

Doing **Business** in Brazil



BADARÓ & DE LUCA
Sociedade de Advogados

SZYMONOWICZ
ADVOGADOS ASSOCIADOS

Summary

Badaró & De Luca and Szymonowicz.....	4
Doing Business in Brazil.....	6
Foreign Investment	7
Immigration	8
Corporate Law	11
Taxation	18
Labor Law	29
Environmental Law	39
Infrastructure	46
Antitrust	53
Consumer Rights	58
Arbitration.....	60
Criminal Law, Investigations and Compliance.....	61
Intellectual Property	67

Badaró & De Luca and Szymonowicz: A solid and successful partnership

A Creative, Objective and Tailored Law Firm

BADARO E DE LUCA is a business law firm with operations throughout Brazil and also in Portugal. Over the last decade, BADARO e DE LUCA's work has been developed in the international, civil, corporate labor and tax areas. In our specialties, we organize our performance in a) leading cases in higher courts (STF, STJ and TST), b) business advisory and legal advice in all areas and c) strategic conduction of lawsuits.

Today there is a whole business movement towards customized solutions (Taylor made) that meet the metrics of sustainable development metrics. Customers expect an effective outcome to their demands. When seeking seeking legal advice to solve issues in business or personal life, specialized professionals are sought, one looks for professionals specialized in the matter. Our office, as a legal consulting, offers: qualified professionals, exclusive service and legal solutions.

Only the best for our Clients

Established in São Paulo in 1987, SZYMONOWICZ Law Firm began its activities in legal consulting,

tax and corporate law. We have built a successful track record by partnering with our clients in many different business segments, which has resulted in expertise in Tax Law, Corporate and Commercial Law, Contracts, International Law and Capital Markets, Civil and Real Estate Law, Business Negotiations, Mergers and Acquisitions, Governance and Compliance. In addition to our São Paulo office, Szymonowicz Advogados Associados maintains a network of correspondents covering all countries in South, Central and North America, Europe, Africa and some Asian countries. Our focus is to obtain the best solution, scaling risks and aiming to add value for our clients.

A solid and successful partnership

BADARO & DE LUCA and SZYMONOWICZ have established a solid partnership, shaping the practice areas of both offices, to offer the best to those who wish to invest in Brazil.

We invite you to discover us and become our client. Welcome to Brazil, be our guest.



Badaró & De Luca and Szymonowicz: A solid and successful partnership

A solid and successful partnership

CREATIVITY - The search for excellence drives our evolution and leads us to build important differentials for us and our clients. We understand that innovation is an opportunity to transform creative ideas into reality with the objective of solving problems and reinventing our own methodology.

INTERNATIONAL PARTNERS - The experience in different jurisdictions and client profiles allows a deep improvement and knowledge of different realities. Our international partnerships enable the exchange of professionals, which is essential for the development of our team.

BEST TECHNIQUE AND METHODOLOGY - Our workflow has a methodology that establishes verification and review points as a way to present Taylor made solutions to our clients.

DIVERSITY - Respect for otherness is valued in our team. Here, we put ourselves in the other's shoes, so that we strengthen personal bonds and respect diversity. An empathetic environment, where harmonious and respectful coexistence is the rule.

CLIENT CENTRIC CULTURE - We consider the client as the priority focus of our initiatives and processes, and we are frequently reassessing and adjusting procedures in search of the best experience for the client. We want to be effective based on the best technique and the excellence of our relationship with our clients.

EUROPEAN LAWYERS - Our firm has lawyers regularly registered in several countries of the European continent, allowing us to act in the entire European Union. Our team has lawyers who are fluent in French, English, Italian, Spanish and German, allowing for easier dealings with our clients.

RESPONSIVE ACTS - In the face of the unforeseeable, we will propose the necessary measures for the immediate control of the situation.

 /LAWBYadvogados

 @badaroedeluca

 /badaroedeluca



Doing Business in Brazil

With more than 200 million inhabitants and over 8.5 million square kilometers, Brazil is the largest country and economy in Latin America. It is a federative republic, consisting of the union of states, municipalities, and the federal district. Moreover, the 1988 Federal Constitution provides for a presidential type of government with three independent branches: the Executive, the Legislative and the Judiciary.

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

BADARO & DE LUCA and SZYMONOWICZ has prepared this Doing Business in Brazil as an introductory guide to the main aspects of carrying out business activities and transactions in and with the country.



Foreign Investment

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

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

BACEN has a modern system of registration of foreign investments, the Declaratory Electronic Registration of Direct Investments, which provides that direct foreign investment shall be registered electronically on the online information system of BACEN ("SISBACEN"). Capital investment, repatriation and profit remittance related to foreign investments duly registered with BACEN may be effected without prior authorization of BACEN. Also, foreign loan transactions and some specific transactions such as the issuance of securities abroad and loans relating to export transactions, can generally be registered through the Electronic Declaration Register of Financial Operations Registration Module ("RDE-ROF"), also with no need of prior authorization from BACEN.

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

Immigration

Brazilian law includes several types of visa: visitor's, temporary, courtesy, official and diplomatic. Courtesy, official, and diplomatic visas have special rules and are not dealt with in this publication.

Visitor's Visas

Visitor's visas are granted to foreigners visiting for transit, tourism, business, artistic or sporting purposes.

Transit

Visitor's visas for transit purposes are issued for individuals who are passing through Brazil enroute to another country. This situation occurs when a flight connection is long and the passenger does not remain restricted to the international transit area of the airport. Transit visas may be obtained at the nearest Brazilian Consulate by presenting one's passport and connecting flight ticket.

Tourism

Visitor's visas for tourism purposes fall into two basic categories, depending on the bilateral reciprocity agreements between Brazil and other countries. For passports issued by countries that demand a visa, a visa stamp must be included in the passenger's passport before departure from their origin. For countries that do not require a visa, passengers need only to pass through customs at the airport, seaport, or border point of arrival. Since June 17, 2019, United States, Canadian, Japanese, and Australian citizens are no longer required to obtain a visa stamp, notwithstanding the fact that there are no reciprocity agreements between Brazil and such countries.

Since reciprocity agreements may change, it is advisable to check with a Brazilian Consulate before traveling. In general, and regardless of the need for, or exemption from, a stamp in the passport, visitor's visas for tourist purposes are usually granted for a term of 90 days and are renewable for another 90-day period, with a total maximum stay of 180 days per year. For visitors from certain countries, the maximum stay of 180 days per year is also permitted, however the stay is limited to 90 days for each 180 days. This means that during a given period of 180 days, a visitor may spend either 90 consecutive days in the country, or they may leave and return however many times they like provided the combined maximum number of 90 days is not exceeded.

Business

Visitor's visas for business purposes grant their holders authorization to perform business activities in Brazil provided the holders of such visas are not remunerated by entities domiciled in Brazil. This type of visa may also be obtained by applying to the nearest Brazilian Consulate and its term generally follows the same rules applicable to tourism (i.e. an initial period of 90 days, renewable for another 90-day period, with a total maximum stay of 180 days per year or limited to a combined 90-day period during each 180 days). Moreover, and similar to tourist visas, visitor's visas for business purposes may also be waived (i.e. with a stamp in the passport), but this varies in accordance with international treaties.

Temporary Residence

Temporary residence can be granted to those who intend to work, study, or be subject to health treatment, among other specific situations. Our comments will focus on the work scenario.

In order to obtain a temporary work residence, first a residence permit application must be issued by the Immigration Division of the Ministry of Justice located in Brasília-DF. If such application is approved, the procedure and all related documentation should be submitted to the Ministry of Foreign Affairs and then to the Brazilian Consulate mentioned in said application, at which time the foreigner, as a general rule, must (individually) go through the bureaucratic phases required to obtain his/her visa. Each visa will be issued by the Brazilian Consulate nearest to the place the applicant has been residing for more than one year. The dependents of the main applicant are entitled to the same type of visa through a joint family application.

Temporary Residence with an Employment Agreement

This type of visa authorizes its holders to work directly for a Brazilian company under an employment contract, subject to Brazilian Labor Law. The Brazilian Immigration Authorities usually only grant temporary residence under employment agreements when:

- The foreigner is requested to perform administrative, financial or managerial activities in Brazil;
- The salaries paid to foreigners do not exceed one-third of the total payroll;
- The number of foreign employees does not exceed one-third of the company's total number of employees.

The respective temporary work residence will be valid for up to two years.

Temporary Residence for Technical Services Purposes

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

Residence Visas

Residence visas are usually granted to foreigners being transferred to Brazil to occupy positions of officers/managers or directors of companies incorporated in Brazil. To qualify for such a visa, the government requires a minimum investment in the employing company, in foreign currency, equivalent to at least BRL 600,000.00 per residence visa application. However, this investment can be reduced to BRL 150,000.00 if the Brazilian affiliate assumes the commitment to generate at least 10 direct jobs over a maximum period of two years.

Additionally, residence visas may be granted to foreign investors who contribute to the Brazilian economy. The requirements for such application are:

- The foreigner must be a quotaholder/shareholder and administrator of a Brazilian company;
- An investment in foreign currency must be made in an amount equivalent to at least BRL 500,000.00;
- A descriptive summary of the activities to be developed by the Brazilian company must be submitted to the competent authority.

Finally, residence visas may also be granted to anyone who acquires real estate in Brazil that is valued at a sum equal to or greater than BRL 1,000,000.00. For properties located in the North or Northeast regions of Brazil, the minimum sum is BRL 700,000.00.

Mercosul Visas

Mercosul visas permit legal temporary residence in Brazil for two years. The citizens of Mercosul countries (including Bolivia, Chile, Peru, Colombia, and Ecuador) who wish to reside in Brazil should submit the necessary documentation to the appropriate Brazilian Consular authority or directly to the Federal Police in Brazil.

These two-year Mercosul visas can be converted into permanent residence in Brazil provided that the citizens submit a request for such permanent residence, along with the necessary documentation, to the appropriate authorities 90 days before the expiry of the temporary residence.

Corporate Law

Business Entities

The Brazilian Civil Code (Law No. 10,406/2002), effective January 2003, as amended, changed the rules governing all companies established in Brazil, except for corporations (*sociedades por ações*).

In accordance with the Brazilian Civil Code, companies incorporated in Brazil will be classified either as a *sociedade empresária* (business company) or as a *sociedade simples* (non-business company). A business company conducts organized economic activity aimed at the production and circulation of goods or services. All corporate documents, including those establishing the company, must be filed with the Commercial Registry (*Junta Comercial*). An entity conducting any other activity (including intellectual, scientific, literary, or artistic activities) is considered a non-business company. All corporate documents of a non-business company, including those establishing the company, must be filed with the Civil Registry for Corporate Entities (*Registro Civil das Pessoas Jurídicas*). It must be noted, however, that since the abovementioned concepts are vague, many misunderstandings may arise when classifying a company.

Business companies are most commonly incorporated as limited liability companies (*sociedades limitadas*, abbreviated as Ltda.) or corporations (*sociedades por ações*, abbreviated as S.A. or S/A). Corporations are always considered to be “business companies” regardless of their corporate objectives.

Limited Liability Companies (Sociedades Limitadas or Ltdas)

Limited liability companies are regulated by the Brazilian Civil Code. In addition to such provisions, the company’s Articles of Association (*Contrato Social*) shall establish that it will be governed in a subsidiary basis by either the provisions of the Brazilian Civil Code regarding non-business companies or by the Law of Corporations (Law No. 6,404/1976 and its amendments) regarding business companies.

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

- A recent amendment to the Brazilian Civil Code² made important progress by allowing limited liability companies to be incorporated by a sole quotaholder executing its Articles of Association (*Sociedade Limitada Unipessoal*)³, which shall be registered with the Commercial Registry of the State or with the Civil Registry for Corporate Entities of the city where its head office is located, as the case may be. A partner of a limited liability company is called a quotaholder since the capital of the company is divided into quotas, as opposed to shares.

² In September 2019, Executive Order No. 881/2019 was converted into the Law No. 13,874/2020, which established, among others, the Declaration of Economic Freedom Rights.

³ Prior to such amendment to the Brazilian Civil Code, at least two quotaholders were required to incorporate a limited liability company in Brazil.

- Husband and wife married under the universal community regime (past, present and future property) (*regime da comunhão universal*) or compulsory separate property regime (*regime da separação obrigatória*) cannot be quotaholders of the same company. This condition is not applicable to companies incorporated prior to January 2003.
- The Articles of Association must establish the company's corporate capital, but no minimum amount is required (except for certain types of companies such as banks and insurance companies, or if permanent residences for the non-resident officers are required).
- Each quota usually grants its holder the right to one vote at quotaholders' meetings.
- Quotaholders are in principle not liable for the debts and other obligations of the company; however, they are jointly and severally liable for the total payment of the subscribed capital.
- Quotaholders may pay their respective equity interests with assets (but not services), which are required to be appraised.
- The company's capital may be increased by a quotaholder resolution. A right of first refusal is granted to existing quotaholders so that all of them may subscribe to the new quotas issued as a result of the increase in proportion to their equity interest in the company's capital.
- Quotas may be assigned to third parties, depending on the provisions of the Articles of Association. Likewise, it is possible to bar heirs and successors from becoming quotaholders, depending on the provisions of the Articles of Association.
- Only individuals, quotaholders or not, residing in Brazil may be appointed as officers (*administradores*) of limited liability companies. Foreigners wishing to occupy management positions must first obtain the respective residence, in accordance with minimum legal requirements. Please refer to the Immigration section of this publication for additional information on residences for foreigners.
- The company may have one or more officers (*administradores*).
- Quotaholders determine the officers' remuneration.
- An Audit Committee (*Conselho Fiscal*) may be created depending on the provisions of the Articles of Association. Such committee must be composed of at least three members, who may or may not be quotaholders of the company. The Audit Committee is one of the corporation's boards set forth by Law No. 6,404/1976, the main function of which is to audit the corporation's management, and it may or may not, depending on the Articles of Association's provisions, accumulate attributions of the Audit Committee established in the Sarbanes-Oxley Act, 2002.
- Law No. 11,638/2007 mandates that large-sized companies – defined as companies, or groups of companies under common control, with total assets in their preceding fiscal year in excess of BRL 240.000.000,00, or gross revenues of over BRL 300.000.000,00, regardless of corporate nature (thus encompassing limited liability companies of this size) – are subject to Law No. 6,407/1976 with regard to bookkeeping, financial statements and the mandatory hiring of independent auditors registered with the Brazilian Securities and Exchange Commission ("CVM"). This includes publishing such financial statements in the official gazette and a widely distributed newspaper. As from January 1, 2022, only a summarized version of the documents will need to be published in a major newspaper (in terms of circulation); simultaneously, a complete version of the documents must be published on the newspaper's webpage.
- Limited liability companies with more than 10 quotaholders must mandatorily approve matters under their responsibility at a quotaholders' meeting, which must comply with specific Brazilian Civil

Code requirements regarding call notices, opening and passing of resolutions. Companies with fewer than 10 quotaholders may hold quotaholders' meetings, subject to less bureaucratic procedures, in accordance with the provisions of their Articles of Association.

- There are specific quorums for approving certain matters. For example, amendments to the Articles of Association and/or amalgamations, mergers or dissolution of the company require an affirmative vote of quotaholders representing at least 75% of the company's capital. The quorum required for appointing officers (*administradores*) may be unanimity, two-thirds of the capital or 50% plus one quota, depending on whether or not the capital has been fully paid up, and if the appointment of the officer (*administrador*) is done in the Articles of Association or in a separate instrument.
- The approval, by quotaholders, of the financial statements and officers' accounts is required once a year, within four months after the end of the preceding fiscal year. These types of companies are not required to publish their financial statements, unless they are considered large-sized companies according to Law No. 11,638/2007 mentioned above.
- Limited liability companies are not required to pay minimum dividends to their quotaholders. The dividend payments may be pro-rated or not to the equity interest held by the quotaholders, in accordance with the provisions of its Articles of Association.
- Limited liability companies may not issue securities, such as debentures⁴ and commercial papers, and do not have access to capital markets.

