Doing
BUSINESS IN BRAZIL

8th edition

BRITCHAM
BRASIL

The British Chamber of Commerce and Industry in Brazil
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The British Chamber of Commerce and Industry in Brazil - BRITCHAM BRASIL

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Foreword

Brazil, with its vast economy and wealth of resources, has consistently attracted the interest of international investors and entrepreneurs eager to explore its business opportunities.

However, historically, the country's regulatory and tax environment has posed complex challenges, discouraging companies from establishing or expanding their operations.

In this context, the current Tax Reform emerges as a direct response to these difficulties, promising a simpler, more transparent, and more efficient system. The Brazilian Tax Reform, currently in progress, seeks to modernise and reduce bureaucracy within the country's intricate tax system. Inspired by international models, the reform proposes the implementation of a value-added tax (VAT) aimed at consumption, which simplifies taxation and offers a clearer view of the tax environment for investors. Furthermore, discussions surrounding special regimes and the granting of tax incentives for strategic sectors create a window of opportunity for new companies, which now find a more welcoming, equitable, and transparent scenario for investment.

A significant change introduced by the reform is the shift in the taxation agent's focus, now concentrating on the destination

rather than the origin. This transformation addresses long-standing barriers imposed by the "tax war" between states, paving the way for the consolidation of companies that previously faced competitive and regional obstacles.

Simultaneously, progress in discussions regarding Corporate Income Tax (IRPJ) and the recent adoption of Transfer Pricing (TP) rules that are more aligned with OECD standards reinforce Brazil's direction towards greater integration with international business models, providing enhanced legal certainty and predictability.

From Brazil's macroeconomic perspective for 2025, moderate growth is anticipated, with GDP projected at 2.4% by both IPEA and the IMF.

This growth is supported by improvements in key economic indicators throughout 2024, such as a reduction in the unemployment rate, an increase in average income, and the maintenance of inflation within the tolerance target.

However, this moderate growth is associated with several persistent challenges, including the need for effective economic policies to sustain growth and measures to address global uncertainties.

Among these uncertainties are the potential escalation of conflicts in Europe and the Middle East, alongside the increasing frequency and impact of climate-related adversities.

In summary, Brazil is expected to experience stable growth in 2025, characterised by opportunities and challenges that require continuous attention.

This edition of *Doing Business in Brazil* provides an in-depth and practical analysis of these transformations, guiding foreign investors and companies from various sectors seeking to understand the new Brazilian tax landscape. By presenting the key aspects of the business environment in Brazil, this work serves as an indispensable tool for those looking to seize the opportunities that Brazil has to offer during this period of significant change.

The Legal, Tax & Regulatory Committee of
The British Chamber of Commerce and Industry in Brazil
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The Legal, Tax & Regulatory Committee of
The British Chamber of Commerce and Industry in Brazil
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Abbreviations

ABS	American Bureau of Shipping
ABCON SINDCON	Association and National Union of Private Concessionaires of Public Water and Sewage Services
ACE	Economic Cooperation Agreements
ADR	American Depositary Receipts
AEO	Operador Econômico Autorizado Authorized Economic Operator
AFRMM	Adicional ao Frete para Renovação da Marinha Mercante Merchant Marine Renewal Fee
AGE	Assembleia Geral Extraordinária Extraordinary General Meetings
AGO	Assembleia Geral Ordinária Annual General Meetings

AGU	Advocacia-Geral da União Federal Attorney General
ALADI	Latin American Integration Association
ALESP	Assembleia Legislativa do Estado de São Paulo Legislative Assembly of the State of São Paulo
AML	Anti-Money Laundering
ANA	Agência Nacional de Águas National Water Agency
ANAC	Agência Nacional de Aviação Civil National Civil Aviation Agency
ANATEL	Agência Nacional de Telecomunicações National Telecommunications Agency
ANBIMA	Associação Brasileira das Entidades dos Mercados Financeiro e de Capitais Brazilian Financial and Capital Markets Association
ANCINE	Agência Nacional do Cinema National Cinema Agency
ANEEL	Agência Nacional de Energia Elétrica Brazilian Electricity Regulatory Agency
ANM	Agência Nacional de Mineração National Mining Agency
ANP	Agência Nacional do Petróleo, Gás Natural e Biocombustíveis National Agency of Petroleum, Natural Gas and Biofuels
ANPP	Acordo de Não Persecução Penal Non-Prosecution Agreement

ANS	Agência Nacional de Saúde Suplementar National Supplementary Health Agency
ANSN	Autoridade Nacional de Segurança Nuclear National Nuclear Safety Authority
ANTAQ	Agência Nacional de Transportes Aquaviários National Water Transport Agency
ANTT	Agência Nacional de Transportes Terrestres National Land Transport Agency
ANVISA	Agência Nacional de Vigilância Sanitária National Sanitation Agency
APA	Advance Pricing Arrangement
API	Active Pharmaceutical Ingredients
APP	Permanent Preservation Area
B3 | BM&F Bovespa	Brasil, Bolsa, Balcão Brazil Stock Exchange
BACEN | BCB	Banco Central do Brasil Central Bank of Brazil
BCS	Health Balance of Trade
BCCA	Brazilian Clean Company Act
BDR	Brazilian Depositary Receipts
BEPS	Base Erosion and Profit Shifting
BNDES	Banco Nacional de Desenvolvimento Econômico e Social Brazilian Development Bank
BofD	Board of Directors

BPTO	Brazilian Patent and Trademark Office
CADE	Conselho Administrativo de Defesa Econômica Administrative Economic Defence Council
CAMED	Chamber of Medicine
CAMEX	Secretaria-Executiva da Câmara de Comércio Exterior Foreign Trade Chamber
CAP	Cost Plus Taxes and Profit
CARF	Conselho Administrativo de Recursos Fiscais Higher Chamber of the Administrative Tax Appeals Council
CBA	Brazilian Aeronautical Code
CBAr	Brazilian Arbitration Committee
CBD	Convention on Biological Diversity
CBF	Confederação Brasileira de Futebol Brazilian Football Confederation
CBS	Contribution on Goods and Services
CBTU	Companhia Brasileira de Trens Urbanos Brazilian Company of Urban Trains
CCA	Cost Contribution Arrangements
CCB	Cédulas de Crédito Bancário Banking Credit Notes
CCEE	Electrical Energy Trading Chamber
CCO	Chief Commercial Officer
CCUS	Carbon Capture Usage and Storage

CDC	Consumer Protection Code
CDN	Conselho de Defesa Nacional National Defence Council
CDCA	Certified Agribusiness Credit Rights
CDNR	Cadastro Declaratório de Não Residente Non-Resident Declaratory Register
CDI	Certificado de Depósito Interbancário Interbank Deposit Certificate
CEO	Chief Executive Officer
Cepea	Centro de Estudos Avançados em Economia Aplicada Centre for Advanced Studies on Applied Economics
CFEM	Compensação Financeira pela Exploração de Recursos Minerais Compensation for the Exploration of Mineral Resources
CFO	Chief Financial Officer
CGEN	Conselho de Gestão do Patrimônio Genético Genetic Heritage Management Council
CGU	Controladoria-Geral da União Comptroller General of Brazil
CIDE	Contribuição de Intervenção no Domínio Econômico Contribution of Intervention in the Economic Domain
CIF	Cost, Insurance and Freight
CINM	International Business Centre of Madeira

CISG	Convention on Contracts for the International Sale of Goods
CLT	Consolidation of Labour Laws
CMN	Conselho Monetário Nacional National Monetary Council
CMSE	Comitê de Monitoramento do Setor Elétrico Electric Sector Monitoring Committee
CNCP	Conselho Nacional de Combate à Pirataria National Piracy Prevention Council
CNEN	Comissão Nacional de Energia Nuclear National Nuclear Energy Commission
CNI	Confederação Nacional da Indústria National Confederation of Industry
CNIg	Conselho Nacional de Imigração National Immigration Council
CNJ	Conselho Nacional de Justiça National Board of Justice
CNPE	National Council for Energy Policy
CNPJ	Entities Tax ID Number
CoAF	Conselho de Controle de Atividades Financeiras Council for Financial Activities Control
COFINS	Contribuição para o Financiamento da Seguridade Social Contribution for the Financing of Social Security
CONABIO	National Biodiversity Commission
CONAMA	National Environmental Council

CONDECINE	Contribution for the Development of the National Cinema Industry
CONFAZ	Conselho Nacional de Política Fazendária National Council of Finance Policy
COO	Chief Operating Officer
COP	Conference of the Parties to the United Nations Framework Convention on Climate Change
COPOM	Brazil's Monetary Policy Committee
COSRA	Council of Securities Regulators of the Americas
CPF	Individuals tax ID number
CPI	Comissões Parlamentares de Inquérito Parliamentary Inquiry Committees
CPL	Cost Plus Profit
CPSI	Contrato Público para Solução Inovadora Public Contract for Innovative Solution
CRA	Receivables Certificate in Agribusiness
CSLL	Contribuição Social sobre o Lucro Líquido Social Contribution on Net Profit
CTC	Cape Town Protocol
CTN	National Tax Code
CTPS	Carteira de Trabalho e Previdência Social Employment Booklet
CUP	Paris Convention Agreement
CVA	Customs Valuation Agreement

CVM	Comissão de Valores Mobiliários Securities and Exchange Commission
DBT	Department for Business and Trade
DECOM	Departamento de Defesa Comercial Department of Commercial Defense
DIT	Department for International Trade
DNA	Deoxyribonucleic Acid
DPO	Data Protection Officer
DR	Depositary Receipts
DrCI	Department of Asset Recovery and International Legal Cooperation
DSI	Digital Sequence Information
DU-E	Single Export Declaration
ECA	Export Credit Agency
EED	Strategic Defence Company
EFTA	European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland)
ENBPar	Empresa Brasileira de Participações em Energia Nuclear e Binacional Brazilian Company of Nuclear and Binational Energy Holdings
ENCLLA	National Strategy Against Corruption and Money Laundering
EPC Contract	Engineering, Procurement and Construction Agreement

EPE	Energy Research Company
EST	Expressed Sequence Tags
ETVE	Entidad de Tenancia de Valores Extranjeros
EU	European Union
FCPA	Foreign Corrupt Practices Act
FCTA	Foreign Corrupt Practices Act
FECP	Fundo Estadual de Combate à Pobreza State Funds to Combat Poverty
FDA	U.S. Food and Drug Administration
FDBT	Federal Department of Boards of Trade
FDI	Foreign Direct Investment
FGTS	Fundo de Garantia do Tempo de Serviço Government Severance Indemnity Fund for Employees
FIDC	Fundos de Investimento em Direitos Creditórios Receivables Investment Funds
FIFA	International Federation of Association Football
FIFO	'First In First Out'
FIF FIP	Investment Funds in Equity Fund Quotas
FII	Fundos de Investimentos Imobiliários Real Estate Investment Funds
FIP	Equity Investment Funds
FIP – PD&I	Private Equity Funds - Intensive Economic Production in Research, Development and Innovation

FISTEL	Fundo de Fiscalização das Telecomunicações Telecommunications Fiscal Fund
FMIEE	Investment Funds in Emerging Companies
FNRB	National Fund for the Distribution of Benefits
FOC	Franchise Offering Circular
FOP	Free on Board
FP	Factory Price
FTA	Free Trade Association
FUNCINES	Funds of the National Film Industry
FUNDAP	Fund for Performance of Port Activities
FUNTELL	Fundo para o Desenvolvimento Tecnológico das Telecomunicações Fund for the Technological Development of Telecommunications
Fust	Fund for the Universalization of Telecommunications Services
GAAP	Generally Accepted Accounting Principles
GATT	General Agreement on Tariffs and Trade
GBF	Global Biodiversity Framework
GDP	Gross Domestic Product
GFIP	Guia de Recolhimento do Fundo de Garantia do Tempo de Serviço e Informações à Previdência Social Employee Dismissal Fund and Social Security Information Payment Form
GNP	Gross National Product

GPA	Agreement on Government Procurement
GTIP	Group of Public Interest Evaluation
GURTs	Genetic Use Restriction Technologies
HCC	High Cinema Council
HMO	Healthcare Management Organizations
IATA	International Air Transport Association
IBAMA	Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis Brazilian Institute of Environment and Renewable Natural Resources
IBS	Imposto sobre Bens e Serviços Tax on Goods and Services
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Chamber of Commerce
ICMBio	Chico Mendes Institute for Biodiversity Conservation
ICMS	Imposto sobre Circulação de Mercadorias e Serviços State Value-Added Tax
ICTs	Scientific, Technological and Innovation Institutions
IDERA	Irrevocable Deregistration and Export Request Authorization
IED	Investimento Estrangeiro Direto Foreign Direct Investment
IHC	International Holding Companies

II	Import Duty
ILS	Insurance Linked Security
INCRA	National Institute for Settlement and Agrarian Reform
INEA	State Environmental Institute
INSS	Instituto Nacional do Seguro Social National Social Security Institute
INPI	National Industrial Property Institute
IOF	Financial Operations Tax
IOSCO	International Organization of Securities Commissioners
IP	Internet Protocol
IPBES	Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services
IPCA	Índice Nacional de Preços ao Consumidor Amplo Consumer Price Index
IPEA	Instituto de Pesquisa Econômica Aplicada Institute of Applied Economic Research
IPI	Imposto sobre Produto Industrializado Excise Tax on Industrialised Products
IPI-ZFM	Imposto sobre Produtos Industrializados na Zona Franca de Manaus Tax on Goods Industrialised in the Manaus Duty-Free Zone
IPO	Initial Public Offers
IPTU	Tax on Urban Property

IPVA	Vehicle Tax
IRPJ	Imposto sobre a Renda da Pessoa Jurídica Corporate Income Tax
IRR	Internal Rate of Return
IRRF	Withholding Income Tax
IS	Imposto Seletivo Excise Tax
ISS	Imposto sobre Serviços Service Tax
ISP	Internet Service Providers
ITBI	Real Estate Conveyance Tax
ITC	International Trading Companies
ITCMD	Estate and Gift Tax
ITR	Tax on Rural Property
JSCP	Interest on Net Equity
JV	Joint Ventures
LAIA	Latin American Integration Association
LALUR	Livro de Apuração do Lucro Real
LAVCA	Association for Private Capital Investment in Latin America
LCA	Letters of Credit for Agribusiness
LFO	Official Pharmaceutical Laboratories
LGCE	General Foreign Trade Law

LGPD	Lei Geral de Proteção de Dados General Data Protection Law
LIFO	'Last in First Out'
LLC	Limited Liability Company
LPCO	Export License, Permit, Certificate or Other
Ltda.	Sociedade Limitada – similar to a LLC
MAPA	Ministry of Agriculture and Livestock
MCI	Marco Civil da Internet Internet Civil Milestone
MCL	Método do Custo mais Lucro Cost plus Profit Method
MCOM	Ministry of Communications
MCTIC	Ministry of Science, Technology, Innovations and Communication
MDL	Método de Divisão de Lucros Profit Split Method
MJSP	Ministry of Justice and Public Safety
MLT	Margem Líquida da Transação Transactional Net Margin Method
MMA	Federal Ministry of Environment
MME	Ministry of Mines and Energy
MOIC	Multiple on Invested Capital
MP	Provisional Measure

MPS	Ministério da Previdência Social Social Security Ministry
MRA	Mutual Recognition Agreement
NCM	Mercosur Common Nomenclature
NEPA	National Environmental Policy Act
NICE	National Institute for Health and Clinical Excellence
NRPOL	Reference Rules for Online Privacy
ODR	Online Dispute Resolution
OECD	The Organisation for Economic Co-operation and Development
ONS	National System Operator
ORF	Open Reading Frames
PAC	Growth Acceleration Program
PAE	Plano de Aproveitamento Econômico Mine Economic Plan
PBI	Precision Breeding Innovation
PCDT	Clinical Protocols and Therapeutical Guidelines
PCI	Price Quotation Method on Import
PCT	Patent Cooperation Treaty
PDIL	Local Development and Innovation Programme
PDP	Productive Medicine Development
PE	Permanent Establishment

PEC	Proposta de Emenda à Constituição Proposed Amendment to the Constitution
PECEX	Price Quotation Method on Export
PGMU	General Universalization Targets Plan
PIC	Comparable Independent Price
PIS	Programa de Integração Social Social Integration Program
PL	Partido Liberal Liberal Party
PLP	Projeto de Lei Complementar Supplementary Law Proposal
PM	Provisional Measures
PMVG	Maximum Sales Price to the Government
PNBL	National Broadband Program
PND	National Privatization Program
PNMA	National Environmental Policy
PPB	Basic Production Process
PPH	Patent Prosecution Highway
PPI	Programa de Parcelamento Incentivado Investment Partnership Program
PPP	Public Private Partnerships
PRL	Resale Price Less Profit
PRODECINE	National Film Development Programme

PROEX	Programa de Financiamento às Exportações Export Financing Program
PRONABIO	National Biodiversity Program
PROUNI	Programa Universidade para Todos University for All Program
PSA	Payment for Environmental Services
PSA Regime	Production Sharing Agreement Regime
PT	Partido dos Trabalhistas Workers' Party
PVA	Wholesale Price Less Profit
PVE	Foreign Visiting Teacher
PVEX	Export Sales Price
PVV	Retail Price Less Profit
RAB	Registro Aeronáutico Brasileiro Brazilian Aeronautical Registry
RDC	Differentiated Procurement Regime Regime Diferenciado de Contratação
RECAP	Special Regime for Acquisition of Capital Goods for Companies
RECOF	Regime for Industrial Establishment under Automated Customs Control
RECOM	Special Input Import Customs Regime
REIDI	Special Regime of Incentives for Infrastructure Development
REIF	Real Estate Investment Funds Law

RENAPRO	National Registry of Banned Players
REPES	Special Regime for the Export and Service and Information Technology Platform
REPETRE	Special benefit for the import and export of goods to be used in the economic research, exploration and development of oil and natural gas in Brazil
RFB	Receita Federal do Brasil Federal Revenue of Brazil
RGPS	Regime Geral da Previdência Social General Social Security Regime
RIA	Regulatory Impact Analysis
RNM	Registro Nacional Migratório Brazilian Identity Card for Foreigners
ROF	Registro de Operações Financeiras Financial Operations Registry
RZF	Free Trade Zone System
R&D	Research & Development
S.A.	Sociedade por Ações - similar to a Corporation
SAC	Secretary of Civil Aviation
SCE-IED	Sistema de Prestação de Informações de Capital Estrangeiro de Investimento Estrangeiro Direto Foreign Capital Information System for Foreign Direct Investment
SCD	Sociedade de Crédito Direto Direct Credit Company
SDE	National Secretariat of Economic Law

SEC	Securities and Exchange Commission
SECEX	Secretaria de Comércio Exterior Secretariat of Foreign Trade
SEI	Sistema Eletrônico de Informações Electronic Information System
SELIC	Sistema Especial de Liquidação e de Custódia Special Settlement and Custody System
SCM	Serviço de Comunicação Multimídia Multimedia Communication Service
SEP	Sociedade de Empréstimo entre Pessoas Peer to Peer Company
SFB	Brazilian Forestry Service
SFH	Sistema Financeiro de Habitação Housing Finance System
SFI	Sistema de Financiamento Imobiliário Real Estate Financing System
SFN	Sistema Financeiro Nacional National Financial System
SISBACEN	Central Bank Information System
SIN	National Interconnected System
SIRE	Strategic Relations of Embrapa
SISCOMEX	Sistema Integrado de Comércio Exterior Foreign Trade Integrated System
SisGen Genético	Sistema Nacional de Gestão do Patrimônio e do Conhecimento Tradicional Associado National System for the Management of Genetic Heritage and Associated Traditional Knowledge

SNJ	Ministry of Justice's National Justice Department
SNP	Single Nucleotide Polymorphism
SNVS	National System of Sanitary Vigilance
SPB	Sistema de Pagamentos Brasileiro Brazilian Payment System
SPEs	Special Purpose Entities
SPS	Sanctions Process Superintendence
SUS	Sistema Único de Saúde Unified Health System
SUSEP	Private Insurances Office
STF	Federal Supreme Court
STFC	Switched Fixed Telephone Service
STJ	Superior Court of Justice
STM	Superior Military Court
SUDAM	Acre, Pará, Roraima, Rondônia, Amapá, Amazonas, Tocantins, Mato Grosso, Mato Grosso do Sul, Goiás and part of Maranhão
SUDENE	Part of Maranhão, Piauí, Ceará, Rio Grande do Norte, Paraíba, Pernambuco, Alagoas, Sergipe, Bahia and parts of the states of Minas Gerais and Espírito Santo
TAC	Term of Commitment for Adjustment of Conduct
TCU	Federal Audit Court
TEC	Common External Tariff

TELEBRÁS	Telecomunicações Brasileiras S.A. Brazilian Telecommunications S.A.
TFA	Trade Facilitation Agreement
TJLP	Government's Long-Term Interest Rate
TK	Traditional Knowledge
TLD	Top Level Domain
TLP	Long-Term Rate
TP	Transfer Pricing
TPS	Public Benefit Survey
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TSE	Superior Electoral Court
TST	Superior Labour Court
TUP	Terminal de Uso Privado Terminal for Private Usage
UNCED	United Nations Conference on Environment and Development
UNCITRAL	United Nations Commission on International Trade Law
UNEP	United Nations Environment Program
VAS	Value-Added Services
VAT	Value-Added Tax
VC	Venture Capital

VoD	Video-on-Demand
WCO	World Customs Organization
WHT	Withholding Income Tax
WIPO	World Intellectual Property Organisation
WTO	World trade Organisation
ZPE	Export Processing Zones

Chapter 1

An Overview of Brazil

Introduction

The Federative Republic of Brazil is the largest country in Latin America and the fifth largest in the world. It covers over 8.5 million square kilometres and occupies over half of South America. Brazil shares borders with all South American countries except Chile and Ecuador. Brasília is the capital, Portuguese is the official language and the Real (R$, BRL) has been the currency since 1994. According to the latest data, Brazil has more than 203 million inhabitants,[1] representing one-third of Latin America's population.

After experiencing some economic struggles, especially due to the consequences from the Covid-19 pandemic, Brazil started to demonstrate some growth again in recent years. In 2023, Brazil's Gross Domestic Product (GDP) was around US$ 2.13 trillion, an increase of 2.9% compared to 2022, which has put the country back on the list of the ten largest economies in the world. In the first quarter of 2024, Brazil registered growth of 0.8%, driven especially by household consumption, investments, services and agriculture.[2]

Accumulated inflation rates in 2023 were 4.62%, lower than the 5.79% in 2022 and the lowest level since 2020. Brazilian external

debt in March 2023 was US$ 321.342 billion, with long-term external debt reaching US$ 265.451 billion in March, while the short-term stock was US$ 90.282 billion. In March 2024 the Brazilian Central Bank estimate was US$ 355,733 billion.[3]

The largest states in Brazil in terms of GDP are São Paulo, Rio de Janeiro and Minas Gerais, representing 51.2% of the national GDP.[4] These states are all in Brazil's Southeast region and they have a combined population of around 84 million. According to the latest data, the city of São Paulo produces around 9.2% of Brazil's GDP.[5] B3 S.A. (BRASIL, BOLSA, BALCÃO), which combines both the São Paulo Stock Exchange (B3) and the Commodities & Futures Exchange (BM&F), is one of the world's largest financial market infrastructure companies and the largest stock exchange in South America. It trades a large part of Brazilian production. The Average Daily Trade Volume of the B3 market in the first half of 2023 was R$21.5 billion (US$3.9 billion)[6] per day –16% lower than the same period in 2022, when the volume was R$25.6 billion (US$4.7 billion) per day.

In the 2000s, strong economic indicators combined with government policies aimed at reducing poverty by increasing access to credit and stimulating internal consumption led to an increase in the middle class, which currently accounts for over half of Brazilians.

Since the 2010s, significant shifts in ideology and leadership have reshaped the nation's landscape. The election of Jair Bolsonaro in 2018 marked a decisive turn towards right-wing governance, characterised by promises of liberal economic policies, closer ties with the United States and controversial environmental deregulation. His administration focused on economic reforms such as a pension reform, in an effort to reduce government spending.

The Covid-19 pandemic exacerbated existing social and economic challenges in Brazil, overwhelming healthcare systems and

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1. Censo IBGE 2022.
2. CNN Brasil.
3. Exame.
4. Poder 360.
5. IBGE.
6. The exchange rate, according to the Brazilian Central Bank, on July 12, 2024: USD 1 = BRL 5.41.

causing a widespread economic downturn with significant impacts on unemployment and education. In the aftermath, Brazil experienced a highly contentious 2022 election, resulting in Lula da Silva's return to the presidency amidst widespread polarisation.

Brazil is a member of Mercosur, an association formed by Argentina, Paraguay, Uruguay and Bolivia in order to strengthen their economic and political ties. In 2022 Mercosur traded US$ 727 million with the rest of the world, an increase of 21.4% on 2021. Exports accounted for 55% and imports 45%.[7] Mercosur's agenda, however, extends far beyond economic and trade issues, as it also covers education, employment, the environment, consumer protection and culture.

Brazil is divided into 26 states and one Federal district (within which Brasília is located). This table shows the 5 regions and their populations:

Region	States	Population
North	7	17,349,619
Northeast	9	54,644,582
Southeast	4	84,847,187
South	3	29,933,315
Central-west	3	16,287,809

Source: Censo IBGE 2022

The largest city in Brazil and South America is São Paulo, with more than 11 million inhabitants. Taking into account the metropolitan area around São Paulo - The Greater São Paulo area - the figure rises to approximately 20 million.

There are 14 other Brazilian cities with populations exceeding one million, including Rio de Janeiro.

In November 2024 Brazil hosted the G20 meeting[8] in Rio de Janeiro, which will be attended by the leaders of the 19 member countries, as well as the African Union and the European Union.

Furthermore, Brazil has been selected to host COP30[9] in November 2025, which will take place for the first time in an Amazonian city in Belém (state of Pará).

The Political System

Brazil is a democratic federative republic, consisting of the Federal Government (Union), states, municipalities and the Federal District. It has a representative form of Government with universal elections for the Executive and Legislative Branches.

In 1985, after 21 years under a military regime that repressed civil rights, Brazilian democracy was fully restored when the first civilian president was elected by an electoral college through indirect vote. The direct election of governors and mayors on a four-year cycle was reinstated in 1982. After that, the first free and direct presidential elections in Brazil took place in 1989.

A new Constitution was introduced in October 1988, which is still in force today. It introduced a Presidential form of Government with three independent branches: the Executive, the Legislature and the Judiciary. A national referendum held in April 1993 confirmed the presidential system as the preferred regime and the Republic as the preferred form of Government.

Brazilian democracy is open to various forms of political participation in addition to voting. There are several mechanisms for people to directly participate in decision-making procedures and exercise control, including popular consultations and referendums, executive branch impeachment proceedings, forums and public hearings for the voting public and companies. A free press is a social and constitutional right, censorship is forbidden and free speech is guaranteed.

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7. Mercosur.
8. G20 stands for "Group of Twenty" and refers to the countries with the largest economies in the world. The member states meet annually to discuss economic, political and social initiatives.
9. COP stands for "Conference of the Parties" and is an annually meeting and the supreme decision-making body of the United Nations Framework Convention on Climate Change (UNFCC).

The Executive

At the Federal Level, the Executive is headed by the President. The President and Vice-President are elected by direct vote for four-year terms. It should be noted that since Brazil implemented direct elections, voting is mandatory for citizens between 18 and 70 years of age. Both the President and Vice-President can stand for re-election once. The Executive's main responsibilities include:

- sanctioning and passing laws, as well as issuing decrees and regulations for their enforcement;
- proposing and carrying out public policies;
- signing international treaties, conventions and acts (which must be approved by the National Congress);
- maintaining national security, public safety and the Union-assigned public services;
- executing the Congress-approved annual budget.

The Executive also occasionally assumes the law-issuing role of the legislature in urgent situations by passing Provisional Measures (MPs). MPs have the force of law but must be approved converted into law by the National Congress within 60 days of publication. Congress is allowed to extend the validity of the MPs once only for an additional 60 days. If it does not do so, the MP ceases to have any effect.

Congress may, by resolution, delegate the power to legislate to the President. The resolution may state that Congress will examine the subject of the proposed law. The Vice-President assists the President when requested and performs other roles attributed to the office by supplementary laws. The Vice-President will replace the President if he or she is incapacitated, impeached or leaves office.

The President appoints and dismisses the cabinet of Ministers. Each ministry is responsible for a specific area and is led by a minister or chief minister, whose role is to advise the head of the Government on their respective department's policies. However, responsibility for these policies lies with the President. They remain subordinated to the President, who is solely responsible - after consulting with his or her ministers - for Federal administration. As of July 2024, there are 39 ministerial departments, with 31 ministries,

four secretariats and four bodies equivalent to ministries.

The Executive exercises direct and indirect administration. The direct administration includes the Ministers and their administrations, secretariats, chambers and committees, as well as the President's administration. The indirect administration comprises governmental administrative organisations, state-run companies (including those with private investors), federal foundations and federal regulatory agencies.

According to the latest data from 2022, the federal government controls 130 state-owned companies, 46 of which have direct government control and the other 84 being subsidiaries of another federal state-owned company. Of these 84 subsidiaries, 80 are directly controlled by just three state-owned companies: Petróleo Brasileiro S.A. (Petrobras), Banco do Brasil S.A. and Caixa Econômica Federal. The other four are owned by the National Bank for Economic and Social Development (BNDES), Empresa Brasileira de Participações em Energia Nuclear e Binacional (ENBPar) and Companhia Brasileira de Trens Urbanos (CBTU).[10]

The Legislature

The Legislature consists of a two-chamber National Congress (the Senate and the Chamber of Deputies). Members of the Senate and the Chamber of Deputies are elected directly by the people. The Senate is comprised of 81 Senators who represent the states (three Senators for each state and Federal District). They serve staggered eight-year terms, but Senate elections are held every four years. Thus, in each election, the Senate alternately renews one-third and two-thirds of its 81 seats.[11] The Chamber of Deputies is comprised of 513 deputies who serve concurrent four-year terms. The Chamber of Deputies employs a proportional representation system, meaning that each state and the Federal District elect between 8 and 70 Representatives each, according to the size of its population. For example, São Paulo elects 70 deputies, while the state of Acre elects only eight.[12]

10. Ministério da Economia.
11. Agência Senado.
12. Câmara dos Deputados.

The Legislature approves and oversees the execution and effectiveness of the annual budget and performs the government's legislative functions by passing:

- constitutional amendments;
- complementary, ordinary and delegated laws;
- legislative decrees and resolutions; and
- provisional measures.

Before any proposed legislation can become law, it must be approved by both chambers and receive Presidential sanction.

The Federal Constitution prescribes the matters falling within the exclusive remit of the Chamber of Deputies and the Senate. It empowers both bodies to make their own organisational rules, regulations and staff appointments. The Constitution also defines the functions of the National Congress, stating which matters must be submitted to the President for approval and which fall under its own authority.

Each house has committees that analyse and report their findings on the specific matters submitted to them. The Chamber of Deputies has 20 permanent committees whilst the Senate has 12. Furthermore, temporary committees such as Parliamentary Inquiry Committees (CPI) can be created to investigate certain matters. For instance, in 2021 a CPI was created to investigate alleged omissions and irregularities in federal government actions during the Covid-19 pandemic which identified various forms of misconduct during the term of the former president Jair Bolsonaro.

Both states and municipalities have legislative branches. The Senate also has the power to approve the President's nomination of Supreme and Superior Courts Justices, the directors of regulatory agencies, the President of the Central Bank and other government officials as defined by specific legislation.

The Judiciary

The Judiciary is comprised of Federal and State courts headed up by the Federal Supreme Court (STF). The STF is the final appellate instance for Federal and State courts on Federal

Constitutional matters. The 11 STF justices are appointed by the President and approved once an absolute Senate majority has been achieved.

Under the STF are the special courts. These are the final appellate instances for non-constitutional matters:

- Superior Court of Justice (STJ): this court hears appeals on how to interpret and apply Federal law;
- Superior Military Court (STM);
- Superior Electoral Court (TSE); and
- Superior Labour Court (TST).

Below these special courts are the Federal Regional Courts and the State Courts of Appeal. These hear appeals against decisions taken by both the Lower Federal Courts and the Lower State Courts (which are usually the first instance courts). Federal Courts can hear cases to which the Federal Government or any of its government corporations or entities are party. The State Courts hear cases that involve individuals or entities not related to the Federal Government or State or Municipal entities or authorities.

Finally, there are the First Instance Courts for Employment Matters; the Regional Employment Courts of Appeal (which only deal with employment litigation); the Lower Electoral Courts and Regional Electoral Courts (organisation, inspection and summing-up of elections) and the Lower Military Courts (judgment of military officers). All these courts form part of the Federal judicial system.

The Judiciary is independent in its role of applying the law, providing fair and equal justice and protecting citizens' individual rights. The protagonism of the courts has grown in both scope and complexity over time and judicial politicisation (or judicialisation of politics) has become a recurring topic of debate in Brazil.

Political Divisions

States

Brazil is divided into 5 regions and 26 states:

- North: Acre, Amapá, Amazonas, Pará, Rondônia, Roraima and Tocantins states;
- Northeast: Alagoas, Bahia, Ceará, Maranhão, Paraíba, Pernambuco, Piauí, Rio Grande do Norte and Sergipe states;
- Southeast: Espírito Santo, Minas Gerais, Rio de Janeiro and São Paulo states;
- Central-West: Goiás, Mato Grosso and Mato Grosso do Sul states and the Federal District;
- South: Paraná, Rio Grande do Sul and Santa Catarina states.

Each has its own constitution, governor and State legislature. The Federal District, located within the borders of Goiás State (Central-Western region) also has its own governor and legislature.

The Governor exercises each State's executive powers. The Governor and Deputy Governor are elected by direct vote for four-year terms in elections that happen concurrently with the presidential and legislature elections. Secretaries of State assist the governor in performing their functions. Their number and powers may vary but, under State laws and the State Constitution, they all govern the State. Legislative power is exercised by the State Assembly, composed of State deputies. The number of deputies in each State's Assembly is proportionate to its population. The State of São Paulo, for example, has 94 deputies.[13]

Each State judiciary is organised by highest State court, the State Court of Appeals, in its respective State and is made up of the. The State Court of Appeals is subordinate to both the STF (the Federal Supreme Court) and the STJ (the High Court of Justice).

Municipalities

States are composed of municipalities, which are the smallest self-governing units in Brazil. Every 4 years, they elect their own chief executives (mayors), deputy mayors and members of the legislature (councillors) and control local public services. Brazil has currently 5.569 municipalities, the smallest by number of inhabitants being Serra da Saudade (Minas Gerais State) with 833 residents. The biggest

is São Paulo with more than 11 million inhabitants.[14]

Municipalities are created by State law and subject to Federal law rules on minimum population size, public revenue and popular consent. The mayor governs the municipality with the help of municipal secretaries or departmental directors. The council is the municipality's legislative body. It may legislate on certain local matters authorised by the Federal Constitution.

The State Courts have jurisdiction over the municipalities.

The Legal System

Brazil is a civil law jurisdiction and its legal system is based on the Federal Constitution and laws enacted mainly by the National Congress.

The states also have their constitutions and statue laws approved by State Assemblies. The cities are governed by their respective statutes and ordinary laws enacted by Municipal Councils.

The courts base their decisions mainly on enacted law. If however, a case does not fall within a specific rule or law, the Introductory Act to Norms of Brazilian Law provides that courts may rely on judicial precedents, general principles of law, analogies, customs and usage.[15]

Sources of Law

Basically, the main sources of law in Brazil are:

- **Enacted law.** This is the main source of law in Brazil. The Federal Constitution is the primary source of law and regulates legislative distributed powers between the Union, states and

13. Alesp.
14. CNN Brasil.
15. Article 4th of the Introductory Law to Norms of The Brazilian Law (Decree-Law # 4.657/1942).

municipalities. According to the Constitution, although the country is divided into states, Brazil's civil, commercial, labour and criminal laws (among others) can only be enacted via federal legislation, which, thus, is the most important source of law in the country. State and local laws, though important, apply only to very specific situations. This predominance of federal legislation brings uniformity to the main legal rules across the country, which is positive for business.

- **Judicial precedents.** Although not exactly comparable to case law in common law jurisdictions, judicial precedent, i.e. the courts' interpretation of the law, plays an important role in the system, providing consistent interpretation of laws and rules by the courts.
- **Books of authorities.** Although there may be some academic disagreement here, books plays an important role as a source of law, especially when it comes to defining concepts that are not always clearly defined in enacted law. Many court decisions cite these writings.
- **Comparative law.** A court may also use comparative law as a source in very specific cases dealing with situations not covered by Brazilian legislation, but only in cases heard by the Supreme Court.

The Federal Constitution

Brazil's Federal Constitution was approved in 1988 after the restoration of democracy.

Since its approval, the Constitution has received 132 amendments, the last in 2023 when which the so-called Tax Reform (now under regulation) was approved.

As part of its humanist vision, the Brazilian Constitution contains a number of safeguards that are strongly influenced by the Universal Declaration of Human Rights.

The Constitution provides general political rules, such as terms of office and some eligibility rules (complemented by additional legislation) for the positions of President, Senators, Federal Representatives, Governors, State Representatives, Mayors and Councillors.

Although the Brazilian Constitution contains several

provisions not commonly present in other constitutions, it fundamentally defines Brazil as a capitalist country, provides for the Rule of Law, guarantees free enterprise and creates equality between Brazilians and foreigners, which is fundamental for a good business environment and brings stability and security to all investors.

Highlights of Federal Legislation

Although the National Congress enacts thousands of laws at the infra-constitutional level, few of them have a greater impact on the business environment.

The most important private-sector law is the Civil Code, which was approved in 2002 and governs contracts and most corporate relationships.

The *Brazilian Corporation Law ('Lei das Sociedades por Ações')* regulates more sophisticated corporate relationships, especially those involving 'corporations', a mandatory corporate form for publicly listed companies and financial institutions.

The *Consumer Protection Code*, approved in 1990, created important civil (and even criminal) liabilities for suppliers of products and services and was a very important step towards increasing quality standards found in the Brazilian market.

Labor relations are predominantly governed by the *Consolidation of Labour Laws*, approved in 1943 and reformed in 2017.

The *National Tax Code*, approved in 1966, sets out the general rules of tax law that apply to all Brazilian taxes.

Competition issues are dealt with by *Law No. 12,529/2011*, which requires prior control of the so-called 'acts of concentration', such as some M&A transactions.

The main criminal issues are dealt with by the Penal Code of 1940, reformed in 1984, but several criminal provisions can affect business activities scattered throughout the legislation.

Despite not addressing corruption in private transactions, *Law No. 12,846/2013* is an anti-corruption law. It is largely based on the FCPA and the UK Bribery Act. These and other laws in force in Brazil will be cited and discussed in greater depth throughout this guide.

Political and Economic History

Brief History

Brazil started as a Portuguese colony between the XVI and XIX centuries initially as part of a process to occupy the country and extract its natural resources. This process went through three major economic cycles focusing on particular resources: brazilwood, sugar and gold. Following Napoleon Bonaparte's 1807 invasion of Portugal, the Portuguese Royal Family came to Brazil in 1808 and left its heir, Pedro I, to rule the country. He declared independence from Portugal in 1822 before later returning to Portugal and leaving his son Pedro II in Brazil. The reign of Pedro II was marked by the Paraguayan War (1864-70) and a political crisis which resulted in local military leaders declaring Brazil a Republic on 15 November 1889. The Royal Family received a request to leave Brazil.[16]

Brazil subsequently had various regimes and alternated between democratic and authoritarian periods, but at no point was there ever a full rebellion or significant civil war. Those periods can be divided as follows:

- First Brazilian Republic (1889-1930)
- Getúlio Vargas' Era or Second Brazilian Republic (1930-1945)
- New Republic or Third Brazilian Republic (1945-1964)
- Military Regime (1964-1985)
- New Republic from 1985 to date[17]

For the past half century, Brazil has experienced various political regimes. Following the military regime (1964 to 1985), there was a 'transition' period which led Brazil to approve the current Federal Constitution in 1988. This established the foundation for a Democratic Republic that is governed by the rule of law, with checks and balances, Congressional and Judicial independence, freedom of the press and social and civic rights.

After a period struggling with high inflation, an aging governmental structure and the first impeachment of a duly elected President - Fernando Collor de Melo (1990-92) - the 1990's were marked by several attempts at stabilisation, with the most important

being 1994's implementation of the Real Plan. It was a major plan launched during the government of Itamar Franco (1992-95) and conceived by the then Finance Minister Fernando Henrique Cardoso (1993-94) to stabilise the Brazilian economy. In the first half of 1994, the plan implemented measures that stabilised the Brazilian economy and put an end to the hyperinflation crisis that had affected the country since the 1980s. On the back of the Real Plan's success, Cardoso (1995-2003) was elected president. His administration promoted economic and financial stability and decreased inflation, with rates falling sharply, created regulatory agencies, moved ahead with privatisations, created public-private partnerships (PPP) projects and implemented efficient public spending management, all helping to revamp the business environment. The country then saw GDP grow and the local currency strengthen.

The Government of Luiz Inácio Lula da Silva

Ex-metalworker Luiz Inácio Lula da Silva (2003-11, 2023-) is from the Workers' Party (PT) and became the next democratically elected president in 2003. Lula kept Brazil's macroeconomic situation stable and this brought positive results for agribusiness, with ethanol becoming an important player in the government's investments in agribusiness with significant government funding for marketing programs that advertised the product. However, areas such as soy and meat production also played a significant role as output boomed. The Brazilian economy also benefitted from a global rise in commodity prices.

Another mark of Lula's administration was the discovery of pre-salt oil reserves in 2006, an offshore find that nearly doubled the country's oil reserves and attracted considerable interest from foreign and national oil companies; to date, however, these fields have not yielded significant output. Lula also stabilised and strengthened the Real by multiplying Brazil's foreign currency reserves. By 2011, Brazil was reportedly the fifth largest creditor of the United States' foreign debt.

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16. Agência Brasil.
17. National Geographic Brasil.

Under Lula, Brazil also invested Treasury and Development Bank funds in infrastructure projects, mainly through the *Programa de Aceleração do Crescimento* (PAC), a growth acceleration program launched in 2007. Despite these large investments, only 46% of PAC projects had either started or been concluded by 2010.

In addition to the measures mentioned above, Lula visited several countries with Brazilian entrepreneurs representing various sectors to promote Brazilian products and develop foreign trade and relations. Brazil signed commercial treaties with countries such as India, China and Russia and fostered trade with countries with which it already had a firm commercial base.

Despite this progress and the President's notable approval ratings, the Lula administration was also marked by high-profile corruption investigations into senior government officials, including Lula himself and former Chief of Staff José Dirceu (2003-05). Most notably was the *Mensalão*[18] scheme, which came to light in 2005, gaining notoriety as an allegedly widespread cash-for-votes scheme involving high-level Government officials, Congress members and business leaders in the private sector. The scheme allegedly consisted of monthly contributions to members of Congress in order to obtain political support in matters before the Federal Government.

The Government of Dilma Rousseff

Lula's support helped Dilma Rousseff (2011-16) become Brazil's first female president in October 2010, winning 55% of the popular vote in a contested presidential election. In 2013, under the Rousseff administration, Brazil endured a series of demonstrations, especially in state capitals, which were initially protesting increases in public transport fares, but then came to incorporate demonstrations against the FIFA's mega-events (Confederations Cup and World Cup) and broader issues, such as tackling corruption. These were the biggest protests in the country since the calls for the impeachment of Fernando Collor in 1992.

In response, the Brazilian government announced several measures to meet protesters' demands and Congress voted in a series of concessions (the so-called positive agenda), such as making corruption a heinous crime and archiving PEC 37, which prohibited

investigations by the Public Prosecutor's Office. The Rousseff administration also revoked public transport fare increases in several cities.

In March 2014, the Federal Police initiated a series of investigations that became known as Operation Car Wash, looking into a billion-dollar corruption and money-laundering scheme involving numerous politicians from Brazil's largest parties. The investigation had a direct impact on the country's politics, contributing to the decline in Rousseff's approval ratings.

Rousseff was re-elected in October 2014 by a narrow margin, highlighting the polarisation in the country. The presidential campaign was notable for low voter turnout, riots and controversies, mainly due to the Operation Car Wash investigations' hit on large infrastructure companies, the ruling political class and political parties across the spectrum.

Driven by her low approval rates, corruption investigations and strong opposition from centre and right-wing deputies, an impeachment process against Rousseff began in December 2015 resulting in annulment of her term in August 2016. A political crisis that resulted in a presidential impeachment, associated with the Operation Car Wash - a corruption scandal that targeted top politicians and key players in the infrastructure sector - drove Brazil into the biggest recession in its history which lasted for two years.

The Government of Michel Temer

Vice-President Michel Temer took office following Rousseff's impeachment. According to the CNI/Ibope survey conducted in September 2017, additional corruption schemes involving Temer's government alongside unpopular reform proposals saw Temer's approval rating plunge to 3%, making him less popular than Rousseff.

Among the main reforms, we should mention: the New Fiscal Regime, a constitutional amendment that establishes a limit for increases in Federal Government spending for 20 years; the

18. Mensalão is a neologism, a variant for the expression "big monthly payment".

Outsourcing Act, a law that allows the outsourcing of work for end-activities; and the Labour Reform, which resulted in significant changes to the Consolidation of Labour Laws (CLT) and changed the future of politics by ending mandatory union funding that had been in place since 1964.

As a result of Operation Car Wash, President Temer's influence in Congress declined and his Social Security Reform bill was not approved.

In 2018, Operation Car Wash resulted in Lula's arrest for corruption and money laundering.

The Government of Jair Bolsonaro

Following a period of political instability, Brazil experienced a change in ideological framework with the emergence of new conservative movements influenced by far-right and right-wing ideas. The most significant example of this change was the 2018 election of Federal Deputy and reformed military officer, Jair Bolsonaro (2019-22), who represented the right-wing Liberal Party (PL). Lula was sentenced to 12 years and 1 month in prison for passive corruption and money laundering. Then, in April 2019, the High Court of Justice (STJ) reduced the sentence to 8 years, 10 months and 20 days in prison. He took office despite issues such as his rhetoric and political alignment with far-right ideologies and close ties to the military and his promises to facilitate access to firearms, end the demarcation of Indigenous and *quilombola*[19] lands and to water down environmental legislation.

After the 2018 election, 47% of the seats (243) in the Chamber were filled by newly elected Deputies, the greatest political refresh since 1988. The Senate also faced substantial change, with only eight senators re-elected and 46 of the 54 disputed seats won by new faces. The profile of the newly elected legislators suggested that voters prioritised economic growth and believed this should be the focus of the incoming government.

Bolsonaro's administration was marked by openness to the private sector, controversial statements (over scientific research, the electoral system, public security, the military regime and other topics) and by the Covid-19 pandemic and its consequences,

leading to political instability.

Regarding environmental policies, Bolsonaro advocated for loosening environmental laws and reducing oversight of forested areas. His administration also caused staffing and funding issues at environmental agencies, including the Brazilian Institute of Environment and Renewable Natural Resources (IBAMA), resulting in the larger proportional increase in Amazon rainforest deforestation compared to the previous administration.[20]

In 2019, following months of negotiations, both houses of the legislature approved a Pension Reform bill promoted by Bolsonaro's administration to amend the Constitution and modify the social security system. The changes included a minimum retirement age – 65 for men and 62 for women –, an increase in workers' pension contributions and a mechanism to calculate benefits, which together are expected to result BRL 800 billion in savings (US$195bn) over 10 years.[21]

In June 2019, news outlet 'The Intercept' leaked messages between investigators and judges working on the Operation Car Wash task force. Among the messages were controversial discussions between Justice and Public Security Minister Sergio Moro (a former judge involved in the operation) and public prosecutor Deltan Dallagnol, who coordinated the operation in Curitiba (Paraná State). The leaked discussions between Moro and Dallagnol led the Second Panel of the STF to recognise Moro was biased while judging the "triplex case".[22] As a result, the STF overturned the court's decisions and, by extension, Lula's arrest.[23]

In foreign relations, Bolsonaro's term was marked by diplomatic estrangement from our South American neighbours,

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19. A quilombola is an Afro-Brazilian resident of quilombo settlements first established by escaped slaves in Brazil.
20. Piauí.folha.uol.
21. BBC News.
22. The case refers to an accusation made by the Public Prosecutor's Office in which it was stated Lula had received a bribe from the construction company OAS through the reservation and renovation of a triplex apartment in the city of Guarujá, whose ownership had been concealed from the authorities.
23. Uol.

closer alignment with the Donald Trump (2017-21) administration in the United States and by prioritisation of an ideologically oriented agenda. Despite this diplomatic distancing, Brazil had record foreign trade flows between 2019 and 2022, trading half a trillion dollars in imports and exports.[24]

The administration allegedly spread misinformation regarding democratic institutions and fuelled polarisation in society and political classes. The main target of these misinformation campaigns was the Supreme Federal Court, which often brought attention to a recurring problem in Brazilian politics: the politicisation of the judiciary (or the judicialisation of politics). It is common for politicians, from the Legislative and Executive branches to use federal judicial matters or decisions for bargaining or campaigning and justices are sometimes criticised for using their power to influence policy outcomes.

The Covid-19 Pandemic

One of the biggest challenges of the period was the Covid-19 outbreak. In the first few months, the Bolsonaro administration understated the impact of the disease, spread misinformation about its severity and treatment[25] and delayed delivery of vaccines.[26] Between 2020 and 2022 the disease caused, inter alia, the collapse of the public and private health systems in Brazil, caused a deep economic recession in the country with an increase in unemployment rates and the informal economy, deepened the educational gap for low-income children and killed more than 600,000 people in Brazil.[27]

Current scenario

After an uncertain political and economic period, Brazil had a very polarised election in 2022, with the tightest result in the history of the country. Lula was elected for his third presidential term with 60 million votes (50.90%), while Bolsonaro received 58 million votes (49.10%). His left-wing coalition does not have a majority in either house of Congress and centrist legislators' support is conditioned on pork-barrel practices and political appointments to cabinet posts. The

Chamber and the Senate will likely maintain a mostly conservative, right-wing profile for the next couple of years.

A week after Lula took office, on 8 January 2023, far-right supporters of Bolsonaro stormed and vandalised several public buildings in Brasilia, including the presidential palace, the Supreme Court and the Congressional towers. They rejected Lula's victory and asked the military to overthrow him. Bolsonaro had left the country for the United States and did not participate in the presidential handover to Lula.[28] The government reacted and sent police to contain the demonstrators.

The events raised national and international concerns about the stability of a democratic state in Brazil and highlighted the risks of highly polarised societies.[29] However, the quick reaction of the democratic institutions prevented these events from escalating, while civil unrest associated with this incident has largely subsided. Soon thereafter, the Federal Police started Operation Treason (*Lesa Pátria*) to investigate the financiers, participants and organizers of the attempted coup d'état.

As of now, Lula's third term has been characterised by attempts to negotiate with Congress, by increased public spending associated with social programs and by a more pragmatic foreign policy approach. Even so, legislators will likely take advantage of Lula's popularity issues in pork-barrel negotiations and they will continue to demand the distribution of public funds and political appointments in exchange for their support. Nevertheless, Lula is likely to retain enough popular and political support to prevent government stability from sharply eroding prior to the end of his term. Despite frequent disagreements with business leaders, the Lula administration continues to seek foreign investment as a catalyst for social and economic development.

One of the most prominent reforms from the administration

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24. World Bank.
25. BBC Brasil.
26. El País Brasil.
27. Cieges.
28. Reuters.
29. European Parliament.

so far is the 2023 approval of the Tax Reform. The reform seeks to simplify taxes and exempt items from taxation, focusing on unification of the five taxes now in force in the country. Although it is still the subject of debate, the Tax Reform was approved at the end of 2023 and transformed into a Constitutional Amendment and regulated by the National Congress in July 2024.[30]

Municipal elections were held in October 2024 and highlighted the strength of centre-right candidates and parties ahead of the next general elections.

International Treaties

In Brazil, international treaties are jointly approved, ratified, and enacted by the Executive and the Legislature. According to the Federal Constitution, the President has the authority to sign treaties and may delegate this power to appointed plenipotentiaries. Except for less formal executive agreements, all treaties signed by the Executive's representative must be submitted to Congress for approval. Upon approval by Legislative Decree, the Executive decides whether to ratify the treaty. If ratified, the President signs the ratification instrument and exchanges it with that of the other signatory (for bilateral treaties) or forwards it to the depositary mentioned in the treaty. The treaty must then be enacted in Brazil via Presidential Decree and published in the 'Official Gazette'.

The Brazilian constitutional tradition does not grant the states of the Federation the right to enter into treaties. In line with this principle, the current Constitution assigns to the Union the responsibility to "maintain relations with foreign states and participate in international organisations" (Art. 21, item I). Therefore, any agreements that a federated state or municipality wishes to establish with a foreign state, or any entity empowered to conclude treaties, must be conducted by the Union, with the mediation of the Ministry of Foreign Affairs, in accordance with its own legal competence.

There have always been debates in Brazil regarding the binding nature of international treaties on domestic legislation. The Supreme Federal Court (STF) has ruled that treaties incorporated into the Brazilian legal system have the same force as ordinary laws. Thus,

the general rule is the precedence of the most recent norm in case of conflict between a treaty and domestic law on the same subject. In tax matters, the National Tax Code clearly establishes that treaties take precedence over ordinary laws. Treaties and international conventions on human rights approved by both Houses of the National Congress, in two rounds, by three-fifths of the votes of their respective members, are equivalent to constitutional amendments. Additionally, the STF recently decided that international conventions take precedence over Brazilian legislation in the air cargo transportation from abroad. The majority of the Plenary understood that, in case of conflict with the Brazilian Civil Code, the rules of international agreements must be followed.

Brazil's foreign trade policy shifted focus with the change in Federal government in 2023. The country has set an ambitious goal of achieving a total trade volume of US$1 trillion in exports and imports by the next decade. To achieve this, the government strategy includes bolstering export companies and expanding trade agreements with key partners such as China and the United States, as well as enhancing the presence of Brazilian firms in Latin America.

In late 2023, Bolivia joined Mercosur and became the fifth full member of the regional economic integration group, alongside Brazil, Argentina, Paraguay, and Uruguay.

A major milestone in international trade was reached on 6 December 2024, when MERCOSUR and the European Union announced the conclusion of negotiations for their long-awaited Partnership Agreement. Following over two decades of dialogue, the agreement marks a significant step forward in economic and political cooperation, positioning MERCOSUR as a more globally integrated bloc. With a combined population of approximately 718 million people and a GDP of around USD 22 trillion, it stands as the largest trade agreement ever concluded by MERCOSUR and one of the most comprehensive entered into by the European Union. Its conclusion, amid a global landscape of increasing protectionism, reaffirms a joint commitment to open markets and sustainable, rules-based growth.

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30. Uol.

In April 2025, European Commissioner for Economy and Industry, Valdis Dombrovskis, reaffirmed the strategic importance of the agreement and acknowledged the complexity of the negotiation process, particularly in aligning regulatory standards and sustainability commitments across regions. Despite global uncertainties, the current environment is also seen as an opportunity to strengthen and diversify trade partnerships. In this context, the EU-MERCOSUR agreement stands out as a key instrument for advancing economic integration and enhancing international cooperation, alongside other ongoing initiatives such as negotiations with India.

In December 2023, Mercosur and Singapore signed a free trade agreement. Singapore is the 7th largest destination for Brazilian exports and ranks among the top recipients of foreign investment worldwide. This marks Mercosur's first free trade agreement concluded since 2011 and its first with an Asian country.

A feasibility study is currently underway for a Mutual Recognition Agreement (MRA) between Mercosur and the Pacific Alliance. The signing will mark the first agreement between economic blocs regarding the Authorized Economic Operator (AEO) Programme. Brazil, Argentina, Uruguay, and Paraguay are involved in these negotiations on behalf of Mercosur, while Mexico, Peru, Colombia, and Chile represent the Pacific Alliance.

The progress in Mercosur's negotiations with the EFTA countries (Iceland, Liechtenstein, Norway, and Switzerland) is also noteworthy.

The current Brazilian government has declared an interest in joining the Organisation for Economic Co-operation and Development (OECD), but membership is no longer a priority.

Logistics

Given Brazil’s continental proportions and its diverse geography, investment in a logistical network across different modalities is crucial for economic growth and development. The government plays a significant role in promoting projects in this sector.

It is important to note that infrastructure projects can be carried out at the federal, state or municipal level, depending on the

sector and territory involved. Projects involving interstate infrastructure, railways and ports are usually carried out by the federal government, while subways and transportation tend to be handled by the states. Urban mobility projects are typically local.

In the last years of Jair Bolsonaro's Administration (2019 to 2022), several projects involved privatisation of public assets in the energy, oil and gas sectors, as well as ports, including privatisation of the port operator "Companhia Docas do Espírito Santo". These projects aimed to attract investment and improve efficiency. Concessions for railways, ports, and airports were also developed.

Brazil's current President, Luiz Inácio Lula da Silva, who began his term in 2023, has demonstrated a commitment to investing in social initiatives, emphasising education, health and social infrastructure projects.

The Investments Partnership Program ("PPI") instituted by *Federal Law 13,334/2016* is designed for pivotal projects that include privatisation, public concessions, Public-Private Partnerships (PPPs), and other collaborative ventures between the private sector and the Federal Government or state-owned enterprises. The program also extends to projects delegated to local authorities and those included in the National Privatisation Program, as per *Federal Law 9,491/1997*.

The Growth Acceleration Program ("PAC"), updated in 2023, is designed to bolster logistics and economic, social, and urban infrastructure with a focus on industrialisation. Over the next four years, the program is set to invest BRL 540 billion in energy, BRL 609 billion in transportation, BRL 45 billion in education, science, and technology, and BRL 27 billion in digital inclusion and connectivity.

The federal projects pipeline in the Airport sector, all of which are structured by the National Civil Aviation Agency, includes (i) the 8th Concession Round, as part of the Investment Partnership Program, which is expected to include Santos Dumont and Galeão Airports, both in Rio de Janeiro and with significant passenger traffic; (ii) the PPP Regional Airports, Amazonas Block, with estimated investment of BRL 400 million; and (iii) re-tendering of Viracopos Airport in Campinas, estimated to attract BRL 4.25 billion in investments.

The roads and highways projects are mainly in the Center-West, North, and Northeast regions, and in the states of Minas Gerais, Paraná and Rio de Janeiro. Toll road concessions are one of the most consolidated sectors in Brazil. However, the government has introduced other forms of highway use charging such as the free flow system instead of toll plazas.

In the railway sector there are five projects being planned: (i) the Ferroeste (EF-277), with privatisation process of state-owned company Estrada de Ferro Paraná Oest; (ii) the Nova Ferroeste Project concession, with an estimated length of 1,567km mainly to shipgrains, containers, fertilisers and cement; (ii) the West Network, with the Rebidding project for concessions on the West Network (Malha Oeste) in the section between Mairinque (SP) and Corumbá (MS); (iii) the Ferrogão (EF-170), a railway segment between the cities of Sinop/MT and Miritituba, a district of the municipality of Itaituba/PA, approximately 933 km in length. The project aims to consolidate Brazil's new export rail corridor through the Arco Norte. The railroad will connect grain-producing region in the Center-West to the state of Pará, ending at the Port of Miritituba. The corridor consolidated by the EF-170 and BR-163 will provide a new soybean and corn export route in Brazil.

Another pivotal project is the West-East Integration Railway – FIOL (EF-334), spanning 1,527 kilometers from Ilhéus/BA to Figueirópolis/TO. It includes Section II from Caetité/BA to Barreiras/BA, a 485 km stretch with approximately 45% of construction completed, and Section III from Barreiras/BA to Figueirópolis/TO, which is roughly 505 km long. The primary cargo for FIOL's Section I is for iron ore, sourced from Bamin's mines in the Caetité region.

Additionally, the East-West Rail Corridor comprises the West-East Integration Railway - FIOL (EF-334) in Sections II and III, and the Center-West Integration Railway - FICO (EF-354) in Sections I and II. This corridor is under consideration for a joint grant. The railway is poised to offer an alternative route for transporting goods to the ports in the North and Northeast, particularly benefitting cargo from Goiás, Mato Grosso, and Rondônia. It promises to boost agro-industrial production in the region by improving market access and to facilitate the exploitation of underutilised mineral reserves.

In tandem with these initiatives, legal advancements have been made to enhance the execution of public projects. It is noteworthy that state and municipal authorities have autonomy to set their own logistics priorities and regulations. Nonetheless, the overarching rules for public contracts and hiring processes are set by the federal government.

Enactment of *Federal Law 14,133* on April 01, 2021 marked a significant step forward in public contract regulation. It came into effect at the beginning of 2024, replacing the longstanding *Federal Law 8,666* of 1993. The new legislation modernises government hiring processes and updates the general rules on public contracting to promote efficiency, sustainability, and transparency, while fostering increased competitiveness. Notable amendments include:

1. The introduction of a new modality, competitive dialogue, enabling government to engage in proposal discussions with interested private parties, explore alternatives to fulfill government requirements and formulate a final proposal.
2. An increased emphasis on the highest economic return in public tenders and bids.
3. A streamlined, standardised procedure where proposals are first classified, then the documents of the top-ranked bidder are analysed, enhancing the efficiency of the contracting process.

A key legal revision pertains to infrastructure debenture rules. *Federal Law 14,801*, dated January 09, 2024, and *Decree No. 11,964*, dated March 26, 2024, facilitate issuance of publicly distributed debentures by concession holders, permit holders, grantees, or lessees structured as joint-stock companies. Companies in priority sectors may issue incentivised debentures, which means reduced tax payments for investors and the companies themselves. This also expedites the debenture issuance process, exempting federal projects from requiring ministry approval.

Companies in priority sectors are now empowered to issue incentivised debentures, which reduce tax payments for both investors and the companies themselves. This legislative change streamlines the debenture issuance process, as federal projects no longer require ministry approval. Priority sectors include logistics and

transportation (encompassing highways, railways, waterways, ports, and airports), urban mobility, renewable energy, telecommunications, sanitation, education, health, security, parks, social housing, and public lighting. The overarching goal is to increase funding for infrastructure projects across Brazil, thereby accelerating privatisation and fostering public-private partnerships.

Furthermore, the federal government, in collaboration with the Rio Grande do Sul State government, is poised to make substantial investments in the state. These investments will focus on logistics in response to the extensive damage caused by the heavy rains that impacted the state's entire infrastructure.

Chapter 2

Foreign Investment in Brazil

Direct Investments

According to the **Organisation for Economic Cooperation and Development (OECD)**, Brazil was the second-largest recipient of Foreign Direct Investment (FDI) at the end of 2023. With over US$ 64 billion in investments, Brazil topped Canada and was second only to the United States in the OECD's ranking.

This type of financial contribution has proven vital in a number of economic sectors. FDI facilitates foreign investors' direct acquisition of stakes in Brazilian companies through long-term prospects and acquisitions outside of over-the-counter markets and stock exchanges. This involvement not only boosts capital inflow but

also fosters business growth within the country.

However, foreign capital must be registered with the Central Bank of Brazil (BACEN), the authority legally mandated to perform this function. The procedure must be carried out using the Foreign Capital Information System for Foreign Direct Investment (SCE-IED).

Over the past few years, several important resolutions have been issued, changing the requirements for providing this information. Since November 2023, FDI conversions from services, dividends, equity interest and specific loans must be reported. A number of recent amendments also include an increase in reporting thresholds based on transaction values and the establishment of new brackets and criteria for the mandatory submission of periodic reports, which must be filed quarterly, annually, or every five years, according to the total amount of assets held by recipients.

In general, Brazilian legislation allows foreign investors to invest in the same assets available to residents, with a few exceptions. Industries such as healthcare, news media and broadcasting, mining and hydroelectricity, financial institutions, rural land subdivision services, and ownership of companies located in municipalities along the border strip are subject to restrictions and impediments.

Business Structures in Brazil

When planning to operate in Brazil, it is important to remember that each type of company has its own characteristics. The rules may vary greatly, for example, between a limited liability company (or, as they are known in Brazil, '*Sociedade Limitada*' - *Ltda*.) and a corporation ('*Sociedade Anônima*' - *S.A*.), which are the types most often targeted by investors.

Limited liability companies (Ltd.) are more prevalent in the country since they limit the partners' personal liability and are subject to fewer rules. Corporations (S.A.), on the other hand, are subject to specific regulations and can list their shares to the public, so that they become publicly traded and subject to the rules of the Brazilian Securities Commission ('*Comissão de Valores Mobiliários*' - *CVM*). Below are some additional differences between both company types:

	'Sociedade Limitada' - LTDA.	'Sociedade Anônima' - S.A.
Owners' capital	Divided into membership units (or 'quotas', as they are known in Portuguese). Members are entitled to a share of the profits and can participate in the decision-making process	Divided into shares. Preference shares are aimed at shareholders who primarily wish to receive dividends, while ordinary shares ensure voting rights and participation in the decision-making process
Owners' liability	Members' personal assets are protected because liability is limited to the value of their paid-up shares	Limited to the issue price of the shares
Founding document	Articles of Association	Articles of Incorporation
Administration	Managers and directors can hold their positions indefinitely	Managers and the board of directors serve three-year terms and may be re-elected

Legalization process

To acquire ownership of a Brazilian legal entity, a foreigner must register with the country's tax authorities. A CNPJ (National Register of Legal Entities) number is required for companies located overseas. Private individuals are required to register for an Individual Taxpayer Registry (CPF). Foreigners who wish to consolidate their shareholdings are subject to this requirement as well as anyone who intends to own assets or rights subject to government registration in Brazil, including real estate, vehicles, vessels, aircraft, bank accounts or financial market investments.

It is important to note that the Non-Resident Declaratory Register (CDNR) is mandatory for non-residents of Brazil who are required to provide proper identification when registering foreign capital transactions with the Central Bank. Applicants must enroll through a Brazilian representative, since access to the system is restricted to individuals and businesses based in Brazil.

Over the past few years, Brazilian authorities and regulatory agencies have taken steps to streamline the country's business landscape in order to reduce red tape. As a result, since 2021, non-resident foreigners can serve as company managers. In the past, only Brazilian residents could hold managerial or executive positions in corporations and limited companies. Non-nationals must appoint a representative residing in Brazil and grant them the authority to receive court summonses on their behalf prior to taking office.

Before submitting the necessary documentation and paperwork, it is imperative to ascertain whether the foreign investor's country of origin has adopted the Hague Convention. If so, the documents will be validated through the "Hague Apostille", an international notarisation procedure that certifies public documents between signatory countries. Conversely, if the investor's country of residence is not a signatory to the convention, the documents must be consularised in the issuing country (or at a Brazilian diplomatic office) and be translated by a sworn public translator in order to ensure their legal validity when submitted to Brazilian authorities.

Foreign-owned companies in Brazil are also required to appoint an attorney-in-fact to represent them before the Federal

Revenue Service (*'Receita Federal do Brasil' – RFB*) for legal and tax purposes. This agent, who may also serve as an administrator or director of the entity, must be appointed through a power of attorney, which can be electronically signed.

Indirect Investments

Financial and Capital Markets

Non-resident investors may invest in the financial market and securities market in the country, in accordance with the provisions of Joint Resolution No. 13 of 2024. Financial assets and securities traded must, according to their nature, be recorded, held in custody, registered, or deposited in institutions authorized to provide these services.

The appointment of a representative has become mandatory only for certain regulated activities or transactions that exceed specific thresholds.

The representative function may be performed by a financial institution or any type of institution authorised to operate by the BACEN, including payment institutions, or by clearinghouses and settlement service providers that are under the supervision of the Central Bank of Brazil within the scope of the Brazilian Payment System.

The list of institutions authorised, regulated or supervised by the BACEN must be consulted by the investor.

The non-resident investor's representative has, among his powers and obligations:

- to register the non-resident investor with the CVM and keep it up to date;
- to provide the BACEN and the CVM with the requested information and to maintain, for a minimum period of 10 years:
  a) individualised control, by the representative, of the income and remittances made, including the limitation of financial transfers to the amounts of the non-resident's investment balance;

b) evidence of compliance with contractual obligations and movement of funds; and

c) supporting documentation required from the parties involved in the transaction;

- to receive, on behalf of the non-resident investor, citations, summons and notifications regarding administrative, arbitration or judicial proceedings instituted based on the legislation of the financial market and the securities market, related to transactions that are the subject of the representation agreement signed with the non-resident investor.

Brazilian Depositary Receipts (BDR)

Brazilian Depositary Receipts (BDRs) are securities issued in Brazil that represent shares or other instruments issued by foreign companies and traded on international markets. BDRs enable Brazilian investors to diversify their financial portfolios by investing in international assets without trading directly on foreign exchange markets.

This instrument is ideal for foreign companies looking to establish themselves in the Brazilian capital market, enhancing their visibility and preparing them for future public offerings, acquisitions and business expansion. While BDRs represent foreign securities and are issued and traded on the Brazilian stock exchange (B3), they are denominated in Brazilian reais (R$), the local currency.

The CVM has updated the rules governing BDRs to enhance investor protection in the capital markets. Under these new guidelines, foreign issuers must meet the following criteria:

a) Having a distinct legal personality;

b) Limiting shareholder liability to the issue price of the subscribed or acquired shares;

c) Admission of securities issued for trading on a securities market;

d) Registration with a local supervising authority responsible for overseeing operations;

e) Management by delegation, with a collegiate body serving as its

highest authority;

f) Granting shareholders' rights to vote and receive dividends.

BDRs are categorised into three levels. Level I BDRs do not require foreign issuers to register with the CVM, except when backed by debt securities issued by Brazilian entities. Levels II and III require registration. The primary distinction between these levels is that Level III permits public offerings without restrictions on the target market.

As a further consideration, the foreign company's shares (which support the BDR) must derive from securities traded and held in custody in countries that have a mutual cooperation agreement with the CVM or are signatories to the the International Organisation of Securities Commissions (IOSCO) multilateral agreement. Meeting these criteria allows shares to be held in custody and traded across multiple jurisdictions, including in multiple countries.

Mutual Funds

Brazil offers numerous investment opportunities through mutual funds, which pool their resources of various investors under the direction of a professional fund manager. Taking the time to understand the different types of funds and knowing which asset categories the resources will be invested in is crucial for making well-informed investment decisions.

In recent years, the CVM has implemented significant regulatory changes that have enhanced the fund market' efficiency. Here are some of the financial products recently affected by these regulations.

Real Estate Investment Funds
('Fundos de Investimentos Imobiliários' - FII)

Real Estate Investment Funds (FIIs) have gained significant traction due to the multitude of benefits they offer. They provide investors from diverse backgrounds the opportunity to participate in the real estate market by pooling resources for projects that would be financially prohibitive individually.

This collective approach benefits small investors by leveraging the combined resources of participants, granting the fund additional negotiating power and distributing administrative costs across all shareholders.

FIIs do not allow direct redemption from the fund manager; instead, shares are sold through the secondary market, typically on stock exchanges or organised platforms. This arrangement ensures liquidity, enabling new investors to enter the fund and existing investors to adjust their holdings as needed. Trading is facilitated through authorised brokers or distributors, with associated costs to consider.

Private Equity Funds (FIP)
('Fundos de Investimentos em Participações' - FIP)

Private Equity Funds (FIPs), also known as Venture Capital Funds, are investment vehicles mainly focused on start-ups, whether they are publicly traded, privately held or limited companies. Fund establish the fund and raise capital from investors by selling shares. These investments are variable income, meaning shares can only be redeemed at the end of their term or upon liquidation, as decided at a shareholders' meeting.

FIPs are enable active participation in the investee's decision-making processes, directly influencing the company's strategic and management policies. This influence is exercised through mechanisms such as ownership of controlling shares, shareholder agreements, or other means that ensure that the fund effectively participates in the company's management.

Depending on how their portfolios are structured, FIPs can be classified as follows:

- FIP - Seed Capital: Focuses on companies with annual gross revenue of up to BRL 20 million.
- FIP - Emerging Companies: Targets companies with annual gross revenue of up to BRL 400 million.
- FIP - Infrastructure (FIP-IE) and FIP - Intensive Economic Production in Research, Development, and Innovation (FIP-PD&I): Focuses on infrastructure projects or economic output that involve intensive research and development in priority

areas such as energy, transportation, water, and basic sanitation.

- FIP – Multistrategy: Permits investments in companies of various sizes and types and is aimed exclusively at professional investors.

FIPs must keep at least 90% of their assets held in shares, simple debentures, subscription warrants or other securities convertible or exchangeable into shares issued by public or private companies. They may also invest in securities representing a stake in limited companies. Generally, investment in debentures and other non-convertible debt securities is limited to a maximum of 33% of the total subscribed capital. Additionally, up to 33% of the subscribed capital can be invested in foreign assets, provided they are similar to domestic assets. There is also the possibility of investing in shares of other FIPs or equity funds in the access market.

FIPs are managed by specialised professional managers who are technically qualified to review investments with a high return prospect. FIP investors participate in the growth of portfolio companies, whether publicly or privately held, seeking investments with high potential for yields and opportunities for significant gains. Furthermore, diversifying investments reduces the overall risk of the portfolio.

Credit Rights Funds (FIDC)
('Fundos de Investimento em Direitos Creditórios' - FIDC)

Also known as Receivables Funds, this type of investment is aimed exclusively at qualified investors. FIDCs can be open-ended, allowing shares to be redeemed at any time, or closed-ended, where shares can only be redeemed at the end of the fund's term or through amortisation, upon deliberation at a shareholders' meeting.

FIDCs invest most of their assets (at least 50%) in credit rights, which are receivables from companies arising from trade, industrial, financial, and real estate transactions, among others. These receivables include trade bills, checks, and credit card installments, allowing companies to receive funds in advance at a discount. Investors who buy shares in FIDCs earn a profit from these receivables.

One of the main advantages of FIDCs is their potential for

diversification and risk mitigation, as the credits acquired can come from a variety of operations, increasing the chances of a positive return. Furthermore, the fund's regulations ensure transparency by clearly defining the types of credit rights eligible for the fund and how the remaining net assets will be utilised.

Chapter 3

Corporate Law

Different Types of Corporate Entity

Although Brazilian law allows several type of corporate entity, the two most frequently used are limited liability companies (*sociedades limitadas*) and corporations (*sociedades anônimas)*.

Regardless of type:

(i) foreign legal entities or individuals holding equity investments in Brazil must appoint an individual resident in Brazil to act as its legal representative (attorney-in-fact); and

(ii) prior to incorporation, it is necessary to (a) verify if the shareholders/quotaholders have any legal impediments barring them from incorporating the company; (b) perform a "viability check" (*teste de viabilidade*) to confirm whether the company is allowed to carry out its business at the potential headquarters' address; and (c) consult with the relevant Board of Trade to confirm whether the proposed corporate name is available for use.

Limited Liability Company

Incorporation

A limited liability company is incorporated by contract (i.e., articles of incorporation), and requires one or more quotaholders, who may be individuals or legal entities resident or incorporated in Brazil or abroad.

This document must include: (i) the corporate name; (ii) corporate capital (expressed in Brazilian currency) and the number of quotas held by each quotaholder; (iii) address of the head office and branches, if any; (iv) corporate purpose; (v) company duration (may be indefinite); (vi) end of the fiscal year; and (vii) manager(s) of the company.

In order to be enforceable on third parties, the articles of incorporation and other corporate documents must be filed with the relevant Board of Trade within 30 days from the date of such documents being produced. The effects of incorporation and other decisions are retroactive to the date of the applicable act if the documentation is filed by the above deadline.

Corporate Capital

The corporate capital of a limited liability company is divided into quotas, each one usually with the same par value.

Quotas may be paid in using cash or assets, immediately or at a future date[1]. Quotaholders are liable only up to the value of the quotas to which they have subscribed. However, until the capital of the company is fully paid, all quotaholders are jointly and severally liable for payment of the whole amount of the unpaid portion of the capital of the company.

Limited liability companies may (i) issue different classes of quotas in the proportions and subject to the terms defined in the

1. However, only after all quotas are paid the corporate capital may be increased.

articles of association and may grant their holders different economic and voting rights; and (ii) acquire and hold its own quotas in treasury.

Assignment of Quotas

The transfer of quotas takes place via an amendment to the articles of incorporation, which must be registered with the relevant Board of Trade. Although registration makes the amendment a matter of public record, the terms and conditions of the transfer (e.g., price and payment) may be kept confidential.

Profit Distribution

As a general rule, quotaholders of a limited liability company share the profits and losses in proportion to their quotas in the total capital. Disproportional distribution of profits is possible as long as the articles of association provide for this. Provisions excluding any quotaholder from profit sharing are not permitted and limited liability companies are not legally required to distribute a minimum amount of profits to quotaholders.

Corporate Resolutions

Resolutions by quotaholders in a limited liability company are taken at a quotaholders´ meeting. A meeting is not required if all quotaholders vote on the matters of the agenda in writing.

Quotaholders' meetings must be called via a meeting notice published first published at least 8 days prior to the relevant meeting. Meetings may be held physically, digitally (by videoconference) or in hybrid format (i.e., physically and digitally).

Resolutions are taken by majority of votes from quotaholders attending the relevant meeting, unless a higher majority is required by law or in the articles of incorporation.

Management

A limited liability company must be managed by one or more individuals (officers), who may reside in Brazil or abroad. Officers may be appointed and removed at any time by resolution of the quotaholders.

Although not expressly stated in law, other management bodies (such as a Board of Directors) may be implemented at a limited liability company.

Quotaholders Agreement

Quotaholders of a limited liability company may enter into a quotaholders' agreement to govern matters not addressed in the company's articles of association, such as restrictions on the transfer of quotas or the exercise of voting rights.

Capital Market

Quotas of a limited liability company are not securities and cannot be traded on a Brazilian stock exchange Capital Market. However, limited liability companies may issue specific debt instruments.

Dissolution, Right of Withdrawal and Exclusion of Quotaholders

A limited liability company may be fully dissolved (i) when it expires; (ii) by unanimous resolution of quotaholders prior to expiry; (iii) by resolution of a majority of votes, in case of companies with indefinite duration; (iv) by cancellation of its authorisation to operate; or (v) by a court order requested by any quotaholder in case (a) incorporation is deemed invalid or (b) its corporate purpose is fulfilled or becomes impossible to pursue.

Furthermore, during specific events (e.g., if a limited liability company is merged into another company), dissenting quotaholders' will have the right to withdraw from the company. In such cases, the quotaholder has the right to receive the equity position of the

company on the date of the termination and verified in a specially prepared balance sheet, unless otherwise provided in the articles of association.

When quotaholders representing more than half of the capital understand that one or more quotaholders are jeopardising the company's ability to continue operating due to serious actions, the former may exclude the latter from the company by amending the articles of association, provided tat the possibility of exclusion is provided in the articles of association.

Publications and Other Relevant Formal Requirements

In principle, all publications of a limited liability company must be made in the Federal or State gazette and in a mass-circulation newspaper available at the place where the head office of the company is located. It is not necessary to publish quotaholders' meetings or amendments to the articles of association, except when expressly required bylaw.

Limited liability companies must keep the corporate books required by law. In addition to the accounting books applicable to any type of company, Limited liability companies must also keep the following books: (i) Book of Minutes of Quotaholders' Meetings; (ii) Book of Minutes of Management's Meetings; and (iii) Book of the Minutes and Opinions of the Fiscal Council.

Corporations

Incorporation

A corporation may be incorporated by: (i) a private instrument, by at least two shareholders; or (ii) by public deed, with another Brazilian corporation being the sole shareholder. The rules governing a corporation are set forth in its bylaws.

Incorporation of a corporation requires, inter alia:

- payment of at least 10% of the company's total subscribed capital stock, in cash, at the time of incorporation;[2]

- filing the bylaws with the Board of Trade and publishing them in a newspaper with a wide circulation.

The bylaws must indicate at least the following: (i) the corporate name; (ii) corporate capital (expressed in Brazilian currency); (iii) address of the head office; (iv) corporate purpose; (v) term of duration (may be indefinite); (vi) end of the fiscal year; and (vii) management bodies of the company, such as board of officers (mandatory), board of directors (as a general rule, optional), fiscal council (as a general rule, optional) and other committees (as a general rule, optional).

Shareholders are entitled to the following basic rights:

- participation in the company's profits;
- a share of the company's remaining assets, if any, upon liquidation;
- to supervise management of the company's business using the mechanisms provided in law;
- preemptive rights to subscribe shares and other titles convertible into shares; and
- to withdraw from the company in the cases set forth in law.

Corporate Capital

Capital may be paid up in cash or assets. If the shares are paid using assets, they must be valued, and the relevant appraisal report approved at a shareholders' meeting.

The capital of a corporation is divided into shares, which may or may not have a par value.

A company may issue common or preferred shares and both common and preferred shares can be separated into different classes.

Preferred shares may grant certain additional rights to their owners: (i) priority on distribution of fixed or minimum dividends; (ii) priority in capital reimbursement, with or without a premium; and

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2. As a general rule, there is no minimum capital requirement.

(iii) a combination of the two former rights. Preferred shares may also have restricted voting rights or no voting rights at all.[3] Privatised companies may create a special class of preferred share known as "golden shares". These shares are owned by the government entity that privatised the company and give its owner specific rights such as the right to veto certain matters.

Assignment of Shares

As a general rule, shares transfers do not require approval or consent from the company or other shareholders. Any transfer of shares must be reflected in the company's corporate books, which requires the signatures of the transferor and the transferee.

Profit Distribution

As a general rule, dividend distribution is proportional to each shareholder's interest in the company's capital.[4]

The company must pay its shareholders a mandatory dividend V, calculated in accordance with the rules included in the bylaws. If no such rules are provided for in the bylaws, the amount must be 25% of the net income for the fiscal year, adjusted for certain reserves that may be created.

Corporate Resolutions

Shareholders' meetings can decide most of the matters pertaining the company. There must be at least one shareholders' meeting held within 4 months of the end of each fiscal year. This is the annual shareholders' meeting which will vote on the following matters:

- the directors' and officers' accounts, and the financial statements for the prior fiscal year;
- distribution of net profits and payment of dividends; and
- election of Directors and members of the Fiscal Council, as applicable.

Other shareholders' meetings may be held to resolve other matters set forth in law (e.g., amendment to the by-laws) or as per the company's by-laws.

Subject to the exceptions provided by law and, in the case of closely-held corporations, in the by-laws, resolutions must be taken by a majority of votes of shareholders attending and voting at the respective meeting.

Management

The basic management structure of corporations is composed by the Board of Executive Officers (*Diretoria*), with powers to represent the company and manage it on a day-to-day basis and the Board of Directors (*Conselho de Administração*), with powers to decide on the overall direction of the company.

A Board of Executive Officers is mandatory at all corporations. A Board of Directors is mandatory only for certain types of corporations (e.g., publicly-held corporations).

Corporations must have at least one officer. Officers and Directors must be individuals, who may reside in Brazil or abroad.

Up to one-third of the Directors may also be elected to act as officers.

Except for publicly-held companies, election of independent directors is optional.

Shareholders' Agreement

Shareholders of a corporation may agree on specific voting rules or restrictions on share transfers (e.g., right of first refusal).

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3. Preferred shares without voting rights or with restricted voting rights cannot exceed 50% of the total number of shares issued by the company.
4. Except if otherwise prohibited in the relevant by-laws, shareholders of privately-held corporations with an annual gross revenue of up to BRL 78,000,000 are allowed to freely establish, at the shareholders meeting, the form of dividend distribution, as long as the rights of preferred shareholders are guaranteed.

In order to be enforceable against the corporation's management and, when applicable, third parties, shareholders' agreements must be filed at the company's headquarters and annotated in the company's books.

Brazilian corporations may be privately or publicly-held. Privately-held corporations cannot trade their securities on stock exchanges or over-the-counter markets. Publicly-held corporations may trade their securities (including shares) onstock exchanges or over-the-counter markets and, as a consequence, are subject to additional governance and disclosure requirements.

Dissolution, Right of Withdrawal and Exclusion of Shareholders

As a general rule, partial dissolution of a corporation is not possible. However, Brazilian courts have allowed corporations (e.g., corporations owned 100% by a family) to be partially resolved in certain circumstances.

Brazilian law allows dissenting shareholders to withdraw from a company upon approval of certain matters. Withdrawing shareholders receive reimbursement for the value of their shares, which is calculated according to the law and the by-laws of the company.

Brazilian law does not allow exclusion of a shareholder by resolution of the other shareholders.

Publications and Other Relevant Formal Requirements

Certain corporate documents (e.g., minutes of shareholders' meetings and meeting notices) must be published in a newspaper with wide circulation.

However, privately-held corporations with annual gross revenue of up to BRL 78 million may make publish such document exclusively in electronic format.

Corporations must keep the following corporate books: (i) Nominative Shares Register Book; (ii) Nominative Shares Transfer

Book; (iii) Book of Minutes of Shareholders' Meetings; (iv) Book of Attendance at Shareholders' Meeting; and (v) and Books of Minutes of Meetings of the Board of Directors, the Board of Executive Officers and Fiscal Council.

Duties and Liabilities of Managers

1. Introduction

As previously mentioned in this chapter, Brazilian corporate entities are regulated by *Law No. 10,406/2002* (the "Civil Code") and/or *Law No. 6,404/1976* (the "Corporations Act") and the provisions regulate the duties and liabilities applicable to managers of corporate entities.

The Corporations Act regulates joint-stock corporations (*sociedades anônimas*) as well as limited liability companies (*sociedades limitadas*) to the extent the articles of association of the limited liability company expressly provide for supplementary regulation by the Corporations Act. On the other hand, the Civil Code regulates those limited liability companies that do not expressly adopt supplementary regulation by the Corporations Act in their articles of association, as well as other less usual corporate types listed in the Civil Code (e.g., general partnerships, limited partnerships and professional partnerships).

For ease of reference, we will refer to the corporate entities regulated by the Corporations Act as corporations and to those regulated by the Civil Code as limited liability companies. It is also worth noting that the vast majority of limited liability companies incorporated in Brazil are also regulated by the Corporations Act based on express provisions in their articles of association, as explained above.

In this context, we highlight that limited liability companies, as provided by the Civil Code, must be governed by "one or more persons designated under the company's articles of association or separate document". Such persons are referred to as the company's

managers (*administradores*).

Further, management of corporations must be handled by a board of officers (*diretoria*) and a board of directors (*conselho de administração*), noting that the board of directors is not a mandatory governance body unless the corporation is a publicly held corporation or it has authorised capital. The board of officers and board of directors are also referred to together as the managers (*administradores*) of the corporation.

In this section, we will refer to the individuals making up the management bodies of corporations and/or limited liability companies simply as managers.

2. Civil Code Regulation

With respect to the duties of managers of limited liability companies, the Civil Code establishes that managers must manage the company with diligence and. In this sense, the Civil Code states managers must "in the performance of his/her duties, employ the care and diligence that every honest and prudent person usually employs in the management of their own affairs".

By setting forth the provision above, lawmakers sought to set a standard for performance which must be utilised as a parameter when discussing in specific cases.

On another note, when referring to the liability of the managers of limited liability companies, we may refer to (a) the concept of general civil liability applicable to any person – i.e., "anyone who, by voluntary action or omission, negligence, or imprudence, violates a right and causes harm to another, even if only non-material harm, or commits an unlawful act" and (b) the liability of managers under the Civil Code (*article 1,016*) – i.e., "managers are jointly and severally liable to the company and third parties harmed due to defective performance of their duties".

Analysing both these provisions, we note that a manager may be held liable when (a) there is an act or omission of the manager involving fault or willful misconduct or (b) there is a violation of applicable laws or the articles of association that harms the company or others or causes damage, provided there is a causal link between

the conduct and resulting harm.

This means not all damages caused by managers in conducting the business would generate liability. For example, managers must are not penalised for customary management activities not involving fault, negligence, imprudence, or willful misconduct. In these cases, a party that feels aggrieved, whether a partner of the company or a third party, would take measures against the company and the manager would not be held personally liable for acts falling outside the civil liability framework presented above.

In addition to the above, the Civil Code lists other specific situations when liability is attributable to managers such as (a) when managers perform illicit or fictitious profit distributions, in which case managers are joint and severally liable with the shareholders that received such profits (*article 1,009*); or (b) when managers divert company assets or credits for personal use or benefit third parties without shareholder consent (*article 1,017*).

Finally, we note the Civil Code includes certain restrictions on managers, whereby certain persons are prohibited from acting as managers:

(a) Persons prevented by special laws from acting in such capacity (e.g., government employees);

(b) Persons convicted to a sentence that prohibits access to public office, even temporarily;

(c) Persons convicted for bankruptcy, malfeasance, bribery, graft, extortion or embezzlement; and/or

(d) Persons convicted of crimes against public welfare, the national financial system, competition rules, consumer relations, public faith or property, for as long as the effects of their conviction last.

3. Corporations Act Regulation

In order to understand managers' liability under the Corporations Act, it is important to understand the duties applicable to and expected from managers when performing their roles.

(a) Duties

Firstly, it should be noted that the duties mentioned in this section apply not only to managers of corporations – i.e., officers and directors –, but also to members of other technical or advisory management bodies created by the shareholders in the company's bylaws to support company management.

In this respect, the Corporations Act establishes the following duties that must be observed by managers:

(i) Duty of Diligence

According to the Corporations Act – and the Civil Code –, managers must employ the care and diligence that a diligent and honest individual usually employs in the management of his/her own business.

In order to assess whether fulfilled manager is acting with sufficient diligence or not under Brazilian law, certain scholars in Brazil apply the following criteria: (a) possession and maintenance of qualifications necessary to perform the function; (b) being informed; (c) proactive administration; (d) supervision and (e) intervention.

Several aspects can be considered when evaluating compliance - or not - with the duty of diligence, such as, for example, the position occupied by the manager, the time elapsed since the manager's investiture, the manager's legal and statutory powers, the act or omission involved, the degree of technicality of the matter, the information available, presence of red flags, timing and other elements. All these aspects are evaluated alongside the manager's conduct when assessing whether she acted diligently in any specific case.

(ii) Duty of Loyalty

The duty of loyalty is based upon three main rules managers must observe: (a) the company's business must remain confidential; (b) they cannot use information acquired by reason of the their position for the benefit of the manager or a third-party; and (c) protecting the company from losses and/or losing benefits available to it.

Based on the principles above, the Corporations Act provides a list illustrating situations a company's managers

must avoid and which help us grasp the extent of the manager's duty of loyalty: a manager cannot (a) use commercial opportunities that he or she is made aware of due to his/her position for his/her own or a third-party's benefit, whether or not the company suffered any loss or harm,; (b) fail to protect the company's rights or, in order to obtain an advantage for him/herself or others, fail to take advantage of business opportunities of interest to the company; and (c) acquire, for resale with profit, a good or right that the manager knows is necessary for the company, or that the company intends to acquire. Finally, the manager's loyalty to the company must be absolute, undivided and integral.

(iii) Ethical-social Duty

The Corporations Act also establishes, as a "sub-duty" to the duty of diligence, i.e., that managers must pursue the company's interests aligned with satisfaction of the public good and the company's social function. Accordingly, even if a manager has been elected by a group of shareholders, they must still observe their obligations regardless of the interests of those who elected him/her.

As per the Brazilian Federal Constitution and Civil Code, the social function of a company essentially means companies should serve the community, fulfill social interests and limit the discretion of related contractors in order to achieve a balance between the company's economic and social functions.

Further, the Corporations Act sets forth certain acts which managers must avoid to fulfill their ethical-social duty: (a) engage in acts of free will at the expense of the company, (b) loan resources or assets from the company, or using assets, services or credit of the company for their own benefit or the benefit of another company in which they hold interests or of third-parties and (c) receive personal advantages from third-parties due to his/her position without authorisation to do so.

(iv) Confidentiality

As managers have access to privileged information in light of their positions, relevant information relating to the

company's business (and, more importantly, information pertaining to the continuity of the company's business) must be treated as confidential by the managers.

The duty of confidentiality is the obligation of the manager to hold in secrecy any non-public information obtained by virtue of their office (be it from the company itself or external agents).

Further, specifically with respect to publicly held corporations, it is also the duty of the manager to maintain confidential any information that has not yet been disclosed to the market, that was obtained by virtue of their position and is capable of significantly influencing the securities' market value. The manager is further prohibited from using information to obtain an advantage, for themselves or for others, through the purchase or sale of securities, as further detailed in the publicly held corporations' section below.

(v) Duty to disclose

We note that the duty to disclose in the Corporations Act applies solely to publicly held corporations. The duty establishes obligations to provide certain company information as required to publicly disclose aspects of the company's business or circumstances that may impact the company's market value.

The obligation to disclose generally relates to, inter alia, aspects pertaining to the company's shares, subscription bonuses, stock options, and convertible debentures issued by the company, as well as relevant acts or facts relating to the company's activities and the shares' market value.

Finally, it is worth noting that the duty to disclose complements and provides exception to the duty of confidentiality, to the extent that certain information must be mandatorily disclose to determined agents.

(b) Conflict of interest

Apart from the duties that apply to the managers of corporations, it is also important to address the conflict of interest

provisions in the Corporations Act.

Essentially, the conflict of interest provisions establish that in certain circumstances managers are prevented from intervening or participating in any company transactions and/or voting on resolutions in which he/she has a conflicting interest with the company. Managers will therefore have a duty to inform the company and/or the other managers of his/her impediment and document it in the corresponding meeting minutes with details on the kind and extent of the conflict.

The Corporations Act also states that even if a manager compliers with the duty to disclose conflicts of interests, a manager may only enter into contracts with the company on an arms length basis, with similar terms and conditions to market standard contracts that the company would enter with third parties. Contracts entered into without observing this rule are voidable and the manager will be obliged to transfer any benefits obtained from such voided transactions to the company.

(c) Liability

Following an overview of the duties managers must observe and the liability of managers of corporations, the Corporations Act stipulates a manager will not be held personally liable for losses or obligations incurred by the company resulting from the manager's lawful management activities. This reveals that the acts performed by a manager compliant with the relevant fiduciary duties and within the limits of the manager's role established under the law or in the bylaws must not support a claim against the manager, even if such act constitutes a loss to the company and/or third parties.

The Corporations Act also determines that a manager has civil liability for damages caused to the company, even when acting in their official capacity, when the acts or omissions causing damages result from fault or willful misconduct and/or when he/she violates applicable law or the company's bylaws.

We note that the logic for establishing managers' liability is also rooted in the civil liability logic from the Civil Code, which means we need to identify the elements relating to conduct involving

fault or willful misconduct, harm and the causal link between the conduct and harm.

Further, with respect to a manager being jointly and severally liable with other members of the management body, the Corporations Act states a manager is not responsible for unlawful acts of other managers, unless he/she is complicit, if he/she neglects to discover them or if, having knowledge of them, he/she fails to act to prevent wrongdoing. A dissenting manager will be exempt from liability to the extent he/she records the disagreement in the minutes of the meeting of the relevant administrative body or, if this is not possible, immediately informs the respective management body, the audit committee (if active), or the company's general meeting, in writing.

Managers are joint and severally liable for losses caused to the company resulting from a breach of their legal duties to ensure the company's normal functioning, even if according to the company's bylaws such duties do not apply to all managers. Exceptions are made at publicly held corporations in which case liability will be restricted to those managers who have specific responsibility to observe certain fiduciary duties according to the company's bylaws.

Notwithstanding the foregoing, a manager who becomes aware of any breach or wrongdoing by another manager must notify the company and should he/she fail to do so, he/she will be considered jointly and severally liable for the breach or non-compliance.

(d) Liability Lawsuit

As a general rule, a company is entitled to file a civil liability lawsuit against managers that cause losses to the company. Under the Corporations Act, a corporate resolution must be passed at a general shareholders meeting of the company approving the filing of a claim in order to file such civil lawsuit. If a corporate resolution is passed at an ordinary general shareholders meeting, the matter does not need to be included in the meeting's agenda beforehand and may be raised for discussion by a shareholder attending the meeting. Conversely, if the corporate resolution is taken at an extraordinary general shareholders meeting, the matter must be included in the meeting's

agenda beforehand.

A manager who is a defendant in such a civil lawsuit will be suspended from their position and must be replaced at the same shareholders meeting that resolved to file the aforementioned lawsuit.

Moreover, as an alternative to the general rule, the Corporations Act allows the filing of a lawsuit by shareholders of the company as follows: (i) any shareholder may file a civil lawsuit if one is not filed by the company within 3 months of the shareholders meeting that approved the filing of a lawsuit (combating inertia); and (ii) if a company's general meeting decides not to file a civil lawsuit, shareholders representing 5% (five percent) of the capital stock may file one in order to protect the interests of minority shareholders.

Thus, a civil lawsuit against managers may be classified as *ut universi* (when the company itself is the plaintiff) or *ut singuli* (when the shareholders are the plaintiff). As mentioned, in both cases a prior resolution at a company general shareholders meeting is mandatory.

The results of the lawsuit filed by a shareholder will accrue to the company, although the company must indemnify the shareholder for all expenses incurred, including inflation adjustments and interest on expenditures the shareholder that filed the claim incurred.

It is important to point out while analysing the civil lawsuit brought against a manager the court has the discretion to find the manager is exempt of any liability if it concludes the manager acted in good faith or with the intent of achieving the company's interest whenever such elements are crucial for assessing managers' liability.

Finally, managers may cause losses directly to shareholders and/or third parties. In this case, the Corporations Act states individual lawsuits may be filed by parties directly harmed by the manager's acts or omissions.

4. Publicly held corporations

(regulated by the Brazilian Securities and Exchange Commission, the *Comissão de Valores Mobiliários* – CVM)

Unlawful conduct by managers of publicly held corporations

that violate corporate law and/or capital market legislation may, in addition to civil liability, attract administrative liability imposed by the Brazilian Securities and Exchange Commission (the *Comissão de Valores Mobiliários* – CVM).

Law 6,385/1976 stipulates the CVM is responsible for creating, overseeing, investigating and enforcing the rules applicable to Brazilian securities market participants. This means the CVM is responsible for assigning administrative liability to managers of publicly held corporations.

Under *Law 6,385/76*, the following penalties apply to Brazilian securities market participants, including but not limited to managers: (i) warning; (ii) fine; (iii) temporary prohibition and disqualification; and (iv) suspension of authorisation/registration to engage in activities compatible with the law. The penalties applied by CVM serve an educational purpose with respect to market participants and are not comparable to, for example, criminal sanctions.

Administrative liability can only be attributed to managers of publicly held corporations if support by evidence of fault or willful misconduct. Restrictions/specifications in connection with the duties of to each manager as per the corporation's bylaws will be observed more closely when assessing liability of managers of publicly held corporations.

It is worth highlighting that (i) the administrative procedure adopted by CVM to assess managers' liability following alleged breaches of securities market regulations is regulated by CVM *Resolution No. 45/2021*, and (ii) it is the responsibility of the Sanctions Process Superintendence (SPS) to initiate and conduct CVM administrative inquiries, observing the principles of informality and expediency that are characteristic of administrative procedures.

Finally, managers may be held liable for insider trading, i.e. the use by managers of undisclosed information from publicly held corporations in order to benefit themselves or third parties. Legal measures to combat insider trading can be classified as preventive or repressive.

The preventive rules supports information transparency and disclosure relating to corporations and securities traded by

corporations, in order to ensure symmetry of information for all market participants. Repressive measures, however, might result in: (i) civil liability, given that insider trading is a breach of the fiduciary duties of loyalty and confidentiality; (ii) criminal liability, since article 27-D of *Law 6,385/1976* defines the crime of insider trading and sets a penalty of imprisonment for 1 to 5 years and a fine of up to 3 times the amount of the illicit advantage obtained, and (iii) administrative liability, given that CVM is entitled to investigate and initiate administrative procedures against managers.

Resignation of Directors and Officers

Directors and officers may cease to hold their positions upon (i) expiration of the relevant term of office (the term of office must be established in the articles of association or in a separate document in the case of a limited liability company, or in the company's bylaws, in the case of a corporation), (ii) removal, at any time, by decision of the company's shareholders or its board of directors, as the case may be, or (iii) their resignation.

Directors and officers may resign at any time by notifying the company and, depending on the situation (e.g., sole officer and no board of directors), its shareholders. Resigning is a unilateral act and does not required the relevant company's or its shareholders' approval or consent.

A resigning director or officer may indicate their resignation will become effective as of a future date. In this situation, the company is not required to accept such a condition and may proceed to remove the director or officer by decision of the company's shareholders or Board of Directors, as the case may be.

If the resignation notice does not indicate that the resignation is effective as of a future date, it becomes effective as soon as the company and/or shareholders are notified. However, resignation is only effective in relation to good-faith third parties upon completion of resignation notice registration with the relevant Commercial Registry (*Junta Comercial*), which may be carried out by the company,

or the resigning director or officer.

Liability After Resignation

Former directors and officers remain liable to the company for their activities that represent a violation of the law or the company's Articles of Association or By-laws, as the case may be. The applicable statute of limitation is three years which runs from, (i) in the case of a limited liability company, the earlier of (a) the date the financial statements relating to the fiscal year when the illegal act occurred are made available to the shareholders or (b) the date of the shareholders' meeting held to acknowledge such activities; or, (ii) in the case of a corporation, the date the minutes of the shareholders' meeting that approved the resigning manager' accounts relating to the fiscal year when the illegal act occurred are published.

As a general rule the statute of limitations liability for environmental matters, is five years from the date of the illegal act or, in the case of permanent or continuous violations, from the day the act ceased, except when it is also a crime, in which case the statute of limitation will the same that applies to the corresponding crime. Civil claims for compensation arising from environmental damage are not subject to any statutes of limitation.

In relation to anticorruption matters, Brazilian law provides civil and administrative strict liability of legal entities for acts against the Public Administration, both domestically and abroad. The statute of limitations for these violations is five years from the date the offense becomes known. In case of permanent or ongoing violations, the statute starts to run on the day they are discontinued. However, as with environmental liability, if the relevant illegal act is also a crime the statute of limitation will the same that applies to the corresponding crime. The liability of the legal entity, however, does not affect the individual liability of its directors or officers, or of any natural person who are the perpetrators, conspirators or participants in the wrongful act and they can be held liable for wrongdoing to the extent of their culpability.

Restructuring and Insolvency

Introduction

The Brazilian Bankruptcy Act (*Law No. 11,101/2005*) provides (i) judicial reorganisation, a court-supervised restructuring proceeding, (ii) prepackaged reorganisation, an out-of-court restructuring proceeding, and (iii) bankruptcy liquidation.

Judicial Reorganisation

The judicial reorganisation proceeding aims to allow a debtor to overcome their economic-financial crisis, allowing their continuity as a productive source, maintaining jobs, and preserving the creditors' interests.

Judicial reorganisation is a voluntary proceeding and binds all pre-filing claims, even those not yet due. There are exceptions to this rule, such as tax and social security-related claims and claims guaranteed by fiduciary lien[5].

The court decision commencing the proceeding triggers a 180-day protection period – extendable for the same period exceptionally and one time only as long as the delay is not attributed to the debtor[6] –, during which the majority of lawsuits filed against the debtor (including all enforcement and foreclosure proceedings) will be suspended. This decision also appoints a trustee, who will be responsible for managing the claims verification process and overseeing management of the debtor's business, among other duties.

Within 60 days of the court decision commencing the

5. Fiduciary lien is a type of collateral provided by Brazilian law that allows the debtor to dispose of a relevant asset (e.g., real estate, equipment, receivables, equity) in guarantee of a debt. In this transaction, ownership of the asset is transferred to the creditor (*credor fiduciário*), and the debtor (*devedor fiduciante*) keeps the immediate possession of the asset. On default of the debtor, the asset can be foreclosed.
6. Another 180-day extension will be applicable if creditors submit an alternative judicial reorganisation plan.

proceeding, the debtor must present its judicial reorganisation plan, containing the reorganisation measures to be undertaken, evidence of the economic viability of the plan, an economic-financial report, and an appraisal report of the assets of the debtor, prepared by a duly qualified professional or by a specialised company. In the event the judicial reorganisation plan proposed by the debtor is accepted by the creditors, the court will confirm the reorganisation. However, if the judicial reorganisation plan is opposed by any creditor, the court will convene a creditors' general meeting to discuss and vote on the plan.

Creditors can request a meeting of creditors if they represent at least 25% of the total amount of claims of a given class of claims.

For purposes of the creditors' meeting, the creditors are classified in 4 classes, as follows: (i) Class I – labor claims; (ii) Class II – secured creditors (i.e., credits with guarantees in rem, such as a mortgage or pledge); (iii) Class III – unsecured creditors; and (iv) Class IV – creditors classified as small enterprises.

For approval of the judicial reorganisation plan at a creditors' general meeting, two requirements must be met: (i) in the classes of secured and unsecured creditors, the judicial reorganisation plan must be approved by more than 50% of creditors attending the meeting both by (a) amount of claims and (b) number of creditors (on a headcount basis); and (ii) in the classes of labor claims and creditors classified as small sized enterprises, by more than 50% of creditors attending the meeting (on a headcount basis), regardless of the amount of their claims.

The Brazilian Bankruptcy Act also grants the debtor the option to request the Judge to "cram down" the judicial reorganisation plan if the requirements described above are not met. The cram down is only possible if: (i) at least 50% of the creditors by amount of claims voted to approve the judicial reorganisation plan; (ii) the judicial reorganisation plan is approved by three classes of creditors (if there are four classes in total), two classes of creditors (if there are three classes in total) or one class of creditors (if there are only two classes of creditors in total); and (iii) one-third of the creditors attending the creditors' meeting in the rejecting class voted to approve the judicial reorganisation plan (this one third can be based either on the amount of claims and/or number of creditors, depending on the class).

Creditors are entitled to present an alternative judicial reorganisation plan if the debtor's plan is rejected or fails to be approved before expiration of the stay period. The alternative plan must meet certain criteria and cannot impose a sacrifice greater on the debtor or its shareholders than that which would result from liquidation in bankruptcy.

Requirements for creditors to propose an alternative plan are: (i) the debtor's proposed plan is not approved by the cram-down rules; (ii) after rejection of the plan, the trustee shall submit to vote a 30-day deadline for creditors to present their plan (approval must be by more than 50% of creditors by amount of claims); and (iii) support for the alternative plan from creditors holding more than 25% of the total amount subject to judicial reorganisation or more than 35% of credits attending the creditors meeting that rejected the plan.

Other rules related to the alternative plan are: (i) creditors cannot impose new obligations on the debtor's shareholders (i.e., impose subscription of new shares or to provide new money); (ii) creditors cannot put the debtor in a worse situation than it would face under a bankruptcy liquidation; and (iii) the plan shall release personal guarantees granted by third parties that are not companies (normally shareholders) to guarantee claims held by creditors who supported the alternative plan.

Once the judicial reorganisation plan has been approved by creditors and confirmed by the court, the debtor will remain under judicial reorganisation for up to two years, during which time failure to comply with any obligations set forth in the plan can result in judicial reorganisation being converted into a bankruptcy liquidation proceeding. Similarly, as a general rule, failure to obtain approval for the judicial reorganisation plan from creditors or failure to secure a court-ordered confirmation of the reorganisation plan will also result in the debtor's bankruptcy liquidation.

Prepackaged Reorganisation

In a prepackaged reorganisation, the debtor negotiates a prepackaged reorganisation plan involving either a portion or all the claims subject to the proceeding. If the applicable legal requirements are met, the plan will be confirmed by the court and will bind all

creditors of the restructured classes, even those who did not adhere to the plan.

The debtor may restructure claims of secured and unsecured creditors, as well as create sub-groups of creditors of the same type and with similar payment conditions. To restructure labor claims in a prepackaged reorganisation, the debtor must carry out a collective negotiation with the labor union representing the respective professional category. Claims not subject to judicial reorganisation cannot be bound by a prepackaged reorganisation plan either.

If more than half of the claims in each class or group of creditors support the restructuring plan, the debtor can seek court confirmation for binding all creditors in the restructured classes or groups, even if they opposed the plan. Alternatively, the debtor can request confirmation with support from at least one-third of the creditors, while committing to reach the legal quorum within 90 days of filing.

The debtor's request for confirmation of the reorganisation plan triggers the 180-day stay period that applies exclusively for claims subject to the plan. Classes or groups of creditors excluded from the prepackaged reorganisation can enforce their rights against the debtor.

Since there is no stay of proceedings while the debtor engages in out-of-court negotiations with creditors (i.e., before filing the plan), the debtor may need a standstill agreement with creditors to enable the negotiation of the prepackaged restructuring plan.

Bankruptcy

In bankruptcy liquidation, the assets of an insolvent company are collected and sold by a court-appointed trustee and the proceeds are used pay creditors on a waterfall base is described in the Brazilian Bankruptcy Act.

A liquidation proceeding begins with the debtor company filing of a bankruptcy petition (voluntary proceeding), or the company's creditors filing one (involuntary proceeding). A liquidation proceeding may also initiate when a judicial reorganisation is converted into a bankruptcy.

The bankruptcy decree will also set the "clawback period". According to the Brazilian Bankruptcy Act, the "clawback period" is a period defined by the court in which transactions carried out by the debtor can be revoked but the period must not retroact to more than 90 days prior to (i) the filing for bankruptcy; (ii) the filing for judicial reorganisation; or (iii) the first protest of a title/bond issued by the debtor.

The trustee has the duty of collecting and assessing all assets of the debtor, including any assets in the possession of a third party by reason of a pledge or deposit. Subsequently, the trustee will carry out the sale of debtor's assets to pay credits owned by the creditors with the proceeds.

In a bankruptcy liquidation proceeding, creditors are classified in accordance with the nature of their claims for payment purposes and the debtor must respect these waterfall of payments:

(i) expenses whose advanced payment is necessary for management of the bankruptcy and labor claims from three months prior to the bankruptcy decree, limited to 5 monthly minimum wages per employee;

(ii) Debtor-in-possession financing granted during the judicial reorganisation;

(iii) restitution claims;

(iv) trustee fees and labor claims related to activities executed after the bankruptcy decree;

(v) credits originated during the judicial reorganisation or after the bankruptcy decree;

(vi) claims related to loans provided to the bankrupt estate by creditors;

(vii) claims related to the sale of the bankrupt estate assets;

(viii) judicial fees related to proceedings in which the bankrupt estate loses;

(ix) tax claims relating to triggering events that occurred after the bankruptcy decree;

(x) labor claims, limited to 150 monthly minimum wage per employee;

(xi) secured creditors, up to the value of the assets given as collateral;

(xii) federal, state and municipal tax claims, excluding fines;

(xiii) unsecured creditors;

(xiv) contractual and public fines and penalties, including tax penalties;

(xv) subordinated claims; and

(xvi) interest accrued after the bankruptcy decree.

Bankruptcy liquidation tends to be time-consuming, taking several years to conclude. In 2024, Brazil's Congress is expected to vote on a bill to amend the Brazilian Bankruptcy Act and several provisions related to the liquidation proceeding, but the vote has yet to take place.

Media and Foreign Investment

Journalistic and FTA broadcasting services

The legal framework that governs foreign investments in Brazilian journalistic companies and Free Trade Association (FTA) broadcasters is grounded in the Brazilian Federal Constitution, which includes the rule in article 222 (introduced in the 36th Constitutional Amendment, dated May 28, 2002), and *Law No. 10,610/2002*, which further regulates amendment of the constitutional rule. The carrying out of FTA broadcasting services in Brazil, as a public service, is also subject to a set of rules established in *Law No. 4,117/1962*, which approved the Brazilian Telecommunications Code.

These rules have proven to be an important legal landmark for development of the local market and journalistic and broadcasting companies, given they have provided significantly greater flexibility for such companies to raise funds overseas and enter into strategic partnerships with foreign companies. The regulations have also supported these companies by applying international accounting and management practices and standards in order to support their

international business with third party investors.

Foreign ownership restrictions

Pursuant to article 222 of the Brazilian Federal Constitution, *Law No. 4,117/1962*, and *Law No. 10,610/2002*, foreign investors are allowed to own up to 30% of the voting capital stock and the total capital stock of journalistic and broadcasting companies, which in turn must be held by legal entities incorporated under Brazilian laws and headquartered in Brazil. The remaining 70% of the voting capital stock and total capital stock of such companies must be owned by native Brazilian citizens,[7] who will mandatorily carry out management activities.

Nonetheless, although foreign investors are authorised to participate in the capital of journalistic and broadcasting companies, the current legal framework provides certain restrictions on management by foreign individuals and this should be addressed before investing in the Brazilian media market. They include:

- Native Brazilian citizens must be responsible for defining editorial content, the selection of programme schedules and the management journalistic and broadcasting companies' corporate activities;
- Foreign investors cannot hold rights that could ensure access to more comprehensive and broader rights than those held by native Brazilian citizens;[8] and
- The same individual cannot participate in administration or management of more than one broadcaster at the same location.

In view of the corporate restrictions above, the majority of

7. For the purposes of the current legal framework, the expression "foreign individuals" means foreign persons, or foreign persons naturalized as Brazilian citizens for less than 10 years, while "native Brazilians citizens" means native Brazilian persons or foreign persons naturalized as Brazilian citizens for more than 10 years.
8. Although the concept of "superior rights" has not been legally defined, it is generally understood as a restriction for the creation of any corporate subordination of native Brazilian citizens to foreign individuals in connection with the management of journalistic and broadcasting companies.

the transactions involving equity interests held by foreign investors in journalistic and broadcasting companies have been concluded on the basis of a standard set of rules (mostly veto rights) that both complied with the current legal framework and addressed the interests of foreign investors, which generally vary depending on the type of investor (e.g., foreign media groups or financial/private equity investors).

Such issues must be carefully addressed by foreign investors as agreements with equity holders at journalistic and broadcasting companies may be declared void if they result in breaches of the corporate restrictions described above. *Law No. 10,610/2002* authorised the Federal Executive to request documents and information from journalistic and broadcasting companies to verify their compliance with these restrictions.

Journalistic and broadcasting companies must also submit annual statements to the Board of Commerce where its constitutional documents have been filed certifying at least 70% of the voting capital stock and of the total capital stock is owned by Brazilians and confirming their identification.

Furthermore, changes in corporate control of journalistic and broadcasting companies must be communicated to the Brazilian Congress and the transfer of public broadcasting concessions, permissions or authorisations is subject to prior approval from the Federal Administration through the Ministry of Communications (MCOM).

Pay-TV services

According to the Brazilian General Telecommunications Law and additional regulations issued by the Brazilian National Agency of Telecommunications (ANATEL), Pay-TV services (*Serviço de Acesso Condicionado*) are classified as a collective telecommunications service that enables distribution of audiovisual content via technology, processes, electronic media, and communication protocols, with access based on paid subscription. This service must not be mistaken for Value-Added Services (VAS) (e.g., OTT platforms), which are not classified as telecommunications services under Brazilian law. Within the scope of Pay-TV, the service provider is responsible for making

the connection available to the client through its own efforts and using its own technology.

Market access and foreign investment restrictions

As a rule, only companies headquartered and legally incorporated under Brazilian laws are eligible to obtain authorisation/licensing to provide telecommunications services. However, *Law No. 12,485/2011*, which regulates the provision of Pay-TV services, includes a more robust and specific restriction regarding cross-ownership among content producers and telecommunications service providers. According to the law:

- The control or ownership of more than 50% of the voting capital stock of companies providing collective telecommunications services cannot be directly or indirectly held through a company under common control of FTA broadcasters and/or by audiovisual producers and programmers headquartered in Brazil, which are prohibited from directly exploiting those services; and
- The control or ownership of more than 30% of the voting capital stock of FTA broadcasters and audiovisual producers and programmers headquartered in Brazil cannot be directly or indirectly held through a company under common control of telecommunications service providers of collective interest, which are prohibited from directly exploiting those services.

Such cross-ownership restrictions are currently under review by the Brazilian Congress but remain in force in the meantime.

Video-on-Demand services

According to the Brazilian General Telecommunications Law, services and other solutions that add utilities to a telecommunications service but do not provide connection among users (i.e., OTT platforms), are not to be confused with the telecommunications services supporting them and are deemed VAS, which are currently outside ANATEL's regulatory competence and thus not subject to telecommunications laws and regulations.

Currently, the Internet is regulated by the Brazilian Internet Act (*Law No. 12,965/2014*), which does not provide specifically for Video-on-Demand (VoD), given that Pay-TV regulations do not apply to content delivered exclusively over the Internet.

As a result, the foreign investment restrictions outlined above do not apply to VoD services. Nevertheless, there are ongoing discussions to enact more comprehensive regulations of OTT platforms, especially within ANATEL and the Brazilian Congress, which may introduce changes.

Despite challenges that affect development of the Brazilian media market, Brazil's current legal framework has significantly expanded local opportunities for foreign investors, whether via private equity investments or through the strategic partnerships.

Managers' and Investors' Liability in Brazil

Acknowledgments

Brazil remains a strong trading partner and import market for British companies. The reasons for that are many: its vast consumer market, the leading economy in Latin America, recently improvements to open market policies, stable democratic government and solid business practices. Due to the singularities of doing business in Brazil, it is recommended that investors rely on local advice during their entire entrepreneurial endeavor. It is also crucial to understand the different aspects of liability for foreign investors and managers, which can directly impact the investor's equity. This guide discusses the most significant aspects of risks and ways to mitigate them.

1 - Brazilian Legal System and Dispute Resolution Methods

Before addressing the most significant aspects of the existing

risks and ways to mitigate them, we should briefly explain that Brazil influenced by the European legal tradition, with the civil law model as the structural base of its legal system. The Federal Constitution is the country's supreme law with which all other laws and court rulings must comply.

Brazil is a federation, formed by the Federal Government, Federal District, States and Municipalities, all with the authority to legislate, as specified in the Constitution. For instance, the federal government has exclusive jurisdiction to legislate on corporations, contractual rules, trade, financing, labor relations and intellectual property proceedings.

In Brazil, companies are regulated by various pieces of legislation. Some deserve special attention, such as the Introduction to the Rules of Brazilian Law, the Brazilian Civil Code and the Corporations Act, which establish the general business rules (contracts, corporate types and civil liability, among other important issues).

In addition to the codified legislation, Brazil is a signatory to several international agreements in the business sphere. Because they have been approved by the domestic legal system, in practice, they have the force of law.

Conflict resolution is still very much linked to the Judiciary in Brazil. The judicial system is still the most commonly used method to settle disputes in litigious situations.

In Brazil, the best-known methods of non-judicial dispute resolution are arbitration, mediation and negotiation. In addition, some new alternative dispute resolution methods that could become more widespread are Online Dispute Resolution (ODRS) and cyber courts. If appropriately used, these methods effectively prevent conflicts and help settle disputes.

2 - The Disregard Doctrine in Brazil

First and foremost, it's interesting to realise that a company is a legal fiction created to stimulate entrepreneurship by segregating a business's equity from the private assets of its partners and managers. This way, any liability must lie on and every debt must be charged against, the company and if it remains delinquent, creditors

can then seize the company's equity. Neither partners nor managers are accountable for the company's debts as a first step.

The Economic Freedom Act[9] acknowledges that a company's equity autonomy is a legal instrument aimed at stimulating enterprise, creating jobs and generating tax revenue, income and innovation for the benefit of all. In doing so, the Act confirms that a company's legal personality is autonomous and must not be confused with that of its partners, associates, founders, or managers.

That's how the concept was originally conceived.

However, time has shown that investors sometimes used this corporate immunity to defraud creditors, leaving the company "hollow" with no equity to pay its debts. This scenario brought about the disregard doctrine, also known as piercing the corporate veil.

Disregarding the legal entity[10] is the result of a judicial ruling that lifts the corporate veil, allowing the company's creditors to reach the assets of the shareholders/members and managers.

In general, piercing the corporate veil only reaches the assets of the shareholders/members or managers engaged in wrongdoing. However, if the Court can't assign individual guilt, then liability may encompass the assets of all shareholders/members and managers regardless of their actual involvement.

The law allows piercing the corporate veil in exceptional cases expressly established by law or when certain special conditions are presented. As it is an atypical measure, specific legal requirements must be fulfilled in order before the doctrine can be applied.

The disregard doctrine appeared for the first time in Brazilian law in 1990 in the Consumer Protection Code (*Law No. 8,078/90*). Later, in 2002, the Brazilian Civil Code introduced the general rule for the disregard doctrine. The difference between the two is that the first applies the so-called Minor Theory while the latter applies the Major Theory.

Veil-Piercing Major Theory

For the Veil-Piercing Major Theory, embraced by the Brazilian Civil Code, one must prove the company was used to breach the law

or defraud third parties. Thus, in the traditional conception of this theory, it is fundamental to prove the company's intentional, fraudulent, or abusive use.

The Major Theory only authorises piercing of the corporate veil when there is proof the shareholders/members or managers abused rights, diverted the company from its original purpose, or when the assets of the individual are commingled with those of the legal entity in order to embezzle or divert the company's equity to defraud its creditors.

Abuse of rights	Diversion of purpose	Commingling
Use of the company to perform fraudulent, illegal or abusive acts or violate the company's bylaws. To clearly exceed the limits imposed by economic or social limits, good faith, among others.	Unlawful use of the corporate entity for purposes other than the ones for which it was created, with the intent to defraud creditors or to engage in illegal acts.	Equity and other obligations of shareholders/me mbers and the company are so intertwined that it is difficult to distinguish between the two.

In order for this theory to be enforced, a creditor must prove that a company was used unlawfully to defraud creditors or third parties, which must be shown using concrete evidence and acknowledged by a reasoned judicial ruling.

Modern literature understands that a company's thin capitalisation should also be framed as an unlawful act and allow

9. *Law No 13,874* of September 20, 2019.
10. Also known as "piercing the corporate veil", veil-piercing, lifting the corporate veil.

piercing of the corporate veil when combined with fraud or gross negligence.

A company is considered to be thinly capitalised when it has a high proportion of debt capital in relation to its equity capital, that is, the equity capital is insufficient to meet its basic needs and/or bear the risks inherent to the company's activity.

Veil-Piercing Minor Theory

Contrary to the first theory, for the Minor Theory insufficient equity is enough to pierce the corporate veil. That, of course, is a much harsher measure. Hence, it should be applied only in very limited circumstances.

The idea behind the Minor Theory is that a business, risk inherent to economic activities, should not be borne by a third party but by the company's shareholders/members and managers, even if there is no evidence of negligent or malicious conduct on their part.

Foreign investors should understand that cases in which the Minor Theory is applied are the most troublesome aspect of Brazilian legislation. In these cases, the corporate veil is pierced whenever a company's equity autonomy poses an obstacle to fair compensation for damage caused to third parties.

In Brazil, the Minor Theory is adopted in the following areas of the law:

> **CONSUMER LAW**, which provides that "a legal entity will also have the veil pierced whenever its legal autonomy is in any way an obstacle to reimbursement of consumer harm" (*Article 28, paragraph 5, Law No. 8,078/1990*).
>
> **ENVIRONMENTAL LAW**, which provides that "a legal entity may have the veil pierced whenever its legal autonomy is an obstacle to compensation for environmental damages " (*Article 4, Law No. 9,605/1998*).
>
> **LABOR LAW**, which stipulates, via case-law, that employees are economically disadvantaged and cannot bear the enterprise's risks managed on behalf of their

> employer. Thus, if a company does not have sufficient equity to pay its labor debts, the shareholders/ members and possibly its managers, directors or legal representatives may be held liable[11].

In these cases, it is possible to pierce the corporate veil simply because legal autonomy is in some way an obstacle to reimbursement of harm caused (to the consumer, the environment and so on), even in the absence of wrongdoing.

Consumer Liability

The whole idea behind the Consumer Protection Code (*Código de Defesa do Consumidor* – CDC) is that the consumer is the weakest side of the consumer relationship, thus deserving special protection from the law. A few good examples of special protections are the requirements for veil piercing, which are much less rigorous than the general rule set forth in the Civil Code.

In short, whenever a supplier's conduct is deemed to be an obstacle to compensating consumers for harm, veil-piercing is authorised, enabling creditors to reach the equity of shareholders/ members, managers, directors or legal representatives.

This, of course, significantly increases the exposure of legal representatives at companies that deal directly with consumers in Brazil.

Once again, a company should adopt preventive policies for quality control, compliance and corporate governance to mitigate exposure.

It is also strongly recommended that a timely and efficient hotline be maintained allowing consumers to address their needs before they turn into administrative or judicial litigation. Good service and speedy resolutions help mitigate risks to the company and its managers.

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11. Labor and consumer protection relations tend to have a 'social' or 'distributive' approach (employees and consumers are deemed the 'weak link of the chain').

Environmental Liability

Brazil is a continental country. 1,275 billion acres are covered by forests, which account for 60.7% of national territory. Faced with this fact, environmental concerns deserve special attention in our legal system.

Under the Brazilian Constitution, a person or entity that causes any type of damage to the environment is subject to criminal and/or administrative sanctions and is responsible for restoring the environment and repairing the damage caused.

The environment is very problematic because all levels of government have jurisdiction over it. Therefore, investors who wish to pursue activities that might cause environmental damage must be prepared to meet a set of requirements before starting their business as part of the environmental licensing process.

Regardless of the company's business, civil liability for environmental damage is strict, joint and unlimited. Environmental liability is governed by the so-called "polluter-payer principle", which states that whoever pollutes must pay. In practice, that means that whenever the environment is damaged, it must be restored in full and preferably in nature (instead of simply monetary reimbursement). Environmental law aims to protect the environment as a collective asset. Therefore, a set of rules was created to facilitate access to justice, including always shifting the burden of proof in favor of the environment.

When the environment is damaged, any link between the company's actions and the resulting damage damage is enough to impose liability on: (i) those who caused the damage; (ii) those who did not act to avoid the damage when they should have done so; (iii) those who did not care if others caused the damage; (iv) those who paid others to cause the damage; and (v) those who profited from the damage caused by others.

In other words, the range of accountability is huge in environmental liability. In the interests of environmental protection, even when unintended, everyone involved in the environmental damage is potentially liable for restoring the environment and/or making whole the damage.

If a legal entity does not have sufficient equity to restore the environmental damage, its veil may be pierced, whether or not there is evidence of fault or intent.

Besides civil liability, there are also administrative sanctions, which include:

- Warnings;
- One-off fine;
- Daily fine;
- Seizure of animals, fauna and flora products, instruments, supplies and equipment of any kind used to break the law;
- Suspension of the sale and manufacture of the product;
- Interruption of construction or business activities;
- Destruction of the product.

Environmental liability can also be criminal liability. Brazil was the first country to adopt this position in Latin America, creating the theory of criminal liability of the legal entity. The Brazilian Constitution[12] clearly provides that both individuals and legal entities that cause damage to the environment are subject to criminal and administrative sanctions, in addition to having to repair the damage caused.

It is undeniable that virtually all business activities have some degree of impact on the environment. To minimise these impacts, businesses should take measures in the following order of preference: first avoidance, then mitigation, followed by restoration and, finally, compensation.

Antitrust Liability

Competition in the free market is guaranteed at a constitutional level in Brazil. At the legal level, different pieces of legislation ensure a competitive market. If an economic agent engages in conduct that hinders, or even potentially hinders, competition, this

12. 1 Article 225, paragraph 3.

may be considered anticompetitive conduct even if the offender acted without intent to harm.

Of course, market power itself is not illegal, but abusing such power is. Such abuse is not limited to a set of specific practices since many factors are taken into account before classifying a given conduct as abusive.

The Administrative Council for Economic Defense (*Conselho Administrativo de Defesa Econômica* - CADE) is the state body responsible for overseeing and controlling Brazilian competition. It is also responsible for investigating and identifying conduct that harms competition.

The Brazilian Antitrust Act[13] provides a list of the types of conduct considered breaches of the economic order insofar as they aim to produce or are capable of producing anticompetitive effects by tilting or in any way diminishing free competition[14].

This provision sets out an illustrative list of types of conduct that have the potential to harm competition. The due process of law will define whether such types of conduct hurt competition in any given case. The list includes the following types of conduct:

- Cartelisation;
- Dumping;
- Territorial restrictions or customer base restrictions;
- Demand or grant of exclusivity to advertise in mass media;
- Abuse of a dominant position;
- Price fixing;
- Refusing to sell under standard conditions;
- Hindering a competitor's operations.

One of the most common types of conduct is cartelisation, which constitutes an administrative offense punishable by CADE under the Antitrust Act and is also a crime punishable by law.

The Antitrust Act allows the disregard doctrine to apply in cases involving: a) abuse of rights; b) excess of power; c) violation of the law; d) violation of the company's bylaws; or also, e) when mismanagement results in bankruptcy, insolvency, irregular closure or inactivity.

Labor Liability

The Consolidation of Labor Laws[15] (*Consolidação das Leis Trabalhistas* – CLT) regulates the relationship between employers and employees in Brazil.

Despite the precise definition of labor liabilities in the CLT, case law shows that judges often disregard the legal entity regardless of the legal requirements.

In theory, the Major Theory should be applied to labor cases. However, when a company does not have sufficient assets, regardless of whether there is fraud or gross negligence, abuse of company rights and so on, labor Courts have been ruling against shareholders/members, managers, directors and legal representatives in general.

Labor Courts in Brazil, with very few exceptions, take the view that the employee is the economically weak party and cannot bear the risks of the enterprise managed by their employers. Consequently, when a company becomes delinquent and doesn't have enough equity to pay labor debts, Courts often hold the shareholders/members and sometimes even managers, directors and legal representatives jointly liable for any debts left unpaid.

That is a clear misuse of the Major Theory by the labor Courts since there are no legal grounds to hold shareholders/members or managers liable for labor debts when the company doesn't have enough equity.

Thus, it is recommended that shareholders/members and investors pay special attention to labor issues, ensuring their companies are always in full compliance with labor laws. Furthermore, they should always keep employee records up to date to demonstrate compliance whenever necessary.

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13. *Law No. 12,529/2011*.
14. Under *Law No. 9,279/1996*, several conducts are crimes of unfair competition. Among others, they include publishing false information about a competitor and using the competitor's commercial signs (trade dress) to generate confusion between products and/or establishments. The punishment for the crime of unfair competition goes from 3 months to 1 year of detention or fine.
15. *Decree-Law No. 5,452/1943*.

Tax Liability

The Brazilian tax system is a very complex one. It is comprised of many special rules, regulations and statutes that are enacted at different levels of government (Federal, State and Municipal).[16] This is why tax planning is essential to opt for the best corporate structure and reduce the tax burden. The significant number of rules that govern the current tax system can lead to incorrect collection of taxes, which can generate significant losses for a company.

Good tax planning helps a company define precisely, inter alia: (i) the possibility of using tax incentives or exemptions; (ii) a schedule of taxes, meaning the best dates for collection of fees and taxes and delivery of ancillary obligations; (iii) the tax liabilities that shareholders/members, managers, directors and others involved in management of the company may face for the payment of taxes, fees, fines and penalties in the event of piercing the corporate veil.

The National Tax Code[17] (*Código Tributário Nacional* – CTN) regulates tax liability in Article 134. This article presents a list of people that, under particular circumstances, are held jointly liable for payment of taxes when the primary taxpayer is delinquent.

The mere fact these individuals are acting as the company's management does not make them liable for the company's tax debts in case of non-compliance with tax procedures. Here, the Major Theory rule, as presented above, is fully applied.

However, individuals who exceed their powers as set forth by the law or in the company's bylaws might be considered jointly liable for the payment of outstanding taxes and obligations[18].

3 - Types of Business Organisations and their Specific Liabilities

There is a variety of business types to choose from when setting up a business in Brazil. Among them are the "Sociedade Limitada – Ltda." (similar to a Private Limited Company) and "*Sociedade Anônima* – S/A" (similar to joint-stock companies), which are the two most common types chosen by foreign investors. Two

other possibilities are also sometimes used: (i) opening a branch of the foreign company in Brazil and (ii) forming a consortium so that foreign companies and investors can coordinate their specific interests towards a common end.

Depending on the business type, a company's shareholders/members may have limited or unlimited liability for the company's obligations. Thus, it is essential to understand the limits and liabilities of Brazilian companies.

Sociedade Limitada – LTDA

The most commonly used business type in Brazil is the "*Sociedade Limitada – Ltda.*". This business type is governed primarily by the Brazilian Civil Code and subsidiarily by the Brazilian Corporations Act.

The preference for this business type is mostly due to five key aspects that protect its members and provide more straightforward management. They are: (i) simple and extremely flexible corporate structure; (ii) an explicit limitation of the member's liability; (iii) there is no legal obligation to publish financial statements each fiscal year; (iv) it ensures a certain degree of confidentiality for the company's affairs; and (v) there is no statutory obligation to distribute profits.

Until recently, Brazilian laws required the "*Sociedade Limitada - Ltda.*" to have at least two members. The Economic Freedom Act allowed the "*Sociedade Limitada – Ltda.*" to have a sole member. This new rule benefits entrepreneurs and investors who would prefer to own their own businesses without any other members.

Entities currently structured as "Ltda." that intend to transfer all membership quotas to a sole owner will have to change their

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16. According to recent studies, since the enactment of the current Constitution, in 1988, Brazil passed over 400 thousand laws and regulations in tax matter (source: IBPT).
17. *Law No. 5,172/1966*.
18. Considering that bylaws limit the manager's powers, it's correct to say that the legal representative exceeds their powers when the company's bylaws are violated.

articles of association to eliminate, for example, the requirement to hold members meetings. Those opting for a single member "Ltda." can maintain their National Register of Legal Entities (CNPJ) number and should not face any tax penalties. This new law is undoubtedly impacting the way companies choose to structure investments in Brazil. From a global standpoint, it provides attractive flexibility and better options for foreign investors.

Individuals and companies can be members of a "Ltda." They may or may not reside in Brazil. Non-resident members must be formally represented by an attorney-in-fact residing in Brazil, with powers to receive service of process on behalf of the foreign member.

In a "Ltda.", all members are jointly liable for full payment of the corporate capital. Once the capital is fully paid up, liability is restricted to the amount of each member's ownership interest (unless the corporate veil is pierced - see topic "THE DISREGARD DOCTRINE IN BRAZIL" above).

Sociedade Anônima – S/A

A "*Sociedade Anônima* – S/A" is governed by the Corporations Act. It could also be described as a business corporation having the purpose of earning profits to be distributed to the shareholders as dividends or interest on their own capital.

In Brazil "*Sociedades Anônimas* – S/A" can be public companies (sociedades de capital aberto), which raise capital by trading shares on the stock market and are supervised by the "*Comissão de Valores Mobiliários* – CVM" (a Brazilian peer of the Securities and Exchange Commission – SEC) or closely held companies (*sociedades de capital fechado*), which raise capital from their private shareholders or subscribers and don't trade shares on the stock market.

Equity is represented by securities called shares. Depending on their holders' rights or advantages, the shares may be common, preferential or fruition shares. Common shares give holders to the right to vote, whereas preferential shares, which grant special rights to their holders, may restrict or suppress the right to vote.

The main strengths of the "*Sociedade Anônima* – S/A" are: (i) there is no joint liability among shareholders (when, for example, other shareholders fail to deposit their contributions to the corporate capital); (ii) protection of minority shareholders from arbitrary decisions of majority shareholders; (iii) the possibility of raising external funding through stock markets; and (iv) liability is limited to the issuing price of shares subscribed to or acquired.

Branch of a Foreign Company

A branch can be described as an extension of the main company insofar as it is not autonomous from the main company. A branch of a foreign company is not to be confused with the incorporation of a Brazilian company whose partners are foreign companies - the latter has a legal personality separate from that of its shareholders.

According to the Brazilian Civil Code, a Presidential Decree is required to set up a branch of a foreign company in Brazil. Only a handful of multinationals operate under this structure in Brazil due to the overly bureaucratic requirements associated with creation and maintenance of a branch in Brazil.

Under the Civil Code, any foreign company authorised to operate in the country is obliged to have a permanent representative in Brazil with powers to resolve any issue and receive judicial services of process on its behalf. Then, these representatives can be held directly liable for the company before third parties.

Consortium

According to the Corporations Act, a consortium consists of an association of companies under the same control or not, each of them keeping their own personality to perform a certain enterprise, usually one which costs a lot and requires specialised technical knowledge.

LIABILITIES OF PARTNERS	
Sociedade Limitada – Ltda.	Restricted to the number of shares held by each member in the subscribed corporate capital. However, all members are jointly liable if the corporate capital is not fully paid in.
Sociedade Anônima – S/A	Liability is limited to the issuing price of all shares subscribed to or acquired by each shareholder.
Branch of a foreign company	Considered an extension of a foreign company's head office. Therefore, its liability to third parties in Brazil may extend not only its own corporate capital but also that of the foreign company's head office.
Consortium	The companies that take part in a consortium have separate liability, each of them being liable for their own obligations, unless otherwise expressly determined by the consortium. Based on this legal provision, creditors can seek payment directly from the consortium members, who are liable for the obligations incurred on behalf of the consortium.

4 - Brazil's Anti-corruption Law and Compliance

Brazil reached a new level of maturity in its business environment with *Law No. 12,846/2013*, also known as the "Anti-Corruption Act". Brazil has some of the most strict and advanced anti-corruption legislation in the world. This presents a challenge for the organisations that operate in Brazil, in terms of creating a corporate governance, compliance, risk management and internal control structure. These are profound changes that directly involve corporate culture as a whole.

The Anti-Corruption Act's elaborate structure is comparable to similar laws in the United States (the Foreign Corrupt Practices Act, or FCPA) and the United Kingdom (the Bribery Act). The law was passed in August 2013 and came into effect in January 2014.

This law has helped reinforce business ethics since it can be used to investigate and hold accountable those involved in corruption. This new landscape requires changes in the way companies interact with the public sector, such as taking steps to prevent corruption involving their employees, consultants, or suppliers.

The Anti-Corruption Act is not restricted to organisations that participate in bids or engage in contracts with government bodies. It also applies to any company (regardless of type), foundation, association, or foreign company established or represented in Brazil.

Thus, having a properly structured and effective integrity program in place not only prevents wrongdoing, but the Anti-Corruption Act also considers it an extenuating condition for application of administrative penalties in the event of wrongdoing.

The compliance program should be tailored to each legal entity's business. It should also encourage a whistleblowing culture in the corporation by creating proper channels that ensure secrecy and protect the whistleblower while ensuring management will look thoroughly into each lead. Finally, a robust compliance program should also include periodic audits and constant risk analysis to keep it up to date.

The main target of the Anti-Corruption Act is legal entities. However, it is crucial to mention that the law also explicitly provides for managers' and investors' liability.

5 - Legal Representation in Brazil – Relevant Information

Under Brazilian law, legal representatives are all persons who are granted by law or contract powers to act or manage interests on behalf of another person[19]. For the purposes of this guide, "legal representatives" means those individuals who effectively exercise management and business management on behalf of foreign investors and shareholders, such as: officers, directors, managers and attorneys-in-fact[20].

Any investors who decide to appoint a legal representative in Brazil need to understand the risks and liabilities involved, given that this is an extremely delicate position and may, as a result of the FCPA and the UK Bribery Act provisions, affect the company both in Brazil and abroad.

Legal representatives are always in contact with public bodies because of their duties as attorneys-in-fact for foreign investors or officers/directors of a Brazilian company. Therefore, it is strongly recommended that they monitor this type of interaction closely.

Members and investors must retain control over specific decisions by reserving certain rights and imposing restrictions on the legal representatives acting under a power of attorney, articles of association, bylaws, internal regulations, agreements or other corporate documents. It is also recommended the company establish an effective compliance and corporate governance plan to ensure the activities are being carried out with total and complete confidence.

Likewise, a background check is an important step to foreign investors should take when choosing their local representatives. This assessment must consider the legal representatives' past activities and any other companies they might be linked with. It is quite common in Brazil that a legal representative's relationship with a problematic company will entail risks for another company he or she serves at the same time (a situation called "crossed risk"). Hence, directors, officers/managers and attorneys-in-fact must be under constant scrutiny to assess the risks to which a company could be exposed by associating with them.

Nowadays, there is no doubt that foreign companies doing business in Brazil are considered directly liable and must be fully aware of the activities of their employees, suppliers and their legal

representatives in order to identify, fight and mitigate acts of corruption.

Besides that, with the rising number of situations that allow the courts to pierce the corporate veil, especially in environmental, consumer and labor cases, an assessment of the relevant case law shows that, besides members, managers and shareholders (positions traditionally affected by the piercing of the corporate veil), attorneys-in-fact have also been held liable in Court and some of their assets have even been seized.

Attorney-in-Fact

The attorney-in-fact is the key person who will act on behalf of as foreign company as shareholder/member of the Brazilian company. Attorneys-in-fact may perform several corporate acts before federal, state, municipal agencies and public authorities. As per the Brazilian Civil Code, this mandate is exercised when someone receives powers to perform acts or manage interests on behalf of others. The power of attorney is the document that puts the mandate in force.

The Corporations Act requires a foreign company (a shareholder or member of a company in Brazil) to appoint an attorney-in-fact to represent it permanently in Brazil, with powers to receive service of process on lawsuits filed against it.

Besides the power to receive service of process, the power of attorney must include powers to: (i) attend meetings, assemblies, or other acts of deliberation; (ii) subscribe to, acquire, dispose of, assign, or transfer shares or quotas; and (iii) exercise all other rights inherent to the position of shareholder or member of said Brazilian company.

It is important to emphasise that a foreign individual may act as an attorney-in-fact for foreign companies in Brazil, provided that they reside permanently in Brazil.

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19. Articles 115 and 653 of the Brazilian Civil Code.
20. Attorneys-in-fact who hold powers to receive services of process on behalf of foreign companies and foreign investors in Brazil.

Officer or Director of a Brazilian Entity

As previously explained, foreign companies usually operate in Brazil as shareholders/members of Brazilian companies. In most cases, foreign companies choose to open a brand-new company in Brazil (often through holdings).

The law provides that when a new company is incorporated the Articles of Incorporation must appoint an officer or director to represent the company for all legal purposes. Until recent days, the Corporations Act required that a director reside in Brazil. In 2021, *Law No. 14,195* allowed individuals' resident abroad to be nominated directors of a Brazilian company, provided they appoint an attorney-in-fact domiciled in Brazil. This attorney-in-fact must serve a term of at least 3 (three) years after the foreign director leaves office and his powers must include powers to receive service of process in both judicial and administrative proceedings filed against the foreign director[21].

This new possibility, however attractive, has proved to be somewhat challenging in practice, given the time some authorities have taken adjusting to the new regulatory landscape. These difficulties should be settled soon. Until then, an alternative for those who wish to nominate a director resident abroad is to nominate a second director resident in Brazil who will be able to replace his foreign peer in the day-to-day tasks whenever necessary.

In addition to being responsible for full legal representation of the company, the officer or director may be held civilly, administratively, or criminally liable if they fail to comply with the rules defined in contract or by law, including the obligation to make whole any losses or damages borne by foreign shareholders.

Board of Directors

When shareholders elect the members of the company's board (also known as the board of directors – BofD), they delegate to the nominated members the obligation to watch over the interests of all shareholders regarding the operation of the company.

BofD members acting lawfully are not personally liable for

any obligations they may incur on behalf of the company. However, they may be held liable for any torts they cause if they (i) act with fraud or gross negligence or (ii) violate the law or the company's bylaws.

The Corporations Act provides that BofD members resident abroad must appoint an attorney-in-fact resident in Brazil, with powers to receive service of process in lawsuits filed against them. Furthermore, the power of attorney must be valid for at least 3 (three) years after the member of the BofD leaves office.

6 - Corporate Criminal Liability and Fraud

As a general rule of thumb, managers or directors are not held criminally liable for the company's unlawful acts under Brazilian criminal laws. They will only face criminal charges if they took part in the criminal acts themselves or they knew the company was engaging in criminal activities and failed to take action to avoid it.

The Brazilian Constitution provides that an act is only considered a crime if defined as such in law prior to said act. That means mere rules can't define an act as a crime. Also, criminal laws may encompass past acts only if they benefit the defendant – for instance, if the punishment for a particular crime committed prior to its enactment is made shorter, then the law may be retroactive.

Below is a list of some of the main laws that provide criminal liability for managers or even foreign investors:

- Brazilian Criminal Code;
- Anti-Corruption/Money Laundering Law;
- Environmental Crimes Law;
- Tax Code (Tax, Economic and Financial System);
- Consumer's Defense Code;
- Illegal Enrichment/Misappropriation;
- Law of Court-Supervised Reorganisation and Bankruptcy;

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21. Article 146, 2nd paragraph as amended.

- Labor Legislation (Discriminatory Practices at Work);
- CVM/Capital Market - Insider Trading - Article 27-D of Law 6,385/76 as amended.

When it comes to the liability as it pertains to managers and investors in Brazil, fraud deserves special attention. Fraud is nothing more than the use of deceit or deceptive means to bypass the law or an existing or future agreement. The law requires the intent to commit fraud in order to consider an act fraudulent.

The reason why fraud has such a detrimental effect on corporate practices is because it erodes the foundation of all business relationships, the trust among those involved. The good news is that there are ways to prevent this harmful weed from spreading. Including protection clauses in the company's bylaws is strongly recommended. Examples of such clauses would include: (i) setting a cap for financial transactions and contracts; (ii) creating of an effectively structured Board of Directors/Fiscal Council; and (iii) implementing compliance and corporate governance rules in line with Anti-Corruption and Anti-Money Laundering Acts.

Chapter 4

Corporate Criminal Law

Introduction

Legal entities can be victims of or benefit from criminal activities.

Within this context, companies that are subject to corporate fraud investigations or criminal proceedings due to tax, social security, financial, competitive, environmental, money laundering or bankruptcy-related issues require legal advice that extends not only to white-collar crimes but also to a comprehensive and multidisciplinary perspective.

Economic Criminal Law

Economic criminal law is a branch of criminal law that focuses on law enforcement against crimes that affect the economic order and the financial system. It encompasses a variety of illicit activities that adversely affect the economy, public finances, and markets. Multidisciplinary in nature, economic criminal law often interacts with other branches of law, such as administrative law, tax law, civil law and environmental law.

Its importance lies in protecting the integrity and efficiency of the economic system, ensuring a fair and transparent business environment, and safeguarding public and private interests.

Criminal Liability

Under Brazilian law, legal entities are only criminally liable in exceptional cases, such as environmental crimes. In all other cases, criminal liability only applies to individuals, not companies.

Also, Brazilian law does not have strict liability for criminal matters.

Criminal liability requires an individual to act with mens rea or fault, and criminal intent is crucial to determine both participation in criminal offense and criminal liability. Therefore, Brazilian law does not authorise the attribution of criminal liability based solely on one's role within a company.

There are situations, however, in which criminal liability can be attributed to those who, despite not committing the offense themselves, failed to make decisions or take action that could have prevented such criminal offense, considering that they had the duty and the opportunity to avoid it.

Therefore, companies' representatives or directors may be held liable for crimes that they have not perpetrated directly, if the criminal offense is deemed a result of the company's lack of compliance with the legal requirements applicable to its activities, and if the representatives/directors, although aware of irregularities, did not take action to prevent the offense (omission).

Corporate Criminal Liability

Brazilian law provides for corporate criminal liability of legal entities only for environmental crimes. If convicted of such crimes, legal entities can be penalised with:

- Fines;
- Rendering of community services (e.g. environmental project financing);
- Partial or full suspension of the company's activities;
- Suspension of a specific project or activity executed by the company;

➢ Ban on contracting with Brazilian public entities and obtaining donations, loans, or tax incentives from Brazilian public entities (*Federal Law n. 9,605/1998*).

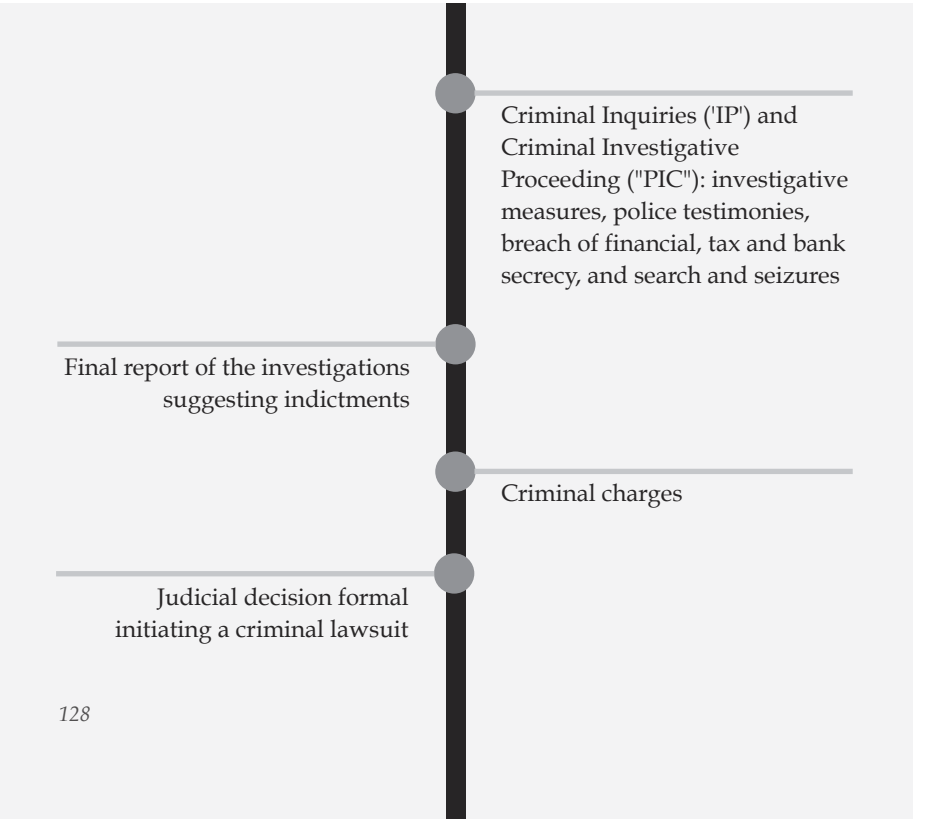
When determining the amount of the fine, the judge will take into consideration:

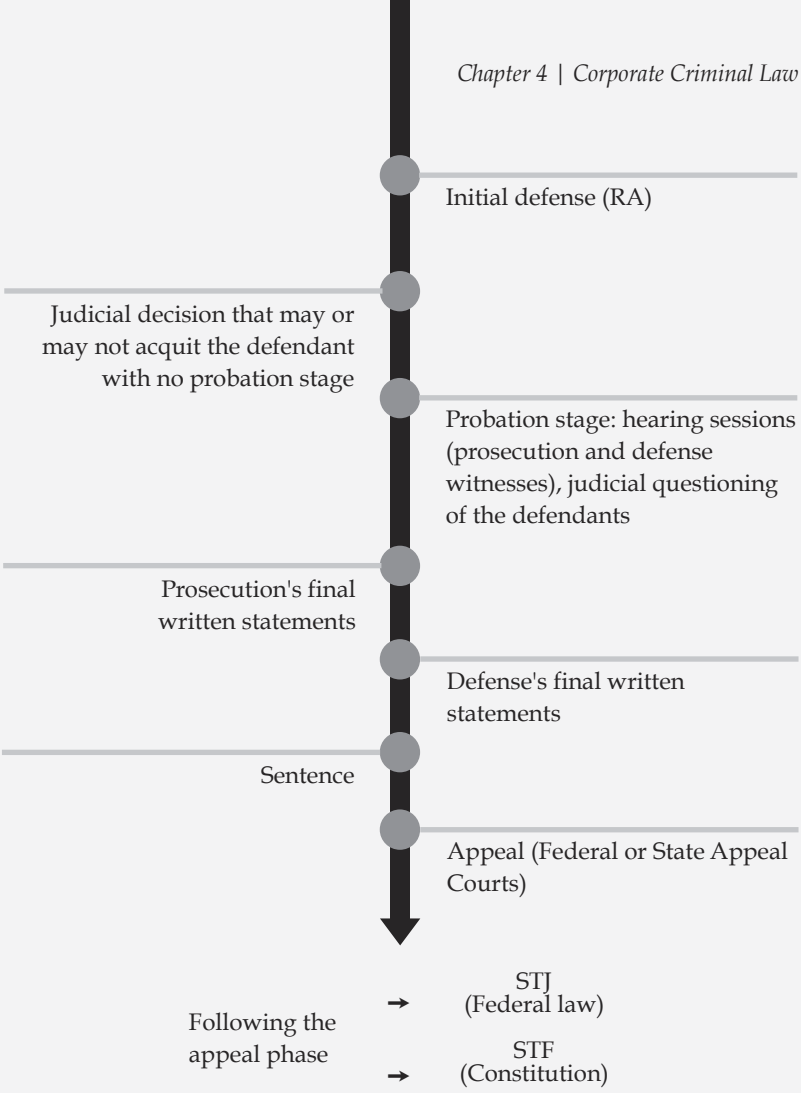
- Severity of the fact, considering the reasons for the infraction and its consequences for public health and the environment;
- Perpetrator's history regarding environmental legislation compliance;
- Financial conditions of the perpetrator.

Furthermore, pursuant to Section 19 of *Federal Law n. 9,605/1998*, a forensic exam will determine the level of environmental damage for the purpose of setting bail and fines.

Timeline – Criminal Prosecution

Negotiated Criminal Justice





*At any time of a criminal inquiry, criminal lawsuit or appeal, it is possible to apply for a writ of Habeas Corpus, which shall be granted whenever a person suffers or is in danger of suffering violence or coercion against his freedom of locomotion, on account of illegal actions or abuse of power. It is possible to file a Habeas Corpus against the judge's decision to maintain the charge and initiate the probate phase of the criminal lawsuit, or against the chief of police's decision to indict the individual as the probable author of the criminal offense.

New instruments have made negotiated justice more relevant in Brazil in recent years.

1. Non-prosecution agreement ("ANPP")

A non-prosecution agreement is a legally binding agreement between prosecutors and corporate or individual defendants subject to a criminal (or civil enforcement) investigation. The agreement must be proposed only when there is sufficient evidence to press charges.

- It applies to crimes with a minimum sentence of less than four years;
- A confession is mandatory – which may have legal effects in civil and labor courts;
- The victim must be compensated for financial losses.

On October of 2024, the Superior Court of Justice defined four thesis regarding the applicability of the ANPP:

- The first thesis defined that the ANPP constitutes a criminal procedural legal transaction established by a rule that, on the one hand, has a procedural nature with regard to the possibility of agreement between the parties in order to avoid the launching of criminal proceedings, and, on the other hand, has a material nature because it provides for the extinction of the liability of those who comply with the duties established in the agreement.
- The second thesis establishes that, given the hybrid nature of the rule, the principle of retroactivity of the beneficial criminal rule must be applied to it, authorizing the application of the agreement even without a confession by the defendant up to the moment in the ongoing proceedings when the Law N. 13,964/2019 came into force.
- The third thesis concerns the criminal proceedings that were ongoing on September 18, 2024, when the Supreme Court ruled on Habeas Corpus No. 185,913 and opened the possibility for retroactive application of the ANPP. In such cases, if the agreement is applicable, the Public Prosecutor's Office must offer it at the first opportunity.
- Finally, the fourth thesis provides that, in investigations or criminal proceedings initiated after September 18, 2024, admissible before the receipt of the complaint, except for the

possibility of proposing the agreement during the course of the criminal proceedings, if applicable.

2. Conditional suspension of the lawsuit

It applies to crimes whose minimum penalty provided for by law is equal to or lower than one year of imprisonment, and the Public Prosecution Office is entitled to offer the defendants a decriminalising measure, so long as they are not being criminally prosecuted for another crime, and have not already been convicted.

If accepted, the measure will suspend the criminal prosecution for two to four years, and if the defendants comply with the conditions imposed by the Public Prosecutor, the lawsuit will end, and criminal liability will be extinguished. Also, the conditional suspension of the lawsuit does not require guilty pleas.

An individual or company can only benefit from the conditional suspension lawsuits once every five years.

Given that Brazilian law does not provide for joint and several liability in criminal matters, and there is no strict criminal liability for criminal matters, accepting the benefit of conditional suspension of the lawsuit does not affect a company's legal representatives.

3. Collaboration agreement

The agreement is similar to a plea bargain. When an alleged perpetrator cooperates with the investigation and research, provides useful evidence, and denounces other individuals involved in the crime, he or she may be eligible for certain benefits (reduction of penalties and alternatives to imprisonment – although they must still be criminally prosecuted).

It is valid to mention that the court executing the conviction of a collaborator cannot include more onerous conditions such as changing the enforcement regime or imposing new restrictive penalties.

4. Leniency agreement

Individuals who enter into a leniency agreement with the Brazilian Antitrust Authority ("CADE") are immune from criminal prosecution for cartel crimes or other related crimes. The leniency agreement provided for by the Anticorruption Law does not provide for criminal immunity.

Crimes against the environment

The criminal liability system in Brazil is generally based on individual and personal responsibility. The Brazilian Federal Constitution allows for exceptions to this rule, allowing for corporate criminal liability, specifically in cases of environmental crimes.

Corporate criminal liability for crimes against the environment is fully regulated by *Federal Law No. 9,605/98* ("Environmental Crimes Law"). According to section 3 of the Environmental Crimes Law, companies can be held criminally liable if an environmental crime:

- (i) resulted from a decision made by the company's legal or contractual representative or its collegiate board; and
- (ii) is committed in the entity's interest or benefit.

In addition, corporate criminal liability does not exclude criminal liability of individuals, authors, co-authors, or participants in the crime.

The Environmental Crimes Law provides for offenses against fauna and flora, urban order, historical sites, and the environment as a whole. Under this law, the emission of gas, liquid or solid waste in violation of legal standards is punishable with severe penalties, including imprisonment for up to five years and fines to determined by the court, if the pollution compromises a local ecosystem or human health.

Moreover, *Decree 6,514/2008* provides for administrative infractions against the environment, the administrative proceedings that apply to investigations of such infractions, as well as all applicable penalties.

Lack of proper licensing is also considered a serious offense, which can result in the suspension of a company's activities if it operates without the required regulatory licenses, including the imprisonment of individuals responsible for the crime. The environmental agencies issuing these licenses can also be held criminally liable if they are issued to companies that do not comply with environmental laws.

Criminal liability in environmental matters is charged according to the offender's degree of guilt and applies not only to those directly involved in the environmental damage but also to any

party that was aware of the criminal conduct and failed to prevent it, despite having the opportunity to do so. The Brazilian Superior Court of Justice ("STJ") recognises corporate criminal liability in cases involving the simultaneous responsibility of at least one individual.

In August 2013, however, the 1st Panel of the Brazilian Federal Supreme Court ("STF") amended this opinion to allow for corporate criminal liability regardless of individual criminal liability. The justices determined that the Constitution does not require that legal entities be held legally liable for environmental crimes so that allegedly responsible individuals can be charged simultaneously for the crimes.

Since then, both the STF and the STJ have begun to authorise the prosecution and conviction of companies for environmental crimes, regardless of whether a representative of the company was charged.

Therefore, a company can be held criminally liable for a crime against the environment regardless of potential penalties against the individuals involved in such offenses.

Article 4 of Environmental Crimes Law provides for piercing corporate veil if the existence of a legal entity impedes environmental damage recovery. Where penalties are concerned, individuals can face imprisonment or confinement, as well as restrictions on their rights (provide community service, temporary limitations of rights, partial or total interruption of activities, fines, home confinement), which can replace a penalty that deprives freedom, provided that the conditions provided for in Article 7 of *Law 9,605/1998* are met.

According to Article 21 of the Environmental Crimes Law, legal entities are subject to fines, restrictions of rights (partial or total interruption of activities, temporary prohibition of commercial establishments/activities, ban from public-private partnerships, as well as any government subsidies or grants) and are required to render community services.

Bidding crimes:

In 2021, *Federal Law No. 14,133/2021* was enacted to amend the Penal Code and provide for bidding crimes, which were previously regulated by *Federal Law No. 8,666/93.*

Bidding crimes, previously provided for in articles 89 to 99 of *Law No. 8,666/93*, were fully transferred to the Penal Code, through

the inclusion of articles 337-E to 337-O in Chapter II-B: "Crimes against bidding and administrative contracts".

In addition to the relocation of crimes from the extravagant legislation to the Penal Code:

Illegal direct hiring:

Art. 337-E. Allowing, enabling, or creating direct hiring outside the legal framework:

Penalty - imprisonment for four years to eight years, and a fine.

Frustration with bidding competition

Art. 337-F. Undermining the competitive nature of the bidding process to obtain a competitive advantage for oneself or others:

Penalty - imprisonment for four years to eight years, and a fine.

Improper hiring sponsorship:

Art. 337-G. To directly or indirectly sponsor a private interest before the government, which leads to a bidding process or the conclusion of a contract whose invalidation may be decreed by the Judiciary Branch:

Penalty – imprisonment for six months to three years, and a fine.

Modification or irregular payment in an administrative contract:

Art. 337-H. Accepting, enabling, or giving rise to any modification or advantage in favor of the contractor, including contractual extensions, during the execution of government contracts without legal authorisation, as contained in the bidding notice or in the contract, or even paying an invoice without paying attention to the due date's chronological order:

Penalty - imprisonment for four years to eight years, and a fine.

Disruption of the bidding process:

Art. 337-I. To prevent, disrupt or defraud the bidding process:

Penalty – imprisonment for six months to three years, and a fine.

Violation of bidding confidentiality:

Art. 337-J. To violate the confidentiality of a proposal presented in the bidding procedure or provide a third party with access to such proposal:

Penalty – imprisonment for two to three years, and a fine.

Bidder exclusion:

Art. 337-K. Excluding or attempting to exclude a bidder from a bidding procedure through violence, serious threats, fraud, or any advantage:

Penalty - imprisonment for three to five years and a fine, in addition to punishment corresponding to the violence committed.

Single paragraph. Anyone who abstains or withdraws from bidding due to offering an advantage will face the same penalty.

Bidding or contract fraud:

Art. 337-L. Committing fraud against the government, a bidding procedure, or a contract by:

I - Delivery of goods or provision of services with a quality or quantity different from those stipulated in the notice or contractual instruments;

II - Supply merchandise that is counterfeit, deteriorated, unusable for consumption or expired, as genuine or in perfect conditions;

III - Delivery of one commodity to another;

IV - Change in the substance, quality or quantity of the merchandise or service provided;

V - Any fraudulent means that unfairly make the proposal or execution of the contract more expensive for the government:

Penalty - imprisonment for four to eight years, and a fine.

Unsuitable hiring:

Art. 337-M. To admit a company or professional deemed unsuitable to bidding:

Penalty – imprisonment for one to three years, and a fine.

§ 1 Entering into a contract with a company or professional deemed unsuitable:

Penalty – imprisonment for three to six years, and a fine.

§ 2 The same penalty as in the head paragraph of this article applies to anyone who is deemed unsuitable and participates in a bidding procedure. The same penalty as in paragraph 1 of this article applies to anyone who is deemed unsuitable and enters into a contract with the government.

Undue impediment:

Art. 337-N. To unfairly obstruct, impede or hinder the registration of any interested party in the registration records or unduly promote the change, suspension or cancellation of the registrant's registration:

Penalty - imprisonment for 6 (six) months to 2 (two) years, and a fine.

Serious omission of data or information by the submitting projector:

Art. 337-O. Omitting, modifying or delivering to the government a cadastral survey or boundary condition that is significantly out of line with reality, or in frustration of the competitive nature of the bidding or to the detriment of the selection of the most advantageous proposal for the government, in contracting for the preparation of a basic, executive or preliminary project, in competitive dialogues or in the expression of interest procedures:

Penalty - imprisonment for six months to three years, and a fine. (Included in Law No. 14,133, of 2021)

§ 1 The information and surveys sufficient and necessary for the definition of the project solution and the respective prices by the bidder are considered a boundary conditions, which include surveys, topography, demand studies, environmental conditions and other impactful environmental elements, as part of technical standards used to guide project development.

§ 2 Double the penalty is applied if the crime is committed to benefit oneself or others, whether directly or indirectly.

Unfair competition:

Art. 195 of the Federal Law No. 9,279, known as the Intellectual Property Law, establishes a crime of unfair competition.

Legislation imposes penalties on those who commit the following acts:

I - publish, by any means, a false statement, to the detriment of a competitor, to gain an advantage;

II - provides or discloses false information about a competitor, to gain an advantage;

III - employs fraudulent means to divert, for one's own benefit or that of others, another's clientele;

IV - uses someone else's expression or advertising sign, or imitates them, to create confusion between products or establishments;

V - sale, display, offer for sale, or have in stock any product with a commercial name, title or emblem that belongs to someone else;

VI - replaces someone else's name or company name, without their consent, with its own;

VII - a reward or distinction that was not earned is attributed as a publicity stunt;

VIII - the act of selling, displaying, or offering for sale an adulterated or counterfeit product on someone else's container or packaging, or engaging in negotiations with one, even if it does not represent a more serious crime;

IX - gives or promises money or other benefits to a competitor's employee, so that the employee provides him with an advantage;

X - receives money or other benefit, or accepts a promise of payment or reward, to, in breach of the employee's duty, provide an advantage to the employer's competitor;

XI - disseminates, commercialises or uses, without permission, knowledge, information or confidential data, usable in industry, trade or provision of services, excluding those that are public knowledge or that are evident to an expert on the subject, to which there was access through a contractual or employment relationship, even after the contract ended;

XII - discloses, exploits or uses, without authorisation, knowledge

or information referred to in the previous section, obtained through illicit means or a fraudulent process; or

XIII - sells, displays or offers for sale a product, falsely declaring that it is the subject of a deposited or granted patent, or registered industrial design, or mentions it, in an advertisement or commercial paper, as deposited or patented, or registered, without being so;

XIV - discloses, exploits or uses, without authorisation, test results or other undisclosed data, the preparation of which involves considerable effort and which is presented to government entities as a condition for approving product marketing.

These offenses are punishable by imprisonment, ranging from three months to one year, and fines.

It is also important to note that, in the cases of items XI and XII, liability also extends to the employer, partner or administrator of the company. This crime, however, is applicable to both (i) the employee and (ii) the administrator of the company that received the confidential information, depending on the circumstances.

The legal entity, in turn, is not criminally liable for unfair competition.

If sufficient evidence indicates that the crime was committed, the Police Authority will launch an investigation, in order to learn all the details and identify the perpetrators. These criminal measures, however, will depend on the pieces of evidence brought to the attention of the authorities and the results of the investigative measures.

When a crime of unfair competition has been proven, the Authorities usually target the company's administrator to answer for the crime.

Tax crimes

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

- omitting information or providing false statements to treasury authorities;
- defrauding tax investigators by providing imprecise elements,

or omitting transactions of any kind in a document or ledger required by tax law; and

- falsifying or altering any document related to a taxable transaction.

This offense is punishable by imprisonment from two to five years, plus a fine to be defined by the court.

Submitting a false declaration or omitting a declaration of earnings, assets or facts, or carrying out fraud to exempt oneself from paying taxes, partially or fully, as well as failing to withhold taxes or social contributions owed within the legal deadline, are also punishable from six months to two years of imprisonment.

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

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

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

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

On October 2024, unanimously, the Plenary of the Supreme Court established Theme 863, which established that the tax fine resulting from tax evasion, fraud, or collusion cannot exceed the amount of the tax debt until a federal law on the matter is enacted.

Larceny and other fraud

Fraudulent acts are punishable by the Brazilian Criminal Code. A classic example of this type of crime is larceny by trick, which is defined by Article 171 of the Brazilian Criminal Code and, in its standard format, is a model for other offenses of the same nature, such as those described in Articles 172-179. Larceny by trick is defined as obtaining an illicit advantage to the detriment of someone else. This is done by artifice, trickery or other fraudulent means.

The fundamental characteristic of this crime is fraud intended to mislead or keep the victim in error in order to obtain an illicit patrimonial advantage. Punishment for this offense is imprisonment for one to five years, plus a fine established by the court.

The same penalty is applied to those who carry out the following acts: disposing of someone else's property, fraudulent sale, defraud of pledge, insurance or indemnity fraud, and cheque fraud.

In 2021, a new law came into force, which added a new clause to the Brazilian Criminal Code, aimed at increasing the penalty for fraud committed through electronic means: imprisonment, from four to eight years, plus a fine, if the fraud is perpetrated through the use of information provided by the victim or by a third party misled through social networks, telephone calls, fraudulent e-mails, or by any other similar deceptive means). This penalty can be increased by one-third to two-thirds (if the crime is committed through a server located outside of Brazil) depending on the severity of the outcome. Also, the penalty can be increased by one-third if the crime is committed against an entity governed by public law or a popular economy, social assistance or charity institution.

According to *Law No. 14,478 of 2022*, the provision of virtual asset services is governed by guidelines and standards, and it establishes the crime of "Fraud involving the use of virtual assets, securities, or financial assets" through Article 171-A of the Brazilian Criminal Code: "Art. 171-A. Organise, manage, offer, or distribute portfolios or mediate operations involving virtual assets, securities, or any financial assets with the purpose of obtaining an

> illicit advantage, to the detriment of others, by inducing or maintaining someone in error, through artifice, ruse, or any other fraudulent means. Penalty - imprisonment from four to eight years, and a fine."

It is common in Brazil for legal entities to be victims of fraud, which is usually perpetrated by employees in sensitive areas such as finance, payroll and HR.

In addition, banks and large business conglomerates are indirectly linked to fraud carried out against their clients, requiring them to register the facts before the police authority to formalise an internal investigation, or to maintain compliance.

In compliance with *Federal Law 13,964/19*, larceny by trick used to be considered a public criminal lawsuit that did not require request from the victim.

The authority would initiate a police inquiry, and, at the end of the investigation, the Public Prosecutor's Office could file a criminal complaint against the person under investigation.

Federal Law 13,964/19, however, added paragraph 5 to Article 171 of the Brazilian Criminal Code, which conditions the criminal lawsuit of larceny by trick depending on the victim's representation. It is not sufficient for the victim to report the criminal fact to the police authority, by way of a police report, for example. Rather, it is necessary to formalise to the competent authorities the intent to criminally pursue the perpetrator.

It is not necessary to formalise representation with the police authority if the victim is the government (directly or indirectly) or a child, adolescent, disabled, or over 70 years old. This ensures the protection of vulnerable individuals. It is also a crime to issue a simulated duplicate invoice, duplicate bill of sale, or a bill of sale that does not correspond to the merchandise sold, in quantity or quality, or to the service rendered. Punishment for this offense is imprisonment for two to four years, plus a fine established by the court (in compliance with Article 172 of the Brazilian Criminal Code).

There is also the provision for the crime of abuse of disabled persons (in compliance with Article 173 of the Brazilian Criminal Code), in which individuals are mislead into gambling, betting, or

speculation (Article 174 of the Penal Code), and fraud in commerce, defined by selling a false or deteriorated commodity as if it were in perfect condition, or providing a different commodity than one previously agreed to (Article 175 of the Penal Code).

Article 177 of the Brazilian Penal Code provides for fraud and abuse while incorporating or managing a business corporation.

The act involves providing false statements about the incorporation of a corporation in a prospectus or in communication to the public or assembly, or concealing facts relating to it.

Punishment for this type of offense is imprisonment for one to four years, plus a fine (if the fact does not constitute a crime against the popular economy).

According to Article 177 of the Brazilian Criminal Code, the same penalty applies if the crime does not constitute a crime against the popular economy in the following situations:

> "I – to the director, manager or supervisor of a public limited company, who, in a prospectus, report, opinion, balance sheet or communication to the public or board, makes a false statement about the economic conditions of the company, or conceals fraudulently, in whole or in part, a fact involving them;
>
> II – to the director, manager or supervisor who, by any means, provides a false list of shares or other securities of the company;
>
> III – to the director or manager who borrows from the company, or uses for their own benefit or that of a third party, the company's assets, without prior authorisation from the general meeting;
>
> IV – to the director or manager who buys or sells, on behalf of the company, shares issued by it, except when permitted by law;
>
> V – to the director or manager who, as a guarantee of social credit, accepts the shares of the company as a pledge or

> guarantee;
>
> VI – to the director or manager who, in the absence of a balance sheet, in noncompliance with it, or by means of a false balance sheet, distributes fictitious profits or dividends;
>
> VII – to the director, the manager or the supervisor who, through an intermediary, or in collaboration with a shareholder, obtains approval for an account or opinion;
>
> VIII – to the liquidator, in the cases of items I, II, III, IV, V and VII above;
>
> IX – to the representative of the foreign corporation, authorised to operate in the country, which carries out the acts mentioned in items I and II above, or provides false statements to the government."

Article 178 of the Brazilian Criminal Code provides for the crime of irregular issuance of deposits or warrants. The punishment for this type of offense is imprisonment for one to four years, plus a fine.

Finally, Article 179 of the Brazilian Criminal Code provides for the crime of fraudulent execution, which is characterised by the disposal, deviation, destruction or damage of assets, or simulation of debts. The punishment for this crime is imprisonment for six months to two years, plus a fine.

Cryptocurrency Regulation and Criminal Liability

On December 21, 2022, the president of Brazil sanctioned *Law 14,478/2022*, which provides for cryptocurrency regulation in Brazil. The law entered into force 180 days following its publication.

From the criminal perspective, this new Law adds a new type of larceny by trick to the Brazilian Criminal Code, which applies to any individual who organises, manages, offers, or distributes portfolios, or intermediates transactions involving virtual assets, securities, or any financial assets, in order to obtain illicit advantages,

and misleading or keeping someone in error, through artifice, ruse, or any other fraudulent means.

The penalty is imprisonment for four to eight years, and a fine.

Furthermore, the Law amends the law against money laundering, adding virtual asset crimes to the list of crimes, which can incur increased penalties by one-third to two-thirds if the offense is repeated. In addition, because they operate in a sensitive sector, virtual asset service providers are now obliged to store information about their clients - the know your client (KYC) policy - and report suspicious laundering activities to the competent authorities.

In other words, virtual service providers are obliged to identify their clients, keep records of their financial transactions and forward data and documents to the Financial Activities Control Board (COAF).

Bullying and Cyberbullying and Criminal Liability

On January 15, 2024, *Federal Law 14,811/2024* came into force, providing for important changes to the criminal legislative framework in Brazil, notably including bullying and cyberbullying in the Brazilian Criminal Code (*Decree 2,848/1940*).

The new Law introduced Article 146-A into the Brazilian Criminal Code, defining bullying as:

"*Systematically intimidate, individually or in groups, through physical or psychological violence, one or more people, intentionally and repetitively, without evident motivation, through acts of intimidation, humiliation or discrimination or verbal, moral, sexual, social, psychological, physical, material or virtual actions.*"

If the conduct does not constitute a more serious offense, the penalty is a fine. Significantly, the new Law also typifies the virtual version of bullying, known as cyberbullying, when the conduct is carried out in the digital environment. In this case, the penalty is two to four years' imprisonment and a fine, if the conduct does not constitute a more serious offense.

By addressing bullying from a criminal law perspective, in other words, as crimes per se, the Brazilian authorities demonstrate a clear commitment to combat such practices. By recognising the importance of combatting bullying, the authorities aim to interrupt a toxic cycle that inhibits social development in schools, online

environments and other communities.

It is especially relevant to highlight the legislator's concern in criminalising cyberbullying, since it has increased significantly in recent years – especially after the Covid-19 pandemic – and had not been criminalised until that point in time, which brought a feeling of impunity across Brazilian society.

The Law additionally included several acts among the heinous crimes that carry more rigid consequences for convicted individuals, such as serving their sentence necessarily in prison without the possibility of posting bail or applying to other legal benefits, such as amnesty or pardon:

(i) encouraging or assisting in suicide or self-mutilation through a computer network, social network or real-time transmission – Art. 122, main section and § 4 of the Brazilian Criminal Code;

(ii) kidnapping of a minor under 18 years of age – Art. 148, § 1, item IV of the Brazilian Criminal Code;

(iii) human trafficking of children or adolescents – Art. 149-A, main section, items I to V, and § 1, item II of the Brazilian Criminal Code;

(iv) to arrange, facilitate, recruit, coerce or mediate the participation of children or adolescents in pornographic records or recordings and display, transmit, assist or facilitate the display or transmission, by any means or digital environment, of an explicit or pornographic sex scene with the participation of children or adolescents – Art. 240, § 1, of the Child and Adolescent Statute;

(v) to acquire, possess or store, by any means, photographs, videos or other forms of recordings that contain explicit or pornographic sex scenes involving children or adolescents – Art. 241-B of the Child and Adolescent Statute.

Another relevant change concerns the inclusion of Article 244-C into the Statute of the Child and Adolescent, which criminalises the conduct of the father, mother or legal guardian who intentionally does not report to public authorities the disappearance of a child or adolescent. The penalty is imprisonment for two to four years, plus a fine.

Finally, *Law 14,811/2024* also increases the penalties for the crime of homicide against children under 14 years of age (Art. 121 of the Brazilian Criminal Code), which can be increased by two-thirds if it was committed in a school, as well as the possibility of increasing the penalty for the crime of inducing or instigating suicide (Art. 122 of the Brazilian Criminal Code), which can be doubled if the perpetrator is the leader, coordinator, administrator or person responsible for a virtual network group/community.

Also, the new Law provides for the development of the National Policy for Preventing and Combating Abuse and Sexual Exploitation of Children and Adolescents.

Market Manipulation and Insider Trading

The Brazilian Constitution protects and provides for "the freedom to engage in economic activity without the need for authorisation from Government organisations, except in specific cases stipulated by law". Article 173 of the Constitution establishes that state interference in such matters is justified only if it serves collective interests or is imperative to national security.

Despite the exceptionality, the Brazilian Constitution also establishes that legislation is necessary to regulate the individual liability of managers in cases of acts committed against the economic and financial order and the popular economy (article 173, paragraph 5) against which the State can act to protect fundamental rights.

As a component of the economic order, the securities market is regulated by *Law 6,385/1976*, whose provisions aim to protect the integrity and stability of the market itself, as well as the preservation of the assets of its investors. It also provides for the imposition of administrative penalties by the Brazilian Securities and Exchange Commission (CVM), which is similar to the Financial Services Authority in the UK, as well as criminalising various activities carried out against the capital market, including market manipulation (Section 27-C) and insider trading (Section 27-D).

According to Section 27 C of *Law No. 6,385/1976*, the individual who "carries out (trades) simulated operations or performs other fraudulent maneuvers aiming to raise, maintain or lower the quotation, price or traded volume of a security, with the purpose of obtaining undue advantage or profit, for himself/herself or for others, or causing damage to third parties" commits the crime of market manipulation.

The penalty this crime ranges from one to eight years' imprisonment plus a fine of up to three times the value of the illicit advantage obtained as a result of the crime. It is important to highlight that it is sufficient to demonstrate the performance of alleged simulated operations or other fraudulent maneuvers, regardless of effectively obtaining an advantage or profit.

In addition, the crime does not define a specific perpetrator for the criminal conduct, so any individual can be held criminally liable. On the other hand, the parties harmed by the illegal act are the financial market itself (State) and the investors who may be harmed by the manipulation.

As defined by the Federal Reserve, insider trading involves using relevant information that the perpetrator knows, but that has not yet been disclosed to the market. By trading securities in his/her own name or the name of third parties, the individual may gain an undue advantage for himself/herself or third parties. That is, individuals who, by any means, gain access to the alleged "privileged information" about the market and misuse it for his/her own benefit or the benefit of others (Article 27-D).

Pursuant to CVM Instruction 358/2022, a relevant fact is "any decision of the controlling shareholder, resolution of the general meeting or of the management bodies of the publicly-held corporation, or any other act or fact of a political-administrative, technical, business or economic-financial nature that occurs or is related to its business, which may significantly influence the price of the securities issued by the publicly-held company or referenced thereto; investors' decision to buy, sell or hold those securities; and in the decision of investors to exercise any rights inherent to the condition of holder of securities issued by the company or referenced thereto".

Also, an individual who discloses privileged information to which he or she has had access by reason of his or her office or position in a security issuing company or by reason of a commercial, professional or trust relationship with the issuer may be deemed an insider trader (paragraph 1).

Regarding the first modality, in which the Law does not specify the perpetrator, it is well established that only those with knowledge of a relevant fact not disclosed to the market commit the crime. In the second modality, the Law expressly defines the crime is

committed by those who, in the manner provided for, are linked to the issuer of securities and provide information to third parties.

The penalty provided for by Law for insider trading in both modalities described above ranges from one to five years of imprisonment plus a fine of up to three times the value of the illicit advantage obtained as a result of the crime. Finally, Article 27-D, paragraph 3, also provides for a one-third penalty increase if the perpetrator uses relevant information about which he/she must maintain confidentiality.

Legal Framework on Foreign-Exchange Market (*Federal Law No. 14,286/2021*)

In December 2021, *Federal Law No. 14,286/2021*, was enacted to regulate the Brazilian foreign-exchange market, Brazilian capital abroad, foreign capital in Brazil and the provision of information to the Central Bank of Brazil.

According to the Law, also known as the Legal Framework on Foreign Exchange Market, foreign exchange market transactions may be carried out freely, without limitations on amounts, but only by institutions authorised to operate in this market and in compliance with current legislation, guidelines of the National Monetary Council and regulations of the Central Bank of Brazil (BACEN). These institutions must adopt measures and controls aimed at preventing money laundering and terrorist financing operations in the foreign exchange market.

As part of its responsibilities, BACEN is regulates the foreign exchange market, its operations, governance, authorisation of incorporation, operation and supervision, control, mergers and incorporations of authorised institutions, including those involving non-residents. BACEN may also cancel authorisations, impose sanctions, as well as regulate foreign currency and Brazilian reais accounts held by non-residents.

Foreign capital in Brazil, i.e. pecuniary amounts, goods, rights or assets of any nature held in the country by non-residents, will receive the same legal treatment national capital under equal conditions. BACEN will be responsible for creating cases in which i) the capital of residents held in Brazil in favor of non-residents will be paralleled with Brazilian capital abroad and ii) the capital of non-residents held abroad in favor of residents will be paralleled

with foreign capital in Brazil.

In addition, BACEN may request necessary information from residents for the compilation of official macroeconomic statistics, the confidentiality of which will be preserved by the institution and its agents.

Furthermore, the Legal Framework provides that national and foreign currencies into and out of the country must be operated exclusively through an institution authorised to operate on the foreign exchange market, which will be responsible for identifying the customer and the recipient.

A notice of violation and a term of seizure will be formalised by the tax Auditor of the Federal Revenue Office when more than US$ 10,000.00 of cash is in possession. If necessary, a notice of custody will be issued, accompanied by testimonies, reports and other elements of evidence necessary to prove the offense. A penalty of loss of the excess amount will be applied in favor of the Brazilian Treasury, in addition to any applicable criminal sanctions.

***Federal Law 7.492/1986*:**
Crimes Against the National Financial System

In *Law No. 7,492/1986*, any conduct that may harm the proper operation of the National Financial System is criminalised. This is an extremely vague law, filled with imprecise and excessively sweeping concepts; for these very reasons, it has drawn harsh criticism since it was promulgated.

Section 1 of the Law defines a financial institution as a legal entity governed by public or private law, whose main or ancillary activity, cumulatively or not, is the collection, intermediation or application of financial resources from third parties, in national or foreign currency, or the custody, issuance, distribution, negotiation, intermediation or administration of securities.[1] The provision also

1. It is noteworthy that this definition is more specific than the one provided in *Federal Law N. 4,595/94*, which pertains to monetary, banking, and credit institutions policies. This law establishes the National Monetary Council and introduces various measures related to the financial sector, defining the main activity of a financial institution as not only a collection, intermediation or application of third-party resources, but also of their own (Section 17).

broadens the definition to include entities engaged in activities such as insurance, exchange, consortium, capitalisation, savings management, as well as individuals performing any of these activities.

Law 7,492/86 addresses crimes of negligent and fraudulent management (art. 4), off-book accounting fraud (art. 11), forbidden borrowing (art. 17) and currency control and tax violations (art. 22).

In 2017, *Federal Law No. 13,506/17*, a new law allowing leniency agreements in financial matters, was enacted, with both the Central Bank and the Securities Exchange Commission as counterparties. Notwithstanding, such agreements do not encompass individuals and do not grant immunity from prosecution. Hence, plea agreements are entered into with the Federal Prosecutor's Office on an individual basis.

As of *Federal Law No. 14,748/2022*, dated June 2023, legal entities that offer services related to virtual asset operations, including intermediation, negotiation, or custody are also considered financial institutions, which represents an important advance in the regulation of the crypto asset market.

Legal Framework for Crypto Assets (*Federal Law No. 14,478/2022*)

Federal Law No. 14,478/2022, also known as the Legal Framework for Crypto Assets, established guidelines for legal entities that provide services related to crypto assets, such as the exchange between one or more assets or between assets and national or foreign currency, transfer, custody or administration of assets. These legal entities may only operate in Brazil with prior authorisation from an agency or Federal Government body and can provide services exclusively related to the asset market or combine their services with other activities.

In June 2023, *Decree No. 11,563/2023*, which regulates *Federal Law No. 14,478/2022*, established the powers of the Central Bank of Brazil (BACEN) in regard to crypto assets. Pursuant to the Decree, BACEN is responsible for regulating the provision of virtual asset services and the legal entities providing such services, including the granting of authorisations, operation and supervision of their activities, in addition to deliberating on other matters stipulated in the Legal Framework for Crypto assets, except for the operation of

the National Registry of Politically Exposed Persons.

As the Legal Framework paralleled virtual asset service providers to the concept of financial institutions (Article 1 of *Federal Law No. 7,492/1986*), these legal entities are responsible for crimes against the national financial system through their shareholders and controllers. In fact, the Law criminalises any conduct that may harm the proper operation of the System, including crimes of negligent and fraudulent management (Section 4), off-book accounting fraud (Section 11), forbidden money loan (Section 17) and currency evasion (Section 22).

As for criminal liability regarding the infractions perpetrated within these financial institutions, Section 25 of the same legislation expressly provides that it can factor in its controllers and administrators, also considered directors and managers, as long as the element of intention (the requirement of a subjective bond between the perpetrator and the criminal result) as previously described is identified in the case under investigation.

The Legal Framework also introduced a new crime related to crypto assets into the Brazilian Penal Code. This is a specific crime of embezzlement (Section 171-A of the Brazilian Criminal Code), which criminalises the conduct carried out by an agent who organises, manages, offers, distributes a portfolio or facilitates virtual asset transactions, securities or financial assets in order to gain illicit advantage at the detriment of a third-party that has been deceived or maintained fraudulently.

The law provides for imprisonment for four to eight years, plus a fine.

Finally, the Legal Framework also amended *Law No. 9,613/1998*, which regulates money laundering crimes, with a provision increasing the penalty from one third to two thirds if a criminal organisation or virtual asset is used to commit a crime of this nature.

Betting

1. Sports betting

Under Brazilian law, fixed-odds betting on sports events ("sports betting") - those in which the gambler knows the return rate before the bet's result - are legal and were recently regulated by

Federal Law No. 14,790/2023 and *Decree No. 827/2024* of the Ministry of Finance[2].

Among other provisions, sports betting must be operated exclusively in a competitive environment within the country and requires discretionary authorisation from the Ministry of Finance, which is responsible for regulating, supervising and monitoring sports betting operations by private entities.

Pursuant to the referred Decree, foreign companies are authorised to operate sports betting activities in Brazil if they establish a subsidiary office in the country - constituted in accordance with Brazilian legislation - and have at least one Brazilian shareholder with a stake of at least twenty percent. The authorisation shall be valid for 5 years, and the intended operator will be required to pay BRL 30 million for the authorisation.

From a criminal standpoint, we highlight that the operator shall be required to adopt and implement Anti-Money Laundering and Anti-Fraud internal policies, procedures and controls (pursuant to Section 12, item II, "a", of *Decree No. 827/2024*).

AML regulations were already established for sports betting companies under Section 9, item VI, of the Brazilian Anti-Money Laundering Law (*Federal Law No. 9,613/98*), if they are headquartered in Brazil or at least have a branch/subsidiary/office located in the country (Section 9, items VII and, of the Brazilian Anti-Money Laundering Law, XVIII). In the first case, i.e. if the regulated entity is headquartered in Brazil, its foreign branches must comply with Brazilian AML duties when dealing with customers that reside in Brazil.

Betting operators were legally permitted to start operating in Brazil as of January of 2025, if several conditions, including a formal authorization by the Secretariat of Prizes and Bets (SPA) were met. For example, security requirements and terms for operating within the country, such as the need to be headquartered in Brazil, the payment of a BRL $30 million and the use of the domain "bet.br". These measures aim to ensure cyber protection, financial security and the prevention of money laundering.

In addition, for consumers, the regulated market requires a minimum age of 18, identification and facial recognition to create an account on the platforms. Transactions in cash, bills and credit

cards are prohibited, and bet payments must be made via electronic transfer within two hours after the end of the session. These changes increase security and transparency in the sector, in addition to allowing bettors to have access to national judicial means to resolve disputes.

2. Games of chance

The exploitation of gambling or games of chance in public places or accessible to the public, however, remains prohibited in Brazil and is considered a misdemeanor, subject to penalties ranging from three months to one year of imprisonment and a fine, pursuant to Section 50 of the so-called Misdemeanor Law (*Decree-Law No. 3,688/1941*)[3].

The referred provision defines games of chance as: a) games where winning and losing are determined exclusively or primarily by luck; b) bets on horse races outside of racecourses or authorised locations; c) bets on other sports.

Furthermore, Brazilian doctrine recognises three other elements as constituting a game of chance: luck, the inclusion of a prize, and the betting of an asset[4]. In these games, luck means that skill cannot be the predominant factor.

Since skill competitions are not considered games of chance, as luck is not a predominant factor in determining the outcome, they are not considered illegal. However, there is no specific legislation regulating these kinds of games.

Workplace Accidents

In accordance with Section 19 of *Federal Law No. 8,213/91*, a workplace accident is when an employee sustains physical injuries

2. The deadline for legal entities operating in Brazil to comply with the new rules is December 31, 2024.
3. Considering the abstract penalty set forth in Section 50 of the Misdemeanor Law - three months to one year of imprisonment -, the Public Prosecution Office would be entitled to offer the defendant the following decriminalising measures to avoid criminal prosecution, the imprisonment, and the loss of his/her first offender status: (i) Non-Prosecution Agreement; (ii) Plea Bargaining; and (iii) Conditional Suspension of the Proceeding.
4. FEIJÓ, Ricardo de Paula. "Regulação dos Jogos de Azar e das Loterias no Brasil". Rio de Janeiro. Lumen Iuris. 2021. p. 5-9.

or functional disturbances to as a result of a work-related event, causing their death or permanent or temporary impairment.

The most common cause of these accidents, from a criminal standpoint, would be the company's failure to comply with the safety and health measures imposed by regulations of the Ministry of Labor, such as *Decree No. 3,214/1978*.

Section 19, paragraph 2 of *Federal Law No. 8,213/91* defines non-compliance with workplace hygiene and security regulations as a misdemeanor punishable by a fine.

Workplace accidents can result in investigations that can also lead to charges of exposing others to danger, punishable by imprisonment between three months to one, pursuant to Section 132 of the Brazilian Criminal Code[5].

Legal entities cannot criminally liable for such crimes, as previously mentioned.

A person must act with *mens* rea (knowledge and intention of wrongdoing) in order to be criminally liable for the crimes referred to, as these crimes cannot be committed by mistake (for example, recklessness or negligence committed with no intention of wrongdoing). As Brazilian law does not allow criminal liability to be attributed solely based on someone's role within a company, intent is crucial to determine both participation in the criminal offense and criminal liability.

However, if the accident results in severe disabilities or even death and there is sufficient evidence that omission led to it, the crimes investigated are likely to be bodily injury by fault (as specified in Section 129, paragraph 6 of the Brazilian Criminal Code) or manslaughter (as specified in Section 121, paragraph 3 of the Brazilian Criminal Code).

In this case, despite not having committed the offense directly, the employee who has failed to make decisions or take actions that could have prevented the criminal offense, having had the duty and the possibility of avoiding it[6], may be criminally liable –the employee responsible for work safety would be the one held liable.

Although unlikely, an employee could also be investigated for the crimes of homicide (set forth in Section 129 of the Brazilian Criminal Code) and bodily injury with *mens* rea (set forth in Section 121 of the

Brazilian Criminal Code), if it is considered that the employee took the risk of producing the incident, even in an indirect manner.

Therefore, to avoid such criminal exposure and prevent workplace accidents, it is important for the company to ensure that all employees are trained on potential hazards, safe practices and emergency procedures, as well as to provide all the necessary safety equipment required for its activities.

Specifically, the State Court of Paraná rescinded the criminal liability of a safety supervisor initially convicted of manslaughter due to a fatal workplace accident. Due to the fact that the victim received all the necessary equipment and training, the Judge concluded that no reckless or negligent behaviour .

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5. Considering the abstract penalty set forth in Section 132 of the Criminal Code - three months to one year of imprisonment -, the Public Prosecution Office would be entitled to offer the defendant the following decriminalising measures to avoid criminal prosecution, the imprisonment, and the loss of his/her first offender status: (i) Non-Prosecution Agreement; (ii) Plea Bargaining; and (iii) Conditional Suspension of the Proceeding.
6. Section 13, §2nd, of Brazilian Criminal Code establishes the criminal relevance of an omission: "The omission is criminally relevant when the person should and could act to prevent the outcome. The duty to act applies to those who: a) have by law the duty of care, protection or surveillance; b) otherwise assumed the responsibility to prevent the outcome; c) with its previous behavior, created the risk of the occurrence of the outcome".

Chapter 5

Contract Law

The Agency and Distribution Relationship

The most straightforward way to begin doing business in Brazil is through the appointment of agents and distributors.

The adoption of one of these formats enables foreign companies to have a local presence in Brazil with low risks, low investment and without the need to open a local subsidiary.

In the Brazilian business environment, personal contact is crucial. A local presence is also necessary to handle customs processes and the bureaucracy imposed by tax and labour laws.

Agents, also called commercial representatives in Brazil, are mainly engaged in business mediation and promoting the sale of foreign manufacturer's products, which are to be imported by the purchaser. The agent is remunerated by commission, usually paid by the foreign manufacturer. The withholding of such commission payments by the purchaser's bank (at the moment the foreign exchange agreement to pay the price to the manufacturer is closed) is equally admitted as a means of paying the agent. In addition to the

manufacturer's warranty and technical assistance, the agreement may also stipulate other obligations for the representative.

The distributor, in turn, procures the products from offshore manufacturers at wholesale prices, import the products and resells them to end users or to previously defined dealer networks. In accordance with the accreditation rules set forth in the distribution agreement, the distributor may also accredit the dealers that will form the retail sales channels. The distributor's remuneration is generated by the margins obtained from the resale of the products.

The best model depends on the product's nature and destination.

In the case of capital goods, which usually have higher prices, the most common practice is to appoint an agent, because the cumulative incidence of taxes would increase the end user's cost. This situation may change as an effect of the Tax Reform, which will replace the main internal taxes on products with a dual VAT and will be fully in force in 2033.

For basic materials, low-cost products or products that will be sold to retailers or end users, the distribution model may prove more suitable, since the distributor will handle the import and wholesale operations.

Hybrid figures may also be found (the local partner sometimes plays the role of agent and sometimes plays the role of distributor) and there is also the franchise model in which the same company may play the role of distributor and master franchisor, an arrangement which is best suited to retail chains, such as fashion stores or fast-food restaurants.

Choosing the right partner

Although the appointment of an agent or distributor is the simplest way to start an operation in Brazil, some care must be taken by the foreign principal.

First, the operation in Brazil needs to be planned in advance. This will enable the company to identify the exposure and liabilities to which it or the appointed agent or distributor will be subject.

This sort of planning will also help identify the financial

magnitude and organizational maturity that must be demonstrated by the prospective agent or distributor, mainly if the agreement will involve large imported volumes or operations throughout Brazil.

As a result of the planning, it will be easier to identify the ideal agent or distributor, which will simplify the screening process.

The screening process can be performed with the assistance of the local British consulate or the Department for Business and Trade (DBT), and with the support of the British Chamber of Commerce. Specialised consultancy companies may also provide such services.

It is also advisable that the foreign company's representatives conclude the selection process by visiting the facilities of the intended agent or distributor, either to strengthen interpersonal relationships or to ensure that the intended local partner fits the outlined profile.

Agency Agreements

Individuals or legal entities can provide independent professional services as sales agents, subject to registration with a special Agents' Council. Apart from the provisions described below, Agency Agreements are governed by Brazilian law and any disputes can also be settled by mediation or arbitration in lieu of Brazilian courts.

Regardless of the terms agreed between the parties (called 'Principal' and 'Agent'), Agency Agreements must include:

- The general terms and conditions of the agency;
- A detailed list of the products covered by the agreement;
- Its duration, whether fixed or indeterminate;
- The territory covered;
- Whether the agreement is exclusive or non-exclusive (for example: (i) will the agent be the principal's only agent within the territory? and (ii) can the agent represent any other third party within the territory?);
- The commission rate, payment dates and whether the payments are conditional upon the principal being paid for the invoices issued by the principal;
- The parties' obligations and responsibilities; and

- The compensation due to the agent upon termination of the Agency Agreement.

As a rule, fixed term agreements end on their expiry date. However, the law allows for a single extension of such a term. Should the term be extended more than once or the parties enter a new agreement six months prior to expiry, the agreement is deemed to have an indefinite term by force of law.

Agents may receive commissions by the 15th day of the month after the customer pays the invoices issued by the principal. The agent will be paid commissions on the total amount of goods sold. Moreover, if the agent offers an unconditional discount, subject to the principal's consent, the agent will receive commission on the final net price paid by the customer.

If the principal terminates the agreement without just cause, the agent must immediately be paid the full amount of the outstanding commissions, even if the invoices remain unpaid on the date of termination.

The principal can withhold commissions due and payable if the agreement has been terminated with just cause, or if the agent has caused losses. The principal may also sue the agent for damages if the losses exceed the amount of commissions due to the agent and withheld by the principal.

If the principal terminates the agreement without just cause, the compensation due and payable to the agent will depend upon whether the agreement is for a fixed term or not. If the term is not fixed, the indemnity will be equal to 1/12 of the total amount of commissions the agent received during the agreement. If the term is fixed, the indemnity will equal the average commissions earned before termination, multiplied by half of the outstanding months. Either party can terminate indeterminate term agreements performed for over six months by giving the other a 30-day notice. If this is not provided, the defaulting party must pay the other 1/3 of the commissions the agent earned in the preceding three months.

A principal cannot refuse an agent's order after 120 days from its receipt, unless the agreement allows this (and the principal is a non-resident). The principal will not owe commissions if:

- A customer fails to pay because of insolvency;

- The transaction has not been definitively closed; or
- Delivery of the goods is suspended because there is a risk the customer will not pay.

If the principal grants the agent a power of attorney, the agent can represent the principal in court. Regardless, the agent must record all legal claims filed by customers and inform the principal. The agent must also suggest which steps should be taken to protect the principal's best interests.

Agents may subcontract, but the subcontracted agent will only be paid if the principal pays the agent the commissions due.

Any clause in the agreement holding the agent jointly or severally liable to customers for late or non-payment will be null and void. Agents cannot guarantee payment from customers.

Brazilian laws do not require agency or distribution relations to be contracted in writing. However, it is essential that this is done so that everyone is absolutely sure of what is being agreed upon.

Distribution Agreements

Distribution agreements in Brazil, with the exception of automobiles, are highly flexible, allowing both parties to define the relationship according to their own needs.

Although most of the relationship is regulated by the agreement itself, the assistance of local lawyers for this task is highly recommended, if not essential, and it is not advisable to use standard forms available online.

Distribution agreements, besides having clauses specific to each industry and situation (for instance, performance targets to be met by the distributor), usually address the following topics:

- **Products covered.** Many manufacturers produce a very large and diversified line of goods whilst distributors specialise in a specific segment. It is therefore important that the product line covered by the contract is established in advance, with rules for the launch of new lines and cancellation of existing lines by the manufacturer.
- **Territory and exclusivity.** Another essential topic addressed in the agreement is the definition of the distributor's territory, and

the exclusive or non-exclusive basis of distribution. Brazil is a country of continental dimensions, and, in some cases, a single partner may not possess the operational or financial conditions to serve the entire country, in which case it will be necessary to appoint more than one distributor for different regions, with a delimitation of the area of activity of each one.

Brazilian Law allows for any type of arrangement between the parties in this regard and the result of granting exclusivity for distribution within a specific area is usually the manufacturer being required to indemnify or pay commissions to the distributor if another agent or distributor trespasses on the territory.

It is also important for the parties to promptly define the manner in which a distributor will be compensated for the trespass of another distributor on its exclusive territory, as well as the hypotheses by which such remuneration must be paid, preventing a court from determining such compensation, which would certainly upset at least one of the parties.

In the event the distribution is non-exclusive, it is important for the principal to establish in the agreement a rule that expressly forbids the appointed distributor from selling the product outside its territory, including specific penalties for the violation of this rule, as the manufacturer could be held liable for the territorial invasion perpetrated by its distributor.

- **Marketing.** No matter how good or well-known a product might be, it does not sell itself, meaning it is necessary for customers to at least know where to find it. Therefore, it is important to establish in the agreement general rules for promoting products, the responsibilities concerning marketing campaigns and payment of related expenses, as well as the conditions under which the distributor and agent/dealer must be accredited before using the trademark.
- **Sales terms and conditions.** The general conditions for supplying the products can be established in the distribution agreement and/or in each individual sale and purchase agreement (at least one of these documents must set forth such conditions). If there is a risk of different conditions being established for distinct operations, it would be advisable to clearly state in the distribution agreement which rules shall

prevail. It is important to remember that capital flows between Brazil and other countries are controlled by the Central Bank, and Brazilian laws have strict rules for offsetting debts and credits in international operations. It is also necessary to observe the rules governing the customs value and transfer pricing as set out by both domestic and international laws (especially the GATT) when defining sales terms and conditions. The United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG) also applies.

- **Product warranty.** According to consumer protection laws, the party responsible for the product's warranty is, as a rule, the manufacturer. However, in the case of imported goods such liability is transferred to the importer. Hence, the agent or distributor will likely assume those liabilities on behalf of the manufacturer in Brazil. It is therefore essential that each party's role is clearly defined. Also, it is important to remember that the import of spare parts, even for the fulfillment of warranty obligations, is subject to import duties, customs fees, and expenses, which is why it is crucial to establish clearly who bears these costs.
- **Governing law.** As the distribution activity will be performed mostly in Brazil, it is advisable that Brazilian Law govern the agreement, as the adoption of foreign laws, although not forbidden, could be considered abusive (and thus void) by a Brazilian court.
- **Duration and termination.** The law does not require the establishment of a specific term for the distribution agreement, which may be entered into for a fixed or indeterminate term.

  However, it is essential to establish the means for terminating the agreement, most importantly the period of prior notice to be given to the distributor if the agreement is for an indeterminate term.

  If the distributor's investment is high/substantial (and such substantiality is assessed on a case-by-case basis), Brazilian Law authorizes the judge to extend the agreement for a further term, even if a fixed term was agreed upon, so that the distributor may recover its investments.

  In some cases, the manufacturer may be required to repurchase the stock upon termination of the agreement, so it is important

for the parties to negotiate this specific matter.

- **Dispute resolution.** Brazilian laws allow the parties to agree to resolve disputes arising between them either judicially or by alternative means such as mediation and arbitration (including internationally), and such laws grant enforcement of the decisions produced in those alternative proceedings, which carry the same weight as a court decision.

Digital Signatures and International Legalisation

Both the Agency and Distribution agreements can be digitally signed, which is fully recognised and enforced by Brazilian Laws.

In the event the agreement is produced outside Brazil (and not governed by Brazilian Law), Brazilian laws require it be apostilled in the country where it was made. After being apostilled, the agreement shall also be translated (by a Brazilian sworn translator) and registered with a Brazilian registrar.

Taxation

Regardless of the type of agreement, each party is usually responsible for its own taxes. However, in the case of an agency agreement, the commissions paid by the agent may also be taxed in the manufacturer's country of origin (usually withheld at the source) in addition to Brazilian taxation. Therefore, it is important for the parties to consider these issues and take into account the existence and effects of any possible international covenants, in order to avoid double taxation.

Investors should also be aware of the corporate income tax due on sales made by non-resident principals through Brazilian agents. Under applicable law, corporate income tax will be due based upon the assumption that the sales have been made in Brazil, unless the agent cannot contractually bind the principal in relation to local customers. This calculation does not apply if the agent only forwards customer orders to the principal but does not have any authority to sign contracts on behalf of the principal.

The Franchising Agreement

The corporate franchise system is characterised by the authorisation granted by the franchisor to the franchisee for use of its trademarks and other intellectual property elements, always associated with the right of production or exclusive or non-exclusive distribution of products or services and also the right to use business implementation methods and systems or operational systems developed or owned by the franchisor, upon payment of direct or indirect remuneration, without characterising consumer relationship or employment relationship in relation to the franchisee or its employees, even during the training period. Its rules and assumptions were initially established pursuant to *Law No. 8.955*, dated 15 December 1994, which was repealed by *Law No. 13.966*, dated 26 December 2019 (hereinafter known as the "New Law").

Under the Contract, the Franchisor shall be the legal owner, or the applicant, of trademark and other intellectual property rights negotiated. In addition to private companies, the New Law now extends franchises to non-profit public companies and law firms of any segment.

In order for the Franchisee and Franchisor to establish the rights and obligations related to the production or distribution of products or services owned by the Franchisor, the Franchisor, before the formalisation of the franchise contract, shall deliver to the potential Franchisee a Franchise Offering Circular (hereinafter referred to as "FOC"), which includes important franchise information.

The New Law has considerably expanded the list of information that shall be submitted in the COF which, within the scope of the Former Law, comprised 12 items, while the list in the New Law was expanded to 23 items, requiring the full disclosure of all important details for the future benefit of the Franchisee.

The FOC addresses the following items:

I - an overview of the franchised business history;

II - full qualification of the franchisor and the related companies,

identifying them with the respective enrolment numbers in the National Register of Legal Entities (CNPJ);

III - the franchisor's last two years' balance sheets and financial statements;

IV - indication of the litigations related to the franchise challenging the system or that may compromise the franchise operation in Brazil, to which the franchisor, the controlling companies, the sub-franchisor and the holders of trademarks and other intellectual property rights are parties;

V - detailed description of the franchise and general description of the business and the activities to be performed by the franchisee;

VI - profile of the ideal franchisee with respect to past experience, education and other mandatory or preferential characteristics;

VII - requirements regarding the direct involvement of the franchisee in the operation and management of the business;

VIII - specifications regarding: (a) total estimated initial investment necessary for the acquisition, implementation and startup of franchise activities; (b) initial affiliation or franchise fee; (c) estimated cost of facilities, equipment and inventory and payment conditions;

IX - clear information on the periodic fees and other amounts payable by the franchisee to the franchisor or third parties indicated by it, describing the respective calculation bases and what they remunerate or their purpose, specifically indicating the following: (a) periodic remuneration for the use of the system, trademark, other intellectual property items of the franchisor or on which it holds rights or, also, for the services provided by the franchisor to the franchisee; (b) lease of equipment or points of sale; (c) advertising or similar fee; (d) minimum insurance;

X - complete list of all network franchisees, sub-franchisees or sub-franchisors and, also, those who withdrew in the past twenty-four (24) months, including their respective names, addresses and telephone numbers;

XI - information related to the territorial operation policy,

specifying: (a) whether the franchisee is ensured exclusivity or preference over a given territory and, in this case, under which conditions; (b) whether the franchisee can make sales or provide services outside its territory or carry out exports; (c) whether there are and which are the territorial competition rules between own and franchised units;

XII - clear and detailed information on the franchisee's obligation to acquire any assets, services or inputs necessary for the implementation, operation or management of its franchise solely from suppliers indicated and approved by the franchisor, including a complete list of these suppliers;

XIII - indication on what is offered to the franchisee by the franchisor and under which conditions, with respect to: (a) support; (b) network supervision; (c) services; (d) incorporation of technological innovations into the franchises; (e) training of the franchisee and its employees, specifying the length, content and costs; (f) franchise manuals; (g) support in the analysis and selection where the franchise will be established; and (h) layout and architectonic patterns of the franchisee's facilities, including physical organisation of equipment and instruments, descriptive memorandum, composition and sketch;

XIV - information on the situation of the franchised trademark and other intellectual property rights related to the franchise, which use will be authorised in a contract by the franchisor, including the complete characterisation, with the number of registrations or requests filed, including the class and subclass, with the competent bodies, and, in the case of cultivars, information on the situation before the National Cultivar Protection Service (SNPC);

XV - situation of the franchisee, after the end of the franchise contract, in relation to: (a) know-how of the product, process or management technology, confidential information and industry, trade, finance and business secrets to which it has access as a result of the franchise; (b) competitive activities against that of the franchise;

XVI - a model of the standard contract and, if applicable, also of the standard franchise pre-contract adopted by the franchisor,

with full text, including the appendices, conditions and validity period;

XVII - an indication of whether or not there any transfer or succession rules and, if so, which ones;

XVIII - indication of situations where penalties, fines or indemnities are applied and the respective amounts established in the franchise contract;

XIX - information on the existence of minimum purchase quotas by the franchisee from the franchisor, or third parties designated by it, and on the possibility and conditions for the rejection of products or services required by the franchisor;

XX - indication franchisees' council or association, including their duties, powers and representation mechanisms before the franchisor, and descriptions of their competences for managing and inspecting existing investments;

XXI - indication of the competition restrictions between the franchisor and franchisees, and between the franchisees, during the term of the franchise contract, as well as the territorial coverage, the term of the restriction and the penalties for noncompliance;

XXII - accurate specification of the contractual terms and renewal conditions, if any;

XXIII - place, date and time for receiving the proposed documentation, as well as for beginning the envelope opening process, when referring to a public body or entity.

The FOC shall be delivered to the potential Franchisee within no less than 10 days prior to the signing of the Franchise Contract or Pre-contract, or before any fee is paid by the potential Franchisee to the Franchisor An entity or public body conducting a bid or prequalification shall disclose the Franchise Offering Circular at the very beginning of the selection process.

In case of non-compliance with the FOC delivery as mentioned above, the Franchisee may claim annulability or nullity, and request a refund of any and all amounts already paid to the Franchisor, or third parties indicated by it, as affiliation or royalties, adjusted for inflation.

While the terms and conditions of the Franchise contract may vary depending on the specific characteristics of the franchised product or service, there are some terms and conditions common to all negotiations:

a) general obligations of the Franchisee to operate its business based on the Franchisor's trademark patterns;

b) initial fee paid by the Franchisee to the Franchisor and a percentage rate for royalties payable by the Franchisee to the Franchisor for selling products or services;

c) the Franchisor shall define the specifics about a Franchisee's operating territory, and reserve its rights within the territory of a Franchisee, including alternative distribution and online sales;

d) potential training and initial and/or continuing support offered by the Franchisor to the Franchisee;

e) intellectual property clauses to protect the Franchisor's trademark rights, patents and ownership manuals;

f) potential advertising fees.

In addition to these clauses, there are other matters that shall also be addressed in the contract, such as default, rescission, indemnity, insurance, among others.

Should the Franchisor sublease the business site to the Franchisee, either party may request an extension of the Lease Contract. The lease amount payable by the Franchisee to the Franchisor in the sublease can be higher than the amount paid by the Franchisor to the property owner in the original lease of the point of sale, provided that: (i) the Franchise Offering Circular and the contract explicitly state such possibility; and (ii) the amount overpaid to the Franchisor in the sublease does not entail excessive onerousness for the Franchisee, ensuring the maintenance of the economic-financial balance of the sublease during the term of the franchise contract.

FOCs and Franchise Contracts entered into and executable in Brazil must be written in Portuguese, be clear and objective and, governed by Brazilian laws; international arrangements, on the other hand, shall be originally written in Portuguese or shall be sworn translated into Portuguese and paid by the Franchisor, and the contracting parties can choose which jurisdiction will be applied to them.

Generally, an international arrangement is one that, in accordance with the acts involved in its completion or execution, the nationality or domicile of the parties, or the place where the subject matter of the agreement is located, has ties to more than one legal system. If the parties choose a foreign Court, they must appoint and retain a legal representative or attorney-in-fact duly qualified and domiciled in the country of jurisdiction defined, with power to represent them administratively and judicially, as well as receive process service. Also, the parties can equally elect to resolve disputes through arbitration.

Sub-franchisors and sub-franchisees shall be subject to the same laws as franchisors and franchisees.

Electronic Commerce

Introduction

A simple concept, the Internet began as a means of transmitting information between two locations connected by electromagnetic means, such as radio or electric wire. The inventors intended it to be an efficient military communication tool during the Cold War.

Internet use has changed over the past two decades and is no longer used only for information, but also for commercial transactions, which has an impact on human relations. An example of this is the growth of the electronic commerce, which simplifies and facilitates global trade.

But what is electronic commerce? Electronic commerce or e-commerce refers to commercial activities carried out over the internet. It is a type of commerce in which online purchases and sales of products or services, as well as financial transactions, are fully carried out through the internet using electronic devices, such as computers, phones or tablets. These transactions can occur (i) between companies and consumers (b2c); (ii) between companies (b2b) or (iii) between consumers (c2c).

Few laws in Brazil regulate electronic commerce, focusing

on B2C relationships (i.e., companies and consumers). These rules include: (i) the Consumer Defence Code (*Law No. 8.078/90*), *Decree No. 7.962/2013*, which regulates e-commerce contracting, (iii) the Internet Civil Milestone (*Law No. 12.965/2014*), which establishes the reciprocal rights and obligations between users and service providers; (iv) the General Data Protection Law (*Law No. 13.709/2018*), (v) the Civil Code (*Law No. 10.406/2002*).

A brief description of the e-commerce provisions and context can be found below.

Brazilian Laws

Consumer Defence Code ("CDC") and *Decree No. 7.962/2013* ("E-commerce Law").

The CDC establishes a set of principles and rules aimed at protecting and defending consumer interests, including in a virtual environment, to ensure good faith in consumer relationships.

They include the following: (i) the principle of objective good faith by the supplier, which means that the supplier is responsible for providing all the information the consumer needs so as to ensure their best decision, (ii) supplier's responsibility for any defect and/or vice in the product and/or service acquired; (iii) the supplier must comply to the precise terms of the offering, under penalty of the consumer requiring compliance with the conditions announced; and (iv) the consumer is assumed to be vulnerable against the supplier, as the weakest party in the relationship, so any dispute or litigation will be treated differently.

In addition, the CDC provides a series of articles that support in-person consumer relationships, as well as those that work in virtual environments, including: (i) prohibition of cross-selling; (ii) right to pay for the amount announced; (iii) prohibition against misleading advertisement, among others.

The E-commerce Law, also known as *Decree No 7.962/2013*, regulates the CDC and specifically addresses e-commerce. This means that, besides the CDC, the E-commerce Law specifically addresses transactions carried out between virtual stores and consumers.

The Decree provides for, among others, the following

obligations for online suppliers of products and/or providers of services: (i) provide their physical and electronic addresses on their websites; (ii) show its full identification in a prominent and easily visible location; (iii) provide a summary of the contract to be entered into among the parties before the operation is closed, and the full document after it is completed; (iv) maintain an efficient customer service channel; and (v) inform and enforce the consumer's right of regret.

Furthermore, the CDC's and the Decree's contractual nature rules apply, including those prohibiting suppliers from fixing clauses exempting or mitigating their responsibility. According to article 56 of the CDC, e-commerce entrepreneurs who fail to comply with the rules will face administrative penalties.

In addition to these specific provisions, this legal framework provides guarantees and protection to the final consumers in Brazil, including on the internet, against potential abuse by the companies that might be in a situation of tighter economic or technical control in the relationship, particularly in the B2C market (business-to-consumer, focused on the final consumer).

Both the CDC and the Decree aim to consolidate an ethical, transparent treatment culture with more explicit information that facilitates the companies' liability in case of product defects or service errors.

Because commercial relationships established online are subject to the same rules and principles nationwide, an effective document with the "Terms of Use" and well-written "Policies" that also reflect these consumer guarantees are essential instruments that should be used to establish the credibility of e-commerce.

Decree No. 10.271 of 2020 (Mercosur)

As per *Decree No 10.271*, issued in March 2020, all consumers and suppliers living or established in Mercosur countries, or operating under any of their domains, are subject to the GMC Resolution No. 37/19. Suppliers must abide by guarantees such as the right of regret, availability of commercial information on the supplier, among others, which is in accordance with the minimum

consumer defence obligations in digital commerce within the four Member States of Mercosur (Argentina, Brazil, Paraguay and Uruguay), through a common protection level.

Also, the Decree expands consumers' protection, as: (i) it reiterates that suppliers must provide consumers with a summary of a contract prior to its formalisation, particularly the key clauses pertaining the consumer; (ii) expressly provides for the co-operation between the national consumer defence bodies; and (iii) determines the adoption of online, efficient, fair, transparent and low-cost dispute resolution mechanisms, so that the consumers can have their claims satisfied.

In Brazil, there are already some dispute resolution platforms (ODR – Online Dispute Resolution), such as "consumer.gov", as well as other methods such as mediation, negotiation and arbitration. However, fact remains that they go back to the digital scope that is supported by the law as a result of the necessity to protect consumers in online operations, which is why it is critical that these companies adopt them.

The structuring of ODR mechanisms has been a challenge for companies, in order to enable them on an innovative, light and effective basis, so as to improve consumers' experience, with platforms such as Amazon already adopting mechanism that switch between automatic and personal service when necessary.

Last but not least, the document also contains several articles that guide the formulation of the Terms and Conditions, providing a good framework for what must be observed in Brazil and elsewhere. In summary, a clear explanation of the offering conditions as well as the inherent rights of the consumer, along with the guarantee of exercise facilitated by the e-commerce companies, whether through good service channels or clear instructions on how to access them.

Civil Milestone

Brazilian internet regulations include the Internet Civil Milestone (*Law No. 12.965/2014*) ("MCI") and the General Data Protection Law (*Law No. 13.709/2018*) ("LGPD").

The MCI is a law that establishes general parameters for Internet use in Brazil. The text specifically reaffirms the provisions

regarding consumer protection rules in this context, provided there is a consumer relationship involved.

This law also addresses other transactions carried out by the e-commerce establishments, including the collecting and processing of personal data and other matters related to privacy protection. All relationships established through the internet, including electronic commerce, are directly impacted by its rules and principles.

Privacy and Personal Data Protection

E-commerce development relies heavily on privacy and data protection. E-commerce customers usually provide their personal data when creating an account or making a purchase in a virtual store. This data may include information such as name, CPF (*Cadastro de Pessoa Física)*, address, telephone number, e-mail and bank account information.

The LGPD is a Brazilian law that came into effect to strengthen citizens' control over their personal data and information.

In general, the LGPD has profound impacts on e-commerce transactions and the way how the personal data is processed (i.e. "processing" shall be extensively understood as all operations carried out using personal data, including the collection, storage, access, reproduction, among others). The LGPD has principles and events that companies must observe to validate the use and processing of personal data.

In the case of e-commerce, except for certain cases provided for in the LGPD, in general, no personal data – information related to an identified or identifiable natural person – can be collected without the consumer's or user's consent and without being previously and clearly informed, subject to the principle of transparency, about the purpose for their collection, use and sharing of data. Such information is usually available in the Privacy Policies.

The LGPD also provides for the rights of the personal data owners, granting to them greater control over their data and making the controllers or operators responsible for requesting the personal data processing: (i) confirmation of the existence of personal data processing, (ii) the possibility of verifying what data the company holds about the owner, (iii), the possibility of correcting incomplete,

inaccurate or outdated data; (iv) anonymisation, locking or deletion of unnecessary or excessive data or data processed in violation of the LGPD, (v) portability of the data to another service provider or product supplier; (vi) elimination; (vii) inform who the data was shared with and (viii) information about the possibility of refusing consent and about the consequences of that decision.

The LGPD does not include a prohibition on personal data collection and/or use. Instead, it includes rules and guidelines so that the owner has knowledge of and control over it. In electronic commerce, companies are responsible for maintaining data security and privacy.

It is therefore critical that companies operating within electronic commerce to adjust their practices and operations in conformity with the requirements both from the Civil Milestone and the LGPD, thereby ensuring greater clarity and transparency in the relationships with their customers and consumers, mitigating risks and reducing their exposure to penalties.

Senacon

As part of the Ministry of Justice, the National Consumer Department (Senacon) was established in 2012, by *Decree No. 7.738/2012*, to plan, prepare, coordinate and execute the National Consumer Policy, specifically to: (i) ensure the protection and exercise of the consumers' rights; (ii) promote the standardisation of consumer relationships; (iii) encourage the integration and joint operation of SNDC members; and (iv) participate in national and international bodies, forums, commissions or committees that address consumer protection and defence or consumer interest matters, among others.

Within the scope of its activities, the Senacon has performed numerous actions for consumer protection, such as piracy prevention and product recalls.

Piracy

Senacon has placed numerous actions to fight illegal commerce, such as the issuing ordinances, technical notes and even

simple recommendations of reprimand and preventive measures to be observed by electronic commerce establishments to prevent piracy.

The resulting measures include the obligation of selecting and registering suppliers, for a tighter control over the sites with respect to what is sold and the need to inform the commerce of illegal products to the competent bodies – such as the National Piracy Prevention Council (CNCP) and Senacon, as soon as they are identified, as well as inform actions already implemented.

Also, the body suggests that omissive platforms are not exempt from legal obligations and can be held liable for damages caused to consumers. In addition, Senacon published the Good Practices Guide and Instructions for Electronic Commerce Platforms in order to "establish a model of ethical conduct for digital consumers".

This document applies to and covers "the entire supply chain, including manufacturers, retailers, online platforms that allow third parties to sell products to consumers, as well as service centres". It is therefore important that direct (e-commerce) or indirect (marketplace) electronic commerce establishments pay attention to and abide by these guidelines.

The document also provides for penalties and recommendations, in addition to encouraging the adoption of policies, notification procedures, reporting systems, feedback, monitoring of violators, co-operation with public authorities and preventive measures.

Despite not being binding, compliance with the rules outlined in the Guide aimed at promoting the digital business environment based on good faith and healthy, competitive self-regulation and free of illegal products is recommended, whether it is pirated, smuggled or infringing on consumers' or intellectual property's rights, which shows the commitment of those compliant the prevention of those types of practices.

Recalls

As expressly set forth in the CDC, the supplier shall ensure the security of the products and services it provides, including the obligation to communicate any defect after the inclusion of these

products or services are marketed.

The rule establishes that the products made available shall not pose any health or safety risks to their purchasers, except for those that are normal and predictable due to their nature.

The recall process intended to obtain indemnification and/or replace the defective product and/or service offered on the market (i.e. Recall Campaign), is regulated by Ordinance No. 618/2019 issued by the Ministry of Justice, where Senacon is also responsible for monitoring and supporting compliance with the Ministry.

It is the responsibility of the supplier to notify the National Consumer Department within a period of twenty-four hours of becoming aware of the possibility of introducing harmful or dangerous products or services into the Brazilian consumer market.

Upon verification of the harmful or dangerous nature of the aforesaid investigations, the supplier shall communicate the fact to Senacon and the competent regulatory or inspection body, within two (2) business days of the recall decision.

This communication shall be made in writing, preferably through the Electronic Information System (SEI), or another system introduced by Senacon, and contain the following information: (i) the full identification of the supplier (corporate name, fanciful name, economic activity involved, CNPJ, address of the establishment head office, among others); (ii) detailed description of the product or service and the defective component, including the necessary characteristics for its identification, in particular: trademark, model, batch, series, chassis, initial and final manufacturing date and photo; (iii) detailed description of the defect together with technical information necessary to clarify the facts, as well as the date, including day, month and year, and how the harmfulness or dangerousness was detected; (iv) indication of the measures already adopted and measures proposed to correct the defect and resolve the risk; (v) media plan for informing the affected consumers; (vi) consumer service plan, among others.

Domain Name

In order for an e-commerce site to operate in Brazil within

the ".br" category, the domain main must be registered with Registro.br. The domain name can be registered in the name of an individual or legal entity.

For foreign companies that wish to register a domain name in Brazil, it is necessary to have an attorney-in-fact representative in Brazil. Otherwise, if the foreign company is not yet registered in Brazil, it must sign a letter which stipulates that within the next twelve (12) months, the foreign company shall establish a company and activities in the Brazilian territory, with a physical address in the country.

The domain names are registered without a review of potential conflicts with third parties. Hence, in case of a domain name dispute, CGI.br has implemented an administrative body in charge to quell such matters.

The domain name can be challenged when used in bad faith and if it is:

1. Identical or similar in a way that could be mistaken by the trademark already registered or filed in Brazil before the domain name registration;
2. Identical or similar in a way that could be mistaken for a notably known trademark, even without registration in Brazil; or
3. Identical or similar in a way that could be mistaken for another domain name, trade name, family name, known alias, artistic name, etc.

After analysing the dispute, the administrative body shall decide whether to maintain, cancel or transfer the domain name. However, the decisions shall not impose penalties and can be challenged in court.

Establishment of a Virtual Store

Any company is free to operate using e-commerce in Brazil, provided that it is validly organized and established in accordance with the laws and provides licit activities. Therefore, all requirements necessary for a traditional operation (non-virtual) are, in theory, fully applicable to electronic commerce. Websites and apps must adhere to

specific rules related to e-commerce, especially since they are digital.

First, the virtual store must visibly disclose the company data, such as its name, physical and electronic addresses, enrolment in the Brazilian Federal Revenue Services' record, as well as clear, precise, direct and ostensible information on the services and products offered, such as price and payment methods, quantity, specifications and characteristics, in addition to other information that might be relevant for its use.

In this regard, it is important to stress that the contracting terms for the purchase of the product or service, as well as the website use terms, privacy policies and other documents binding the consumer shall be accessible prior to the completion of the business, and they must be incorporated into the website so they can be easily found and accepted.

Additionally, the virtual store must have a reliable and safe system for registering purchases and payments, requiring informed consent from the user for the use of its data, and the consumer should have the option of verifying the data, correcting errors and cancelling the transaction before registration, if they so wish. E-commerce security is commonly provided to both the company and the consumer by the good e-commerce practices generally adopted in Europe. The virtual store shall also provide customer services such as information, doubts, complaints and suspension or cancellation of purchases or services, both through telephone and email. Any questions or complaints should be addressed by the company within five (5) days after the call is registered with protocol numbers.

Therefore, in certain situations, it may be necessary to separate e-commerce geared towards Brazilians from e-commerce geared toward foreigners, due to the particularities of Brazilian consumer law. As a result, the separation of IP (internet protocol) numbers and domain names in the Brazilian first level domain (ccTLD .br) might be used and subject to the rules of the Managing Internet Committee in Brazil, Registro.br. These rules are very similar to those adopted by ICANN internationally.

As long as the product is delivered from abroad, it will be treated as an import, it is not considered a generic prohibition for a foreign company to sell its products through a virtual store hosted and operated abroad. However, the Brazilian consumer, internet user

and personal data protection laws shall also be fully applicable to this company, and any responsibilities and penalties will also be enforced, particularly if the company is established in Brazil or holds a branch, unit or representative in the country.

Responsibilities

The rules of responsibility for defects and facts regarding products and services sold in virtual stores are similar to those of merchants operating in physical stores. Due to the CDC protection rules, sellers and manufacturers are responsible for defects in any product or service, and also for any and all delays or failures in the delivery of the products or provision of services. The law requires that, regardless of whether the granting or sale of extended warranties, sellers and manufacturers are jointly responsible for warranting their products against defects or vices for a period of thirty (30) days from the date of delivery or the discovery of the defect, and ninety (90) days for durable goods.

In case of a defective product or service, the law grants a period of thirty (30) days for repairs. If this not possible, the consumer has the option of either receiving a price discount, receiving a replacement or returning it, receiving a refund of the original price.

The company that operates the e-commerce platform can also be held liable for illegal practices of consumers and other users of its platform if it cannot cooperate with the Brazilian authorities when trying to identify the person who infringed the rights on third parties.

Therefore, it is recommended to store access date and activity of consumers and other users for at least six (6) months, as specified in the Brazilian Internet Civil Milestone, or even for a longer period in specific situations, as required by sector law. The privacy policy and any instruments of consent should inform consumers about such data collection and storage, as well as other gathered personal information.

Furthermore, the LGDP provisions must be followed when collecting data from consumers and users of e-commerce platforms. As a result, the controller or operator may be jointly liable for infringements of the LGDP resulting in personal data processing, as

well as required to correct those infringements. A record of all personal data processing transactions shall be maintained by the operator and controller in case of LGDP violations.

The Brazilian case law recognizes the possibility of holding Brazilian units, branches or representatives of foreign companies in Brazil liable if these companies are only established abroad There are cases in which lower court rulings order telecommunication companies to lock foreign services in Brazilian territory due to a refusal to comply with court orders.

Taxation

The taxation of e-commerce sales is complicated by the fact that each Brazilian state has its own tax laws regarding product sales, and each municipality has its own laws regarding service taxation. In this regard, it is important to stress the matter of the division of the State VAT (ICMS) on interstate sales that deliver goods and services to a final consumer, i.e. when goods are delivered from the state where the company is located to another state. Constitutional Amendment No. 87, of 15 April 2015, established that, from 2016 to 2018, both the states of origin and destination will collect tax, and from 2019 onwards the state of origin will receive the tax in full.

In view of the variation of tax rates, as each Brazilian state has authority to provide for this tax in its territory, and the bureaucracy involved regarding its payment, e-commerce companies have extensively criticized the law, resulting in a revision of e-commerce strategies.

It is possible to observe the complex nature of the national tax framework. Due to the several particularities and details of Brazilian tax laws, every company should verify the requirements and obligations applicable to its particular business.

Chapter 6

Tax Law

General Rules of Brazilian Tax System

The Tax system

The 1988 Federal Constitution, Federal Tax Code of 1966 and enabling legislation govern Brazil's tax system, which is based upon the principle of strict legality. Taxes may be levied at Federal, State or Municipal Government levels.

The Federal tax system is managed by the Brazilian Federal Revenue Service (*Receita Federal do Brasil* - RFB), which is part of the Ministry of Finance (*Ministério da Fazenda*). States and municipalities have similar bodies.

There is a clear separation of jurisdictions and powers between judiciary and administrative boards for resolving tax disputes. Typically, tax matters are initially addressed at administrative level before potentially being escalated to the judiciary.

Federal Corporate Income Taxes

Income tax regulations apply to all taxpayers. Only the Federal Government may charge income taxes. It does, however, transfer some of the taxes collected to States and municipalities.

Brazilian companies are taxable on their worldwide profits and capital gains. The origin of the capital, as is whether the investor is foreign or domestic, is irrelevant. Foreign branches must pay tax in the same manner as resident entities.

The Brazilian tax year is the calendar year, irrespective of the corporate year. An annual income tax return must be filed by the date determined by the RFB - normally the last business day of July. In 2024, the RFB began accepting income tax returns on March 15th with the final date being May 31st.

The income tax return must also be filed when certain special events occur during the year (e.g., mergers, liquidations, spin-offs).

There are two income taxes in Brazil: (a) corporate income tax (*Imposto sobre a Renda da Pessoa Jurídica* – IRPJ); and (b) social contribution on net profits (*Contribuição Social sobre o Lucro Líquido* – CSLL). They are charged on similar tax bases.

Corporate Income Tax (IRPJ)

Previously, income taxation in Brazil was regulated by Decree No. 3,000/1999. However, this decree has been revoked, and income taxation is currently regulated by Decree No. 9,580, enacted on November 22, 2018.

Brazilian corporate income tax is a Federal tax charged on net taxable income. It applies at a basic rate of 15%, plus a surcharge of 10% on annual income that exceeds R$ 240,000.00 per year or R$ 20,000.00 per month.

Social Contribution on Net Profit (CSLL)

CSLL is a social contribution levy that funds the social

security system. It is also assessed on net taxable income. It is not deductible for corporate income tax purposes and the tax base is similar to the tax base for corporate income tax, although some specific adjustments may be applicable to one tax and not to the other.

In general, the rate for Social Contribution on Net Profits is 9%. For financial institutions, private insurance and capitalisation companies the rate is 15%.

Calculation Methods

There are three methods provided by law to calculate corporate income taxes: Presumed Profit, Actual Profit and Arbitrated Profit.

Presumed Profit System

This system is available to many corporate entities. It has two advantages: first, bookkeeping requirements are less stringent; and second, if actual profits of an entity are higher than those calculated under this system, the company saves on tax. Corporate entities prohibited from adopting the presumed profits system include:

- those with an annual gross revenue above R$78,000,000;
- commercial banks, investment banks, development banks, savings and lending organisations, credit, financing and investment organisations, real estate credit entities, securities or currency exchange houses, leasing companies, credit co-operatives, insurance companies and pension plan funds open to the public;
- those which receive profits, capital gains or income from abroad (i.e. directly or via foreign subsidiaries);
- those which benefit from regional income tax incentives;
- companies that make monthly payments under the month-per-month estimative regime;
- factoring and similar entities; and
- those which pursue securitisation activities involving real estate,

financial and agribusiness credits.

The system is chosen annually at the beginning of the year and the choice may be changed every year. The choice is valid for both corporate income tax and social contribution on profits. Under the Presumed Profit System, taxes must be calculated and paid on a quarterly basis.

Under this system, the company's Actual Profit is irrelevant, since the tax authority will presume that the company made a profit of between 1.6% and 32%, depending upon the sector (e.g. commercial companies are usually subject to presumed rates of 8% for IRPJ and 12% for CSLL, and services companies of 32% for IRPJ and 32% for CSLL). The corresponding tax rates are applied to this Presumed Profit base plus the total amount of capital gains, financial revenue and other revenues.

Actual Profit System

Under the Actual Profit System, net taxable income corresponds to the company's net book profit, arrived at by applying Brazilian GAAP, which is adjusted using inclusions and deductions described in Brazilian corporate tax law.

Taxpayers under the Actual Profit system may choose to calculate taxes on a quarterly or annual basis. The choice must be made at the beginning of each calendar year and is valid for the entire fiscal year. Under the annual Actual Profit System, taxable income is computed on an annual basis, but monthly advances are required during the year and are payable on an (i) actual or (ii) estimated basis, which corresponds to the Presumed Profit tax base mentioned above, with slight differences.

In general, companies must adopt the accrual basis of accounting for both accounting and tax purposes, although tax reporting may differ. For example, only a few provisions, such as provisions for employee vacation payments, are allowed for tax purposes. The taxpayer must record the reconciliation between book and taxable income in a tax register (*Livro de Apuração do Lucro Real* - LALUR).

Taxable income does not include, inter alia, dividends and

profit income from other Brazilian entities earned from January 1, 1996; or positive equity pick-up from investments in related companies.

Deductible expenses are generally all items relating to the company's ordinary business and which are necessary to maintain its source of income. The most important deductibles are:

- credits in bankruptcy or those not honoured in a court-supervised agreement with creditors;
- secured credits - after two years, if the taxpayer takes legal action to recover the credits;
- unsecured credits limited to:
  - credits under R$5,000 if outstanding for over six months;
  - credits between R$5,000 and R$30,000, if outstanding for over one year and the taxpayer has taken administrative collection measures; and
  - credits over R$30,000, if outstanding for over one year and the taxpayer has taken legal action for collection;
- inventory - the taxpayer must value inventory at actual cost using either 'First In First Out' (FIFO) or average cost. 'Last in First Out' (LIFO) is not acceptable, nor is standard cost unless the taxpayer adjusts it to actual cost at the end of the tax period. For companies without integrated costing systems, they must value finished goods at 70% of the highest sales price during the year, and work in process at either 80% of the finished goods' valuation or at 1.5 times the highest raw material cost during the year;
- depreciation - charged on the asset's useful life. As a general rule, the maximum annual rates for tax purposes are: buildings - 4%; equipment - 10%; passenger vehicles - 20%. Where a company operates two or three shifts, it may increase these rates by 50% and 100%, respectively; and
- technical assistance and royalty payments - subject to additional terms, such as INPI approval.

Non-deductible expenses include:

- fines not inherent to the taxpayer's trade or business;
- provisions for estimated inventory obsolescence or price

fluctuations, except those established to pay for employee vacations and thirteenth salary, and the technical provisions created by insurance and capitalisation companies, as well as private pension entities, when mandated by the special legislation that applies to them;

- lease payments and rents for goods or real estate property, except when related intrinsically to the production or sale of goods and services;
- depreciation, amortisation, maintenance, repair, maintenance, taxes, fees, insurance and any other expenses relating to goods or real estate property, except if they are intrinsically related to the production or sale of the goods and services;
- expenses for shareholders and administrators' meals;
- non-compulsory contributions, except those intended to cover insurance and health insurance, and complementary benefits similar to those of social security, established in favour of the employees and managers of the legal entity;
- donations, except those expressly regulated by law;
- the cost of gifts; and
- depreciation, amortisation and depletion expenses generated by goods that are the object of the lease, by the lessee, in the event the lessee recognises the charge.

Taxpayers may defer tax on income in some cases, such as: (i) income from the sale of fixed assets received in the long term; and (ii) income not yet received from long-term Government contracts.

Arbitrated System

Under certain circumstances, for instance if a company has inadequate or unreliable records, the tax authorities may arbitrate profits. This is a type of punishment applicable in certain situations provided for by law. Income tax paid on Arbitrated Profit is definitive and cannot be offset against future payments. The Arbitrated Profit system is similar to the Presumed Profit system, but with higher percentages applied to gross sales. Penalties may also be charged by the tax authorities.

Tax Losses

Companies which adopt the Actual Profit system may carry forward tax losses indefinitely against future profits. However, they can only offset up to 30% of the current year's taxable income. Tax losses generated as of January 1, 1996 are separated into 'operating' and 'non-operating' for offsetting purposes. Non-operating tax losses can only be used to offset future non-operating profits.

Tax losses are lost if, cumulatively, there is a change in control and change in the type of activity performed by the taxpayer between their generation and utilisation.

Carry-back of losses is not allowed.

Disguised Profit Distributions

Transactions between a business and its shareholders, quotaholders, related companies, partners and administrators or their families must be on a fair value basis. Amounts held to be income distributions under these provisions are taxable to the recipient and are not corporate tax deductible.

Interest on Net Equity (*Juros Sobre o Capital Próprio* – JSCP)

Under Brazilian law, in addition to dividends Brazilian subsidiaries may also pay interest on net equity to shareholders.

Interest on net equity is a hybrid instrument as it is deductible for Brazilian tax purposes while considered as remuneration for the investor based on the shareholder's net equity.

In general terms, interest on net equity is calculated by applying the daily pro-rata variation of the Government's long-term interest rate (*Taxa de Juros de Longo Prazo* - TJLP) to the Brazilian entity's adjusted net equity accounts: (i) capital; (ii) capital reserves; (iii) profit reserves; (iv) treasury shares; and (v) accumulated losses.

The payment or credit of JSCP, however, is conditioned to the

existence of profits, calculated before the deduction of interest, or the existence of accumulated profits and profit reserves, in an amount equal to, or that does not exceed, double the sum of the interest to be paid or credited. Nevertheless, although not clearly stated in law, the Brazilian Central Bank does not usually allow remittances of interest on equity based on current profits when the company has accumulated losses in the prior year's balance sheet (December 31), and it normally requires offsetting of the accumulated losses first.

Interest on equity is subject to 15% income tax withheld at source on the date it is paid or credited to the recipient (25% withholding tax might be applied as well if the recipient is located in a low tax jurisdiction). If the shareholder is a resident entity, the withholding tax becomes a tax credit (moreover, in this case, other tax consequences might arise considering that other Brazilian taxes might apply).

On the other hand, the local payer is allowed to deduct interest on equity paid or credited to resident or non-resident shareholders as remuneration on their capital investment for purposes of corporate income tax and social contribution tax on net profits. However, in this case, the amount of JSCP paid or credited, even if capitalised, cannot exceed 50% of: (i) the net income of the period, before the provision for corporate income tax and the deduction of said interest; or (ii) the balance of accumulated profits of previous periods.

Additionally, tax legislation expressly allows interest on net equity to be incorporated as capital or held in a reserve account for the purpose of a capital increase.

Therefore, consideration should also be paid to the tax treatment applicable to the equity in the jurisdiction where the foreign beneficiary resides (whether the income is taxable, whether Brazilian withholding tax is creditable, etc.) as there may be significant tax opportunities in paying interest on net equity.

Thin Capitalisation Rules

The Brazilian Thin Capitalisation rules aim to suppress excessive imbalances between the capital of companies domiciled in

Brazil and their debts to related individuals or legal entities (e.g. companies, investment funds, etc.) resident or domiciled abroad that are not based in tax havens (defined as jurisdictions with favoured taxation) or privileged tax regimes, or debts to unrelated parties resident or domiciled in tax havens, through maximum leverage ratios for purposes of deducting interest expense from the base used to calculate corporate income taxes under the Actual Profit system.

Therefore, under current legislation, interest paid or credited by a Brazilian company to a related party located abroad will be deductible from the base used to calculate corporate income taxes under the Actual Profit system, when there is evidence the expense is necessary to the company's business (a general rule for deduction of all expenses) and when the following additional requirements are satisfied:

- in the case of debt with a related overseas party that holds an equity stake in a Brazilian company, the amount of the debt at the time of appropriating the interest cannot exceed twice the value of the equity stake in the Brazilian company;
- in the case of debt with a related overseas party that does not hold an equity stake in a Brazilian company, the amount of the debt at the time of appropriating the interest cannot exceed twice the value of the entire net equity of the Brazilian company;
- in either of the cases above, the sum of debts with related overseas party at the time of appropriating the interest cannot exceed twice the sum of the equity stakes of all related parties in the Brazilian company.

Brazilian companies are not prohibited from being thinly capitalised; rather, the deductibility of interest expenses generated by a thinly capitalised company is limited, since the amount of the interest that exceeds the legal limits above is deemed an expense not necessary to the company's business, and as such will not be deductible from the base used to calculate corporate income taxes.

Auditing Tax Returns

Federal tax inspectors randomly audit tax returns. The scope and frequency of audits does not follow a set pattern. The tax

authorities' right to assess income tax expires five years after the end of the tax year in which the tax return should be filed.

Taxpayers wishing to appeal assessments must do so within 30 days of assessment. If the assessment is upheld, the taxpayer may appeal to an administrative court and finally to a judicial court.

Permanent Establishment

Only companies incorporated in Brazil are generally subject to taxation as residents. In principle, Brazilian companies must register for tax purposes. Companies that carry out taxable activities in the country, but have not properly registered for tax purposes, are also subject to taxation.

There is no general concept of permanent establishment (PE) specifically defined in Brazilian legislation. There are a few sparse decisions involving foreign companies doing business in Brazil through commissionaires or commercial representatives entering into agreements binding the foreign companies referencing the OECD Model Convention.

Normative Instruction no. 1,681/2016, amended by Normative Instruction no. 2,161/2023, establishes country-by-country reporting requirements (*Declaração País a País*) to increase the transparency of international transactions within business groups and fight abusive practices that erode the tax base; this represented an initial positioning by the Brazilian Tax Authorities in view of determining the outlines of the concept of PE for the purposes of this new reporting.

According to such legislation, a PE should be considered a fixed place of business from which an entity performs all or part of its activities in another jurisdiction, including, especially: (i) a management office; (ii) a subsidiary or branch; (iii) an office; (iv) a factory; (v) a workshop; (vi) a mine, an oil or gas well, a quarry or any other natural resource extraction location; or (vi) a construction site, construction project or installation project, but only if its duration exceeds twelve (12) months.

It is important to highlight that, as a general rule, a non-resident's income is taxed at a higher rate than that of a resident. For

instance, while a resident's corporate profits are taxed at a combined rate of 34% (IRPJ and CSLL), gross non-resident service fees are taxed, in general, at 25% (income tax withheld at the source and CIDE, if applicable), plus other taxes such as PIS/COFINS on imports of services (combined rate of 9.25%) and ISS service tax (2% to 5%).

Furthermore, the Brazilian Civil Code prohibits foreign entities from operating in Brazil without authorization. In principle, authorisation is granted by establishing a branch which is taxable in Brazil in the same way as a Brazilian legal entity.

Nevertheless, the following situations may possibly generate a taxable presence in Brazil and we therefore recommend analysing the specific activities that will be carried out in Brazil in order to assess possible risks:

- De facto branch: the foreign company has an unregistered branch or office;
- Consignment: sales are made under consignment and proper accounting records are not kept by the consignee in Brazil;
- Binding agent: sales are made in Brazil through a resident agent or representative of a foreign company who has the power to bind the company to a contract and habitually exercises it.

Gross Revenue Taxes

PIS and COFINS are Federal taxes charged on revenues, on a monthly basis, under either a cumulative or non-cumulative system.

The PIS and COFINS non-cumulative systems are mandatory for companies subject to the Actual Profit method of computing corporate income taxes.

Taxpayers under the non-cumulative system are subject to PIS at a rate of 1.65% and COFINS at a rate of 7.60% and are allowed to recognise tax credits at those same rates for PIS and COFINS levied on certain inputs, such as: (a) products purchased for resale; (b) goods and services used as inputs in the rendering of services or manufacturing (excluding labour); (c) consumed electrical power; (d) the rental of real estate and fixed assets used in their activities; (e) the acquisition of certain fixed assets; and (f) returned goods, if the

corresponding revenue was included in the previous month's PIS and COFINS taxable bases. Provided certain requirements are met, these credits may be used to offset PIS and COFINS due on the company's taxable revenue.

The PIS and COFINS cumulative system is applicable for certain entities, such as financial institutions and companies operating under the Presumed Profit system, among others, and for some revenues from telecommunications, transport and software development services, which are generally subject to a 0.65% tax rate for PIS and 3% tax rate for COFINS with no credits available. Financial institutions are subject to a 4% COFINS rate.

Companies with revenues subject to the cumulative system and other revenues subject to the non-cumulative system are required to calculate PIS and COFINS separately in each system.

Revenues related to exports and the sale of permanent assets are, in general, exempt from these taxes.

There are special PIS and COFINS systems for companies engaged in certain types of industries, such as automotive, auto-parts, cosmetics, pharmaceutical, oil, beverage, packaging materials, energy and real estate, amongst others.

Tax on Manufactured Products (*Imposto sobre Produtos Industrializados* - IPI)

IPI is a type of value added (or excise) tax on imports and products made in Brazil. It has regulatory purposes and the Government uses IPI to pursue its financial and economic policies. Unlike most taxes, the Government can raise the rates of this tax by Executive Decree and the Legislature cannot interfere in this. Furthermore, it can be collected in the same financial year in which the law or decree was published.

IPI rates vary depending upon how the Government has classified a product: they can be higher for nonessentials such as cigarettes and perfumes. Some products are exempt: for example, exports and sales to the Manaus Duty-Free Zone. It is sort of a value added tax, since in some cases the amount paid in previously taxed operations - as a tax credit - can be offset against IPI debts in later

operations. The tax authorities restrict the use of IPI tax credits when the matching inputs are bought to make a product but the subsequent sale of such products is not taxed.

Taxpayers may sometimes use accumulated IPI tax credits to pay other Federal taxes or contributions.

Tax on the Circulation of Goods and Provision of Interstate, Intercity Transportation Services and Communication Services (*Imposto sobre Circulação de Mercadorias e prestações de Serviços de transporte interestadual, intermunicipal e de comunicação* - ICMS)

ICMS is a State value added tax levied on imports of products and transactions involving goods (including electricity), intercity and interstate transportation services and communication services.

As a rule, when goods circulate across two different States, the rates are 7% (when the purchaser is located in States in the North, Northeast and Centre West regions or in the State of Espírito Santo) or 12% (for purchasers located in the South and Southeast regions). For transactions within the same State and imports, rates can vary from 17% to 22% depending on the State. The current rates in the states of São Paulo and Rio de Janeiro are 18% and 20%, respectively.

In view of the significant growth in e-commerce and following a request made by the National Revenue Policy Council (*Conselho Nacional de Política Fazendária* – CONFAZ) and several trade associations, Congress enacted Constitutional Amendment 87, dated April 16, 2015, altering the wording of the Brazilian Federal Constitution with respect to sharing ICMS levies. These provisions were regulated by ICMS Convention 93, dated September 17, 2015, effective January 1, 2016.

However, this Convention was revoked by ICMS Convention no. 236/2021, effective January 1, 2022, which defines the procedures to be followed in goods and services transactions involving end consumers located in another State.

Due to the Federal Supreme Court judgment in Theme 745 with General Repercussion, which recognised the essential nature

of electric power and telecommunication services, the rates on these services are now the same as on other transactions, ranging from 17% to 22%.

ICMS is also payable either when a product is resold on the domestic market or when it is physically removed from a facility. The taxable base is equal to the value of the transaction, including the ICMS itself (gross-up), insurance, freight and conditional discounts. IPI must also be added to the ICMS tax base when the transaction is carried out with a non-ICMS taxpayer or when it involves a product that will not be further processed or resold (e.g. fixed assets).

Each branch of a company is considered a separate taxpayer for ICMS tax purposes.

In general, ICMS taxpayers are entitled to a tax credit for the amount of the tax paid on the previous transaction involving the same asset (inputs), provided the purchaser is an ICMS taxpayer with respect to that product, i.e. subsequent transactions involving the purchased product are also subject to ICMS. The tax credit may be offset against future ICMS payables.

If the purchaser is not an ICMS taxpayer, and depending upon whether sales are subject to this tax, ICMS may become a cost and will not be recoverable as a credit.

Municipal Service Tax (Imposto sobre Serviços - ISS)

ISS is a Municipal tax levied on revenues derived from the provision of services. Although it is a Municipal tax, the services that pay ISS are listed in federal law (Complementary Law 116/03).

The tax base is the price of the service and rates vary from 2% to 5%, according to the Municipality where the service provider is located, where the service is provided and the type of the service involved. For some services, there is significant debate as to whether the ISS should be paid to the Municipality where the service provider is located or where the service is performed.

The taxpayer is, in principle, the service provider. However Municipal tax legislation may impose a withholding responsibility on the company contracting the services.

When the provision of a service also involves the provision of goods, ISS applies on the total price of the service, except when there is a specific provision determining ICMS applies to the value of the goods.

ISS also applies to imported services. A Brazilian company retaining such services is obliged to collect tax on the service fees paid to the non-resident.

Furthermore, Complementary Law 116/03 introduced an ISS exemption for certain exports of services.

Social Contributions on Imports (PIS and COFINS Imports)

PIS and COFINS Imports are enforced on the product imports and, as a rule, applied at a combined rate of 11.75% (respectively, 2.10% for PIS and 9.65% for COFINS). However, there are specific rates for some products, such as pharmaceutical products, which pay rates of 2,10% for PIS and 9,90% for COFINS and in the case of perfumes and certain cosmetics, rates are 2,20% for PIS and 10,30% for COFINS.

PIS and COFINS Imports may generate a tax credit that can be offset against PIS and COFINS due on gross revenues provided the importer operates under the non-cumulative PIS and COFINS basis on its domestic transactions. The tax base is the CIF amount plus ICMS, PIS and COFINS. Certain products may be subject to different tax rates.

PIS and COFINS Imports are also levied on service imports, as a rule at a combined rate of 9.25% (respectively, 1.65% for PIS and 7.60% for COFINS).

Import Duty (Imposto de Importação - II)

This is a Federal tax on imports. The tax basis is normally the 'customs value' - usually the Cost, Insurance and Freight (CIF) value of imported goods. The rates are set on the Common External Tariff (TEC), which is based upon the Mercosul Common Nomenclature.

Under the Mercosur Treaty all member countries must apply the same import duty on goods from third party countries. The rate between Mercosur countries is 0%.

The Executive can raise import duty rates. Taxpayers must pay the tax in the same financial year as the law creating it, or in which the decree increasing its rate was published.

According to the Brazilian Customs Regulation (Decree 6,759, dated February 5, 2009), the base for calculating import taxes must adopt one of the valuation methods indicated in Article VII of the General Agreement on Tariffs and Trade (GATT) or the Customs Valuation Agreement (CVA).

The CVA requires the use of successive criteria to determine the real customs value, in the following order:

(i) value of the transaction: The customs value of imported goods is the transaction value, being the price actually paid or payable for the goods in a sale for export to the importing country, plus certain expenses (i.e. insurance and freight);

(ii) value of a transaction with identical goods: If the customs value of the imported goods cannot be determined under item (i), it is considered the transaction value of identical goods sold for export to the same importing country and exported at the same, or approximate, time as the goods to be valued;

(iii) value of a transaction with similar goods: If the customs value of the imported goods cannot be determined under items (i) and (ii), the transaction value of similar goods sold for export to the same importing country and exported at the same, or approximate, time as the goods being valued is considered;

(iv) resale price (minus deductions): If imported goods or identical or similar imported goods are sold in the country of importation in the state in which they are imported, their customs value is based on the unit price at which imported goods, or similar or identical goods, are sold in this way in the greatest total quantity at the time of importation, or at the approximate time of importation of the goods being valued, to persons not related to those from whom they purchase such goods;

(v) sum of the production costs and other amounts: the calculated value is equal to the sum of: (a) the cost or value of the

materials and the manufacture, or processing, employed in the production of the imported goods; (b) an amount for profit and general expenses equal to that usually found in sales of goods of the same class or kind as the goods being valued, or sales for export by producers in the exporting country to the country of importation; (c) the cost or value of all other expenses necessary to implement the valuation option chosen;

(vi) flexible application of one of the above methods, based on reasonable criteria, if none of the above methods can be applied.

If the customs value of the imported goods cannot be determined in accordance with items (i), (ii) or (iii), it is determined in accordance with the requirements of item (v) or, if this is not possible, the value is determined based on the provisions of item (vi), unless at the request of the importer the order of application of items (v) and (vi) is reversed.

The import price is then verified for customs valuation purposes at the moment the Import Declaration (*Declaração de Importação* - DI) is registered on the Integrated Foreign Trade System (SISCOMEX). Verification is based on internal lists of prices that are not publicly available and are used by Brazilian customs authorities as an initial basis for comparison.

As a general rule, the Brazilian customs authorities adopt the "transaction value" methodology.

Export Tax (IE)

Export tax is a Federal tax applicable to goods exported from Brazil and is paid when such goods are registered on SISCOMEX. As the Government is trying to encourage exports, it has mostly stopped levying export tax. Because the tax is used to control foreign trade, the Government can set the rates depending on the country's economy, foreign currency balance and internal market needs.

Only the following exports are taxed: (i) leather and fur (9%); (ii) some cigarettes bought by South and Central American countries (150%); (iii) weapons (150%); and (iv) milk and cream, either concentrated or containing added sugar or other sweetening matter (up to 100%).

The tax is charged on the normal price of the export. This price is that of the product or a similar one in a free and competitive market: it cannot include other taxes and financing costs.

Income Withholding Tax (*Imposto sobre a Renda Retido na Fonte* – IRRF)

The Income Withholding Tax applies to certain domestic transactions, such as payment of fees to certain service providers, payment of salaries and financial income from banking investments. In most cases, the withholding tax is a prepayment of income tax on the individual or entity's final tax return. However, in some cases it is considered a final taxation.

Additionally, Income Withholding Tax is due on most non-residents' income that has a Brazilian source of payment (e.g. royalties, service fees, interest, and others). According to Brazilian tax law, withholding tax is due upon payment, credit, delivery, utilisation or remittance of the funds.

The rates depend upon the nature of the payment, the residence of the beneficiary and the existence of tax treaties between Brazil and the country where the beneficiary is located. Most common rates range from 15% to 25%. As a general rule, income paid to beneficiaries located in low tax jurisdictions is subject to 25% withholding tax. Some specific types of payments to beneficiaries domiciled abroad benefit from a zero withholding tax rate (e.g. an agent's export commissions, interest on export financing, etc.)

In the case of the sale of assets (including shares or quotas) held by a non-resident in Brazil, the withholding tax on capital gains also applies when the transaction is performed by two non-residents. The capital gain is the positive difference between the sales proceeds and the cost of acquisition of the investment. Rates vary from 15% up to 22.50%.

CIDE (Contribution for Intervention in the Economic System – CIDE)

CIDE is a 10% contribution levied on payments due to non-

residents in the form of royalties, or payments for technical and administrative services and technical support, among others, at a rate of 10%. It should be noted that unlike withholding tax, CIDE is a tax imposed on the Brazilian payer of the fees and, therefore, may not be reduced by tax treaties and does not generate a tax credit abroad.

There is a limited tax credit granted to a Brazilian entity for CIDE paid on royalties for the use of trademarks or trade names which thus reduces the effective tax rate.

Law 11,452, dated February 27, 2007, established that royalties for a software license are no longer subject to this levy, except for technology transfers.

'CIDE Combustível' is another contribution levied on the import and sale of oil and gas-related products including ethanol. The manufacturer, formulator and importer are the taxpayers of CIDE Combustível, according to Law 10,336/01.

Financial Transactions Tax (*Imposto sobre Operações Financeiras* - IOF)

IOF is a Federal tax levied on credit, exchange, insurance and securities transactions executed through financial institutions. The tax also applies to gold transactions and includes intercompany loans.

IOF is levied at varying rates, depending on the maturity and type of transaction. These rates can be raised by the Federal Government by decree and take effect immediately. The tax base varies according to the taxable event and the financial nature of the transaction.

The IOF-Exchange tax trigger event, as a rule, occurs on liquidation of foreign exchange transactions, usually at a rate of 0.38%. In the case of international loans, IOF-Exchange will currently be levied both on the entry of sums into the Country and on the return of sums abroad, but rates vary according to the term of the loan agreement and currently stand as follows: (i) if the sums are returned abroad, even symbolically, within 180 days or less, the tax is levied at a rate of 6% at the time these sums enter the Country, as well as a rate of 0.38% at the time of these sums return abroad; and (ii) if the amounts are returned abroad, albeit symbolically, after more

than 180 days, the tax will be levied at a zero rate at the time these sums enter the Country and at a zero rate at the time of the return of these sums abroad.

Brazilian intercompany loans, on the other hand, are as a rule subject to IOF-Credit at a rate of 0.0041% per day (limited to 1.50%), plus a 0.38% surcharge.

Tax on Rural Property (*Imposto sobre a Propriedade Territorial Rural* - ITR)

ITR is a Federal tax collected every year on the property, possession and use of rural real estate. The ITR does not extend to small rural properties when the land's user and owner (and family) does not own any other property. The tax discourages maintenance of non-productive properties. ITR rates vary depending upon the land's location and use. Rates are calculated on the value of the basic property without its improvements.

Estate and Gift Tax (*Imposto sobre Transmissão Causa Mortis e Doação - ITCMD*) and Real Estate Conveyance Tax (*Imposto de Transmissão de Bens Imóveis Inter-Vivos* - ITBI)

ITCMD is a State tax on transfers of goods and rights on death-related inventories or on donations. When transferring real estate and its corresponding rights, the tax is collected by the State where the real estate is located. ITCMD on commodities, securities and credit transfers must be paid to the State where the donor lives or where the corresponding inventory occurs. The rate in São Paulo State, for example, is currently 4%.

ITBI is a Municipal tax on transfers of real estate and in rem rights on any real estate. It differs from the State tax because it applies to transfers in which consideration is paid, while ITCMD applies to transfers by donation or causa mortis succession. In this sense, the ITBI is not a free transfer, but rather a charged transfer and only applies to real estate and in rem rights, while ITCMD is paid on the transfer of any goods and rights.

ITBI is based on the value of the real property or in-rem rights to real estate. Each Municipality sets its own rates; in São Paulo city, for example, the rate is currently 3%. ITBI is not due when real estate, or rights to any real estate, are transferred in paying up a corporate entity's capital, or through a company merger, consolidation, spin-off or closure. ITBI is due if the buyer's main activity is buying these assets and rights, leases, or commercial leases of real estate.

Vehicle Tax (*Imposto sobre a Propriedade de Veículos Automotores* - IPVA)

The IPVA is a State tax levied on ownership of motorised vehicles (e.g. cars, trucks, boats and other forms of transport). The tax base is the value of the vehicle with rates varying according to State legislation.

Tax on Urban Property (*Imposto Predial e Territorial Urbano* - IPTU)

This is a Municipal tax collected every year on the ownership, possession and use of urban real estate. The tax basis is the market value of the property. Municipalities can set progressive rates.

Contribution for the Development of the National Cinema Industry (*Contribuição para o Desenvolvimento da Indústria Cinematográfica Nacional* - CONDECINE)

CONDECINE is levied on the marketing and promotion, production, licensing and distribution of commercial motion pictures and video works.

It is levied at 11% on the payment, credit, use, remittance or delivery of income to foreign producers, distributors or intermediaries, for commercial use of motion pictures or video works, or their purchase or import.

Contribution for Improvements

This contribution is only occasionally levied on real estate benefiting from public works and is calculated using the value of the property improvement. The Federal, State and Municipal Governments, as well as the Federal District, levy this tax depending upon which of them made the improvements.

Other Matters

Tax Fines and Interest

The fine for overdue Federal taxes is 0.33% per day (limited to 20%). Interest on overdue Federal taxes is at a floating SELIC rate.

Assessed tax violation notices are generally subject to a 75% fine. If fraudulent intent is proven, the fine rises to 150%.

Tax Accounting

The consolidation of accounts has no tax effect.

Tax Treaties

Brazil has signed double taxation treaties with various countries. The main method of tax relief under these treaties is the foreign tax credit. Existing treaties offer very limited opportunities to reduce or eliminate withholding taxes on payments overseas. Additionally, tax sparing clauses are also found in most treaties in force.

Brazil has double taxation treaties with the following countries: Argentina, Austria, Belgium, Canada, Chile, China, Czech Republic, Denmark, Ecuador, Finland, France, Hungary, India, Israel, Italy, Japan, Luxembourg, Mexico, Netherlands, Norway, Peru, Philippines, Portugal, Russia, Slovakia, South Africa, South Korea, Spain, Sweden, Trinidad and Tobago, Turkey, Ukraine, Venezuela, United Arab Emirates, Singapore and Switzerland.

The treaty between Germany and Brazil was reversed by Germany in 2006.

Low Tax Jurisdictions and Privileged Tax Regimes

As per Normative Instruction no. 1,037/2010, the RFB defines low tax jurisdictions as those that do not impose taxation on income

or impose income tax at a maximum rate of less than 20% (reduced to 17% as per MF Ordinance 488/2014).

In most cases, remittances to beneficiaries located in listed low tax jurisdictions are subject to a 25% withholding tax rate. Blacklisted jurisdictions are: Andorra, Alderney, American Samoa and Western Samoa, American Virgin Islands, Anguilla, Antigua and Barbuda, Aruba, Ascension Islands, Bahamas, Bahrain, Barbados, Belize, Bermuda, British Virgin Islands, Campione d'Italia, Cayman Islands, Cook Islands, Curaçao, Cyprus, Djibouti, Dominica, French Polynesia, Guernsey, Gibraltar, Granada, Grenadines, Hong Kong, Isle of Man, Jersey, Kingdom of Swaziland, Labuan, Lebanon, Liberia, Liechtenstein, Macau, Maldives, Marshall Islands, Mauritius Islands, Montserrat, Monaco, Nauru, Niue, Oman, Panama, Pitcairn Islands, Queshm Islands, Republic of Kiribati, Saint Helena, Saint Vincent, Saint Lucia, Saint Peter and Miguel and Island, San Marino, Sark, Seychelles, Solomon Islands, State of Brunei Darussalam, Sultanate of Oman, Territory of Norfolk Islands, Tonga, Tristan da Cunha, Turks and Caicos Islands, United Arab Emirates and Vanuatu. New jurisdictions may be added to this list at any time.

Privileged tax regimes, on the other hand, are jurisdictions that:

(i) do not impose taxation on income or impose income tax at a maximum rate of less than 20% (reduced to 17% as per Ordinance MF 488/2014);

(ii) grant tax advantages to a non-resident entity or individual (a) without the need to carry out substantial economic activity in the country/territory, or (b) conditional upon not exercising substantial economic activity in the country/territory;

(iii) do not tax proceeds generated abroad or tax proceeds generated abroad at a maximum rate of less than 20% (reduced to 17% as per Ordinance MF 488/2014); or

(iv) restrict the ownership disclosure of assets and ownership rights or restrict disclosure about economic transactions.

The RFB has grey-listed the following as "privileged tax regimes":

- Holding Companies in Denmark, Austria and the Netherlands,

which do not perform a substantial economic activity;

- Uruguay - only with respect to "*Sociedad Anonima Financiera de Inversion*" (Safis) until December 31, 2010;
- Iceland - only with respect to International Trading Companies (ITCs);
- United States of America - only with respect to Limited Liability Companies, or LLCs, with participation of non-resident investors and those that are not subject to federal income tax in the USA;
- Spain - only with respect to "*Entidad de Tenancia de Valores Extranjeros*" (ETVE);
- Malta - only with respect to International Trading Companies (ITC) and International Holding Companies (IHC);
- Switzerland - the schemes applicable to legal entities incorporated in the form of a holding company, domiciliary company, auxiliary company, mixed company and administrative company whose tax treatment results in the incidence of combined IRPJ lower than 20%;
- Costa Rica - the Free Trade Zone System (RZF);
- Portugal - the regime of the International Business Centre of Madeira (CINM); and
- Singapore - different rate regimes for various activities.

The concepts of a low tax jurisdictions and privileged tax regime are relevant for: (a) transfer pricing purposes; (b) thin capitalisation rules; and (c) deductibility of expenses.

Tax Reform on the Consumption of Goods and Services

Constitutional Amendment 132/2023 was published on 21 December 2023 introducing the Tax Reform on the Consumption of Goods and Services in Brazil (hereinafter referred to as 'Tax Reform').

With a view to creating a simpler tax system that could lead

to an economic growth and improvement of the business environment in Brazil, the Tax Reform was designed based on the following basic premises:

- Simplicity: ease of interpretation and application of tax rules;
- Tax justice: compliance with the principle of tax capacity;
- Overall tax burden maintenance: redistribution of taxes without modifying the overall burden;
- Efficiency: organization of the economy according to business-, and not tax-related drivers;
- Transparency: clarity on the tax burden for consumers.

From a practical perspective, the Tax Reform reorganises the main taxes on consumption in Brazil, replacing PIS[1], COFINS[2], IPI[3], ICMS[4] and ISS[5] with CBS (Contribution on Goods and Services), IBS (Tax on Goods and Services), IS (Excise Tax), IPI-ZFM (Tax on Goods Industrialised in the Manaus Duty-Free Zone) and the State Contribution on Primary and Semi-Finished Products.

It is worth highlighting that the Bills of Law[6] intended to regulate the Tax Reform have been put before the Brazilian National Congress, but they have not been voted on yet and might be amended before approval. This Topic will therefore focus on and address the Tax Reform aspects set out in Constitutional Amendment 132/2023.

CBS and IBS

CBS and IBS are, taken together, a Dual VAT. CBS is a federal tax, and IBS is a State and Municipal tax. CBS and IBS will replace PIS, COFINS, IPI, ICMS and ISS.

Those taxes will necessarily be instituted by the same complementary law[7] and will have the same:

- Taxable events;
- Taxable basis;
- Cases of non-levy and constitutional exemptions;
- Taxable persons / taxpayers;
- Specific, differentiated or favoured regimes;

- Non-cumulative and crediting rules.

CBS and IBS: General System

CBS and IBS will be levied broadly, meaning that all economic activities involving goods, tangible or not, rights and services, including imports and transactions related to the digital economy, will be subject to those taxes. It is important to note that exports will not be subject to CBS and IBS.

The gross-up method will be extinguished, meaning that CBS and IBS will not be included in their own taxable basis.

PIS, COFINS, ICMS and ISS will not be included in the taxable basis of CBS and IBS during the transition period, however, IS will.

On the other hand, CBS and IBS will be included in the taxable basis of IPI, ICMS and ISS while they exist (transition period).

The CBS rate will be defined by the federal government, while the IBS rates will be defined by each State and Municipality.

As a general rule, the Federal government may impose only a single CBS rate for all goods, rights and services, and each State and Municipality may also impose only a single IBS rate applicable within their territory for all goods, rights and services.

The final Dual VAT rate will be the sum of the CBS rate and the State and Municipal IBS rates. The definition of the State and Municipality whose IBS rates will apply will be guided by the destination principle; 'destination' will be defined by complementary law.

Furthermore, one of the most important aspects of CBS and

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1. Social Integration Program.
2. Social Security Financing Contribution.
3. Tax on Industrialised Goods.
4. Tax on Trade of Goods and Services.
5. Tax on Service.
6. Bills of Law 68/2024 and 108/2024.
7. The Bill of Law 68/2024 addresses the CBS, IBS and IS institution and rules.

IBS is that they will follow the principle of neutrality. In other words, taxpayers should be entitled to register credits corresponding to the CBS and IBS levied on the acquisition of goods, rights and services, except (i) where those supplies are for the taxpayer's personal use and consumption taxpayer, (ii) when legal and constitutional exemptions apply (with no maintenance of credits), and (iii) other situations provided in the Federal Constitution.

Complementary law may make the right to register CBS and IBS credits conditional on payment of those taxes, provided that (i) the taxpayer is able to pay the taxes or (ii) payment takes place in the financial settlement of the transaction (split payment).

CBS and IBS: Tax Incentives and Specific, Favoured or Differentiated Tax Regimes

The Tax Reform not only no longer allows tax authorities to grant tax incentives in addition to than those already provided in the Federal Constitution, but it as well prohibits any extension of current ICMS incentives beyond 2032.

Notwithstanding the above, the Tax Reform provides for a few specific, favoured and differentiated CBS and IBS regimes, as follows.

The Tax Reform establishes that complementary law will set forth rules for the following sectors:

- Fuels and lubricants;
- Cooperatives;
- Hotel services;
- Bars and restaurants;
- Regional aviation;
- Lotteries and similar;
- Travel and tourism agencies;
- Sports activities developed by *Sociedade Anônima do Futebol*;
- Financial services, real estate transactions and healthcare plans;
- Transactions hired by the direct public administration,

independent governmental agencies and public foundations;

- Transactions covered by international treaty or convention;
- Collective passenger transport services by road (intercity or interstate), rail and waterway; and
- Amusement parks and theme parks.

The Tax Reform provides favoured regimes in three situations, namely: (i) transactions involving the Manaus Duty-Free Zone and other Duty-Free Zones; (ii) taxpayers qualified as micro and small businesses, which can adopt a simpler tax regime (*SIMPLES Nacional*); and (iii) transactions involving biofuels and low-carbon hydrogen, which should be subject to taxation at a rate lower than the one applicable to fossil fuels.

Differentiated tax regimes provide CBS and IBS rate reductions and exemptions for certain goods and services.

More specifically, a complementary law might grant a 100% rate reduction for the goods and services listed below:

- National Basic Consumer Products;
- Medical devices;
- Accessibility devices for people with disabilities;
- Services provided by a non-profit Scientific, Technological, and Innovation Institution (ICT);
- Passenger automobiles acquired by people with disabilities or with people with autistic spectrum disorder;
- Automobiles acquired by professional drivers for use in the rental category (taxi);
- Medicines;
- Menstrual health care products;
- Vegetables, fruits and eggs;
- Capital goods[8]; and
- Higher education services – PROUNI (only CBS).

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8. The taxation on the acquisition of capital goods may be released by means of (i) full and immediate CBS and IBS credit, (ii) deferral, or (iii) reduction of 100% of the CBS and IBS rate.

In turn, a complementary law might also grant a 60% rate reduction for the following goods and services:

- Educational services;
- Public passenger transport services by road and subway;
- Accessibility devices for people with disabilities;
- Foodstuffs intended for human consumption;
- Personal hygiene and cleaning products mostly consumed by low-income families;
- Medical devices;
- Health services;
- Menstrual health care products;
- Artistic, cultural, event, journalistic, and audiovisual national productions, sports activities and institutional communication;
- Agricultural, aquaculture, fishing, forestry and vegetable extraction in natura products;
- Goods and services related to national sovereignty and security;
- Agricultural and aquaculture inputs; and
- Medicines.

In addition, a complementary law shall establish the transactions subject to a 30% rate reduction involving intellectual and professional services of a scientific, literary, or artistic nature subject to supervision by a professional board.

Finally, other differentiated tax regimes provided for by the Tax Reform include:

- Exemptions for urban, semi-urban, and metropolitan public passenger transport services by road and subway;
- Exemptions for religious entities, temples of any worship, including their welfare and charity organizations; and
- Exemptions or rate reductions up to 100% for (i) urban rehabilitation activities in historic areas and (ii) areas that are critical for recovery and urban reconversion.

It is important to note the differentiated tax regimes will be subject to a five-year cost-benefit assessment, which will also examine

the extent to which tax legislation promotes gender equality.

Lastly, the Tax Reform also provides for other tax regimes, such as: (i) special customs and Export Processing Zones (ZPE) regimes with a provision for tax deferral and release via complementary law; (ii) maintenance of favoured regimes currently laid out in the Federal Constitution; (iii) specific systems for some sectors; and (iv) cases of presumed credits and the option to be a CBS and IBS taxable person.

CBS and IBS: Funds

There are various CBS and IBS-related Funds laid out in the Tax Reform, one of which is the Compensation Fund for ICMS Tax or Financial Incentives.

Due to the end of ICMS tax incentives, these Fund seek to compensate taxpayers who enjoy exemptions, or tax or financial incentives and benefits granted for a determined period of time and under specific conditions (onerous benefits).

In order to be entitled to these funds, taxpayers must have been granted onerous benefits no later than 31 May 2023, notwithstanding subsequent extensions or renewals.

The compensation period goes from 1st January 2029 until 31st December 2032, and the fund has an estimated budget of 160 billion BRL.

The other Funds set forth in the Tax Reform are:

- National Fund for Regional Development: reduction of regional inequalities;
- State Funds to Combat Poverty (FECP): this Fund already exists nowadays (financed with an ICMS surcharged), and the Tax Reform provides that it shall be included in the State rate for IBS;
- Fund for Sustainability and Economic Diversification of the State of Amazonas: fostering the development and diversification of economic activities in the State of Amazonas; and
- Fund for the Sustainable Development of the Western Amazonia and the State of Amapá: fostering business development and

diversification in the States of Amazonas, Acre, Rondônia, Roraima and Amapá.

Accumulated Tax Credit Balances

It is expected that taxpayers will still hold accumulated tax credit balances during implementation of the Tax Reform.

The Tax Reform imposes rules for use of these credit balances.

When it comes to ICMS credit balances, those existing at the end of 2032 (including any carried over) will be eligible for use, provided that they are approved (expressly or tacitly) by the respective States. The eligible ICMS credit balances may be offset with IBS in 240 monthly instalments, expect for the credit balances relating to the acquisition of fixed assets.

In turn, for PIS, COFINS and IPI credit balances to be eligible, they must not have been registered or used prior to these taxes being extinguished. It is important to point out that presumed credits are also in the scope of the applicable rules. PIS, COFINS and IPI credit balances may be offset against other federal taxes or cash reimbursement for credits that meet the legal requirements on the date these taxes are extinguished.

Partial Tax Refund

Part of the CBS and IBS revenue will be refunded to low-income families. The refund will be mandatory for the tax levied on electricity, liquefied petroleum gas (cooking gas) and extended basic consumer products.

IBS Management Committee

The IBS Management Committee will be a body composed by the States, Federal District, and Municipalities for the regulation and administration of IBS tax collection.

It has powers to:

- Publish a single regulation and standardize interpretation and application of the IBS legislation;
- Regulate IBS collection, compensation and distribution of proceeds among the States, Federal District and Municipalities; and
- Rule on administrative tax litigation.

More specifically, the IBS Management Committee will be composed of:

- 27 members, representing each State and the Federal District; and
- 27 members, representing all the Municipalities and the Federal District, being (i) 14 representatives, elected by the votes of each Municipality, with equal weight for all, and (ii) 13 representatives, elected by the votes of each Municipality, weighted by the respective population.

The Presidency of the body will alternate between the group of the States and of the Municipalities, and the person occupying the Presidency must have in-depth knowledge of tax administration.

Deliberations by the IBS Management Committee will be considered approved whenever they obtain, cumulatively:

- In relation to the group of the States and Federal District: votes from (i) an absolute majority of its representatives and (ii) the representatives of the States and Federal District (corresponding to more than 50% of the country's population); and
- In relation to the group of the Municipalities and Federal District: votes from an absolute majority of its representatives.

Excise Tax (IS)

In general terms, the IS will be a federal tax levied on the production, extraction, commercialization or importation of goods and services that are harmful to health or the environment. The tax will not be levied on exports and transactions with electricity, telecommunications and goods and services subject to CBS and IBS whose rates are reduced by 60%.

IS will not be included in its own taxable basis, but it will be in the taxable basis of CBS and IBS, as well as in the ICMS' and ISS'

ones during the transition period.

Rates of taxation will be established by ordinary law, but, when it comes to IS on extraction, the Tax Reform already determines that the ISS rate will not be higher than 1% of the product's market value.

Finally, the tax must follow the principles of annual and ninety-day anteriority in relation to its institution and increase of rates.

Tax on Industrialised Goods – Manaus Free Trade Zone (IPI-ZFM)

IPI will be maintained as a means to preserve the competitive advantage of the Manaus Duty-Free Zone, hence the so-called 'IPI-ZFM'.

The tax will be levied on output transactions of goods that are industrialised with incentives in the Manaus Duty-Free Zone, and may not be levied cumulatively with IS.

State Contribution on Primary and Semi-Finished Goods

Such contribution may be instituted by States to replace state contributions on primary and semi-finished products, instituted to finance funds for investments in infrastructure and housing and as a condition for enjoyment of deferrals, special regimes or other differentiated treatment of ICMS (ICMS incentives).

Powers to introduce this contribution will be granted only to States that had, on 30 April 2023, the above-mentioned funds. Once introduced, the contribution may not be linked to ICMS and shall be extinguished on December 31, 2043.

Concerning the taxable events there is a lack of clarity in the Tax Reform, but, in principle, they should be 'similar' to the taxable events of the contributions that will be replaced.

Finally, the taxable basis and rates may not be higher or broader than the contributions in force on 30th April 2023 and being replaced.

Transition Regime

The transition regime applicable to taxpayers can be illustrated as follows:

- 2026: institution of CBS at a rate of 0.9% and IBS at a state rate of 0.1%;
- 2027: (i) effective implementation of CBS and institution of IS; (ii) extinguishment of PIS and COFINS, as long as CBS is instituted; (iii) IPI rate reduced to zero, except for goods manufactured with incentives in the Manaus Duty-Free Zone;
- 2027 and 2028: (i) IBS levied at the state and municipal rates of 0.05% each; (ii) CBS rate reduced in 0.1%;
- 2029: CBS effective rate;
- 2029 a 2032: proportional reduction (10%/year) of the ICMS and ISS rates, as well as tax incentives;
- 2033: (i) IBS effective implementation; (ii) extinguishment of ICMS and ISS.

From the tax authorities' perspective, the transition regime will take place over 49 years. This is because the shift in taxation to the destination will significantly affect the current composition of tax revenues, especially for States (whether producers and consumers).

Changes to Other Taxes

IOF-Insurance

From 2027 onwards, no IOF[9] will be levied on insurance transactions (only on credit, foreign exchange and securities transactions).

IPVA

Taxable events will be broadened, meaning that IPVA[10] will be levied not only on terrestrial vehicles (as it is currently the rule), but also on air and water vehicles.

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9. Tax on Financial Transactions.
10. Tax on Property of Motor Vehicles.

There will be, nevertheless, some exceptions, namely:

- Agricultural aircraft and those of an operator certified to provide air services to third parties;
- Vessels of legal entities with a concession to provide transport services or vessels belonging to individuals or legal entities engaged in industrial, artisanal, scientific or subsistence fishing;
- Platforms capable of moving through the water by their own means (including those intended primarily for business);
- Tractors and agricultural machinery.

Lastly, the IPVA rates may be differentiated according to the type, amount, use and environmental impact of each vehicle.

ITCMD

The Tax Reform introduces the following changes to ITCMD[11]:

- Progressive rates based on the amount of the share, legacy or donation;
- Taxation of inheritances in case of residents or persons domiciled abroad;
- The State of domicile of the deceased will have powers to tax movable property, securities and claims;
- The tax will not be levied on transfers and donations to non-profit institutions of public and social relevance.

IPTU

The Tax Reform allows that IPTU[12] taxable basis to be updated by means of a decree based on the criteria provided in the respective municipal laws.

Tax Reform - Specific Tax Regime for Financial Services

Brazil is generally an outlier when it comes to taxing financial services. Although most countries exempt these services from VAT, Brazil currently imposes turnover taxes on financial revenues arising from credit transactions, commercial and financial leases, insurance

and reinsurance, financial investments, among others.

Indeed, revenues from financial services and products are subject to Social Contributions on Gross Income ("PIS/COFINS") at a 4.65% rate with most, but not all, regulated entities being allowed to deduct certain financial expenses from the contributions' tax base. Moreover, some financial transactions are subject to Tax on Financial Transactions ("IOF") at varying rates, while other financial services trigger Municipal Tax on Services ("ISS") at rates ranging from 2% to 5%.

With the Consumption Tax Reform, financial products and services will continue to be taxed as the new taxes (CBS and IBS) replace the existing PIS/COFINS and ISS. IOF is likely to remain in place even though it may be warded off by the Executive Branch at any time. CBS and IBS will be imposed on financial service revenues under a Specific Tax Regime, which will allow for the deduction of specified expenses directly relating to these services. Also, local acquirers will be entitled to accrue IBS and CSB tax credits on most financial services, but not all.

Therefore, the Specific Tax Regime will differ from the General Tax Regime that will govern CBS and IBS on the supply of non-financial goods and services. For these transactions, new taxes will be charged on a value-added basis, meaning taxpayers will be entitled to accrue tax credits on virtually all purchases.

This guide will provide an overview of the Specific Tax Regime for financial services according to the current wording of the Supplementary Law Proposal ("PLP") approved by the House of Representatives in July, 2024. Rules may change substantially when the Senate reviews the PLP, so this guide is by no means definitive.

Activities Within the Scope of the Specific Tax Regime (in-scope activities)

The Specific Tax Regime will encompass revenues arising from the following activities:

✓ credit transactions of any sort.

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11. Tax on Transmission of Property Causa Mortis and Donations.
12. Tax on Urban Property.

- ✓ foreign exchange transactions;
- ✓ financial intermediation services in general (e.g., liquidation, custody, brokerage, distribution and other forms of intermediation);
- ✓ financial investments, including security and derivative transactions;
- ✓ securitisation of credits;
- ✓ factoring services;
- ✓ commercial and financial leases;
- ✓ consortium administration;
- ✓ management and administration of financial resources, including investment funds;
- ✓ payment services through payment arrangements including the pre-payment of receivables;
- ✓ market infrastructure services;
- ✓ insurance and reinsurance, except health insurance;
- ✓ private pensions;
- ✓ capitalisation transactions;
- ✓ brokerage of insurance, reinsurance, private pensions and capitalisation;
- ✓ virtual asset services.

Entities Subject to the Specific Tax Regime (in-scope entities)

All entities supervised by one of the regulatory bodies that form the National Financial System ("SFN"), including the National Monetary Council in charge of the Brazilian Central Bank, the National Council for Private Insurance and the National Council for Private Pensions, will be taxed on revenues arising from the activities mentioned in the previous section according to the Specific Tax Regime.

The list of entities includes, but is not limited to:

- ✓ banks of any kind;

- ✓ savings banks;
- ✓ credit cooperatives;
- ✓ foreign exchange brokers;
- ✓ securities brokers;
- ✓ securities distributors;
- ✓ administrators and managers of securities portfolios, including investment funds;
- ✓ investment advisors;
- ✓ securities consultants;
- ✓ consortium administrators;
- ✓ direct credit companies;
- ✓ inter-personal loan companies;
- ✓ development agencies;
- ✓ savings and loan associations;
- ✓ mortgage companies;
- ✓ credit, financing and investment companies;
- ✓ real estate credit companies;
- ✓ leasing companies;
- ✓ micro-entrepreneur and small business credit companies;
- ✓ payment institutions;
- ✓ entities managing organised securities markets, including stock exchange and securities markets, organised over-the-counter markets, settlement and clearing entities, central depositories and other financial market infrastructure entities;
- ✓ insurance companies;
- ✓ reinsurers, including local reinsurers;
- ✓ admitted reinsurers and occasional reinsurers;
- ✓ open and closed-end pension fund entities;
- ✓ capitalisation companies;
- ✓ insurance brokers, reinsurance brokers and other insurance, reinsurance, supplementary pension and capitalisation

intermediaries; and

- ✓ virtual asset service providers.

Furthermore, the following entities will be taxed according to the Specific Tax Regime on revenues arising from in-scope activities, even if not supervised by an SFN body:

- ✓ participants in payment arrangements that are not payment institutions;
- ✓ companies that carry out credit securitisation activities;
- ✓ factoring companies;
- ✓ simple credit companies;
- ✓ bank correspondents registered with the Brazilian Central Bank.

Finally, the Specific Tax Regime contains a catch-all provision that reaches other "suppliers" who regularly provide financial services as part of their professional activities. This catch-all provision has both an upside and a downside.

On the upside, it allows for small non-regulated entities or market entrants to compete with regulated entities on a neutral tax basis, which is not currently the case. Indeed, regulated entities recently created by the Brazilian Central Bank – such as payment institutions and direct credit entities – are generally subject to a more onerous tax regime than most financial institutions under the current system.

On the downside, the provision applies to financial vehicles that are currently exempt from consumption taxes, such as investment funds. According to PLP version approved by the House of Representatives, investment funds will pay CBS and IBS whenever they do not qualify as "investment entities", i.e. are not professionally managed by a third party with discretionary powers to determine the portfolio composition.

Out of Scope Activities (General Tax Regime)

As described, in-scope entities will be required to levy IBS and CBS on revenues arising from in-scope activities according to the Specific Tax Regime. However, if these same entities provide other services remunerated by commissions or tariffs, or supply goods,

these transactions will be taxed under the General Tax Regime.

As an example, card issuers will be required to levy IBS and CBS under the General Tax Regime on tariffs charged from cardholders even though payment processing and acquiring services provided through payment arrangements will be taxed under the Specific Tax Regime.

Tax Rate Applicable to All Financial Services and Products (Unified Tax Rate)

Unlike other services, all in-scope financial services and products will be taxed at the same tax rate nationwide. This is a substantial (and positive) difference in comparison to the General Tax Regime, in which the applicable tax rate will be defined according to the State and Municipality where the acquirer is located.

Also, the PLP determines that the tax rate applicable between the years of 2027 to 2033 should consider the tax burden currently imposed on financial services to achieve a neutral transition to the period after the tax reform. Moreover, the tax rate applicable from 2034 onwards will mirror the tax rate in force in 2033.

Common Rules to The Tax Base Definition

The basis for calculating IBS and CBS under the Specific Tax Regime will be made up of revenue arising from in-scope activities. These revenues, however, will not include (i) accounting gains resulting from the reversal of provisions; and (ii) credits recoveries written off as losses if the losses have not been previously excluded from these taxes calculation basis.

Nonetheless, the deduction of administrative expenses is prohibited.

Taxation of Credit, Foreign Exchange and Investment Transactions

Entities that regularly carry out credit, foreign exchange and investment transactions, whether they are regulated entities or not, may deduct certain expenses from the IBS and CBS tax base

including:

- ✓ fund raising costs;
- ✓ foreign exchange expenses;
- ✓ financial expenses resulting from losses in security or derivative transactions;
- ✓ expenses relating to debt instruments, even if treated as equity (which must be reincluded if effectively converted into capital investments);
- ✓ losses with bad debt and credit recovery, including discounts granted for debt repayment if determined at market value and provided that deductibility standards set by income tax regulations are also met;
- ✓ expenses incurred with investment advisors, securities consultants and correspondents registered with the Central Bank of Brazil.

In comparison to the current tax regime, items (iii) to (v) are a positive innovation, as financial institutions are not entitled to these deductions for PIS/COFINS purposes. However, entities will only be allowed to deduct the expenses mentioned above to the extent that they ascertain corresponding taxable revenues. For example, entities that do not provide investment services or do not regularly accrue revenues from security and derivate transactions will not be allowed to deduct expenses with investment advisors.

Interestingly, the Specific Tax Regime also allows taxpayers who carry out credit, foreign exchange and investment transactions to deduct amounts corresponding to the application of the SELIC rate on the positive difference between: (i) financial assets from credit, foreign exchange and securities and derivative transactions; and (ii) financial liabilities from funding operations, including deposits, foreign exchange, securities and derivative transactions and financial or debt instruments.

This is because taxpayers under the General Tax Regime will be entitled to accrue IBS and CBS credits: (i) on credit and loan transactions, including those granted through debentures, commercial notes or any kind of debt instrument, but solely on financial expenses that exceed the application on the SELIC rate on the loan/credit and only once the principal amount is deemed fully

repaid (regardless of the amortisation system adopted for contractual purposes); (ii) discounts applied on the pre-payment of receivables to the extend that such discounts exceed the SELIC rate. Also, credits may only be accrued on a cashflow basis, i.e., in case the debt is effectively repaid.

Taxation of Lease Transactions

As per Section 191 of the PLP, revenues from lease transactions will generally be taxed on a cashflow basis.

For operational leases, the rate of IBS and CBS levied on lease payments will be equivalent to the tax rate applicable to rent and real estate transactions and is likely to differ in the case of movable property and real estate assets. Likewise, the final acquisition of assets will be taxed according to the tax rate applicable to the sale and purchase of the underlying items.

For financial leases, lease payments and interest expenses be subject to the unified rate while the sale of the asset by its residual value will be taxed according to the tax rate applicable to the sale and purchase of the underlying item.

Taxpayers under the General Tax Regime will be entitled to accrue IBS and CBS credits on their cashflow operational or financial expenses, as incurred under lease arrangements.

Taxation of Other Financial Services

- **Consortium administration:** taxable revenues will include all tariffs, commissions and fees, as well as the respective charges, fines and interest, arising from the consortium group participation contract, when actually paid. However, the acquisition of assets as a consortium structure will be taxed according to the General Tax Regime, except in the case of real estate assets, which will be taxed under the corresponding tax regime.
- **Asset management:** financial services provided to investment funds will be taxed under the Specific Tax Regime, but funds

will not be entitled to accrue tax credits on them. If, however, a fund is deemed to be an IBS and CBS taxpayer – i.e., if the fund is not classified as an investment entity for lack of discretionary management – it may accrue tax credits on goods and services it acquires, except on management services provided by the fund's administrator.

- **Payment services:** payment processing and acquiring services provided to sellers, as well as pre-payment services (i.e., discounted acquisition of receivables) will be taxed under the Specific Tax Regime, while issuing services provided by regulated institutions to cardholders will be taxed under the General Tax Regime. It is relevant to note that investment funds that acquire receivables will be subject to IBS and CBS on the applied discount whether they qualify as investment entities for regulatory purposes or not.
- **Insurance and reinsurance services:** taxable revenues will include those earned from insurance, coinsurance, reinsurance and retrocession premiums, but insurance companies will be allowed to deduct (a) indemnity expenses relating to elementary and personal insurance without survival cover, exclusively when they relate to insured individuals and companies who are not IBS and CBS taxpayers under the Regular Tax Regime, when corresponding to claims actually paid in insurance operations, after subtracting salvage and other reimbursements; (b) amounts relating to cancellations and refunds of premiums that have been computed as income; and (c) amounts relating to insurance and reinsurance intermediation services and reinsurance services. Moreover, indemnities received will not be subject to IBS and CBS.
- **Capitalisation services:** taxable revenues will include those arising from capitalisation bonds as well as prescriptions and penalties, but entities may deduct (a) the portions of contributions earmarked for provisions or technical reserves, including provisions for draws payable; (b) amounts relating to cancellations and refunds of securities which have been computed as income; and (c) amounts paid for capitalisation intermediation services. Moreover, capitalisation entities will not be taxed on financial revenues arising from investments carried out with resources allocated to provisions or technical reserves.

- **Private pension:** taxable revenues will include those from contributions to the pension fund and the fund's charges arising from the structuring and maintenance of plans and insurance for individuals with survival cover. Meanwhile, deductible expenses will include: (a) the portions of the contributions intended for provisions or technical reserves; (b) amounts relating to cancellations and refunds of contributions that have been computed as income; (c) amounts paid for intermediation services. Also, unlike other financial services, taxpayers in the Regular Tax Regime will not be allowed to accrue tax credits on private pension expenses.

Virtual Asset Services

The sale and acquisition of virtual assets, including, for example, cryptocurrencies, will be taxed under the General Tax Regime, but taxpayers will not be allowed to accrue credits on these acquisitions.

However, in the case of "services with virtual assets", e.g., brokerage of cryptocurrencies, the PLP determines that these activities will be taxed by the same tax rate applicable to financial services (i.e., the unified tax rate mentioned above).

Import of Financial Services

CSB and IBS will be imposed on the import of financial services on a presumed basis, i.e., taxes will be levied on gross income, as ascertained by the supplier abroad, but will include a presumed reduction factor.

Nonetheless, whenever taxpayers in the Regular Tax Regime are allowed to accrue IBS and CBS credits on domestic financial transactions or services, CBS and IBS will be levied at a zero rate on imports. As an example, local taxpayers will be subject to a zero IBS and CBS rate on cross-border financial leases, because they would also be entitled to tax credits had these transactions be hired locally.

Differently, in-scope entities will be taxed at a zero rate on the import of financial services, even though they will be allowed to

deduct the corresponding expenses from the IBS and CBS tax base.

Export of Financial Services

Financial services provided to non-resident parties (individuals and legal entities) will be deemed exported and, therefore, not subject to IBS or CBS. However, the suppliers will be required to revert the allowable deductions proportionally to their exportation revenues from the CBS and IBS tax base.

Also, services rendered to branches, controlled entities or invested entities abroad will not be considered an export.

Taxation on Indirect Investment

Under Brazilian Law, Income Tax rules on gains and income derived from transactions carried out in the Brazilian financial and capital markets can vary depending upon the non-resident investor's domicile, the type of Central Bank registration for the investment held by the non-resident investor, and how disposition is carried out.

For foreign investors whose inflow of funds follows CMN Resolution No. 4,373/2014 and who are not from a jurisdiction considered a tax haven (Blacklist provided by Normative Ruling No. 1,037/10) are subject to a special regime and income tax is imposed as follows:

(i) capital gains from the sale of stock on Brazilian stock exchanges are income tax exempt, except if related to combined transactions with a net fixed income result;

(ii) on income from equity funds, swap and other transactions on the futures market not carried out through a Brazilian stock exchange, with income tax imposed at a rate of 10%; and

(iii) on income from all other fixed income investments made through a Brazilian stock exchange or over-the-counter market, and on gains earned, except as provided for in item (i) above,

income is tax withheld at source at a rate of 15%. In this case, transactions conducted by investors cannot offset gains and losses, whilst the transactions need to be taxed separately, with no consolidation of results.

Investments in financial markets by non-resident investors acting through an investment mechanism regulated by Resolution CMN no. 4,373/2014 and allocating their funds locally are subject to taxation only when the fund quotas are redeemed and tax is payable at a rate of 15%, and 10% in the case of transactions in equity investment funds. Transactions conducted by investors through the funds (part of the Fund portfolio) may offset gains and losses and they are taxed on the increase in quota prices.

The taxation rule mentioned above is generally applicable to all types of non-resident investors, whether individuals or institutions which act pursuant to the CMN Resolution No. 4,373/2014 investment mechanism. Other foreign investors, as well as those located in jurisdictions considered tax havens, are subject to the same income tax rules currently applicable to Brazilian investors.

These other foreign investors pay Income Tax Withheld at Source (*Imposto sobre a Renda Retido na Fonte* – IRRF), as described below:

(i) on income from financial transactions (fixed income and variable income), including hedging transactions, at rates varying from 15% to 22.5%. The Income Tax is withheld at source and rates vary according to the transaction type and terms;

(ii) on income from financial transactions (variable income), at rates varying from 15% to 22.50%, according to the transaction type and terms;

(iii) on income from Equity Investment Funds (FIP), Investment Funds in Equity Fund Quotas (FIF FIP), and Investment Funds in Emerging Companies (FMIEE), at a rate of 15% upon redemption, provided the funds meet certain conditions set forth by Brazilian legislation. In case of a gain on disposal of fund units, the rate will also be 15%, however Income Tax is not withheld at source because it is paid directly by the investor; and

(iv) income from other long and short-term investment funds,

other than those mentioned in items (ii) and (iii), at rates varying from 15% to 22.5%, depending on the length of time the investment is held.

Tax Benefits on Foreign Investment in The Financial and Capital Markets

It is also important to mention that the Brazilian Government has reduced non-resident investors' income tax on proceeds generated on Federal Government bonds to zero, provided the inflow of funds is made in accordance with CMN Resolution No. 4,373/2014.

This measure benefits all foreign investors, except those located in tax haven jurisdictions. This reduction also applies to quotas of investment funds dedicated to non-resident investors where at least 85% of the portfolio consists of Federal Government bonds. 85% is a daily limit - thus there is a need to actively manage the fund to maintain the ratio of 85% or implement controls to manage the limit.

Finally, Law No. 12,431/2011 provides that income derived by non-resident investors (who are not domiciled in tax haven jurisdictions) from publicly traded bonds and securities issued by nonfinancial institutions and acquired as of January 1, 2011 are subject to Income Tax at a rate of 0%. In order to be entitled to this benefit, certain requirements should be met.

FIP Taxation

Income earned by foreign investors under Resolution No. 4,373/2014 derived from the redemption of FIP quotas may be subject to IRRF at a reduced zero rate if foreign investors comply with requirements in article 3 of Law No. 11,312/2006.

In order to enjoy this tax benefit, the following conditions must be met:

(a) FIP investors cannot hold, individually or jointly with related persons, quotas representing 40% or more of all the FIP's quotas or 40% or more of the total income of the FIP;

(b) the FIP cannot hold in its portfolio, at any time, debt securities exceeding 5% of the FIP's net equity (i.e. convertible debentures and Government bonds are not included in the 5% limitation).

(c) the foreign investor cannot be resident or domiciled in a country defined in Brazilian law as a tax haven jurisdiction.

Provided the FIP continues to be qualified to operate as a private equity fund under CVM Ruling No. 578/2016, the income foreign investors derive from the FIP will be exempt from Income Tax.

Nevertheless, in the event a foreign investor cannot be a beneficiary of the tax benefit established by Law No. 11,312/06, Income Tax is levied at a rate of 15% on income derived from the FIP.

Should the FIP fail to comply with the investment diversification rule provided by CVM Ruling No. 578/2016, a foreign investor located in a tax haven jurisdiction will be subject to Income Tax at different rates (22.5% - 15%), depending upon the length of time the investment is held.

American Depositary Receipts (ADR) Taxation

According to Law No. 10,833/03, capital gains realised on the disposition of assets located in Brazil by a foreign investor, whether to another non-Brazilian resident or to Brazilian residents, are subject to taxation in Brazil.

Regarding ADRs, although the issue is not fully clear the gains realised by a foreign investor on the disposition of ADRs to another foreign investor will not be taxed in Brazil, based on the fact that for purposes of Law No. 10,833/2003 ADRs do not constitute assets located in Brazil. However, we cannot guarantee that Brazilian courts would adopt this theory.

The deposit of shares in exchange for ADRs may be subject to Brazilian income tax if the acquisition cost of the shares is lower than: (i) the average price per share on a Brazilian stock exchange on which the greatest number of such shares were sold on the day of the deposit; or (ii) if no shares were sold that day, the average price on the Brazilian stock exchange on which the greatest number of shares were sold during the 15 trading sessions immediately preceding such

deposit. In this case, the difference between the acquisition cost and the average price of the shares, calculated as set forth above, is considered a capital gain subject to income tax at a rate of 15% (or 25% in the case of investors who are located in tax haven jurisdictions).

The withdrawal of shares upon cancellation of ADRs is not subject to Brazilian Income Tax as long as the regulatory rules are appropriately observed with respect to registration of the investment with the Brazilian Central Bank.

In the case of redemption of the shares or ADRs or capital reduction by a Brazilian corporation with subsequent withdraw of the ADRs, the positive difference between the amount effectively received by the foreign investor and the acquisition cost of the securities redeemed is treated as capital gain derived from sale or exchange of shares not carried out on a Brazilian stock exchange market and is therefore subject to Income Tax at a rate of 15% (or 25% for investors located in tax haven jurisdictions).

Dividends and Distributions of Interest on Net Equity (*Juros sobre o Capital Próprio* – JSCP)

Dividends paid on profits on or after January 1, 1996 are not subject to income tax withheld at the source in Brazil. Dividends paid on profits generated before January 1, 1996 may be subject to Brazilian income tax withheld at the source at varying rates depending upon the year in which the profits were obtained.

In accordance with the amendment to Law No. 9,249/1995, Brazilian corporations may make payments to shareholders characterised as distributions of interest on the net equity of the company as an alternative form of making dividend distributions. The JSCP is a hybrid instrument as it is deductible for Brazilian tax purposes while classified as remuneration for the investor based upon the shareholder's net equity.

In general terms, interest on net equity is calculated by applying the daily pro rata variation of the Government's long-term interest rate (*Taxa de Juros de Longo Prazo* - TJLP) on the Brazilian entity's adjusted net equity accounts: (i) capital; (ii) capital reserves;

(iii) profit reserves; (iv) treasury shares; and (v) accumulated losses. The payment or credit of JSCP, however, is conditioned to the existence of profits, calculated before the interest deduction, or of accumulated profits and profit reserves, in an amount equal to or greater than the amount that is double the interest to be paid or credited.

For tax purposes, the total amount distributed as interest on equity may not exceed the greater of (i) 50% of net income (after the deduction of the social contribution on net profits and before taking into account the provision for corporate income tax and the amounts attributable to shareholders as net interest on equity) related to the period in respect of which the payment is made; or (ii) 50% of the sum of retained profits and profit reserves as of the start date of the period in respect of which the payment is made.

Distributions of interest on equity can be deducted from Brazilian corporate income tax and social contribution on net profit as long as the above limits are observed. Such payments are subject to IRRF at the rate of 15%, except for payments to shareholders situated in tax haven jurisdictions in which case payments are subject to income tax withheld at the source at a rate of 25%.

These payments may be included, at their net value, as part of any mandatory dividend. To the extent that payment of interest on net equity is so included, the corporation is required to distribute to shareholders an additional amount to ensure the net amount they received, after payment of the applicable Income Withholding Tax, plus the amount of declared dividends, is at least equal to the mandatory dividend.

IOF-Exchange

IOF is a tax imposed on financial transactions, such as credit, foreign exchange and insurance transactions or those securities-related transactions. The rate of the IOF varies according to the policies adopted by the Brazilian Government and is designed to restrict or stimulate the inflow of foreign capital and to limit credit to individuals. The IOF rate may be changed by Executive Decree (rather than a law). In addition, a statute increasing the IOF rate will take effect from its date of publication.

IOF is payable on several foreign exchange transactions (IOF-Exchange). Its rates may be increased by up to 25%. Recently, rates imposed on foreign exchange transactions have been modified and are currently levied at a rate of 0.38%, with the following main exceptions:

(i) IOF-Exchange is 6% on foreign exchange transactions, including simultaneous foreign exchange transactions, carried out by a foreign investor for the purpose of investing in the Brazilian financial and capital markets. In relation to these investments, the rate of IOF-Exchange imposed on the outflow of funds, from the country, will be zero;

(ii) IOF-Exchange is levied at a reduced rate of 0% on exchange transactions related revenue inflows deriving from the export of goods and services;

(iii) IOF-Exchange is levied at a rate of 0% on foreign exchange transactions for the remittance of interest on net equity and dividends earned by foreign investors;

(iv) IOF-Exchange is levied at a rate of 0%, as a general rule, on foreign exchange transaction related to acquisition of foreign currency by financial institutions simultaneously contracted with a foreign currency sale transaction;

(v) IOF-Exchange is levied at a rate of 0% on settlements of simultaneous foreign exchange transactions executed after January 1, 2011 for the inflow of resources through the cancellation of depositary receipts for investment in shares traded on stock exchanges;

(vi) IOF-Exchange is levied at a rate of 0% on settlements of simultaneous exchange for the inflow of resources derived from the modification of a foreign investor's registration, with direct investment being established by Law 4,131, dated September 3, 1962, for investment in shares traded on stock exchanges, as regulated by the National Monetary Council;

(vii) IOF-Exchange is levied at a rate of 0% on foreign exchange transactions, including simultaneous foreign exchange transactions, related to the attendance of initial or additional margin requirements in connection with futures transactions carried out within the Brazilian stock, commodities and future

exchanges (e.g., derivative transactions);

(viii) IOF-Exchange is levied at a rate of 0% on the liquidation of exchange transactions by a foreign investor for the inflow of funds, including by means of simultaneous transactions, for investment in the financial market and capital market. In relation to these investments, the rate of IOF-Exchange imposed on the outflow of funds, from the country, will be zero;

(ix) IOF-Exchange is levied at a rate of 1.10% on the settlements of foreign exchange transactions, performed on or after May 3, 2016, for the acquisition of foreign currency; and

(x) IOF-Exchange is levied at rate of 1.10% on the settlements of foreign exchange transactions, performed on or after March 3, 2018, for the transfer of funds abroad by a Brazilian tax resident.

Depending on the type of foreign funds inflow into the country, IOF-Exchange may be levied on both the outflow and inflow of funds. It may also be levied when the type of investment is changed. In many cases, the outflow and inflow of funds will require simultaneous foreign exchange transactions.

Since January 2, 2023, IOF-Exchange has been reduced to 1% on a progressive basis for the following transactions: (i) payments for intangible services rendered abroad using credit cards; (ii) transactions with institutions that issue cross-border payment arrangements, referring to withdrawals by users abroad; (iii) obtaining cash from travelers' checks and prepaid international cards used for personal expenses while abroad; (iv) transfering money from accounts in Brazil to foreign receivers via international financial institutions. In this case, the IOF-Exchange rate formerly was 5.38%. As of January 1, 2024, the rate has been 4.38%.

IOF-Bonds

IOF tax may also be levied on the issuances of bonds or securities, including transactions carried out on Brazilian stock, futures or commodities exchanges (IOF-Bonds).

The President, however, has the legal authority to increase the rate, during the period in which the investor holds the securities, to a maximum of 1.50% per day of the amount of the taxed

transaction, up to an amount equal to the gain made on the transaction and only from the date of its increase or creation.

IOF-Bonds is assessed on gains realised on investments lasting less than 30 days, which includes the sale, assignment, repurchase or renewal of fixed investments or redemption of shares in investment funds or investment pools. The maximum rate of IOF-Bonds payable in such cases is 1% per day, up to the amount equal to the gain made on the transaction and decreases the longer the investment is held until reaching zero for transactions with maturities of at least 30 days.

The rate of IOF-Bonds is currently 0% for many securities transactions, including:

- transactions carried out by financial institutions and other institutions chartered by the Central Bank as principals;
- transactions carried out by mutual funds or investment pools themselves;
- transactions carried out in the equity markets, including those performed in stock, futures and commodities exchanges and similar entities, except for transactions with predetermined results;
- redemptions of shares in equity funds;
- transactions with Certified Agribusiness Credit Rights (CDCA), Letters of Credit for Agribusiness (LCA) or a Receivables Certificate in Agribusiness (CRA), contracted after May 25, 2011;
- transactions with private bonds (i.e. debentures) as described in article 52 of Law No. 6,404/1976;
- transactions with Real Estate Receivables Certificates (CRI) and Financing Bills as described in article 37 of Law No. 12,249/10, contracted after May 25, 2011.

Finally, IOF is levied at a rate of 1.50% on the assignment of shares traded in the Brazilian stock market in order to permit the issuance of depositary receipts.

IOF-Bonds on Derivatives

According to article 32-C of Decree No. 6,306/2007, IOF-Bonds will also be assessed at 1% on derivatives linked to the FX rate.

In this regard, IOF-Bonds will be charged on the adjusted notional value of the acquisition, sale or maturity date of any derivative agreement that exceeds USD 10 million on the sell side. On the other hand, if sell-side exposure does not exceed USD 10 million, IOF-Bonds will be levied at a zero rate.

Transfer Pricing on Commercial and Financial Transactions

General Terms

Transfer pricing ("TP") rules were first implemented in Brazil in 1996 and took effect on 1st of January 1997 and they were partially reformed in 2012.

The legislation aims to test the pricing policy on commercial and financial transactions – either inbound or outbound – between Brazilian residents and their related parties abroad, as well as with any company established in a low-income tax jurisdiction ("tax haven") or under a tax privileged regime.

If the documented price transacted between the parties does not comply with any of the transfer pricing methods (comparable price), the difference must be added to the corporate income tax ("IRPJ") and social contribution on net profit ("CSLL") calculation bases.

Recent changes – Enactment of New TP Rules in Brazil, aligned with OECD Standards

Until 2023, Brazilian TP rules were governed by Law 9,430/1996 ("Law 9,430"). However, these rules have undergone significant changes in view of the enactment of Law 14,596/2023 ("Law 14,596"), which replaced the regime in Law 9,430 with a new one that aims at aligning Brazilian TP rules with OECD standards and in doing so, includes the adoption of the arm's length principle, not adopted by the system in Law 9,430.

Law 14,596 is the result of the conversion into law of Provisional Measure 1,152/2022 ("MP 1,152") and 14,596 became effective as of January 1st, 2024 (except for taxpayers that opted to anticipate its effects to 2023). Its provisions are partially regulated by Normative Instruction 2,191/2023 ("IN 2161"). IN 2161 covers only the chapters of Law 14,596 that deal with the so-called general rules. Law 14,596's provisions that deal with specific situations or transactions[13] had not yet been the subject of regulation by the Brazilian Federal Revenue Service by the date of conclusion of this book.

IN 2161 sets forth that OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration of 2022 may serve as a subsidiary source for purposes of application and interpretation of Brazilian TP Rules. Future changes to such guidelines may also serve as subsidiary source, provided they are approved by the Brazilian Federal Revenue Service.

Comments below are based on the rules in Law 14,596 and the regulation thereunder, as per IN 2161.

Controlled Transaction

As mentioned above, Brazilian TP rules apply to cross border commercial or financial transactions between a Brazilian entity and one or more related parties domiciled abroad or non-related parties domiciled in low-tax jurisdictions or benefiting from privileged tax regimes (the controlled transactions)[14]. A controlled transaction includes imports and exports of goods, services and rights, as well as intercompany financing transactions, business restructurings, transactions with intangibles, among others, provided they are of a commercial or financial nature.

According to Law 14,596, parties are related when at least one of them is subject to influence exercised either directly or indirectly by another party which may lead to the establishment of terms and conditions in their transactions that differ from those that would be adopted by unrelated parties in comparable transactions. Law 14,596 provides an illustrative list of entities or individuals resident abroad considered related parties of taxpayers in Brazil, such as the controlling shareholder, subsidiaries, affiliates, etc.

Application of the Arm's Length Principle

To determine whether the terms and conditions of the controlled transaction (or controlled transactions) are in accordance with the arm's length principle, the transactions must be delineated and subject to a comparability analysis.

Delineation of the controlled transaction requires an evaluation of the transaction documents vis-à-vis the actual conduct of the parties, as well as an analysis of the functions performed by each of them, the assets that were used, the risks they have assumed, the characteristics of the goods, rights and services involved, the market in which the parties operate, business strategies, and other economic characteristics. The delineation process may cause the controlled transaction to be reclassified (a type of substance over form approach) or even disregarded.

The terms and conditions of the controlled transaction resulting from the delineation process must then be compared with the terms and conditions that would be established between unrelated parties in comparable transactions. The comparable transaction must not have material differences when compared to the controlled transaction (dates, economic conditions, etc.). If such differences exist, adjustments should be to eliminate them; otherwise, such independent transactions cannot be used for comparability purposes.

Transfer Pricing Methods

The comparison between controlled and independent transactions must also consider the method under which the comparison should take place. In this sense, the TP rules conveyed by Law 14,596 require adoption of the most appropriate method, which is the method that provides the most reliable determination of the terms and conditions that would be established between unrelated parties in a comparable transaction given the characteristics of the

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13. Transactions with intangibles, intra-group services, business restructurings, cost contribution arrangement and financial transactions.
14. For the definition of low tax jurisdictions and privileged tax regimes, please refer to the topic "General Rules of Brazilian Tax System" of this chapter.

format and specific features of the controlled transaction.

The TP methods provided for by Law 14,596 are very similar to those in the OECD's TP guidelines. They consist of the following:

- **Comparable Independent Prices (*Preços Independentes Comparáveis* – PIC):** comparison of the price or value of a controlled transaction with those practiced in comparable transactions between unrelated parties. PIC is the preferable method whenever there is reliable information on such prices or values of comparable transactions (including transactions with commodities).
- **Resale Price (*Preço de Revenda menos Lucro* - PRL):** comparison of the gross margin the acquirer in a controlled transaction obtains on subsequent resale to unrelated parties with the gross margins obtained in comparable transactions between unrelated parties.
- **Cost Plus (*Custo mais Lucro* – MCL):** comparison of the gross profit margin obtained on the supplier's costs in a controlled transaction with the gross profit margins obtained on costs in comparable transactions carried out between unrelated parties.
- **Transactional Net Margin Method (*Margem Líquida da Transação* – MLT):** comparison of the net margin of the controlled transaction with the net margins of comparable transactions between unrelated parties, both calculated based on an appropriate profitability indicator.
- **Profit Split (*Divisão do Lucro* – MDL):** comparison of the division of profits or losses, or part of them, in a controlled transaction according to what would be established between unrelated parties in a comparable transaction, taking into account the relevant contributions provided in the form of functions performed, assets used and risks assumed by the parties involved in the transaction.

The law also authorizes adoption of other methods, provided the alternative methodology produces a result consistent with that which would be achieved in comparable transactions between unrelated parties.

In cases where application of the method requires selection of one of the parties of the controlled transaction as the test party, this will be the party in relation to which the method can be applied in the most appropriate way and for which the most reliable data on

comparable transactions between unrelated parties is available. Therefore, the tested party may not necessarily always be the Brazilian entity involved in the controlled transaction.

Types of adjustments

Law 14,596 provides for three possible adjustments to eliminate any price differences between controlled and comparable transactions:

- **Spontaneous adjustment:** made by the Brazilian taxpayer directly to the IRPJ and CSLL calculation basis, for the purpose of adding the result that would have derived from the controlled transaction if its terms and conditions had been established in accordance with the arms-length principle.
- **Compensating adjustment:** made by the Brazilian taxpayer and its counterparty(ies) abroad by the end of the year in which the transaction was executed. It is an effective adjustment to the price or value of the controlled transaction, made with the purpose of adjusting it to the arm's length principle and can be implemented by means of an invoice or debit or credit notes, depending on the transactions that motivated the TP adjustment to the IRPJ and CSLL base. It is the only adjustment that allows for reduction of the tax basis.
- **Primary adjustment:** similar to the spontaneous adjustment, it is an adjustment in the calculation basis of IRPJ and CSLL. The difference is that it is an adjustment made by tax authorities and, therefore, may attract penalties.

Brazilian TP rules do not provide the possibility of implementing the so-called secondary adjustment, provided in the OECD TP Guidelines, which seeks to expand the scope of the spontaneous and primary adjustments so as to reach the value of the controlled transaction, like the compensating adjustment[15].

15. MP 1,152 provided that the secondary adjustment would be deemed as a credit granted by one related party to the other in the controlled transaction, remunerated at an interest rate of 12% per year and charged until the credit was settled. This interest would be subject to the imposition of IRPJ and CSLL. Upon conversion of MP 1,152 into law, the Brazilian Congress rejected MP 1,152's provisions that dealt with the secondary adjustment.

Intangibles

Under the legal framework in force until 2023, the deductibility of royalties paid to foreign entities, including related parties, was subject to the provisions of Law 4,506/1964. Since those expenses were subject to specific rules and requirements, Law 9,430 did not deal with the deductibility thereof.

Law 14,596 repealed the provisions in Law 4,506/1964 that deal with the deductibility of royalty expenses owed to foreign parties. As of 2024, the deduction of royalty expenses remitted to foreign related parties is also subject to Brazilian TP rules.

Notwithstanding, Law 14,596 provides for specific situations in which royalties paid to non-residents are deemed non-deductible: (i) when the same amount is treated as a deductible expense by the other related party; (ii) when the amount deductible in Brazil is not treated as taxable income in the jurisdiction of the foreign related party; or (iii) when the amounts are destined to directly or indirectly subsidize the deductible expenses of related parties, resulting in the consequences described in "(i)" and "(ii)".

The allocation of results arising from controlled transactions involving intangibles will be determined based on the contributions provided by the parties and the relevant functions performed by them in relation to the intangible and the risks associated therewith. The mere legal ownership of the intangible will not entitle its owner to a remuneration derived from its use.

The remuneration of the related party involved in the controlled transaction that has financed development of the intangible is limited to levels that vary depending on whether or not the related party has the financial capacity to provide such financing and control over the associated risks.

Brazilian TP rules also contain specific provisions for transactions involving the so-called hard-to-value intangibles, which are those transactions where the parties are uncertain about the pricing or the economic evaluation of the intangible at the time of the transaction.

Intra-Group Services

Law 14,596 defines intragroup service as any activity carried out by a related party - which includes providing the use or availability of tangible or intangible assets or other resources by the service provider - which results in benefits for one or more parties.

The activity is beneficial when it provides a reasonable expectation of economic or commercial value to the other party, resulting in improvement or maintenance of its commercial position. Intragroup services do not include activities that qualify as shareholder activity.

IN 2161 allows adoption of a simplified approach for the purposes of determining the arm's length charges in low value-adding intra-group services. In these cases, the consideration due in exchange for such services will have a gross profit margin, calculated using all direct and indirect costs related to the transaction, of: (i) at least 5%, in cases where the service provider is a legal entity domiciled in Brazil; or (ii) a maximum of 5%, in cases where the provider is a related party abroad.

IN 2161's definition of low value-adding intra-group services is aligned with OECD's definition. In this sense, such services consist of activities that are of a supportive nature; are not part of the core business of the MNE group; do not require use of unique and valuable intangibles and do not lead to their creation; and do not involve the assumption or control of significant risks by the service provider and do not give rise to the creation of such risks for the service provider.

Cost contribution arrangements

Cost contribution arrangements ("CCA") are those in which two or more related parties agree to share the contributions and risks related to the acquisition, production or joint development of services, intangibles or tangible assets based on the proportion of benefits each party expects.

This arrangement does not include the Brazilian cost-sharing agreement, an arrangement simply for allocation of administrative

costs between entities within the same group, which could be covered by the provisions concerning intra-group services.

CCA participants are the parties that exercise control over the risks associated with the project and have the financial capacity to assume such risk and obtain the benefits of (i) the services developed or obtained, or (ii) the tangible or intangible assets.

Participants' contributions can be of any kind, provided they are of an economic value, thus including the provision of services, performance of activities or provision of tangible or intangible assets.

The contributions of each party must be determined in accordance with the arm's length principle and will be proportional to the total expected benefit - which should be evaluated based on estimates of revenue increases, cost reductions or other benefits -, otherwise, there must an appropriate compensation between participants in order to reestablish an appropriate economic balance.

Business Restructurings

The provisions involving business restructurings deal with modifications to commercial or financial relationships that result in the transfer of potential profit or benefits or losses to any of the related parties, including commercial renegotiations or termination of commercial or financial relationships.

To determine the compensation due in exchange for the benefit obtained or the loss suffered by any party to the controlled transaction, the parties must consider the costs borne by the transferring entity by virtue of the restructuring and the potential profit that has been transferred.

The potential profit comprises the expected profits or losses associated with the transfer of functions, assets, risks or business opportunities. Compensation for the potential profit transferred will consider the value that the transferred items have if considered in a joint manner.

IN 2161 states that intragroup corporate reorganizations – which do not necessarily coincide with business restructurings -

qualify as a business restructuring transaction. This matter may be controversial, as corporate reorganizations may not be implemented with a commercial or financial intent. OECD TP Guidelines do not provide specific guidance on this matter.

Financial Transactions

Law 14,596 contains specific provisions for financial transactions. Such provisions are divided into four groups, as explained below, and aim at assuring that such transactions observe the arm's length principle.

Debt transactions

When the controlled transaction involves the provision of financial resources and is formalized as a debt transaction (e.g., a loan agreement), Law 14,596 establishes criteria based on the arm's length principle to assess whether the transaction should be defined, in whole or in part, as a debt or equity transaction. Interest and other expenses related to a transaction qualified as an equity transaction are not deductible for purposes of IRPJ and CSLL.

In a controlled transaction deemed a debt transaction, the definition of the remuneration due to the creditor will depend on variables such as whether or not the creditor has financial capacity and control over the financial resources lent the and risks associated with the transaction, or whether the creditor only performs intermediation activities.

Financial guarantees

Controlled transactions involving the provision of guarantees by related parties must be evaluated under the arm's length principle in order to determine whether the provision of the guarantee should be classified as an intragroup service, in which case remuneration is due to the guarantor, or as a shareholder activity or

capital contribution, for which no remuneration is due.

Brazilian TP rules also convey rules that deal with the delineation of additional funds obtained in a debt transaction with an unrelated party due to the existence of a related party's guarantee, as well as the terms and conditions for transactions involving the provision of guarantees defined as services.

Treasury function

Law 14,596 sets forth the analysis and adjustments that must be undertaken in order to assure a transaction between related parties delineated as centralized management of cash for short-term liquidity is in compliance with the arm's length principle.

In this context, the Law provides the elements that must be considered for purposes of delineating such transactions, including the options realistically available to each party and the proportional benefits derived from their contributions. The arm's length analysis should also consider the allocation of synergy benefits among the participants and the remuneration due to the party that assumed the coordinating or centralizing role within the agreement.

Insurance

The terms and conditions of insurance transactions executed between related parties that are delineated as services under the provisions of Law 14,596 should be established in accordance with the arm's length principle.

The provisions above include arrangements involving insurance operations between unrelated parties where a portion or all of the insured risks are transferred from an unrelated party to parties that are related to the insured one, as well as situations where an insurer, acting as an intermediary between related insured parties and an unrelated party. In the latter case, the related party must be remunerated based on the functions performed, assets used, risks assumed, among other relevant economic elements.

Other Matters

Other relevant aspects of the TP rules provided by Law 14,596 are:

- **Documentation:** The taxpayer must file the documentation that proves compliance with the arm's length principle, including those relating to transaction delineation and comparability analysis, with the tax authorities. It is also necessary to file documentation containing information on controlled transactions the Brazilian taxpayer has entered into, the related parties and activities involved therein, the multinational group's structure, global revenue and assets allocation, income tax paid by the group to which the taxpayer belongs, among other relevant information.
- **Advance Pricing Arrangement (APA):** May be requested from Brazilian tax authorities, subject to a specific consultation procedure. The APA is valid for 4 (four) years, extendable for another 2 (two) years and is not subject to limits concerning the value of the transaction or size of the taxpayer. An APA obtained by the Brazilian entity may have apply retroactively.
- **Mutual Agreement Procedure:** Brazilian tax authorities may have to review their tax assessment if necessary to implement the agreement settled with another country in the context of a tax treaty for avoidance of double taxation.
- **Penalties:** Law 14.596 sets forth different and specific financial penalties in case of non-compliance with its provisions. Such penalties may have a significant impact. Taxpayers are advised to be aware of such penalties in order to mitigate adverse tax implications.

Tax Aspects of Electronic Commerce

Taxation in Brazil is a vast and complex field, comprising numerous federal, state, and municipal taxes. The following topics

summarise the most relevant taxes for e-commerce business, their main aspects, and challenges.

It is important to highlight that at the end of 2023, Brazil approved the Brazilian Tax Reform on consumption, as the final wording of Constitutional Amendment No. 132/2023 ("EC 132/2023") was enacted. We will comment on the consumption tax reform on a specific topic[16].

Corporate Income Tax ("IRPJ")

Taxable profit is taxed at a basic rate of 15% plus an additional rate of 10% on taxable profits that exceeds BRL 20,000.00 per month.

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

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

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

Companies with total annual gross revenue that exceed BRL 78 million and others required by law must calculate real profits based on quarterly or annual balance sheets. They are not allowed to calculate their taxes using presumed profits.

There is a third method, the arbitrated profit basis, which can be applied by the tax authorities, at their discretion, in certain limited circumstances. Taxpayers cannot voluntarily opt for this method. For example, the arbitrated method is applied when proper records of revenues and costs/expenses are not maintained.

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

If the company opts for payment based on annual profits (the most common and widely adopted system), profits will be calculated from the profit-and-loss statement prepared in December covering

earnings for the entire calendar year, but the tax must be pre-paid monthly. Monthly prepayment may be lowered or suspended if a taxpayer has accounting evidence that the amount pre-paid to date exceeds the tax value calculated using real profits.

Social Contribution on Net Profits ("CSLL")

This tax is payable at a general rate of 9% on adjusted quarterly or annual net income (depending on the taxpayer's income tax option) and is not deductible from corporate income tax. While the basis of this tax is similar to that of Corporate Income Tax (IRPJ), adjustments used to calculate the taxable basis of the CSLL are sometimes different. Some activities (such as banking, insurance, etc.) may be subject to higher rates (i.e., 20% or 15%, depending on the case).

Social Security Contributions on Gross Revenues ("PIS/Cofins")

PIS/Cofins are contributions levied on legal entities' overall revenues. There are basically two systems for the calculation of PIS/Cofins: (i) the cumulative system and (ii) non-cumulative system.

- Under the cumulative system, PIS/Cofins are generally levied at the rates of 0.65% and 3% respectively, and the taxpayer is not allowed to offset any tax credits.
- Under the non-cumulative system, revenues are generally levied by PIS/Cofins at rates of 1.65% and 7.6%, respectively, but the taxpayer is allowed to discount credits related to part of its costs and expenses, provided certain conditions are met (PIS/Cofins are levied at rates of 0.65% and 4% for financial

16. An income tax reform is also under discussion, proposing amendments to individual and corporate income taxation. The most important amendments proposed are (i) 15% or 20% income tax on dividends exclusive at source; (ii) reduction in the corporate income tax rate (from 25% to 18%); and (iii) new limits of tax-deduction of interest on net equity (INE) under the actual profit regime. Thus, we cannot rule out that a near-future change in the Brazilian tax system by means of an income tax reform may change the general information presented.

revenues earned by companies subject to the non-cumulative system, with some exceptions).

As a rule, Brazilian legal entities are subject to the non-cumulative system - unless they are expressly excluded by law, in which case the cumulative system applies. For instance, revenues from telecommunications activities are subject to the cumulative system.

Finally, the PIS/Cofins exemption on revenues from service exports is subject to these services being provided to an individual or legal entity resident or domiciled abroad and to the foreign currency inflow. if there is an inflow of funds related to the transaction.

EC 132/2023 provides for the "replacement" of PIS/Cofins by the CBS and establishes a transition regime in which PIS, Cofins, and CBS will coexist until 2027, when PIS/Cofins will cease to exist and will be replaced by the CBS. We will comment on the tax reform and the transition regime on separate topics.

Social Contributions on Imports ("PIS/Cofins-Imports)

PIS/Cofins-Imports is levied on imports of goods and services. PIS-Imports and COFINS-Imports apply regardless of the nature of the imported service (i.e., technical, or non-technical). Services performed in-country or abroad whose results are verified in Brazil are subject to these contributions

PIS-Imports and Cofins-Imports are levied at 1.65% and 7.6% on the amounts paid, credited, delivered, utilised, or remitted abroad for imported services (the calculation basis includes ISS, PIS-Imports and COFINS-Imports). PIS-Imports and COFINS-Imports are levied at 2.1% and 9.65% respectively on the customs value for goods imports (an additional 1% COFINS-Imports rate may be applicable depending on the NCM of the products imported).

According to Law No. 10,865/04, as amended by Law No. 12,865/2013, PIS/Cofins calculation basis on goods imports is simply the "customs value", as defined by customs legislation. The new wording given by Law No. 12,865/2013 was adopted after the STF deemed the previous text of Law No. 10,865/04, through which ICMS was included in the concept of "customs value" for PIS/COFINS-Imports purposes, was unconstitutional.

Following the STF's ruling and Law No. 10,865/04's new wording, a discussion regarding inclusion of ISS in the PIS/COFINS-Imports tax base began to emerge in the Judiciary. The subject has not yet been ruled on under as a wider precedent, but recent decisions by the STF have been favourable to taxpayers.

The amount paid for PIS-Imports and COFINS-Imports may be added to a company's local credits calculated on its costs and expenses to offset the COFINS and PIS due on its gross revenues only if the non-cumulative method is applicable to such gross revenues. In this case, certain legal requirements must be observed.

Since the STF's ruling on ADIs No. 1.945 and No. 5.659, which decided that ISS should be levied on software use licenses (and not ICMS), the Brazilian Federal Revenue Service has significantly shifted its understanding (through Tax Consultation Rulings) on transactions involving software. Concerning PIS/COFINS-Imports, the Federal Revenue Service's new position is that transactions involving the licensing of software use should be classified as services and, therefore, levied by PIS/COFINS-Imports, should be recognised in transactions involving the licensing of software use.

Please note that PIS/COFINS-Imports bear a close relationship with the PIS/Cofins already commented on above, but they are different contributions. PIS/COFINS-Imports are levied on imports of services and goods, and the taxpayer is the importer domiciled in Brazil, whereas PIS/Cofins are contributions levied on revenues of Brazilian legal entities (which are the taxpayers of the contributions). Nonetheless, these contributions bear a relationship in regard to the calculation system and rates, and especially because within certain situations the credits of PIS/COFINS-Imports may be offset against the "local" PIS/Cofins contributions (under the non-cumulative system, if applicable).

WHT

The income generated or paid from Brazilian sources and remitted to a foreign beneficiary is subject to the Withholding Income Tax (“WHT”) in Brazil. The obligation to collect this tax falls on the Brazilian source required to withhold the income tax and transfer it to the proper tax authorities.

This applies to interest, royalties, leasing, capital gains and payments for services remitted by Brazilian sources to an entity abroad. WHT rates vary depending on the nature of the payment.

Payment for services may be subject to a rate of 25% or 15%, depending on the type of service or the beneficiary's domicile. The standard WHT rate for payment of technical services (as well as technical or administrative support) is 15%, and for general non-technical services, the rate is 25%. The 25% rate applies to all cases in which the beneficiary is in a low tax jurisdiction (as defined by the Brazilian Federal tax authorities).

Although there is no express provision in local legislation, the current position of the Brazilian tax authorities is being enforced: (i) payments related to the software as a service (SaaS) licensing are subject to WHT at a rate of 15%; (ii) payments for the right to distribute software are also subject to WHT at a rate of 15%; and (iii) payment for acquisition of non-customised ("off-the-shelf") software is not subject to the WHT.

Royalties are generally considered payments for the use or licensing of patents, trademarks and other technology transfers and copyrights. The remittance must be preceded by registration of the relevant contract with the Brazilian Patent and Trademark Office ("INPI").

CIDE

The Contribution on Economic Activities ("CIDE") is levied on foreign remittances relating to payments for copyrights, royalties on trademarks and patents, technical services, technical support, administrative support and similar services. As a rule, CIDE is owed by the Brazilian company and is levied on the overseas remittances at a rate of 10%.

This contribution does not fall within the scope of international double taxation treaties. CIDE is a local entity's cost and therefore not creditable to non-residents. To the extent the services are rendered in an electronic commerce scenario, CIDE should also be levied.

CIDE is not levied on remuneration paid for the licensing the

use or rights to sell or distribute software, except when the transaction involves a transfer of the corresponding technology (i.e. the transfer of the source code of the software, subject to registration with the Brazilian Patent and Trademark Office - INPI).

Brazilian tax authorities currently take the view that payments for software as a service is subject to CIDE.

Tax on Financial Transactions ("IOF")

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

IPI

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

As it also encompasses imported goods, IPI is charged both on customs clearance and resale, if applicable. For instance, e-commerce business may be subject to IPI if they resell imported products.

IPI is usually levied ad valorem. In the case of imported products, IPI is calculated on the customs value, plus import duty. The rates are based on the type of product involved.

As a value-added tax, IPI tax credits are allowed for tax paid on the purchase or import of raw materials and components used to manufacture a product to be taxed or on the resale of the imported product.

ICMS

ICMS (the Brazilian almost-true value-added tax) is a non-cumulative state tax levied on transactions the circulation of most

goods, including e-commerce transactions, as well as certain services[17].

The ICMS tax rate varies from state to state and also depends on the transaction/products involved (mostly defined by their NCM code[18]). General ICMS tax rates on transactions within the same state vary between 17% and 18% (which is the general rate in the state of São Paulo, for instance).

In interstate transactions, rates depend on the goods' state of origin and destination, and whether the goods are domestic or imported. In summary:

- Domestic goods: the rate is 7% if it originates in the states of the South and Southeast regions (except for the state of Espirito Santo) and is destined for the states in the North, Northeast, Center West (and also the state of Espirito Santo). In all other interstate transactions with domestic goods, the rate will be 12%.
- Imported goods: the rate is 4%, regardless of the state of origin and destination. This rate also applies for interstate transactions involving manufactured goods that have more than 40% of imported content (i.e. imported inputs)[19].

Interstate transactions can also be subject to the differential ICMS rate ("ICMS-Difal") if they are carried out with end consumers. According to the Brazilian Federal Constitution of 1988 with the wording provided by Constitutional Amendment No. 87/2015 ("EC 87/15"), ICMS-Difal is payable in two situations:

- ICMS- Difal on interstate sales: levied on the sale of goods to an end consumer that is not an ICMS taxpayer, in which case ICMS-Difal is payable by the remitting business. This situation has major effects on sales by e-commerce companies, given the nature of the transactions and the fact most online shoppers are not ICMS taxpayers.
- ICMS-Difal on interstate acquisitions: payable on the acquisition of goods by an ICMS taxpayer as an end consumer (fixed assets and goods for use and consumption).

The amount due as ICMS-Difal corresponds to the difference between the internal ICMS tax rate in the state of destination and the interstate ICMS tax rate.

ICMS-Difal regulation was not initially addressed by

Supplementary Law No. 87/96, but only by ICMS Agreement No. 93, of September 17, 2015 ("ICMS Agreement No. 93/15"), which had its constitutionality subject to many years of discussion between state tax authorities and taxpayers.

This matter was only settled in 2021, after the STF ruled in a binding decision[20] that the collection of the ICMS-Difal requires its regulation by a supplementary law and, therefore, many provisions of ICMS Agreement No. 93/15 were unconstitutional. Given the STF's ruling, ICMS-Difal regulations were duly introduced through Supplementary Law No. 87/96[21].

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

As a rule, this system is implemented through a state agreement ("ICMS Agreement") signed by all Brazilian states and the Federal District and is valid across the Brazilian territory (except if one or more states decide not to implement the rule within its territory) or through specific protocols ("ICMS Protocols") signed by two or more states. In the latter case, the system will only be valid for taxpayers located in the territory of each signatory state.

However, there are cases in which one state, through a state law, can implement the ICMS/ST system for transactions within their territory, or for shipping products to taxpayers located in their territory.

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17. The main aspects of ICMS are regulated by Supplementary Law No. 87, of September 13, 1996 (**"Supplementary Law No. 87/96"**).
18. The Mercosur Common Tariff (**"NCM"**) is a Harmonized System-based nomenclature. NCM is formed by eight digits, of which the first six reproduce the Harmonized System tariff codes. The seventh and eight digits correspond to specifications endorsed among Mercosur countries.
19. It is worth noting that, as an exception to the application of the 4% rate, interstate transactions with products considered to have no domestic similarity (defined in a list issued by the Chamber of Foreign Trade – **"Camex"**) are subject to the same treatment of domestic products – at an ICMS rate of 7% or 12%.
20. Extraordinary Appeal No. 1.287.019 (General Repercussion Theme No. 1.093).
21. By Complementary Law No. 190, of January 4, 2022.

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

It is also important to mention that several states have published legislation that, in practice, assigns responsibility to marketplaces for the collection of ICMS due by their clients (advertisers/sellers) in transactions carried out through their platform. According to many states, the link to ICMS taxable event arises from the exposure of these advertisers (sellers), thus considering the marketplace as an intermediary in the virtual world, even if the digital e-commerce platform is not the seller, or a link in the chain of suppliers.

ISS

ISS is a municipal tax that is levied on the provision of services contained in the Services List of Supplementary Law No. 116/03 (including if rendered from abroad) and the ISS is due to the municipality in which the service provider is located, except for a few specific cases expressly provided for by Supplementary Law No. 116/03 – these exceptions shift ISS collection to the municipality of the service taker or to the municipality where the service is rendered itself.

The calculation basis is the service price, and its applicable rates may vary according to the service nature and to the municipal legislation but cannot be lower than 2% or higher than 5%, depending on the municipality.

In case of services rendered from abroad, the responsibility for ISS collection is attributed to the contracting party located in Brazil. However, the import of services related to the IT sector has been constantly discussed at both administrative and judicial levels, including due to the difficulty in determining where the service is rendered and where the result is verified.

In a case involving the import of licensing services and

assignment of the right to use software, the STF determined, under the general repercussion system, that the ISS triggering event is the result of the service, that is, the legal utility for which the service provider is obligated towards the contracting party (Extraordinary Appeal No. 688.223). According to the STF, although the creation of the computer program was completed abroad, the taxed service is the licensing or assignment of the right to use the software, and consequently the use resulting from the licensing act, which culminates in the service, occurred in Brazil.

Considering the tax challenges arising from the digitalisation of the economy, which includes significant legislative changes (in order to expand the taxation on new technologies) and prevent disputes between states and municipalities to define which is entitled to charge the tax, e-commerce companies should keep track of developments to avoid substantially increased tax burdens, as well as the risk of any future questioning of its transactions.

Internet Service Providers

The tax treatment of Internet Service Providers (ISP) activities can be a grey area. In general terms, telecommunication services ("SCM") are subject to ICMS, as well as contributions to FUST (Law No. 9,998/00) and FUNTELL (Law No. 10,052/00).

However, SCM is often provided in association with activities classified as Added-Value Services ("SVA"). SVA is defined by regulatory legislation as the activity that adds, to an SCM service that supports it and with which it is not to be confused, new utilities related to access, storage, presentation, handling, or retrieval of information (article 61 of Law No. 9,472/97).

According to STJ's understanding, internet access services are not subject to ICMS, given that they are not SCMs, but rather SVAs (STJ Ruling No. 334).

Although the SVA (once it is no longer an SCM) is not subject to ICMS and contributions to FUST/FUNTELL, it is possible that the ISS will be levied if its purpose/activity corresponds to a service contained in the Services List of Supplementary Law No. 116/03.

For an effective analysis of whether the SVA falls within one

of the services on the List Annexed to LC 116, it is essential to evaluate all the information and elements that best prove its nature.

Consumption Tax Reform

Despite the tax system overview above, it is important to emphasise that Brazil had approved the Consumption Tax Reform when the final wording of EC 132/2023 was approved.

The tax reform introduces a dual Value-Added Tax (dual-VAT), composed of a federal contribution on goods and services (CBS) and a sub-national goods and services tax (IBS), creates a new excise tax ("IS", "selective tax") and a new state tax levied on primary and semi-finished products.

The CBS will "replace" the current federal social contributions (PIS/COFINS), whereas the IBS will replace both ICMS and ISS. In summary, the dual-VAT will have a broad-based and full non-cumulative tax on goods and services, be charged at the destination, and have a few tax rates and exceptions.

Both CBS and IBS will be subject to the same taxable events (domestic transactions and imports with tangible or intangible goods, including rights or with services), tax calculation bases, non-incidence events, and taxable persons; specific, exceptional, or favoured taxation regimes; and non-cumulative and crediting rules.

EC 132/2023 also simplified the calculation of the dual VAT, providing that the tax will be levied on the gross value of the goods and services (calculation without a gross-up expressly forced by the law), with the non-inclusion of the IBS and CBS in their tax basis calculation. Also, EC 132/2023 implemented a complete non-cumulative system, expanding the circumstances in which the tax can be credited.

The Federal Senate will set each entity's IBS and CBS reference rates, which must be enough to maintain the current overall tax burden. Each federal entity (the Federal Government, states, and municipalities) will set a single rate applicable to all goods and services. The tax reform also establishes the reduced rates applicable to specific transactions (goods and services), which may vary from 100% to 30%.

Note that the enactment of EC 132/2023 is the first step regarding the implementation of the new consumption tax system.

However, many subjects in the constitutional amendment need to be regulated, most through different supplementary laws that the Brazilian Congress will have to issue for the beginning of the new tax regime. In January 2025, the first supplementary law regulating the IBS, CBS, and IS was published, specifically Supplementary Law No. 214/2025 (further detailed below).

Importing and Exporting

Export earnings are a key priority under the Brazilian Government's economic policy, given the need to produce large balance of payment surpluses to fund debt repayment and imports. For similar reasons, in the 1980s the Brazilian Government implemented import limits, except on strategic resources locally unavailable, such as oil and capital goods.

In the 1990s, however, the drive to modernise Brazilian industry and curb inflation led to deregulation of trade policies, with termination of import limits and the use of import tariff cuts as a tool employed by the Government to target industries dominated by oligopolies or monopolies. This measure put pressure on these sectors, aiming to cut prices via foreign competition.

In the 2000s, Mercosur was consolidated and expanded based on preferential agreements with most Latin American countries as well as other nations, such as India and Israel. In parallel, Brazil increased the number of trade remedy measures applied on exports from other countries and became a more frequent target of these measures by other countries.

More recently, Brazil has gone through two administrations with opposing international trade policies. First, the Bolsonaro Administration (2019 to 2022), which approved widespread tariff cuts and revoked antidumping measures to open the Brazilian market. Following this is the Lula Administration (2023 to 2026), which has reversed most of these tariff cuts and has raised tariffs in many segments, such as steel and chemical products, electric cars, solar panels, paper and cellulose, among others. In addition, the current administration has increasingly used trade remedies to curb rising imports from China.

The Foreign Trade Secretariat ("SECEX") controls imports and exports in Brazil. Companies engaged in foreign trade must register with SECEX as an importer and/or exporter.

Trade Organisations

Mercosur *(for more details refer to Chapter 21)*

This is a common market established by Brazil, Argentina, Paraguay, and Uruguay and it hasassociations with Chile and Bolivia. Venezuela became a member in 2012 but was suspended in 2017, given the common view that it is no longer a democracy. In December 2023, Brazil was the last member to ratify the protocol on the accession of Bolivia as a full member of Mercosur. Bolivia now has four years to implement the Mercosur rules and effectively join the common market.

Mercosur has a joint population of approximately 300 million people and a total Gross National Product (GNP) of around USD 2.7 billion.

The main Mercosur objectives, as stated in the Treaty of Asunción, are:

- To establish the free transit of goods, people, capital, and services by removing customs and non-tariff barriers;
- To pursue a common trade and economic policy, adopting a Common External Tariff ("TEC");
- To coordinate macro and microeconomic policies, not only on foreign trade, but also in other sectors such as agriculture, industry, tax and monetary systems to ensure free and fair competition among members; and
- To require a commitment from members to adjust their laws for easier integration.

As for customs duties and non-tariff limits, every member country has a list of exceptions to the TEC. Mercosur introduced both the TEC and the lists of exceptions in January 1995.

To avoid severe damage to member countries' domestic markets – because of a sudden increase in imports –, safeguard clauses provide temporary import quotas. Commercial and industrial free-trade zones currently fixed or approved can continue to operate but

will receive the same tariff treatment as if they were non-member states. Member countries have, however, executed bilateral agreements to extend Mercosur treatment to their respective free-trade zones.

To gain a Mercosur certificate of origin, goods must have a substantial transformation – the resulting product must be classified in a heading that differs from the one in which the imported inputs were classified. Alternatively, local content of 55% is also sufficient to confer Mercosur origin. There are specific rules of origin, though, for a long list of products.

Capital movement is, in principle, free between the member countries, including stock exchange transactions by both corporate entities and individuals, subject to limits in special situations.

Mercosur has entered into free or preferential trade agreements with Bolivia, Chile, Colombia, Cuba, Ecuador, Egypt, India, Israel, Mexico, Peru, Singapore, and the Southern African Customs Union (formed by South Africa, Namibia, Botswana, Lesotho and Eswatini). Mercosur is currently negotiating with other countries and economic blocks such as the European community.

Others

Brazil also belongs to the Latin American Integration Association (ALADI), which provides reduced duties and other benefits. Member countries include Argentina, Bolivia, Chile, Colombia, Cuba, Ecuador, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela. Brazil is also a member of the World Trade Organisation (WTO).

Exports

Exporters must register with SECEX, which controls imports and exports. The following transactions need special export authorisation:

- Transactions involving a nonconvertible currency;
- Transactions without currency coverage;
- Consignment of goods; and
- Weapons, ammunition and goods containing nuclear and radioactive materials.

Certain exports of raw lumber, animals and other products are either specifically banned or severely restricted. The Ministry of Agriculture regulates the export of certain products of animal origin.

Tax Incentives

Several tax and financial incentives are still available to exporters. The main tax concessions are summarised as follows:

- Exported products are free from the Excise Tax ("IPI") and the rules also provide for a credit instrument for excise taxes paid on raw materials used to make goods for export;
- A credit instrument is allowed for turnover taxes paid on raw materials such as energy consumed and amortisation;
- Exports are free from the Tax on Circulation of Goods and Services ("ICMS"). Similar to the IPI, a credit mechanism for ICMS paid on raw materials or inputs used in the manufacturing process is also available;
- Exports of products or services are also exempt from the Social Integration Program ("PIS") and the Contribution for the Financing of Social Security ("COFINS"), provided that certain requirements are met; and
- Materials, parts, and semi-manufactured goods imported for producing goods targeted for export – "drawback" – are free from excise taxes and import duties.

Export Guarantee Insurance

The Brazilian Ministry of Finance provides export guarantee insurance covering up to 100% of losses arising from political risk and extraordinary causes, and 95% of losses arising from commercial risks.

Financing

Banks provide financing for exporters against forward sales contracts and by discounting drafts accepted by foreign importers.

This type of financing is also available for "indirect exporters" or manufacturing companies that export through trading companies.

The Central Bank of Brazil ("BC") allows banks to re-lend funds gained abroad to Brazilian exporters exempt from the Tax on Financial Operation ("IOF"). Exporters can use these funds to buy raw materials to produce goods for export.

Export Duties

Exports of cigarettes, raw hides, skins and leather are subject to export taxes.

Government Rules

Exporters must register with SECEX to qualify as an export company. To perform an export transaction, the exporter must submit a Single Export Declaration ("DU-E").

SECEX will verify and evaluate whether the export prices are reasonable using the international trade market as a guideline. The period of time needed for payment as well as for commissions to be paid to sales agents will also be subject to Government scrutiny.

Export Processing Zones

Export Processing Zones ("ZPEs") are free-trade areas created to set up manufacturing plants for export production in locations where the corresponding State or Municipal governments provide a suitable infrastructure. An exemption from the IPI, import tax ("II"), IOF and the Merchant Marine Renewal Fee ("AFRMM") is available for goods to be exported and such exemptions can be valid for up to 40 years.

Twenty-six ZPE authorisations have been granted so far. However, only those located in Pecém/CE and Parnaíba/PI are operating.

Trading Companies

Commercial companies that buy manufactured goods solely for export can register as trading companies, which entitles them to tax benefits and the use of special customs warehouse rules. These rules simplify both export and import transactions. Trading companies are also eligible for extra financing allowed by the BC for companies with 75% domestic capital.

In summary, the main features of trading company rules are as follows:

- The trading company must be set up as a corporation with registered voting shares and a minimum capital equivalent to approximately USD 200,000.00. Up to 50% of the capital can be in the form of preferred shares without voting rights; and
- A special customs warehouse allows tax deferral on imported goods until they are sold on the local market, as well as on manufactured goods for export, in which case the tax deferral becomes a tax exemption on effective export. The maximum deposit period is one year, but it is possible for a trading company to obtain an extension.

The warehouse rules apply to warehouses controlled by ports and airports, those of general warehouse businesses and those managed by public or private entities. However, this benefit is only granted to goods deposited by registered trading companies.

Imports

Government Ruling

All importers must register with SECEX. As a rule, imports are not subject to any kind of import licencing requirements. However, certain products are subject to import licencing by health and agriculture authorities, as well as the army, among others. Should an import licence be necessary, it is normally valid for 180 days for each import operation. The importer can apply for a licence through the Integrated Foreign Trade System ("SISCOMEX"), an online computer system that processes all import licences. SISCOMEX

normally issues authorisation within five days of application and the goods must be loaded for shipment within 90 days of the import licence being issued.

In relation to imported products eligible for tax incentives, SECEX will verify beforehand whether the imported product is similar to products manufactured locally. SECEX allows imports of used machinery and equipment, provided that there is no local production of similar products. Importing certain products – such as petrochemicals, human blood, drugs, weapons, herbicides and pesticides, and leather – is subject to prior approval from the competent Government department.

Customs

Essentially, SECEX reviews import prices in order to examine whether a foreign company is dumping its products in the Brazilian market. The Brazilian customs authorities, in turn, revise import prices in order to police underpaid import duties through under-invoicing. Brazilian customs authorities also apply customs valuation controls.

SECEX and the customs authorities cross-check prior transactions, information from commodities exchanges, industry publications, foreign manufacturer price lists, and other sources of price information while carrying out their investigations.

Tariffs

Import duties have a maximum threshold of 35% and average 15%. Duties are levied on the Cost, Insurance and Freight (CIF) value of the product. The import value of the goods, for tariff purposes, is calculated by applying a special foreign exchange rate, set by the Ministry of Finance, to the CIF value. The taxable event is the physical entry of goods manufactured abroad into Brazil. The classification of products for the purposes of determining the import taxes levied is based on the Mercosur Common Nomenclature ("NCM"), which is based on the Harmonized System of the World Customs Organization (WCO).

As well as the abovementioned import tax, the following

taxes are levied on imports:

- IPI: Rates vary from zero%, for basic goods, to 300% for cigarettes. The tax calculation basis for IPI includes import duties.
- ICMS: Rates vary from zero% to 25%. The tax calculation basis for ICMS includes import taxes and IPI.
- PIS and COFINS: PIS and COFINS are charged on the import of goods and services, normally at a combined rate of 11.75%. A credit mechanism can be used to offset the PIS and COFINS liabilities, provided the Brazilian entity operates under the noncumulative system and certain requirements are met. Imports of certain products (mainly agribusiness and pharmaceutical products) benefit from a zero% PIS and COFINS rate.

There are other minor customs fees, including a processing fee of about USD 100.00 for import authorisations, a freight duty that funds the merchant navy fleet – levied at 25% of the freight cost –, as well as miscellaneous harbour and airport charges.

Tax Incentives

In Brazil tax incentives have been provided for decades to promote the economic growth of certain industrial sectors, in the form of government financing, tax exemptions and/or tax relief.

Tax incentives are crucial to encouraging and motivating national and international investors to invest in Brazil and are one way of attracting them in light of Brazil's complex tax system. As a result of these incentives, which will be discussed in more detail below, companies are in a better position to manage their investments, both financially and strategically.

Tax incentives can be offered at federal, state and municipal level in the most diverse sectors and for the most varied purposes.

From a federal standpoint, tax incentive programmes are designed to promote policies to develop local industry, involving measures such as export incentives and capitalisation of local industry. Moreover, state and municipal incentive programmes decisively assist with the creation and growth of regional employment.

States and municipalities normally apply exemptions or prepayments for taxes levied on goods and services, taxes over which they exercise their authority as set forth in the Constitution, so as to help potential investors obtain access to federal programmes. Therefore, before a company chooses where it will build its new plant in a given region, it is advisable that it pay close attention to federal, state and municipal programmes and incentives to determine which tax incentives it can use.

It is important to stress that the Brazilian government frequently revises the incentives provided in terms of their scope, basic approach to tax benefits, categories and tax rates offered. Hence, companies intending to take advantage of local programmes and incentives must always seek to obtain up-to-date information on such programmes and incentives.

In general, governments do not offer cash subsidies to reduce pre-operational expenditures on industrial buildings or equipment; this may occur, exceptionally, at municipal level owing to the organisation and authority established by the Constitution for each Brazilian state, which determines that municipalities are responsible for property-related taxes.

In the following paragraphs, we will provide an overview of the main tax incentives currently available.

SUDAM and SUDENE Income Tax Incentives

SUDAM and SUDENE are both administratively and financially independent special autarchies with the purpose of promoting inclusion and sustainable development in the Northeastern and Amazon regions. These regions encompass the following geographic regions:

- SUDAM: Acre, Pará, Roraima, Rondônia, Amapá, Amazonas, Tocantins, Mato Grosso, Mato Grosso do Sul, Goiás and part of Maranhão.
- SUDENE: Part of Maranhão, Piauí, Ceará, Rio Grande do Norte, Paraíba, Pernambuco, Alagoas, Sergipe, Bahia and parts of the states of Minas Gerais and Espírito Santo.

The Brazilian Federal Government administers both

autarchies and they are affiliated to the Ministry of National Integration. Companies located in the Northeastern and Amazon regions can receive a partial tax exemption of up to 75% on the standard corporate income tax for Brazilian companies.

Eligibility for the concessions depends upon SUDAM and SUDENE's approval of a feasible industrial project for the setup, extension, modernisation and diversification in an economic sector considered to be a priority for regional development.

SUDAM and SUDENE not only evaluate the project in terms of its technical and economic feasibility, but also verify whether the project is appropriate considering the overall economic development needs of the region.

The tax benefit can only used by companies calculating their corporate income tax (IRPJ) and social contribution tax (CSLL) under the Actual Profit methodology, in which the tax base is determined as the accounting profit or loss before tax adjusted by add-backs and exclusions, and is applicable for a reduction of up to 75% of the income tax (IRPJ) due.

Below is an illustrative calculation of the impact of the SUDAM and SUDENE tax benefits:

CIT calculation basis	**BRL**	
Profit before taxes	40.189	(1)
(+) Add-backs pursuant to applicable legislation	32.632	
(-) Exclusion allowed	(2.814)	
(=) Actual profit calculation basis	**70.007**	
(-) NOL offset	(21.002)	
(=) CIT calculation basis after NOL	**49.005**	
Income tax (25%)	7.351	
Income tax surcharge (10%)	4.876	
(-) SUDAM/SUDENE tax incentive	(4.141)	(5)
Income tax due	**8.086**	(6)
Social contribution (9%)	4.410	
Social contribution due	**4.410**	(7)
Total CIT due (Income tax 25% + Social contribution 9%)	**12.496**	(6) + (7)

SUDAM/SUDENE tax incentive	BRL	
Profit before taxes	40.189	(1)
(+) Add-backs pursuant to applicable legislation	14.832	
(-) Exclusions pursuant to applicable legislation	23.058	
Total calculation basis	**31.963**	(2)*(3)
Calculation basis proportional to incentivised operation	**22.130**	(2)
Income tax (25%)	3.319	
Income tax surcharge (10%)	2.202	
Total of federal tax incentive	5.522	(4)
% of tax incentive allowed by legislation (75%)	**4.141**	(4)*75%=(5)

Additional information:

Revenue of SUDAM/SUDENE branch	120.394	69%	(3)
Revenue of other branches	53.498	31%	
Company's total revenue	**173.892**		

Corporate Income Tax deductions

Companies calculating Corporate Income Tax (IRPJ) may enjoy certain tax incentives that are considered deductions from the income tax payable.

These deductions derive from specific programs, such as the workers' meal programme - a programme to improve the nutrition of employees; cultural projects and sports incentive programmes, intended to promote cultural and sports activities; maternity leave extension, where the full compensation of the employee is paid by the government for a period of four months, enabling the deduction of expenditures in full for IRPJ calculation purposes if the company extends maternity leave for another two months.

It is worth mentioning that there are certain particularities, such as individual or combined thresholds ranging from one percent (1%) to four percent (4%), depending on the tax incentives adopted by each taxpayer.

Technological Innovation
(Tax Incentive Law or "*Lei do Bem*")

Tax incentives for technological innovation, popularly known as the 'Tax Incentive Law', are offered to companies investing in technological research, development and innovation. In these cases, technological innovation is defined as the design of a new product or process, or inclusion of new functions or characteristics in products or processes, the results of which lead to an improvement or development and effective enhancement of a company's quality or productivity, resulting in greater competitiveness.

This tax benefit can be used by companies adopting the Actual Profit regime and basically provides for the following incentives:

- Additional deduction for purposes of IRPJ from sixty (60%) to eighty percent (80%) of total expenditure in technological research, development and innovation, provided that they are, or can be classified in the future, as operating expenses.
- Accelerated depreciation in the acquisition year of machinery, equipment, devices and instruments dedicated to and exclusively used in technological innovation activities.
- Accelerated amortisation in the fiscal year they are incurred of expenditures classified as deferred assets relating to the acquisition of intangible assets exclusively associated with technological research, development and innovation activities.
- Withholding Income Tax Exemption - IRRF on remittances to non-residents for purposes of registration and maintenance of trademarks, patents and cultivars (cultivated plant varieties) overseas.
- 50% decrease of Federal VAT (IPI) on machinery, equipment, devices and instruments, as well as the respective spare parts and supporting tools exclusively used in technological research, development and innovation activities.

It is important to mention that tax incentives for technological innovation do not require prior approval. However, taxpayers eligible for the incentive must file the form containing the projects and respective expenditures with the Ministry of Science, Technology,

Innovations and Communications (MCTIC) annually, by July 31 of the following year.

Basic Production Process (PPB)

The Basic Production Process (PPB) is a tax benefit ordinarily offered to Brazilian companies responsible for the production and sale of goods related to a specific niche of the technology sector (IT and automation goods and services). The PPB corresponds to a minimum set of operations carried out at the plant that characterises the effective manufacture of a given product and, to this end, basically consists of the minimum length of the manufacturing stages necessary for the manufacture of the respective product.

The incentive initially targeted the IT industry, and was subsequently expanded to include a large variety of electronic and telecommunication products. The PPB benefit is offered to companies operating projects that have been approved by the Ministry of Science, Technology, Innovations and Communications (MCTIC) and they must annually invest at least (4%) of their gross revenues in the domestic market, deriving from the sale of IT and IT-related communication goods and services, in R&D activities within the country.

The tax benefit percentage rates vary by eligibility period. Their incentives are basically related to Federal VAT (IPI) and State VAT (ICMS) on transactions involving the circulation of goods and provision of interstate, inter-municipal and communication services.

IPI tax relief adopts the following rates:

- Eighty percent (80%) up to December 2024;
- Seventy-five percent (75%) from January 2015 to December 2026; and
- Seventy percent (70%) from January 2027 to December 2029.

Currently, this benefit has been expanded under Provisional Measure No. 810, dated December 11, 2017, which became Law No. 13,674, on June 11, 2018, introducing several changes, including the need for, and mandatory performance of, an annual independent audit to examine the projects submitted for MCTIC's approval.

With respect to ICMS, the benefit varies according to the State in question. Basically, the benefit can be related to a reduction of ICMS levied on interstate transactions, or to a tax credit deferral or exemption, or a "special credit". In the case of the State of São Paulo, SF Resolution No. 14, dated February 7, 2013, determines the purpose of the calculation base reduction for industrial products and electronic data processing, manufactured by an industrial establishment covered by the provisions of article 4 of Law No. 8,248, dated October 23, 1991 (PBB), reducing the calculation base on domestic shipments made by the manufacturing establishment.

IT Law

The tax incentive known as "IT Law", governed by Law No. 11,774, dated September 17, 2008, and Law No. 13,023, dated August 8, 2014, grants IT companies (IT and communication goods and services) investing in the research and development of hardware and electronic components, a partial or total reduction in the IPI rate on the sale of certain products. Products eligible for IPI rate reduction must be included in the Basic Production Process (PPB), which consists of a process that determines the nationalisation level necessary for each type of product, so that it can be considered eligible for the tax incentive.

This tax incentive is given by the federal government to promote investment by Brazilian industry in innovation in the hardware and automation sector.

RECOF (Special Customs Regime for Industrial Establishment under Automated Customs Control) and RECOM (Special Input Import Customs Regime)

RECOF is a Special Regime for Industrial Establishment under Automated Customs Control (the so-called "Traditional RECOF") or the Public Digital Bookkeeping System (so-called "RECOF SPED"). The regime allows the beneficiary company to import or acquire goods in the domestic market with suspended tax payment, provided that those goods are used to manufacture products for export (there are minimum export volume requirements

to be observed).

The regime is very beneficial for exporting companies, as shipment to the foreign market is not taxed and, upon eligibility for RECOF, companies can acquire products with tax payments suspended and will only have to pay taxes on products sold in the domestic market.

The tax payment suspension applies to II (Import Duty), IPI (Federal VAT), PIS (Contribution to the Social Integration Program) and COFINS (Contribution to Social Security Financing).

The Special Input Import Customs Regime (RECOM) is focused on the custom-made manufacture of certain products; it is a regime that is only applicable to imports made by manufacturing companies on the account and order of the legal entity that ordered the product and is domiciled abroad.

RECOM allows imports, without foreign exchange hedge, of car chassis, bodies, parts, pieces, components and accessories that will be used to manufacture products for export and partial sale in the domestic market upon payment of the Import Tax and suspended IPI tax payment; the IPI levied on the resulting products will be payable on the shipment from the wholesale establishment similar to the industrial establishment.

Both regimes provide a specific list of products that can be imported under these systems (mainly car, aircraft and electronic parts). There are numerous requirements that must be met, including strict control over the imported inventory. The biggest advantage of these systems is that the products can be imported without a foreign exchange hedge, that is, the foreign party can maintain ownership of the products and hire a Brazilian importer for production.

REPETRO

REPETRO is a special benefit for the import and export of goods to be used in economic research, exploration and development of oil and natural gas in Brazil. It allows the export of goods without physical shipment from the Brazilian territory and subsequent import to Brazil under the temporary entry regime.

There are basically three types of benefits: (a) import of foreign equipment exempt from II (Import Duty), IPI (Federal VAT),

PIS (Contribution to the Social Integration Program) and COFINS (Contribution to Social Security Financing); (b) import of raw material, parts and pieces to be used in the production of goods to be exported (drawback), and (c) deemed export, which allows Brazilian suppliers of goods to sell such goods to foreign parties with export-related benefits, but with the possibility of keeping the goods in Brazil. This last REPETRO category must be combined with the subsequent temporary import of goods. The benefits from the State VAT (ICMS) – tax on transactions involving the circulation of goods and provision of interstate, inter-municipal and communication services - may also be available, depending on the provisions of the ICMS law effective in the State in which the activities are performed.

This regime is applicable to companies that are authorised or permitted to explore oil and gas in Brazil and their subcontractors. The import process within the scope of REPETRO is complex and provides for specific requirements, such as an online inventory control with the tax authorities.

REIDI

The Special Regime of Incentives for Infrastructure Development (REIDI), established by Law No. 11,488/07, is a special tax regime created to promote the development and implementation of projects in the infrastructure sector. These projects are specifically developed by companies interested in investing in the transportation, port facilities, energy, health and irrigation sectors.

The main tax benefit is the PIS exemption (Contribution to the Social Integration Program) and COFINS (Contribution to Social Security Financing) on domestic and foreign acquisitions. Corporate entities must have a previously approved infrastructure project to be eligible for the benefits. These projects must be approved for the implementation of infrastructure works in the transportation, port, energy, basic sanitation and irrigation sectors.

REIDI benefits will be valid for a five-year period, counting from the approval of the infrastructure project by the competent tax authorities.

RECAP and REPES

The Special Regime for Acquisition of Capital Goods for Companies (RECAP) is an important incentive offered to predominantly exporting companies, which consists of a special tax regime with suspended payment of PIS (Contribution to the Social Integration Program) and COFINS (Contribution to Social Security Financing) on the acquisition of fixed assets.

A predominantly exporting company is one in which the revenues deriving from exports during the previous calendar year are 50% or more of the total gross revenue; it should be stressed that the company will assume a commitment of maintaining such a rate for the two (2) subsequent calendar years.

In turn, the Special Regime for the Export and Service and Information Technology Platform (REPES) is intended to benefit companies specialising in software development and the provision of information technology services.

The incentive is offered in the form of suspended PIS and COFINS payments levied on gross sales revenue, when goods to be incorporated in fixed assets and services are acquired by the eligible company. This incentive will only be offered if the taxpayer exports an amount of 50% or more of the annual gross revenue from the sale of goods and services.

Special ICMS benefits and regimes

As ICMS plays an important role in the majority of companies, despite the benefits set forth in the legislation it is also possible to request a special regime from state governments. A special regime can offer specific ICMS tax benefits that are not necessarily stated in the state legislation.

This is because each State has the authority to regulate domestic ICMS rules, and they aim to attract investments. For this reason, Brazil faces a "tax war" between the States. In order to generate more revenue for the State Government, ICMS benefits are frequently offered in one State without the approval of the CONFAZ (the National Finance Policy Council) which includes the other States.

Consequently, some States are frequently questioning the tax benefits granted in one State without being duly approved, by not accepting tax credits of products originated from other states. The situation is complex and controversial.

Upon publication of Supplementary Law No. 160, dated August 7, 2017, tax incentives unilaterally offered by the States could be maintained, provided that the respective States publish in the respective official gazettes a list identifying all regulatory acts relating to tax or financial exemptions, incentives and reliefs and register and file it with the National Finance Policy Council (CONFAZ). Such legal provisions give more legal security to States and those eligible for the tax incentives.

Therefore, companies should pay special attention to the state incentives and regimes during the process involved in determining their site location.

FUNDAP

The Fund for Performance of Port Activities (FUNDAP), established by Law No. 2,508, dated May 22, 1970, and regulated by Decree No. 163-N, dated July 15, 1971, is a special State incentive consisting of the deferral of the ICMS – tax on transactions involving the circulation of goods and provision of interstate, inter-municipal and communication services - due on imports by trading companies located in the State of Espírito Santo which, in practice, provides a significant financial benefit.

Chapter 7

Labour Law

Employment Law

The Consolidated Labour Laws or Brazilian Labour Code (CLT) of 1943 contains the country's foremost employment law principles. Since then, however, scattered statutes have been passed regarding social security and pension funds, salary adjustments, strikes, unemployment insurance, notice periods, health and safety standards, as well as distinct regulations for certain professions. In addition, the Federal Constitution of 1988 provides workers with rights that supersede some of those in the CLT. Moreover, on November 11th, 2017, a major reform in labour legislation entered into force (Law 13,467/2017) and modified many rules governing labour relations in Brazil. Further revision happened amid the Covid-19 pandemic, with regulations for remote work. Case law also took a central role, filling gaps and providing clarity (or lack thereof) on all these recent changes.

Definition of an Employee

According to the Brazilian Labour Code, an employee is an

individual who performs habitual services for and under the direction of an employer (subordination) while receiving payment (salary) in exchange for the services rendered. Employees are generally regarded as disadvantaged parties, as the CLT rules are designed to provide them with certain rights and protections.

Subordination is an essential requirement of the employment relationship. Accordingly, genuine autonomous workers should be recognised by the Labour Courts as non-employees A contractual arrangement in which autonomous work is performed independently, i.e. without subordination, will not constitute an employment relationship, even if the relationship is exclusive and the services are provided on a regular basis.

In recent months, however, the Brazilian Supreme Court (STF) and Labour Courts have been engaged in a dispute over this issue. On one side, the Labour Courts tend to broadly apply the elements of the employment relationship, leading to a generally restrictive view that most if not all forms of labour outside the CLT are unlawful, requiring their classification as employees. In contrast, STF supported other forms of service provision, such as contracts entered with independent contractors and arrangements under which gig economy workers are paid for their work. Due to this dispute, it has become increasingly difficult to answer the question of what constitutes an employee.

Nevertheless, the CLT rule defining what constitutes an employee remains in effect. So that should be considered the default. As any default, there are other forms of service rendering:

Officers in Brazilian corporations may be an alternative. They could indeed be employees, but they could also be engaged under what we refer as a *pro-labore* arrangement. That would be considered a non-employment relationship governed by the relevant company's bylaws, corporate law and a contract entered into between the parties. Officers with more flexibility are less likely to be considered employees, and vice-versa.

Another alternative way would be independent contractors and self-employed individuals. Under Brazilian law, individuals can form small legal entities to provide services and collect their fees. This is the case for certain healthcare professionals and even software engineers. Agreements entered with these professionals have been

validated by the STF has in some instances.

The gig economy also created a new type of worker who is not governed by the same rules as classic employees. Brazilian lawmakers are currently discussing whether this new relationship should be regulated and to what extent.

The definition of what constitutes an employee is just as important as the definition of what constitutes an employer. According to the CLT, the employer is not only the entity that hires and pays employees, but also its shareholders and affiliates. These persons and entities together are considered an economic group, with each member being jointly and severally liable for any employment matters that may arise.

Employee Hiring Procedures

Brazilian nationals may be hired as employees by companies incorporated in Brazil without prior authorisation. As for foreign employees, they must obtain a residence authorisation (introduced by the New Migration Law - Law 13.445, dated May of 2017) before applying for a temporary visa from the Ministry of Justice.

Every employee must have a Labour and Social Security ID Card, which must be presented to the employer at the time of the admission. Upon hiring, the employee must undergo a medical examination and submit other personal documents.

It is unlawful to discriminate against potential employees on the basis of gender, ethnicity, colour, marital status, family situation or age.

Employee Agreements

Individual labour agreements may be set forth in writing or implied from the work relationship or service rendered between a person and a company. Employers and employees may freely negotiate labour agreements, provided, however, that the provisions of the law and the terms and conditions of the collective bargaining agreements, if any, are followed.

Duration of Individual Employment Contracts

It is permissible for an employment contract to be either indefinite or fixed, although the latter is only permitted in specific circumstances.

Employment contracts generally have an indefinite term, i.e. if they are expressly stated in a contract or do not stipulate a term.

In addition, labour laws provide for intermittent work arrangements between employers and employees, through which employers pay employees only for the hours they work, excluding inactive periods from being considered 'work'. As the contract does not specify minimum working hours, employers are able to hire staff on a sporadic basis and pay them solely for the time in which they provide services.

Unions

Although the Federal Constitution of 1988 provides that unions must be established and organised without State interference, excluding the requirement for prior authorisation, it also establishes that only one local union may be recognised for each economic category (company union) or professional category (trade union). However, once enacted, the terms and conditions collective bargaining agreements signed between unions apply not only to their affiliates, but also to all their employees and companies they represent.

Under the Brazilian legal system, collective bargaining agreements are contracts negotiated between employers' unions and workers' unions, or between the employees' labour unions and a specific company, for the purpose of establishing general and normative rules governing the relationship between employers and employees.

Collective bargaining agreements will prevail over legal rules, including the Consolidation of Labour Laws (CLT), when their subject concerns: (i) working hours; (ii) time off in lieu of overtime; (iii) breaks; (iv) employee representatives in the workplace; and (v) remote work and intermittent work (zero-hour contracts), among

other topics. Under the law, certain rights are expressly non-negotiable, including basic employment rights and workplace health and safety matters, among others.

According to the labour reform of 2017, union dues are not mandatory for those who are not affiliated with a union. However, in October 2023, the Supreme Court allowed unions to establish a fee in their favour through Collective Bargaining Agreements called Assistance Contributions, provided that employees were given the right to reject its payment. The fee must be paid by those who do not object, even if they are not unionised.

Remuneration and Minimum Salary

Except for commissions, salaries must be paid at least monthly and in Brazilian currency. Employees are entitled to receive a '13th Salary' per year, corresponding to one monthly salary.

As part of the remuneration, however, employees may receive benefits in kind, such as housing, food and clothing.

In addition to the employee's fixed salary, remuneration may include commissions and legal benefits (such as the 13th salary, among others). According to the Labour Reform, amounts paid as allowances, travel grants and bonuses are no longer part of an employee´s salary (as they were under the former regime) and thus will not be included in the employment contract, nor will they be eligible for labour or social security tax deductions.

In general, the employee's salary cannot be reduced, except in a few limited circumstances provided by law.

Brazilian law guarantees all workers a minimum wage equivalent to BRL 1,518 (approximately £199). Collective labour bargaining agreements may entitle a minimum wage for a specific class of workers.

Employees earning more than BRL 2,259.20 (approximately £296) are required to pay income tax on a sliding scale ranging from 7.5% and 27.5%. The employer withholds income tax from the employee and pays the tax authorities directly.

Social Security and Additional Contributions

In order to ensure the payment of retirement salaries, sickness, accident and disability compensations, maternity leave, family allowances, funeral assistance, medical, dental and hospital care through the Unified Health System (SUS), all employers and employees are required to pay monthly contributions to the National Institute of Social Security (INSS). Additional contributions are required to fund educational programs aimed at enhancing professional skills and supporting businesses, as well as promoting activities that improve the well-being of workers.

In general, employers are required to pay 28% of their monthly payroll for social security and additional contributions.

Employees are assigned percentiles that vary between 8% and 11% of their monthly remuneration, with a maximum contribution of BRL 951.62 (approximately £124.70) per month.

Salary Increases

A negotiated collective bargaining agreement may establish a percentage increase in annual salaries that employers must apply their employees' salaries.

Other salary increases based upon merit or promotion may be freely negotiated by employers and employees.

Working Hours

The regular working period may not exceed 8 hours per day or 44 hours per week, unless, pursuant to an individual contract between the employer and the employee or a collective bargaining agreement, additional hours worked on one day are offset by a reduction in those worked on another day, provided the total work hours does not exceed ten hours per day.

If the workday is longer than four hours but less than six, there must be a fifteen-minute rest and meal break between each shift. For workdays of over six hours, a minimum interval of one hour is

required. The 2017 labour reform introduced the possibility of reducing the aforementioned interval to thirty minutes through a collective bargaining agreement.

Employees are also entitled to a weekly rest period of 24 hours, preferably on Sundays.

Overtime compensation must be at least 50% greater than compensation for regular work hours.

Holidays and Leaves of Absence

After each 12-month working period, an employee is entitled to 30 consecutive days of vacation, which must be taken within the next 12 months. In addition, the employee is entitled to receive a vacation bonus equivalent to one-third of their salary.

There is also a 120-day maternity leave policy. The National Institute of Social Security reimburses the employer for the salary paid while on maternity leave. Five days of paternity leave are granted.

Terminations

Employees, with the exception of a few cases in which they are entitled to protection, may be terminated without cause at any time upon a minimum 30-day notice (plus three extra days per year of employment). Employers can pay employees outside of the applicable notice period.

Employees terminated without cause are entitled to the following severance package: (a) the balance of his or her pay; (b) the corresponding payment for vacations not yet taken; and (c) a proportionate Christmas bonus equivalent to the number of months they worked during the calendar year. In the event of fixed-term agreements being terminated without cause, the terminating party must pay damages in the amount of 50% of the compensation established for the remaining term of the agreement. Termination of contracts with an indefinite term requires at least thirty (30) days' notice, or payment in lieu of notice and a penalty equal to 40% of the balance of the Government Severance Indemnity Fund for Employees (FGTS).

An employee may resign at any time by giving written notice to the employer (at least 30 days). Employees who resign are entitled to accrued benefits, but not to the FGTS 40% additional contribution.

Employer and employee can terminate under a mutual agreement. If this is the case, the notice period is shortened in half (at least 15 days) and the employer pays 20% of the FGTS. The employee is than able to cash out 80% of the funds in the FGTS.

Brazilian law also lists certain cases where an employee can claim constructive dismissal. They are: (i) the employee is assigned to tasks (a) out of the scope of the services they render; (b) that require more skills or strength than the employee actually possesses; or (c) which are immoral or in breach of the law; (ii) the employee is harassed, bullied or discriminated against; (iii) the employer frequently fails to pay salaries, benefits or breach terms under an employment agreement; (iv) the employee is subject to serious danger while on duty; (v) personal injury, defamation and other torts; or (vi) if the employer reduces the employee's salary or work in a manner that adversely affects their compensation.

Furthermore, Brazilian law also lists certain circumstances in which an employer may terminate an employee without cause (in which case employee may only be entitled to outstanding compensation and benefits, as well as compensation for unused vacation days). These are the statutory just causes: (i) misconduct (fraud); (ii) misbehaviour or harassment; (iii) direct or indirect competition with the employer or serious conflict of interest; (iv) a criminal conviction; (v) gross negligence; (vi) ongoing alcohol/drug abuse or (once if on duty); (vii) breach of trade secret; (viii) breach of employer policies or employment agreement; (ix) abandonment of job; (x) personal injury, defamation or torts against a colleague or a supervisor; (xi) constant gambling; and/or (xii) acts detrimental to national security.

Employees who have attained the temporary protection against termination, either by law or by collective bargaining agreement (such as a union leader, an expectant mother or an employee who has been absent from work due to a work accident), may not be terminated. Those with employment stability may only be dismissed with just cause under the Brazilian Labour Code.

Government Severance Indemnity Fund for Employees (FGTS)

The FGTS is a public sponsored severance plan. Employers contribute eight percent of all compensation paid to its employees to individual accounts. Deposited funds may only be withdrawn in special circumstances, such as termination, retirement, real estate purchases and death.

Employers are required to pay employees an amount equivalent to 40% of the account balance upon dismissal without cause.

Immigration and Expatriate Rights

The Brazilian Immigration System

Brazilian legislation experienced great success in 2017. Not only was the Brazilian Consolidation of Labour Laws ("CLT") extensively reformed, but immigration legislation also underwent its biggest change since 1980 as the Foreigner Statute (Law No. 6,815/80) was repealed and the Migration Law (Law No. 13,445/2017) was enacted.

Large companies and civil organisations dedicated to helping immigrants have sought to modernise the Foreigner's Statute, as it was a law that had a more protective bias towards the national territory, greatly bureaucratising the immigration process, and being out of step with the globalisation process that began in the 1980s. The current Migration Law is more aligned with current times where the flow of visitors, immigrants and foreign manpower is on the rise. In Brazil, the massive presence of multinational companies, the explosion of "start-ups" incorporated by foreign nationals and the possibility of foreigners working remotely for Brazilian companies – especially after the Covid-19 pandemic – made it necessary for visas, residency permits and legalisation of the immigration status of irregular foreigners to be more flexible and less bureaucratic.

The new law is governed by important principles, including the Principle of Non-Criminalisation of Immigration, Repudiation of Xenophobia, Document Regularisation and Repudiation of Collective Expulsion or Deportation. As a result of these principles, the most relevant practical outcome for Brazilian immigration policy is the possibility of legalising an irregular migration status without leaving the country.

In this same spectrum, another important change to the law was the enactment of the possibility of obtaining a so-called "residence". Although a **visa** is a document issued by consular offices abroad allowing foreign citizens to enter Brazilian territory, **residence** allows the applicant to obtain the same effects of the visa even if their immigration status is irregular. In other words, a foreigner in Brazil with a tourist visa can apply for residence for work purposes, without the need to leave Brazil and collect the visa at a consulate abroad, thus carrying out the procedure internally before the competent authorities.

Brazilian immigration is controlled by the Ministry of Justice and Public Security, the Federal Police (which is a body of the Ministry of Justice) and the Ministry of Foreign Affairs.

The visa policy for Brazil considers the "principle of reciprocity", which is quite straightforward: when a country requires a Brazilian citizen to hold a visa for entry and stay in its territory, their citizens must also display a certain type of visa according to the reason for entry or stay in Brazil.

In 2018, this principle was mitigated, allowing US, Canadian, and Australian citizens to enter Brazil for tourism and business (visitors), although Brazilian citizens require visas to enter such countries. From 10th April 2025, however, citizens of these countries will once again need a visa to enter Brazil.

Currently, the country has bilateral agreements with more than 90 countries for visa exemption. This exemption is determined by the Brazilian authorities, always under a reciprocity regime, according to the provisions of the current Brazilian migration law. However, as the authorities themselves warn, this regime may be altered at any time and without prior notice.

For information about the countries that hold bilateral relations with Brazil and those in which Brazilian citizens can enter

without needing a visa, as well as a list of Brazilian consular offices abroad, visit the Ministry of Foreign Affairs website at: https://www.gov.br/mre/pt-br/assuntos/portal-consular/vistos/QGRVsimplesing04JUN241.pdf .

As a rule, the request for a visa or residence in Brazil requires meeting three basic requirements: submitting a specific form, a valid passport and payment of the applicable fees.

Visas are classified according to the purpose of the trip and the foreigner's interest in staying in Brazil. It is crucial that the concerned party knows which visa is suitable for their entry and stay in Brazil. Unsuitable visas may result in denial of entry or deportation.

Specific documents are required for each type of visa and, in certain cases, depending on the region, you may also have to submit an international immunisation certificate. One of the documents required in certain situations is a letter of invitation.

It is the National Immigration Council (CNIg) that regulates migration policies and grants visas and residence to foreigners, a collegial body that is a deliberative, normative, and consultative body within the Ministry of Justice and Public Security.

CNIg was initially created by the Foreigner Statute and maintained by the new Migration Law. CNIg is composed of representatives from federal agencies, industry and union representatives, as well as representatives from civil society.

CNIg regulates the Brazilian labour immigration policy through the issuance of Normative Resolutions. Each Normative Resolution regulates a specific type of visa or residence, providing the list of documents required. Applying for a visa/residence is 100% electronic, using a Federal web-based portal.

The Federal Police - the body that controls migration at Brazilian borders - cannot authorise the entry of a foreign citizen into Brazilian territory without a correct visa, when one is necessary.

Foreign citizens do not have a right to enter national territory simply because they have a visa. The border control police at airports, ports or any other border are responsible for assessing whether a foreign citizen complies with minimum requirements for entry. Individuals who have already entered the country with the

appropriate visa may also request extensions of their stay or residence permits from the Federal Police and the Ministry of Justice. Visa applications for work or scientific research on Brazilian territory are handled by the Ministry of Justice.

Types of Visas

Under current Brazilian immigration rules, foreign nationals may apply for the following types of visa:

- Visitor;
- Temporary;
- Diplomatic;
- Official;
- Courtesy.

Visitor Visa

The new Migration Law made a substantial change regarding the classification of visa types for Brazil. The visa categories were reduced to five, and some of the subcategories were changed, with the current categories being: visitor, temporary, diplomatic, official and courtesy visas, which may be expanded by new regulations.

The Visitor visa category has not changed much, being a temporary visa, with the subcategories established as: Tourism, Business, Transit, Artistic or Sporting activities. The Visitor visa is designed for people travelling for a short period of time and does not allow remuneration in Brazil (with some exceptions, such as brief artistic events).

Visitor visas are granted for 90 days, but can be extended for another equal period not exceeding 180 days in one year (once again, depending on reciprocity rules). It is important to highlight that the Brazilian authorities have the power to reduce the 90-day period if they consider there is a relevant circumstance.

The **Tourism visa** is issued for visiting purposes.

The **Business visa** is issued if the visitor will undertake

activities including participation in meetings, fairs or corporate events, provide journalistic, film or reporting coverage, prospect business opportunities, sign contracts, conduct an audit or provide consultation, or operate as an aircraft or vessel crew member.

The **Transit visa** is only for those travelling through Brazil to another country.

The **Artistic or Sporting Activities visa** is issued for artistic and sporting activities and will not exempt its holder from the need to obtain authorisation and registration with the Ministry of Justice to perform artistic activities. This visa also extends to technicians working at shows and other professionals who, on an auxiliary basis, participate in the activity of the artist or sportsperson.

The Ministry of Foreign Affairs will communicate with the Ministry of Justice in relation to visiting visas issued for artistic or sporting activities, for auditing and consulting, or for acting as a vessel's employee, and will state the financial sums to be received by the visitor.

Regarding the remuneration for those within this category, the Immigration Law allows only the payment of daily allowances, artists' pay cheques, compensation, or other travel expenses.

The visitor's visa may be incorporated into a residence permit or an official or courtesy diplomatic visa in national territory, provided that the visitor fulfils the requirements established by law.

Temporary Visas or Residence

Temporary visas or temporary residence are granted for foreign nationals who are willing to establish residency in Brazil during the visa duration, provided they can be classified under any of the following categories:

- *healthcare;*
- *humanitarian;*
- *student;*
- *work;*
- *working-holiday;*

- *as a minister of a religion or as a member of a monastery (or similar) or a congregation or religious order;*
- *voluntary work visa;*
- *investor visa;*
- *family reunification;*
- *artistic or sporting activities visa;*
- *due to international agreements;*
- *other provisions according to the Brazilian immigration policy.*

Health Care: Granted to people visiting Brazil for private health treatment provided s/he can prove having the financial resources to support themselves in Brazil. The visa is valid for up to one year.

Humanitarian: Granted to stateless people or nationals of countries suffering severe institutional instability, armed conflict, natural disasters, human rights violations, or other international humanitarian violations. The length of the visa depends on specific regulations issued by the Brazilian Government in each humanitarian situation.

Student: The Brazilian government may award a temporary one-year visa for a foreign citizen who wishes to travel to Brazil as a student, either to attend a regular course, an internship, or a study/research exchange programme.

Nevertheless, due to its nature, this visa cannot be used for immigration or professional activity. As professional activities are prohibited, students who do not comply with this rule may be subject to a fine or, as a last resort, deportation.

To pursue education in Brazil, a foreign citizen must be accepted by the educational establishment and granted a student visa. A visa is only granted upon presentation of the document verifying approval or enrolment in the school or university. One of these documents is an acceptance letter.

The student visa permanency period is one year, which may be successively extended for an equal period, in order to allow attendance for the full duration of the chosen course in Brazil.

Extension requests must be submitted to the Federal Police

or subject to the Ministry of Justice's general protocol, thirty (30) days before the termination of the ongoing period of stay.

The student must communicate any course changes, transfers to another institution, or any other changes to the original visa conditions when he or she requests an extension.

Upon the initial issuance of the temporary visa ('IV'), also known as ITEM IV, the concerned party is required to enter Brazil within three (3) months after it has been granted.

Within thirty (30) days of arriving on Brazilian territory, the student must register with the Federal Police Department in their area of residence. Citizens who wish to study in Brazil may choose from a range of opportunities:

a) **Diverse courses:** primary and secondary school, technical or language courses;

b) **Graduation**: with the specific documents and proof of graduation from secondary school or equivalent; a student who wishes to attend a graduation course in Brazil must pay attention to the schedule and demands of each university's selection process. Some universities select foreign citizens according to their entrance examinations, whilst others have programmes to receive foreign citizens, and these may adopt a special selection process.

c) **Post-graduation:** besides the specific documents, you should also submit proof a higher education course or equivalent;

d) **Exchange programme:** for students aged between 15 and 18. Exchange programmes are normally managed by educational companies, associations or organisations. In such cases, the entity organising the exchange programme is responsible for the student's selection and enrolment in Brazilian schools. The student is not required to speak Portuguese. Generally, exchange programmes envisage a learning period of the national language, either in their country or in Brazil.

e) **PEC-G or PEC-PG participant:** this is a student programme arranged through an agreement and, exceptionally, the visa request is made in Brazil by the educational institution with the concession authorisation being communicated to the Consulate at a later date. In this case, the concerned party must prove their

participation in a selection process, as well as submit a certificate of participation in the programme. The PEC-C is managed by the Ministry of Education and Ministry of Foreign Affairs, in partnership with the educational institutions participating in the programme, focused on developing countries. The selection process occurs annually in September and applications must be submitted to Brazilian embassies or consulates. It is possible to indicate two course options and two residence options.

The PEC-PG programme is designed for university professors, researchers, professionals or holders of a higher education degree from developing countries that hold agreements with Brazil.

There is also a programme called **Foreign Visiting Teacher (PVE)** which supports foreign teachers invited to pursue doctorate courses at Brazilian institutions.

f) **Religious Student:** for ministers of a religious belief; member of a confessional or devotional institution or monastery (or similar); or members of a congregation or order - besides the general documents, the concerned party must always submit a proof of acceptance from the religious education institution.

g) **Curricular Internship:** this is an educational act with a professional aspect since, besides studying, it allows for an internship with private or public legal entities. There must be no incompatibility. In this case, the student may receive a grant and all benefits provided by Brazilian internship laws. This is the only modality that allows an extension of the stay period.

Work

This visa (or residence, if the applicant is already in Brazil) is granted for labour activities under an existing job proposal which usually requires a formal employment relationship in Brazil.

Temporary residence under a work visa may be granted for up to two years, which may be extended for an indefinite period.

A working visa under a formal employment relationship requires: (i) a job offer under an employment agreement subject to Brazilian Labour Legislation, either by a Brazilian company or

individual (in the event of domestic employees); (ii) the employment agreement may last for a fixed or indefinite period; (iii) the employee must prove professional or academic qualifications which are compatible with the job position in Brazil, and which may be assessed by means of a certificate of technical, bachelor or post graduate studies OR at least 12 years of primary education along with four years' experience in a job position which does not require technical, bachelor or post graduate studies OR three years' experience in artistic and cultural activities. The requirements above do not apply to domestic employees, who can also apply for a work visa under an employment contract.

A working visa without a formal employment relationship with a Brazilian company may also be granted for the following activities: (i) services or technical assistance for the Brazilian Government; (ii) services rendered under an agreement of international cooperation; (iii) services or technical assistance for private companies; (iv) representatives of foreign financial institutions or similar companies; (v) representatives of foreign private non-profit organisations; (vi) professional training of overseas employees in Brazilian branch, subsidiary or head offices; (vii) employees of international vessels; (viii) trainee and professional internships; (ix) employees of foreign television broadcast companies, newspapers, radio stations or magazines; and (x) auditors and consultants. The length of the visa varies from one to two years, depending on each category, and may be extended for the same period of time as the first visa granted.

Minister of religious confession or a member of a monastery (or similar) or of a congregation or religious order: for those visiting Brazil to provide religious assistance without an employment relationship in the country.

Voluntary work visa: granted to those willing to perform voluntary and non-paid work for non-profit organisations.

Investment: It is very important for Brazil to obtain economic cooperation designed to develop new technologies and promote job creation.

In recent years, investments in Brazil have grown in several sectors: agriculture, mining, manufacturing, general services, infrastructure, renewable energies and, lately, digital technology.

Brazil is proud of the dimension of its market and a tradition that equally incorporates foreign and national investors. There are opportunities for cooperation and investment in Brazil, and foreign companies and investors are willing to participate in government programs and auctions addressing these needs.

It is also necessary to submit a labor visa/residence application before the Ministry of Justice in order to obtain an investment visa (or residence) in Brazil. There are two types of applications:

Temporary visa for immigrants intending to invest in Brazilian companies using their own funds from abroad (Normative Resolution N. 13/2017)

According to law, these visas are issued for projects that can create jobs or income in the country, and they may be obtained in one of three ways:

1. through an external investment directly in a Brazilian company, regulated by the Brazilian Central Bank;
2. with the incorporation of a simple or corporate company in Brazil;
3. through other possibilities provided for in foreign investment policies.

An immigrant's prior residence permit shall be granted based on proof of investment, defined as:

- in foreign currency, at a sum equal to, or greater than, R$500,000.00 (five hundred thousand reais), through the submission of an Investment or Business Plan.
- in an amount lower than R$500,000.00 (five hundred thousand reais), provided that it is not lower than R$150,000.00 (one hundred and fifty thousand reais), for an entrepreneur to establish themselves in Brazil with the aim of investing in innovation and basic or applied research activities, of a scientific or technological nature, always considering, in this case: the originality, relevance, impact and technical innovation aspects.

The Investment or Business Plan is always required for the authorisation of residence for an individual foreign investor. The investment plan must be executed over a period of three (3)

years and include the following topics:

a) business definition, with the indication of the sector, description of the service and term for the activities;

b) the purpose of the enterprise: clarifying the importance of the investment for the region and economic sector; including the technologies and services involved, as well as the partnerships and strategies for business development;

c) job creation: with a hiring plan relating to the first three (3) years.

Furthermore, the investment must be accompanied by documents stating the articles of incorporation or the beneficiary company; evidence of the external investment through the Central Bank system. The Ministry of Justice may still require other documents or even due diligence for proof of presence. The residence period has no term.

(I) Temporary visa granted to an administrator, manager, director or executive immigrant with management powers, who is travelling to the country to represent a commercial company or business conglomerate, who makes an external investment in a company incorporated in the country (Normative Resolution No. 11/2017)

In order for this type of temporary visa to be granted, the executive must be working in accordance with a contract duly registered with the competent authority. Prior to the issuance of the visa, the residence permit should be requested from the Ministry of Justice, safeguarding cases defined in the National Immigration Council resolution. The residence permit does not automatically grant a visa. If a member is assigned to serve on the Board of Directors, Advisory Board, Executive Board, Consultative Committee, Audit Committee, or any other statutory body in an insurance or capitalisation company or an open private company, the Private Insurances Office - SUSEP must approve the immigrant for that position. As a condition of the assignment of a manager with general representation to a financial institution or other institution that is authorised by the Brazilian Central Bank - Bacen - the petitioner must provide Bacen with a letter of approval of the immigrant's assignment.

When assigning a legal representative to a foreign company offering air transport and ancillary services, the petitioner must provide the immigrant with a power-of-attorney granting him/her powers, as well as the National Agency of Civil Aviation's acceptance letter of the representative's assignment in Brazil.

The visa/residence application must be accompanied by the following documents:

a) the Administrator, Manager, Director or Executive assigned to the project must submit to the Central Bank a specific document proving that the investment has been integrated into the beneficiary company or an exchange contract issued by the bank that received the investment in the amount of R$600,000.00 (six hundred thousand reais), or

b) evidence of the external investment in an amount equal to, or greater than, R$150,000.00 (one hundred and fifty thousand reais) by the Administrator, Manager, Director or Executive assigned, under the same prior conditions, and creation of at least ten new job within two years of the incorporation or appointment of the Administrator, Manager, Director or Executive; or

c) in the case of investment by a legal person not residing in Brazil, regarding the application of external resources through the Equity Investment Fund (FIP), the petitioner must submit: evidence of appointment of the person who will represent the legal entity (person who will receive the visa) the act of appointment of the person who will represent the legal entity (person who will receive the visa); proof of foreign capital participation and of a transfer corresponding to one of the above-mentioned amounts, beside other documents requested.

The residence period deferred in the permit shall always be without a specific term and the requesting company must notify the Ministry of Justice if the administrator, manager, director or executive has withdrawn, transferred to a company outside of the same group or is even able to join functions, provided that a new residence permit is granted to

accommodate these changes. In addition, national capital companies with international branches who hire immigrants as administrators, managers, directors, or executives must fulfill all other documentation requirements, including the submission of a power-of-attorney granting the immigrant powers, as well as the approval letter of the appointment of the representative in Brazil or his/her alternate.

Family Reunion Visa

This type of visa and/or residence permit for the purpose of family reunion will be granted, among other circumstances, to an immigrant who has a Brazilian spouse or partner; to the child of an immigrant; or to an immigrant who has a Brazilian or immigrant child to whom a residence permit has been granted; to the first or second degree relative of a Brazilian or immigrant who has a residence permit; to those who have a Brazilian under their care or guardianship; and to the sibling of a Brazilian or immigrant with a residence permit, as long as economic dependence is proved.

The application for a temporary visa for meeting purposes will have a maximum validity period of one year, which cannot be mistaken for the period of residence. In cases where the marriage between the foreigner and the Brazilian spouse was made by proxy, a visa will not be granted.

An immigrant with a temporary visa for family reunion must register with the Federal Police within 90 days of entering the country for the purpose of registering the term of residence.

The holder of a residence permit based on family reunion may undertake any activity in the country, including paid work, under the same conditions as Brazilian citizens, in accordance with the law.

The residence permit may be granted to a person who has previously obtained Brazilian citizenship and does not wish or qualify to reclaim it. In this case, a residence permit may be granted for an indefinite period.

An immigrant or visitor who is in the country and who wishes to apply to regularise their immigration status based on family reunion

may apply for a residence permit at one of the Federal Police units.

Artistic or Sporting Activities

This type of visa or residence may be granted to foreign nationals who are visiting Brazil to participate in exhibitions, shows, artistic presentations or meetings, sports competitions or other similar activities, with the intention of staying in the country for a period exceeding ninety days. This visa is applied to all ancillary staff required to perform the artistic or sport activities.

International Agreements

Future bilateral or multilateral international agreements related to immigration in which Brazil is engaged.

- MERCOSUR Visa

  The Mercosur Residence Visa agreement is valid for: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru and Uruguay.

  The application for a residence visa must be made at the Brazilian Consular Office in the country where the foreigner is staying, when no work or study visa is required. If the foreigner is in Brazil, they should report to the Federal Police to apply for a temporary residence visa based on the Agreement. The process to obtain the residence permit provided for in the Mercosur Residence Agreement begins with the granting of a temporary residence visa of two years' duration. It is consequently converted into permanent residence. Ninety (90) days before the two-year period ends, the foreigner should request the change from temporary residence to permanent residence.

  A foreigner who benefits from the Mercosur Residence Agreement has equal civil rights in Brazil. Employment and social security duties and responsibilities are also protected, as is the right to transfer resources, and to name, register and grant nationality to the children of these immigrants.

Application to Become a Brazilian Citizen – Naturalisation

A foreign national will have four options under which they may apply for Brazilian nationality: ordinary naturalisation, extraordinary naturalisation, special naturalisation, and provisional naturalisation.

- **Ordinary naturalisation** may be requested by foreigners of any nationality provided they have legal capacity, in accordance with Brazilian law; at least four (4) years residence in Brazil; ability to communicate in Portuguese; no criminal record or proof of rehabilitation. Portuguese-speaking countries must have uninterrupted residence in Brazil for one year. Foreign nationals with a Brazilian spouse or a Brazilian offspring must have uninterrupted residence in Brazil for one year.
- **Extraordinary naturalisation** can be requested by foreigners of any nationality or migration status, as long as they have lived in Brazil for more than 15 years without interruption and without criminal convictions.
- **Special naturalisation** may be granted to a foreign spouse or partner who has been in a relationship with a Brazilian national for more than five years, to a member of the Brazilian Foreign Service in activity, to a person in the service of Brazil abroad, or to a person who is or has been employed in a Brazilian diplomatic mission or consular office for more than ten uninterrupted years.
- **Provisional naturalisation** may be granted to an immigrant child or adolescent who has established residence in Brazil before the age of ten. Naturalisation must be requested by their legal representative.

Other Requirements

Beyond the visa/residence permit, there are other legal requirements needed to legalise the immigration status of a foreign national in Brazil:

(i) Registration of the foreign national with the Federal Police to obtain his/her Brazilian Identity Card for Foreigners ("RNM");

(ii) Enrolment with the Individual Taxpayers' Registry ("CPF"); and

(iii) Obtaining his/her Employment Booklet ("CTPS"), which currently is only issued electronically, as the case may be.

Digital Nomad Visa

In view of the significant changes to the work structure triggered by the Covid-19 pandemic, the National Immigration Council issued Resolution No. 45, on 9th September 2021, setting out rules for "digital nomads" in Brazil, defining these as immigrants who, remotely and with the use of technology, can perform his/her work activities for a foreign employer while in Brazil. Specific temporary visas and residence permits may be granted for this type of immigrant.

Expatriated Brazilian Citizens

For Brazilian employment law purposes, an expatriate is a Brazilian individual who, at the request of his/her employer, resides temporarily (over 90 days) or permanently in a country other than the one where he/she was initially hired to carry out their work (even though foreign nationals with a work visa for Brazil are commonly known as "expatriates", too).

In Brazil, expatriate employees are governed by Law No. 7,064/1982, which regulates the status of workers hired in Brazil or transferred by their employers to provide services abroad.

In order for the transfer to be characterised as expatriation, pursuant to Law No. 7,064/82, one of the provisions set out in its 2nd Article must be observed, namely: (I) the employee is assigned to work abroad, based on an employment agreement that was being carried out in Brazilian territory; (II) the employee is assigned to a company based abroad, to work in a foreign country, as long as the employment relationship with the Brazilian employer is maintained and (III) the employee is hired by a company based in Brazil to work abroad at its service.

The foreign company which will be responsible for the

transferred employee, must ensure that, regardless of compliance with the legislation of the place where the services are performed, the rights provided for by Law No. 7,064/82 and Brazilian labor protection legislation are observed, unless contrary to Law No. 7,064/82. Brazilian legislation also applies regarding social security and severance fund deposits, proportional to the employee's remuneration.

In addition to these above-mentioned rights, it is important to clarify that for Brazilian expatriate employees an additional transfer premium of 25% (twenty-five percent) or another (higher) percentage adjusted in the agreement between the parties is due, without prejudice to other Brazilian employment law entitlements, such as Christmas bonus (13th salary), vacation + vacation bonus, severance fund deposits, life and personal accident insurance, as well as other rights provided for in the CLT.

Stock Option Plans

Stock option plans in Brazil became more frequently used in the 1990s, when large-sized multinational companies started to offer their employees the opportunity to acquire some of the company's shares after a certain length of their employment contract. Nevertheless, up to the present day, there has been no labour legislation, nor any social security legal document that specifically governs stock option plans in Brazil.

Hence, companies and employees are free to stipulate, through specific agreements, the description and conditions of the plan, the employees eligible to participate, the respective costs and related benefits, along with the time limit for the employees to exercise their options, among various other conditions.

Generally speaking, the stock option plans granted by Brazilian companies vary greatly and follow specific structures used by their parent companies all over the world. Moreover, it is possible to note that many publicly traded Brazilian companies are also offering stock option plans to their employees.

It is worth mentioning that Labour Courts in Brazil are extremely protective towards employees. As such, and with very few

exceptions, judges and inspectors apply the principle "in dubio pro operario" when deciding on labour disputes. In other words, if any doubt remains regarding a particular situation, the interpretation most favourable to the workers' health and safety perspective must prevail.

This is the context in which the following comments on whether any benefits gained by employees through stock option plans may be categorised, or not, as salary under the framework of Brazilian labour law.

According to article 457 of the Brazilian Consolidated Labour Laws, along with the fixed wage amount, other payments regularly provided to the worker by the employer as consideration for the services rendered must also be considered as salary. Nonetheless, according to the Labour Reform, amounts paid as allowances and travel grants are no longer part of the employee´s salary, and thus will not form part the employment contract, neither be considered for labour and social security calculation basis.

In this regard, the usual interpretation of the Brazilian Labour Code stipulates that in the absence of any correspondent cost supported by the employee to regularly receive a specific advantage arising from the employment contract, the advantage in question should be considered as salary. This means that if the employee receives a benefit in the form of free shares or stock options (not paying anything for these shares or stock options), the financial gain obtained by the worker in the form of dividends, or especially as proceeds coming from the sale of shares, will be seen as salary and not as the outcome of a commercial transaction.

It is possible, though, to identify a chargeable nature in the transactions deriving from stock option plans whenever the beneficiaries, while exercising the option granted, actually purchase the shares, using their own money, at a fixed value, based upon defined trading criteria, which are not depreciated as to the market value relevant at the time the options were granted.

Another parameter inferred from the rules comprised in the Consolidated Labour Laws, which has served as a basis for interpreting the nature of stock option plans offered to employees in Brazil, is the presence - or absence - of risk.

The Brazilian Labour Code provides that "An employer is regarded to be any business entity, individual or collective, that, while

assuming the risks related to the economic activity, hires, pays and directs the personal rendering of service executed by an individual" (Article 2).

Therefore, in relation to stock option plans, the interpretation rendered by the Brazilian Labour Courts establishes that the benefits granted are to be considered as salary if the employer bears all the risks of the share's performance and guarantees a future profit in favour of the employee, regardless of the market variations or the company's capital. In summary, when the employer assures positive results to the employee in connection with shares or stock options, these results will be deemed as salary for any and all intents and purposes.

In addition to the abovementioned points, if employees do not participate voluntarily in the stock option plans, the program will probably not be seen as a commercial contract; on the contrary, it will most likely be qualified as compensation for the work performed. Hence, the employees must state their actual intention to participate in the stock option plan in writing, in addition to granting authorization (also written) for discounts to be made from their payslip associated to the investment.

It is worth noting that, according to Brazilian Law, if benefits arising from stock option plans are assumed as salary, they will be considered as part of the basis for labour and social security calculations, and will also influence paid vacation + 1/3 bonus, 13th salary, severance pay and the Government Severance Indemnity Fund for Employees ("FGTS") - equivalent to 8% of the salary amount.

In spite of the aforementioned context, the Brazilian Labour Courts have been frequently ruling to recognise stock option plans as commercial transactions instead of salary payment, provided that: (i) the employee actually pays for the benefits received in consequence of the stock option plan; (ii) the stock option plan has been subject to the risks of the market as well as to the financial performance of the company. Thus, stock option plans with the actual characteristic of granting the employee beneficiaries the opportunity to invest in the stocks of their employer (company or economic group), even if the offer in question is different from those for regular investors in the market, have not been recognised as salary payments.

Brazilian labour law is distinct from the legislation that rules

social security contributions and withholding income tax calculated on salary paid to employees. As such, in addition to analysing the Consolidated Labour Laws, one should also analyse Brazilian tax legislation, in order to determine which sums paid through stock option plans should be taxed for payroll taxes purposes, which tax burdens ranging from 20% to 31.8%.

The first requirement to be evaluated when qualifying stock option plans for social security purposes is whether or not the benefits granted are in compensation for work carried out by the employee, especially in the case of regular payments. It is worth noting that, under social security law, extraordinary gains are exempt from the related contributions.

The lack of specific legislation on stock option plans results in a great deal of uncertainty. While gaps in legislation can be solved through the application of case law, analogy, as well as usage and customs, the excessive protectionism of the judicial system, and the social security authorities' eagerness to collect, strongly affects the outcome of relevant disputes and may lead to imbalanced results.

Within this context, it is worth mentioning that Law No. 12,973, sanctioned in 2014 (providing that some requirements are met), allowed the deduction of payments of stock-based remuneration for corporate income tax purposes after their accounting recognition, which can be done by corresponding credit in cash, other asset or net worth (transferring the ownership of the shares).

Some controversy still remains, however, regarding the nature of financial gains related to stock option plans. Fortunately, specific key parameters have, nevertheless, been established by Brazilian Labour Courts to avert the salary nature regarding stock option plans, and to consider such plans as "a contractual benefit", with parameters such as: a) the stock option plan should clearly represent an investment opportunity in the company's shares; b) participation in the plan must be optional, in other words, never imposed; c) an effective disbursement should be made by the beneficiary for the exercising of the options and acquisition of the corresponding shares; d) the beneficiary must bear the risks of fluctuation in the shares' value; e) the benefit granted must not be directly connected to performance or productivity targets.

Outsourcing in Brazil

Until 2017, there was no legislation regulating outsourcing in Brazil. The theme was regulated by the Precedent No. 331, issued by the Brazilian Superior Labor Court ("TST").

According to such precedent, outsource company's core activities - i.e. the activity to which all other activities of the company converge; the one that generates its revenues - was deemed unlawful. Thus, if a labor lawsuit or a labor inspection took place, an employment relationship could be pronounced directly between the outsourced workers and the contracting company.

According to such Precedent, only the outsourcing of the contracting company's "secondary activities" would be deemed lawful. For its purpose, the concept of "secondary activities" should be considered in a highly restrictive manner and limited to those activities completely unrelated to the productive activities of the company, such as security services, cleaning, maintenance, tax, accounting, IT, among others.

Precedent No. 331 also states that, even if the outsourcing is related to the contracting company's secondary activities, if the outsourced workers are directly subordinated to the contracting company's representatives, the outsourcing would also be deemed unlawful and, in this case, a direct employment relationship between the outsourced workers and the contracting company could be pronounced if a labor lawsuit was filed.

This understanding is based on the articles 2nd and 3rd, of Brazilian Labor Code, and the general principle of "substance over form", according to which an employment relationship shall exist directly between the parties, regardless of any agreement executed between them, if the worker renders services to the contracting company (i) on a personal basis, meaning that he/she may not be replaced by other worker, (ii) on a regular basis (i.e. following a certain schedule), and (iii) under the contracting company's representatives subordination/direction, meaning that the contracting company's employees/representatives have substantial interference on how the outsourced worker perform his/her tasks.

Finally, even if the outsourcing was considered lawful, Precedent No. 331 establishes that the contracting company is secondarily liable for any labor obligations not complied with by the third-party company in relation to the outsourced workers provided with regards to facts occurred during the period they worked in the benefit of said company.

On March 31, 2017, however, Law No. 13,429/2017 amended Law No. 6,019/1976 to authorise outsourcing in Brazil. According to it, companies could outsource services related to the core and non-core activities, provided that some requirements are fully observed, such as: (i) the service provided must be specific and determined; (ii) contracted company's capital stock must be consistent in relation to the number of employees; (iii) contracted companies must hire, compensate and coordinate their employees by themselves; and (iv) the contracting company is responsible for assuring the compliance with health and safety requirements in relation to the contracted company's dedicated employees. Later, in November 2017, Law No. 13,467/2017 further regulated Law No. 6,019/1976 to expressly establish that companies could outsource any activities, including their main activities.

Due to this, after March 31, 2017, the restriction established by Precedent No. 331 according to which the outsourcing of main activities would be unlawful is no longer valid. Therefore, currently, companies are authorised to outsource any activities, including their main one.

In this respect, it is also important to mention that, recently, the Brazilian Supreme Court ruled that (i) the restriction established by Precedent No. 331 according to which the outsourcing of main activities would be unlawful was not valid and (ii) companies could outsource any activity, even before March 31, 2017, based on the argument that there was no legal provision expressly forbidding companies to outsource their main activities.

In any case, it is important to highlight that Law No. 6,019/1976 does not avoid the recognition of a direct employment between the outsourced workers and the contracting company if the legal requirements for an employment relationship are found to exist.

Finally, it is also important to highlight that Law No. 6,019/1976 establishes that former employees of the contracting

company may not provide services as outsourced workers to the contracting company that was their employer within 18 months following their termination. If the contracting company does not comply with this rule, it would be exposed in a potential judicial dispute, having the of the nullity of the outsourcing and, therefore, the recognition of an employment relationship between the contracting company and the outsourced worker (contracting company's former employee).

Gig Economy

What is the Gig Economy?

The Gig Economy, characterised by temporary contracts and flexible work arrangements frequently mediated by digital platforms, has become a prominent feature of the Brazilian and global workforce. While offering convenience and autonomy to workers, it raises critical questions about labour rights and legal classification.

This phenomenon is often mediated by digital platforms, a concept known as "platformisation".

The use of apps for hiring a wide range of services has already integrated into the modern life of a large part of the Brazilian and global population, especially concerning individual passenger transport, food, and product deliveries.

This analysis delves into the key aspects of the Gig Economy in Brazil, highlighting its growth, the ongoing debate around worker classification, and potential legislative solutions.

Exponential Growth and Evolving Dynamics

Data from the review of the Institute of Applied Economic Research (IPEA) paints a clear picture of the Gig Economy's expansion in Brazil. The number of app-based passenger transport drivers has skyrocketed from 39.8% in 2012 (572,879 drivers) to a staggering 60.7% in 2022 (approximately 1,109,578 drivers).

In this scenario, the predominance of autonomous drivers prevails: in 2012, 74.1% of passenger transport drivers were autonomous, a percentage that increased to 88.9% in 2022.

For motorcyclists, there has been significant growth in activities such as deliveries and parcels (from 10.9% in 2012 to 36% in 2022) and food (from 6.4% in 2012 to 14.2% in 2022). The hiring of motorcyclists as self-employed for deliveries and parcels has increased significantly, from 43.4% in 2012 to 82.6% in 2022.

This growth underscores the increasing importance of "platformisation" and the need for a legal framework that addresses the unique challenges of this new work model.

Work Relationship vs. Employment Relationship

The central debate in Brazil revolves around classifying Gig workers as employees or independent contractors. Brazilian laws contemplate clear distinctions between them and not every work relationship constitutes an employment relationship, with an "employment relationship" offering greater benefits and stricter regulations. The concept of an employment relationship requires the simultaneous presence of the following elements: personal service, regularity, onerousness, and, principally, subordination.

Subordination is the most critical criteria analysed by labour courts and labour Ministry inspections, characterised by the control of the employer over the worker, which may include setting working hours to comply with, deductions for absences, and the application of disciplinary measures in case of breaches of company rules, among other forms of control and inspection of the worker.

According to Brazilian law, an employee is an individual who habitually works for an employer under subordination and receives remuneration in exchange for the services provided. It is important to emphasise that exclusivity in service providing is not a requirement to characterise an employment relationship, but its existence can reinforce the recognition of such a relationship, provided, of course, that all mentioned criteria are present in the specific case.

In this context, it is worth highlighting the principle of the primacy of reality adopted in Brazil, which provides for the

prevalence of facts over legal formalities. Thus, even if a contract is formalised as an independent contractor, for example, if the requirements to characterise an employment relationship are present, the same will prevail.

Examples of exclusive rights granted to workers with an employment relationship include Christmas bonus, paid vacations accrued by 1/3, overtime pay, Severance Fund (FGTS), and mandatory breaks, among other rights, which make employment relationship recognition more expensive for companies.

It is important to note that the guarantee of a minimum workday is not a right for all workers with an employment relationship in Brazil, due to the intermittent work mode created by the 2017 Labour Reform, in which there is no guarantee of minimum hours of work. However, please note that this framework is adopted in more exceptional scenarios in the country.

The Brazilian Context: Minimum Rights and Union Representation

Brazil's unique system offers some minimum rights even for non-employees.

Firstly, Brazil guarantees the constitutional right to health through the Unified Health System (SUS), accessible to all Brazilian citizens.

Additionally, workers in digital platforms can contribute to Social Security, ensuring their status as insured individuals for receiving social security benefits such as sickness paid leave, maternity leave, and retirement.

These two aspects are relevant because they demonstrate that there is already an assurance of minimum rights for workers hired as independent contractors through digital platforms in Brazil.

Unlike some countries, Brazil's "union singularity" restricts workers to a single union for the same professional category within the same territorial base. Workers cannot freely choose the union that best represents their interests, as the law allows only one union per territorial base. The union can negotiate provisions that will apply to all employees of the professional category, including those

who are not affiliated to the union.

Judicial Overview

Numerous ongoing individual lawsuits are discussing the recognition or not of employment relationships between workers and digital platforms.

Labour courts have issued conflicting decisions regarding the recognition or not of employment relationships, depending on the evidence submitted to the court in each specific labour claim. It is also important to note that there have been discrepancies between decisions from the Superior Labour Court and the Supreme Federal Court regarding the recognition of an employment relationship in this Gig Economy scenario.

There are also collective actions filed by entities with legitimacy to do so, such as the Ministry of Labour Prosecution. One of the main ongoing actions was filed by the Public Labour Prosecutor against a major passenger transport company, resulting in a judgment that sentenced the company to pay R$ 1 billion as compensation for collective pain and suffering, due to the absence of registering drivers as fully-fledged employees. Additionally, the decision ordered the company to register all current and future drivers, under penalty of a daily fine of R$ 10,000 per unregistered driver. The company has appealed the judgment, which is still pending review.

Currently, the spotlight is on Extraordinary Appeal No. 1446336, pending judgment by the Supreme Federal Court, whose decision will be binding on Theme 1291: "Recognition of employment relationship between app-based transportation service drivers and the managing company of digital platform".

This decision will have a significant impact on the Brazilian scenario, potentially setting a precedent for other types of services offered through digital platforms in the country.

Legislative Overview

Recognising the limitations of current legislation drafted in a pre-digital era, the Brazilian government is actively seeking solutions.

Several bills of law have been drafted to modernise Brazilian laws, but none have been enacted so far. The most recent proposal, Complementary Law (PLP) 12/2024, presented on 5th March 2024 by the government, focuses on app-based passenger transport. It attempts to strike a balance by establishing minimum hourly wages, social security contributions, and limitations on platform connection time, while also explicitly allowing for union representation.

In this regard, PLP 12/2024 suggests a minimum hourly rate of BRL 32.10 (thirty-two reais and ten cents), applicable from the moment the worker accepts the trip until the user reaches the destination. Considering a daily working hours of 8 hours over 22 days, this could result in a monthly remuneration of up to BRL 5,649.60 (five thousand, six hundred and forty-nine reais and sixty cents). Please note that the current minimum wage salary in Brazil is BRL1,412.00.

Additionally, PLP 12/2024 proposes to limit the maximum daily connection time to a single platform to 12 hours, and it foresees enrollment in the General Social Security System with contribution rates of 7.5% for workers and 20% for companies, based on the salary contribution equivalent to 25% of the gross amount earned in the month.

PLP 12/2024 also contemplates a provision for union representation, which would enable collective bargaining, the negotiation of agreements and collective conventions, as well as collective representation of workers in judicial and extrajudicial disputes. This point is especially important considering that unions could negotiate provisions different from those provided by law and there is a huge discussion about the payment of union contributions.

It is important to remember that PLP 12/2024 is still under legislative debate and subject to amendments. However, it is a valuable indicator of parameters regarding regulating the Gig Economy.

General Overview: Balancing Flexibility and Security

The Gig Economy in Brazil presents a complex scenario with no easy answers. Balancing worker flexibility and autonomy with appropriate security and guaranteed minimum rights remains a challenge. Reaching a solution requires a multi-pronged approach involving clear judicial rulings, comprehensive labor legislation, and responsible business practices by platform companies.

Meanwhile, digital platform companies must adopt good labour practices to avoid or at least minimise the recognition of employment relationships with workers, based on strategic legal analysis regarding the business structure and implementation of procedures and compliance with Brazilian legislation. This includes particularly reinforcing workers' autonomy in service provision, aiming to mitigate any characterisation of a subordinate relationship with the company.

Chapter 8

Banking Law

Financial Markets

Introduction

The main legislation governing the regulation and supervision of banks and other financial institutions is Law No. 4,595/1964, which sets out the legal framework for the financial system and establishes the National Monetary Council (CMN) as the authority in charge of establishing monetary and credit policies and the Central Bank of Brazil (BACEN) as the authority in charge of supervising financial institutions.

Payment activities are also regulated by the CMN and BACEN within the scope of the Brazilian Payment System (SPB). They have created an entire regulatory framework allowing nonfinancial institutions to offer payment services through the type of instruments used in Brazil specifically for this purpose, such as credit cards, electronic currency and other electronic means of payment.

Overview – Regulation

Financial Institutions – Authorisation Requirements

Brazilian financial institutions can operate under many forms, all of which are regulated by different BACEN and CMN rules. The main types of institutions engaged in the financial market are:

- multiple-services banks;
- commercial banks;
- investment banks;
- development banks, such as the Brazilian Development Bank (BNDES);
- foreign exchange banks;
- credit, financing and investment companies; and
- other types of financial institutions and equivalent entities, such as cooperative banks, credit co-operatives, commercial lease companies, securities brokerage companies, securities distributor companies, exchange brokerage companies, real estate credit companies, mortgage companies, and development fostering organisations.

All financial institutions require prior authorisation from the BACEN to operate in Brazil. The process for obtaining a license requires several documents, proof of origin of the funds to be used by the institution and eventually a technical interview involving the BACEN and members of the controlling group. The entire authorisation process takes on average between one and two years.

In general, Brazilian regulations determine that only the following are allowed to have the direct controlling participation of a financial institution:

- Natural persons.
- Financial institutions headquartered in Brazil or abroad.
- Another corporate entity headquartered in Brazil with an exclusive corporate purpose of investing in financial institutions. A decree issued by the Brazilian President used to be required for foreign shareholders. As of September 2019,

such a decree is no longer required.

Payment Institutions

Categories of Payment Institution

Payment Institutions are classified as follows:

Electronic money issuer: a payment institution that manages end-users' prepaid payment accounts and provides payment transactions using the electronic money held in the account, converting funds to fiat currency or vice-versa.

Post-paid payment instrument issuer: the payment institution that manages post-paid end-users' payment accounts and provides payment transactions through such accounts.

Acquirer: payment institution that, without managing payment accounts:

- enables receivers for the acceptance of payment instruments issued by a payment institution or a financial institution participanting in the same payment scheme; and
- participates in settlement of the payment transactions as creditor to the issuer, according to the payment scheme's rules.

Payment initiator: payment institution that renders services related to the initiation of payment transactions and:

- does not manage a payment account;
- does not hold the transferred funds at any moment while performing the services.

Payment Scheme

What is it?

A collection of rules and procedures that regulates payment services. It is regulated by BACEN Resolution No. 150/2021. Some payment schemes are not considered part of the SPB and therefore

do not need authorization from BACEN to operate depending on certain criteria (including those defined as of "limited scope").

Payment Scheme Owner: creates and organises the payment scheme and use of the associated brand.

Fintechs

The term "fintech" is not a legal concept under Brazilian laws or regulations, despite the BACEN informally designating two new types of credit entities created in 2018 as "credit fintechs", called Direct Credit Companies (*Sociedades de Crédito Direto* – SCD) and Interpersonal Credit Companies (*Sociedades de Empréstimo entre Pessoas* – SEP). These are financial institutions with limited scope that may operate in the credit segment under less stringent regulatory requirements compared to more traditional financial institutions.

Fintechs may be subject to different regulations depending on the business model and target market.

The Brazilian fintech market has grown significantly in the past in different verticals, including credit, payment, financial management, loan, investment, financing, insurance, debt negotiation, foreign exchange, and multiservices. This is mainly due to regulators' positive and supportive stance towards the development of tech-based financial enterprises, with different actions taken to modernise regulations to foster competition. Promoting innovation-driven economy is one of the main goals from regulators for the near future.

Crypto Assets

In June 2023, Law No. 14,478, of December 21, 2022, came into force. It provides guidelines on the provision of virtual asset services and is considered the 'legal framework of crypto assets' in Brazil, an important first step towards regulating the Brazilian virtual assets market.

The law determined that BACEN is responsible for regulating the provision of virtual asset services, as well as authorising and supervising operators in the sector, except when the asset is framed as a security. In this case, the Brazilian Securities and Exchange Commission (CVM) will be responsible and virtual assets must observe the rules applicable to securities and capital markets in general, including requirements for registered public offerings.

On the other hand, the CVM has issued recent circular letters with its views on characterising a token as security, including fixed income tokens, providing guidelines that must be observed by the market when issuing and offering tokens.

BACEN also issued the Public Consultation 109/24, which provides for a proposed BACEN resolution that regulates the constitution and operation of virtual asset service providers and provides for the provision of virtual asset services by other institutions authorised to operate by the BACEN, and Public Consultation 110/24, which provides for a proposed BACEN resolution that regulates the authorisation processes for foreign

exchange brokers, securities brokers, securities distributors and virtual asset service providers to operate. both consultations closed in February 2025.

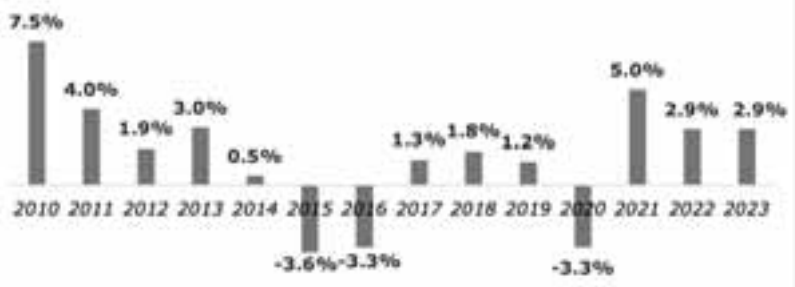
Chapter 9

Project and Trade Finance

Introduction: The Future of the Brazilian Economy

Brazil is home to 203 million inhabitants and boasts a nominal GDP of $1.9 trillion, making it the 3rd largest economy in the Americas and the 10th in the world. While the early 2010s saw strong GDP growth (7.5% in 2010 and 4.0% in 2011), this was followed by a sharp downturn in 2015-16, a modest recovery in 2017-19, and a steep decline in 2020 due to the pandemic. After a decade of instability, the Brazilian economy has been rebounding, with GDP growth of 5.0% in 2021 and 2.9% in both 2022 and 2023.

Brazilian GDP Growth (year-over-year)



Source: IBGE (Brazilian Institute of Geography and Statistics)

Looking ahead to 2024 and the next three years, the Central Bank of Brazil's Focus Report, which compiles expectations from key financial market players, predicts annual GDP growth of around 2.0%. The primary question revolves around local interest rates. After a series of cuts in the basic interest rate (SELIC), which dropped from 13.75% to 10.5%, the latest decision by COPOM (Brazil's Monetary Policy Committee) was to maintain the rate, reflecting uncertainty about rate cuts in the U.S. and other developed economies. Inflation is expected to hover between 3.5% and 4.0% in 2024 and the following years—a relatively low rate by Brazil's historical standards.

Project Finance

Project finance refers to the funding of an economic entity, where lenders primarily look to the cash flow generated by the project and its assets as collateral for repaying loans.

Typically, project finance involves financial structures where funding is not primarily based on the credit risk of its sponsors or the value of the physical assets involved. Instead, the financing relies on the confidence in and performance of the project itself, which generates cash flow and becomes self-sustaining in the medium to long term. This cash flow is used to repay the debt and sustain the project. Project finance is particularly suitable for projects that involve the long-term exploitation of an asset, such as a concession with a predictable revenue stream.

In Brazil, project finance gained prominence in the mid-1990s as public services were privatized or subject to concession arrangements. Constitutional amendments and new legislation spurred private developers to adopt project finance structures for funding new infrastructure. Successful projects in the electricity sector, such as hydro and thermal plants, and the construction or refurbishment of toll roads were financed through this model. Additionally, in the oil and gas sector, which was liberalized, project finance has been widely used to boost exploration, production capacity, and expand refining, transportation, and distribution infrastructures.

Over the past decade, project finance has grown to include

sectors such as railways, ports, industrial plants, and mining projects. It also encompasses renewable energy projects like wind farms, biomass plants, and small hydro-projects. Large infrastructure projects for the 2014 FIFA World Cup and the 2016 Olympic Games in Rio de Janeiro utilised innovative project finance structures.

Brazil's local development bank, the National Development Bank (BNDES), alongside other state-owned financial institutions such as *Caixa Econômica Federal* (directly or via the FGTS Investment Fund), *Banco do Nordeste do Brasil*, and *Banco do Brasil*, have actively financed infrastructure projects. BNDES played a particularly dominant role due to the low interest rates it applied until 2017. However, the economic and political crises that peaked in 2015 ended a period of optimism. Despite these challenges, the infrastructure sector remains a priority for pro-market reforms and sustainable economic growth.

Since 2016, reforms aimed at recovering the economy have been implemented. One key reform in the infrastructure sector is the creation of the Brazilian Investment Partnership Program (PPI), which reduces bureaucracy and encourages private investment in infrastructure. By 2018, two years after its establishment, hundreds of brownfield and greenfield projects in infrastructure and energy had been privatised or awarded concessions under the PPI framework, attracting foreign investors.

BNDES has also undergone reforms to attract new investors, especially large international financial institutions, by creating a more competitive financing environment. For example, since 2017, BNDES has used the Long-Term Rate (TLP), which is aligned with market interest rates and allows for greater private bank participation. As a result, in 2018, BNDES' participation in project financing reached its lowest level in 13 years at just 5.3%, opening the door for greater involvement from international lenders and capital market investors through instruments like infrastructure debentures (project bonds).

Infrastructure debentures were introduced by Law 12,431 in 2011 to provide long-term financing options. In 2018, more than 10 billion Reais were raised through these debentures, marking the largest amount since 2012. It is estimated that these capital market instruments will account for 20% of project finance investments in the near future. As of now, 656 infrastructure projects await the issuance of incentivised infrastructure debentures, with investments exceeding

235 billion Reais. The electric energy sector, in particular, has seen substantial investment with 354 projects valued at 106 billion Reais.

International lenders, Export Credit Agencies (ECAs), and multilateral organisations have increased their presence in the Brazilian market, introducing products such as loans denominated in or indexed to Brazilian currency (Reais) to mitigate foreign exchange risks. Recent projects also include mechanisms to hedge against foreign exchange fluctuations, encouraging innovative project finance structures.

Private commercial banks with expertise in the sector will play an essential role in providing bridge loans, mini-perms, and guarantees for infrastructure debentures until project completion is reached. These banks are also critical in underwriting debt instruments such as debentures.

Main Legal Aspects

The legal framework for project finance in Brazil can be divided into two major categories: (i) public law and regulatory aspects specific to each type of project, and (ii) general commercial and civil law applicable to all transactions.

Public Law and Regulatory Aspects

Projects in regulated industries such as electricity, oil and gas, telecommunications, transportation, water, and sewage are subject to public law and regulation by specialised agencies. Most of these projects involve concessions granted through public bidding. Until recently, the Brazilian Public Bidding Law (Law No. 8,666/1993) was the primary legal instrument for public contracting. However, in 2011, Law No. 12,462 introduced the Differential Public Procurement Regime (RDC), streamlining public procurement for global events like the 2014 FIFA World Cup and the 2016 Olympics.

Concessions are also regulated by the Brazilian Concessions Law (Law No. 8,987/1995) and the Public-Private Partnership Law (Law No. 11,079/2004), which provides a legal framework for PPPs. Other relevant laws, such as the State-Owned Companies Law (Law

No. 13,303/2016), further streamline bidding processes and establish corporate governance rules for state-owned enterprises.

Lenders are particularly concerned with the terms of concession agreements, seeking assurances against arbitrary termination by the government and provisions for appropriate compensation in case of termination. They also want mechanisms in place to pass through cost increases due to legislation changes, force majeure, or currency fluctuations.

Governing Law

In project finance, the contract is crucial. Lenders will typically review all project agreements to ensure they are "bankable." For instance, during construction, the key contract is the Engineering, Procurement, and Construction (EPC) Agreement, which must allocate and mitigate construction risks. Once operations commence, key contracts typically include the agreement for raw materials procurement and the agreement for selling the project's output.

Financing agreements, including loan agreements and security documents, are vital, with a typical security package encompassing shares of the project company, its assets, accounts, and revenues.

Most project agreements are governed by Brazilian law, which recognises the parties' freedom to negotiate, though they are subject to Brazil's Civil Code. This legal framework provides protections for borrowers and outlines lengthy procedures for enforcing contractual rights.

Conclusions

The implementation of infrastructure projects and the securing of project finance in Brazil involves navigating a complex array of laws and regulations. In addition to public and private law considerations, developers and lenders must address legal issues related to environmental, labor, and tax legislation. Foreign investors may find Brazil's legal complexity overwhelming compared to their home jurisdictions, making qualified legal counsel essential for

successful project development and financing.

Trade Finance

Trade finance refers to the financing of export and import transactions. In Brazil, both private and public sources provide trade financing, notably through the National Development Bank (BNDES) and the Export Financing Program (PROEX). These programs offer financing for various phases of production and export, including working capital and pre-export finance transactions, which benefit from tax exemptions on interest payments to foreign creditors.

Details on terms and conditions for trade finance should be verified on relevant government websites, such as the BNDES and *Banco do Brasil* (http://www.bndes.gov.br and http://www.bb.com.br).

Export Financing

Exports can be financed through both private and public funding sources. Each trade finance transaction has its own unique characteristics, terms, and conditions. Some financing covers all phases of production and export, including working capital, while others focus solely on production phases.

Cross-border pre-export finance transactions are widely used due to the exemption of Brazilian withholding income tax, which would otherwise apply to interest payments to foreign creditors. These transactions must be carefully structured, as the exemption may not apply to all jurisdictions. Additionally, transfer pricing and thin capitalisation rules may apply to transactions within the same economic group. It is crucial that the funds are genuinely used for financing Brazilian exports, which must be proven with appropriate documentation.

In addition to private sources such as commercial banks, two public funding sources provide domestic financing for export transactions:

- BNDES-EXIM, which supports the export of goods and services;
- PROEX, which covers both imports and exports.

BNDES-EXIM

BNDES-EXIM funds the export of goods and services through financial institutions accredited by BNDES. It operates in the following areas:

- **BNDES-EXIM Pré-Embarque (Pre-Shipment):** This credit facility supports the production of goods for export, based on a sale negotiated in advance with a foreign importer. The credit is calculated based on the Free on Board (FOB) value of the contracted export. Beneficiaries are industrial and exporting companies of manufactured products. The credit can be secured by guarantees such as sureties, mortgages, personal guarantees, or the assignment of credit rights under the export contract (the most common form). Micro, small, and medium-sized companies may also use the BNDES FGI (Investment Guarantee Fund) to complement the guarantees.
- **BNDES-EXIM *Pré-Embarque Empresa Âncora* (Anchor Company Pre-Shipment):** This credit supports exports by small and medium-sized companies through an anchor company, which could be a trading or exporting company, as per BNDES policies. The credit is based on the FOB value of the contracted export.
- **BNDES *Exim Automático* (Automatic):** Aimed at supporting the export of Brazilian goods in the post-shipment phase, this line of credit operates through a network of accredited banks. It offers two financing structures: (i) financing via letters of credit issued or confirmed by a foreign bank in favor of the exporter, and (ii) financing via disbursement authorisations issued by a foreign bank through a contractual instrument signed between the foreign bank and BNDES. Neither structure involves recourse against the exporter. Disbursements are made in Brazilian Reais through the agent bank.
- B**NDES-EXIM *Pós-Embarque* (Post-Shipment):** This credit facility supports the sale of goods and services abroad by

refinancing export receivables (such as promissory notes or bills of exchange) or by assigning credit rights from export transactions (such as letters of credit). These transactions cannot be secured with personal guarantees. Instead, bank guarantees, including sureties and letters of credit, are accepted, provided they are issued by banks approved by BNDES.

PROEX

The PROEX Export Financing Program supports the export of Brazilian goods and services for future payment, offering competitive interest rates and internationally common payment terms. Repayment terms range from 60 days to 10 years, depending on the value added to the exported goods and the complexity of the services provided.

Banco do Brasil S.A. is the only authorised agent of the Federal Government for PROEX. PROEX credits are available to importers and exporters of Brazilian goods and services through two methods:

1. **Direct Export Financing:** This involves financing with funds from the National Treasury. Both Brazilian exporters and foreign importers can apply, though the credit is only provided in Brazilian currency. The financing can take the form of:
    - **Supplier's Credit:** This is credit for the exporter and involves negotiating receivables and documents representing the export transaction.
    - **Buyer's Credit:** A credit extended to the importer, structured between the Brazilian Government and a foreign corporate entity.
2. E**qualisation – Financing by Matching Interest Rates:** Available only in foreign currencies, this mechanism makes Brazilian exports more competitive by aligning financing costs with international rates. The National Treasury covers the difference between the cost of raising funds abroad and the cost of making these funds available to the exporter or importer. This option is open to any commercial bank approved by BACEN to operate in foreign exchange markets and offers two forms:
    - **Supplier's Credit:** The exporter extends credit to the

importer, which is later discounted at any bank authorised to operate in exchange.

- **Buyer's Credit:** A foreign credit institution finances the importer, allowing for lump-sum payment to the exporter. Unlike direct export financing, companies of any size may apply, although equalisation is capped at 85% of the export value.

To benefit from PROEX or BNDES-EXIM credit lines, the exporter, importer, and guarantor must not have any outstanding debts with the Brazilian Government or any public or private corporate entity controlled by the Brazilian Government.

Mergers & Acquisitions

In recent years, foreign investment has remained resilient, while local M&A activity has been more subject to fluctuations in interest rates, increasing as rates decrease. Additionally, uncertainties surrounding Brazil's new government, which began in 2023, have also impacted this activity.

In 2023, the total number of transactions was 2,008, with an aggregate value of BRL 215.7 billion (excluding transactions with undisclosed values). This represents a decrease of 22% in the number of deals and 29% in value compared to 2022. The sectors showing the most activity in M&A were:

- Internet, Software & IT Services: 377 transactions,
- Business & Professional Support: 342 transactions,
- Financial Services: 263 transactions,
- Real Estate: 254 transactions.

Of the total transactions, 1,421 involved domestic players, while 287 were inbound acquisitions (foreign companies acquiring Brazilian firms) and 126 were outbound (Brazilian companies acquiring businesses abroad).

In terms of inbound acquisitions, the leading countries by number of transactions were:

- USA: 161 transactions with BRL 25.6 billion in value,

- United Kingdom: 53 transactions with BRL 7.1 billion,
- Spain: 32 transactions with BRL 3.0 billion,
- Germany: 18 transactions with BRL 8.3 billion.

An important development is the improvement in the M&A approval process by Brazil's Administrative Council for Economic Defense (CADE), the local antitrust authority. CADE has committed to reviewing deals of BRL 500 million or more within 30 days. As a result, the average regulatory approval time for Brazilian strategic deals decreased from 166 days in 2021 to 74 days in 2022, with further reductions to just 17 days in 2023*.

*Sources: TTR Data Brazil Annual Report 2023, Bain & Company M&A Report 2023.

Private Equity and Venture Capital

The Private Equity (PE) and Venture Capital (VC) market in Brazil began gaining relevance in the early 2000s, with a significant increase in both the number of firms and the amount of invested capital. The market has continued to grow in both relevance and maturity. According to LAVCA (Association for Private Capital Investment in Latin America), investments in 2022 reached USD 11.3 billion across 587 deals, up from USD 9.9 billion and 305 deals in 2019.

A study on the performance of Private Equity and Venture Capital in Brazil between 1984 and 2023[1], which analysed 1,047 transactions with available return data, revealed an average gross multiple on invested capital (MOIC) of 2.9x in USD. The average internal rate of return (IRR) was 25% in USD. Breaking down the deals between technology (primarily VC) and non-technology (primarily PE) sectors:

- Technology transactions (546 deals) had an average MOIC of 3.9x

1. Performance of Brazilian Private Equity and Venture Capital Investments 1994–2023 – Brazilian Venture Capital and Private Equity Association (ABVCAP), Spectra Investments, and Insper.

and an IRR of 41%.

- Non-technology transactions had an average MOIC of 2.6x and an IRR of 22%.

While technology deals exhibited relatively higher returns, they also experienced more volatility: 40% of transactions resulted in a total loss of capital, while 18% saw partial losses. On the other hand, 13% of transactions achieved exceptional returns with MOICs exceeding 5x. Non-technology deals presented a more balanced risk/return profile: 9% resulted in total loss, 23% in partial loss, and 11% delivered outstanding performance with MOICs above 5x.

Despite currency devaluation, returns in Brazilian PE and VC investments have remained strong. In Brazilian Reais, overall returns were even higher, with a 39% IRR and a 4.7x MOIC. This indicates great potential and a wide range of opportunities moving forward, in both technology and non-technology investments.

Regarding legal structure, **FIPs** (*Fundos de Investimento em Participação*) are the preferred vehicles for PE and VC investments in Brazil due to favorable tax treatment under certain conditions and increased security. FIPs are flow-through entities, exempt from typical income and revenue taxes applicable to partnerships in Brazil. Taxes are only applied to realised capital gains upon redemption of investors' quotas, with rates ranging from 15% for local investors to 0% for foreign investors, provided certain conditions are met. Dividends paid by companies to FIP investors are exempt from income tax.

ESG Investments & Agribusiness

Investing in Brazilian Agribusiness and ESG: A Path to Sustainable Profitability

The Significance of Agribusiness in Brazil

Brazil's agribusiness sector is a cornerstone of the country's economy, contributing significantly to its GDP. According to the Centre

for Advanced Studies on Applied Economics (Cepea) and the National Confederation of Agriculture and Livestock of Brazil (CNA), agribusiness could account for approximately R$ 2.63 trillion, or 24% of Brazil's GDP, in 2023. The sector encompasses a wide range of activities, from the production of inputs and agricultural goods to secondary and tertiary activities that link agriculture and livestock to industry and product distribution.

Brazil also plays a crucial role in global food security. The country's presence in the international food market has expanded significantly, with exports of meat, soybeans, corn, cotton, and forest products reaching new highs. According to a study by the Secretariat of Intelligence and Strategic Relations of Embrapa (Sire), Brazil's share in global grain production increased from 6% in 2011 to 8% in 2020. It is estimated that Brazilian agricultural products feed approximately 800 million people worldwide.

Brazil's Competitive Advantages in Agribusiness

Brazil has positioned itself as a global leader in agribusiness due to several key competitive advantages:

1. Vast Agricultural Areas: Brazil possesses extensive areas with high agricultural potential, making it one of the world's largest producers of crops like soybeans, sugarcane, and corn. It is also a leading meat producer and exporter.
2. Technological Advancements: Innovations across the agricultural production chain have increased both productivity and sustainability.
3. Diverse Financing Sources: The availability of various financing options has facilitated sustainable growth, from purchasing inputs to production, transportation, and storage.

The Resilience of Agribusiness

A notable strength of the agribusiness sector is its resilience during economic downturns. Its ability to weather crises makes it a reliable investment choice. For instance, despite the challenges posed

by the COVID-19 pandemic, Brazilian agribusiness continued to thrive, underscoring the sector's robustness and adaptability.

ESG: The Future of Sustainable Investments

Environmental, Social, and Governance (ESG) investments represent a new era where profit and positive societal impact are aligned. ESG criteria are divided into three main pillars:

1. Environmental (E): Evaluates a company's environmental performance, including waste management, greenhouse gas (GHG) emissions, and efficient use of natural resources.
2. Social (S): Assesses how a company manages relationships with stakeholders such as employees, suppliers, customers, and communities. Important factors include workplace safety, diversity and inclusion, consumer responsibility, and community engagement.
3. