit, financial institutions, health plan operators, private pension entities and insurance company, among others. In regard to the taxpayers that are subject to higher tax rates pursuant to the single-phase system of the PIS and COFINS, such as the pharmaceutical and auto industries, pursuant to Law No. 10,865 of April 30, 2004 they thenceforth are entitled to credits under the non-accumulation system.

Further, there exists an express provision determining that PIS and COFINS does not apply over the revenues resulting from the export of products to abroad, supply of services to an individual or company domiciled abroad, whose payment represents the inflow of foreign currency and over the revenues of sales to trading companies (*empresas comerciais exportadoras*) with the specific purpose of export. Another important aspect concerns the reduction to zero of the tax rate of these contributions over the financial revenues (except those pursuing from interest on own capital and hedge) as of August 2004, provided that the taxpayer is covered in the non-accumulation system of the tax.

Moreover, Law No. 10,865/04 introduced the taxation of PIS and COFINS on imported products and services. This law determines that PIS and COFINS are due in the entry of foreign goods in Brazil and in the payment, crediting, delivery, the use or remittance of amounts to foreign residents or domiciled abroad as payment for the services supplied.

The taxpayers thereof are all the importers and companies or individuals that contract the services of individuals or companies domiciled abroad and the beneficiary of the service in the event the principal party also resides or is domiciled abroad. The general tax rate of the PIS and COFINS contributions are, respectively, 1.65% and 7.6% and the tax basis shall be as follows: value for customs purposes adopted as the tax basis in the import tax, plus the State Sales tax (ICMS) and the PIS and COFINS amounts. In the import of services the tax basis is the price of the service plus Service tax (ISS) and the PIS and COFINS contributions. However, Provisional Measure No. 255/05, later converted into Law N° 11,196/05, established that PIS/COFINS-Import as well as other taxes and customs expenses, shall not be included in the ICMS tax basis for purposes of calculating the PIS/COFINS – Import tax basis;

11.6. Contribution for Intervention in Economic Domination ("CIDE")

The CIDE contribution was introduced to finance a new social program (Incentive for the College-Company Relations to Support Innovation Program) for the interaction between colleges and companies, aiming to incentive the technological development in Brazil. The program will be realized through scientific and technological research programs between colleges, research centers and industries.

This contribution is paid by Brazilian companies that hold licenses to exploit rights, purchasers of know how or parties to contracts that imply in the transfer of technology executed with non-residents. As of January 1, 2002 the CIDE contribution is also paid by companies that supply technical services, administrative assistance and other similar services that do not involve transfer of technology. The CIDE contribution is due over the amounts paid, credited, delivered, used or remitted, on a monthly basis, to non-resident beneficiaries, such as royalties (any type) and remuneration in the following types of contracts: (i) technology supply, (ii) technical support (technical assistance and specialized technical services), (iii) assignment and licensing of trademarks, (iv) assignment and licensing of patents, and (v) contracts for the supply of technical services, administrative assistance and other similar services that do not involve transfer of technology.

The tax rate of this contribution is 10% over the amounts paid, credited, delivered, used or remitted per month to non-resident beneficiaries as payments under the types of agreements mentioned above. The

contribution is due on the last business day of the fortnight subsequent to the month in which the royalties or other type of compensation subject to the contribution are paid, credited, delivered, used or remitted abroad.

11.7. Contribution for the Development of the Brazilian Cinematographic Industry ("CONDECINE")

This contribution is due over the exhibition, production, licensing and distribution of movies and photography work in video with profit purposes, per market segment, and it is calculated based on the period of work on predetermined basis.

CONDECINE is also due at the tax rate of 11% on the amounts paid, credited, remitted, delivered or used by local agents to foreign producers resulting from the exploitation of audiovisual work in Brazil or the importation thereof on a fixed basis.

11.8. Contribution for Intervention in the Economic Domain ("CIDE") over Combustion Fuels

This contribution is due over the import and sale of certain types of combustion fuels (petrol, diesel oil, aircraft kerosene and other types of kerosene, gasoline, liquefied petrol gas, including the by-products of natural gas, methanol and naphtha) in a fixed amount in Reais.

The CIDE contribution is payable by the producer, mixer or importer of combustion fuels. The taxpayer may deduct the CIDE amount from the PIS and COFINS contributions that are due in the sale of combustion fuels. The CIDE contribution is not due over the profit that results from the exports of the aforesaid products.

11.9. Import Tax ("II")

The import tax is due upon the clearance by customs of the imported products, according to an *ad valorem* tax rate. The tax rate varies according to the tariff classification of the imported product. Imports of products are also subject to IPI (Tax on Industrialized Products), ICMS (Sales Tax) (further addressed below) and PIS/COFINS-Import. These taxes, jointly with the import tax, are calculated as follows: the import tax is applied over the CIF price of the imported product; the IPI tax applies over the CIF price plus import tax; the ICMS tax applies over the CIF price, plus import tax, IPI tax and the ICMS tax and the PIS/COFINS-Import applies over the CIF price, plus ICMS and the PIS/COFINS-Import themselves.

11.10. Export Tax ("IE")

The export tax is due upon the export. This tax has an *ad valorem* tax rate that is applied according to a limited product list and varies according to the type of product that is being exported.

11.11. Tax on Industrialized Products ("IPI")

The tax on industrialized products is a federal tax that is due over industrialized products upon the exit thereof from the facility where they are manufactured. The IPI tax is also due in the import of industrialized products in the case of import of a product used as an input and its subsequent sale by the importer. The IPI tax rates vary according to the product's essentiality.

The IPI is due in each stage of the manufacturing process of the industrialized products, and also in the import thereof. This tax is paid upon the purchase or import of raw materials and products, parts, intermediary components and packaging materials and may be offset in subsequent operations.

11.12. Tax on the Circulation of Products and Services ("ICMS")

Similar to the IPI tax, the ICMS tax is another tax that is due over the sale of products and, also, the supply of services, due upon the import of a product into Brazil and the sale or transfer thereof within Brazil, or upon the supply of communication services and intra or interstate transportation, upon the supply of the service.

The ICMS tax rates and the tax benefits vary from state to state and also according to the type of operation (e.g. sale (intra or interstate) of products, communication services or transportation, etc). In the state of São Paulo the most common tax rates are currently (i) 12% over transportation services, (ii) 18% over imported products, sold or transferred and (iii) 25% over communication services. According to Constitutional Amendment (EC) no. 33/01, ICMS is due over imports by companies and individuals, even when not considered taxpayers for the purposes of ICMS payment, at a tax rate of 18%. The other tax rates may be applied depending on the product/service. The tax rates may also vary in interstate operations (usually 7% or 12% depending on the state of destiny of the products and services).

Similar to IPI, the ICMS system allows a certain taxpayer to offset the ICMS paid upon the purchase of products and services with the tax amount due in subsequent taxable operations (e.g. sale of products and services subject to ICMS). The difference that results therein shall consist in the amount due to the state.

As of Nov. 1, 1996 importers/buyers may be credited by the ICMS paid over imports and local purchases of fixed assets (which was prohibited up to Nov. 1, 1996). However, Supplementary Law (LC) No. 102/00 introduced a new system for the use of ICMS credits upon the purchase of fixed assets so that the taxpayer may record the aforesaid credits at a 1/48 monthly rate. As of Jan. 1, 2007 the taxpayer will be authorized to credit the ICMS paid upon the purchase of goods for consumption, i.e., products that are consumed in the activities in which the taxpayer is engaged.

In regard to taxpayers that have excess ICMS tax credit, some state laws establish options that allow the taxpayer to transfer its credits. In the state of São Paulo, for example, the state law offers three options for the taxpayer that has an excess of ICMS tax credit to use the tax already paid (instead of offsetting same with ICMS debt), namely: (i) transfer of ICMS credits to any of its affiliates or offices established in the state of São Paulo, (ii) transfer the credits to an inter-dependent company, as defined by the law, or (iii) use the credits to pay suppliers of raw materials and/or certain fixed assets. Other state laws may establish other options for the use of ICMS credits.

11.13. Tax on Financial Operations ("IOF")

The tax on financial operations is due over exchange operations carried out for the foreign remittance of payments for remuneration of services that were supplied, including technical support fees and royalties for the licensing of trademarks and patents. The party that remits the resources abroad is liable for the payment of IOF. The tax is charged by the commercial bank established in Brazil upon the closing of the exchange agreement. Currently, however, most of these operations have a zero tax rate.

The IOF tax is also due in exchange agreements that are intended for loans to resident Brazilians and/or to implement certain investments in Brazil. Currently, the IOF tax rate is 5% over loans extended to Brazilian companies with a term of less than 90 days. The law establishes a 25% limit to the increase of the rate of this tax. In regard to the exchange agreements involving credit card administration companies to cover expenses incurred by their clients abroad, the applicable tax rate is 2%.

In addition to the levy of IOF in exchange agreements, this tax is also due over financial operations involving credit, insurance and securities.

11.14. Provisory Contribution over Financial Operations ("CPMF")

Law No. 9,331 of Oct. 24, 1996 introduced the CPMF for a temporary period. However, the term of validity of this contribution has been repeatedly extended, to the extent that Constitutional Amendment (EC) No. 42/2003 foresees the possibility of charging this contribution up to Dec. 31, 2007. Currently, the CPMF contribution is levied at the tax rate of 0.38% over all bank transfer and drafts of cash operations, such as, for example the clearance of checks.

Note that as of October 2004 a mechanism to prevent taxation by CPMF in the transfer of funds between different fixed and variable yield investment accounts by introduced by Law No. 10,892/04. For this purpose, a deposit account for investments was introduced, in which the debiting for applications in fixed or variable yield are subject to CPMF at a zero tax rate.

11.15. Tax on Transmission of Property *Causa Mortis* and Donations ("ITCMD")

The ITCMD is a state tax levied on the transmission of chattels or real estate property by way of donation or death (inheritance). Currently, in the state of São Paulo, the ITCMD tax rate is 4% of the appraised value of the chattels or real estate or the transmission of rights.

11.16. Services Tax ("ISS")

ISS is a municipal tax levied on the supply of any type of services, as defined in federal Supplementary Law (LC). This tax is currently governed by Supplementary Law (LC) no. 116/03.

ISS is due generally to the jurisdiction of the supplier's facility. The following exceptions are determined in LC no. 116/03: civil construction, services acquired abroad, sweeping and collection of garbage services, treatment of effluents, environmental sewage, forestation, parking security, storage and amusement services.

As of January 2004 the ISS tax is due over the purchase of foreign services, the Brazilian beneficiary thereof being liable for the payment of the tax, in addition to its levy over exports of services when the results occur in Brazil (despite that the payment is made by a foreign resident).

11.17. Tax on Urban Buildings and Property ("IPTU")

IPTU is a municipal tax that is levied on an annual basis and has progressive tax rates based on the use and appraised value of the real estate property in the municipality of Sao Paulo.

11.18. Tax on the Transmission of Real Estate Property ("ITBI")

ITBI, also known as SISA, is a municipal tax levied over the transfer of real estate property. The tax rates may vary according to the real value of the operation or the appraised value of the real estate, whichever is higher. Note that, in the Municipality of Sao Paulo, the tax authorities are allowed to update the appraised value of the real estate through market researches. In addition, in the municipality of Sao Paulo it has a fixed tax rate of 2%. The ITBI/SISA tax is not due in the transfer of real estate property in the events of merger of companies or contributions for paying in corporate capital.

11.19. Income Tax - Individuals ("IRPF")

Brazilian law distinguishes resident from non-resident individuals. Generally, a Brazilian national is automatically a resident when he/she is legally domiciled in Brazil or, if not domiciled in Brazil, as of his/her election to be treated as a resident for tax purposes.

11.19.1. Payments to Non-Resident Individuals

By rule, the salaries paid by a Brazilian source for services supplied by non-resident individuals are subject to withholding income tax at the rate of 25%.

11.19.2. Visas

As of January 1, 1999 individuals that hold temporary visas are considered residents for tax purposes upon their entry in Brazil to work pursuant to a labor agreement. Thus, they are required to file an annual income tax report, also stating their foreign income. The payments are subject to progressive income tax at the rate of 15% or 27.5% (maximum tax rate).

Further, individuals that hold temporary visas who enter Brazil for any other reason other than to work under a labor agreement are considered residents for tax purposes after a permanence of 183 days in a 12-month period as of the date of entry.

11.19.3. Non-Residents

Expatriates treated as non-residents are subject to Brazilian income tax only in regard to the income earned from Brazilian sources, namely: Brazilian residents, whether individuals or companies. The Brazilian source of income pursuing from salaries and remuneration is subject to a standard withholding income tax of 25% while capital gains are subject to a 15% withholding income tax. This taxation may be reduced in cases where a treaty to prevent dual taxation applicable to the case exists. The tax is usually based on gross income, net of any deductions, being due upon the crediting, availability or use of the resources on behalf of the non-resident or remittance thereof to the non-resident, whichever occurs first.

11.19.4. Residents

Brazilian residents are subject to the payment of income tax on their global income, with progressive tax rates, which vary according to the specific class in which the taxpayer is classified, based on the overall taxable net income earned. The current tax rates are as follows: (i) 15% to those whose monthly income is in the bracket of R\$ 1,164.01 up to R\$ 2,326.00 and (ii) 27.5% to those whose monthly income is higher than R\$ 2,326.00. Nevertheless, subject to certain conditions and provided that the expatriate's country assures reciprocal treatment, the resident expatriates may offset their tax burden with the federal taxes paid abroad based on the foreign income source.

11.20. Transfer Pricing

11.20.1. Introduction

As of January 1, 1997 Brazil issued specific rules on transfer pricing (articles 18 and 24 of Law No. 9,340/96) with the purpose of preventing the improper distribution of income in international commercial relations between related parties. The system that was adopted foresees the determination of maximum amounts of deductible expenses and the minimum taxable income to Brazilian companies involved in transactions with related parties established abroad.

The Brazilian transfer pricing rules establish three bases to determine the maximum deductible amount of expenses, costs and charges in regard to products, services or imported rights of a related party, namely:

- (a) Compared Independent Prices;
- (b) Production Cost Plus Profit;

(c) Resale Price Less Profit.

In exports the taxpayers are subject to adjustments whenever the average sales price in these operations is less than 90% of the average sales price in the domestic market in the same period and under the same payment conditions. If the average price with the related parties is less than 90% of the price practiced with non-related parties the income earned with the export shall be adjusted based on one of the following bases:

- (a) Average Sales Price in Exports;
- (b) Wholesale Price in the Country of Destination Less Profit;
- (c) Retail Price in the Country of Destination Less Profit;
- (d) Cost of Purchase or Production Plus Taxes and Profit.

On April 30, 1997 the Ministry of Finances regulated the rules on transfer prices thru Ordinance (*Instrução Normativa*) no. 38/97. Subsequently, new rules and regulations were enacted in 2000, particularly related to the "Resale Price Less Profit" criteria in the import of products subject to production processes in Brazil (Provisory Act (MP) no. 1.924 – converted into Law No. 9,959/00 and Ordinance (*Instrução Normativa*) no. 113/00 of the Ministry of Finances). Note that on Nov. 11, 2002 Ordinance (*Instrução Normativa*) 243 was enacted and introduced a new method to calculate the reference-price thru the basis "Resale Price Less Profit" of 60%.

Ordinance (*Instrução Normativa*) 243/02, which revoked Ordinance 32/01, introduced a new method for calculating the reference-price thru the Resale Price Less Profit of 60%. This new ordinance of the Ministry of Finances did not bring any additional changes to the common practice of adopting the transfer pricing rules in Brazil, when compared to the former Ministry of Finances' Ordinances 38/97 and 32/01, but clarified some aspects that were not clear up to then.

The taxpayer has the burden of proof to demonstrate abidance to the transfer pricing rules and, if this is not done, it may suffer a tax assessment. The costs and average prices to which Law No. 9,430/96 refers must be based on official information or on reports prepared by the import / export country, or on researches conducted by companies or institutions that have notorious technical expertise.

In regard to products, services and rights imported from a related party, the taxpayer must prove that the related costs, expenses and charges do not exceed at least one of the three criteria established by Law No. 9,430/96. Otherwise, the tax authorities could question the excess deduction. The excess amount must therefore be re-added as taxable income and shall be subject to corporate income tax at the rate of 15% plus an additional 10%. The social contribution due on the adjusted income, at the rate of 9%, shall apply over the excess amount.

Although Law No. 9,430/96 does not foresee the adjustments to compare the prices practiced by the taxpayers with the prices adopted by other Brazilian companies that import or sell similar products, services or rights in the Brazilian market, Ordinance (*Instrução Normativa*) 38/97, currently Ordinance 243/02 of the Ministry of Finances, establishes certain rules for the purpose of price comparison.

The regulation defines "similar products" as those that, simultaneously:

- (a) Have the same nature and use;
- (b) May be interchanged to perform the use for which it was designed;
- (c) Have the same specifications.

11.20.2. Related Parties for Transfer Pricing Purposes

The following parties are considered related parties for the purposes of applying the transfer pricing rules:

- (a) Parent company domiciled abroad;
- (b) Affiliate or branch domiciled abroad;

- (c) The individual or company, resident or domiciled abroad, whose stake held in the stock of the Brazilian taxpayer renders it a controlling stockholder or affiliated company, as defined in commercial law;
- (d) The company domiciled abroad considered as a parent company or affiliate of the Brazilian taxpayer, as defined in commercial law;
- (e) The company domiciled abroad when this company and the Brazilian company are under a common stock or administrative control, or when at least 10% of the capital of each company is owned by the same individual or company;
- (f) The individual or company, resident or domiciled abroad that, along with the Brazilian taxpayer, holds a stake in the stock of another company, which in the total renders them controlling stockholders or affiliated companies of this other company;
- (g) The individual or company, resident or domiciled abroad that is affiliated to any company under the form of a consortium or condominium, as defined in Brazilian law;
- (h) The individual resident in Brazil that is a relative up to the 3rd degree (as defined by the Brazilian Civil Code); the wife or husband of the manager or controlling stockholder, directly or indirectly, of the Brazilian company;
- (i) The individual or company, resident or domiciled abroad, that holds an exclusive right as an agent or distributor, in the purchase or sale of products, services and rights of the Brazilian company;
- (j) The individual or company, resident or domiciled abroad, that has appointed the Brazilian company as an exclusive agent or distributor, in the purchase or sale of products, services and rights.

According to Ordinance (*Instrução Normativa*) 32/01 of the Ministry of Finances, the taxpayers must inform in their annual record of taxes paid ("DIPJ") the existence of any transaction with individuals or companies domiciled abroad that are considered related parties.

11.21. International Treaties on Tax Matters

Brazil is a party of many treaties to prevent dual taxation in international transactions. Up to this date Brazil has already entered treaties with Argentina, Austria, Belgium, Canada, Chile, China, Czech Republic, Slovakia, Denmark, Ecuador, Finland, France, Hungary, India, Israel, Italy, Japan, Luxembourg, Holland, Norway, Philippines, Portugal, Spain and Sweden. The Treaty with Paraguay has already been negotiated and signed, pending only presidential ratification. The Treaties signed with Mexico and Ukraine are still pending approval of the National Congress.

In July of 1995 Brazil and Switzerland signed a statement whereby both undertake to resume negotiations for a bilateral agreement to prevent dual taxation, however, up to this date, this has not materialized.

In April 2005, the Government of Germany terminated the Tax Treaty signed with Brazil. In this sense, as of June 1st, 2006, the treaty shall no longer produce effects.

12. LABOR LAW IN BRAZIL – A BRIEF OVERVIEW

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12.1. Introduction

The Labor Code (CLT) is the legal statute that governs labor relationships in Brazil and on a supplementary basis by the Federal Constitution, specific laws for certain professions and other laws providing on several matters of labor relationships and the entire regulations issued by public authorities, among several other legal provisions.

The Labor Code is an extremely protectionist law characterized by the old exaggerated intervention of the Government in the regulation of contracts, the parties being allowed, exceptionally, and provided that it does not conflict with the law, to freely convene. To understand and accept this legislation is not an easy task.

We shall address below certain important topics to comprehend Brazilian Labor Law, being necessary, however, *ab initio* to address the principles on which it is based.

12.2. The Principles of Labor Law

12.2.1. Principle of protection

The protection principle is, without doubt, the principle that differentiates Labor Law and it is essential to its existence and for its comprehension. This principle contains three other principles-species, which are: the *in dubio pro operario* principle, the principle of *applying the most favorable rule* and the principle of *the most favorable condition*.

This principle matches the purpose of labor law: disrupt the premise of the equality among the parties, compensating the weaker position of the worker vis-à-vis the superiority of the employer, by the legal protection claimed by the worker.

Notwithstanding its importance, evidently the criticism against this principle-gender is not sparse, particularly because it is applied unlimitedly and generically to any and all circumstances that are brought before the labor courts.

Hence, it is necessary to adapt this principle-gender to the present reality, despising from it the aspects of the absoluteness of exaggerated protection and the minimum, if not none, freedom that were vested thereon, so that it may be applied efficiently to the party that indeed needs it.

12.2.2. The *in dubio pro operario* Principle

This principle aims to determine the more favorable interpretation of a certain and dubious rule in the worker's benefit. It has been severely criticized having in view its incompatibility with the current reality that labor law is experiencing, with the impartiality that is required from a labor judge and with the principle of equality that is assured under most Constitutions.

12.2.3. Principle of applying the more favorable rule

The principle of *applying the most favorable rule* aims to assure to the worker the provision that is most convenient to the worker, regardless of observing the hierarchy of the laws.

The first meaning of this principle pursues from the analysis of the several meanings of a certain provision, while the second pursues from the confrontation of several rules that apply to a certain aspect.

The most appropriate theory to assert this principle is the theory of conglomeration of the provisions, substantiated in the construction of the law as a whole rather than as a fraction.

12.2.4. Principle of the most favorable condition

This principle, despite of its particularities, since it presumes the existence of a prior rule already applied to the case and is directed particularly to each worker, it is closely related to the principle of the more favorable rule commented above and also to the principle of impossibility of a contractual amendment that is detrimental to the worker.

The principle of the most favorable condition aims at ensuring the evolution of the labor law rules in terms of protection, thus weakening the introduction of rules that diminish rights that have already been conquered thru a prior rule.

The conditions, however, are not incorporated to the contract in the form established by this principle, and they may be changed, as is the case of the convened clauses, the existence of which is limited to the period of validity of the collective rule that foresaw them, therefore not vesting the characteristic of definitiveness.

12.2.5. Principle of non-waiver of rights

The principle of non-waiver of rights is supported by the protection of the worker to prevent the worker from, due to unfamiliarity with the law and lack of knowledge to negotiate, agreeing with the loss or diminishment of rights that are legally or contractually guaranteed.

Hence, the autonomy of the parties' will is thereby limited. Although this principle does not impede the worker from waiving a right, it renders such waiver void of validity since the waiver violates the guarantees established by Labor Law.

This principle is therefore based on the fragility of the worker in the labor relationship, who, due to such deficiency, may be coerced and obligated to waive rights protected by the law or the labor agreement in order to keep the job. Thus, the unavailability of rights constitutes a general rule in Labor Law.

The principle of non-waiver of rights was included in several rules established in the Labor Code (CLT), such as in articles 9, 444 and 468.

12.2.6. Principle of continuity of the employment relationship

Labor Law establishes the continuity of the employment agreement and this factor enables the worker's integration into the company's structure, acquiring economical and social safety, thus attaining improvement in the labor conditions, which is the teleological goal of Labor Law. But the beneficial reflexes of the continuity are not limited to the worker; the employer may benefit from experienced and trained labor, and therefore is interested in the continuity of the employment.

The preference for employment agreements of indefinite duration pursues from the ongoing aspect of the agreement, which is not extinguished upon the completion of a certain task.

The employment agreement may be amended, provided that observing the provisions of article 468 of the Labor Code, to assure to the employee evolution within the company and to keep it effective. Such amendments also authorize the transmutation of the legal nature of the agreement imputed by the parties, not being relevant the title of the amendment but rather the reality of the underlying fact.

The labor agreement may also be maintained despite of the existence of a breach of obligations by one of the parties or nullities. The breach must be of a grave nature to lead to the termination of the agreement and such grave events are, by rule, described in articles 482 and 483 of the Labor Code, which address the events that constitute grave fault by the employee and by the employer, respectively, and authorize termination for just cause. As regards the void clauses (nullities), they will not produce effects after they are declared as such. On the other hand, a clause that is affected by a nullity will not render the entire document void.

The employment agreement is also maintained in the cases of replacement of the employment in the events established in articles 10 and 448 of the Labor Code given that the employee is bound to the company in the sense of economic activity, not to its legal structure. Not occurring interruption in the economic activity, the employment agreement continues effective. As may be noted, this principle of continuity of the employment relationship operates solely in favor of the worker.

12.2.7. Principle of prevalence of the reality of the facts

Under this principle labor law is concerned with the aspect of the actual facts involving the performance of the agreement and not the merely formal aspects. The former prevails over the latter. The employment agreement and other documents on which the labor relationship is based are not ignored but rather valued jointly with the factual reality, which may prevail over such documents. The contractual clauses thus generate merely a presumption of validity that may be contradicted by the factual reality.

The rule of the prevalence of the reality is adopted to avoid the disguise of employment agreements under several forms of contracting, such as independent contractors and the like.

This principle is widely used in court rulings to trans change relationships that are formally conceived as civil/commercial nature to employment relationships.

The characteristic presumption adopted by Labor Law scholars that labor agreements are presumably employment agreements, supported precisely by the inequality between the contracting parties is weakened by the evolution of other forms of labor, which is the gender of the species employment, in adaptation to the effects of globalization.

Such presumption must be applied to the cases in which the contractual clauses are adopted with the intention of prejudicing one of the parties, violate the law, though, for such purpose the evidence produced must reflect such reality. In the cases in which the voluntary manifestation issues from a legally capacitated party, financially, legally and technically independent its application is useless and the viewpoint defended by the traditional scholars that the plain supply of services presumes the labor agreement is dissociated from the factual reality. In these cases it is necessary to be free of these preconceptions and question all the daily routines of the relationship constituted by the formal, signed agreement.

In fact, this principle constitutes a tool to investigate the truth, which may be dissociated from the preconceptions constructed by the discipline to which we devote ourselves in this survey. Since it is a common presumption, it cannot prevail over any proof, which must be produced in order to prevail.

Consequently, in the applying of the principle of prevalence of the reality of the facts the parties' intention and the extent of the worker's dependence or autonomy in the contracting of the labor agreement must be thoroughly, so to deprive the operator of the law of the presumptions previously stated, since they no longer reflect the current reality in the field of labor.

Pursuant to these comments on the principles that apply to Labor Law, which are necessary to comprehend the following issues, we heretofore address the common labor law topics that we deem are important.

12.3. Company Administrator – Employee of Service Supplier

A common question concerns the definition of the legal nature of the relationship between an administrator of a company that will be organized in Brazil or of an already existent company that is acquired by a foreign investor.

First, it is important to assert the legal structure of the company that will be organized or already existent.

If one of the two is a limited liability company (Ltda.) civil law currently establishes that possibility of the administrator not being a partner thereof, which event in the past was questioned, especially by the INSS (Social Security).

If one of the two is a corporation (S/A), the Brazilian Corporation's Law expressly establishes the possibility of the administrator that is not an employee. If an employee is promoted to the position of director, the employment agreement shall be suspended in accordance with Instruction (*Enunciado*) 269 of the Higher Labor Court of Appeals (TST), except if the legal subordination inherent to the labor relationship persists.

Attention should be drawn to the daily aspects of the relationship since, in deciding to contract the professional under the regime of service supplier in either of the two foregoing hypothesis, the administrator's autonomy and independence to perform the activities that were contracted must be considered. If no such freedom exists, this could convert the civil relationship into an employment relationship.

Hence, in making a decision thereof, the way the day-to-day relationship will be carried out must be evaluated so to avoid a future contingency, which is not limited to the filing of a suit before the Labor Courts by the professional allegedly prejudiced, but also to labor assessments by the labor inspection authorities.

Electing to contract the professional as an employee the risks quoted in the foregoing paragraph do not exist, but without doubt the cost of labor is higher.

In the event of contracting an administrator under the regime of an independent service supplier the cost to the company shall correspond to 20% of the compensation paid to the administrator, corresponding to social security contribution.

If the administrator is contracted as an employee the direct cost shall be the social security contribution at the rate of 20% of the administrator's compensation, insurance covering work accident (varying between 1 to 3%, subject to change depending on the hazards posed by the work site environment), in addition to indemnity in the event the administrator incurs in voluntary misconduct or negligence, contribution to third parties – System S – (5.8%), FGTS – at the rate of 8.5% of the salary, vacation, the right to which accrues each twelve months period of employment, plus statutory 1/3, 13th salary (Christmas bonus), based on the full compensation, among other legal or contractually agreed rights.

12.4. Statute of Limitations

The statute of limitations for the worker to file a labor claim is five years as of the damaging event to the right, reduced to two years in the case of termination of the employment agreement.

For example, an employee who has been working at a company for six years, works overtime and does not receive the payment thereof, is dismissed; a labor claim to claim such right must be filed in up to two years as of the termination date, under penalty of becoming totally extinguished such right by operation of the statute of limitations. Upon the filing of the labor claim, a five-year period retroacts. As an exception, the statute of limitations in regard to the Workers Severance Fund (FGTS) is thirty years.

12.5. Registration of Employees and the Worker's Record of Employment and Social Security Booklet (CTPS)

The employee's employment must be recorded in his/her Record of Employment booklet, which is the proper document for the future purpose of counting work periods for retirement effects.

In addition to the Record of Employment booklet the employer is required to register its employees in a proper book or card, which must be certified by the Regional Labor Inspection Office (DRT), authority responsible for the surveillance of compliance with the labor laws. The physical registration card may be replaced by a computer file, which eases the company's routines.

Other aspects of the employment relationship may be regulated thru the employment agreement and also thru collective labor agreements, which consist in contracts entered between the company and the workers' union or between the employers' union and the workers' union, the latter having, thus, a broader scope.

12.6. Work Hours

The normal work hours period is eight hours per day and forty-four hours per week, except if another period is established.

Certain specific cases determine different periods, as in the case of the continuous relay shifts, and others establish shorter periods, as in the case of doctors and dentists (four hours) and telephone operators (six hours).

The normal period may accrue supplementary work hours by at maximum two hours, subject to a written agreement between the employee and employer or a collective labor agreement (entered with the worker's union).

The value of the overtime hour must be at least 50% higher than the value of the regular work hour. Overtime that is repeatedly labored integrate the employee's compensation for the effects of calculating vacation, 13th salary (Christmas bonus), prior notice of termination and severance fund (FGTS) payments, among others.

The non-payment of overtime is allowed provided that the overtime hours are offset with the work hours on another day, provided that the offset possibility is foreseen by a collective labor agreement.

This practice is known as a work hours bank and has rendered savings to the companies, under which system they no longer disburse amounts to pay overtime and which expenses thenceforth are no longer computed into the price of the product or service manufactured/supplied by the company, and a benefit to the employee, which uses the work hours that exceed the normal hours for purposes that because of unavailability of time pursuing to the worker's routine work hours, are not enjoyed, such as leisure, spend time with the family, training, studies, etc.

Employees that are engaged in external activities in which a work hours period is not established and those that occupy jobs based on trust, holding direction and managerial powers, at the higher ranks of the company's staff and receive compensation and benefits that differ from those of his/her subordinates are not entitled to overtime payment.

12.6.1. Intra and Inter work period rest

The rest periods are not computed in the work hours period.

In any continuous work period of more than six hours it is mandatory to grant a break for rest and meals of at least one hour. In a shorter work hours period of not more than four hours a fifteen-minute break is mandatory. In some jobs there are special breaks, as in the case of data process, in which for each fifty minutes of continuous work corresponds a ten-minute rest period.

Between one daily work period and the next the employee is entitled to a rest period of at least eleven hours, which cannot coincide with the weekly one-day rest period. In other words, such period starts when the employee effectively ceases work activities, whether overtime or regular hours.

12.6.2. Paid weekly rest period

Every employee is entitled to a paid weekly rest period of twenty-four consecutive hours, which usually falls on a Sunday.

12.6.3. Work at night hours

Work labored between 10 p.m. and 5 a.m. of the next day is defined under Brazilian law as work at night hours. The hour of work at night corresponds to 52 minutes and 30 seconds, i.e. a seven-hour period of work at night hours is equal to eight hours of work in day hours. The hour of work at night accrues an additional 20% over the day hour.

12.7. Salary

Salary is the total of the amounts and benefits paid to the employees as compensation for the worker's labor.

A salary may be paid under several forms, currently resumed to fix and variable.

The **fixed salary** assures to the employee payment of the full amount, regardless of the employee's performance, while the **variable** salary depends on the employee's individual performance and results or collectively by a department or by the company as a whole.

Compensation may be fixed and paid on a per-unit of time or production/task basis and in cash or utilities.

The salary cannot be **reduced** (article 7, VI, of the Federal Constitution) – except in the case of a collective agreement, **changed** unilaterally by the employer and in detriment to the employee, **pledged** (article 649, IV of the Code of Civil Procedure - CPC) and are **intangible** (cannot be discounted – article 462 of the Labor Code – CLT and Instruction 342 of the Higher Labor Court of Appeals - TST).

12.7.1. Form of Establishing a Salary

12.7.1.1. Unit of Time basis

This form is based on the period of time in which the employee is at the employer's disposal. It does not depend on the employee's performance or the company's results. This means that, regardless of these aspects, the employee is entitled to a salary. The traditional form of salary is, under the viewpoint of many scholars, inconvenient, to the extent that it is imprecise (remunerates equally unequal employees), unfair (equal compensation to unequal employees and detrimental to the employee that is more productive) and does stimulate performance (the employee is not interested in the results).

12.7.1.2. Unit of Production or Task

What is important in this type of salary is the quantity resulting from the work performed by the employee. In other words, each unit produced by the employee constitutes compensation, not being considered the period of time in which the employee is at the disposal of the employer.

12.7.1.3. Mixed Basis

In this case a salary is paid considering not only the time devoted to the employer, but also the employee's productivity, as minimum requirements.

12.7.2. Payment

The salary must be paid in local currency being prohibited its payment in foreign currency. Some find that it is possible to establish a salary in foreign currency and convert it to local currency on the date of payment. The courts and inspection authorities have not been accepting such a clause.

The salary should be paid by the 5th business day subsequent to the month in which it accrued (article 459 of the Labor Code) based on the month labored, and it should not be delayed. Commissions and bonuses may be paid in longer periods, depending on the provisions that establish such payments.

12.7.3. Utilities

The salary may also be paid in utilities (article 458 of the Labor Code - CLT), though not entirely; at least 30% of the salary must be paid to the employee in cash. The Labor Code - CLT merely exemplifies types of utilities, which must have fair and reasonable values. Not all utilities extended by the employer are salary: it must be gratuitous and regularly extended; in exchange for the work labored by the employee, extended pursuant to work labored and not for the labor.

12.7.3.1. Clothing, Equipment and other accessories

These items shall only be considered a utility salary when extended by the employer in exchange for the work labored and in substitution of the amount that would otherwise be used to acquire this item. The clothing, equipment and other items that are provided in order to perform work is not considered, in any event, a utility salary (paragraph 2, item I of article 458 of the Labor Code – CLT).

12.7.3.2. Transportation

This is one of the most controversial issues. If transportation is extended in order to perform the work, it cannot be considered a utility salary. If it is extended to fill a need of the employee, namely transportation from home to work and return, then it is a utility salary. The transportation coupon introduced by Law 7418/85 and regulated by Decree 95.247/87 is not considered salary.

Rulings Instruction no. 246 of the Higher Labor Court of Appeals (TST) rejects the salary nature of the vehicle, even if used by the employee for private purposes.

12.7.3.3. Meals

It has a salary nature when extended free of charge to the employee – Rule 241 issued by the TST.

It is not considered a salary if the company adopts the PAT (meals for workers program tax benefit) program established by Law 6321/76 and Decrees 5 and 349, both enacted in 1991.

12.7.3.4. Housing

For housing to be considered a utility salary it must be extended pursuant to an employment agreement. Main Exception: housing extended to a home keeper.

A controversial issue is the rent of a home for executives, whereby it is leased in the name of the company that hired the employee, as an indirect form of compensation. It is now quite common, particularly in cases of multinational companies, to enter a lease of a residence in its name as a means of indirectly compensating the employee, usually brought to Brazil from a foreign country. Regardless of the lease being in the name of the company or employee, given that it is a benefit that is extended gratuitously pursuant to an employment agreement, regularly extended, it characterizes a utility salary and, as such, taxes and levies accrue thereon.

Cigarettes and alcoholic beverages, though extended regularly and free of charge by the employer, do not constitute in any event a salary, given that they are drugs. Article 458 of the Labor Code – CLT expressly prohibits such a possibility.

12.7.4. Bonuses

Essentially, bonuses constitute salary advancements.

12.7.5. Accretions

A salary accretion, whose purpose is to “indemnify” work performed in adverse conditions. Mandatory accretions: overtime, work at night hours, unhealthy/hazardous environment, and relocation. They are cumulative, except for the salary accretions for unhealthy/hazardous environment. The salary accretion for suffering, a novelty introduced by the Federal Constitution of 1988, has not yet been regulated and, thus, it is not applied.

12.7.6. Allowance for Costs and Travel Expenses

Allowance for costs is the amount paid to the employee so that the employee is able to perform his/her duties. It does not comprise the salary, according to paragraphs 1 and 2 of article 457 of the Labor Code - CLT. Under the tax and social security laws, in order to be excluded from the employee’s compensation it must be paid in a lump sum in pursuance of the employee’s moving to a new home.

Travel allowance is the amount paid to the employee to reimburse expenses that were incurred in the performance of his/her work, such as transportation, hotel, meals, etc. If these expenses exceed 50% of the employee’s salary the allowance shall be considered salary.

12.7.7. Commissions

Commissions consist in compensation on a percentage basis of results obtained by the employee or by the company. They are usually paid to employees engaged in trade and sales. Commissions may constitute the exclusive form of compensation, except that the employee is warranted a minimum salary or wage determined by the workers class in which the worker is classified.

12.7.8. Gratifications

In labor law, the gratification paid to an employee consists in an act of free will of the employer, in recognition of an accomplishment of the employee. It depends on an external element (the employer’s will).

Under the current legislation, any gratifications convened between the parties are afforded the nature of salary in accordance with paragraph 1 of article 457 of the Labor Code - CLT. The court rulings, however, find that if it is regularly paid, then it will have the nature of salary, comprising the compensation for all effects.

Hence, if a gratification is regularly paid: 1) it constitutes a salary and comprises the compensation for all effects, 2) it cannot be eliminated or reduced, 3) it must be paid proportionally, in the event of termination, 4) it cannot constitute a single form of compensation.

12.7.9. Prizes (bonus)

There is no legal provision that regulates the grant of such a payment. As a general rule, it is paid for personal reasons regarding the employee or several employees, such as assiduity, production, quality, efficiency, etc. It depends on an internal factor, i.e. the employee itself.

In order to be entitled to the payment of the prize, the employee must fulfill the conditions established by the employer. If they are fulfilled the employee shall be entitled to the payment thereof, and the employer cannot evade this obligation.

The prize may be individual or collective and may pursue from the law, employment agreement, conventions/collective labor agreement, costumes, etc.

If it is regularly paid, it acquires the nature of salary 1) integrating the compensation for all effects, 2) cannot be cancelled unilaterally by the employer, 3) cannot be incorporated to the salary, except upon the employee's express consent and provided that it is not prejudicial to the employee, 4) may be claimed by the employee, provided that the condition for which it was established is attained, 5) cannot be established as the sole form of compensation, 6) its amount cannot be reduced.

Similar to prizes, bonuses are not foreseen under current Brazilian labor law. They also are intended to award the employee for personal or collective reasons, depending, as a general rule, on the conditions established by the employer.

A critical issue is the detailed definition of the criteria and conditions to implement prizes/bonuses, as it is very common to face in labor suits claims for prizes that were not paid to employees that were dismissed in the course of the period to acquire the right thereto, and to lack elements that suffice to prove in court the non-attainment or fulfillment of the conditions for its payment to the former employee (claimant).

The company must possess documents that support the conditions and criteria that was established for the payment of the prize and that demonstrate, on the other hand, that the employee to whom the prize was not paid, failed to fulfill the requirements.

12.7.10. Profit sharing and participation in results

The previous Federal Constitutions warranted this right, but did not launch the institution by the employer of this variable form of compensation.

The Federal Constitution of 1988 was the instrument that effectively launched the adoption of the profit sharing and participation in results program, providing to it the express nature of indemnity granted to both rural and urban workers.

Although the Federal Constitution expressly refers to its definition by law, the Government did so thru Provisory Acts (*Medidas Provisórias*) that were subsequently re-issued, and finally converted into Law 10.101 of December 2000.

Profit sharing consists in the payment to the employee pursuant to the distribution of positive results (profit being equal to gain) achieved by the employer, which was obtained with the collaboration of the employee, who attained the goals that were established.

The Federal Constitution and the law that address the matter did not define or distinguish profit and result. It is important to emphasize that there are companies that are not aimed at obtaining a profit, but instead results, as is the case of equalized employers (article 2, paragraph 1 of the Labor Code - CLT). The majority of scholars consider profit as the real profit, i.e. the actual profit earned by the company after deducting the operational expenses reserves. Results are goals related to factors of several natures, such as productivity, quality and quantity of products, etc.

Company: individual, company or corporate group, engaged in an organized business with the purpose of achieving a profit or result, with the collaboration of employees. Excluded types that do not fall under the definition of company: public utility associations, workers unions, purely residential condominiums and the estate, since they are not engaged in an economical activity. Collective organization (*cooperatives*) are covered thereby.

Employee is a specimen of the worker gender, as defined in the Constitution. Who is entitled to profit and results sharing? The employee is defined in article 3 of the Labor Code (CLT) as the sporadic worker (equalized thereto), governmental employees contracted under and governed by the Labor Code (currently non-longer existent), employees of government agencies and public foundations (participation in results), employees of public companies, of joint capital companies and other entities engaged in an economical activity, employees retained by liberal and independent professionals.

Temporary, housekeeping and government employees are not entitled to participation in profits and results.

In order to participate in profits the workers' committed shall be comprised by workers in general, whereas only the employees of the departments that are directly interested in the accomplishment of the goal are entitled to participation in the results.

The legal nature of profit sharing is of an indemnity for participation and it is conditioned to the occurrence of a profit. If such condition is not fulfilled no profit sharing will be paid. However, in the event of loss the employee does not participate therein inasmuch that the employee is not the owner of the business and, thus, cannot be held for losses. If the employee assumes losses, he/she is not an employee, but rather a partner.

The rules for implementation of the program must be clear and objective as to the establishing of the substantial right and procedural rules. According to the Provisory Act (MP), it is also required to establish the mechanism to check the information regarding the accomplishment of the agreement, periodicity of distribution, term of validity and terms for reviewing the agreement.

The program shall be implemented as agreed between the employer and employees, negotiated thru a committee appointed by the employees, also comprised by a representative of the workers union. The union's participation is intended for implementing collective negotiation.

The participation in profits is unrelated to compensation and does not replace or supplement it. Being unrelated to the workers' compensation, it has a nature of indemnity, not being subject to severance fund (FGTS) and social security contributions and not reflecting on the other contractual payments, being however subject to income tax.

In the event of disagreement the parties shall resort to mediation and arbitration, not to Labor Courts, which may only be sought for a decision when all the previous attempts have been made.

12.7.11. Miscellaneous Benefits: school allowance, medical and dental plans, life insurance and supplementary pension plans, scholarships, etc.

Article 458 of the Labor Code (CLT), as amended in June 2001, excluded the following benefits from salary:

- education, at a self-owned or third party teaching facility, covering admittance fee, monthly and yearly tuition, books and literature materials,
- transportation used to go and return from work in a route followed or not by public transportation,
- medical, hospital and dental assistance provided directly or thru health insurance,
- life insurance and insurance covering personal accidents;
- private pension plan.

12.8. Salary Equalization and Replacement

Employees of a same company that work at the same site and have the same job (identical quality and volume of work) and that have been doing so with a difference in their periods of employment of not more than two years must necessarily receive the same salary.

In the cases of replacement the employee that replaced another is also entitled to the salary that was paid to the replaced employee while the replacement subsists. This does not consist in salary equalization, but rather an assurance for an equal salary for equal work.

12.9. 13th Salary

It consists in a Christmas bonus that is paid until December 20th, irrespective of the salary that is paid to the employee and corresponds to 1/12 of the salary per month of employment or 15-day fraction.

12.10. Relocation

Relocation is the transfer of the employee to a site different than the originally agreed work site.

According to article 469 of the Labor Code, which regulates the matter, the employer cannot relocate the employee without the employee's consent. If the transfer does not lead to a necessary relocation of the employee to a new home, i.e. if the transfer to another location does not require the employee to move to a new home then it is not a case of relocation.

Another controversial issue is the clause establishing the employer's right to relocate its employees. Existing such a clause the employees may be transferred. In the lack of such a clause the employment agreement may be amended to provide so. Some scholars find that such an amendment may be implemented at any time, inclusively when the employee is relocated.

However, it is important to stress that the existence of a clause authorizing relocation (consent of the employee) is an important point, but Brazilian courts have been ruling that the clause, per se, does not validate the relocation, for that the employer may use its authority to compel the employee to accept the imposition, under risk of being dismissed.

Another important aspect is that the relocation must pursue from a real work necessity, which consists in the company's impossibility to carry out its business if the employee is not relocated to work at a place other than the place that was originally contracted.

Employees that hold jobs based on trust are not covered by the legal protection and thus cannot oppose the employer's decision (paragraph 1 of article 469 of the Labor Code - CLT):

The closing of the facility where the employee works is a cause that is acceptable to justify the employee's relocation without the occurrence of the cause quoted above (real work necessity). That is, in the event the facility where the employee was contracted to work is closed the company is authorized to relocate the employee so that the employee continues to work. This is what the law establishes: "The relocation is lawful when the facility where the employee works is closed".

An aspect that is quite difficult to quantify concerns the provisory relocation. It has been understood that a temporary relocation is the relocation in which the employer temporarily transfers the employee to work at a place other than the original work place due for an important reason (to cover another worker's absence, assemble equipment, etc.) that requires a relocation.

The employer does not intend to fulfill the position on a definitive basis, only temporarily. The temporary aspect of the relocation determines that the employee will not remain definitively at the place to where he/she was relocated. Thus, there exists an estimate for a return to the original work site.

In the definitive relocation the employer's intention is that the employee will remain at the new work site until the employment agreement expires. The employee moves with the certainty that, while his/her employment with such company persists, he/she must reorganize his/her personal and professional life.

The employee is entitled to an additional sum for relocation (which shall be specifically agreed) only in the case of temporary relocation. The employee is not entitled to such right in the case of permanent relocation.

In the case of temporary relocation the employee is entitled to an additional payment for relocation, payable by the employer, equal to 25% of the salary that was paid while the employee was working at the original work site. The additional payment for relocation shall be due while the relocation persists. The right thereto is extinguished upon the employee's return to the original work site (paragraph 3 of article 469 of the Labor Code - CLT).

All the expenses incurred in the relocation (temporary or definitive) by the employee and his/her family (moving, transportation, rent, etc.) shall be borne by the employer. The additional expenses related to the relocation in which the employee does not move from home will also be borne by the employer, as determines article 470 of the CLT: "The expenses incurred in the relocation shall be borne by the employer".

12.11. Vacation

Every employee has a right to a yearly vacation, without prejudice to salary and counting of period of employment for retirement purposes, and it is usually thirty continuous days. The employee has the option to convert 1/3 (one third) of the vacation period to which he/she is entitled into a cash payment, which amount shall correspond to the number of days that are being converted into cash.

12.12. Job stability

Job stability protects the employee from unfair dismissal or dismissal without cause while the situation that entitles stability to the employee persists and impedes the employer from terminating the employment agreement.

Among the several cases of job stability, stand out: the employee appointed to direct internal fire prevention teams, which commences with the registration of such employee's candidacy and persists up to the expiration of the appointment; the job stability of the pregnant employee, as of the confirmation of her pregnancy up to five months after she gives birth; the job stability of the union leader, as of his/her candidacy up to one year following expiration of his/her appointment; the job stability of the employee that suffered a work accident, up to one year following the expiration of the accident leave.

Further to these cases, some collective labor conventions and agreement establish job stability in other cases, such as the minor-aged employee that is drafted to military service; the employee that suffers an accident at the work site or those that suffer a professional illness, during a certain period to the workers of a certain company, etc.

12.13. Workers severance fund (FGTS) and unemployment insurance

The employer deposits on a monthly basis an amount equal to 8.5% of the employee's salary to a specific account that each employee holds. The deposited amount may only be drawn in the express cases established by law, such as dismissal without cause, termination of an employment agreement that had an indefinite term of duration, retirement, purchase of a home, death, among others.

Unemployment insurance is the benefit that is paid on a limited basis to the employee that was dismissed without just cause and corresponds to 3 or 5 payments that are calculated based on the average of the last salaries, varying according to the period of employment, and it is paid by the Social Security.

12.14. Safety and health at the work site

Brazilian Labor Law also establishes safety and health measures that the employer must abide by to assure to the employee minimum work conditions.

Labor health rules aim to study ways to protect the worker's health, indicating preventive and corrective measures for the work site (conditions at the place of work) and the worker (personal aspects). Labor safety rules aim at assurances to the employee in regard to the risks associated with the professional activity and it is directly related to the protection of the conditions of the facilities' installations and of the machines that the employee routinely operates.

12.14.1. Salary Accretion for Unhealthy and Hazardous Work Conditions

Unhealthy work is defined as the activities that, due to their nature, condition or method of work expose the worker to elements that are hazardous to health (noise, warmth, coldness, vibrations, ionized and non-ionized radiation, aerosols, gases and vapors, chemical and biological agents, etc.) above the established tolerance limits due to the nature and levels of the agent and period of exposure to the effects thereof.

The unhealthy work entitles the employee to a salary accretion, according to the level of unhealthiness, which is determined by the Ministry of Labor, ranging from 10, 20 or 40% of the minimum monthly salary, currently corresponding to approximately US\$ 120.00, in addition to being entitled to a special retirement.

Work activities or operations that, due to their nature or work methods imply in permanent contact with inflammables or explosives under extreme risk conditions are considered dangerous (hazardous).

The hazardous activity entitles the employee to a salary accretion for hazardous work conditions, in an amount equal to 30% of the employee's base salary.

These salary accretions are not cumulative, that is, the employee that receives a salary accretion for unhealthy work conditions is not entitled to the accretion for hazardous work conditions.

12.15. Female Employees

Women are entitled to special protection in regard to men, mainly in regard to pregnancy. The pregnant employee has job stability as of the confirmation of her pregnancy up to five months following birth and is entitled to a maternity leave of 120 days. The father is assured a fatherhood leave of only 5 days.

The employee that adopts a child is also entitled to a leave, the leave period depending on the child's age.

12.16. Minor-Aged Employees

It is prohibited have employees aged less than 16, except in the case of apprentices, whose minimum age is 14.

The minor-aged cannot work at night hours or engaged in hazardous or unhealthy work, as established in article 7, item XXXIII of the Federal Constitution.

Likewise, the minor-aged are not allowed to work at places that are prejudicial to their education and physical, psychic, moral and social development.

Work performed at hours and places that do not enable 14 to 18 year olds to attend school is also prohibited.

All companies, irrespective of their line of business, are required to employ and enroll apprentices in the National Courses of Apprentice, in a number equal to at least 5% and at maximum 15% of their employees, being allowed to resort to, in the lack of the official schools, technical education schools or non-profit organizations whose purposes are to assist the young aged and provide education.

12.17. Termination of the Employment Agreement

The employment agreement may be terminated by either the employer or the employee and, also, by common decision of both parties.

Employment is terminated by an act of the employer dismissing the employee, with or without cause. When with cause, the employee loses his/her right to severance payments assured by law (due to practicing grave fault), which payments are assured in the case of termination without cause.

The employment relationship shall be terminated by act of the employee thru a voluntary dismissal request or indirect termination. In the first case, the employee is not entitled to any severance payments; in the second case the employee is entitled thereto, especially since it is a penalty to the employer for having practiced a fault.

The employment relationship may be terminated by the parties' mutual agreement, when both agree on the terms of the dismissal.

12.18. Prior Notice

Prior notice is the expression of intention by the parties that intends to terminate the employment. It usually corresponds to one month of work. The employer that no longer desires the presence of the worker at its facilities as of the delivery of the notice of termination may indemnify the prior notice period, which shall be computed in the employment agreement for all effects, i.e. calculation of vacation, 13th salary (Christmas bonus), Severance Fund (FGTS), etc.

Certain collective labor agreements establish different periods to the prior notice, taking into consideration the period of employment at the company, among other aspects.

12.19. Damages Pursuing from the Employment Relationship

The employer cannot make any deductions from the worker's salary, except cash advancements, legal requirements or collective agreement provisions.

In the case of damages caused by the employee, the deduction is legal, provided that this possibility has been agreed or in the occurrence of the employee's voluntary misconduct.

On the other hand, the employer shall be liable for any damages caused to the employee, whether physical or moral.

Brazilian labor courts have been recognizing their authority to accept and rule claims for damages caused to employees, but this is not pacific and decisions still issue transferring to civil law courts the authority to review and rule these cases.

In these cases the right to indemnity is not controversial, falling upon the employer that practiced the act, directly or thru an agent that caused the damages, liability for the payment, irrespective of the court where the matter will be discussed.

12.20. Conclusion

This paper was intended solely to draw up a simplified overview of the main rules that govern employment relationships in Brazil.

Evidently, each case must be reviewed, observing the general and specific legal rules that apply individually in order to make the best business decision and so to avoid a contingency for having adopted procedures that are not in line with the current labor laws.

13. SOCIAL SECURITY LAW

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SOCIAL INSURANCE

13.1. Introduction and Purpose of Social Security

The Brazilian Social Security system comprises an integrated set of actions of governmental initiative and of the community that are aimed at protecting the rights to health, social security and social assistance. Thus, social security is inserted in a broader concept, which is the concept of social insurance.

Social Assistance aims to establish a social policy to the weaker party in the relationship through private and state funded activities envisaging the extension of minor benefits and services, regardless of contribution by the interested party.

Health aims to offer a social and economic policy designed to mitigate risks of illnesses and other complications, affording action and services to protect and recover the individual.

On the other hand, the Brazilian Social Security (*Previdência Social*) is a public institution that, upon the payment of a contribution (fee), aims to assure to its beneficiaries the indispensable means for survival in the event of occurring a contingency established in the law, such as a loss of work capacity, illness, disability, advanced age, death and involuntary unemployment, or even maternity or incarceration.

13.2. Structure of the Brazilian Social Security System

In Brazil, Social Security is provided through the General Social Security Regime (RGPS) and the social security systems of the government employees (RPPS) and of the military. The general regime is regulated by the Brazilian Federal Constitution and Law 8213/91 and further amendments, implemented by the governmental agency designated National Social Security Institute (INSS), of the Ministry of Social Security. The supplementary social security is organized independently of the general social security system and is optional.

The current Brazilian social security system is based on the so-called plain division, which is characterized by the transfer of income between individuals of the same generation, whereby the workers in activity finance the inactive workers. The legal grounds of the system is the principle of solidarity (Federal Constitution, article 3, I) and it is publicly managed.

The next section addresses the General Social Security System, which aggregates the employers, employees and independent contractors.

13.3. General Social Security System - RGPS

13.3.1. Beneficiaries

Those who hold the subjective right of benefiting from the benefits established under the general system are legally designated beneficiaries, covering both the insured individuals and their dependents. The insured parties are individuals that, pursuant to exercising an activity or payment of contributions, are bound directly to the General System. Dependents are the individuals whose legal ties to the insured party allows the social security protection to be extended to them, by reflection.

A. Insured workers

The individuals insured under Social Security are classified as

- (i) compulsorily insured worker and
- (ii) optionally insured worker

13.3.1.1. Compulsorily Insured

This regime applies to the following individuals obligated to pay Social Security contributions so that they may obtain pecuniary benefits (retirement, pension, etc.) offered in the Brazilian system:

(i) Employee

This class covers rural and urban workers that have their employment recorded in their Employment and Social Security Record booklet (CTPS), temporary workers, directors-employees that were elected with a certain term of office, governmental service providers such as ministers and secretaries and commissioned workers in general, employees of Brazilian companies established abroad, multinational companies that operate in Brazil, international organizations and diplomatic staffs installed in Brazil. This class does not cover employees that are governed by other, specific regimes such as governmental workers.

(ii) Household workers

Worker that renders services at the house of another person or family, provided that this work is not profit-oriented in benefit of the employer. Household workers cover: butlers, nurses, gardeners, drivers, housekeepers, maids and others.

(iii) Occasional workers

Workers that render services to several companies, but are contracted by workers unions and labor suppliers. This class covers dock workers: foremen, loader, vessel ropers, vessel cleaners and guards. There are occasional workers also in the salt and coffee bagging business.

(iv) Insured Individuals

The social security contributors formerly designated entrepreneurs, independent contractor and those equalized to independent contractors, pursuant to Law 9.876 of Nov. 29, 1999 are now considered a single class and designated individual contributors, who are engaged in paid work and is considered a compulsory contributor under the General Regime of Social Security, being required to be affiliated therein. The following are considered individual contributors, among others:

- The worker that renders urban or rural services on a occasional basis (i.e. non-continuously and occasionally, without subordination and a work hours schedule) to one or more companies without a binding employment relationship;
- The individual that is engaged, on a self-employed basis, in an urban work activity that aims a profit, or non-profit;
- The holder of a single individual firm of urban or rural nature;
- The non-employed director and member of a board of officers of a corporation;
- The partners of the general partnership and capital and industry-type companies;
- The manager-partner and the quota holder-partner that receive a fee for their services rendered to the quota capital limited liability company engaged in urban or rural activities;
- The associate appointed to a directive position of a collective organization, association or legal entity or any nature or purpose;
- The condominium manager or administrator appointed to a directive position of a condominium, provided that they are paid a fee for their services;
- Liberal professionals;
- Painters, electricians, firemen, hydraulics workers, plumbers and others that render services to residences on a non-continuous basis, without a binding employment relationship;
- Hairdressers, manicures, estheticians and similar professionals that render services at beauty parlors, on an autonomous basis;
- Itinerant salespersons;
- The worker affiliated to a collective organization who, through the latter, renders services to third parties;
- The worker paid on a per day basis that renders services on a non-continuous basis at the residence of a person or family, without a profit purpose;
- The resident doctor;

- The rural worker that works on a occasional basis, without subordination (tamers, animal castrators, fence repairers, etc.);
- The officials and assistants of sport events, in accordance with Law 9.615/98;
- The individual, owner or not, that exploits agricultural, livestock breeding or fishing or mining activities, directly or through others, and assisted by employees used for any reason, even those on a non-continuous basis;
- The minister of a religious confession and the member of a sacred institute and of a congregation or religious nature, when maintained by the entity to which they belong, except if it is a compulsory contributor to Social Security or another social security system;
- The civil construction worker.

(v) Specially Insured Contributors

This category covers rural workers that produce in the regime of family economy, without use of salaried labor. It includes spouses, companions and offspring over the age of 16 that work with the family in rural activities. The non-employed fisher and Indians engaged in rural activities and their families are also included in this category.

13.3.1.2. Optionally Insured Contributors

The General Social Security Regime (RGPS) also allows the optional affiliation of certain individuals, designated as

(i) Optionally Insured

Individuals over the age of 16 that are not engaged in a paid work activity that falls under the category of compulsorily insured contributors to social security may affiliate themselves to the General Social Security Regime (RGPS) as optionally insured contributors.

The following, among others, are considered optionally insured:

- * Housewives;
- * The condominium manager that is not paid a fee for his/her services;
- * Students;
- * The Brazilian that accompanies his/her spouse that works abroad;
- * The individual that is no longer a compulsory insured contributor;
- * The scholarship holder and the trainee that render services to a company in accordance with Law 6.494/77;
- * The scholarship holder that is engaged on a full-time basis in research, specialization course, post-graduation or master's degree, in Brazil or abroad, provided that he/she is not bound to any special social security regime;
- * The convict that is not engaged in any paid work activity or bound to any social security regime;
- * The Brazilian residing or domiciled abroad, except if affiliated to a social security regime with which Brazil maintains an international agreement.

As of April 2003 the contribution of the optionally insured worker shall be, regardless of when the worker affiliated with Social Security and the contribution basis adopted, paid observing maximum and minimum contribution bases.

B. Dependents

The General Social Security Regime (RGPS) also covers the dependents, who, by rule, are defined as those who economically depend on the insured worker. They are basically classified in three groups:

- Spouse, companion and children under 21, not emancipated or disabled;
- Parents;
- Brothers/sisters under 21, not emancipated or disabled.

Stepchildren or adopted under the age of 21 that are in the custody of the insured worker have the same rights of children, provided that they do not have property for their support and education.

The economical dependence of spouses, companions and children is presumed. In the other cases it must be proven by documents, e.g. Income Tax Report.

To be considered a companion it is necessary to prove the stable relationship with the insured worker. Collective Action no. 2000.71.00.009347-0 determines that the insured worker's homosexual companion

shall be entitled to a pension in the event of death and financial aid for incarceration. Existing dependents classified in a group, those classified in the next group lose their right to the benefit.

13.3.2. Company and Household Workers

These are the parties that are the contributors that finance the General Social Security Regime (RGPS). The companies deduct the worker's contributions in the payroll, pay a contribution based on its revenues and also based on the profit, these being the tax basis that are authorized by the Federal Constitution for charging taxes that finance social security.

13.3.3. Benefits

Social Security offers 10 different types of benefits, including retirement pension, pension for death of the insured contributor, maternity-salary and financial aid for illness, namely

a) in regard to the Insured Contributor:

- Retirement based on age
- Retirement based on disability
- Retirement based on period of contributions paid
- Special retirement
- Financial aid for illness
- Financial aid for work accident
- Maternity-salary
- Financial aid for family support

b) in regard to the Dependents:

- Financial aid for incarceration
- Pension for death of the insured contributor

c) in regard to the beneficiaries (insured and dependents):

- (i) Social Service
- (ii) Professional rehabilitation (social security service)

13.3.3.1. Benefits – Grant and Conditions

The benefits quoted above are granted under the conditions summarized below:

(i) Retirement based on age

This type of retirement is granted to men at the age of 65 and to women upon attaining the age of 60. Rural workers (men) retire at the age of 60 and women at the age of 55. The minimum contribution period required is 15 years for those who registered with Social Security after July 25, 1991.

In the case of retirement based on the period of contribution payments, the male worker is required to have contributed for 35 years and the female worker is required to have contributed for 30 years. Certain categories, such as teachers, have a different contribution period (30 years for males and 25 years for female teachers).

(ii) Retirement based on period of contribution

Contribution period means the period of time elapsed since the worker's hiring or initiation in the activity covered by the Urban and Rural Social Security regime, even if prior to the introduction thereof, up to the worker's dismissal or cease of work activity, deducting the periods established by the law such as suspension of the labor agreement, interruption of exercise and cease of activities. The retirement based on the period of contribution is considered irreversible and cannot be waived as from the instance the insured receives the first payment.

It may be in full or partial. To be entitled to a full retirement pension the male worker must prove at least 35 years of contribution payments, 30 years in the case of the female worker. To apply for a proportional retirement pension the worker must fulfill, cumulatively, the following requirements:

- a) age: 53 (males); 48 (females);
- b) period of contribution: 30 years (males); 25 (females);
- c) an additional contribution period equal to 40% of the period that remained on Dec. 16, 1998 to attain the contribution period established in "b".

- Acquired Right

The insured contributor that on Dec. 16, 1998 had already worked for 30 or 25 years (males and females, respectively) are entitled to apply for, at any time, a monthly retirement payment proportional to the number of years worked accrued up to such date, calculated based on the 36 monthly contributions paid previously to December 1998, adjusted up to the date of filing of such application, by the adjustment rates determined in the salary policy. In these cases the inclusion of a period of work subsequent to Dec. 16, 1998 is prohibited for any purposes.

If, however, at Dec. 16, 1998 the insured contributor had worked for 30 or 25 years (males and females, respectively) and elects to include the contribution period subsequent to such date, the monthly retirement payment calculated based on the 36 contributions paid previously to the application shall be subject to the limit-age of 53 (males) and 48 (female workers).

- Monthly Benefit Payment

The full retirement is equal to 100% of the benefit-salary;

The proportional retirement pension is equal to 70% of the benefit-salary plus 5% per complete year of contribution in excess of the minimum required period.

- Benefit-Salary Amount

In regard to those affiliated with Social Security up to Nov. 28, 1999 the benefit-salary shall be calculated at the arithmetic average of the highest contributions (contribution-salary), accruing monetary adjustment, equal to at least 80% of the entire contribution period since the contribution related to the month of July 1994, multiplied by the social security factor that will be determined based on age, period of contribution, life expectancy (according to the life expectancy schedule published by the IBGE) and contribution rate.

In regard to those affiliated with the Social Security as of Nov. 29, 1999 the benefit-salary shall correspond to the arithmetic average of the highest contribution-salaries equal to at least 80% of the entire contribution period multiplied by the social security factor asserted in accordance with the foregoing criteria.

For the purposes of applying the social security factor to the period of contribution paid by the insured contributor, the following shall be added:

- 5 years, in the case of females;
- 5 years, in the case of the male teacher that proves period exclusively engaged in teaching at the infant and elementary school levels;
- 10 years, in the case of the female teacher that proves period exclusively engaged in teaching at the infant and elementary school levels.

(iii) Retirement for disability

This benefit is granted to workers that, due to an illness or accident, are considered by the Social Security's expert doctors as disabled for performing their duties or other type of work that enables them to support themselves.

The person that, at the time of affiliation to Social Security already had the illness of disability that generates the benefit, excepting the disability that results from the aggravation of the illness, is not entitled to retirement for disability.

The grant of this retirement will depend on the assertion of the disability condition through a medical-expert examination, the insured contributor being allowed to, at its expenses, be assisted by his/her self appointed doctor.

The insured worker that is receiving a retirement for disability pension, regardless of his/her age, is required to undertake a Social Security expert medical examination on a 2-year basis.

- Monthly Benefit Amount and Benefit-Salary

The retirement for disability amount is equal to 100% of the benefit-salary (which corresponds in regard to those affiliated with Social Security as of Nov. 29, 1999, the arithmetic average of the contributions equal to 80% of the entire contribution period), provided that the insured was not receiving the financial aid for illness benefit.

In regard to the specially insured worker that did not elect to contribute optionally, the benefit amount shall be equal to one minimum monthly salary.

(iv) Special retirement

This benefit is granted to the insured worker that worked in conditions harmful to health or physical integrity. To be entitled to a special retirement the work is required to prove, in addition to the work period, effective exposure to physical, biological or combination of harmful elements during the period required for the grant of such benefit (15, 20 or 25 years).

(v) Financial aid for illness

This benefit is granted to the insured worker that is impeded from working due to an illness or accident for more than 15 consecutive days. In the case of workers under an employment agreement registered in their Employment and Social Security Record Booklet (CTPS), the employer pays the benefit in the first 15 days of the leave and Social Security pays it as of the 16th day of work leave. In the case of the individual contributor (entrepreneurs, liberal professionals, self-employed workers, among others), Social Security funds the entire illness or accident period (provided that the worked applies for the benefit).

(vi) Financial aid for accident

This benefit is paid to the worker that suffers an accident that causes a reduction in the worker's work capacity. It is granted to the insured worker that was receiving financial aid for illness. The employed worker, the occasional worker and the specially insured worker are entitled to the financial aid for accident. The household workers, the individual contributor and the optional contributor are not entitled thereto.

(vii) Financial aid for incarceration

The dependents of the insured contributor that is incarcerated for any reason are entitled to the financial aid for incarceration during the entire incarceration period. The benefit shall be paid if the worker is not receiving a salary from the company, financial aid for illness, retirement or bonus for continued services.

(viii) Pension for death

This benefit is paid to the worker's family upon his/her death. In order to obtain this pension no minimum contribution period is required, being however required that when the death occurred the worker had the status of insured.

(ix) Maternity-salary

The female workers that pay contributions to Social Security are entitled to a maternity-salary during the 120-day period in which they are not required to work for having given birth to a child. This benefit was extended to foster mothers.

(x) Family-salary

This benefit is paid to workers that earn a monthly salary of up to R\$ 586.19 to assist in the support of worker's children aged 14 at maximum or handicapped. The stepchildren and children under the worker's custody that do not have sufficient means for their self-support are equalized to the worker's own children.

13.3.3.2. Condition for Fruition: Affiliation and Grace Period

A. Affiliation

To be entitled to these retirements or to any other benefit offered by the Social Security (INSS), the worker must be affiliated thereto, pay the contributions each month and fulfill the grace periods established for each type of benefit.

- How to become affiliated to Social Security

The worker hired under an employment agreement annotated in the worker's Employment and Social Security Record booklet (CTPS) is affiliated upon the signing of the employment agreement. The independent contractor must affiliate as an individual contributor. The minimum contribution is equal to 20% of the official minimum monthly salary. The affiliation may be accomplished through the website www.previdencia.gov.br or the toll-free phone number 0800 78 0191. Alternatively, it may be done at a Social Security office, submitting Identity Card, Taxpayer Enrollment ID (CPF) and proof of residence.

B. Grace period for fruition of the Benefits

The grace period corresponds to the number of minimum monthly contributions that are required to entitle the beneficiary to the benefit, considered as of day one of the months in which the contribution is due. In the case of insured employed and occasional workers the grace period is counted as of the date of affiliation to Social Security. In regard to the household, individual, special and optional secured workers the grace period is counted as of the date of payment of the first contribution timely paid, not being considered for this purpose the contributions lately paid related to former contribution periods. The grace period varies according to the benefit claimed, as follows:

- financial aid for illness: 12 monthly contributions;
- retirement for disability: 12 monthly contributions;
- financial aid for accident: no grace period is required;
- retirement based on age: 180 monthly contributions;
- retirement based on period of contributions: 180 monthly contributions;
- special retirement: 180 monthly contributions;
- maternity-salary: no grace period in regard to female employed workers, house maids and occasional workers; 10 monthly contributions in the case of individual and optional contributors and 10 months of rural work for rural workers;
- family-salary: none;
- pension for death: none;
- financial aid for incarceration: none.

Note:

The foregoing refers to insured workers affiliated to the Social Security General Regime (RGPS) after July 24, 1991, which date is subsequent to the enactment of Law 8.213/91.

III.4. Funding and Contribution-Salary

The social security system, whether in its general scope or in the other specific regimes of the governmental workers currently has a contributive character. This means that the insured workers must contribute to finance the social security benefits. However, the contributions may be indirect. The Federal Constitution, in the indication of the possible sources for financing social security, lists not only the social contributions that the employer pays based on the payroll, but also the company's contributions based on the income or revenues and on the profit, and on the revenues of lotteries.

The following contributions are intended exclusively for financing social security: the company's contribution based on the salaries that it pays to the insured workers under its employment, at a rate of 20%, except financial institutions, to which apply a higher rate of 22.5%, and of rural producers (2.6% of the sales revenues of the rural production); the contribution of household workers (12% of the contribution-salary) and the contribution of the insured workers either in the condition of registered employee or occasional worker (7.65% to 11% of the contribution-salary), individual contributor (20% of the contribution salary), specially insured (rural producer and non-professional fisherman) that exercise an activity under a family economy regime, at the rate of 2.1% of the rural production sales revenues) or optionally insured (20%, observing the minimum and maximum limits of the contribution-salary).

The Social Contribution on Net Profit (CSLL), at 9% of the adjusted net profit of the company and the contribution for financing social security (COFINS), in which the tax basis is the company's revenues, at 3% to 7.6%, are intended for financing social security as a whole. The CPMF (Provisory Contribution on Financial Operations) contribution is due at the rate of 0.38% over the debiting to accounts held in financial institutions is intended to finance social security and the Fund to Attack Poverty. On the other hand, the Programs for Social Integration and for Formation of the Governmental Workers' Patrimony (PIS-PASEP), which is due at rates varying between 0.65% to 1.65%, is intended exclusively to the Workers' Support Fund (FAT), which funds the unemployment insurance (welfare).

Structure of the Social Security Funding

Sources	Rates	Levy	Taxpayer	Destined Entity
Social Contribution	20% of 7,65% to 11%	Payroll Salary, subject to maximum limit	Employer Employee	Social Security Social Security
COFINS	3% (in the presumed profit system) 7.6% (in the real profit system) and 4% (financial institutions)	Revenues (gross)	Private law companies	
CSLL – net profit	9%	Results at Dec. 31 st	Companies	
CPMF	0.38%	Debits by financial institutions to bank deposit accounts, loans, savings accounts...	Individuals and companies	0.18% social security
PIS/PASEP	0.65% to 1.65% 1% 1%	Gross revenues Payroll Current revenues received and current transfers and capital received	Private law companies, non-profit organizations and foundations domestic public law legal entities	FAT-BNDES FAT-BNDES FAT-BNDES

A. Contribution payable by the Employer

The percentage of the workers' contribution varies between 7.65% to 11% of the contribution-salary. Higher salaries contribute at a higher rate. These contributions are withheld by the employer in the payroll.

The Contributions by the individual and optional contributors in the payment of salaries as of May 2005 is subject to the rate of 20% of the contribution-salary that shall vary from R\$ 300.00 to R\$ 2,668.15.

The contribution payable by the employer shall be calculated at 20% of the total of the salaries paid in the month to the employees, and this contribution may be increased by other contributions, as set out in the following schedule:

Contribution	Rate for payment purposes (%)
General Contribution to the INSS	20
Contribution for funding work accidents	varies between 1 to 3 (depending on the risk of the company's line of business)
Contribution for education	2.5
Contribution to the National Service of Rural Apprentice (SENAR)	varies between 2.3 to 2.85 (depending on the company's line of business)
Contribution to Apprentice Programs (SENAI, SENAC, SENAT)	1.0

Contribution to Social Programs (SESI, SESC, SEST, SEBRAE)	varies between 2,5 to 5,8 (depending on the company's line of business)
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Financial institutions, leasing companies, collective credit organizations, insurance and capitalization companies, autonomous insurance agents shall pay an additional 2.5% over the salaries paid or credited to the insured employees that work for them, thus totaling a contribution of 22.5%.

Further, the employers must pay a contribution at the rate of 20% of the compensation paid to company directors and independent contractors.

B. Individual and Optional Contributors

B.1 Withholding of the Social Security contribution of the “Individual Contributor” by the company – Withholding at payment of the salary

As of the contributions accrued in April 2003, which fell due in May 2003, the obligation to pay the Individual Contributor’s contributions was transferred from the Individual Contributor to the company that paid the services of these professionals. This system was effective until the contribution of March 2003, in which the payment thereof fell due in April 2003.

Accordingly, the companies are obligated to pay the social security contribution of the individual contributor that works for it, by deducting it from the salary at the rate of 11% of the total compensation paid due or credited to these insured workers and pay the total amount deducted jointly with the company’s contributions, by the 2nd day of the month subsequent to the month in which it accrues, the maturity date being extended to the next business day when the 2nd day falls on a day in which banks are not open.

- *Collective Labor Organizations and Companies that Adopt the SIMPLES/Federal tax regime*

The new system for withholding the contributions of the “Individual Contributors” insured workers also applies to (i) the collective labor organization in regard to the social security contribution of the worker under its hire, due over the labor quota attributed to worker in regard to the labored work, and also to (ii) the companies that elected the tax regime designated “Integrated System of Payment of Taxes and Contributions of the Micro and Small-Sized Companies (SIMPLES).

- *Social assistance entity*

The entity that provides social assistance – exempted from payment of the employer’s social contributions – is also obligated to withhold 20% of the compensation paid, due or credited to the Individual Contributor under its hire, observing the maximum limit of the contribution-salary.

B.2 Contribution payable by the “Individual Contributor” – Exclusive cases

The contribution payable by the “Individual Contributor” is now incumbent on the company that contracted such worker. However, if the total monthly compensation received by the “Individual Contributor” for the services rendered to one or more companies is less than the minimum limit of the contribution-salary (i.e. 1 Minimum Salary), the insured worker is required to pay directly the complementary contribution due on the difference between the minimum limit of the contribution-salary and the total compensation received in the month, applying thereon a 20% rate.

B.3. Contractor Individual Contributor

The obligation to pay the social security contribution of the individual contributor under its hire does not apply in the case of contracting by another individual contributor that is equalized to a company or by a rural producer (individual) or by a diplomatic body and consulates of foreign countries.

This also does not apply to the hiring of a Brazilian civilian that works abroad for an official international organization in which Brazil is an effective member.

B.4. Obligations of the Companies and Proof of Deduction

The company is obligated to pay the social security contribution of the individual contributors under its hire through deduction in the compensation paid, owed or credited to this insured worker, and pay the total of the

deductions jointly with the company's contributions by the 2nd day of the month subsequent to the month of maturity, the deadline thereof being extended to the next business day when the 2nd day of the month falls on a day in which banks are not open.

The companies that pays compensation to an individual contributor is required to provide to the individual a receipt for the service rendered, indicating in addition to the salary amounts and the social security deduction, its complete identification, including its taxpayer registration number (CNPJ) and the individual contributor's registration number with Social Security (INSS).

The company shall keep on file for 10 years copies of the receipts of payment or the statement provided by the individual contributor for the purposes of its submission to the INSS, at its request.

B.5. Simultaneous Activities and Obligations of the Individual Contributor

The individual contributor that renders services within the same month to more than one company is required to inform to each company the amount or amounts received against which the contribution deduction is due, upon presentation of the payment receipt for the purpose of observing the maximum contribution-salary.

The individual insured contributor that renders services and simultaneously works as an insured employee or occasional worker shall, for the purposes of observing the maximum contribution salary amount, present to the company in which the worker is an employee, to the Labor Manager (OGMO) in the case of occasional port workers, or to the hiring company when the occasional worker is a non-port worker, the foregoing payment receipt.

The individual contributor shall keep a copy of the declaration mentioned above jointly with the payment receipts for the purposes of presenting to the Social Security, at request.

B.6. GFIP

The contributions quoted above shall be informed in a Severance Fund – FGTS Payment and Social Security Information Slip (GFIP) according to the instructions established in the GFIP Instruction Manual.

The contributions that are deducted from individual contributors cannot be parceled. The company that remunerates an individual contributor that has proved the rendering of services to other companies or that has been engaged, simultaneously, in an activity as an insured employee or occasional worker, in the same month, shall inform the occurrence of several payer sources in the Severance Fund – FGTS Payment and Social Security Information Slip (GFIP).

C. Employee, including household workers, and occasional workers.

The contribution of these insured workers is calculated by applying the corresponding rate, on a non-cumulative basis, over the worker's monthly contribution-salary according to the following schedule, for payment as of January 2004:

CONTRIBUTION-SALARY (R\$)	RATE FOR SOCIAL SECURITY PAYMENT PURPOSES (%)
up to R\$ 800.45	7.65*
R\$ 800.46 up to R\$ 900.00	8.50
R\$ 900.01 up to R\$ 1,334.07	9.00
R\$ 1,334.08 up to R\$ 2,668.15	11.00

Note:

Whenever an insured employee and household worker have more than one job the remunerations shall be added for the proper classification in the foregoing schedule, observing the maximum contribution limit. This rule also applies to the remunerations of the occasional worker.

In the cases of payment of the 13th salary (Christmas bonus) this payment should not be added to the monthly compensation for the purposes of classification in the schedule of contribution-salaries, i.e. the rate shall apply over the amounts separately.

The employer of a household worker contributes differently to Social Security, paying on a monthly basis 12% of the contribution-salary of the employer's household worker(s), while the employers of other types of

workers pay based on the payroll. It is incumbent on the employer to pay on a monthly basis to Social Security its and the workers' contributions deducted from the monthly salary.

The deduction against the worker shall follow the contribution-salary schedule. The contributions of the employer of and of household workers shall be paid through a proper payment slip (Social Security Payment Slip - GPS), observing the payment codes when filling it out.

If the employer decides to pay FGTS (Worker's Severance Fund) to its household worker, it will be necessary to fill out a Specific Social Security Registry (CEI) and the Severance Fund – FGTS Payment and Social Security Information Slip (GFIP).

Following the annotation of the labor agreement in the household worker's Employment and Social Security Record booklet (CTPS), the employer shall register the worker in the Social Security through the Internet or a Social Security agency. In order to register, the worker's CTPS booklet recorded with the employment, the worker's and the employer's identification documents are required.

If the female household worker (maid) is on a maternity leave the employer shall pay to Social Security only the employer's quota.

D. Specially Insured Contributors

The contribution of the specially insured worker corresponds to 2.3% of the gross sales revenues of the rural production. This percentage is comprised as follows:

2.0% to Social Security;

0.1% for financing the benefits that are granted based on the extent of labor disability that results from the environmental risks associated with the labor (SAT); and

0.2% to SENAR (National Rural Apprenticeship Service).

Whenever the specially insured worker sells its rural production to a company buyer, consumer or consignee, the latter will be subrogated in the obligation of deducting against the producer and payment of the corresponding Social Security contribution.

In addition to this compulsory obligation, the specially insured worker may also contribute optionally, applying the rate of 20% of the corresponding contribution-salary (optionally insured), to be entitled to the social security benefits in amounts of more than one minimum monthly wage.

E. Low Income Employees

According to the Constitutional Amendment no. 47, as of July, 5, 2005, a new law must be created in order to dispose about a special system of social security inclusion regarding the extension of its benefits to low income employees and to employees without personal income who work exclusively at home performing domestic jobs, when from a low income family.

13.4. Supplementary Pension Plans

In the private pension plans the benefits are funded through a capitalization regime, i.e. amounts accumulate throughout the worker's productive labor life so that they may be used at retirement.

The private pension institute is still optional in Brazil, the employer having the option to extend this benefit to its employees.

Basically, there are two types of supplementary pension plans:

(i) Unlisted Supplementary Pension Plans, which may only be organized in the form of a foundation or non-profit company and exclusively offered to the employees of a company or group of companies, to the governmental workers of the Federal Government, States and Municipalities, the latter designated sponsors, in addition to the affiliated or members of professional, class or segment organizations, designated institutors;

(ii) Listed Supplementary Pension Plans, in which the managing entities thereof are organized under the form of a Brazilian corporation (*sociedade anônima*) with the corporate purpose of establishing and operating benefit plans that have the nature of pension, extended in the form of continuous compensation or paid in a lump sum, which may cover any type of individual. This group includes the so-called PGBL and VGBL Plans. The PGBL (Free Generating Benefit Plan) is a fixed contribution type pension plan that affords greater flexibility and offers greater transparency to the participants since the yield, rates and equity are published daily by the press. The main feature of this plan is the full transfer of the yield of the Plan without any guarantee of adjustment or minimum yield in the deferral period. In other words, the entire yield generated in the capital accumulation period is transferred to the affiliate, less costs.

It is worthy to note that the government stimulates the creation of such plans by extending favorable tax and labor treatment.

a) Labor Aspects

In regard to the labor aspects, the Labor Code (CLT) was amended in 2001 to expressly EXCLUDE from the definition of salary the private pension plan granted by the employer (CLT, article 458, paragraph 2), among other items.

b) Tax Aspects

These aspects must be analyzed under the prism of the (a) individual taxpayer and (b) the corporate taxpayer; in both cases the current laws establish certain tax benefits.

- Individual taxpayer

According to the tax laws the contributions to Private Pension Plans that are similar to Social Security may be deducted from Income Tax up to the limit of 12% of the participant's gross annual income.

However, the redemption and the sums received are considered income and, thus, taxed according to the progressive Income Tax rate. The tax applies over the total income and/or redemption amount. The redemptions and income received must be informed in the Annual Income Tax Report.

- Corporate taxpayer

According to Law 9.532/97 the company that offers Private Pension Plans to its workers may deduct the contributions payments as operational expenses, limited to 20% of the total of the workers' salaries and compensation paid to the directors under the Plan.

13.5. FGTS – Worker's Severance Fund

The FGTS is a compulsory bank deposit in favor of the employee that may only be operated in certain cases. It is deposited by the employer in favor of the employee and it corresponds to 8% of the employee's monthly salary.

These deposits are intended to form a type of savings fund to the employee and it may be withdrawn in specific cases, namely:

- (i) dismissal without cause;
- (ii) grave illness;
- (iii) retirement;
- (iv) payment of purchase of house for own use, etc.

In the event of death of the worker the FGTS shall be paid to the worker's dependents.

In the cases of dismissal without cause the employer shall pay, as indemnity, an additional 40% of the existing deposits in the FGTS account.

13.6. Professional-Graphical Social Security Profile (PPP)

Effective January 1, 2004, Social Security requires the companies that expose their employees to toxic chemicals, physical and biological elements the so-called PPP based on an environmental conditions survey. It consists in an individual chronological-labor document of the worker's labor, presented in a form established by the Social Security that informs the worker's exposure to toxic agents containing administrative, environmental and biological information on the entire period in which the worker worked for the company. The PPP guides the process of recognition of special retirement developed by the Technical Survey of the Environmental Conditions at Work (LTCAT) and provides biological monitoring results obtained based on the Medical Control of Professional Health Program (PCMSO) and in the Environmental Risks Prevention Program (PPRA).

The declaration of false information in the PPP characterizes the felony of false statements (article 297 of the Penal Code).

The information stated in the PPP are private statements of the worker, consisting in a crime foreseen in Law 9029 discrimination practices resulting from its requirement by others and also its disclosure to third parties, except where required by the relevant governmental authorities.

13.7. RPPS – Social Security System of Governmental Workers

In general, pursuant to the overhaul of the social security system, implemented by Constitutional Amendment (EC) no. 41 of Dec. 19, 2003, the social security system that applies to governmental workers was thenceforth characterized as follows:

:: Current Active Governmental Workers

Former aspects	Changes (Constitutional Amendments no. 41 and 47)
RETIREMENT REQUIREMENTS The governmental workers hired before Dec. 16, 1998 may retire upon completion of the age of 53 and 35 years of social security contribution (plus toll of 20% of the period that remained on such date to complete the contribution period), in the case of males, at 48 and 30 years of contribution (plus toll) in the case of females. In both cases, it is required to be occupying the position in which the retirement will operate for at least 5 years.	Maintains the possibility for these workers to retire at such ages, however applying a 5% reduction factor per anticipated year in regard to the reference age (60 for males and 55 for females) and the benefit shall be calculated based on the average of the contributions, similar to the General Social Security System (RGPS) managed by the INSS. The reduction factor shall be reduced to 3.5% per anticipated year in regard to the governmental workers that attain the right to retire in 2004 and 2005.
MAXIMUM PENSION IN SUPER RETIREMENTS The Constitution determined as the maximum amount the highest compensation paid to the Supreme Court justice, established by a joint law of the three Branches. However, there was no consensus for submission of the proposed bill.	Establishes as the maximum retirement pension in the public sector the highest compensation paid to the Supreme Court justice.
PROPORTIONAL RETIREMENT The governmental workers hired before Dec. 16, 1998 may retire at the age of 53 and 30 years of contribution (plus toll of 40% of the period that remained on such date to complete the contribution period), for males, and at 48 and 25 years of contribution (plus toll) for females. In both cases, it is required to be occupying the position in which the retirement will operate for at least 5 years.	Establishes acquired right to proportional retirement and this possibility is extinguished in regard to workers hired before Dec. 16, 1998
BONUS FOR CONTINUING TO WORK Exemption of the social security contribution by workers hired before Dec. 16, 1998 that fulfilled the	Establishes a bonus equal to the social security contribution (11% of the salary) for workers that have acquired the right and decide to continue to work until

conditions for retirement but decided to continue to work. The exemption persists until the worker completes the age of 60 and 35 years of contributions (males) and the age of 55 and 30 years of contribution in the case of females.	compulsory retirement (at the age of 70)
FULL AMOUNT AND PARITY The amount of the benefit is the last salary while active and it is adjusted always on the same date and at the same rate applied to the active workers	Maintained in regard to those that have acquired the right to the current rules. In regard to the others, it is no longer valid as a general rule. It is granted, exceptionally, solely as a bonus to the current workers that worked until the age of 60, with 35 years of contribution (males) or the age of 55 with 30 years of contribution (females). In both cases are required are required 25 years of public service, 15 years of career and 5 years in the job occupied by the worker by the time the benefit is granted. The parity criteria shall be defined in a regular law passed by congress
SUB-MAXIMUM AMOUNT FOR STATE COURTS Actually, non-existent	Establishes the limit at 90.25% of the compensation of the Supreme Court justice, which imposes salary reductions of up to R\$15,000 to some state court of appeal's justices

:: Current inactive government workers and Pension holders

Former aspects	Changes (Constitutional Amendments no. 41 and 47)
SOCIAL SECURITY CONTRIBUTION None	At the Federal Government level, 11% over the amount that exceeds R\$ 1,440 In the States, Federal District and in the municipalities, 11% over the amount that exceeds R\$ 1,200, observing the different salary realities in the public sector. The contribution emphasizes the contributive and collective aspect of the social security system.
ACQUIRED RIGHT Preserves acquired rights, not imposing any recalculation of the retirement and pension benefit amounts	Preserves acquired rights, not imposing any recalculation of the retirement and pension benefit amounts

:: Social Security workers

Former aspects	Changes (Constitutional Amendments no. 41 and 47)
Maximum amount of benefits and contributions: R\$ 1,869.34	Maximum amount of benefits and contributions increased to R\$ 2,400.00 broadening the scope of social security coverage to the workers
	Foresees a law that will establish a special system of social security inclusion to low-income workers, assuring to them access to benefits in the amount of one minimum monthly wage, which could benefit 18.7 million workers that do not have social security coverage

:: Future Pension holders

Former aspects	Changes (Constitutional Amendments no. 41 and 47)
The benefits are paid in full, based on the compensation paid to the active worker or the retirement of the deceased inactive government worker	Benefits in the amount of up to R\$ 2,400 shall be paid in full. The part that exceeds R\$ 2,400 shall be deducted at 30%

:: Future Government Workers

Former aspects	Changes
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	(Constitutional Amendments no. 41 and 47)
CALCULATION OF THE BENEFIT Entitled to a full retirement based on the last salary when active	Average of the social security contributions throughout the work period, similar to the formula adopted in the General Social Security System (RGPS) managed by the INSS
MAXIMUM AMOUNT Established a maximum amount for benefits identical to the benefits of the workers under the RGPS system managed by INSS, provided that the supplementary pension funds are established	Establishes a maximum benefit of R\$2,400.00, identical to the benefit of workers under the RGPS system managed by the INSS, provided that the supplementary pension funds are established
PENSION FUND Foresaw the creation of pension funds regulated by a supplementary law (PLP 09). The entities would be subsequently enacted by a specific law	Creates private, non-profit pension funds entities, managed in parity by government workers and governmental entities, to supplement the retirement pension of the workers. The pension funds shall have a public nature and have only defined contribution plans

**source – Social Security Ministry website*

14. CONSUMER PROTECTION LAW

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One of the main requirements for entrepreneurs that are interested in investing in the Brazilian market is to learn certain aspects of the local legislation on Consumer Protection Law, which is primarily intended to protect the consumer against any abuses, assuring harmony and transparency in the consumer relations.

As the Brazilian Labor Code (CLT) arose to stabilize the relations between workers and their employers, the Consumer Protection Code was conceived starting from the premise that the consumer relation is unequal, favoring the product/service supplier.

Moreover, the consumer's protection is a principle of economic order established in article 170, item VI of the Brazilian Federal Constitution, since the relationship between the supplier and the destined party is essential in a "consumption society" for the competitiveness of the companies and development of the Brazilian capitalist system based on the decent existence of the individuals and on the maxim of justice.

The purpose here is to address a few specificities of the Brazilian Consumer Protection Code (CDC) and some of the new provisions of the New Brazilian Civil Code (NCC).

14.1. Adhesion Agreement

Aiming to prevent any abuses in this type of contract, article 51 of the CDC stipulates the requirement of several clauses to support the consumer's contractual position. For example, the supplier cannot: (i) transfer its responsibilities established in the law to third parties; (ii) invert the burden of proof in a lawsuit; (iii) unilaterally change prices; (iv) unilaterally terminate an agreement without vesting the consumer with the same right.

The CDC also determines that the clauses of this type of contract must be in a written, comprehensible and clear form. Any provisions that restrict any right held by the consumer must be drafted emphasizing the restriction, allowing an easy and immediate comprehension.

Further, article 423 of the NCC provides that any ambiguous and conflicting clauses established in the adhesion agreements shall be construed in benefit of the adherent/consumer, confirming the provisions established in Section III of the CDC.

14.2. Statutory Warranty

Another important aspect is the difference between the contractual warranty and the statutory warranty. While the former consists in the warranty that is established in the contract (voluntarily warranted by the supplier), the latter consists in the warranty established by law and to which the consumer is entitled, irrespective of any other covenant.

According to the warranty established in the CDC the buyer is entitled to the proper repair or exchange of the product that was purchased or, in the case of a service, that it be redone. The period established in the CDC to exercise such rights is 90 days in the case of durable goods, and 30 days in the case of non-durable goods. Therefore, any clause that establishes a smaller period shall be deemed void of validity.

14.3. Liability *Strictu Senso*

Brazilian Consumer Protection law adopted the liability *strictu senso* principle in the indemnification for the damages caused or derived from the consumer relation.

This means that, irrespective of fault, the supplier must repair the damages that were caused to the consumer by the supplier itself or by the products or services that were provided. In practical terms, the consumer may claim the repair of the damages against any of the companies that were engaged in placing the product or service in the market (manufacturer, distributor, seller – all defined in the CDC as suppliers). In this case, the company that bore the loss caused to the consumer is entitled to proceed in court against the other suppliers that jointly concurred for the occurrence of such damages.

The liability *strictu sensu* is imposed by the law and it is the law that establishes the cases in which the entrepreneur's responsibility is excluded from the events whereby they, their products or services caused damages to the consumer, namely: (i) upon proof that the entrepreneur's company did not participate in the placement of the product/service in the market; (ii) despite of having placed the product/service in the market, upon proof that no defect exists; (iii) upon proof that the defect pursues from fault exclusively attributable to the consumer. These rules were tailored under the premise that the supplier must assume the risks that are inherent to its business and, thus, in no other event other than these three cases foreseen in the CDC may the liability for indemnification be excluded.

14.4. Corporate Liability

The NCC introduced important amendments to corporate law. The new legislation increased the partners' liability for the acts that they performed while they were company directors.

Accordingly, the liability *strictu sensu* was extended in regard to the supplier that is a regular company or member of a corporate group, given that article 1.023 of the NCC provides on the possibility of holding the partners' personal property to cover the damages that the company or its products/services caused to the consumer. However, such a collection proceeding may only be conducted if the debt amount exceeds the value of the company's stock, thus affecting the partners' personal property (article 1.024 of the NCC).

Finally, since every specific law originates from basic principles, it is advisable to abide by the provisions of article 4 of the CDC, which reads: “The National Policy of the Consumer Relations has as its purpose to attend the consumers' needs, respect the consumer's dignity, health and safety, protect the consumer's economical interests, improve the quality of the consumer's life and also the transparency and harmony in the consumer relations (...).”

These are rules of public order and, as such, must be complied with by the foreign companies that are engaged in activities within Brazil.

15. ENVIRONMENTAL LAW

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15.1. Historical Background

Brazilian environmental law originated in the '70s, influenced by the Conference of Stockholm on the Human Environment. However, it was in the '80s, pursuant to the enactment of the National Policy for the Environment Law in 1981, the Class Action Act in 1985 and of the Federal Constitution in 1988 that the legal protection of the environment gained national recognition and statutes that were more appropriate for its implementation.

Particularly in the second half of the '90s and early 2000 the Brazilian Environmental Law was significantly modernized. New laws such as the Environmental Crimes Act (1998), the Bio-Safety Act (1995), currently being reviewed, and the law that vested special protection to territorial areas of special ecological interest, the so-called National System of Conservation Units Act (2000), provide greater effectiveness for the protection of the natural resources, including bio-diversity, and for the efforts against pollution.

A brief description of the main aspects of the Brazilian environmental law follows.

15.2. Legislative and Supervisory Powers in Environmental Matters

An important aspect that must be considered in regard to the Brazilian Environmental Law is that Brazil is not a single State but rather a Federative Republic comprised of the Union, States and Municipalities. This political-territorial division produces effects in the attribution of powers to legislate on the protection of the environment, as well as for the control and licensing of effective or potentially polluting activities.

According to the Federal Constitution, the Federal Government and the States are to concurrently legislate on (i) the protection of the natural environment, covering forests, game, fishing, conservation of nature, protection of the soil and of the natural resources, and pollution control, (ii) protection of the cultural environment, covering the protection of the historical, artistic, tourist and landscaping environments, and (iii) liability for environmental damages.

Despite the powers expressly attributed to the Federal Government and to the States, the Municipalities also have the power to legislate on environmental matters in regard to specific issues that are considered to be of local interest. Hence, in practical terms, all levels of the Federation legislate on environmental matters. It is important to emphasize that the vast federal legislation on environmental matters is usually adopted and applied by the surveillance departments of the States and Municipalities.

All bodies of the Federation have authority to perform the environmental control activity through departments that have been vested such authority through a specific legislative act. Some Municipalities have environmental agencies or departments, but, generally, it is the States and the Union that have specific departments for the environmental control and surveillance.

The group of governmental bodies and entities that are responsible for the protection and improvement of the quality of the environment comprises the National Environmental System - SISNAMA.

Although it is not a body that comprises SISNAMA, the Public Prosecutor (*Ministério Público*) has the institutional duty of opening civil investigations and filing class action suits aimed to protect the environment and collect indemnity for environmental damages. The Public Prosecutor is also the competent authority to file criminal lawsuits against environmental crimes.

15.3. Environmental Liability

The liability for environmental offenses may be at the civil, administrative and criminal levels. The liability that is attributed at each of these levels is autonomous and may occur cumulatively or severally depending on the environmental offense that was committed.

The criminal liability is asserted through a criminal action filed exclusively by the Public Prosecutor and to characterize it the fault or willful misconduct of the agent accused of having committed the crime must be proved.

The Environmental Crimes Act provides that both individuals and companies are subject to criminal liability. In regard to individuals there are two main classes of liable individuals. The first class covers any individual that participates in the crimes established by law, to the extent of his fault. The second class covers directors, officers, board and technical advisory members, auditors, managers, agents and designees that, aware of the criminal conduct, failed to prevent, by their inertia, the committing of the offense that they could have attempted to prevent by acting.

The criminal liability of the company occurs when the offense is committed pursuant to a decision taken by the company's legal or statutory representative or by its collegial body, on behalf of the company.

The administrative liability occurs when an offense against the environmental law is committed and it is asserted through an administrative proceeding opened by the executive bodies that comprise SISNAMA, initiated through an environmental violation assessment proceeding. The administrative penalties range from plain warnings to fines of up to R\$50,000,000 or interruption of operation.

At the civil law level the liability arises from the damages that the environment and/or third parties suffered pursuant to ecological damage. The liability of the agent that caused the damages may be claimed in court by any harmed party in defense of its own interests, or by the Public Prosecutor, the Federal, State or Municipal governments or by private organizations engaged in the environmental protection activity, such as non-governmental organizations (NGO's) in defense of the community's interests.

Under Brazilian environmental law the civil liability for ecological damages is strict sense, i.e. the agent is required to repair the damages that were caused to the environment or indemnify such damages, irrespective of fault.

The law further establishes the joint liability at the civil level of all the agents that rendered feasible, contributed or created conditions, pursuant to the activities in which they were engaged, for the occurrence of the ecological damage.

It should be emphasized that, although it is not conditioned to fault, the characterization of civil liability requires demonstration of the effective occurrence of damages and a link between the damages and the agent's activity. In other words, the agent will only be liable if the damages and the extent thereof and also the link between the damages that were caused and the agent's activity are proven.

15.4. Environmental Licensing

The installation of activities that are deemed to be pollutant or potentially pollutant or that require the use of natural resources is subject to environmental licensing, which consists of a public administrative proceeding through which the relevant environmental authority assesses and authorizes the site, installation, expansion and the operation of these enterprises, taking in account the legal and regulatory provisions and the technical rules that apply to the case.

The licensing of projects that effectively or potentially cause considerable degradation, deemed as such by the relevant environmental authority, is subject to a prior Environmental Impact Survey.

The environmental licensing process has three different and successive stages in which the environmental feasibility of the enterprise is evaluated and conditions for the installation and operation of the project are established. Three licenses are issued in these stages: (i) Provisory License (*Licença Prévia – LP*), granted in the preliminary stage of the planning of the enterprise or activity, in which the site and conception are approved, and it attests the environmental feasibility and establishes the basic requirements and conditions that must be fulfilled in the subsequent phases of the implementation thereof, (ii) Installation License (*Licença de Instalação – LI*), which authorizes the installation of the enterprise or activity according to the specifications set out in the approved plans, programs and projects, including the environmental control measures and other conditions and (iii) Operation License (*Licença de Operação – LO*), which authorizes the operation of the enterprise, after assessing the effective compliance with the terms of the preceding licenses, with the environmental control measures and the conditions that were established for the operation.

The authority for the environmental licensing is attributed to the bodies that comprise SISNAMA, the federal environmental agency named *Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis – IBAMA* having the authority to license enterprises that cause impact at the national and regional levels, and in regard to activities carried out in Indian reservations, in the territorial sea, the continental sea shelf and in the exclusive economical zone, and also in the case of nuclear activities. The State environmental agencies have authority to license enterprises in which the impacts do not go beyond the State's territorial borders, located in protected territorial areas under the State's jurisdiction or in the event its authority was delegated by the Federal Government through an agreement between them or a proper legal instrument. The Municipalities may license activities that impact the environment locally.

15.5. Succession In Environmental Contingencies

The company that acquires a business that has environmental contingencies (contaminations, protected environmental areas that are degraded, administrative cases or lawsuits grounded on a violation of the environmental laws, lack of environmental licenses, among others) is deemed under Brazilian law to be a successor of such environmental contingencies.

Although it is possible to contractually attribute to the company that generated the contingency its liability thereof, such a clause does not release the buyer from the liability in regard to the Government and the third parties that were harmed. In this case, the purpose of the contract clauses that provide on the contingencies is to regulate the claim against the former owner of the business in the event the buyer suffers any type of damages pursuant to the environmental contingencies.

15.6. The Environment And Social Responsibility

Environmental issues are receiving increasing attention not only in the communication vehicles but also at the Legislative Branch, with the enactment of several environmental regulations that require the private sector to increasingly consider the environmental agenda in their activities. Specific examples are the law that instituted a fee for the use of water resources, laws that address the post-consumption environmental liability in several States, rules on environmental compensations for the licensing and the environmental crimes act.

In addition to the enactment of these rules, a trend may be perceived in the delegation by the States to the Municipalities of the authority to inspect potentially pollutant activities and in the growing role played by the Public Prosecutor and Non-Governmental Organizations to protect the environment and natural resources. The environmental protection entities and the Public Prosecutor tend to be more active in the surveillance of the polluting sources, applying hefty fines and filing class action suits that impact the polluter's financial resources and reputation.

The increasing pressure applied on those who are not committed to the quality of the environment is not originated solely from parties pursuing the enforcement of the Brazilian laws, but is also applied by external

factors since the social conduct that the company adopts is being increasingly observed and evaluated by the community in general, including consumers of its products.

Hence, the adoption of a conduct aimed to preserve the environment, in addition to being essential for the improvement of the quality of life of the community and of the future generations, could bring direct benefits to those that promote it. The concept of social responsibility has been rapidly spreading in the last years and those who are not prepared to adopt it in their activities will certainly jeopardize their competitiveness. The environmental agenda is a major aspect of social responsibility and may be significantly explored.

16. E-COMMERCE

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ELECTRONIC TRANSACTIONS

The expressions “electronic transactions” or e-business¹³⁵ are used very broadly and cover business activities that are conducted through the Internet, commonly referred to as “e-Commerce” and “e-Services”.

The deals that are concluded through the Internet started in Brazil in 1998 and since then have grown considerably. Brazil is at the same level of the developed countries in terms of the quality of the electronic transactions that are done and it already demonstrates to be prepared to remain engaged in the Internet market.

The electronic transaction does not necessarily lead to a commercial relation. Notwithstanding, upon the recognition of the commercial potential of the Internet, it was no longer plainly a communication vehicle and became an efficient means for legal trade deals in the form of electronic contracts.

The electronic contract is a bilateral legal deal, the most commonly known type of which is the adhesion contract, which involves the use of a computer connected to the world wide web (Internet) as the mechanism to form and formalize the binding contractual relation, perfected upon the parties’ expression of their free will to contract in order to produce legal effects. The requirements for the validity of the electronic contract are the same that are established for the classical contracts.

Brazil still lacks specific legal provisions for the regulation of electronic transactions. This does not mean, however, that the e-business relations lack legal protection.

The contracts that are executed electronically differ from all the other types of contracts only in form and the media through which they are executed. Thus, conflicts related to these contracts may be settled based on the current Brazilian legislation (e.g. the Introduction to the Civil Code Act, the New Civil Code, the Consumer Protection Code) until specific legislation issues.

The current New Civil Code, for example, includes provisions that are directly applicable to legal issues related to the Internet, providing positively, and privileges the electronic deals in its provisions that emphasize the bona fide intentions and the ancillary duties thereof, social purpose, customary practices.

An issue that is currently being broadly discussed concerns the safety of the information and the electronic documents. Certain methods were devised to attempt to ensure the authenticity of the electronic document such as, for example, the digital signature and its certification by a third party through the use of cryptographic systems.

Electronic evidence is expressly recognized and this should foster electronic commerce upon digital certification, according to Provisory Act (*Medida Provisória*) no. 2.200.

Through the Provisory Act quoted above (which was re-enacted twice, with amendments), the Brazilian Government created the Infrastructure of Public Brazilian Keys – abbreviated ICP – to ensure the authenticity, integrity and legal validity of documents in electronic form.

The Digital Certification in Brazil, which is regulated by the aforesaid Provisory Act no. 2.200, is currently effective and it subjects the certification activity to prior registration with the Government, subjecting the legal validity to the registration of certifying entities.

¹³⁵ E BUSINESS is a registered trademark owned by IBM Corporation.

Resolution 397 of Oct. 18, 2004, signed by the president of the Council of the Federal Judiciary, Minister Edson Vidigal, and published on Oct. 19, 2004, establishes guidelines for implementing the use of digital certification at the levels of the Council of the Federal Judiciary and the lower and appellate federal courts, and authorizes the creation of the Certifying Authority of the Federal Judiciary System (AC-JUS) jointly with the Higher Court of Appeals (STJ) and the Federal Regional Court of Appeals (TRF).

There are several bills in Brazil providing on e-commerce, the legal validity of the electronic document, electronic billing, digital signature in e-commerce deals and electronic commercial mail. However, since the matter is subject to being amended with the same celerity that is typical in trade activities, many of those who study the matter find that any bill should be deeply analyzed and discussed so that when the new law is enacted it is not obsolete.

Furthermore, the community speculates that if the Government should interfere in the trade relations in the Internet through legislation that establishes many formal requirements, determining that the user must fulfill certain requirements and only allow acts that vest a certain form this form of interference could negatively impact the development of the Internet.

Whatever the outcome may be, it is important to stress that, as previously stated, in the absence of specific legislation in connection with the electronic contract, which consists in nothing else but a classical contract with innovations as to its form, the current regulations are applicable.

It is important to emphasize that Brazil is acknowledged as one of the most promising countries in terms of development of the Internet. It is the largest market in South America and has the largest number of users and the most important marketing market.

According to a survey prepared by the “E-Consulting” consulting firm that was released on November 3, 2003, the global population of Internet users then totaled 825 million, of which 17.4 million were in Brazil, representing a growth of 21.7% over the previous year.

That firm projected that in 2004 the population of online Brazilians should reach 20.9 million, while the global population should total 945 million.

Finally, it may be noted that in most of the countries that have entered the digital era, the issues that are being raised in regard to this matter are similar and, further, that Brazil has progressed and is equipped with tools that suffice to accompany and assist their trade partners in this regard.

17. REGULATORY LAW

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17.1. Introduction

In the last decade Brazil has been adapting to a new form of role of the State based on a mediation and regulatory system. In fact, as of the '90s decade the country's economic rules have become more flexible, enabling the deregulation of certain fields and the initiation of a decentralization process.

The change in the State's profile from interferer to regulator gave rise to the regulatory agencies, one of the main features of the new system. Through this new model services that were until recently an exclusive monopoly of the State were transferred to the private sector, subject to control by the regulatory agencies.

This gave rise to Regulatory Law, which consists in the combination of public, constitutional, economical and administrative law rules that govern the regulatory agencies and their relations with concessionaires, authorized contractors and users of the public services.

In this new system the State is no longer the financier of development. The supply of services and works that were previously exclusively attributed to the state, were transferred to private enterprises, the State having the plain role of controlling and regulating the services provided by the concessionaires.

The State no longer has an exclusive monopoly, for example, in the fields of exploitation of crude oil, generation and distribution of electric power and telephone services. However, although they have a purpose that is in line with the economical development model adopted in Brazil, the community is criticizing the regulatory agencies in some aspects.

This is due to the fact that the regulatory agencies do not use to a broader extent their regulation and regulatory mechanisms. In fact, despite of being one of their duties, the regulatory agencies are eventually not able to avoid abuses committed by the concessionaires. Instead, the regulatory agencies engage in areas that are not within its attributions, such as the planning of public policies.

Moreover, it may be quoted that it is salutary for the agencies to improve their relations with the authorities that handle the consumers' interests.

Resuming, the regulatory agencies are an important part of the new structure of the Brazilian economy, but they still lack of adjustments to achieve the full attainment of their purposes.

17.2. Regulatory Agencies

The constitution of the regulatory agencies derives directly from the decentralization process, that is, the State's withdrawal from the economy. Accordingly, the agencies were constituted with the purpose to survey, establish rules and regulate the public service sectors that were delegated to private enterprise, aiming for stability and harmony in the relations between the State, users and the concessionaires.

The following regulatory agencies were established in Brazil in the oil, electric power, telecommunications and water resources fields: *Agência Nacional de Petróleo – ANP* (National Oil Agency), *Agência Nacional de Telecomunicações* (National Telecommunications Agency), *Agência Nacional de Energia Elétrica* (National Electric Power Agency) and the *Agência Nacional de Águas* (National Water Resources Agency).

Agência Nacional do Petróleo – ANP (National Oil Agency)

The National Oil Agency, which was constituted as a body of the Ministry of Mines and Energy, has as its purposes to regulate, contract and surveillance of the activities comprised in the oil and natural gas industry.

The agency was created by Law 9.478/97, which establishes the duties to be fulfilled by this agency, namely the protection of the environment and to promote the conservation of energy, and also to enforce proper conservation practices and the rational use of oil, oil by-products and of natural gas and the preservation of the environment.

Agência de Energia Elétrica – ANEEL (Electric Power Agency)

The National Electric Power Agency was created by Law 9.427 of December 26, 1996 and it is also a body of the Ministry of Mines and Energy.

The main duties of this agency are to regulate and control the production, transmission, distribution and commercialization of electric power, hear the complaints and act as a mediator in the conflicts of interests between the agents of the electric power sector and the consumers.

Furthermore, ANEEL is engaged in the authorization of electric power facilities and services, determining investments based on the needs of the consumer market, encouraging competition between the operators and ensuring the universality of the services, in benefit of the Brazilian community.

Agência Nacional de Telecomunicações – ANATEL (National Telecommunications Agency)

ANATEL was created in 1997 under the form of a special agency, having administrative autonomy, not being subordinated to any governmental body.

ANATEL's main purpose is to develop the telecommunications field in Brazil, modernizing and expanding it so to provide to the entire community access to a quality service and at a fair price. Therefore, this agency is responsible for implementing the National Telecommunications Policy, proposing the institution or elimination of types of services, elaborating the General Plan of Concessions and the targets for the universality of the telecommunications services.

ANATEL is also responsible for the control and penalization of violations to the economical order in regard to the telecommunications. ANATEL is also engaged in the defense of the consumers' rights and in settling the conflicts of interests between the service providers, establishing restrictions, limits or conditions to the corporate groups for the grant and transfer of concessions, permits and authorizations, so to ensure competition and prevent market concentration. ANATEL is also responsible for establishing the fees in each type of the services that are provided.

Agência Nacional de Águas – ANA (National Water Resources Agency)

The National Water Resources Agency (ANA) is a special agency that has administrative and financial autonomy, being a body of the Ministry of the Environment. It is responsible for implementing the National Policy of Water Resources.

Brazil created in 1997, through the law on water resources (Law 9433/97) an ambitious model for the management of the use of its rivers.

By creating the technical conditions for the implementation of the Waters Act, in a first instance ANA will contribute in the attempt to solve two serious problems in Brazil: the long drought seasons, especially in the Northeastern region, the facing of which does not depend only on increasing the offer of water, but also in the management of the demand, including adopting rationing measures; and the pollution of the rivers when the action to be taken must be convened at the level of the water basin, covering more than one state.

17.3. Conclusion

As of the 90s decade Brazil changed significantly the role played by the State. In line with a trend that has occurred in several other countries, Brazil structured many changes aiming to mitigate the areas in which the State played a role.

Accordingly, the State has delegated to private enterprise certain works and services which until recently were its exclusive attribution. In this new reality, the State figures as a controller instead of a provider thereof.

In the last decade Brazil exited an extremely interference phase and entered the new millennium consolidating a new model of a Regulating State, bringing with it the regulatory agencies.

In this context, pursuant to having patrimonial, administrative and financial autonomy, the regulatory agencies vest critical importance to carry out the countries' economical activities.

However, they must adapt and attend in a more satisfactory manner, the purposes for which they were created, namely, the regulation and surveillance of the public utility services that are provided by private enterprises.

18. SPORTS

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SPORTS LAW IN BRAZIL RELEVANT BUSINESS ASPECTS

“A sport is the expression of a social fact whose evermore penetrating evidence is not possible to discuss. The sport phenomena, taken as a permanent fact, through the peoples and civilizations, with its character of institution rooted in modern society created an authentic Sports Law, that has rules and principles fairly defined, whose existence is recognized and materialized by practices and laws that apply strictly to as many incidences that succeed in the life of the sport”.

João Lyra Filho

18.1. Introduction

Considering that the Brazilian Constitution establishes in its Article 217 Sports incentive, the progressive development of the possibilities for the engagement of the operators of Law in this new field of work is not totally odd, which is still sparsely explored and experiencing rapid growth, particularly following the legalization of the autonomy of the sport directive entities and the new rules established in the so-called “Zico” and “Pelé” laws.

The appearance of this global phenomena called Sports – and of its broad meaning to the human being – must be construed in a historical context as one of the first manifestations of Law, although strongly connected to elements such as Religion (activities motivated by the adoration of gods) and Militarism (exercises in war training).

The athletic figure pictured in the Greek ideal and the list of regalities that were extended to the roman athletes serve, also, to perfectly demonstrate the importance of sporting events as in these ancient communities such events had social and political connotations, such as entertainment of the population and the personal valuation of the organizers and of the winners.

The fact is that Sports have recently surpassed the obsolete and unpretentious investment that it received from the State to enter in the era of private investment where the cooling down of the heat of the dispute, the professionalizing of the sports relations and the establishment of business bases converge to the administration of sports at a high yield.

Thus, the sport event that is not properly inserted in a structure that involves sports marketing, negotiation of advertisement, proper contracting of royalty payments for the use of intellectual property rights and of the image of both the team-company and of the athletes and, further, the regulation of the Arena Law, is certainly condemned to extinction.

Accompanying the current changes and development of the relations in Sports, the sports regulations development in sensibleness, attempting to attribute stability to all relations and leaving out practices based on the devaluation of the athlete and the enrichment of obsolete entities.

18.2. Background of Sports Laws In Brazil

Sports laws appeared to regulate the games practiced in ancient civilizations. They served as a means of control by the governmental authorities and to establish punishment to the losers and regalities to the winners. Violence was then allowed in both the games and in the punishment.

In his article “*História da legislação desportiva*”¹³⁶, Álvaro Mello Filho describes the origin of sports laws:

“The sports laws have their most ancient roots in the rules that the primitive people held as sacred and strictly carried them out, even because the ancient games never lost their connections that united them to religious ceremonies, and always ended with a religious cult to a God or hero. (...) At that time, the games were presided by a judge and necessarily attended by an officer that had a rank equivalent to a current police chief, which demonstrates how far back dates the interference of governmental authorities in sports affairs and in the genesis of sports law”.

Brazilian sports are currently regulated by Law 9.615 of March 24, 1998 (the so-called Pelé Law as amended, and by Law 10.671/03 (the so-called Fan’s Statute). These two bills constitute the backbone of Brazilian Sports Law, existing other complementary laws such as Law 9.696/98, which provides on the regulation of the Profession of Physical Education (Law 6.354/76) and on the employment relations of the professional soccer player, among others.

However, the genesis of Sports Law commenced with the creation of the National Council of Culture (Decree-Law 526 of July 1, 1938), which coordinated all activities related to the cultural development of Brazil, including “physical education” (gymnastics and sports).

In the following year, Decree-law 1.056 introduced the National Sports Commission. In 1941 Decree-Law 3.199 introduced the National Council of Sports, at the national level, and the Regional Councils of Sports. Following this Decree, the relations between clubs (teams) and athletes began to be regulated through administrative rules of the Confederations and Regional Federations.

On March 25, 1943 Decree-Law 5.342 was introduced, providing on the authority of the National Council of Sports and on the regulations of sports activities. It had a regulatory and interference aspect as it required the sports entities to obtain licenses to operate.

The Labor Code (CLT), enacted May 1, 1943, introduced the relations between clubs and athletes that were subject to the labor laws.

Throughout the 1950s and 1960s, the athlete gained important work assurances such as the right to 15% of the value of his/her pass, predetermined work hours schedule, vacation, insurance, labor agreement, etc.

Law 6.251 of Oct. 8, 1975 concentrated on the National Council for Sports the attributions to legislate, carry out and rule on the regulations, transforming it into a regulatory, surveillance and control entity, with authority to rule on sports issues.

On Dec. 2, 1976 Law 6.354 was introduced, to regulate the profession of professional soccer player, which is currently effective with some amendments, especially those introduced by Law 8.672 of 1993 (the so-called “Zico Law”) and Law 8.615 of 1998 (the so-called “Pelé Law”).

The main turning point of Sports Law in Brazil occurred with the enactment of the Federal Constitution in 1988. Article 217 thereof establishes that the sports are a right of each citizen, being incumbent on the State to foster the practice of sports, whether based on norms and rules or not.

¹³⁶ MELO FILHO, Álvaro. História da legislação desportiva. Revista da Faculdade de Direito do Ceará, 1992/1993, vol. 33, pages 154/156

As of the Federal Constitution of 1988, Sports Law began to establish itself as an autonomous field of law, develop and broaden its coverage, seeking subsidies and support on Civil Law, Labor Law, Criminal Law and Penal Procedural Law, Social Security Law, Tax Law, etc.

18.3. Non-Attachability of the Athlete's Pass

Freedom to Exercise the Profession

This section starts with a conclusion: The athlete, figured as a person that has his/her own will, freedom to exercise will and to exercise his/her profession, cannot suffer a constraint whatever the relationship may be between the team and creditors, athlete and team or creditors and athlete.

The athlete's constraint characterizes an offense not only against the human being, but also against the individual's freedom to work, which is a constitutionally warranted right.

The attachment is a proceeding that comprises a collection (enforcement) proceeding, more specifically in cases of collection of a determined amount against a solvent debtor. It consists, basically, in the expropriation of as many assets owned by the debtor that suffice to satisfy the creditor's credit. The expropriation may be realized with the sale of the debtor's assets, adjudication of the assets in favor of the creditor or by assignment of fruition rights in real estate or a company.

Article 28, Paragraph 2 of Law 9.615/98 (the so-called "Pelé Law") established that the athlete's sport ties with the entity that has the athlete under its contract has the nature of being ancillary to the corresponding employment and it is dissolved for all legal purposes at the termination of the employment agreement, except in the case established in article 29, item II, Paragraph 3 thereof.

Thus, athletes, formerly merely perceived as trade items, began to be perceived differently vis-à-vis the introduction of the Pelé Law. What should be avoided is the institution of a process of transformation of the human being into an object, i.e. pursuant to the extinction of the "pass" (constraint of the sport ties between the athlete and the sport entity) by the Pelé Law, the athlete's pass cannot be attached.

Following the introduction of the Constitution of 1988, even in the relations where the "pass" was still effective, the attachment thereof was no longer possible. In this regard, the Labor Court of Appeals - TRT, 9th Region, ruled:

"SOCCER PLAYER – ATTACHMENT OF PASS – It cannot be denied that the pass, in regard to those who are still subject to it, contracted before Law 9.615/98 was introduced, is intimately related to the athlete as a person, as the market value of the pass is directly related to the athlete's performance and, also, because the exercise of the activity in sports practice is bound to the team that holds it. Thus, it cannot be attached under penalty of agreement with the constraint of human life itself, in violation of the basic rights established in article 5 of the Constitution of 1988, given that nature of the pass is intimately related to the person. (TRT Labor Court of Appeal, 9th Regional Court – Appeal no. 3655/2001 - (11288/2002) – Reporting Justice Luiz Eduardo Gunther – published in the Official Journal (DJPR) of May 17, 2002)

The attachment of the athlete's pass violates the principle of dignity (article 1, item III of the Constitution of 1988) and the right of professional freedom (article 5, item XIII thereof). In abidance by these constitutional rules, any type of blockage of the individual cannot be allowed, in a sense that the individual be treated as an item of trade, as something that may be incorporated to the property of another person.

18.4. Labor Aspects

Item XXXV of Article 5 of the current Constitution of 1988 establishes “the law shall not exclude from the Judiciary the review of harm or risk of harm to a right”. Thus, we may quickly conclude that Article 217, Paragraph 1 of the Constitution, which provides that “*The Judiciary will only review cases related to discipline sport events after the proceedings before the sport courts, as regulated by law, are exhausted*”, only apply to sport matters that have a disciplinary nature or related to contests. In regard to labor issues, the provisions of Article 5, item XXXV of the Constitution apply.

There are many court rulings that support this rule:

“Issue: Labor Courts authority. The professional athlete may file a claim directly before the Labor Courts when the claim is related to labor rights, without prejudice to the rule established in Article 29 of Law 6.354/76 in aspects of sport conduct. The exhaustion of the level in which the Sport Courts have authority concerns merely the disciplinary aspects of the sport”. (Higher Labor Court of Appeals - TST, 1st Panel of Justices – Appeal no. RR 6646/82 – Reporting Justice Ildélio Martins, published in the Bulletin of the TRT, 2nd Region, page 105)

“Clearly, this is not a case involving disciplinary or contest matter, in which the Sport Courts have authority, in accordance with Article 217, Paragraph 2 of the Constitution. The subject matter is related to labor law, whereby all the points of the claim relate to labor payments, without any claim in the field of sports.

Hence, Article 114 of the Constitution applies to this case and the labor courts have authority to rule on the matter”. (Labor Court of Appeals – TRT, 10th Region - 3rd Panel of Justices – Ruling No. 2920/95 – Reporting Justice Francisco Leocádio - published in the Official Journal - DJDF of Aug. 25, 1995, page 11877)

Article 114 of the Constitution is consistent with the foregoing ruling:

“Article 114 – The Labor Courts have authority to settle and rule litigations between individuals and between workers and employers, covering foreign government entities and the Administration of the Municipalities, Federal District, States and Federal Government and, in accordance with the law, other disputes pursuing from employment relations, as well as litigation that originated in the enforcement of the labor court’s own decisions, including class decisions”.

18.5. Patrimonial Exploitation

18.5.1. Club-Company – Equalization to business organizations

A sport constitutes the maximum expression of the flourishing of fan passion, for several reasons. The sport flourishes emotion vis-à-vis the show; it evokes health, companionship, perseverance, faith, i.e. an explosion of emotions that invariably enables the generation of income pursuant to the sale of products and commercialization of sports-related services.

Therefore, it could be expected from the continuous development of Sport Law that the concepts on the exploitation of patrimonial property at the level of Sports would reach the commercial magnitude that it currently attained, particularly after the introduction of Law 9.615/98, which determines that the sports entities engaged in professional contests must be converted into companies.

Article 27 thereof reads:

“Article 27 – The activities related to contests of professional athletes are private privileges of:

I – civil companies that aim a profit;

II – commercial companies foreseen in the current laws;

III – entities engaged in the practice of sports that incorporate commercial companies to administrate the activities addressed in this Article.

Sole Paragraph – The activities of the entities referred in items I, II and III that violate any provision of this Law shall be suspended while the violation persists”.

Provisory Act (MP) no. 39 of June 14, 2002 amended Article 27 of Law 9.615/98 to read as follows:

“Article 27 – In view of the essentially business aspect of the management and exploitation of professional sports, the sports practice entities that. Participate in professional contests and the leagues in which they are organized that do not incorporate a commercial company or that do not contract a commercial company to manage their professional activities shall be equalized, for all legal effects, to non-incorporated or irregular companies, as defined in commercial law”.

By being equalized to a commercial company the club-company was thereby subordinated to the trade rules that are inherent to the conduction of its activities as a business.

In the case of deals that involve non-profit organizations through a sport, it corresponds to the licensing of sports and payment of a royalty for the exploitation thereof.

Thus, there is an initial need for commercial companies to protect their intellectual property to prevent its non-authorized use.

18.5.1.1. Registration of intellectual property - Necessity

In this regard, we may conclude that it is necessary for the club-company to register its company name before the relevant Chamber of Commerce and to register its trademarks with the Brazilian National Institute of Industrial Property (INPI). Further, considering that the registration of Copyrights over artistic or literary work has merely a declaratory nature, the registration thereof is not mandatory.

In regard to the sport clubs, the trademark and company name are confoundable, having in view that the company name is often its trademark, Examples: Santos Futebol Clube, Clube de Regatas Flamengo, etc.

Notoriously, sports clubs (teams) worldwide sell their products such as official jerseys, practice shirts, flags, caps, pennants, lighters, beverages with their trademarks printed thereon.

The sale of these products certainly attracts a large clientele such as fans and collectors, in addition to being a guaranteed form of obtaining additional income, by using its trademark as a symbol that distinguishes its product from the other products.

It is convenient to briefly distinguish the definitions of trademark and company name so that it is possible to understand their intersections as distinct symbols.

Article 122 of Law 9.279 of May 14, 1996 defines trademark as a visually perceivable symbol, which does not fall under the legal prohibitions, that identifies products and services of a certain origin from those of a different origin.

The company name is the name under which the entrepreneur operates, whether as an individual or as a company. The business name may be either a *designation* or a *signature name*. The *designation* is usually a *fictional name* while the *signature name* is a business name formed by the name of one or more partners, in the latter case observing the principle of *veracity*. Hence, despite of their different purposes, having in view that the company name is intended to distinguish an entrepreneur from another while the trademark is intended to distinguish the products/services of competitors, it may be perceived that the company name and the trademark are different legal institutes and means of identification and as such have their own regime of protection against their unauthorized use by third parties.

Although we presume that it is mandatory for the clubs-companies to protect their intellectual property, Article 87 of Law 9.615/98 (the ‘Pelé Law’) provides otherwise:

Article 87 – The name and the symbols of the entities that administrate the sport or sport activity, and also the name or nickname adopted by the professional athlete are their exclusive property and are legally protected throughout Brazil for an indefinite period, without need of registration with the relevant registry.

Accordingly, the protection of the name, symbol, trademark or company name does not require its registration before the relevant authority to be effective. In other words, theoretically the registration of these names and symbols is not mandatory.

On the other hand, considering that the club-company obtains income with the sales of products that carry their famous marks it is necessary to draw to the attention of potential future entrepreneurs that *the registration although not mandatory is recommendable.*

Before commenting in further detail the possibilities of negotiating the sport-related intellectual property, it is worthy to clarify the aspect of the ownership of such property in regard to the Brazilian Institute of Industrial Property (INPI) and under the Brazilian Industrial Property Law (LPI).

Article 128, Paragraph 1 of Law 9.279/96 (LPI) establishes that the companies are required to be engaged in a business activity related to the products/services claimed in the trademark application that the subject company is filing.

This means that the products/services that are claimed in the trademark application must be covered by the applicant’s (club-company) line of business stated in its articles of incorporation or by-laws.

The line of business stated in the articles or by-laws does not always expressly cover all the products or services that the trademark may identify and thus be afforded protection throughout Brazil, which is the scope of protection that the trademark registration provides in Brazil.

In such an event, there are two possible solutions in the scenario that the line of business stated in the articles or by-laws does not cover the products/services claimed:

- a) Amend the Articles of Incorporation or By-laws of the club-company, adapting same to cover the products/services claimed in the trademark application;
- b) Incorporate a company-contractor specialized in the commercialization of intellectual property to earn a profit with the club-company’s trademark designating the products/services of interest.

The registration of Intellectual Property assets is also important since in the absence of the registration of the trademark or copyright the contracts that involve such assets will not produce effects in regard to third parties. Furthermore, the contracts that are based on a company name but that lack the trademark registration before the Brazilian Trademark Office Department of the INPI are not accepted by the Contracts Department of the INPI, as further detailed below.

In summary, although the Pelé Law expressly establishes that the registration of the trademark of the club-company before the relevant authority is not required, given that such law addresses specifically rules pertaining to sports, the registration of trademarks is clearly recommendable. According to the Industrial Property Law (LPI) the registration of the trademark before the INPI is required so that the trademark is afforded legal protection since the LPI does not differentiate the club-company from the other types of commercial companies.

18.5.2. Athlete – ‘Arena’ Right – ‘Use of Image’ Right

The ‘Arena’ Right is established in the Federal Constitution of 1988, where it is classified as a right to ‘use of image’ and it is expressly established in the Pelé Law to protect the athlete in regard to the use of its image in a sport event. Considering the particular aspects of the sport event, the law establishes that the right to negotiate in the holding, transmission and retransmission of the sport event are held by the club (team) to which the athlete is under hire.

It would be illogical to conceive the scenario of each athlete negotiating individually the use of his/her image in the sport event.

Article 42 of Law 9.615/98 reads:

Article 42 – The club (team) holds the rights to negotiate, authorize or prohibit the holding, transmission or retransmission of image of a program or sport event in which it participates.

Paragraph 1 – unless agreed otherwise, at least 20% of the total authorized price shall be equally apportioned among the professional athletes that participate in the program or event.

Paragraph 2 – The provisions of this Article do not apply to flashes of the program or sport event that are used exclusively for press or educational purposes, in which case the overall duration does not exceed 3% of the total estimated period of duration of the event.

It is important to emphasize that Article 42 of the ‘Pelé Law’ does not authorize the use of the athlete’s image aside from the sport event. Therefore, any use of the athlete’s image aside from the event (advertising, photos, movies, release of products with the athlete’s name, etc.) must be negotiated with the same contractual instrument.

Following below are transcripts of rulings of the Higher Court of Appeals (STJ) on this matter:

“The ‘arena’ right, which the law confers on sports entities, is limited to the holding, transmission and retransmission of sports events and does not cover the use of the image in “picture albums” (STJ – 4th Panel of Justices, ruling dated April 12, 1999)

“The ‘arena’ right conferred by the law to sports entities is limited to the holding, transmission and retransmission of sports events and does not cover the use of the players’ image aside from the specific event, such as photographs used in “picture albums” (STJ 4th Panel of Justices, ruling dated Sept. 12, 1994)

Hence, in addition to the 20% minimum of the total authorized price for the holding, transmission and retransmission of a sports event the professional athlete holds the right to negotiate personally the use of his/her image in all other cases.

18.5.3. Licensing of products and services

As set out above, the protection of intellectual property assets is important for being entitled to exclusivity over important items such the club-company’s trademark or corporate name.

Evidently, there are rules that must be fulfilled so that the Contracts that involve intellectual property may be registered with the INPI.

The first question that should be made is whether the contract will or not be valid between the parties if it is not registered with the INPI. The answer is yes since its registration at the INPI is a plain formality and form, under Brazilian Civil Law, is only a requirement for the validity of the act when validity is subject to a formal solemnity (e.g. public deed for the purchase and sale of real estate).

If the formality is merely a means of proof it will not be a requirement for the validity of the act in regard to the parties, hence the contract is perfectly valid between the parties and produces effects in regard to them irrespective of its registration with the INPI.

The issue of form leads us to the first important effect, i.e. efficacy against third parties, that is, assumption of the publicity of the act. If a trademark has been licensed and the owner sells the trademark and the license was not registered with the INPI, the buyer will not be obligated to abide by the license. On the other hand, if the license was registered with the INPI the buyer cannot allege lack of acknowledgment of the license and, thus, the buyer will be obligated to abide by the license that had already been previously granted.

An important point to consider is the doubt as to whether documents that have been registered with the INPI are considered public in that if they are indeed, all persons, including competitors, may consult them. These documents must be held as public for that it is precisely their publicity that affords validity against third parties.

The possibility to remit payments abroad is another effect of the contract. If the contract establishes foreign remittances the Central Bank of Brazil will only allow such remittance if it has been previously registered with the INPI, who up to this date proceeds to review the merits of the contract (strictly speaking, without having powers to do so after LPI/96 became effective).

The last important effect is the possibility of tax deductibility. As known, the company draws up its financial statements at the end of each year to assert its net profit. Tax Law establishes additions and exclusions in the Book for Assertion of the Real Profit with the purpose of asserting the real profit, which will be used as the Income Tax base. The expenses that decrease the net profit must be added to the real profit when they are not tax deductible or operational expenses.

A license of intellectual property contract obviously generates expenses. In order that such expenses may be considered operational expenses that may be deducted it is required that the contract has been registered with the INPI.

In the case of a contract entered between Brazilian companies there one of the companies will have an expense, but the other company will have income. It may be held that the registration of the contract with the INPI is not a requirement for the tax deductibility of the expenses of payment of trademark license entered between Brazilian companies. Notwithstanding, the Federal Revenue's finding to the contrary has been causing for decades disputes between the taxpayers and the tax authority.

18.6. Conclusion

In view of the foregoing, we may note that Sports Law is developing and being specialized in the course of time. However, there is still a long difficult track to be overcome so that it may eventually attain the status that Sports deserve.

Recent amendments to the law such as the introduction of Law 9.615/98 (the so-called 'Pelé Law'), which terminated the slavery of the professional athletes in regard to their employers and the introduction of Law 10.671/03 (the so-called 'Fan's Statute'), which equalized the fan to the figure of a consumer, provided new dimensions to Sports.

Sports are no longer merely a passion of the people and have been transformed into one of the largest business industries in the world, involving huge sums resulting from the sales of products, licensing of intellectual property and image rights, in addition to transmission of footage of sports events.

In this regard, any deal that involves sports in Brazil or in any other country should be carefully considered by entrepreneurs in view of the complexity of the interests that are involved. The entrepreneur that is willing to implement a commercial sports event must be well-assisted by legal consultants in order to protect and abide by the rights related to the interested parties.

19. PHARMACEUTICAL REGULATIONS

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19.1. Pharmaceutical Products¹³⁷

The **National Health Surveillance System** (*Sistema Nacional de Vigilância Sanitária*) in Brazil is responsible for implementing measures aimed to eliminate, decrease or prevent risks to the health of humans and to interfere in sanitary problems resulting from the environment, production and circulation of products and the rendering of services of health concern. It covers, among others, the definition of control measures, evaluation and surveillance of the health department's rules and services, evaluation and disclosure of the population's health standards and of the environmental conditions; the drafting of rules to regulate the health services provided by the private sector; the drafting of technical-scientific rules to promote, protect and recover health; implement the National Blood, Components and Blood Products System; the execution of conventions, agreements and international protocols related to health issues, sanitation and environment and the definition of the administrative ruling structure and of the control and surveillance measures that are inherent to the sanitary police authorities.

It is implemented by bodies of the direct and indirect Administration of the Federal, State, Federal District and Municipal governments that are engaged in health surveillance activities.

At the federal level, the aforesaid activities are carried out through:

- the **Ministry of Health** (hereinafter **MH**): responsible for drafting, accompanying and evaluating the National Policy of Health Surveillance and the general guidelines of the National Health Surveillance System;
- the **National Health Surveillance Department** (*Agência Nacional de Vigilância Sanitária – ANVISA*) - (a governmental agency governed by a special statute, financially independent, administrated independently, its officials vesting job stability, subordinated to the MH, with head offices in the Federal District and carrying out its activities throughout Brazil, having replaced the Health Surveillance Secretariat - *Secretaria de Vigilância Sanitária*, former health surveillance authority): responsible for the regulation, control and health inspection of products, substances and services of health concern, including the manufacture and commercialization of products and services subject to surveillance by the health authorities, inclusively of the environments, processes, inputs and of the technologies related thereto, and also of the control and sanitary surveillance of harbors, airports and borders (a function that may be exercised complementarily by the States, the Federal District and Municipalities)
- other bodies and agencies of the Federal Executive Branch that are engaged in activities related to the system.

ANVISA has the authority to, among other acts, authorize the operation of companies engaged in the manufacture, distribution, import and commercialization of medicines for use by humans, their active ingredients and other inputs, processes and technologies; of compounds, reactive agents and inputs used in diagnoses; of medical-hospital, dentistry and blood products equipment and material and of blood disease treatment and of laboratory diagnosis and diagnosis by imaging; of biological-immunity products and their active ingredients, blood and blood products; of body limbs, human and veterinary tissues for use in transplants or reconstitutions; of radio isotopes used in diagnoses *in vivo* and radio-pharmaceuticals and radioactive products used in diagnoses and therapies.

¹³⁷ Informações fornecidas com base nas Leis nºs 6.360/76, 9.787/99 (Lei dos Genéricos) e 10.742/2003; Decretos nºs 79.094/77 e 3.961/2001; e Medida Provisória nº 2.190-34, de 23.08.2001

It also has authority to grant product registrations to the foregoing; consent to the import and export thereof; coordinate and perform quality control; grant and cancel certificates attesting compliancy with proper manufacturing practices; close - as a health measure - manufacturing, control, import, storage, distribution and sale of products and supply of health-related services sites in the event of violation of the relevant laws or that offer risks to health; prohibit the manufacture, import, storage, distribution and commercialization of products and inputs in the event of violation of the relevant laws or that offer risks to health; cancel the operation permit and the special operation permit granted to companies in the event of violation of the relevant laws or that offer risks to health; establish, coordinate and monitor the toxicological and pharmacological surveillance systems; periodically review the pharmacopoeia, survey the increases of prices of medicines, equipment, components, inputs and health services; control, survey and accompany, under the prism of the sanitary regulations, the advertisement and publicity of products subject to surveillance by the health department, among others.

Medicines are defined as pharmaceutical products that are obtained or prepared for curing, palliative or diagnoses purposes.

19.2. Product Registration

The registration of a medicine consists in a prior enrollment with the relevant department or agency of the MH, without which any activity related to the manufacture, distribution, sale, offer for sale, import, export and commercialization in general of pharmaceutical products, medicines for human use, active ingredients and the inputs, processes and technologies thereof, among the other foregoing activities, are prohibited and subject to the penalties established by the law.

The product registration is valid for 5 years (except for dietetic products, which are valid for 2 years) and may be renewed for equal and successive periods, maintaining the original product registration number.

The grant or rejection and renewal decisions are only effective as of their publication in the official gazette (“D.O.U.”) of the acts of the Federal Government.

A technical report describing the elements that comprise and characterize the product, clarifying its particulars, purposes, manner of usage, indications and restrictions, supported by reliable scientific documentation that demonstrates the quality, safety and therapeutic efficiency of the medicine and any other support that enables the health authority to decide as to whether grant or deny registration, are required in obtain a product registration.

The information describing medicines are analyzed by the MH or by the relevant control laboratory, the conclusions of which shall support the health authority’s decision. The information contained in the reports shall be recognized as scientifically valid by the relevant MH authority.

Any change in the formula, composition, therapeutic indications or instructions, process and/or site of manufacture of medicines already registered and other changes, such as uses and specifications set out in prescriptions, labels or advertisement and of ownership of the registration are also subject to prior authorization by the MH, under penalty of cancellation of the registration.

The change of ownership of the registration is allowed only in the cases of spin-off, amalgamation, merger, succession or change of corporate name.

An application for the renewal or revalidation of the registration must be filed in the first semester of the last year of the 5-year validity period.

In order to maintain the registration and also revalidate it is required that the product has been industrialized in the first validity period.

If the medicine is not commercialized in a 1-year period as of the date of grant of the registration, extendable for additional six months, the registration *shall be deprived of validity*. A fresh application for product

registration may be filed within 2-years as of the event that entailed the loss of validity of the previously granted registration, except if the event is not attributable to the applicant.

In regard to the medicines manufactured in Brazil, the registration owner is usually the manufacturer. In the cases where the manufacturing is outsourced, the name of the company that outsourced its manufacturing is not required to appear, given that the responsibility for the product remains with the registration owner, i.e. the manufacturer.

19.3. Imported Medicines

The import of medicines activity also requires authorization by the MH. The following cases are excluded from the authorization/registration requirement:

- a) the importation, by individuals, of products that are not covered by the special control system and in a quantity for personal use, provided that not intended for resale or commercialization; and
- b) the importation of raw materials, provided that such materials are covered by the lists published by the relevant MH health surveillance authority, which, for this purpose shall consider the shortfall thereof in the Brazilian market and the importance thereof to the specific industry and its need to fulfill health projects.

The biological-immunity products, medicines and other strategic inputs may also be exempted from the necessity of registration by ANVISA when acquired through multilateral international organizations, for use in public health programs by the MH and its agencies.

The registration of drugs, medicines and pharmaceutical inputs of foreign origin are subject to, in addition to the conditions, requirements and procedures quoted above, supporting evidence that such products have already been registered in the country of origin, being defined as such the place where the product was manufactured.

In the impossibility of submitting proof of registration in the country of origin, proof the current registration, issued by the health authority of the country where it is commercialized, or by the international health authority, specifically approved by ANVISA, must be submitted.

Upon the grant of the registration to the medicine of foreign origin the manufacturer must also submit evidence supporting compliancy with the Proper Manufacturing Practices (refer to Licensing of Facility) recognized throughout Brazil.

19.4. Licensing of Facility

In addition to the registration of the product per se, the facility that is engaged in any of the activities that fall under the surveillance of the health authority also require an Operation License. The licensing of the facility is handled by the Health Department of the States (*Secretaria de Saúde*) and of the Federal District and territories where the facility is located.

In addition to the physical installations, the health department's regulations also apply to the equipment, technologies, the environments and the procedures involved in all the stages of the manufacturing processes of goods and products that are subject to the health department's surveillance, including the destination of the wastes thereof.

In order to obtain the license for the facility, it is necessary to prove its technical and operational capacity and also indicate and maintain one or more accountable technicians, duly qualified, that suffice in terms of quality and number to cover the several types of production, at each facility.

The facilities that are used to produce medicines are required to have a technical department for inspection of the production, that functions independently, with the purpose of asserting the quality of the input materials

or substances, survey the quality aspects of the manufacturing operations, the stability of the medicines that are manufactured and to conduct the required tests, so to assure the compliance with the proper manufacturing and control rules. Notwithstanding, the companies may conduct quality control of the products at the official institutes or labs through conventions or agreements.

The operation permit enables the company to operate throughout Brazil and it must be renewed in the event of a change in the company's activities or change as to the partner, director or manager that is the company's legal representative.

The Certificate of Compliance with the Proper Manufacturing and Control Practices is the document that is issued by the federal health surveillance authority, which attests that the licensed facility is compliant with the proper manufacturing and control practices that are required. It is a requirement for the registration of medicines that will be exported to Brazil and has a one-year validity. In the event of change of address of the manufacturing site a new inspection by the relevant MH authority is required.

19.5. Current Classes of Medicines in Brazil

New Medicines (or novel) – Medicines that present in their composition at least one pharmaceutically active ingredient that is the subject matter of a patent, even if already forfeited, by the company responsible for its development and launch in the market of the country of origin and placed in the Brazilian market.

Similar Medicines – Medicines that contain the same active ingredient(s), present the same concentration, pharmaceutical form, means of ministration, prescription and therapeutic use of the reference medicine already registered with MH, being equivalent to it, differing only in regard to aspects related to the size and form of the product, period of validity, packaging, labeling, excipients and vehicles, **its identification by a trademark being always required.** In the event of any change of quantity or quality, of excipient, it will be necessary to demonstrate its equivalence to the similar medicine.

The trend of the MH is to make the revalidation and/or renewal of the registration of similar medicines stricter, including its request for bio-availability and bio-equivalence surveys.

Generic Medicine – the medicine similar to a reference or novel product that is intended to be interchangeable with it, which is usually produced after the expiration or waiver of patent protection, or expiration of other exclusive rights, affording proven effectiveness, safety and quality. It may only be identified by the DCB (Common Brazilian Designation) or, in the absence thereof, by the DCI (Common International Designation), and not by a trademark or fictitious name.

According to an act of the Collegiate Board of ANVISA, the registration of medicines that have an exclusively generic designation shall have priority over the registration of the other medicines.

Medicines exempted from the registration requirement – Certain medicines are exempted from the requirement of registration with the MH, such as: products that have a fixed formula and preparation, with good and relatively long conservation, whose formulas are recorded in the Brazilian Pharmacology, in the Codex or in the forms accepted by the Commission of Review of the Pharmacopoeia of the MH and the raw materials and inputs quoted in the respective forms; the concentrated solutions that serve for obtaining extemporarily pharmaceutical and industrial preparations; the intentional, co adjuvant, excipient additives, vehicles, packaging materials and substances used in the manufacturing processes of products subject to the health department's surveillance, provided that recorded in the Brazilian Pharmacopoeia and other similar codes, or that comprise the formula of composition of product validly registered with ANVISA; homeopathic medicines, whose full formulas are recorded in the Brazilian Homeopathy Pharmacy, constituted by a plain combination of inks or by incorporation to inert solid or liquid substances. Such medicines are required to use a generic name in accordance with the DCB or DCI of the exempted substance or product.

The new medicines that are exclusively intended for experimental use, under medical control, are also exempted from registration and may be imported by express authorization of the MH. This exemption,

however, is only valid for a period of up to 3 years, upon the expiration of which the registration of the product is required, under penalty of seizure.

Note: Phytotherapy medicines are subject to specific regulations.

19.6. Advertisement and Packaging

The advertisement of products and pharmaceutical trademarks, by any media, and also the publicity, labeling and placement of stickers on medicines are likewise subject to the health department's surveillance, with the purpose of preventing the disclosure of inadequate, fraudulent information and unethical practices, which may only be disclosed following authorization by the MH.

In regard to drugs, medicines and any other products in regard to which the sale requires a medical or dentist's prescription, advertisement is limited to publications that are distributed exclusively to doctors, surgeon-dentists and pharmacists.

The advertisement of medicines that may be freely sold, i.e. the sale of which does not require a doctor's or surgeon-dentist's prescription, do not require a prior authorization by the MH, provided that certain legal conditions are complied.

As regards the packaging, the drugs, medicines and any related pharmaceutical may only be offered for use in the original packaging or in other packaging previously approved and authorized by the MH, being, however, allowed re-packaging in Brazil of products imported in bulk in the original packaging.

Changes in the lay out and wording of the labels and other printed matter are also subject to the prior and express authorization of the relevant health department authority of the MH.

Brazilian law further establishes several rules concerning the labeling, prescriptions, printed matter, stickers and prospects of medicines and pharmaceutical products in general.

In regard to imported medicines, it is required that the packaging must contain at least the name and address of the holder of the registration in Brazil and of the manufacturer of the imported product. The imported products that do not require a medical prescription so that they may be sold in Brazil must contain in the labeling clarifying information, in Portuguese, regarding its composition, prescribed use and form of use and, when necessary, the side effects and warnings.

The use of trademarks or fictitious names to identify medicines, including the packaging, is required in regard to the similar medicines but prohibited in regard to generic medicines and medicines that contain a single active substance that is widely known (at the MH's discretion) and also immunity-therapeutic medicines, drugs and pharmaceutical inputs, which must be identified by the designation established in the Brazilian Pharmacopoeia.

Furthermore, Brazilian health surveillance law prohibits the use of a same or similar name or trademark on products that have a different composition, despite of the manufacturer being the same, and it ensures priority to registration in chronological order of the filing of the applications for registration with the relevant MH department, when no prior registration exists.

In the event of conflict of trademarks upon the filing of the application for registration of the medicine with the MH, the name or the designation of the product under the application that was filed last must be changed under penalty of rejection. However, law warrants the right of exclusivity of the owner of the trademark that has been duly registered with the Brazilian Trademark Office (INPI), and in such case the trademark registration owner shall have priority to register the product with such trademark with the health surveillance authorities.

The product name or trademark already registered with MH may be changed before the product is commercialized, at the company's request, even if it does not conflict with any third party's trademark.

In addition to the name or trademark the novel and similar medicines must necessarily state in the packaging and promotional material the Common Brazilian Designation (DCB) or, if the case may be, the Common International Designation (DCI), in letters and characters in a size not smaller than one-half of the size of the letters and characters that comprise the product name or trademark.

Finally, no drawings or decoration are allowed on the cartridges, labels and prescriptions of drugs, medicines and pharmaceutical inputs, except for the company's logo.

19.7. Post-Sales Stage

The surveillance of pharmaceuticals activity is carried out by the relevant department of the MH to monitor the safety, effectiveness and in many cases the prices of medicines, in addition to asserting whether the proper manufacturing and control practices are being complied.

The health surveillance of products activity also covers the inspection of products exempted from registration, inspection of the manufacturing, distribution, storage and sales facilities, vehicles used to transport the products and the other agents engaged throughout the production chain up to the consumption thereof.

The assessment of violations is carried out through the seizure of samples and interdiction of the product and/or facility. In the event of violation of the law the penalties range, among others, from a warning to the seizure and destruction of the product(s) throughout Brazil, interdiction and cancellation of the facility(ies) operation permit and/or fine, in addition to the relevant criminal action.

20. INSURANCE AND REINSURANCE

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20.1. The insurance activity in Brazil is basically governed by the provisions of Decree-Law 73 of Nov. 21, 1966 and also by complementary regulatory legislation and covers all private insurance operations related to the insurance of objects, persons, property, responsibilities, commitments, rights and warranties, expressly excluding social security insurance.

20.2. The Federal Government has exclusive authority to establish the private insurance policies and to legislate on the general rules and surveillance of insurance operations in the Brazilian market, in its capacity of administrator of the national private insurance system, comprised by the National Council of Private Insurances (CNSP), the Superintendent of Private Insurance (SUSEP), the Brazilian Institute of Reinsurance (IRB) and, further by the insurance companies and brokers.

20.3. The insurance companies are regulated by general laws, as applicable, and specifically by Decree-Law 73 of Nov. 21, 1966, and are required to be organized under the form of publicly listed or closed capital corporations, previously authorized to operate by the Federal Government through the relevant department of the Ministry of Industry and Commerce, with a specific definition of the insurance that it will operate with in its business activities, always in abidance by the rules and guidelines established by SUSEP and IRB on the types of insurance-co-insurance, reinsurance and retrocession.

20.4. The surveillance of the operations of the insurance companies is performed by SUSEP, throughout Brazil, which may, in the event of proven economical-financial crisis of the insurance companies that pose a risk to the compliance with the insurance contracted with the insured parties, decree special preventive measures or even compulsory intervention by the Federal Government.

20.5. The directors, administrators, managers and inspectors of the insurance companies shall always be jointly liable with the companies for any damages caused to third parties, not only to the insured, but also to their shareholders, pursuing from the breach of any law, rules and guidelines concerning insurance, co-insurance, reinsurance and retrocession operations, and also for the absence of the statutory accounting reserves, also consisting in a crime against the public economy the voluntary conduct or omission, personal or collective, from which results the shortfall of such reserves and coverage there for, or related to the assurance of the obligations of insurance companies.

20.6. The law expressly establishes that insurance companies cannot in any event place directly in the market its contracts for any type of insurance, being always obligated to do so through duly authorized insurance brokers, which must be individuals or companies registered with SUSEP, who have exclusivity to contract and promote insurance contracts between the insurance companies and those interested in contracting insurance.

21. FINANCIAL INSTITUTIONS

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21.1. Initial Comments

21.1.1. Brazilian law defines financial institutions as entities engaged in the capture, intermediation and application of own or third party resources, i.e. operations that are typically related to credit intermediation.

21.1.2. The financial institutions and those equivalent entities for legal purposes are subject to a specific legal and regulatory regime and to the surveillance of the Central Bank of Brazil (hereinafter “BACEN”). The legal and regulatory requirements that are applicable to these institutions include, among others (i) minimum capital requirements, (ii) mandatory reserves and operational limits, (iii) authorization for capital increases, to open or transfer principal place of business or branches (in Brazil or abroad), (iv) authorization for stock control changes, (v) requirement for presentation of annual and semi-annual audited financial statements revised on a quarterly basis and non-audited monthly financial statements, and (vi) access by BACEN to information on credit and currency exchange transactions, import and export operations and other transactions carried out by the financial institutions.

21.1.3. In addition to the general rules applicable to all financial institutions and equivalent entities, the regulatory structure of the Brazilian Financial System establishes specific rules to each type of financial institution according to the activities in which they are engaged, imposing operational restrictions and limits proportional to the extension and the risks that such activities represent to the financial market as a whole.

21.1.4. A brief description of the main types of financial institutions that are engaged in the Brazilian financial market:

21.1.4.1. *Commercial Banks.* The main business of commercial banks is to provide opportunistic and sufficient resources to finance in the short and mid-term commerce, industry, services, individuals and third parties in general. The obtaining of cash deposits that may be freely operated is the typical business of the commercial bank.

21.1.4.2. *Investment Banks.* Although classified as typical financial institutions, theoretically their role is to foster long-term credit, the role played by investment banks in Brazil is focused on the capital market and to structure operations of their clients, as occurs in the acquisitions of companies and stock holdings. In addition to these activities, many investment banks play a major role in the management of third parties resources comprising their client base of individual, corporate and institutional investors.

21.1.4.3. *Multiple banks.* The multiple banks are financial institutions that are authorized to carry out several types of operations of several types of financial institutions and equivalent entities, i.e. multiple banks are authorized to operate more than one “portfolio” (authorizations to carry out certain types of operations). The multiple banks are required to be engaged in at least two portfolios, one of which must be a commercial or an investment portfolio.

21.1.4.4. *Development Banks.* The main business of development banks is to provide opportunistic and sufficient resources to finance on a mid and long-term basis programs and projects that are intended to promote the economical and social development of the State where the development bank is located, primarily supporting the private sector. Exceptionally, when it aims benefits of common interests, the bank may support a program or project that is carried out in another State through a consortium agreement entered with the local development bank.

21.1.4.5. *Credit, Financing and Investment Companies.* The credit, financing and investment companies are private financial institutions that grant financing through direct credit to the client operations. These

companies are not authorized to open and/or maintain deposit accounts to their clients. Therefore, the main instrument that these companies use is the bill of exchange (*letra de câmbio*), which consists in a cash or term payment order.

21.1.4.6. *Other Participants.* Other types of financial institutions and equivalent entities, such as cooperative banks, credit cooperatives, commercial lease companies, securities brokerage companies, securities distributor companies, exchange brokerage companies, real estate credit companies, mortgage companies, and development fostering organizations, are engaged in the financial market and Brazilian capital market in specific segments and being subject to the general rules that apply to all financial institutions and to surveillance by the regulatory authorities, particularly by the BACEN.

21.2. Authorization to Open and Operate

21.2.1. Under the model adopted in the Brazilian Financial System, the incorporation and operation of financial institutions and entities equivalent thereto to operate in the financial and Brazilian capital markets are subject to BACEN prior approval, which is obtained upon compliance and fulfillment of the conditions and requirements established in the relevant laws and regulations.

21.2.2. Presidential Decree

21.2.2.1. Considering that the entry of foreign capital in the Brazilian Financial System is subject to constitutional restrictions, the filing of applications for authorization to open and operate in Brazil made by foreign financial institutions and also to hold, directly or indirectly equity in financial institutions incorporated in Brazil must be preceded by a Presidential Decree expressing the Federal Government's interest therein.

21.2.2.2. The authorization proceeding before BACEN, to which financial institutions whose capital is exclusively national are also subject to, may only commence after the Presidential Decree is published.

21.2.3. Incorporation

21.2.3.1. The applications to open and operate a financial institution in Brazil must be made through a formal request to BACEN, accompanied by the documentation required in the regulations in effect.

21.2.3.2. The obtaining of BACEN authorization to incorporate a financial institution is subject to fulfillment of the following requirements:

- (a) *Control Structure.* The composition of the financial institution's control group must be perfectly outlined in the request for the request of authorization from BACEN to incorporate a financial institution, observing that it may only be directly controlled by: (i) individuals; (ii) financial institutions and other entities already authorized to operate by BACEN; and (iii) other legal entities which corporate purpose is exclusively be engaged in holding equity of financial institutions and the other entities that are authorized by BACEN to operate.
- (b) *Statement of Purpose.* The future controllers of the financial institution are required to publish a statement of purpose substantially in the form required in BACEN regulations. This statement is intended to disclose the controllers' intentions and enable the filing of any objections in regard thereto before BACEN.
- (c) *Economical-Financial Feasibility, Business Plan and Corporate Governance.* The authorization application filed before BACEN must contain detailed information on the Business Plan and the features of corporate governance that the financial institution will adopt and it must also set out an economical-financial feasibility study of the proposed entity.

- (d) *Demonstration of Economical-Financial Capacity.* The future controllers are required to prove the proposed entity's economical-financial capacity commensurate with its size, the type and purposes of the proposed entity. The method for calculation of its net worth shall be based on the income tax report, in the case of individuals, and the financial statements, in the case of legal entities. The evaluation of the controllers' economical-financial capacity is related to the dimension and risk profile of the business and this capacity must be met, at BACEN's discretion, individually by the controlling shareholder or by the controlling group.
- (e) *Inexistence of Record Restriction to the Controllers and Holders of Qualified Participation.* The inexistence of record restrictions to the controllers of the financial institution must be demonstrated through an affidavit signed by the interested party.

21.2.4. Operation

21.2.4.1. Following BACEN's recognition of the fulfillment of the legal requirements to be incorporate a financial institution, the interested parties must carry out the necessary procedures to incorporate the financial institution and submit the application to operate to BACEN by filing the documents that are required in the applicable regulations and fulfill the following requirements:

- (a) *Origin of resources.* The origin of the resources that the controllers will use to pay-in the subscribed capital must be proved through bank statements, loan agreements, public deeds of sale of real estate, donation contracts, among others, demonstrating compatibility thereof with the financial demonstrations in the case of legal entities and income tax reports in the case of individuals.
- (b) *Inexistence of Record Restrictions to the Names of the Appointees/Designees.* According to the current regulations, the vesting and exercise of statutory positions (directors, officers and managing partners) of financial institutions and equivalent entities may solely be performed by persons whose appointment or designation has been approved by BACEN.

The following basic conditions are required to perform statutory positions in financial institutions: (i) good standing; (ii) be a Brazilian resident, in the cases of director, officer and audit board member; (iii) not be impeded by law or convicted for a bankruptcy crime, tax evasion, prevarication, active or passive corruption, concussion, peculation, crime against the economy, public accreditation, property or the Financial System or convicted to a criminal penalty that impedes, even if temporarily, to hold a public position; (iv) not be declared disqualified or suspended from exercising the positions of a director, officer or managing partner of an institution that is subject to authorization, control and surveillance by governmental authorities, including complementary pension entities, insurance companies, capital-raising companies and publicly listed companies; (v) not be personally held, or in any company in which it is a controller or administrator, for contingencies related to protests of credit instruments, court collection suits, issue of bad checks, breach of obligations and other similar events or circumstances; and (vi) not be declared bankrupt or insolvent or not have participated in the administration or have controlled an organization or company under a reorganization status or insolvent.

- (c) *Paid-up Capital.* In order to obtain authorization to operate, the financial institution's capital must be paid-up in an amount equal or higher than the minimum amount established in the regulations in effect.

The minimum reference capital and equity required under Brazilian regulations are set out below, noting that (i) in the case of the institution that has its registered offices or is headquartered and has at least 90% of its branches operating in places other than the States of Rio de Janeiro and/or São Paulo, the paid-in capital and equity reference amounts shall be reduced by 30%; and (ii) to operate in the currency exchange market, the sum of R\$ 6.500.000,00 (six million five hundred thousand reais) must be added to the paid-up capital and net worth amounts established below:

- (i) in the case of commercial bank and commercial portfolio of a multiple bank: R\$ 17.500.000,00 (seventeen million five hundred thousand reais);

(ii) in the case of investment bank, development bank, corresponding portfolios of multiple bank and savings bank: R\$ 12.500.000,00 (twelve million five hundred thousand reais);

(iii) in the case of credit, financing and investment entity, real estate credit entity, commercial lease entity and corresponding multiple bank portfolios: R\$ 7.000.000,00 (seven million reais);

(iv) in the case of mortgage companies: R\$ 3.000.000,00 (three million reais);

(v) in the case of brokerage of securities companies and securities distributors that administrate investment funds in the forms regulated by BACEN (except investment funds in investment funds quotas) or investment companies that are qualified to realize commitment operations and operations to secure the subscription of securities for resale, of margin account and/or swap operations involving the assumption of any rights or obligations with the counterparts: R\$ 1.500.000,00 (one million five hundred thousand reais);

(vi) in the case of securities brokerage companies and securities distributors that are engaged in businesses that are not covered in (v) above: R\$ 550.000,00 (five hundred fifty thousand reais); and

(vii) in the case of exchange brokerage companies: R\$ 350.000,00 (three hundred fifty thousand reais).

These amounts are the amounts effective at December 2004 and are subject to change by BACEN at any time.

21.3. Agents

21.3.1. The representation in Brazil of financial institutions and similar entities that are established abroad is subject to BACEN's prior approval. The applications for establishing a representative in Brazil must be submitted to BACEN supported by the documents required under the regulations in effect.

21.3.2. The role of the representative (agent), performed exclusively by an individual or legal entity domiciled in Brazil, is to carry out business contacts and relay information of the interest of the financial institution, the head offices or other branches established abroad, being prohibited the performance of the transactions that are exclusive to financial institutions and other entities authorized to operate by BACEN, such private operations as the capture, intermediation or application of resources of third parties.

21.3.3. The representative shall be terminated (i) upon expiration of the term, in the case a term is determined in the instrument of appointment, (ii) at the request of the represented institution; or (iii) at the discretion of BACEN in the event it finds any irregularities involving the representative and/or the represented institution.

21.4. Crimes against the Brazilian Financial System

21.4.1. Law No. 7.492 of June 16, 1986 ("Law No. 7.492/86"), which regulates crimes against the Brazilian Financial System, defines financial institution as the public law or private law entity that has as its core or ancillary business, cumulatively or not, the capture, intermediation or application of financial resources of third parties, in Brazilian or foreign currency, or the custody, issue, distribution, negotiation, intermediation or administration of securities. Further, for the effects of Law 7.492/86, the following entities are equivalent to financial institutions: (i) the legal entities that capture or manage insurance, exchange, consortium, capitalization or any type of savings or third party resources; and (ii) the individuals that are engaged in such activities, even if sporadically.

21.4.2. Law 7.492/86 establishes the following crimes against the Brazilian Financial System:

- (a) Print, copy or by any means manufacture or place in circulation, without the authorization of the issuer, a certificate or other document that represents a security;
- (b) Disclose false or harmful incomplete information on a financial institution;
- (c) Manage a financial institution fraudulently or recklessly;
- (d) Expropriation, committed by the controlling shareholder and/or administrator of the financial institution, of monies or any other security that is under their possession or divert it to their or a third party's benefit or negotiate a right or any other movable or immovable asset that is under its possession, without authorization of the lawful owner;
- (e) Mislead or maintain in error a partner, investor or the relevant government authority as to the operation or financial status, retaining information or providing false information thereon;
- (f) Issue, offer or negotiate in any way papers or securities: (i) that are false or falsified; (ii) that lack prior registration of issue before the competent authority, in conditions that do not match those stated in the registration or that are irregularly registered; (iii) without sufficient support or guarantee, as required by the law; (iv) lacking prior authorization of the competent authority in the cases where this is legally required;
- (g) Determine, in nonconformity with the law, interest, commission or any type of remuneration over the credit or insurance, administration of mutual fund or tax operation, or over a consortium, brokerage or securities distribution operation;
- (h) Fraud the inspection or the investor by inserting or causing the insertion of a false statement or a statement different that what should have been stated in a document supporting an investment in papers or securities;
- (i) Insert false data or omit data required by the law in accounting statements of a financial institution, insurance company or entity that comprises the securities distribution system;
- (j) Maintain or operate resources or sum separately from the accounting records required by the law;
- (k) Failure, by the former administrator of a financial institution, to provide to the interventionist, liquidator or estate manager, within the timeframes and conditions established in the law, the information, statements or documents under its responsibility;
- (l) Deviate an asset covered by the legal indisposition resulting from intervention, extra-court liquidation or bankruptcy of a financial institution or, in the case of the interventionist, liquidator or estate manager, take possession of such asset or deviate it to own or a third party's benefit;
- (m) Present in an extra-court liquidation or bankruptcy of a financial institution, a false statement of credit or false claim or present with same a false or disguised instrument; or, in the case of the ex-administrator or bankrupt party, recognize as true a credit that is not true;
- (n) False statement made by the interventionist, liquidator or estate manager on an issue related to the intervention, extra-court liquidation or bankruptcy of a financial institution;
- (o) Operate without the sue authorization or with an authorization obtained through a false statement, a financial institution, including a securities distribution or exchange entity;
- (p) Take or receive, in the quality of controlling shareholder and/or administrator of a financial institution, directly or indirectly, a loan or cash advancement or extend it to a controller, administrator, statutory board member, their spouses, ascendants or descendants, lateral relatives up

to the second degree, co-breeds or similar, or to a company whose control is exercised, directly or indirectly, by such financial institution or any such persons;

- (q) In self behalf, in the capacity of controller or administrator of the company, grant or receive a cash advance of professional fees, remuneration, salary or any other payment, in the conditions mentioned in (p) above, or promote the distribution or receive profits of a financial institution in a disguised manner;
- (r) Violate the confidentiality of an operation or service provided by a financial institution or entity that comprises the securities distribution system, which is known by the agent pursuant to the position that the agent holds;
- (s) Obtain, fraudulently, financing extended by a financial institution;
- (t) Apply, for a purpose different from the purpose established in the law or contract, the resources originated from financing extended by an official financing institution or by an institution authorized to provide such resources;
- (u) Attribute to itself or to a third party, a false identity to realize an exchange operation; or fail to provide, for the same purpose, information that was necessary to be provided or provide false information;
- (v) Realize an unauthorized exchange operation with the purpose of promoting unreported remittance of currency from Brazil; or promote for any reason and without legal authorization, the exit of currency or foreign currency to a foreign country or maintain abroad deposits unreported to the relevant federal authority; and
- (w) The omission, delay or performance by a governmental worker, contrary to an express provision of the law, an official act required for the regular operation of the Brazilian financial system and to preserve the interests and values of the economical-financial system.

21.4.3. The controlling shareholder, directors and managers of a financial institution, being equivalent thereto the interventionist, liquidator or the estate manager in the cases of intervention and extra-court liquidation extrajudicial, are criminally liable for the crimes foreseen in Law No. 7.492/86. The practice of the crimes mentioned above are subject to detention periods ranging from one to twelve years plus fine.

21.5. “Money Laundering” or Occultation of Property, Rights and Sums

21.5.1. According to Law No. 9.613 of March 3, 1998 (“Money Laundering Act”) the following are considered crimes of “money laundering” or occultation of property, rights and sums, the occultation or disguise of the nature, origin, location, disposal, operation or ownership of property, rights or sums that originate, directly or indirectly from the crimes (i) of illegal trafficking of toxic substances or similar drugs; (ii) of terrorism and the financing thereof; (iii) of smuggling or trafficking of firearms, ammunition or materials to produce same; (iv) of extortion through kidnapping; (v) against the Government, including the requirement to own behalf or to benefit a third party, directly or indirectly, any advantage as a condition or price to perform or omit from performing a governmental act; (vi) against the Brazilian Financial System; or (vii) committed by a criminal organization (the “Crimes of Money Laundering” and the “Preceding Crimes”, respectively).

21.5.2. Additionally, the party that commits any of the following acts also incurs in the Crime of Money Laundering: (i) occult or disguise the use of property, rights or sums that originate from any of the Preceding Crimes, convert same into legal assets; purchase, receive, exchange, deal, gives or receives, keeps, stores, operates or transfers or imports or exports items with a value that does not correspond to their real value; (ii) uses in the business or financial activities items, rights or amounts that are knowingly originated from any of

the Preceding Crimes; (iii) participate in a group, organization or office with knowledge that its primary or secondary business is aimed at the practice of any of the Preceding Crimes.

21.5.3. The agents that commit Money Laundering Crimes are subject to three to ten years of imprisonment plus fine. In cases that involve the Preceding Crimes outlined in 5.1 (i) to (vi) above, the sentence may be increased by one to two-thirds when the crime is committed repeatedly or through a criminal organization.

21.5.4. The Money Laundering Act establishes several obligations to the financial institutions and to other participants of the financial and Brazilian capital markets, which are aimed to prevent and repress Money Laundering Crimes.

21.5.5. Such obligations include (i) identification of clients and maintenance of a corresponding client bases duly updated; (ii) maintain records of all transactions involving Brazilian or foreign currency, securities, instruments of credit, precious metals and any type of asset that may be converted into cash that exceeds the limits established by the relevant surveillance authority; (iii) compliance within the timeframe established by the relevant court with the requests made by the Control of Financial Operations Council (“COAF”), authority instituted with the purpose of discipline, apply administrative penalties, receive, examine and identify the operations that present evidences of Money Laundering Crimes, in addition to the authority of other authorities and agencies; and (iv) notification of suspicious operations to COAF.

21.5.6. Operations that involve the following may be considered suspicious and subject to mandatory notification to COAF: (i) sudden and continued increases in the amounts collected or in the volume of property sold or transferred; (ii) lack of apparent economical or legal reason; (iii) payment through resources originating from foreign accounts and (iv) operations that, based on the parties involved, sums or way in which realized may characterize cases of Money Laundering Crimes.

21.5.7. The financial institutions and their administrators that fail to abide by the obligations mentioned in 21.5.5. are subject to administrative penalties that include: (i) warning; (ii) variable fine, ranging from 1% up to the doubled amount of the operation value or up to 200% of the profit obtained or that presumably would have been obtained in the operation had it been realized or, further, fine of up to R\$ 200.000,00 (two hundred thousand reais); (iii) temporary inability for a period of up to ten years, to occupy the positions of management of financial institutions or other entity that participates in the financial market and Brazilian capital market; and (iv) cancellation of the authorization to operate.

21.6. Bank Contracts

21.6.1. The contracts that are typically used by financial institutions are related in general to the capture, intermediation or application of financial resources of the financial institutions’ own or third party’s resources.

21.6.2. A brief description of some of the main bank contracts is provided below.

(a) *Bank Deposit*. Under this operation the interested party delivers a certain amount to the financial institution which, in the quality of depositary, undertakes to give back the same amount, in the same kind, at request, accruing or not interest and monetary adjustment, as convened. The bank deposit constitutes an irregular deposit contract as it is characterized by the transfer of ownership of deposited resources to the financial institution, which may use them in investments and other operations.

There are three different types of bank deposits: (i) cash deposit (where the depositor has freely disposable resources); (ii) time deposit (where a term is established for the withdrawal of the deposit, which must be longer than three months); and (iii) savings deposit (deposit for capture of resources of the people, with the purpose of enabling the financing of furniture or real estate property).

(b) *Opening of Credit Line*. Through the opening of credit contract the financial institution makes available to the client a certain cash amount to be used through a single or several withdrawals over a determined or

undetermined period. The client, in turn, undertakes to return the credit amount used at the end of the contract accrued by the commission, interest and monetary correction established in the contract.

- (c) *Bank Deposit*. Through this operation the financial institution advances a certain cash amount to the client through the extension of a non-overdue credit against a third party and charges a discount fee.
- (d) *Bank Account*. Through this type of contract the financial institution is appointed as the client's nominee to perform several acts and transactions requested by the client. The financial institution offers such services in exchange for the provision of the necessary funds, which are obtained through deposits made by the client or third parties to its name or through operations that the financial institution realizes in benefit of the client, such as billings, receipt of interest, dividends, etc. This type of contract is characterized by a series of successive and reciprocal operations between the parties, which are recorded as debits and credits. In the bank account the resulting credit in the account is always available over the base of the daily balance.
- (e) *Bank Loan*. The bank loan is the main operation of the typical financial institution. It consists in a contract where the financial institution delivers to a third party a certain cash amount that is scheduled to be returned within a convened period upon the payment of interest there for, plus services fees or charges.

The applicable laws and regulations establish restrictions to the financial institutions in regard to the extension of loans or any other type of credit to individuals that are relatives or economically bound to the financial institution so to avoid undue favoring. In this regard, the financial institutions are prohibited from granting loans or cash advances: (i) to its directors and officers, audit committees members and likewise, as well as their spouses; (ii) to relatives, up to the second degree, of the individuals referred in (i) above; (iii) to individuals or legal entities that hold more than 10% of its stock, except if specifically authorized by BACEN, in each individual case, provided that the operations are secured by commercial transactions such as the purchase and sale or pledge of merchandise operations, abiding by the limits established by the National Monetary Council (CMN) generally applied; (iv) to legal entities in which the financial institution holds more than 10% of its stock; and (v) to legal entities in which any director or administrator of the financial institution or their spouses or relatives up to the second degree hold more than 10% of such legal entity's stock.

- (f) *Exchange Operations*. The exchange operation consists in the purchase and sale of foreign currency, i.e. the exchange of foreign currency for Brazilian currency, at the official exchange rate. According to the structure of the Brazilian Financial System, the practice of exchange operations by financial institutions is subject to specific authorization by BACEN, which is responsible, furthermore, for establishing the exchange rate that such institutions must officially adopt.
- (g) *Savings Account*. The savings account is a type of investment that has specific characteristics established by the Federal Government through national economic policy measures that are aimed at favoring popular savings. Among the features of the saving account stand out: (i) accrual of monthly or quarterly monetary adjustment; (ii) exemption of income tax on the monetary adjustment; (iii) interest yield of 6% per annum, income tax exemption to savings accounts up to a certain amount; and (iv) deduction from gross income, for income tax calculation effects, of up to 20% of the average annual balance of the account.
- (h) *Custody and Safekeeping of Values Contract*. This is an ancillary activity offered by the financial institution. It is related to the safekeeping and physical and legal conservation of instruments and objects of value, which are kept in individual safes.
- (i) *Collection of Amounts*. This is related to the collection by the financial institution of payments for services rendered or supplying of common utilities and of public interest, such as e.g. electricity, water and phone bills.

21.6.3. The banking business has evolved and the banks in Brazil no longer realize only the typical bank operations. Thus, in addition to the typical bank contracts other types of contracts may be utilized by the financial institutions to structure operations, particularly financing operations.

21.6.4. There are no restrictions for the financial institutions to use other types of contracts, provided that they are used within the context of the banking business. The securitization of credits, for example, is a type of structured financing involving financial institutions that utilizes the contract of assignment of credits as the main instrument. The bank guarantee, pledge and mortgage contracts are also widely used by the financial institutions to secure their operations. The derivatives contracts (swaps, futures or options) are other types of contracts widely used by the financial institutions in the services that they provide and operations realized with their clients.

21.6.5. The contracts entered by the financial institutions are subject to private law provisions and governed by the Brazilian Civil Code.

22. LITIGATION IN BRAZIL

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22.1. Introduction

Brazil is a Federal Republic governed by a democratic regime.

As a corollary of the democratic regime existent in Brazil the governmental powers are clearly separated between the Executive, Legislative and Judiciary branches, which are independent and harmonious with each other.

The defense of a person's interests before the Administration at either the administrative or court levels is a constitutional right assured to any person, whether an individual or company, national or foreigner.

To assure fulfillment of its interests, any person may resort to litigation at both the administrative and court levels.

In Brazil, the right to litigate is assured at two levels; at one level, before the Administration in an attempt to reverse an administrative act, designated administrative litigation; at another level, before the Judiciary, whereby the party seeks a court resolution to settle a conflict of interests.

This review is split into these two levels, analyzing first the administrative litigation, whereby, despite of being very useful to prevent the practice of certain illegal practices by the Administration's agents, the administrative ruling does not produce the effect of a definitive ruling in regard to the parties, which means that in the event the party subject to the Administration is not satisfied with the administrative ruling it will be necessary to seek a remedy before a court of law.

The second part of this review analyzes the Judiciary, its jurisdiction and authority and the effects of its rulings.

22.2. Administrative Litigation

Given the need to establish rules for living in society and the search to consecrate procedures for the defense of the classes' interests, in the past England introduced a bill of rights that included administrative law rules, establishing that no one would be prosecuted except by the person's compatriots through a regular proceeding and in accordance with the laws of its country. However, only in a near future pursuant to the principle of separation of the state's governmental duties into executive, legislative and judiciary branches, developed subsequent to the French revolution, the first administrative ruling institutions were instituted with the primary function to structure the relations between the Administration and those governed by it.

In Brazil, although the matter has already been discussed at the academic level since schools of law were first established, only recently administrative rules were introduced to regulate the proceedings of control of the legality of administrative acts by the Administration itself, which control is based on principles that guide the Administration's activities, no longer accepted as being unquestionable.

Moreover, it was important to establish administrative law rules, including procedural rules, to regulate the specific relations of any given society, having in view that issues of this nature may be considered as one of the main corollaries of any legally-bound Democratic State, especially considering the particularities of contemporary society, which constantly seeks new horizons and in which the state's participation is evermore present.

Following this initial presentation, we shall heretofore analyze the legal and procedural aspects of administrative law so to provide a broad and uniform outlook on the theme, demonstrating the current course

of administrative litigation. Firstly, it is worthy to emphasize the definition of administrative litigation as being the form by which the Administration may review and control the legality of its acts through a regular proceeding and with the intention of settling conflicts between the parties of this relation (i.e. the Administration and the people subject to it).

Regarding the development of the matter in Brazil, it should be recalled that in the past this matter was traditionally governed by sparse laws which established some general rules on the administrative proceeding of litigious nature in specific cases. Pursuant to the need to establish rules that were more objective to regulate the administrative litigation, tradition was abandoned and gave way to Decree 70.235/72, which harmonized the law and provided on the administrative tax proceeding, which naturally resulted from the taxpayer's disagreement with the State's authority to tax.

The aforesaid regulation also established rules on the structuring of the administrative ruling entities at the level of the Ministry of Finances, creating the Taxpayers Council as the body having authority to rule on appeals aimed to reverse decisions by the entry level ruler on the taxes administrated by the Federal Revenue (SRF).

Pursuant to the Federal Constitution of 1988, despite of not yet existing then a general rule on the structuring of the administrative litigation procedure in general, the theme gained importance and was addressed in several parts of the Constitution, which established the right to submit motions before the governmental departments to defend rights and to prevent illegalities or abusive conduct by the governmental authority (article 5, XXXIV) and included the rule among the person's basic rights.

It is certain that the foregoing rule coupled with the rule that all persons are entitled, in a court or administrative proceeding, to the right to a broad defense (article 5, LV) marked the starting point of the development of the matter in the pursuit of harmonizing the rules of regulation of the administrative litigation proceeding in broad terms and that culminated in the introduction of Law 9.784 of Jan. 29, 1999, which regulates the federal administrative proceeding.

It is important to emphasize that the aforesaid provision refers to the matter at the federal level only, hence in regard to the federated entities the matter must be regulated individually, emphasizing the introduction of Law 10.177 of Dec. 30, 1998, which regulates the administrative proceeding at the level of the State of São Paulo.

The bill that was introduced to regulate the administrative proceeding in broad terms (Law 9.784 of Jan. 29, 1999) only established general rules of procedural and conduct nature, emphasizing that given the amplitude attributed to the theme of the control of the administrative acts by the Federal Constitution, it is there that may be found the basic principles followed by the Administration. Among such principles stand out the principles of legality, impartiality, morality, publicity and economy, in addition to other express, implicit principles and those that naturally pursue from living in society.

It should also be emphasized that in addition to the valuable importance of the need of rules that enable the control of the administrative acts by the Administration itself, in parallel to the party subject to Administration's right to resort to court action, the Judiciary's right to rule is a general principle established in the Constitution (article 5, XXXV) and, thus, it cannot be relegated to a secondary level in detriment of such party.

However, it is important to emphasize the need for recognition that the decisions taken by the Administration produces the effect of turning definitive the matter that was ruled administratively, without possibility of being reviewed by a court. This point is a matter of logic and results naturally from the fact that the Administration should be bound by its own decisions. This understanding is not shared unanimously and some scholars find that the right to court action cannot be hindered in any event, despite of the allegation that this would completely exhaust the state's control of administrative proceedings.

The foregoing understanding was highlighted by the Ministry of Finance, which adopted the suggestion and approved Opinion PGFN/CRJ 1087/2004 on Aug. 17, 2004 being worthy to note that the matter originated

from the issue of Ordinance 820 of the National Treasury General Attorney and that regulated the cases in which the administrative decisions at the federal level may be challenged in court by the Administration itself. The Minister of Finance's approval of such Opinion was published in the Official Gazette (D.O.U.) of Aug. 23, 2004 and since then its legality and applicability in accordance with the national laws has been debated and criticized.

22.3. Court Litigation

The court's role is to settle conflicts of interests between parties, safeguarding the national legal system. In order to perform such role the Judiciary manifests itself through the courts that comprise it.

The courts that comprise the Judiciary are indicated in article 92 of the Federal Constitution, namely: the Supreme Court (STF), the National Council of Justice, the Higher Court of Appeals (STJ), the Regional Federal Courts of Appeals (TRF), the Labor Courts and Labor Courts of Appeals, the Electoral Courts and Electoral Courts of Appeals, the Military Courts and Military Courts of Appeals, the State Courts and State Courts of Appeals and such courts at the level of the Federal District and Territories.

Court litigation is ultimately divided by the specialized courts and the common courts, existing some courts of appeals that cover both specialized and common courts. This study shall be divided to ease comprehension of the theme.

22.3.1. Specialized Courts

The Specialized Courts consist in nothing other than a designation attributed to certain fields of law that were separated from the others and received their own structure and organization, with specific proceedings and course types.

That is, the Federal Constitution designated certain matters as fit for deserving specialized courts, separated from the others.

Hence, any controversy involving employment may only be processed and ruled by the Labor Courts, through its Judges and Regional Courts of Appeals.

In addition to Labor Courts, the Federal Constitution established the Electoral Courts (which have authority to rule on any conflicts originating from elections) and the Military Courts (which has authority to rule on military crimes).

Each of such specialized courts have lower courts (comprised by a single Judge) that have territorial jurisdiction, and also by courts of appeals, comprised by justices that are more experienced, having authority to review lower court rulings.

Additionally, the Federal Constitution created higher courts of appeals, which have jurisdiction over the entire Brazilian territory, one for each of the specialized courts: the Higher Labor Court of Appeals (TST), the Higher Electoral Court of Appeals and the Higher Military Court of Appeals.

However, despite that the Constitution created higher courts in each of the specialized court systems it also allowed the creation of specific rules so to restrict the access to such levels to a minimal number of cases. Thus, not every case can reach such court level, only those that fulfill specific legal requirements.

22.3.2. Common Courts

Any matter that does not fall under the jurisdiction of specialized courts falls under the jurisdiction of the Common Courts. Thus, it is commonly quoted that the Common Courts have residual authority, being responsible for the ruling of all the other cases that do not fall under the jurisdiction of the Special Courts.

However, within the jurisdiction of the Common Courts there exists a division among two major bodies, designated Federal Courts and State Courts, the division of the jurisdiction being determined based on the nature of the matter or the quality of the persons involved.

In order to define the State Court's jurisdiction, the Federal Constitution adopted as the first criteria the quality of the person involved in the litigation.

Accordingly, in all suits where the Administration has an interest the Federal Courts have the authority to rule.

Likewise, in all suits that are based on a treaty or contract executed by the federal government with a foreign State or an international organization or suits in which foreign countries or international organizations are litigating with parties that reside or are domiciled in Brazil the Federal Courts have the authority to rule.

Some matters have not yet been designated by the Federal Constitution as being subject to Federal Courts, such as: disputes involving Indian rights, crimes committed in aircraft and ships, crimes against the financial system, against the economical-financial order and against labor organization.

The Federal Courts were organized in Brazil in a structure such that the Brazilian territory was split into five regions, each having a Regional Federal Court of Appeals (TFR) responsible for organizing the Federal Courts within its jurisdictional territory. Furthermore, such Courts of Appeals operate as appellate courts in regard to such matters.

The lower Federal Courts of each region were split into jurisdictional sections, having federal judges with jurisdiction over the corresponding territory and their decisions may be reviewed by the relevant Courts of Appeals.

State Courts are indeed residual courts, as they are responsible for ruling on all matters that were not attributed to the other courts.

According to the Federal Constitution, each State shall organize its own judicial system, maintaining a Court of Appeals to operate as an appellate court, splitting the state's territory into Districts that have their own judges responsible there for.

22.3.3. Overriding Higher Courts

In addition to the aforesaid lower courts and courts of appeals, the Federal Constitution established two higher appellate courts designated overriding courts, having in view that their authority may subtract and invade the jurisdiction of the specialized courts.

The Supreme Court (STF) is the highest court under the Brazilian court system, having the primary role of applying the Constitution.

Hence, among its authority it is important to emphasize the direct control of the constitutionality of the laws and regulatory acts and also its review of rulings that possibly conflict with a constitutional provision.

The Higher Court of Appeals (STJ) is the court to which was designated the control of the legality of the rulings.

23. FAMILY LAW

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CORPORATE LAW AND THE NEW MARRIAGE PROPERTY REGIME

23.1. Introduction

23.1.1. The Civil Code of 2002, in the section that provides on the economical relations between spouses in the course of marriage, preserved the property rules that were adopted in the former Civil Code of 1916 and created a new regime designated final apportionment of property.

23.1.2. The regimes of property that exist in Brazilian law are as follows:

- Partial Community Property: in this regime the property that is acquired after marriage is common to the spouses, with some exceptions, such as for example property received through donation or inheritance.
- Community Property: in this regime all the present and future property of the spouses and also their debts, with some exceptions, such as for example property donated or inherited with a clause of non-community.
- Separate Property: in this regime the property of each spouse remains under the management of each respective spouse, who may freely dispose of its property.
- Final Apportionment of Property: similar to the regime of separate property, the partial community of property rules apply in the course of the marriage and after it is dissolved.

23.1.3. This chapter is intended to provide an overlook of the relations between spouses and corporate law, analyzed under the new provisions of the Civil Code of 2002, with a special emphasis on the new property regime (final apportionment of property), as follows.

23.2. Final Apportionment of Property Regime

23.2.1. Under this property regime the property that is acquired in the course of marriage belongs to the party that acquired it, who shall also have the right to manage and freely dispose of movable property and, subject to the other spouse's authorization, of real estate property.

23.2.2. In the final apportionment of property regime, upon the dissolution of the marriage and assertion of the property that belongs to each spouse, each spouse is entitled to one-half of the property acquired by the couple, onerously, in the course of the marriage, excluding the private property that they had before marriage, the subrogated property in place thereof, the property obtained by each spouse through inheritance or donation and the debt related to such matured and not yet matured property.

23.2.3. As concerns the spouses' rights and particularly the event of the spouse that acquires in the course of the marriage a quota or quotas of the stock of a company, the new property regime establishes that the non-partner spouse, in the event of dissolution of the marriage, cannot claim immediately participation in such quota, but rather concur in the periodic apportionment of profits, until the company is liquidated, when the company has an indefinite term of existence, consisting in a very complex issue that will still be discussed.

23.2.4. In the final apportionment of property regime, after the marriage is dissolved the non-partner spouse shall only be entitled to the dividends related to the quota without right to replace the partner in his/her

duties, except with the consent of the other partners expressed in a written amendment to the company's articles.

23.2.5. Aiming to further support the company's interests over the spouse's interests, to prevent third parties from becoming partners it is necessary to include a clause in the company's articles expressly regulating the matter, considering that the spouse that acquired the quota did so in the course of the marriage under the final apportionment of property regime, and that he/she administrated and managed it to an extent that the non-partner spouse had no participation therein and that therefore such partner cannot be replaced by the non-partner spouse, except with the other partner's consent.

23.3. Relations between Spouses and Corporate Law

23.3.1. The limit of the freedom to organize a company between spouses

23.3.1.1. Another new theme in the new Civil Code is the freedom of the spouses to organize a company between them or with third parties, provided that they did not marry under the community property or separate property regimes.

23.3.1.2. As regards the restriction in the case of a company between spouses married under the community property regime, the reason for it is that in this regime all property, current and future, of the spouses is common, even if acquired in the name of only one of them, causing patrimonial confusion (which is consistent with the principle of patrimonial autonomy), applying also to companies in which both spouses join with a third party.

23.3.1.3. Legal doctrine and jurisprudence are contrary to restrictions to organize a company between spouses married under the community property regime, on the grounds that this regime does not render the patrimony perpetually indivisible but rather only in the course of the marriage. The explanation is that in addition to the apportionment of property established by law being enforceable against third parties and between the spouses, there is also property that is excluded from the community for being personal or due to its nature.

23.3.1.4. Moreover, in regard to the community property regime, in the cases of participation of the spouses in a corporation or limited liability company in which capital is allocated as an investment (capitalization companies) legal doctrine finds that such a clause cannot prevail inasmuch that the intention is the agglutination of capitals and plurality of partners.

23.3.1.5. In regard to the separate property regime, the legal support to the restriction lies in the preservation of the separation of the spouses' patrimonies, which is totally logical, as the company is used to change the regime of the spouses' property. Thus, this restriction aims at preventing fraud. In regard to this regime, jurisprudence has been recognizing the participation of spouses in limited liability companies which, not affecting the patrimony as a whole, would only be void in cases where a fraud to the regime is proven.

23.3.1.6. Pursuant to the restriction to the organization of a company between spouses married under the community and separate property regimes, the married partners under such regimes are required to adapt the composition of the company's partners to the new model within one year as of the enactment of the new Civil Code.

23.3.1.7. The question to be analyzed is how to solve the problem of the companies between spouses married under the community and separate property regimes?

23.3.1.8. The option is established in the Civil Code, which now allows the regime of property between spouses to be changed through a court authorization at a grounded request of both spouses that is found fit and safeguarding third party' rights, thus rendering the principle of non-changeability of the regime of property established in the Civil Code of 1916 completely relative, inasmuch that this principle was

previously irrevocable, as an assurance to prevent one of the spouses from using its ascendance to its self benefit and, further, to protect the interests and possible damages to third parties.

23.3.1.9. In the event the spouses are associated to a third party, the option would be for one of the spouses to transfer its participation to the other, thus preserving the regime of property of the marriage. However, if the company was organized by only the two spouses, the option would be to replace one of the spouses by a third party unrelated to the interests of the partners and unprotected in regard to the acts practiced by the company or by the change of the property regime, rendering unnecessary to change the company's structure of partners.

23.3.2. Company organized after marriage

23.3.2.1. The company, whether a profit or non-profit organization¹³⁸, organized after marriage by one of the spouses, should devote special attention to the regime of property that the spouses adopted, except in the regime of separate property.

23.3.2.2. It should be emphasized that the non-partner spouse is merely a co-owner of the quota owned by the partner spouse and, as such, cannot participate in the company's decisions or claim to vest the status of partner. This restriction to claim the status of partner is assured since usually such companies are companies comprised of persons, which would de-characterize its *intuito personae* feature.

Furthermore, the law establishes that the spouse of the partner that became legally separated cannot claim immediately the portion to which he/she is entitled in the company quota, instead concurring periodically in the apportionment of the profits until the company is dissolved.

23.3.2.4. As demonstrated above, it is not necessary to partially dissolve the company so that the ex-spouse does not receive the portion that it is entitled to in the company; the ex-spouse will be merely entitled to concur in the periodical apportionment of the profit on a prorated basis, until the company is liquidated, whereupon he/she shall receive its half of the residual assets to which such partner is entitled.

23.3.2.5. Note that Brazilian law elected to preserve the company in detriment to the non-partner spouse, finding that the personal life of the spouses should not interfere in the development of the enterprise, conferring indeed upon the non-partner spouse after divorce his/her participation in the company profit, but not his/her placement in the company with a partner status, remaining the concept of co-property of the quota.

23.4. Conclusion

23.4.1. Pursuant to the foregoing, it may be noted that: (i) the regime of final apportionment of the property is a mix between the regime of separate and partial community of property; (ii) the Civil Code of 2002 prohibits the organization of companies between spouses married under the community or separate property regimes; (iii) the companies organized between spouses that adopted one or more of the regimes previously quoted must adapt to the new provisions or change the property regime that was adopted, or in the case of a company that has two or more partners, one must transfer its participation to the other, preserving the property regime; (iv) the non-partner spouse is merely a co-owner of the quota owned by the partner spouse and he/she does not vest any partner rights.

23.4.2. Hence, the Civil Code of 2002 did bring any significant changes, but it did introduce a conception to the contrary to a concept that had already been harmonized in doctrine and jurisprudence, such as the cases of the company organized by spouses married under the community or separate property regimes.

¹³⁸ The non-profit organizations differ from the profit companies in the aspect of the organized business activities, which is inherent to business companies and expressed by the prevailing of the organization of persons or material means over the personal labor of the partners.

24. SUCCESSION

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SUCCESSION LAW

24.1. Introduction

In Brazil, the right to inheritance is assured at the level of the Federal Constitution.¹³⁹ The sub-constitutional legislation on succession law is regulated, primarily, in book V of the current Civil Code, enacted by Law 10.406 of Jan. 10, 2002¹⁴⁰. The current Civil Code divides succession law into four parts, namely, the general provisions¹⁴¹, lawful succession¹⁴², succession by will¹⁴³, the estate proceeding and the split of inheritance¹⁴⁴. The Civil Procedure Code, enacted by Law 5.869 of Jan. 11, 1973, establishes procedural rules related to succession, standing out, particularly, those regarding international jurisdiction¹⁴⁵, domestic jurisdiction¹⁴⁶, the estate proceeding and the split of inheritance¹⁴⁷, the wills and the codicils¹⁴⁸ and vacant inheritance¹⁴⁹. Finally, again, the Federal Constitution¹⁵⁰ and the Introduction to the Civil Law Act, Decree-law 4.657 of Sept. 4, 1942¹⁵¹ provide on the applicable law in the cases of succession with international connection. It should be emphasized that Brazil has not ratified up to this date international treaties that interfere in its internal laws, as concerns succession law.

This work addresses only basic issues of substantial and procedural law related to succession law. Moreover, specific issues that are relevant only in *causa mortis* successions with international connection will be reviewed, since the public to which this book is directed is the international public. The matter, however, is being outlined solely under the viewpoint of Brazilian law. This is intended to afford a more practical instead of theoretical viewpoint of the subject.

In the case of persons that own assets located in more than one country it is advisable to make a succession planning while the person is still alive to avoid *post mortem* disputes between the successors since the laws of each State in which the deceased party's assets are located could be interested in attracting the international jurisdiction of its courts and in the applying of its laws. Issues regarding the succession planning will not be addressed in this work since the decision thereof must be individual according to the personal status of the deceased party and its assets.

24.2. Succession with International Connection

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¹³⁹ Article 5, XXX of the Federal Constitution of Oct. 5, 1988.

¹⁴⁰ Articles 1784 – 2027 of the Civil Code of 2002.

¹⁴¹ Articles 1828 – 2027 of the Civil Code of 2002.

¹⁴² Articles 1829 – 1856 of the Civil Code of 2002.

¹⁴³ Articles 1857 – 1990 of the Civil Code of 2002.

¹⁴⁴ Articles 1991 – 2027 of the Civil Code of 2002.

¹⁴⁵ Article 89, II, of the Code of Civil Procedure.

¹⁴⁶ Article 96 of the Code of Civil Procedure.

¹⁴⁷ Articles 982 – 1045 of the Code of Civil Procedure.

¹⁴⁸ Articles 1125 – 1141 of the Code of Civil Procedure.

¹⁴⁹ Articles 1142 – 1158 of the Code of Civil Procedure.

¹⁵⁰ Article 5, XXXI of the Federal Constitution of Oct. 5, 1988.

¹⁵¹ Article 10.

To the extent that a succession is international, i.e. presents elements related to more than one country, certain specific legal issues arise, particularly the international jurisdiction of the claimed Court with regard to the applicable law and also the possible recognition of a document issued by another State such as, for example, a will drafted abroad, with the particularity that the deceased person did not live there, but instead in Brazil at the time of death, or the recognition of a foreign ruling on the split of inheritance pursuant to a lawsuit between the deceased person's heirs. These issues consist in legal issues governed by international civil procedure law and private international law.

In this work the author reviews these issues solely under the Brazilian law viewpoint. When, however, a succession has an international connection, all laws that may have an interest in their applying to the specific case must be considered. Specifically, considering the succession planning done while the deceased person was still alive, these aspects are worthy to emphasize.

Under Brazilian law, the Code of Civil Procedure¹⁵² regulates the international jurisdiction of courts over succession cases and legal theorists and court rulings clarified certain vacancies in the law.

The Brazilian court has exclusive authority to conduct the estate proceeding and distribute the deceased person's assets located in Brazil, being irrelevant in this case whether the deceased party was a foreigner or lived abroad¹⁵³. Since in such a case the Brazilian courts would have the exclusive international jurisdiction, Brazil does not recognize a ruling issued abroad concerning the property of the deceased person that is located in Brazil¹⁵⁴. However, the law does not expressly establish whether the Brazilian court has international jurisdiction in the event that such property is not located in Brazil but instead abroad. According to the Supreme Court (STF) the High Court of Justice (STJ)'s rulings and the prevailing legal theory, the Brazilian courts do not have international jurisdiction in these cases¹⁵⁵. Inclusive, the Brazilian courts do not have the duty of computing the foreign assets in the inheritance to be distributed in Brazil, based on the principle of the plurality of succession courts¹⁵⁶. This rule also applies when the deceased person's domicile was located in Brazil.

In principle, the Brazilian court will apply the laws of the country where the deceased person was domiciled¹⁵⁷. The succession in the property of foreigners that resided in Brazil, however, shall be governed by Brazilian law in benefit of the spouse or Brazilian children in the event the national law that applied to the deceased person is not more favorable¹⁵⁸. As regards the capacity to succeed, the applicable law is the law of the heir's domicile¹⁵⁹. Finally, considering the property system that the married couple adopted, under Brazilian international private law shall apply the laws of the couple's first domicile¹⁶⁰. In practice, however, Brazilian law is frequently applied when the interested party, usually the surviving spouse, does not demonstrate to the Brazilian judge the contents and currency of the foreign law¹⁶¹. In the estate and partition proceeding conducted before the proper Court in Brazil these issues are relevant inasmuch that only when known what part of the spouses' assets belong to each of the spouses is it possible to identify the deceased person's assets. It should also be noted in this regard that under Brazilian law the stable relationship between a man and a woman is considered a family entity¹⁶² and it also has reflexes over succession law¹⁶³.

¹⁵² Article 89, II of the Code of Civil Procedure.

¹⁵³ Article 89, II of the Code of Civil Procedure.

¹⁵⁴ V, Beat Walter Rechsteiner, in *Direito internacional privado - teoria e prática*, 8. ed., Saraiva, São Paulo, 2005, pages 242 and 274-275.

¹⁵⁵ Beat Walter Rechsteiner, in *Direito internacional privado*, page 244-245.

¹⁵⁶ As quoted in RTJ 110, 750-762, 1984.

¹⁵⁷ Article 10, *caput* of the Introduction to the Civil Code Act (LICC), Decree-law 4.657 of Sept. 4, 1942.

¹⁵⁸ Article 5, XXXI of the Federal Constitution of Oct. 5, 1988; Article 10, Paragraph 1 of the Introduction to the Civil Code Act (LICC), Decree-law 4.657 of Sept. 4, 1942.

¹⁵⁹ Article 10, Paragraph 2 of the Introduction to the Civil Code Act (LICC), Decree-law 4.657 of Sept. 4, 1942.

¹⁶⁰ Article 7, *caput* and its Paragraph 4 of the Introduction to the Civil Code Act (LICC), Decree-law 4.657 of Sept. 4, 1942.

¹⁶¹ Beat Walter Rechsteiner, in *Direito internacional privado*, pages 228-229.

¹⁶² As already occurs at the level of the Constitution, as provides Article 226, Paragraph 3 of the Federal Constitution of Oct. 5, 1988.

¹⁶³ Refer, in this regard to Inácio de Carvalho Neto, *A sucessão do cônjuge e do companheiro no novo Código Civil*, RT 803:11-17, 2002, among other authors.

Of great importance in practice, especially to foreigners, is the issue of the recognition by Brazil of wills that the deceased person drafted abroad¹⁶⁴.

Further, it could be important in an estate proceeding in course in Brazil a ruling by a foreign judge or court such as, for example, a decision on an investigation of paternity proceeding filed against the deceased person, accepted and definitively ruled. In order for a foreign ruling to be valid and produce effects in Brazil, the High Court of Justice (STJ) must first recognize it¹⁶⁵.

24.3. Succession Proceeding In Court

The succession starts at the place of the deceased person's last residence¹⁶⁶ transferring the universality of its property to the heirs at law and those indicated in will¹⁶⁷. However, until the partition thereof the heirs' rights as to the ownership and possession of the inheritance is considered indivisible and shall be regulated by the rules that apply to condominium¹⁶⁸.

Brazilian law establishes a compulsory estate and partition proceeding¹⁶⁹ handled by a Brazilian lawyer¹⁷⁰. In this proceeding the estate is represented as a claimant or defendant by the estate administrator (*inventariante*)¹⁷¹ and until its appointment the provisory administrator performs this function¹⁷². The estate and partition proceeding must be opened in up to thirty days as of the opening of the succession¹⁷³, which occurs on the instance of the deceased person's death, even if presumed dead¹⁷⁴.

The estate and partition proceeding aims to gather, describe and appraise the deceased person's property and rights, its itemization and the payment of debts, payment of the *causa mortis* transmission of property tax and the other arrangements that are required to liquidate the inheritance, ending with the partition or adjudication thereof in the case of a single heir¹⁷⁵.

In addition to the formal estate and partition proceeding there are other types of simplified proceedings, namely, *arrolamento sumário* (a fast track estate proceeding) when all the heirs are legally aged and have legal capacity¹⁷⁶ and the proper *arrolamento* proceeding in the event the universality of the deceased person's property does not exceed a certain value established by the law¹⁷⁷.

Brazilian law accepts a consensual partition provided that the heirs are legally capable¹⁷⁸. In any event, the court must approve the partition¹⁷⁹.

A new partition proceeding may be opened in regard to property that was not covered by the original partition. This additional partition is designated *sobrepartilha* (additional partition)¹⁸⁰ and it is carried out in

¹⁶⁴ On this matter, refer to Beat Walter Rechsteiner, *Algumas questões jurídicas relacionadas à sucessão testamentária com conexão internacional*, RT 786:99-107, 2001.

¹⁶⁵ In regard to the recognition of a foreign court decision in Brazil, refer to Beat Walter Rechsteiner, in *Direito internacional privado*, pages 261-282.

¹⁶⁶ Article 1785 of the Civil Code of 2002.

¹⁶⁷ Articles 1784 and 1791, *caput* of the Civil Code of 2002.

¹⁶⁸ Article 1791, Sole Paragraph of the Civil Code of 2002.

¹⁶⁹ Articles 1991 - 2027 of the Civil Code of 2002; Articles. 982 - 1045 of the current Code of Civil Procedure.

¹⁷⁰ As provides Article 36 of the Code of Civil Procedure: "The party must be represented in court by a duly appointed attorney".

¹⁷¹ Article 1991 of the Civil Code of 2002 and Articles 12, V and 991, I of the Code of Civil Procedure and on the order of appointment of the estate administrator, Article 990 of the Code of Civil Procedure.

¹⁷² Article 1797 of the Civil Code of 2002 and Articles 985 and 986 of the Code of Civil Procedure; Higher Court of Appeals (STJ), Appeal REsp 474.982-PR, 4th Panel of Justices, ruled on Feb. 20, 2003, Reporting Justice Ruy Rosado de Aguiar, published in RT 816:198-199, 2003.

¹⁷³ Article 1796 of the Civil Code of 2002 and Article 983 of the Code of Civil Procedure.

¹⁷⁴ Articles 6 and 7 of the Civil Code of 2002.

¹⁷⁵ As quotes Zeno Veloso, in *Comentários ao Código Civil, arts. 1.857 a 2.027*, vol. 21, Saraiva, São Paulo, 2003, page 395.

¹⁷⁶ Articles 1031 - 1035 of the Code of Civil Procedure.

¹⁷⁷ Refer on this matter to Article 1036 of the Code of Civil Procedure.

¹⁷⁸ Article 2015 of the Civil Code of 2002; Article 1031, *caput* of the Code of Civil Procedure.

¹⁷⁹ Article 2015 of the Civil Code of 2002; Article 1031, *caput* of the Code of Civil Procedure.

the same manner as the estate and partition proceeding, in the records of the estate of the deceased person¹⁸¹. The following are subject to the *sobrepartilha* proceeding: a.) the omitted property; b.) the inheritance property that is acknowledged after the original partition; c.) the property in litigation, and also the property that is difficult or slow to liquidate; d.) the property located in a remote location of the jurisdiction where the estate proceeding is being processed¹⁸².

The *sobrepartilha* also applies to the omitted property¹⁸³. This consists in property that should have been included in the estate proceeding but which was not due to the estate administrator's intentional misconduct or of any heir that was aware of the existence thereof and omitted it¹⁸⁴. The current Brazilian law foresees for this event a specific proceeding designated omitted property suit¹⁸⁵. The heirs and the creditor's of the inheritance are the lawful parties to file such action¹⁸⁶. In such event, when the party that omitted the property is the estate administrator it shall lose its appointment as such¹⁸⁷.

In the estate and partition proceeding all the legal and factual issues that are proven by documents shall be decided on and a cognizance proceeding will only be necessary in highly questionable situations or that depend on further evidence¹⁸⁸.

If the deceased person made a will it must be presented to the judge that is handling the estate, irrespective of the form thereof, for the judge's order to be enforced¹⁸⁹.

This rule also applies to wills drafted abroad¹⁹⁰.

Other special procedural rules of voluntary jurisdiction apply in the case of vacant inheritance, i.e. the inheritance in which the lawful heirs or the heirs indicated in a will are unknown, in which event the property to be inherited must be gathered and administrated until it is turned over to a duly capacitated successor or the vacancy is decreed¹⁹¹. The property that comprises the vacant inheritance, according to the prevailing court rulings, may be acquired through *usucapião* (acquisition of ownership through lawful possession) until the court decrees the vacancy thereof¹⁹².

Finally, a suit may be filed by the heir aimed at the recognition of the heir's inheritance right and to obtain the return of the inheritance or a part thereof against the person who in the capacity of heir or not is in the possession thereof¹⁹³. Thus, for example, the lawful heir recognized in court following a paternity investigation suit who did not participate in the estate and partition proceeding involving the deceased person's property, who was his deceased father, is lawfully capacitated to file such a suit¹⁹⁴.

¹⁸⁰ Articles 2021 and 2022 of the Civil Code of 2002 and Articles 1040 and 1041 of the Code of Civil Procedure.

¹⁸¹ Article 1041 of the Code of Civil Procedure.

¹⁸² Articles 2021 and 2022 of the Civil Code of 2002 and Article 1040 of the Code of Civil Procedure.

¹⁸³ Article 2022 of the Civil Code of 2002 and Article 1040, I of the Code of Civil Procedure.

¹⁸⁴ In regard to the omitted properties, refer to Articles 1992 - 1996 and 2022 of the Civil Code of 2002; and 994, 995, VI, and 1040, I of the Code of Civil Procedure.

¹⁸⁵ Article 1994, caput, of the Civil Code of 2002.

¹⁸⁶ Article 1994, caput, of the Civil Code of 2002.

¹⁸⁷ Article 1993 of the Civil Code of 2002, and Article 994 and 995, VI of the Code of Civil Procedure.

¹⁸⁸ Article 1984 of the Code of Civil Procedure.

¹⁸⁹ Article 877 of the Civil Code of 2002; 1130 of the Code of Civil Procedure (private instrument of will); Article 1128 of the Code of Civil Procedure (public deed of will); Article 1875 of the Civil Code of 2002; Articles 1125 - 1127 of the Code of Civil Procedure (will kept in confidentiality).

¹⁹⁰ Beat Walter Rechsteiner, *Algumas questões jurídicas relacionadas à sucessão testamentária com conexão internacional*, in RT 786:99-107, 2001.

¹⁹¹ As provide Articles 1819 - 1823 of the Civil Code of 2002; Articles 1148 - 1158 of the Code of Civil Procedure.

¹⁹² In this regard, the Higher Court of Appeals (STJ)'s ruling of appeal REsp 253.719-RJ, 4th Panel of Justices, ruling dated Sept. 26, 2000 – Reporting Justice Ruy Rosado de Aguiar, published in RT 787:207-210, 2001.

¹⁹³ Articles 1824 - 1828 of the Civil Code of 2002.

¹⁹⁴ As per the TJSP Court of Appeals ruling of Appeal 101.733-4/6 – Court Confidentiality proceeding - 2nd Panel of Justices – ruling dated Sept. 19, 2000 – Reporting Justice Roberto Bedran, published in RT 785:216-218, 2001.

The territorial jurisdiction to rule an estate, partition, collection, enforcement of the will and all of the cases in which the estate is a defendant is basically of the judge that has jurisdiction over the deceased person's last domicile¹⁹⁵.

In the event the persons that are the beneficiaries in the succession (heirs and/or legatees) disagree as to their rights and obligations, the estate proceeding may last several years in Brazil.

24.4. Lawful Succession and Succession By Will

Brazilian law distinguishes lawful succession and succession by will¹⁹⁶. The first occurs pursuant to the law and applies in the cases where the deceased person did not make a will or if the will is deemed void, subject to cancellation or forfeited or, further, in regard to the property not covered by the will¹⁹⁷. In the lawful succession the inheritance is transferred according to the order of inheritance¹⁹⁸ to the lawful heirs. The lawful succession is usually granted to: a.) descendants, concurrently with the surviving spouse, unless the latter was married with the deceased person in the universal property system or in the mandatory separation of property system; or if, in the partial separation of property system, the deceased person did not leave any personal property; b.) descendants, concurring with the spouse; c.) collateral relatives¹⁹⁹. In the absence of descendants, ascendants and surviving spouse, the collateral relatives up to the fourth degree shall be called to succeed²⁰⁰. Only in the event of absence of any relative or in the event of waiver of inheritance will the property be transferred in the Municipality or Federal District, when located in their jurisdictions, or to the Federal Government when located in a federal territory²⁰¹. In regard to the lawful succession, the right of representation must be considered in the cases in which it applies in accordance with the law²⁰².

The difference between a lawful heir and an instituted heir, between a necessary heir and an optional heir, between a heir and a legatee, universal or individual heir is relevant only in regard to the succession by will since in the lawful succession the inheritance is transferred, as previously quoted, always in accordance with the order of inheritance established by the law.

Lawful heir is the heir established by the law, i.e. the person covered by the order of inheritance established by the law, whereas the instituted heir is the person designated by the testator in his/her will²⁰³. Necessary heir is the person that cannot be excluded from the succession at the deceased person's will, unless the requirements for disinheritance are fulfilled in the specific case²⁰⁴. Note, however, that the same legal effects pursue from the exclusion of the heir and of the legatee due to indignity, at the request of an interested ~~third~~ party submitted to the judge and declared by a court decision, this not applying only to the succession by will as it also covers the heirs called in the lawful succession according to the legal order of inheritance²⁰⁵. Optional heir is the heir covered in the order of inheritance but that lacks a right to receive a minimum inheritance quota at the time when the testator established so in his/her will. The lawful succession is always a universal succession; in the succession by will the law allows a universal succession or individual succession, benefiting in the first case the heir by will and the legatee in the second case²⁰⁶. Thus, the law only allows the latter quality of beneficiary in the event of succession by will²⁰⁷.

¹⁹⁵ Article 96 of the Code of Civil Procedure; TJMG Court of Appeals' ruling of appeal AgIn 000.198.228-9/00 – 4th Panel of Justices, ruling dated May 23, 2002 – Reporting Justice Hyparco Immesi, published in RT 805:359-360, 2002.

¹⁹⁶ Refer to Articles 1786 and 1788, among others, of the Civil Code of 2002.

¹⁹⁷ Article 1758 of the Civil Code of 2002.

¹⁹⁸ Articles 1829 - 1.844 of the Civil Code of 2002.

¹⁹⁹ Article 1829 of the Civil Code of 2002.

²⁰⁰ Article 1839 of the Civil Code of 2002.

²⁰¹ Article 1844 of the Civil Code of 2002; and on the succession in Brazilian law: Giselda Maria Fernandes Novaes Hironaka, in *Comentários ao Código Civil*, articles 1784 - 1856, vol. 20, Saraiva, São Paulo, 2003, pages 213-48.

²⁰² Articles 1851 - 1856 of the Civil Code of 2002.

²⁰³ Refer, in particular to Article 1897 of the Civil Code of 2002.

²⁰⁴ Refer to Articles 1961 – 1965 of the Civil Code of 2002.

²⁰⁵ Refer to Articles 1814 – 1818 of the Civil Code of 2002; and Giselda Maria Fernandes Novaes Hironaka, in *Comentários ao Código Civil*, vol. 20, pages 141-167.

²⁰⁶ Article 1897 of the Civil Code of 2002.

²⁰⁷ In regard to legacy, refer in particular to Articles 1912 - 1939 of the Civil Code of 2002.

In the succession by will the deceased person establishes his/her ultimate will, i.e. through a will²⁰⁸. Any person legally capable²⁰⁹ may dispose of all of its property, or a part thereof, through a will²¹⁰. Provisions that do not have a patrimonial nature may also be established in the will such as, for example, burial aspects, even if the testator restricted his/her will only to this aspect²¹¹. The will consists in a personal act²¹². Therefore, the current laws does not allow the declaration of ultimate will by the deceased person's legal representatives or attorneys and also prohibits that a decision on the contents of the will and its enforcement are subjected to the discretion of a third party²¹³. The will is irrevocable²¹⁴.

In order to be valid the will must fulfill the formal requirements established in the law since it consists in a personal act²¹⁵. Brazilian law establishes as regular forms of will²¹⁶ the public deed²¹⁷, the sealed will²¹⁸ and the private instrument²¹⁹. Further, Brazilian law exceptionally allows as special forms²²⁰ carriage²²¹ the aeronautical form²²² and the military form²²³. Finally, Brazilian law allows the codicil²²⁴. This consists in a private instrument, dated and signed, which contains special provisions determined by the deceased person regarding his/her burials, small handouts to certain people or to non-specified poor people of a certain place, as well as on furniture, clothing or jewels of low value that the deceased person personally used²²⁵. Through the codicil the deceased person may designate or replace an executor if such person was not designated in his/her will or when the deceased party decided to change the person that he/she previously designated²²⁶.

When the will is drafted in Brazil it must fulfill the formal requirements that are established in Brazilian law under penalty of not being valid. In the event of a will drafted abroad, it will be recognized in Brazil provided that it fulfills the requirements established in the country where it was drafted²²⁷.

Note in this regard that Brazilian law does not allow the aggregated will whether in the form of simultaneous, reciprocal or correlative²²⁸.

In the event of existence of necessary heirs, the testator may only dispose of half of the inheritance. The other half is reserved to the necessary heirs²²⁹ comprising the legitimate portion²³⁰. Such right is, in principle lawfully vested on them²³¹ except if for a justified reason stated in the will the deceased person constitutes on the property of the legitimate portion a clause establishing that it cannot be transferred, pledged or used to satisfy any indebtedness²³². In the event the testator leaves the part that he/she could have disposed of, or any

²⁰⁸ Articles 1857, *caput* et seq. of the Civil Code of 2002.

²⁰⁹ According to Article 1860, Sole Paragraph, of the Civil Code of 2002, persons older than sixteen may make a will.

²¹⁰ Article 1857 of the Civil Code of 2002.

²¹¹ Article 1857, Paragraph 2 of the Civil Code of 2002

²¹² Article 1858 of the Civil Code of 2002.

²¹³ Refer, in particular, to Articles 1900, III and IV of the Civil Code of 2002, and, on the other hand, Articles 1901 and 1930 thereof, and also Zeno Veloso, in *Comentários ao Código Civil*, vol. 21, page 9.

²¹⁴ Articles 1858 and 1969 - 1972 of the Civil Code of 2002.

²¹⁵ Article 1858 of the Civil Code of 2002.

²¹⁶ Article 1862 of the Civil Code of 2002.

²¹⁷ Articles 1864 - 1867 of the Civil Code of 2002.

²¹⁸ Articles 1868 - 1875 of the Civil Code of 2002.

²¹⁹ Articles 1876 - 1880 of the Civil Code of 2002.

²²⁰ Articles 1886 - 1887 of the Civil Code of 2002.

²²¹ Articles 1888 - 1892 of the Civil Code of 2002.

²²² Articles 1888 - 1892 of the Civil Code of 2002.

²²³ Articles 1893 - 1896 of the Civil Code of 2002.

²²⁴ Articles 1881 - 1885 of the Civil Code of 2002.

²²⁵ Article 1881 of the Civil Code of 2002.

²²⁶ Article 1883 of the Civil Code of 2002.

²²⁷ On this theme, in further detail, refer to Beat Walter Rechsteiner, *Algumas questões jurídicas relacionadas à sucessão testamentária com conexão internacional*, RT 786:99-107, 2001.

²²⁸ As provides Article 1863 of the Civil Code of 2002; Zeno Veloso, in *Comentários ao Código Civil*, vol. 21, pages 49 -52, and the Higher Court of Appeals (STJ) ruling of REsp 88.388-SP - 4th Panel of Justices, ruling dated Oct. 05, 2000 - Reporting Justice Aldir Passarinho, published in RT 787:189-192, 2001.

²²⁹ Articles 1789 and 1857, Paragraph 1 of the Civil Code of 2002.

²³⁰ Article 1846 of the Civil Code of 2002.

²³¹ Article 1846 of the Civil Code of 2002.

²³² Article 1848, *caput* of the Civil Code of 2002.

legacy, to a necessary heir, this shall not affect the necessary heir's right to the legitimate portion of the inheritance²³³.

The law vests this capacity on to the descendants, ascendants and spouse²³⁴, but it does not vest the same benefit expressly on to the deceased person's companion²³⁵.

The testator may designate an executor²³⁶. Otherwise, the implementation of the will shall be incumbent on the surviving spouse and, in the absence thereof, the heir designated by the judge²³⁷. The executor's duty is to implement the will and defend its validity²³⁸. In the cases foreseen in the law, the executor shall be entitled to an award based on the net inheritance for the services rendered²³⁹, in regard to which the executor is obligated to submit records of account²⁴⁰.

24.5. Inheritance Right, Acceptance and Waive of Inheritance and Assignment of the Heir's Quota-Part in the Inheritance

The inheritance right refers to the legitimacy or capacity to succeed and such right operates in regard to any person at birth or already conceived, at the instance succession is opened²⁴¹. In the succession by will the law broadens the list of legally capable persons that may be invoked to succeed, namely: a.) the children, including children not yet conceived, of persons designated by the testator, provided that same are alive when the succession is opened; b.) companies; c.) legal entities that are organized at the testator's will under the form of a foundation²⁴². On the other hand, it also indicates the cases in which a person is prevented from being designated a heir and legatee in a will²⁴³. Thus, for example, the concubine of the married testator cannot benefit, except if the testator, without its fault, has been separated from his spouse for more than five years²⁴⁴. The clauses of the will in favor of persons that are not legitimate to succeed are void²⁴⁵.

The acceptance of inheritance, under Brazilian law, may occur in two ways: expressly or tacitly²⁴⁶. Upon acceptance the conveyance of the inheritance to the heir becomes definitive, effective back to the opening of the succession²⁴⁷. The waiver of inheritance, on the other hand, requires a special form in order to be valid, i.e. an express statement set forth in a public deed or made in court²⁴⁸. Both the acceptance and the waiver of inheritance cannot be partial, conditional or subject to a clause²⁴⁹ and the acts that are performed in conformity with the law are irrevocable²⁵⁰.

Brazilian law allows the heir to assign its quota-part in the inheritance to another heir or third party provided that the transaction fulfills all the legal requirements therefor²⁵¹. As regards the form that the assignment must vest, the law requires the form of a public deed for such assignment²⁵².

²³³ Article 1849 of the Civil Code of 2002.

²³⁴ Article 1845 of the Civil Code of 2002; and on the legal status of the spouse under the new Civil Code, Eduardo de Oliveira Leite, *A nova ordem de vocação hereditária e a sucessão dos cônjuges*, RT 815:32-37, 2003.

²³⁵ In regard to the legal status thereof under Brazilian law, refer to Maria Fernandes Novaes Hironaka, in *Direito das sucessões brasileiro - disposições gerais e sucessão legítima*, RT 808:24-33, 2003.

²³⁶ The legal institute of the executorship is regulated by Articles 1976 – 1990 of the Civil Code of 2002 and Articles 1135 - 1141 of the Code of Civil Procedure.

²³⁷ Articles 1976 – 1984 of the Civil Code of 2002.

²³⁸ Articles 1976 – 1981 of the Civil Code of 2002.

²³⁹ Article 1987 of the Civil Code of 2002.

²⁴⁰ Article 1980 of the Civil Code of 2002.

²⁴¹ Article 1798 of the Civil Code of 2002.

²⁴² Article 1799 of the Civil Code of 2002.

²⁴³ Article 1801 of the Civil Code of 2002.

²⁴⁴ Article 1801, III of the Civil Code of 2002.

²⁴⁵ Article 1802 of the Civil Code of 2002.

²⁴⁶ Article 1805 of the Civil Code of 2002.

²⁴⁷ Article 1804, *caput* of the Civil Code of 2002.

²⁴⁸ Article 1806 of the Civil Code of 2002.

²⁴⁹ Article 1808 of the Civil Code of 2002.

²⁵⁰ Article 1812 of the Civil Code of 2002.

²⁵¹ Articles 1793 – 1795 of the Civil Code of 2002; Giselda Maria Fernandes Novaes Hironaka, in *Comentários ao Código Civil*, pages 72-80).

24.6. Donations by the Deceased Person While Alive and Future Succession

Under Brazilian law inheritance cannot be the subject matter of an *inter vivos* contract²⁵³. It does allow, however, donation²⁵⁴ between ascendants and descendants or by one of the spouses to the other, provided that the property system that the couple adopted allows this²⁵⁵. In this case, the donation will be considered in the donator's succession, resulting in an advancement of the inheritance right vested on the donee²⁵⁶.

As a rule, the descendants concur in the succession of a common ascendant and they are obligated to disclose the donations that they received from the deceased person while he/she was alive, under penalty of omission²⁵⁷. This disclosure consists in the legal institute designated collation²⁵⁸. The donator may at its discretion waive collation, either by way of will or in the legal transaction that led to the donation, upon an express, written statement²⁵⁹.

In regard to the necessary heir the waiver of collation produces legal effects only to the extent of his/her disposable quota, i.e. the hereditary quota that must be preserved in favor of the necessary heir.

Furthermore, such quota cannot be affected by donations to third parties that are not legitimate heirs, or to instituted heirs and legatees, benefited in the deceased person's will. Thus, the donation that exceeds the part that the donator, at the time of such act of free will, could have disposed of in his/her will is another specific case of a donation that is void of validity²⁶⁰.

Summarizing, the donator cannot dispose of, through a donation, of more than half of his/her patrimony if the donator has necessary heirs. One half of the donator's patrimony, in such event, remains non-disposable since it consists in the necessary heirs legitimate portion²⁶¹. Accordingly, nobody may donate what it cannot testate²⁶².

Any donation that the deceased person makes while alive that affects the legitimate part of the necessary heirs at the time when it was made is designated an unofficial donation. The relevant suit against the donator may be filed by the necessary heirs while alive, being relevant for the purpose of calculating the excess the instance when the act of free will was practiced²⁶³.

To the extent that the provisions of last will set out in the will are accountable for exceeding the deceased person's disposable part, the necessary heirs are legitimated to claim the reduction thereof only in the estate and partition proceeding²⁶⁴.

24.7. Taxes

²⁵² Article 1793 of the Civil Code of 2002.

²⁵³ Article 426 of the Civil Code of 2002.

²⁵⁴ In the case of an onerous deal, particularly a purchase and sale between an ascendant to a descendant it may, theoretically, be cancelled except if the other descendants and the seller's spouse expressly agreed thereto. In this regard, refer to Article 496 of the Civil Code of 2002.

²⁵⁵ In regard to the possibility of donations between spouses under Brazilian law, refer to Paulo Luiz Netto Lôbo, in *Comentários ao Código Civil*, Articles 481 - 564, vol. 6, Saraiva, São Paulo, 2003, pages 312-313.

²⁵⁶ Article 544 of the Civil Code of 2002; and on the interpretation of this Article, Paulo Luiz Netto Lôbo, in *Comentários ao Código Civil*, vol. 6, pages 311-318.

²⁵⁷ Article 2002 of the Civil Code of 2002.

²⁵⁸ Articles 2002 – 2012 of the Civil Code of 2002; and Zeno Veloso, in *Comentários ao Código Civil*, vol. 21, pages 404 - 432.

²⁵⁹ Article 2006 of the Civil Code of 2002.

²⁶⁰ Article 549 of the Civil Code of 2002.

²⁶¹ Article 1789 of the Civil Code of 2002.

²⁶² Paulo Luiz Netto Lôbo, in *Comentários ao Código Civil*, vol. 6, page 533.

²⁶³ Paulo Luiz Netto Lôbo, in *Comentários ao Código Civil*, vol. 6, cit., p. 334 - 338.

²⁶⁴ Article 1567 of the Civil Code of 2002.

In the context of a succession the *causa mortis* property transmission and donations of any type of property or rights (ITCMD) tax must be considered. The States and the Federal District levy this tax²⁶⁵. The maximum tax rate that may be applied is eight per cent²⁶⁶. In the State of São Paulo, for example, Law 10.705 of Dec. 28, 2000 (which provides on the levying of the ITCMD tax) and also Decree 45.837 of June 4, 2001 (which regulates the matter addressed in the aforesaid state law) apply to the taxation of succession.

Currently, the Brazilian Congress is discussing a broad tax reform, which will impact the *causa mortis* property transmission tax.

²⁶⁵ Article 155, I of the Federal Constitution of Oct. 5, 1988.

²⁶⁶ Article 155, Paragraph 1, IV of the Federal Constitution of Oct. 5, 1988; Federal Senate Resolution no. 9 of May 05, 1992, which establishes a maximum rate for the *Causa Mortis* transmission of property through inheritance and donation tax quoted in Article 155, IV, Paragraph 1, I “a” of the Federal Constitution.

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