Corporations (Sociedades Por Ações Or S.A.)

Law No. 6,404/1976, as amended from time to time, governs Brazilian corporations.

Brazilian corporations may be publicly held or closed, depending on whether or not they are registered with the CVM and their shares are allowed to be traded on stock exchanges or, as the case may be, the over-the-counter market. CVM was created by Law No. 6,385/1976, which was most recently amended by Law No. 12,810/2013.

Publicly-held corporations are subject to stricter rules than closed corporations, not only because of the provisions of Law No. 6,404/1976 (as amended), but also due to audits and a number of rules issued by the CVM, usually dubbed as "Directives" (*Instruções*) and "Regulations" (*Deliberações*).

Closed Corporations

- They are generally established by a General Meeting of Incorporation, at which all shares that make up the company's capital are subscribed, the by-laws are approved and the members of the Board of Directors (*Conselho de Administração*), if any, or the members of the Executive Board (*Diretoria*) are appointed.

⁴ Bill No. 3,324/2020, which proposes the amendment to the Brazilian Civil Code to allow limited liability companies to issue debentures (bonds), is currently under analysis of the National Congress.

- There must be at least two shareholders except when the corporation is a wholly owned subsidiary (*subsidiária integral*).
- The Minutes of the General Meeting of Incorporation must be filed with the Commercial Registry of the State where the head office of the corporation is located. At the incorporation, at least 10% of the corporation's subscribed capital must be paid in.
- The by-laws must establish the corporation's capital, but no minimum amount is required (except for corporations operating in certain sectors, such as banks and insurance companies). Notwithstanding, if the corporation has a Board of Directors, it is allowed to increase the corporation's capital up to a pre-established "authorized capital" limit as provided in the by-laws.
- The corporation's capital is divided into shares, with or without par value.
- Shares may be common or preferred, but preferred shares may not exceed 50% of the corporation's capital. For companies incorporated prior to the enactment of Law No. 10,303/2001, this ratio was two-thirds.
- Common and preferred shares may be divided into different classes, depending on the rights granted.
- Generally, each share confers on the shareholder one vote at the shareholders' meetings. However, the by-laws may determine that the preferred shares have no voting rights or that this right be restricted to certain matters.
- Preferred shares may confer the preemptive right to receive dividends and/or reimbursement of capital if the corporation is dissolved and may, in accordance with the by-laws, confer final or minimum dividends, and/or a dividend of 10% above the dividend paid to the common shares.
- Shareholders are not liable for debts or other obligations of the corporation. However, they are liable for paying-in the shares they subscribed.
- Shareholders may pay their respective equity interests with assets (but not services), which are required to be appraised. Such appraisal must be approved at a shareholders' meeting.
- A corporation's capital may be increased by a shareholder's resolution. A right of first refusal is granted to existing shareholders so that all of them may subscribe for the shares to be issued as a result of the increase.
- Shares may be assigned to third parties, depending on the provisions of the corporation's by-laws. The corporation may only acquire their shares for the purposes of holding them as treasury shares, cancelling or reselling them, in special circumstances provided by law, such as redemption.
- Corporations must have an Executive Board, comprised of at least two officers, who must be individuals resident in Brazil, shareholders or not. Foreigners who wish to occupy such management positions are required to obtain a permanent residence, in accordance with minimum legal requirements.
If the corporation has a Board of Directors, only one-third of its members can be appointed as officers.
- Corporations may have a Board of Directors, depending on the provisions of their by-laws, which shall be comprised of shareholders or not, residing or not in Brazil. If the appointed members do not reside in Brazil, they must grant a power of attorney to a Brazilian resident who may then receive service of process and represent such member in Brazil. Brazilian law contemplates mechanisms for ensuring that minority shareholders and holders of preferred shares may appoint some of the members of the Board of Directors.

- Shareholders determine directors' remuneration.
- Corporations must have an Audit Committee (*conselho fiscal*) on a permanent or non-permanent basis. However, its operation is optional. The Audit Committee must be comprised of no fewer than three and no more than five members, shareholders or not. Shareholders representing 10% of the voting shares or 5% of non-voting shares may request that the Audit Committee be convened. As is the case with the Board of Directors, Brazilian law contemplates mechanisms for ensuring that minority shareholders and holders of preferred shares may appoint some of the members of the Audit Committee. The Audit Committee is one of the corporation's boards set forth by Law No. 6,404/1976, whose main function is to audit corporation's management, and it may or may not, depending on the provisions of the by-laws, accumulate attributions of the Audit Committee established in the Sarbanes-Oxley Act, 2002.
- Corporations are required to hold one annual shareholders' meeting (*Assembleia Geral Ordinária*) within four months after the closing of the preceding fiscal year, which shall pass resolutions regarding the corporation's financial statements and officers' accounts, utilization of net profits and distribution of dividends, election of directors and the Audit Committee, whenever applicable.
- Any other matters requiring shareholders' approval must be resolved at a special shareholders' meeting (*Assembleia Geral Extraordinária*).
- Shareholders may be represented at meetings by means of duly appointed proxies, who must be shareholders, attorneys, or directors of the corporation. In this case, the power of attorney must have a limited term of one year.
- Law No. 6,404/1976 (as amended) establishes the terms and procedures for the calling and opening of a shareholders' meeting and the approval of resolutions. The corporation's by-laws must comply with the rules provided therein.
- In general, matters submitted to resolution at a duly opened general meeting may be approved by shareholders representing 50% of the voting capital plus one voting share. Applicable legislation provides for a higher quorum for some specific matters. The corporation's by-laws may determine a quorum higher than that established by law.
- Shareholders dissenting from some of the matters provided by law may withdraw from the corporation, upon reimbursement of the value of their shares. Such value may be determined based on the attributable net worth or economic value, depending on the provisions contained in the corporation's by-laws.
- The corporation's financial statements must be published in the Official Gazette and another major newspaper (in terms of circulation) and filed with the Commercial Registry except for closed corporations with fewer than 20 shareholders and net worth not exceeding BRL 10,000,000.00, in which case the corporations need only file their statements with the Commercial Registry.
- As from January 1, 2022, only a summarized version of the financial statements will need to be published in a major newspaper (in terms of circulation); simultaneously, a complete version of the financial statements must be published on the newspaper's webpage.
- Brazilian corporations may privately issue securities as provided for in Brazilian law, including bonds (debentures) and warrants.

Publicly Held Corporations

Provisions applicable to closed corporations are also applicable to publicly held corporations. Note that:

- Publicly held corporations may be incorporated by means of an initial public offering (“IPO”). In order for this to occur, the company must first obtain a publicly held corporation registration statement and the issuance of shares registration statement from the CVM. Closed corporations may become publicly held corporations by obtaining such registration statements. Directive CVM No. 480/2009 and its respective amendments govern this matter.
- Publicly held corporations must pay an annual inspection fee to the CVM.
- In order for the corporation to cancel its publicly held corporation registration statement with the CVM, it must conduct a public offering to buy all outstanding shares in the market, except for the shares held by the majority shareholder. In addition to the rules contained in Law No. 6,404/1976 and its amendments, Directive CVM No. 361/2002 and its amendments also govern this matter.
- Common shares issued by publicly held corporations may not be divided into classes.
- Preferred shares issued by publicly held corporations, or shares having limited voting rights, may only be traded in the capital market if they confer at least one of the following rights:
 - i) the right to a dividend of at least 25% of the net income of the period, with shareholders having (a) preference to receive such dividends in the total amount equal to at least 3% of the net worth amount attributable to the shares; and (b) the right to receive dividends under the same conditions as common shares (after payment of the 3% minimum payment above); or
 - ii) the right to dividends at least 10% higher than the dividends attributed to common shares; or
 - iii) the right to participate in tender offers (tag along), under the same conditions guaranteed to common shares.
- Publicly held corporations may conduct public or private offerings of any security negotiated in capital markets. However, there are a number of rules issued by the CVM regarding this matter.
- The corporation’s purchase of its own shares is subject to Directive CVM No. 567/2015, in addition to the provision of Law No. 6,404/1976 and its amendments.
- The sale of the majority interest in the publicly held corporation may only be made if a public offering is carried out to acquire all of the outstanding voting shares. The price per share must be at least 80% of the price of the shares comprising the controlling block. This matter is also governed by Directive CVM No. 361/2002.
- Financial statements and all accounting issues relating thereto are subject to CVM control, by means of a number of Directives and Regulations. Therefore, the CVM has the power to determine a correction of financial statements whenever applicable; furthermore, it may require that the publicly held corporation publish its financial statements again after such correction is made.
- Publicly held corporations must send their financial information to the CVM quarterly, by means of a form called the Quarterly Information (“ITR”), which is made available to all shareholders of the

company and to the market. Publicly held corporations must also send Annual Information (“IAN”) to the CVM updated once a year. Both the ITR and the IAN must be prepared in accordance with CVM rules.

- Publicly held corporations are required to engage an independent auditor, duly registered with the CVM, subject to Directive CVM No. 308/1999 and its amendments.
- The CVM may postpone the opening of any shareholders’ meeting whenever it verifies that the shareholders were not duly informed of the agenda to be discussed at such meeting.
- Disclosing information and trading shares of publicly held corporations are subject to Directive CVM No. 400/2003 and amendments of Directives CVM No. 482/2010 and No. 601/2018, which require that all such corporations have their Information Disclosure Policy previously approved by the CVM.
- Increasing the corporate capital of a publicly held corporation and the public offering of shares, as well as any distribution of securities in the primary and secondary markets, are subject to Directive CVM No. 400/2003 and its amendments, which contain a number of requirements that must be complied with when carrying out this type of transaction.
- The amalgamation, merger or split up of publicly held corporations must comply with all of the provisions of Directive CVM No. 319/1999 and its amendments, which establish the minimum requirements vis-à-vis information to be disclosed to the shareholders on these operations, disclosure deadlines, appraisals, pricing shares in order to calculate the share swap value etc.
- The penalties that publicly held corporations, their officers, members of the audit committee and shareholders are subject to are provided in Law No. 6,385/1976 and its amendments and they may include warnings, fines, suspension or cancellation of rights, according to the severity of the violation. The CVM regulates the procedures that parties will undergo when applying such penalties.

As regards corporate governance, the CVM issued a booklet in June 2002 called “CVM Recommendations on Corporate Governance” whereby the CVM established practices that it believes should be observed by publicly held corporations, their officers and controlling shareholders. Some of the rules applicable to the corporations and their shareholders are included in Directive CVM No. 358/2002 and amendments of Directives CVM No. 449/2007 and No. 369/2002.

In some cases, these practices do not conform to the provisions of Law No. 6,404/1976, and in others, they enhance the requirements of said law. For example, the CVM recommends that if the majority equity interest is sold, a public offering for the purchase of the outstanding shares should be carried out for the same price to be paid for the shares that comprise the controlling block, and that the offering be made to all shareholders. However, Law No. 6,404/1976 determines that the price should be at least 80% and applicable solely to common shares.

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

Taxation

The Brazilian tax system is very complex, has some confusing and sometimes conflicting rules and requires a series of ancillary tax obligations, many of which overlap in certain aspects. There are different types of taxes at the three government levels (federal, state, and municipal). There are more than 80 different taxes in total in Brazil, and a close scrutiny is necessary in order to evaluate which ones will affect each individual business transaction, structure, or operation. Not surprisingly, the Doing Business report of the World Bank places Brazil in the 184th position (out of 190) in the Paying Taxes aspect – the most challenging aspect of doing business in the country, according to such report.

There have been certain improvements over the past few years, with a view to modernizing the country's tax legislation and procedures and aligning them with current international standards. However, the system still lacks the clarity, efficiency, neutrality, and stability that would create a more pro-business tax environment.

There are countless special regimes and tax incentive programs aimed at specific regions, economic sectors or types/sizes of taxpayers,

such as the SIMPLES regime for small taxpayers, Inova Simples for startups, programs for investing in technology, infrastructure, renewable/green projects, agribusiness, healthcare, specific manufacturing sectors, exports, cultural and non-profit projects etc. Also, the financial and capital markets present a specific tax treatment for the different investment categories, funds, and types of investors.

The Brazilian tax administration, particularly at the federal level and in the most developed states and municipalities, tends to take a revenue-raising approach towards taxation, and is efficient/aggressive when it comes to tax collection. Moreover, administrative tax authorities and judicial courts change their interpretations of the tax laws and rules from time to time, which impairs legal certainty in the tax area, to some extent.

The overall complexity and uncertainty make navigating the Brazilian tax system one of the most vital parts of a successful business strategy in Brazil. Obtaining continuous qualified tax advice can bring competitive advantages to businesses starting and developing their operations in Brazil.

Federal Taxes

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

Individual Income Tax (“IRPF”)

Individuals resident in Brazil are subject to IRPF on their worldwide income. IRPF must be calculated and paid by taxpayers on a yearly basis. The amount due at the end of each fiscal year, calculated over annual taxable income and after the deduction of monthly IRPF payments (including IRPF amounts withheld at source, e.g. by employers), should be paid by the last business day of April of the following year. By such date, an individual is also required to file the annual income tax return (the so-called “*Declaração do Imposto de Renda da Pessoa Física – DIRPF*”) Certain types of income are due under a pay-as-you-go system, e.g. capital gains, certain financial income etc.

For 2019, IRPF is calculated based on the following progressive scale:

Monthly Income	Rate
Up to BRL 1.903,98	Exempt
From BRL 1.903,99 to BRL 2.826,65	7.5%
From BRL 2.826,66 to BRL 3.751,05	15%
From BRL 3.751,06 to BRL 4.664,68	22.5%
Over BRL 4.664,68	27.5%

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

Capital gains earned by individuals resident in Brazil are taxed separately from other income. As a rule, capital gains are subject to income tax at regressive rates that may vary from 15% to 22.5%, depending on the amount involved, as follows:

- 15% on capital gains up to BRL 5.000.000,00;
- 17.5% on capital gains exceeding BRL 5.000.000,00 and up to BRL 10.000.000,00;
- 20% on capital gains exceeding BRL 10.000.000,00 and up to BRL 30.000.000,00; and
- 22.5% percent on capital gains exceeding BRL 30.000.000,00.

An expatriate working in Brazil is considered a resident for tax purposes:

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

Federal Corporate Taxes

Corporate Income Tax (“IRPJ”) And Social Contribution On Net Profits (“CSLL”)

IRPJ is a federal tax levied at a 15% rate. An additional surtax of 10% on annual taxable income exceeding BRL 240.000,00 (BRL 20.000,00 per month) may be charged. CSLL is also a federal tax levied at the rate of 9% on the so-called “adjusted result” (similar to the taxable income). Financial institutions, including banks, securities broker-dealers, real estate financing, credit card, leasing and insurance companies, credit unions and cooperatives, are subject to a higher CSLL rate (15%).

Companies may elect to calculate their taxable income under either the actual profit method (known as *lucro real*) or the presumed profit method (known as *lucro presumido*) every fiscal year.

Actual Profit. Under the actual profit method, companies determine their taxable income by effectively subtracting allowed deductions from the gross income.

The taxable income is the gross income minus allowed deductions. The gross income comprises active (operating) and passive (non-operating, such as interest, capital gains, etc.) income, as well as onshore and offshore income (i.e. taxation on a worldwide basis). The taxable income is further adjusted by additions and exclusions established by law (e.g. non-deductible expenses, tax loss carryforwards). Usually, the taxable base of IRPJ (taxable income) and CSLL (adjusted result) is very similar, but specific situations may give rise to the application of special rules.

Ordinary and necessary expenses may be deducted in the calculation of IRPJ and CSLL based on the actual profit method. The law also allows companies to deduct as a financial expense interest on equity (“JCP”) paid to identified shareholders, to the extent that such JCP:

- Does not exceed the amount resulting from the multiplication of the annual Long Term Interest Rate (“TJLP”), which is an interest rate calculated quarterly by the Central Bank of Brazil, on certain line items of the net worth of the company (equity, capital reserves, profits reserves, treasury shares and accumulated losses) pro rata die; and
- Is equal to or lower than 50% of the greater of
 - 1) the current fiscal year profits (before interest on equity deduction); or
 - 2) accumulated profits and profit reserves.

In the actual profit method, tax losses locally incurred may be indefinitely carried forward, but they are only able to offset taxable income up to 30% in a given fiscal year. Therefore, even having accumulated tax losses exceeding their taxable income, Brazilian companies are required to pay IRPJ and CSLL, since only 30% of such yearly income may be offset against the accumulated tax losses, no matter how large the losses are. Tax losses incurred by foreign branches or subsidiaries cannot be offset against income generated locally.

Presumed Profit. Under the presumed profit method, companies calculate their taxable income by applying a percentage set forth by law on operating income and adding the resulting amount to non-operating income. The law establishes such percentage, which varies depending on the activity conducted by the company. For instance, a percentage of 32% should be multiplied by the gross income generated by the rendering of services in general. Companies that carry out multiple activities framed within categories to which different percentages apply should use the respective percentage over the portion of the gross income related to each activity.

Certain companies are not allowed to elect the presumed profit method, such as companies with gross income exceeding BRL 78.000.000,00, with income earned abroad (except for export income), that have foreign subsidiaries, banks, etc.

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

Concepts relevant to the taxation of companies include:

Interest on Shareholders Equity (“JCP”): amounts paid or credited to shareholders as interest on shareholders’ equity – a kind of hybrid interest calculated upon certain portions of the net worth of the company – are subject to withholding tax at a rate of 15%. If the recipient is a resident of jurisdictions blacklisted as tax havens, the withholding tax rate will be 25%.

Dividends: dividends based on profits ascertained as from January 1, 1996 paid out or credited by companies are not subject to income tax, whether paid out to individuals or to companies resident in Brazil or abroad, including in jurisdictions deemed as tax havens.

Transfer Pricing: international transactions between related companies (including companies located in tax havens) are subject to transfer pricing rules in Brazil, for both imports and exports. Interest paid to foreign related parties are deemed not deductible to the extent they exceed certain parameter rates increased by spreads (prorated for the loan term).

Thin capitalization: for purposes of IRPJ and CSLL, thin capitalization rules establish two different limits, based on the debt to equity ratio, for the deduction of interest paid to related parties or to residents in tax havens or in regions with privileged tax regime. The thin capitalization rules do not affect the ability of a Brazilian resident to pay interest abroad to those recipients but impose limits on the deductibility of such amounts. In sum, the interest paid to related parties is deductible up to the limit of the debt-to-equity ratio of 2:1. The limit to interest paid to residents in tax havens or regions with privileged tax regime is 0.3:1.

Tax incentives: There are tax incentives to carry on certain activities (e.g. technology) or in certain regions (e.g. north and northeast of Brazil).

Taxes on Gross Income - Pis and Cofins

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

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

Under the non-cumulative system, the PIS and COFINS burden corresponds to 1.65% and 7.6%, respectively (the total combined rate under this system is 9.25%, but it is possible to subtract the PIS and COFINS credits granted to the taxpayer).

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

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

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

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

Finally, some special regimes are set forth for specific industries, such as the one-time PIS and COFINS levy, known as *regime monofásico*, applicable to certain pharmaceutical, cosmetics, personal care, vehicles, machines, fuels and LP gas products/activities.

Contribution of Intervention in the Economic Domain (“CIDE”)

CIDE ROYALTIES

CIDE-Royalties is a local contribution on royalties and on technical service fees remitted to non-residents. It is levied at the rate of 10%. It is due by Brazilian companies which pay royalties and technical service fees to non-residents. It is important to point out that CIDE is a deductible expense in the calculation of IRPJ and CSLL for those companies adopting the actual profit method.

CIDE Oil and Gas

CIDE-Oil and Gas is levied on import and local transactions involving oil and its derivatives, gas, and other products at specific rates.

Excise Tax – Federal Vat (“IPI”)

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

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

IPI is also imposed on the import of goods. Its rates vary according to the product’s fiscal classification, and is linked to the essentiality of the product (i.e. the more essential the product, the lower the tax rate).

Tax on Financial Transactions (“IOF”)

IOF is levied on foreign currency exchange, financing agreements (credit/loans), insurance and on transactions involving securities at different rates.

- IOF on foreign currency exchange may be imposed at the rate of 25%, but in general remittances to or from abroad are currently subject to the rate of 0.38%. Cross-border loans with a minimum average term lower than or equal to 180 days (or loans with a higher average term, but with a put or call option exercisable over such period), are currently subject to a 6% rate. Cross-border loans with a longer term are subject to IOF at the rate of 0%.
- IOF on credit is imposed at different rates. On credit agreements where a lump sum is transferred to the borrower for a predefined period, IOF is charged at a daily rate of 0.0041% limited to a 1.88% rate. Loan agreements with a non-defined period are subjected to the same rate, although said limitation is not applicable.

- IOF on insurance is charged at different rates, depending, in general, on the nature of the insurance and of the insured.
- IOF on securities may be imposed on any transaction involving bonds and securities. Currently, most transactions are subject to IOF at the rate of 0%, except certain specific cases. However, the IOF rate may be increased at any time to a maximum rate of 1.5% per day, by means of a decision of the Minister of Finance.

Import Tax (“I.I.”)

Import tax is a federal tax levied on the import of goods and is imposed upon customs clearance of the imported goods. Import tax is calculated over the customs value of the imported good. The rate may vary according to the fiscal classification of the product. The I.I. does not give rise to a tax credit to the importer, thus becoming a cost to the operation. It also has a foreign trade policy function, aimed at regulating imports through tax tariffs.

Export Tax (“I.E.”)

Export tax is a federal tax levied on the export of certain goods and is imposed upon the registration of the export record on the SISCOMEX system. The export tax is calculated over an arm's length price of the exported good. The rate may vary according to the fiscal classification of the product, and ranges from 30% to 150%. Currently, only a few types of products are subject to I.E., such as cigarettes, leather and skin, guns and ammunition (some are only subject to I.E. when exported to specific regions, generally South and Central American countries). I.E. also has a foreign trade policy function.

Social Security Contribution on Payroll (“INSS”)

The social security contributions (commonly known as INSS contributions) are levied on payroll and on salaries, and due, respectively, by companies and beneficiaries. There are also social contributions due to other agencies (SESC, SENA, etc.).

For beneficiaries, the calculation basis is the gross salary, limited to a cap of BRL 5.839,45, and the applicable rate varies from 8% to 11%, depending on the amount received.

For companies, the social contribution is imposed on total payroll (i.e. not subject to the cap above), and the total rate may reach approximately 28%, depending on the company's activities. Taxpayers from selected sectors (certain IT, technology, customer service, construction and transportation services) may elect to pay an alternative Social Contribution on Gross Revenues (“CPRB”) at a rate ranging from 1% to 4.5%, depending on the activity performed. The CPRB is a tax benefit that was set to expire at the end of 2020 but has been extended to the end of 2021.

Tax on Ownership of Rural Land (“ITR”)

The tax on ownership of rural land is payable by individuals and companies. Its taxable base is the value of the land and takes into account a variety of factors (e.g. region, degree of land use etc.). The tax rates range from 0.03% to 20%.

Tax on Large Fortunes (“IGF”)

The federal Government has not yet introduced the tax on large fortunes.

State and Federal District Taxes

STATE VAT (“ICMS”)

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

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

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

Exports are exempt from ICMS and taxpayers are allowed to maintain the credits derived from the acquisition of raw materials used upon the manufacturing of the products exported. Such credits can be transferred to third parties depending on the legislation of the relevant state and upon the authorization from tax authorities, which may take a long time to be granted.

There are special mechanisms and regimes for ICMS collection. For instance, under the tax substitution regime (“ICMT-ST”), the ICMS tax is imposed only once, upon the sale by the importer or manufacturer, at the first step of the supply chain. Under the ICMS-ST regime, the taxpayer must pay the regular ICMS levied on its own sale and pay in advance the ICMS levied on the forthcoming operations (ICMS-ST). In other words, this first player in the value added chain, known as the “surrogate ICMS-ST taxpayer”, substitutes the further players (known as the “replaced/substituted taxpayers”), which do not collect the ICMS.

There are also many peculiarities involving interstate sales, such as agreements and conventions entered nationwide or between specific states under the National Council of Treasury Policy (“Confaz”).

INHERITANCE AND GIFTS/DONATIONS TAX (“ITCMD”)

ITCMD is a state tax imposed on gifts/donations and inheritances. The ITCMD rate varies from state to state. In São Paulo, as a general rule, the ITCMD rate is 4%, but certain exemptions are granted for transfers up to a certain amount. Other states may have other rates (including progressive tax rate schedules reaching up to 8%). Note that different states may use different names for this tax (e.g. ITCMD, ITD, ITCD, ICD).

TAX ON OWNERSHIP OF MOTOR VEHICLES (“IPVA”)

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

Municipal Taxes

SERVICES TAX (“ISS”)

ISS is levied on the rendering of services listed in Supplementary Law No. 116/2003. ISS legislation and regulations are enacted by each municipality. However, local laws must follow the Supplementary Law’s guidelines. Accordingly, municipalities are not allowed to tax services not listed by the national law. ISS is also levied on imports of services.

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

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

TAX ON OWNERSHIP OF URBAN LAND (“IPTU”)

IPTU is a municipal tax applicable on the ownership, control or possession of urban land or buildings. Its taxable base is the market value and the applicable rate usually linked to a basket of criteria related to the piece of real estate (location/zoning, value, property use, type of real estate – land, building, house etc. – and the fulfillment of social function).

Some municipalities, in order to foster the development of new economic activities in their territory, grant IPTU exemptions or reductions for new ventures for a determined period.

REAL ESTATE TRANSFER TAX (“ITBI”)

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

The rate may vary according to the city. In the city of São Paulo, the rate of such tax is 3%, calculated over the market value as established by the City Hall. This tax must be paid when executing the deed of transfer.

Taxation on Cross-Border Remittances

Withholding taxes (due by the foreign recipient and subtracted from the amount payable) and local taxes (due by the Brazilian payor) may be imposed on payments made by residents in Brazil to non-residents.

Depending on the type of the remittance, a different tax treatment may arise. Taxation varies greatly in accordance with the nature of the cross-border payments, e.g. dividends, JCP, interest, technical services fees, general services fees, royalties, capital gains, financial or operating leasing expenses, imports of goods/merchandise etc.

The taxes involved should be analyzed on a case-by-case basis, since they involve withholding income tax (IRRF), CIDE, PIS and COFINS, ISS, IOF, IPI, I.I., ICMS, among other taxes and fees. Taxation on the import of goods and services, as well as on remittances for the return on equity or debt of shareholders (in the form of dividends, interest or JCP) must be carefully analyzed, as they may represent a large portion of a company's success in Brazil. Also, there are specific details of the transactions that imply tax consequences, such as those regarding gross-up provisions.

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

In respect of capital gains, the law imposes withholding tax on the sale of assets located in Brazil even if the sale is made by a non-resident to another non-resident. Normative Instruction No. 1,037/2010 contains the current tax haven blacklist as well as privileged tax regimes, under Article 24 -A of Law No. 9,430/1996, by the RFB.

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

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

Local Withholding Taxes

Payment of certain local service fees from a resident in Brazil to another resident triggers certain withholding taxes at the combined rate of 6.15% (IRRF, COFINS, PIS and CSLL), which are considered as advances of such taxes due in the relevant period. It is necessary to ascertain the nature of the service rendered to confirm whether such withholding taxes are applicable. There may be also a local services tax (ISS) withholding.

Labor Law

In general terms, both the Federal Constitution and the Consolidation of Labor Laws (“CLT”) establish rights and rules over relationships between employees and employers. Brazilian employee-employer relations are also governed by offer letters, employment agreements/contracts/amendments, labor and social security statutes and internal regulations, collective bargaining agreements and companies’ internal rules of conduct (*regulamentos internos*).

Collective bargaining agreements are entered into between employees’ and employers’ unions (*convenção coletiva de trabalho*), or directly between employees and employers (*acordos coletivos*). These agreements usually define the annual salary raise by category and may set forth rights and/or advantages that could ultimately benefit employees more or less than the existing statutory rights.

Primary Labor Rights

Under Brazilian labor law, an employee is entitled to the following enumerated rights in addition to what may be established in any written employment agreement :

- An annual mandatory salary increase, which is based on a percentage rate set forth in the collective bargaining agreement negotiated by and between the respective employer’s and employee’s unions. This percentage rate will govern regardless of whether the employees and employers concerned are affiliated with such unions. Alternatively, the increase may be based on a collective labor claim filed by the employee’s union against the employer’s union;
- An annual Christmas bonus (commonly referred to as a thirteenth salary) equal to the employee’s monthly compensation, to be paid in two installments during the year;
- An annual 30-day paid vacation, coupled with a bonus equal to one-third of the employee’s monthly compensation. The total vacation pay equals 133.33% of the employees’ monthly salary (including both the contractual amount and an average of other entitlements paid, e.g. overtime, night shift premium etc). Vacation is only due after 12 months of service (i.e. the hiring anniversary), considered a vesting period;
- An accrued severance fund (“FGTS”) paid into by the employer, who shall deposit an amount equal to 8% of the employee’s monthly compensation in a blocked bank account in the employee’s name at a branch of the Federal Savings Bank (*Caixa Econômica Federal*);
- A transportation voucher for the total cost of the employee’s transportation that exceeds 6% of the employee’s monthly compensation. Employees who do not use the public transportation system are not entitled to such vouchers;
- 15 days of sick leave paid for by the employer. Thereafter, the Social Security Institute (“INSS”) shall pay the employee’s salary during an extended sick-leave period that it determines to be reasonable;
- Risk premium: 30% premium on the employee’s wage or salary for dangerous working conditions;
- Health hazard premium: a 10%, 20% or 40% increase of the minimum wage for unhealthy working conditions;

- 120 days of maternity leave paid by the employer;
- 5 days of paternity leave paid by the employer;
- For temporary relocation/transfer, a 25% increase in pay;
- For dismissal without cause, the right to an indemnification amounting to 40% of the deposits made into the FGTS bank account during the employment relationship period goes to the employee;
- For overtime, a minimum additional payment of at least 50% of the regular hourly rate;
- For night shifts, increased pay calculated in the following manner: every 52 minutes and 30 seconds worked after 10:00 p.m. but before 5:00 a.m. is considered equal to a full 60 minutes of work;
- For night shifts, an employee will also receive a 20% bonus;
- Certain employee categories, such as bank employees (*bancários*) and telephone operators (*telefonistas*), are entitled to reduced working hours (six-hour shifts);
- For some professions there is a minimum salary guarantee;
- At least one rest day for every week, preferably on Sundays, and there are certain restrictions for work on Sundays (depending on the category) and requirement for shift schedules.

Benefits which are not provided for by law or stipulated in a collective bargaining agreement, but rather extended by the employer on a discretionary basis (i.e. discretionary bonus), might become a vested right of the employee when paid repeatedly and shall not be reduced or suppressed (exception made for certain cases, in which a separate collective bargaining agreement shall take place).

In addition, the CLT establishes a distinction between remuneration and salary. Salary is defined as the total compensation an employer pays to an employee and remuneration is a broader concept, including both salary and tips (*gorjetas*). Certain labor obligations, such as social security contributions, FGTS, severance payments, and taxes withheld are calculated based on the employee's remuneration, rather than his/her salary.

Where the Social Security contributions are concerned, the employer must pay up to 28.8% of the total payroll to the INSS. Additional rates shall apply depending on the activities developed by the company (e.g. risks related to health and safety).

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

As mentioned, Brazilian labor legislation is federal, and, therefore, applied equally to all Brazilian states. However, the various labor unions throughout Brazil do not have equal political and economic strength. As such, some labor unions are more flexible in negotiations, while others are much more rigid. Although some conditions (like work shifts and overtime additional pay) may be negotiated and governed by collective bargaining agreements, benefits which are established by law (i.e. Christmas bonus and FGTS) shall neither be waived nor suppressed, even through collective bargaining agreements, regardless of the employee's seniority. Thus, any private agreement or negotiation in this regard will be considered null and void.

Working Hours

Employees are normally limited to working eight hours per day and 44 hours per week, unless an agreement regarding compensation for hours worked (*acordo de compensação de jornada*) is negotiated or overtime is paid with an additional 50% or other higher percentage established by the collective bargaining agreement. Such number of hours could be reduced depending on the activities developed by the employee.

Every establishment with more than 10 employees is required to implement mechanical, manual or electronic working hours control. Such control must fulfill the requirements established by the Ministry of Economy and must duly reflect the hours worked. Only employees occupying fiduciary positions or external workers are exempt from registering their working hours, and, thus, are not entitled to overtime and night shift pay or reduced work shifts.

With respect to fiduciary positions (e.g. managers, directors and officers), in order to be exempt, such individuals must have effective managerial powers, including the prerogative to hire/dismiss and to take disciplinary actions against employees, not be subject to any pre-determined working hours and differentiated compensation (at least 40% higher than the compensation payable to those employees not considered as occupying a fiduciary position).

External employees are considered those who permanently perform their activities externally, in relation to which the employer is unable to effectively control their working hours. Therefore, the mere fact that employees have external activities is not sufficient to classify them as exempt, if the employer may put in place mechanisms and procedures that register their working hours (i.e. need to return to the office after external meetings, having determined clock-in or clock-out hours to follow external activities that result in their effective working hours being impossible to control).

With the changes introduced in the CLT by Law No. 13,467/2017 (“Labor Reform”)⁵, employers are allowed to establish/negotiate a bank of working hours by means of an individual written agreement entered into between the company and its employees. However, the overtime compensation for such type of bank of working hours shall occur within six months, otherwise the employer will have to pay the respective hours with the applicable additional percentage.

It is possible to establish that the compensation of hours shall occur within a period of up to 12 months, but in this case the bank of working hours must be negotiated with the labor union which represents the employees. If the overtime hours are not compensated within such period (up to 12 months), the additional payment will also be due.

⁵ Law No. 13,467/2017 became effective on November 11, 2017.

Intermittent Contract (Contingent Workers)

The intermittent contract is provided for by the CLT with effect from November 11, 2017, due to the Labor Reform. The referred employment agreement governs a relationship in which the rendering of services occurs with direct subordination (between the employer and the employee) but not on a continuous basis, since it varies between intermittent periods of service and inactivity, determined in hours, days or months, regardless of the activity type.

This type of contract must be written and must expressly indicate the remuneration of the working hour (observing the minimum wage or the remuneration of other employees of the establishment who perform the same activities, whether in an intermittent contract or not).

In order to initiate each period of service, the employer is required to notify the employee, by any effective means, with at least three calendar days in advance. The employee is required to provide the employer with a formal notification accepting or refusing the assignment in one working day.

At the end of each service period, the employee will immediately receive the payment of: (i) the respective remuneration; (ii) vacation *pro rata*; (iii) Christmas bonus *pro rata*; (iv) weekly remunerated resting period (*descanso semanal remunerado*, or “DSR”); and (v) additional payments, when applicable (risk premium etc). After 12 months of contract, the contingent worker will be entitled to enjoy 30 days of vacation.

Profit Or Result Sharing Programs (*Participação Nos Lucros Ou Resultados* - “PLR”)

If a PLR program respects legal requirements, the amount paid to an employee as part of such a program is not considered part of his/her remuneration. This is an advantage both for the company and the employee. PLR programs, however, are limited in that they may pay out in only six-month intervals, or longer. PLR programs must be discussed with the employees’ union and an in-house committee elected by the employees; and a labor union representative must be present at all times during such discussions.

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

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

Confidentiality Clauses

Brazilian labor law recognizes an implied obligation not to disclose confidential information or trade secrets to which an employee is privy during the course of the employment relationship. The breach of this obligation

is considered as a ground for dismissal with cause, even if not explicit in the employment agreement. It is possible to sustain that such an obligation remains in force after the termination of the employment relationship.

Corporate E-Mail

A minority of labor courts still understands that corporate e-mails cannot be monitored. However, several consistent decisions issued by the Court of Appeals (“TRT”) and Superior Labor Court (“TST”)⁶ establish that corporate e-mail is an employer’s property, which can be used only for professional purposes and may be monitored by the employer as long as the employee is previously informed.

Terminating an Employment Relationship

Termination of the employment relationship without cause should be preceded by written notice of at least 30 days (the employee is entitled to three additional days per worked year, with a maximum of 60 days, for a total of 90 days). Failure by the employer to give such notice obligates the employer to pay the employee the amount of remuneration that the employee normally receives in such period.

The main severance payments due in case an employer terminates the employment relationship without cause are:

- Balance of salary;
- Accrued vacation, paid *pro rata* based on the employee’s right to one month of paid vacation for each year of employment;
- Accrued vacation bonus, paid *pro rata* based on the employee’s right to one-third of one month’s compensation once every year;
- Accrued Christmas bonus paid *pro rata* based on the employee’s right to an additional 1/12 of monthly compensation for every month of employment (or a corresponding fraction thereof, for periods less than a month, but of at least 15 days). This compensation shall be calculated from January 1 of the termination year to the day of termination;
- Indemnification in an amount of 40% of the amount in the employee’s FGTS blocked bank account on the day of termination.

Other payments may be due, if particular situations occur or if certain provisions are included in the employment agreements. The employee is entitled to receive his/her severance payments by the 10th day following the dismissal, regardless of the form of dismissal or the prior notice method (worked or indemnified/paid in lieu).

⁶ Second and third levels/instances of jurisdiction, respectively.

Non-Compete

There is no legislation regulating non-compete covenants established in employment contracts or in termination agreements, but only precedents rendered by labor courts. Establishing in advance which activities are forbidden, setting reasonable territorial and temporal limits, and providing fair compensation for the employee increase the probability that such covenants will be enforced.

Moreover, it is recommended for non-compete clauses to provide a pre-established penalty or amount for duly proven damages, to be paid by the employee in case of non-compliance. Additionally, even if such provisions are included in employment agreements, the courts may permit an employee to work for a competitor, simply enforcing the penalty stipulated in the non-compete clause⁷.

Employment Agreement Termination By Mutual Consent

Brazilian labor law sets forth that employer and employee may terminate an employment agreement by mutual consent. In this case, the employee will be entitled to withdraw 80% of the amount of the FGTS amount and the employer will be allowed to reduce the payment of the indemnification over the severance fund balance to 20%, as well as to decrease the prior notice period/payment by half. However, the employee cannot be obliged/forced to adopt the referred procedure.

Judicial Ratification of out of Court Settlement Agreements

The CLT foresees the possibility of submitting an out of court settlement agreement to a Labor Court for judicial ratification, in order to provide legal certainty to this agreement. To file the request of ratification, the parties must be represented by different attorneys and a hearing is expected to occur to obtain the formal approval of the terms of the agreement.

So far, there is no consensus regarding the acceptance of full release clauses, which are usually stipulated in these agreements. A decision of the Superior Labor Court is expected to standardize the understanding regarding this matter.

Effects of Employer Belonging to a Corporate Group

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

⁷ This is because the right for work is fully guaranteed by the Brazilian Federal Constitution.

Effects of Mergers and Acquisitions (Succession)

Labor rights and obligations are not affected by mergers or acquisitions, despite the changes made to the original corporate structure.

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

Outsourcing

Before March 2017, outsourcing in Brazil was regulated according to the Brazilian Superior Labor Court's case law (Precedent No. 331, issued by the referred court). Companies were not allowed to outsource their core activity, which would be interpreted as if the service provider were rendering services under direct oversight of the hiring company's employees. Furthermore, the hiring company had secondary liability for any labor debts of the service provider towards its employees.

On March 31, 2017, Law No. 13,429/2017 – Outsourcing Law (later complemented by the Labor Reform) became effective and established the possibility of outsourcing of any activity, including the core business of the service taker/hiring company, while maintaining the secondary liability of such company regarding the labor rights of the service provider's employees.

The Outsourcing Law also established specific requirements to be observed by the service provider company, which must: (i) be enrolled with the CNPJ; (ii) be registered at the competent official bodies; and; (iii) have corporate capital compatible with the number of employees.

Furthermore, according to the Outsourcing Law, the company whose owners or partners have rendered services to the service taker/hiring company in the last 18 months as an employee or a worker without a formal employment relationship cannot be contracted to provide services.

Discrimination

Law No. 7,716/1989 establishes that to deny or prevent someone's employment on the basis of race is a crime, punishable with two to five years' imprisonment. Additionally, the Brazilian Federal Constitution forbids racial discrimination and Law No. 9,029/1995 establishes specific rules regarding discrimination based on gender, race or age.

In addition to the affected professionals, labor unions and/or the Labor District Attorney's Office are authorized to file judicial claims regarding discrimination, specifically claiming the payment of damages arising for pain and suffering sought by the employees in cases of discrimination.

Equal Payment/Salary Parity

Brazilian labor law (Article 461 of the CLT) establishes the payment of equal salaries for employees with the same position, with the same technical expertise and productivity, in the same workplace, except in case where the employee with the higher salary has worked an additional period of more than two years in the same position. With the changes implemented by the Labor Reform, in addition to such two years' difference in the position, an additional period of four years in the same company will be required, and in case the equal pay rule is not observed and there is evidence of discrimination, a fine of BRL 3.050,53 will be due to the affected employee.

Stability at Work

Some employees may acquire the right to stability at work and may only be terminated with cause. The main types of stability at work result from the following events:

- pregnancy: stability until five months after the child's birth (pregnant workers may have a leave of absence of four months, paid by the INSS);
- election as a union director: one year stability after the term of the respective mandate;
- election as a member of the internal accidents prevention commission ("CIPA"): one year stability after the term of the respective mandate;
- accident at work: one year stability after the term of the benefit granted by the INSS; and
- disease acquired at work: one year stability after the term of the benefit granted by the INSS.

With the changes implemented by the Labor Reform, companies with more than 200 employees will allow employees to elect representatives (from three to seven, depending on the number of employees in different states), who will be entitled to stability at work for the term of their mandates (12 months) and for the next 12 months.

Sexual Harassment

Law No. 10,224/01 establishes that sexual harassment is a criminal public offense punishable with one to two years' imprisonment. Some cities have special police agencies exclusively in charge of offenses against women.

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

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

Apprentices

In accordance with Brazilian legislation (Law No. 10,097/2000), companies must hire apprentices - corresponding from 5% to 15% of their staff - to perform functions which demand professional qualification.

The minor must be enrolled with one of the courses of the National Apprentices Bureau and he/she cannot work in hazardous or dangerous environments/conditions or night shifts and must be at least 14 years old but less than 18.

Apprentices who have completed elementary school may work a maximum of eight hours per day. Those who have not completed elementary school yet may work a maximum of six hours per day.

Disabled Persons

An employer shall reserve a certain percentage of positions for disabled persons. This percentage is determined according to the company's size in the following manner (Law No. 8,213/1991):

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

Mandatory Health and Safety Programs

All employers must prepare mandatory annual health and safety programs (Occupational Health Control Program - "PCMSO"; and Environmental Risks Prevention Program - "PPRA"). Such programs should include the mapping of all environmental and occupational risks of the company and monitor employees' health through medical examinations on a periodic basis, as well as on the admission and dismissal of the employee. Employers are also required to establish internal accident prevention commissions ("CIPA").

Statute of Limitation

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

Covid-19

The Brazilian Government enacted emergency labor measures to be applied by employers during the period of pandemic arising from Covid-19.

Initially, according to Provisional Measure No. 936/2020, the Brazilian Government allowed employers to propose a proportional reduction of hours and salaries (25%, 50% or 70%) for a period of up to 90 days or the suspension of the employment agreement for up to 60 days, which may be divided in two periods of 30 days each. No collective bargaining agreement with the labor union is required with respect to employees who earn either BRL 3.135,00 or less per month or more than BRL 12.202,12 per month and have an university degree. Except for the case of a 25% reduction, collective bargaining agreement with the labor union is required with respect to employees who earn between BRL 3.135,00 and BRL 12.202,12 per month.

Beginning April 9, 2020, the Brazilian Government started paying an emergency assistance, also known as the “coronavoucher”, in the amount of BRL 600,00 (or BRL 1.200,00 for women who are single parents) per month for a period of three months. Eligible beneficiaries are those who do not have formal employment, do not benefit from other social protection programs, have a monthly individual income of not more than BRL 522,20 or monthly family income of not more than BRL 3.135,00, declared income in 2018 of not more than BRL 28.559,70, and exercise activities as an individual microbusiness (MEI), freelancer, or informal worker.

The term of the emergency measure established by Provisional Measure No. 936/2020 was extended by Law No. 14,020/20 and the Measures No. 10,422/2020, 10,470/2020 and 10,517/2020. The period of reduction of hours and salaries as well as the suspension of the employment agreement may be applied for up to 240 days during the pandemic period. The period of the measures previously applied by the employees shall be considered for the limit of 240 days.

Also, by the Interministerial Ordinance No. 16,655/2020, the Brazilian Government allowed employers to rehire former employees within 90 days of the termination of the employment agreement if the same terms and conditions of the previous employment agreement are maintained.

Environmental Law

Businesses willing to operate and provide products and/or services in Brazil must adhere to a myriad of environmental regulations, as briefly described below.

Main Federal Environmental Regulations

- Decree No. 9,406/2018 implementing Decree-Law No. 227/1967 on mining, as amended by Law No. 7,805/1989;
- Law No. 6,938/1981 establishing the National Environmental Policy;
- CONAMA⁸ Resolution No. 1/1986 on environmental impact assessment;
- Law No. 9,433/1997 establishing the National Water Resources Policy;
- CONAMA Resolution No. 237/1997 on environmental permits;
- Law No. 9,605/1998 on environmental offenses;
- Law No. 9,985/2000 establishing the National Conservation Units System;
- Law No. 10,357/2001 on chemicals controlled by the Federal Police;
- Law No. 11,428/2006 on the Atlantic Rainforest biome;
- Decree No. 6,514/2008 on environmental infractions;
- Law No. 12,305/2010 establishing the National Solid Waste Policy;
- Supplementary Law No. 140/2011 on the distribution of powers to enforce environmental regulations among federal, state, and municipal authorities;
- Law No. 12,651/2012 on the protection of native vegetation (“Forest Code”);
- Law No. 13,123/2013 on access to genetic resources and benefit sharing;
- Decree No. 9,493/2018 on chemicals controlled by the Brazilian Army;
- Sectoral agreement on package take-back policy;
- Decree No. 10,240/2020 on electric and electronical equipment take-back policy;
- Decree No. 10,388/2020 on household medicines take-back policy;
- Law No. 14,026/2020 on regulatory framework for basic sanitation .

Environmental Administration & Authorities

Brazil is a Republic Federation comprised of the Union of all 26 Federal States, 5,570 Municipalities and the Federal District. Environmental authorities exist at all federative levels, namely federal, state, municipal and district.

⁸ CONAMA stands for *Conselho Nacional do Meio Ambiente*, Brazil’s National environmental Council. Please see section ‘Authorities’ below.

Environmental authorities deal with nearly all environmental issues, except for mining and water matters, which are handled by specific authorities respectively at the federal level and at both the federal and state levels. At the federal level and in some states, there are separate authorities for protected areas too.

At all levels, policy making, standard setting, and enforcement (including permitting) powers are distributed amongst the different authorities.

The table below summarizes the organization and structure of the Brazilian environmental administration and the powers vested in environmental authorities:

Table 1 – Environmental authorities in Brazil (as of June 2019)

	Environment			Protected areas	Water	Mining
	Policy making	Standard setting	Enforcement			
Federal	Ministry of Environment	National Environmental Council (CONAMA)	Brazilian Environment and Natural Resources Institute (IBAMA)	Chico Mendes Institute	National Water Agency (ANA)	National Mining Agency (ANM)
State	Secretaries of Environment of the States	Environmental Councils of the States (CONSEMA)	State environmental agency (institute, foundation, public company etc.)	(in some states) Protected areas authorities of the states	Water authority of the states	
Municipal	Municipal Secretaries of Environment	Municipal Environmental Councils	(usually) Municipal Secretaries of Environment)			

Facility-Related Regulations

Environmental legislation targets production facilities by regulating (1) protected areas, (2) the use of resources, (3) pollution control, and (4) the permitting procedure.

Facility-Related Regulations (1): Protected Areas, Atlantic Forest, Forest Code (RL and APP)

The first set of facility-related environmental legislation comprises regulations that – firstly – define certain areas as deserving protection and – secondly – prohibit them from being occupied or exploited. Protected areas legislation comprises three main regulations.

The first is Law No. 9,985/2000 establishing the National Conservation Units System. Conservation units are typically public areas which – together with their buffer zones and ecological corridors, as applicable – must be protected according to the conservation objectives set out in their mandatory management plans.

The second is Law No. 11,428/2006 on the Atlantic Rainforest biome. Conservation of Atlantic rainforest varies depending on whether vegetation is primary (i.e. native) or secondary (i.e. in recovery).

The third is Law No. 12,651/2012 on the protection of native vegetation, best known as the ‘Forest Code’. It establishes two types of protected areas, namely permanent protection areas (*áreas de preservação permanente* – “APPs”) and legal reserve areas (*reserva legal* – “RL”).

APPs are protected areas such as riparian areas, lakes, lagoons, reservoirs, water springs, mountain slopes, mangroves, and hilltops. These areas are protected as such, regardless of the existence of native vegetation, due to their ecological importance and the ecosystem services they provide.

RL, in turn, is a portion of rural land that must be conserved with native vegetation. The percentage of RL ranges between 20% and 80% of a property’s total area depending on property location.

The Forest Code also requires that rural properties be registered with the Rural Environmental Register (*Cadastro Ambiental Rural* – “CAR”), which is a nationwide electronic public record of all rural properties serving as a tool for governmental enforcement of the Forest Code.

Facility-Related Regulations (2): Water and Mineral Resources

In areas which are not protected and where facilities may lawfully operate, environmental law is concerned with the intake of resources, on the one hand, and the release of matter and energy back into the environment, on the other hand. In other words, both environmental input and output are regulated.

As for the regulation of environmental inputs, **water** and **mineral** resources merit attention.

Under Law No. 9,433/1997 establishing the National Water Resources Policy, a **permit** is required for the abstraction and use of water. For water from surface sources, the permit is granted by the National Water Agency (ANA) or by the water authority of the states depending on whether the source is under federal or state jurisdiction, respectively. For water from underground sources, the permit is granted by the state water authority.

Mining activities, which include research, mining, mine development, processing, sales of ores, use of tailings and mine closure, are governed by Decree-Law No. 227/1967, as amended by Law No. 7,805/1989 and implemented by Decree No. 9,406/2018. They all require a **permit** to be carried out.

Facility-Related Regulations (3): Pollution (Air and Water Emissions, Waste)

Regulations tackling pollution are concerned with maintaining the quality of environmental media – namely air, water, and soil – by controlling the releases of energy and matter into the environment.

Pollution is typically controlled by quality and emissions standards. **Quality standards** establish the maximum amounts of specific substances allowed to be present in a specific environmental medium (e.g. air). **Emissions standards**, in turn, set quantitative limits on the permissible amount of specific substances that may be released into a specific environmental medium from specific sources over specific time frames. **Sources** may be **stationary** (i.e. facilities) or **mobile** (i.e. products).

Facilities must comply with emissions standards as a condition of lawful operation. As for water pollution control, Law No. 9,433/1997 establishing the National Water Resources Policy demands that facilities obtain a permit from the relevant water authority to discharge pollutants into water courses.

Besides quality and emissions standards, pollution control regulations also include waste requirements. Federal Law No. 12,305/2010 establishing the National Solid Waste Policy requires facilities to formulate a **waste management plan** describing and proposing solutions to the wastes generated by their production activities. It also prescribes that waste management plans be submitted for approval by the relevant permitting authority as a prerequisite for the obtaining of the applicable environmental permit. In other words, obtaining an environmental permit is conditional on submission and approval of the waste management plan.

Facility-Related Regulations (4): Environmental Permit

An environmental permit is required for the construction, modification/expansion, installation, and operation of public and private projects and activities (i.e. facilities) that potentially or effectively use natural resources or pollute the environment. As a rule, there are three different, albeit consecutive, permits, namely the **preliminary permit**, which is granted at the planning stage and lays down the basic environmental guidelines for the subsequent stages; the **installation permit**, which authorizes construction work; and the **operation permit**, which gives permission to operate.

Projects and activities considered by legislation or the permitting authority as having significant effects on the environment require an environmental impact assessment (*estudo de impacto ambiental* – “EIA”).

Approval of the EIA by the permitting authority is a prerequisite for the granting of the preliminary permit. Other environmental studies may be also required by legislation, specially at state, municipal, and district level.

Environmental permits usually impose conditions and standards (e.g. emissions standards) that must be met for the permit to remain valid. Permits also have an expiration date and applications for renewal must be filed 120 days in advance.

Product-Related Regulations

Environmental regulations targeting products are fewer and less developed, but often more complex, than those targeting facilities.

PRODUCT-RELATED REGULATIONS (1): BIODIVERSITY AND GENETIC RESOURCES

Federal Law No. 13,123/2015 regulates access to genetic resources and associated traditional knowledge, as well as the sharing of the benefits deriving therefrom.

Access means any research or technological development activity carried out using genetic resources or associated traditional knowledge. While access does not usually require previous authorization, it must be registered with Brazil's online National Genetic Resources and Associated Traditional Knowledge Management System – "SisGen". Registration must be done prior to (1) any application for intellectual property rights, (2) the sales of intermediate products, (3) disclosure or publishing of results, whether partial or final, in scientific or news media or (4) notification of end products developed from genetic resources or associated traditional knowledge.

If access takes place abroad, **shipping** of the genetic resource material to the foreign country must be also registered with SisGen. Registration must be done before shipping.

Benefit-sharing obligations arise for manufacturers of end products developed from access to genetic resources or associated traditional knowledge. With respect to end products manufactured abroad, the benefit sharing obligation is imposed on the foreign manufacturer jointly and severally with its subsidiary, controlled or affiliate companies, sales representative, and the importer.

Benefits may be shared **monetarily** or **non-monetarily**. Monetary benefits are set at 1% of the annual net revenue from the economic exploitation of end products. Examples of non-monetary benefits include biodiversity conservation or technology transfer projects and they should be equivalent to at least 75% of what would be spent if benefits were shared monetarily.

PRODUCT-RELATED REGULATIONS (2): CHEMICALS

In Brazil, certain chemicals are controlled by the Brazilian Army or by the Federal Police. In either case, the Civil Police of the states exerts control as well. Control fundamentally means having to **register** with the

relevant authority, **obtain a permit** to manufacture, import, export, acquire, sell, store, transport, use etc. a chemical and **periodically report the amounts** handled.

PRODUCT-RELATED REGULATIONS (3): TAKE -BACK REQUIREMENTS

Federal Law No. 12,305/2010 on waste management imposes take-back requirements for the following **products and packaging**: (1) pesticides and their packaging, (2) batteries, (3) tyres, (4) waste oil and its packaging, (5) fluorescent lamps, and (6) electric and electronic equipment.

Take-back mandates may be **further introduced for other products and packaging** provided that take-back schemes are economically and technically feasible. In this sense, take-back schemes have so far been mandated for packaging in general, for household medicines and for electric and electronic equipment. State law may require take-back of end-of-life products and packaging other than those already governed by federal law.

Take-back obligations fall on **manufacturers, importers, distributors, and sellers** (collectively referred to as 'producers'), who must set up and run individual or collective schemes to ensure that products and packaging are **collected** and **recovered in an environmentally sound manner** at end of life.

Environmental Liability

Under article 225, §3 of the 1988 Federal Constitution, breach of environmental regulations can lead to both criminal and administrative penalties, in addition to the obligation to provide compensation for environmental damage. In this sense, environmental liability in Brazil is said to be '**threefold**': legal consequences for noncompliance with environmental requirements arise at three different and independent levels, namely **criminal, administrative, and civil**.

ENVIRONMENTAL LIABILITY (1): CRIMINAL LIABILITY

Federal Law No. 9,605/1998 governs environmental crimes. Environmental offenders may be **natural or legal persons** (i.e. penalties for environmental crimes may be imposed on both individuals and businesses). While individuals are usually penalized with **imprisonment**, penalties to businesses include **finances, restriction of rights** (e.g. suspension of activities, prohibition to participate in public tenders), and/or **community service** (e.g. financing environmental recovery projects). Criminal enforcement of environmental law is carried out exclusively by Public Prosecution Offices, which may bring criminal charges at either federal or state level. **For further information, please see the [CRIMINAL LAW, INVESTIGATIONS AND COMPLIANCE](#) section.**

ENVIRONMENTAL LIABILITY (2): ADMINISTRATIVE LIABILITY

Administrative (i.e. non-criminal) offenses against legislation are termed infractions. Environmental infractions and their corresponding penalties (on both individuals and businesses) are regulated by federal, state, and municipal law, as applicable. Penalties for environmental infractions range from **warnings** through

suspension of activities to **fines** up to BRL 50.000.000,00. Enforcement is carried out by environmental authorities but is open to judicial review.

ENVIRONMENTAL LIABILITY (3): CIVIL LIABILITY

Civil liability concerns the obligation to provide **compensation for environmental harm**. Unlike criminal and administrative liability, Federal Law No. 6,938/1981 adopts a system of **strict, joint and several liability** for environmental damage.

Strict liability means that individuals and/or legal entities may be held responsible **regardless of fault**, that is, even if they have not behaved intentionally or negligently. Proof of causation therefore suffices for liability to arise. Causation is established where there is evidence that the environmental damage is a direct or indirect result of a natural or legal person's activity. Direct polluters are liable due to their action or inaction, whereas indirect polluters have liability if they have financed or benefited from the activity directly causing the environmental harm.

Joint and several liability means that in situations involving **two or more wrongdoers**, each of them is **equally responsible for** providing **full compensation** irrespective of their individual behavior. However, a right of recourse between the liable polluters exists.

Civil liability for environmental harm is usually enforced by Public Prosecution Offices, which may either initiate **public inquiries** (*inquéritos civis*) or bring **public civil actions** (i.e. class actions, *ações civis públicas*) against liable polluters. Civil inquiries are investigations to identify potentially liable parties and ascertain liability. They may result in the execution of commitment agreements (*termos de ajustamento de conduta* – “TAC”), whereby liable polluters commit themselves to abide by the relevant environmental legislation and/or compensate the environmental damage, as applicable. Commitment agreements are enforceable out of court, thereby eliminating the need for public civil actions.

Federal Law No. 7,347/1985 on public civil action grants legal standing also to governments, NGOs, and private associations. There is **no limitation period** for public civil actions seeking compensation for environmental damage, which means that they can be filed at any time. Furthermore, there is **no cap on the amount of compensation**.

Infrastructure

According to the World Economic Forum, Brazil ranks 107 out of 144 countries in terms of infrastructure development. Infrastructure in Brazil requires a great amount of investment, having reached an average of 4.31% of its GDP for ten years in a row (Brazilian Infrastructure and Base Industry Association - ABDIB, 2019). Nonetheless, in the coming years, Brazil's GDP is expected to grow, according to ABDIB. The main sectors that demand investment are sanitation, railroads, transportation, and energy.

A crucial part of the government strategy to increase infrastructure investment is the Brazilian Investment Partnership Program ("PPI"), created in 2016. The program is ongoing and aims at expanding and accelerating the relationships between the state and private enterprises.

The PPI has 147 completed projects, with investments contracted in the order of BRL 260.2 billion. In addition, the PPI has 105 projects in progress in sectors such as highways, airports,

railroads, energy, mining, oil and gas, ports, waterways, and others, with an estimated investment of BRL 1.6 trillion. This represents a great opportunity for foreign companies to invest in varied sectors in Brazil.

In Brazil, the government can delegate infrastructure projects, greenfield or brownfield, to private companies through concessions. Federal Law No. 8,987/1995 ("Concessions Law") and Federal Law No. 11,097/2004 ("Public-Private Partnership Law") establish, respectively, common concession and public-private partnerships, the main difference between which is the remuneration of the private partner. Concessions may have a duration of up to 35 years and, in some cases, can be extended.

In order to invest in infrastructure projects in Brazil and participate in biddings, foreign companies must have a legal representative, open a branch or, more commonly, incorporate a subsidiary in Brazil. Another option is to form a consortium with a Brazilian company.

Sanitation

According to the National System of Sanitation Information (SNIS, 2018) 1,531 Brazilian cities do not have a public sanitation system. While about 83.6% of the Brazilian population has water supply, almost 35 million citizens still do not have access to clean water. In addition, only 53.2% of the Brazilian population has access to the sewage system, and only 46.3% of the sewage created is treated (SNIS, 2018). There are almost 88 million people in Brazil without sewage system access (Abcon; Sindcon, 2020). In the matter of solid waste, Brazil still has almost 3,000 dumps, according to the Brazilian Association of Waste Companies ("Abrelpe").

There is a lot of room for the development of the sanitation market through participation of private companies, considering the precarious fiscal situation of the public sector. According to the National Plan for Basic Sanitation ("PLANSAB"), the sector will have to invest an annual average of BRL 15.2 billion in water supply and sewage in the next 20 years.

The sanitation sector is regulated by Federal Law No. 11,445/2007, which establishes principles, objectives, and instruments. Also, Federal Law No. 9,984/2000 created the National Water Agency (“ANA”), a federal entity that coordinates the National Water Resources Management System and is responsible for the regulation of sanitation public services.

The sector will become even more attractive for investors with the government’s propensity for privatization. New sanitation rules will cause an increase in the number of bidding processes, designed to delegate sanitation services to private companies. According to the Brazilian Association of Private Concessionaires (“Abcon”), private companies have a stake of only 6% of the sector (in terms of utilities users), but this share could reach 35% by 2035.

Telecommunications

In 1997, Law No. 9,472/1997 (general telecommunications law, or “LGT”) established the regulatory framework and rules for the organization of telecommunications services. It also created the Brazilian National Telecommunications Agency (“ANATEL”).

ANATEL is responsible for adopting the necessary measures to safeguard public interest and to foster the development of Brazilian telecommunications, acting with independence, impartiality, lawfulness, impersonality, and publicity.

The nature of the special authority conferred on ANATEL is characterized by administrative independence, lack of hierarchical subordination, fixed service terms and stability of its officers and financial autonomy.

ANATEL is responsible for, among other things:

- establishing the rules applicable to the telecommunications services in the public and private regimes;
- concluding and managing concession contracts and supervising the provision of services in the public regime;
- controlling, monitoring and revising tariffs for services provided under the public regime;
- managing the radiofrequency spectrum and the use of orbits, and issuing the respective standards;
- issuing rules on the provision of telecommunications services in the private regime;
- expediting and extinguishing authorization to provide services under the private regime, supervising and applying sanctions;
- issuing norms and standards to be complied with by the telecommunications service providers for the equipment they use;
- issuing norms and standards to ensure compatibility, integrated operation and interconnection between networks, including terminal equipment;
-

- deliberating at the administrative level on the interpretation of telecommunications legislation and omissions; and
- deliberating administratively the conflicts of interest between telecommunications service providers and curbing user rights violations.

As provided in the LGT, telecommunications services are the set of activities that enable the provision of telecommunication.

Telecommunication is defined as the transmission, emission or reception, by wire, radioelectricity, optical means or any other electromagnetic process, of symbols, characters, signs, writings, images, sounds or information of any nature.

Regarding the scope of the interests they serve, telecommunications services are classified as collective interest or limited interest services.

As for the legal regime of their provision, telecommunications services are classified as public or private.

Public telecommunications service is provided under concession or permission, and the service provider is entrusted with obligations of universalization and continuity. The provision under the public regime will include the modalities of telecommunications service of collective interest.

The exploitation of the service under the public regime will depend on the prior granting, by ANATEL, of a *concession*, implying the right to use the necessary radiofrequencies, according to regulation.

The concession of telecommunication service is the delegation of its performance, by contract, for a fixed term, under public regime, subjecting the concessionaire to business risks but entitling it to the collection of user fees or other alternative revenues. Concessionaires also respond directly to obligations and are liable for damages caused. The concession may only be granted to a company incorporated under Brazilian law, with its head office and management in Brazil, created exclusively to provide telecommunications services.

The exploitation of service under the private regime will depend on the prior *authorization* by ANATEL, which will grant the right to use the necessary radiofrequencies.

Telecommunications services rendered under the private regime are those in which the rendering of the service results from the free exercise of economic activity by the private sector.

The authorization may only be granted to a company incorporated under Brazilian law, with its head office and management in Brazil, created exclusively to provide telecommunications services.

ANATEL may define certain cases which are not subject to authorization.

There are some specific taxes for the telecommunications sector:

- **Fund for Universalization of Telecommunications Services – “FUST”**: the contribution to FUST is due by all telecommunication service providers at the rate of 1% of the gross operating revenue of each calendar month resulting from the provision of telecommunication services, excluding the taxes ICMS, PIS and COFINS;
- **Fund for Technological Development of Telecommunications – “FUNTTEL”**: the contribution to FUNTTEL is due by all providers of telecommunications services, at the rate of 0.5% of the gross revenue of each calendar month, arising from the provision of telecommunications services in the public and private regime, excluding sales returns, discounts granted and the taxes ICMS, PIS and COFINS;
- **Installation Inspection Fee – “TFI”**: due by telecommunications service companies when the license is issued for the operation of the stations. Its amount is determined by ANATEL based on FISTEL Regulations;
- **Operation Inspection Fee – “TFF”**: due annually, and must be paid by March 31 of each year and corresponds to 50% of the TFI value, covering all stations licensed by December 31 of the previous year;
- **Contribution to the Promotion of Public Broadcasting – “CFRP”**: due by the providers of the services listed in the Annex of the Law No. 11,652/2008. The CFRP is to be paid, annually, by March 31, in amounts included in the Annex of the Law;
- **Contribution to the Development of the National Film Industry “CONDECINE”**: CONDECINE Telecom is owed by concessionaires, licensees and those authorized to provide telecommunications services for the provision of services using means that can, effectively or potentially, distribute audiovisual content. In principle, the impact of the contribution does not represent an increase in the tax burden due by the companies, since it is compensated by the reduction to 33% of the percentage levied on the taxable base of the TFF;
- **State and Federal District Taxes - State VAT – “ICMS”**: the tax levies onerous payments of communication services, by any means, including the generation, transmission, reception, transmission, retransmission, repetition and extension of communication of any nature. The rate ranges from 25% to 37%, according to the state; and
- **Social Contributions on Gross Income – “PIS/COFINS”**: telecommunications services are subject to the levy of PIS and COFINS under the cumulative method. Under the cumulative method, PIS and COFINS are levied at the rates of 0.65% and 3% respectively, and no credits on the purchase of inputs are available.

Oil & Gas

BACKGROUND

The oil discovery in Brazil dates back to the Colony period, when the existence of petroleum had already been recorded during the imperial regime. Back then, a license to extract bitumen at Marau riverbanks in the state of Bahia, northeast of Brazil, was granted. At that time, the regulatory framework was very poor, and the industry was basically composed of small companies and entrepreneurs.

In 1938 the discussions on the latest discoveries in the state of Bahia led to the enactment of Decree No. 3,236 establishing that the exploration of reservoirs was a monopoly of the state. In 1941 the Brazilian Government announced the first Brazilian commercial oil field in the city of Candeias, state of Bahia. During the subsequent years, a natural gas field was found in Aratu and a petroleum field in Itaparica, both also in the state of Bahia.

After a long discussion on the possibility or not of private entities investing in such segment, Law No. 2,004 was enacted in 1953, incorporating the national oil company *Petróleo Brasileiro S.A.* (“Petrobras”) and formalizing the state monopoly over the oil and gas industry.

During the subsequent years, Petrobras improved its ability to operate and develop new technologies for exploring the reservoirs. In 1968, Petrobras commenced investing in a deep-water exploration system which led to the discovery of oil at the Campos Basin in 1974, which is still the largest oil producing basin in Brazil.

In 2018, Brazil was the 10th largest oil producer in the world, with an average of 2,515,459 bbl/day, according to the U.S. Energy Information Administration.

THE FEDERAL CONSTITUTION

The 1988 Federal Constitution maintained the Federal Union’s monopoly in Article 177, by expressly prohibiting the participation of private companies in the oil and gas market.

Pursuant to Amendment No. 9/1995, a first paragraph to such Article was introduced authorizing the Federal Government to contract with companies, either state-owned or private, for the purpose of carrying out oil and gas activities, with due regard for the conditions set forth by a federal law.

As a result, Law No. 9,478/1997 (“Petroleum Law”) was passed, establishing the national energy policy on the activities related to the petroleum monopoly and creating the National Council of Energy Policy (“CNPE”), as well as a regulatory agency to regulate the oil and natural gas industry in Brazil, the National Petroleum Agency (“ANP”).

THE CONCESSION REGIME

The Petroleum Law also established the basic rules to allow either state-owned or private companies to participate in similar conditions based under the concession regime on bids to be granted by ANP.

In order to become a party to a concession agreement, the Brazilian interested entity must either participate in one of ANP’s Bid Rounds or be an assignee to a concession agreement already awarded by ANP to other players. It is worth mentioning that foreign entities may participate in ANP’s Bid Rounds but, in the event they are awarded with a concession, they must delegate the signature of the concession agreement to a Brazilian subsidiary.

Under the terms of the Brazilian Constitution and the Petroleum Law, the concessionaire bears all the risks from the activities and becomes the owner of the oil and gas after its production. As a compensation for such right, it must pay governmental participations. In summary, said governmental participations are:

- **signature bonus:** they must reflect the amount offered by the winning bidder in the proposal for the concession of crude oil and natural gas at the Bid Round promoted by the ANP. Signature bonuses must be paid to such Agency up to the date of execution of the concession agreement. The signature bonus amounts for each offered Block are set forth in the respective Bid Round Protocol disclosed by the ANP;
- **royalties:** mandatory financial compensation to be paid monthly by the concessionaires related to each field, starting in the month of the respective start-up production date, without the allowance of any kind of deductions;
- **special participation:** extraordinary financial compensation owed by concessionaires in the case of a large volume of production or high profitability, and shall be paid with regard to each field of a determined concession area as from the quarter in which the respective start-up production date occurs; and
- **fees for the occupation or retention of area:** annual payment for the occupation or retention of the area in which the oil and gas activities are being performed, assessed for each calendar year counted from the date of signature of the concession agreement. The amounts to be paid per square kilometer a year for each offered sector are set forth in the respective bidding documents disclosed by ANP.

During the period from 1997 to 2007, which encompasses the first ten years of the current regulatory concession system for the industry, proven Brazilian oil reserves jumped from 7.1 billion to 12.6 billion barrels, and proven natural gas reserves increased from 228 billion m³ to 365 billion m³.

In that same period, the annual oil production increased from 316 million barrels to 669 million barrels, and the annual natural gas production increased from 9.8 billion m³ to 18.2 billion m³. The result is that the production of hydrocarbons in Brazil more than doubled in 10 years.

THE PRE-SALT DISCOVERY AND THE PRODUCTION SHARING REGIME

On November 8, 2007, the CNPE announced the first assessments on a promising prospect of Petrobras, named Tupi, located in the Santos Basin. Initially, the estimate was that the Tupi reservoir contained four billion barrels, but more accurate studies indicated that this discovery alone holds approximately eight billion barrels of oil equivalent (“BOE”), which would increase the Brazilian hydrocarbon reserves by more than 50%.

The announcement of the Tupi reservoir sparked a series of statements on the possible existence of gigantic reserves in an exploratory frontier area named the “Pre-Salt” layer. This name results from the fact that these reserves are found below a thick layer of salt, around seven thousand meters deep in average. The Pre-Salt area is located approximately 170 kilometers away from the Brazilian coast, distributed throughout a range approximately 800 kilometers wide, between the coasts of the states of Espírito Santo and Santa Catarina.

A debate emerged in Brazil regarding what would be the most profitable and efficient regime for the exploration and production of Brazil's newfound oil reserves and resulted in the formation of an InterMinisterial Commission that decided to submit to Congress bills of law containing the new regulatory framework for the Pre-Salt area.

Therefore, in 2012 three new laws concerning Oil and Gas were enacted: (i) Law 12,276/2010 (“Onerous Assignment”); (ii) Law 12,304/2010 (creating Pré-sal Petróleo S.A. – “PPSA”, a state-owned company which is part of the Ministry of Mines and Energy – “MME” and was established to manage the PSAs); and (iii) Law 12,351/2010 (“PSA Law”).

The PSA Law, as amended by Law No. 13,365/2016, introduced a new contracting system, the Production Sharing Agreement (“PSA”), applicable to exploration and production activities in the Pre -Salt areas and in areas that may be declared as “strategic” by the CNPE. All the oil companies (i.e. Petrobras and other Brazilian and international oil companies) will be allowed to take part in bidding rounds for pre -salt blocks that will be granted under the PSA Law.

According to the PSA Law, Petrobras will always be granted a "right of first refusal" to hold a minimum 30% stake and/or to be the operator in the Pre -Salt and strategic areas' developments in any consortium formed with other oil companies for the relevant Pre-Salt public bid.

Under the production sharing regime, the oil companies bear all the risks (as in the concession regime). However, differently from the latter, under the production sharing regime the oil and gas produced will be the Federal Government's property. In turn, the oil companies will recover the costs and investment made (i.e. the cost oil) and will be entitled to a percentage of the remainder of the production (i.e. the profit oil), in accordance with the provisions of the PSA executed with the government.

The PSA will be awarded to the oil company or consortium of oil companies that provides to the government the highest share of the profit oil, along with the payment of the signature bonus, the value of which is provided in the bid documents.

The parties to the PSA will be: the Federal Union, represented by the MME; ANP, as the regulatory and supervisory agency; PPSA; and Petrobras, if it uses its right to hold the minimum stake of the relevant area and other oil companies (whenever applicable).

Although the execution of a PSA is usually preceded by a bid, Petrobras can also be directly hired by the Federal Government if this is deemed relevant for preserving national interests and attaining the goals of Brazilian national energy policy.

Despite the above, theoretically, both the concession and production sharing regimes will be preceded by a bid proceeding, which is open to Brazilian and foreign companies, but only Brazilian entities can execute either a Concession Agreement or a PSA, as detailed above.

Antitrust

Competition law in Brazil is primarily governed by Law No. 12,529/2011 (the “Brazilian Antitrust Law”) and supplemental regulation issued by the Administrative Council for Economic Defense (“CADE”), which is the agency in charge of the enforcement of competition laws in Brazil.

CADE is composed of three bodies: the General Superintendence (“GS”), the Department of Economic Studies (“DES”) and the Administrative

Tribunal for Economic Defense (“Tribunal”). The GS, led by one general superintendent, conducts antitrust investigations and decides on less complex merger control cases. The Tribunal, composed of six commissioners and one president, issues final rulings in antitrust investigations and in more complex merger control cases. The DES provides economic non-binding opinions to the GS and the Tribunal as support.

Merger Control

Brazil has adopted a suspensory merger control regime, under which the parties can only consummate and implement a reportable transaction after obtaining final antitrust approval, i.e. antitrust clearance is a condition precedent to the closing of the transaction. The parties must comply with a standstill obligation and remain independent until antitrust clearance is obtained. This rule includes the transfer of assets and employees, the exchange of sensitive information and the exercise any kind of influence⁹.

Fines for failure to notify and for implementing a transaction before it has received antitrust approval (the so called “gun-jumping” violation) range from BRL 60,000.00 to BRL 60 million and the authorities may declare void any acts deemed gun jumping.

Filing Thresholds

Pursuant to the Brazilian Antitrust Law, filing in Brazil is mandatory if all the elements of a three-prong test are satisfied:

- **the effects test:** the transaction or agreement has effects or potential effects in Brazil. A given transaction has effects or potential effects in Brazil if (i) it takes place in Brazil, or (ii) even though the transaction takes place abroad (foreign to foreign), the target (or the new company in the case of a joint venture) has or will have direct and/or indirect presence in Brazil (direct presence is typically achieved through a local subsidiary, distributor, sales representative etc., while indirect presence refers to export sales into the country).

⁹ In public tender offers the parties can close the offer before the antitrust clearance is issued but the acquirer is prevented from exercising the political rights linked to the acquired shares until antitrust clearance is obtained.

- **revenues thresholds:** at least one of the groups¹⁰ involved in the transaction or agreement had generated gross revenues in Brazil (including export sales) in excess of BRL 750.000.000,00 in the fiscal year prior to the transaction, and at least one of the other groups involved had generated gross revenues (including export sales) in Brazil in excess of BRL 75.000.000,00 in the fiscal year prior to the transaction.
- **the concentration test:** the transaction or agreement amounts to a concentration under the Brazilian Competition law. The definition of “concentration” in Brazil covers: (i) acquisition of control; (ii) acquisition of certain minority stakes or assets¹¹; (iii) joint ventures; and (iv) certain collaborative/cooperative agreements¹², and consortia, except if created for the purposes of a given tender process launched by the public administration.

The burden of submitting a notification falls on all parties involved in the transaction. According to CADE’s internal rules, the notification must be jointly submitted by (i) the buyer and the target in transactions related to acquisitions of control or equity; (ii) the merging companies in merger transactions; and (iii) the contracting parties in other cases. In practice, in most cases, the buyer leads the notification process with the cooperation of the seller.

There is no deadline for filing. CADE’s recent practice indicates that it is preferable that the parties file the notification following the execution of a binding agreement, but before the consummation of any act related to the transaction – which is consistent with anti-gun-jumping provisions. Notwithstanding, CADE may accept filings submitted in an earlier stage of the transaction, provided that the parties are in good faith to enter into a final agreement. A filing fee of BRL 85.000,00 is required.

Finally, CADE may, at its discretion, determine the filing of any transaction that does not meet the jurisdiction thresholds detailed above within one year of its consummation/closing.

¹⁰ For the calculation of the revenues threshold, a group of companies is defined as: (i) a set of companies subject to common control, internally or externally; and (ii) companies in which the companies mentioned in item (i) above hold, directly or indirectly, at least 20% of its capital stock or voting capital. With regard to investment funds, an economic group is composed of: (i) the fund directly involved in the transaction; (ii) the economic group of each investor in the fund holding, directly or indirectly, 50% or more of the fund, either individually or through co-investing; and (iii) the portfolio companies that are controlled by the fund directly involved in the transaction, as well as the portfolio companies in which such fund holds, directly or indirectly, an interest of 20% or more.

¹¹ Provided that the effects test and the revenues thresholds are met, CADE’s Resolution No. 2/2012, as modified by CADE’s Resolution No. 9/2014, provides that the following transactions trigger notification to CADE: (i) the purchase of shares by means of which the purchaser becomes the largest individual shareholder of the target; (ii) the acquisition of 20% or more of the total share or voting capital of the target when there are no overlaps or vertical links between the parties involved; and (iii) the acquisition of 5% or more of the total share or voting capital of the target when the parties are either horizontally or vertically related. As for the subscription of securities convertible into shares, notification is mandatory when (i) the future conversion into shares falls under any of the scenarios of ownership interest acquisition described above (in which case the parties are exempted from notifying the future conversion); and (ii) the security entitles the acquirer to designate members for management or audit bodies or provides voting or veto rights over competitive/commercial issues.

¹² As set forth by CADE’s Resolution No. 17/2016, an associative/collaborative agreement is subject to mandatory submission in Brazil if executed between competitors in the market related to the agreement and establishes a joint enterprise with the purpose of engaging in an economic activity, provided that the agreement stipulates sharing of risks and profits between the contracting parties. The minimum term for collaborative agreements which triggers the requirement for mandatory filing is two years. Any agreement for a period of less than two years is only subject to mandatory filing with CADE if the two-year period is reached or exceeded by means of a renewal.

Review Procedure

There are two types of review procedures under the Brazilian Antitrust Law: the fast-track procedure and the regular procedure.

Notifications filed under the fast-track procedure are cleared within 30 calendar days counted from the date of the formal submission. Following clearance, the parties must observe a 15-day waiting period to be allowed to close the transaction - during this 15-day period, admitted third parties and members of CADE's Tribunal (Brazil's antitrust agency) may challenge the clearance decision.

The fast-track procedure is available to non-complex cases, such as those (i) resulting in no, or minor overlaps (below 20% for horizontal combined market shares or 30% for vertical relationships); (ii) resulting in substitution of an economic agent or entry in Brazil by an acquisition; (iii) involving horizontal overlaps above 20% whenever the Herfindahl-Hirschman Index ("HHI") variation is below 200 points and the transaction does not lead to a combined market share above 50%; or (iv) other cases not included in any of the situations above that do not result in competition concerns at the discretion of CADE.

In practice, most non-complex transactions filed under the fast-track proceeding have been cleared by the GS in 15 to 30 calendar days counted from the date of the formal submission of the merger filing.

Mergers that entail high concentration or that raise competition concerns are generally reviewed under the regular procedure and are usually reviewed carefully by CADE. In such cases, CADE performs a thorough analysis of the consequences of the joint market share resulting from the transaction, in addition to rivalry and entry conditions. If CADE deems the transaction as being harmful to competition, leading to a substantial lessening of competition and to the creation of incentives for price increases, it may either demand remedies or block the deal.

Under the regular procedure, the parties are required to fill out a full form, similar to the FORM CO in the European Commission, and engage in pre-notification talks with CADE. These pre-notification talks take, on average, four to six weeks, but can be done simultaneously with the drafting of the filing form. In general, legal representatives have a preliminary meeting with CADE in which they present the transaction, its effects or lack thereof, and discuss the market information to be submitted. If CADE agrees with the parties' proposed relevant market definition and information to be provided, a first draft of the full form is submitted for an informal review. CADE takes one or two weeks to review the proposed draft notification and to make comments. After incorporating CADE's comments to the draft, if necessary, the parties formally submit the transaction to CADE.

CADE usually requests information from customers, suppliers and competitors during the merger review. Although customers, suppliers and competitors consulted by CADE are legally obligated to respond within a certain timeframe, they do not have actionable rights during the review process.

CADE may admit third party intervention, customers, suppliers and competitors included. Formally admitted third parties in the merger review have the right to appeal the clearance decision and have the right to submit motions during the merger review process.

CADE's total review period under the regular procedure is 240 calendar days. This 240 -day period can be extended once, for an additional 60 days, if requested by the parties, or for an additional period of 90 days by request of a member of CADE's Tribunal.

In complex cross-border transactions that are being reviewed simultaneously in multiple jurisdictions, CADE will likely ask the parties to grant a waiver of confidentiality for the sharing of confidential information among the competition agencies of multiple jurisdictions.

Both structural and behavioral remedies are generally accepted by CADE, although the latter is less common. To undertake a negotiation of remedies, the parties must submit a proposal to CADE up to 30 days after the GS has concluded the review. However, the lack of a formal timetable can still be a challenge for the negotiation of remedies.

The delivery of misleading or false information, documents or statements is punishable by a pecuniary fine ranging from BRL 5.000,00 to BRL 5.000.000,00 and the antitrust approval request could also be rejected due to a lack of sufficient evidence.

Anticompetitive Conduct

Article 36 of the Brazilian Antitrust Law sets forth the legal framework for anticompetitive conduct in Brazil. A given conduct may constitute an antitrust violation whenever it has the ability (even potentially) to limit, restrain or, in any way, lessen competition or enterprise; lead to control over a relevant market; increase profits on a discretionary basis; or engage in abuse of a dominant position¹³.

Article 36 contains a non-exhaustive list of practices that may constitute antitrust violation, provided they have or potentially have the object or effect of harming competition, including (i) horizontal conduct such as collusion and agreements between competitors to lessen competition, as well as (ii) unilateral conduct such as resale price maintenance, price discrimination, margin squeeze, tying and bundling agreements, refusals to deal, exclusivity arrangements, market foreclosure, limitations on access to inputs or distribution channels, predatory pricing, among others.

Antitrust investigations in Brazil may subject companies to fines ranging from 0.1% to 20% of the gross revenues of the company, group or conglomerate in the fiscal year prior to the launching of the formal investigation in the line of business in which the infringement occurred.

¹³ A dominant position is presumed when a company or group of companies controls 20% of a relevant market. A dominant firm may only be condemned by CADE to the extent that an abuse of such dominance is verified.

In order to determine the actual percentage applicable to a defendant, CADE takes into account the factors listed under Article 45 of Law No. 12,529/2011, namely: (i) the gravity of the violation; (ii) whether the party has acted in good faith; (iii) the economic benefits the party aimed to achieve by means of the anticompetitive conduct; (iv) whether or not the party has successfully achieved its goal; (v) the extension of actual or potential harm to competition, the Brazilian economy, consumers and/or third parties; (vi) the negative impacts of the conduct on the market; (vii) the economic condition of the party under investigation; and (viii) recidivism. In case of recidivism, the applicable fine is doubled.

In addition to the potential fines, corporate defendants are also subject to the following administrative sanctions: (i) publication of the final decision issued by CADE in the Brazilian press (something that can result in risk for the reputation of a company); (ii) prohibition to enter into contracts with the public administration and/or to obtain credit from public financial institutions for up to five years; (iii) mandatory license of IP rights to third parties; (iv) suspension or prohibition to get better payment conditions to resolve tax debts; (v) spinoff; and (vi) prohibition to run a business or up to five years. CADE may also order a corporate spin-off, transfer of control, sale of assets or any other structural measure deemed necessary to end the detrimental effects associated with the wrongful conduct.

Officers and directors liable for unlawful corporate conduct may be fined an amount ranging from 1 to 20% of corporate fines. Other individuals, business associations and other entities that do not engage in commercial activities may be fined from approximately BRL 50.000,00 to BRL 2 billion.

Antitrust enforcement in Brazil is primarily administrative in nature. However, individuals involved in certain conduct, such as cartels and bid rigging, can also be criminally prosecuted, as provided in Law No. 8,137/1990 and Law No. 8,666/1993.

Consumer Rights

Law No. 8,078/1990 enacted the Consumer Protection Code to enforce the rights of the consumers assured in Article 5 of the Federal Constitution.

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

Amongst the rights ensured to the consumers we can find health and safety protection in respect of products and services purchased; access to clear and specific information referring to merchandise, goods and services in general; the prohibition of any kind of misleading advertising; and control of contracts containing “abusive” clauses, including those that may lead the consumer to assume obligations excessively burdensome.

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

This law has also, generally, shifted the burden of proof away from the consumer to the supplier of goods and services. Accordingly, in the majority

of cases the seller of products or provider of services must produce evidence confirming that the merchandise or services comply with the norms and standards required by law, that any possible damages incurred by the consumer were not caused by the products or services, and also that there is no direct causality nexus between the damages incurred and the product or service purchased.

Therefore, sellers and service providers are bound to strict liability for the product sold and services rendered. Accordingly, once the damage is ascertained and the nexus between the damage and the product or service is confirmed, the obligation to indemnify arises, irrespective of whether the seller or provider has acted with or without fault.

Consumer protection legislation also provides for the joint and several liability of all parties involved in the supply chain. However, the service provider or seller of a product will not be held liable if the consumer or a third party is found exclusively liable for the damages. Additionally, the adoption of the “piercing of the corporate veil” is admitted whenever considered necessary to protect consumers from abusive or fraudulent acts.

The Brazilian Consumer Protection Code is compatible with similar regulations on the subject matter in other countries. Brazilian courts have been strict upon enforcing this law with the aim of ensuring that it adheres to its main objective of protecting consumer interests and fostering fair competition between the players in the supply market.

Understanding consumer rights in different jurisdictions will certainly contribute to the expansion and growth of business dynamics within the Brazilian territory in a more expeditious, profitable, and legally protected manner.

It is worth mentioning that the Brazilian Consumer Protection Code may undergo some amendments due to the Bill of Law No. 3,514/2015, which is pending before the National Congress. The bill contemplates general rules on consumer protection in e-commerce.

Arbitration

In 1996, the Brazilian Arbitration Act (Law No. 9,307/1996) was enacted, establishing a modern legal framework based on the arbitration laws of developed countries as well as on the UNCITRAL Model Law on International Commercial Arbitration. This Act grants foreign investors additional security when entering into contracts with Brazilian domiciled parties containing clauses that submit any arising conflicts to arbitration.

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

Brazil is also party to the Inter-American Convention on International Commercial Arbitration and to the Mercosul Treaty on International Commercial Arbitration Agreements.

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

Recently, the Brazilian Arbitration Act was slightly altered by Federal Law No. 13,129/2015, which contemplates the use of arbitration by governmental entities in order to solve disputes involving disposable asset rights. In addition, (i) arbitrators may now request the Judiciary Branch for cooperation on urgent situations regarding law enforcement and protection of rights; and (ii) before resorting to arbitration, the parties are also allowed to seek advance protection of their rights and injunctions via judicial measures.

Criminal Law, Investigations and Compliance

Criminal Liability In Brazil

Criminal liability in Brazil is subjective (personal), which means that it may only fall upon the individual if and when he/she directly performs a crime. Corporate entities cannot be held criminally liable except in the case of crimes committed against the environment.

Therefore directors, officers and administrators of a legal entity cannot be held criminally liable for acts committed by third parties. It must be proved that they performed acts in contravention of the Brazilian Criminal Code or any other criminal law, as objective criminal liability is not allowed by the Brazilian criminal system.

In addition, under Brazilian Law, the concept of succession in criminal liability does not exist.

Criminal Procedure

Police Inquiry is the technical name for the official investigation into a potential criminal fact. It is not a process, but a pre-procedural phase which seeks information that may serve - or not - to support the District Attorney's Office to press charges against an individual.

As stated in article 4 of the Brazilian Criminal Procedure: "*the judicial police shall be exercised by the police authorities in the territory of their respective circumscriptions and shall aim at determining criminal offenses and their authorship.*"

A Police Inquiry should be completed in the shortest time possible and, in any case, within the time limit set by law. As established in Article 10 of the Brazilian Criminal Procedure "*the investigation shall end within (...) a period of 30 days, provided that [the defendant is] set free, on bail or without it.*"¹⁴

Once the Police Inquiry is completed, the Public Prosecution Office has the following options: (i) file a complaint against the defendant, if possible; or (ii) require further diligences from the police authority, if there is any doubt; or (iii) request the investigation to be closed if the facts found are weak or incomplete.

Therefore, if a complaint is filed against the defendant, the case goes to a single judge, who will analyze the facts and begin the criminal lawsuit, when the defendant will be subpoenaed to present his/her written defense, elaborated by a lawyer. After the defense's response, the judge can summarily acquit the defendant. Otherwise, a hearing is appointed.

¹⁴ However, in practice, the investigation usually goes beyond the reasonable time.

The hearings are supposed to combine the victim and the witnesses' testimony and the defendant can produce appropriate evidence in the course of the criminal lawsuit. After that, there is the judicial interrogation, when the defendant has the option to remain silent or to say anything to defend him/herself, not being subject to perjury. At the end of the hearing, the final arguments are presented by the parties. At the end, the judge passes sentence, ruling for the defendant's acquittal or conviction. Such sentence can be appealed by any of the parties.

Anticorruption and Compliance

When dealing with **companies**, Brazilian's applicable legislation is of civil and administrative nature, mostly restricted to the Brazilian Anti-Corruption Law (Law No. 12,846/2013) and its regulatory decree (Decree No. 8,240/2015). Relevant provisions are the following:

Brazilian Anti-Corruption Law

Within the administrative sphere, the sanctions provided for in the law and applicable to companies held liable for any corruption acts shall be (i) a fine in the amount of 0.1% to 20% of the gross revenue earned during the fiscal year prior to the filing of the administrative proceedings, excluding taxes, which shall never be lower than the obtained advantage, when it is possible to estimate it¹⁵; and (ii) the extraordinary publication of the condemnatory decision.

In addition to the administrative penalties, the Anti-Corruption Law lists a few penalties imposable only at the end of a lawsuit, such as: (i) confiscation of assets, rights or values representing an undue advantage directly or indirectly obtained by way of the wrongful act; (ii) suspension or partial shutdown of activities; (iii) compulsory dissolution of the company; and (iv) prohibition from receiving incentives, subsidies, grants, donations or loans from public bodies or public financial institutions or publicly controlled institutions, for a period of one to five years.

Decree No. 8,420/2015

Companies may be eligible for leniency once they collaborate with the investigations and administrative proceedings they are subject to, provided that their collaboration results in (i) the identification of other individuals/companies involved in the administrative offense, when appropriate and (ii) the agile gathering of information and documents that prove the offense under investigation.

In this regard, article 30 of the decree sets forth that the collaborating company must (i) be the first to express interest in cooperating with the investigation of a specific harmful act, when such circumstance is relevant; (ii) have completely ceased its involvement in the harmful act as from the date when the agreement was proposed; (iii) admit to its participation in the administrative violation; (iv) cooperate fully and permanently with the investigations and administrative proceedings and attend its procedural acts, at its own expense and

¹⁵ In case it is not possible to adopt the criterion regarding the value of the company's gross earning, the applicable fine shall range from BRL 6.000,00 to BRL 60.000.000,00.

whenever requested, until its closure; and (v) provide information, documents and evidence that prove the administrative violation.

The Law provides for the confidential treatment of all leniency proposals. Access to the content of such proposals is restricted to the public officers in charge of the procedure.¹⁶

If the leniency agreement proposal is rejected, it will not imply the recognition of the practice of a harmful act by the interested company, and no disclosure will be made in this sense – except with the company’s consent.

The interested company may withdraw the proposed leniency agreement at any time before its signing.

If the agreement is not signed, the documents submitted during the negotiation will be returned to the interested company, with no retention of copies. Its use for future accountability purposes is prohibited, except when the Federal Government is able to have access to the documents independently and regardless of the leniency agreement.

The leniency agreement will contain, among others, provisions that deal with (i) the commitment to comply with the requirements set out in article 30 (explained above); (ii) the loss of the agreed benefits in the event of non-compliance with the terms of the agreement; (iii) the extrajudicial enforceable nature of the agreement; and (iv) the implementation or enhancement of an integrity program.

The effects of a successful agreement, if the company has fully complied with it, will be one or more of the following: (i) exemption from the extraordinary publication of the administrative decision imposing the penalties; (ii) exemption from the prohibition of receiving incentives, subsidies, grants, donations or loans from public entities and financial institutions controlled by the government; (iii) reduction of the final amount of the fine; and (iv) exemption from or reduction of the administrative penalties provided for in the Brazilian Bidding Act (Law No. 8,666/1993). The effects of the leniency agreement will be extended to other companies from the same group, once they have signed the agreement and respect all its conditions.

In addition, the Anti-Corruption Law also establishes an incentive to create and implement integrity (or compliance) programs within companies. Although these initiatives are not mandatory, companies are strongly encouraged to implement integrity programs, for they will serve as a defense and mitigation factor in case of facing corruption investigations or charges¹⁷.

The integrity program will be evaluated for its existence and application, according to the following standards:

- commitment of the company’s top management, including the board, evidenced by the visible and unequivocal support to the program;

¹⁶ However, please be aware that Brazil has faced a lot of illegal leakages of information related to Operation Car Wash – being almost impossible to assure total confidentiality.

¹⁷ Some laws require companies under special circumstances to adopt elements of these programs, such as financial institutions subject to the regulation of the Brazilian Central Bank (“BACEN”). Also, an increasing number of corporations are forced to implement integrity programs in order to maintain or enter into contracts with the public administration.

- standards of conduct, code of ethics, integrity policies and procedures, applicable to all employees and managers, regardless of their position;
- standards of conduct, code of ethics and integrity policies extended, when necessary, to third parties such as suppliers, service providers, intermediaries and associates;
- periodic training on the integrity program;
- periodic risk analysis to make necessary adjustments on the integrity program;
- accounting records that reflect fully and accurately the financial transactions of the company;
- internal controls for ensuring the drafting and reliability of the reports and financial statements of the entity;
- specific procedures to prevent fraud and illegal acts under bidding procedures in the execution of administrative contracts or in any other interaction with the public sector, even if mediated by third parties, such as payment of taxes, inspection proceedings, or application for obtaining of permits, licenses and certificates;
- autonomy, structure and authority of the internal body responsible for implementing the integrity program and for the monitoring of its compliance;
- reporting channels (hotline), open and widely disseminated to employees and third parties, and mechanisms for the protection of whistleblowers in good faith;
- disciplinary actions in case of violation of the integrity program;
- procedures to ensure the prompt interruption of irregularities or violations and timely remediation of the generated damages;
- adequate proceedings for hiring (“vetting”) and, as appropriate, supervision of third parties such as suppliers, service providers, intermediaries and associates;
- verifications, during mergers, acquisitions and corporate restructuring, on the practice of irregularities/offenses or the existence of vulnerabilities within the legal entities involved;
- continuous monitoring of the integrity program, to improve the prevention, tracking and combat of the occurrence of harmful acts provided for in Law No. 12,846/2013; and
- transparency with regard to donations from legal entities to candidates and political parties.

When dealing with **individuals**, authorities tend to apply the Criminal Organizations Law (Law No. 12,850/2013).

If the cooperation agreement is not duly signed, there is, in principle, a guarantee that the information provided during the negotiation will not be used against the collaborator.¹⁸

As regards the use and disclosure of the information, there is no direct mention of it. The conviction of an individual based solely on the oral information provided by the collaborator is prohibited by the law.

Potential benefits for those who have cooperated effectively and voluntarily are, in accordance with the law: (i) granting of judicial pardon; or (ii) reducing the prison sentence by up to two-thirds or even replacing it with a sentence of restrictive rights. It is necessary that the cooperation produces one or more of the

¹⁸ “The parties may retreat from the proposal, and the self-incriminating evidence produced by the collaborator shall not be used exclusively against him”. What we understand from this extract is that the information might be used against the collaborator if it implicates other people beyond him/herself.

following results: (i) identification of participants in the criminal organization and of criminal offenses committed by them; (ii) revelation of the hierarchical structure and of the division of tasks of the criminal organization; (iii) prevention of criminal offenses arising from the activities of the criminal organization; (iv) full or partial recovery of the products or benefits derived from criminal offenses committed by the criminal organization; or (v) location of any victims of the criminal organization with their integrity preserved.

Internal Investigations

Corporate investigations have been often used in cases of internal fraud, corruption, competition issues, among others, in order to guide the adoption of necessary measures and the potential communication to public authorities.

The Brazilian Bar Association, aiming at regulating corporate investigations (or, as it is called, defensive investigation), recently approved the Internal Provision No. 188/2018, regulating the exercise of lawyers' professional prerogative to carry out such task.

- The practice of corporate investigation is defined as the "*complex of investigative activities developed by a lawyer, with or without the assistance of a technical consultant or other legally qualified professionals, at any stage of the criminal prosecution, procedure or degree of jurisdiction, aimed at obtaining elements of evidence destined to the constitution of licit proof collection, for the protection of rights of its constituent*".
- Defensive investigation may be carried out during the preliminary investigation stage, during the judicial process, at any stage, including when serving penalty time in the criminal execution, and as a preparatory measure for the review of the criminal procedure.
- The lawyer has the duty to preserve the confidentiality of the information collected.
- Lawyers/other professionals who assist the investigation do not have the obligation to report the facts under investigation to public authorities.
- Corporate investigation is an exclusive lawyer's activity.
- The Anti-Corruption Law requires that internal agents create and maintain effective compliance programs that allow the company to investigate, discover and discipline acts that could violate the anti-corruption legislation.
- An internal investigation tends to begin with the joint operation of the concerned company, the company that provides forensic advice, and an external law firm for reasons of both impartiality and, essentially, confidentiality of the procedure. From there, it is possible to "divide" an internal investigation into four basic phases: (i) the development of a research plan; (ii) document review; (iii) interviews; and (iv) report.
- The forensic consulting companies may assist in the process and guarantee the regular collection, preservation, processing and availability of the data. The external law firm allows the review process to take place with independence and impartiality.

With regard to the report, all the material produced in an investigation – which may contain clear conclusions about the facts or not – is, in theory, under the rules of attorney-client privilege. The confidentiality of the

procedure is guaranteed while the interest of the company lasts, since a company is not required to disclose the results of its investigations.

Intellectual Property

Brazil is a signatory of the main international intellectual property treaties (such as the Paris, Bern and Rome Conventions, and TRIPS). Intellectual property rights are regulated by federal laws in Brazil (Law No. 9,279/1996 – “Industrial Property Law”, which also regulates unfair competition; Law No. 9,610/1998 – “Copyright Law”; and Law No. 9,609/1998 – “Software Law”).

Intellectual Property comprises copyrights (related to literary, scientific and artistic works),

software protection and also industrial property, which contains trademarks, patents, designs, trade secrets and other intangible assets.

The Brazilian Patent and Trademark Office (*Instituto Nacional da Propriedade Industrial* – “INPI”) is the governmental agency in charge of protecting industrial property rights, as well as registering licensing and technology transfer agreements.

Patents

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

Application Requirements

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

Terms of Effectiveness

Patent protection is obtained by registering the patent with the INPI. Patents may be granted for periods of:

- 20 years for inventions
- 15 years for utility models

The exclusivity period will commence as of the granting date of the patent and once the patent expires, the invention enters the public domain.

Compulsory Licensing

According to Brazilian law, a non-exclusive, compulsory license may be issued on these occasions:

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

Timing

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

Industrial Designs

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

An industrial design must advance the current state of the art and must be original (so defined as “those that have a distinctive visual configuration from previous objects”). The law especially establishes that the combination of known elements may be original if it results in an original combination. The law excludes from protection any works deemed purely artistic, with no industrial application.

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

Trademarks

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

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

Terms of Effectiveness

Brazil adopts the International NICE classification for service and product trademarks to assess classes of registration. Each application may only correspond to one class of products/services and the protection of the trademark limited to its class/registration. Although, the INPI released a regulation of a multi-class system, as well as, the co-ownership of trademarks, these options are not yet available for local trademark applications.

The protection granted to trademark registrations in Brazil is limited to the Brazilian territory (principle of territoriality) and to the field of activity in which the trademark is used (principle of specialty), except for:

- Well-known trademarks, even if not registered in Brazil, in accordance with the Paris Convention; and
- Highly renowned or famous trademarks registered in Brazil (once registered in Brazil, the protection is extended to all classes of products/services).

Effective registration in Brazil will provide a 10 -year protection period for the trademark and may be extended for unlimited successive 10-year periods.

The use of a trademark is not mandatory for registration purposes. However, the owner of a trademark registration must start using the trademark within five years from its registration date in order to avoid forfeiture proceedings.

Timing

The issuance of a trademark in Brazil takes approximately 12 to 18 months.

Madrid Protocol

Brazil recently adopted the Madrid Protocol (more specific on June 25, 2019) which became effective on October 2, 2019. With the adherence to the Madrid Protocol, anyone - individual or legal entity - can apply at the same time, in a single process and language, for the registration of a trademark in the member countries of the Protocol.

The INPI may now act as the Office of origin and as designated Contracting Party, sending and receiving international applications within the scope of the Protocol.

Additionally, international applications designating Brazil can now be filed using the multiclass system as well as indicating co-ownership applicants. Furthermore, and while filling through the Protocol, it is no longer mandatory for a foreign applicant to appoint a local attorney, and the registration fees can be paid in a single currency, avoiding conversion problems. Finally, with the Madrid Protocol, the date for the extension of the

trademark registration will be unique, even if new countries are included in the registration list for the same trademark.

Software

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

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

The copyright protection offered under the Brazilian copyright legislation is also applicable to the software law. However, in respect of moral rights the copyright law is not applicable to software, even though the law protects the right of the author to claim authorship at any time; and oppose any unauthorized changes that might affect his/her honor or reputation.

The law also regulates the ownership of the software created during an employment or contractual relationship. If the software was created by the employee or the contracted party during contractual and employment relationships, the commercial exploitation will be owned by the employer/contractee.

Domain Names

In Brazil, domain names are registered with the Brazilian Internet Steering Committee – CGI.br, created by Ordinance No. 147 – and Registro.br is the official entity responsible for domain name registration. Domain names are granted on a first-to-file basis, nonetheless, there are regulations against registering domain names with proprietary words or trademarks.

For foreign companies that wish to register a domain name, certain specific rules and restrictions may apply. Such companies must be represented before the Registro.br by a local agent or attorney, with the power to register, cancel, and transfer title to the domain name as well as change the designation of the individual who represents the company in the registration authority.

Copyright

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

in any support, tangible or intangible, known or that may be invented in the future.” Copyright protection is independent of registration and lasts for 70 years after the death of the author.

Copyright registration is not mandatory for obtaining protection. However, registration creates a presumption of authorship in case of litigation. In this case, the copyright may be registered with specialized agencies in accordance with the nature of the work, such as the National Library (for literary works), the School of Fine Arts of the Federal University of Rio de Janeiro (for paintings, printings and sculptures), the Federal Council of Engineering and Architecture (for designs and architectural works), among others.

Technology Transfer

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

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

Even though a formal rule limiting the term for a technology transfer agreement does not exist, the INPI has traditionally approved technology transfer agreements for a five-year period. Such term may be extended for an additional five-year period subject to INPI’s approval, for example if the company proves that the technology has not been fully absorbed by the recipient.

Franchises

Franchises in Brazil are subject to a Franchise Law (Federal Law No. 13,966/19), which was recently enacted, revoking Law No. 8,955/94. The intention of the new legislation is to consolidate the Brazilian jurisprudence on the subject, to clarify controversial issues and to provide greater transparency in the activities that involve the franchises and the information that is exchanged between the franchisee and the franchisor.

Franchising is defined as a system by which a franchisor grants to a franchisee the right to use a trademark or patent, along with the right to the exclusive or non-exclusive distribution of products or services and, eventually, also the right to use the technology of implementation or management of related business or operational system developed or owned by the franchisor.

The law sets forth in details all the information that must be disclosed by the franchisor before the execution of any binding document (“Franchise Offer Circular”). However, the new Franchise Law innovates by determining:

- Specific rules regarding the sublease of the commercial point by the franchisor to the franchisee;
- The mandatory delivery in Portuguese of the Franchise Offer Circular and a sworn translation of the franchise agreement, whose costs must be borne by the franchisor;
- The absence of a consumer relationship between the franchisee and the franchisor, nor an employment relationship between the franchisee's employees and the franchisor;
- The possibility of choosing an arbitration court to resolve disputes related to the franchise agreement; and
- The possibility of adopting the franchise model by state-owned companies or non-profit entities.

Although registration of a franchise agreement is not a prerequisite for its validity and enforceability between the parties, the registration with the INPI is required for: (i) remittance of royalties abroad; (ii) deductibility of payments for Brazilian tax purposes; and (iii) enforcement of the obligations before third parties.

Rui Badaró

Rui Badaró is a lawyer in Brazil and Portugal; Partner in Badaró e De Luca Law Firm since 2012; PhD in International Law at Catholic University of Santa Fe; Master in International Law at Methodist University of Piracicaba, DEA en Droit International, Europeen et Comparé - Université de Paris I – Panthéon Sorbonne, Coordinator of the International Law School of the of the Brazilian Academy of International Law - ABDI, Member of the CRI at OAB/SP, Member of the CRIIM at OAB/RS, author of several books and legal articles published in Brazil and integrates the Scientific Council of several legal journals in Brazil and and abroad.



Luis Carlos Szymonowicz

Graduated and Master in Law from the Law School of the University of São Paulo – USP. • Postgraduate in Banking and Accounting from Fundação Getúlio Vargas – FGV SP. • Effective Member of the Advisory, Legal, Tax and Exchange Committees of ABBI - Brazilian Association of International Banks 1994-2000. • President of the Brazilian Bar Association - OAB / SP - International Relations Commission • President of the Belgian-Luxembourgian Chamber • Member of the Tax Council of FECOMERCIO • Member of the International Relations Council of FECOMERCIO • FIA consultant • Funcex consultant • Worked as a volunteer professor at the University of São Paulo Law School - USP • Consul General of Suriname, in São Paulo - Brazil. • Acts in consulting in several countries helping companies and governments to organize, structure and conduct business projects.



A **solid** and **successful**
partnership



BADARÓ & DE LUCA
Sociedade de Advogados

SZYMONOWICZ
ADVOGADOS ASSOCIADOS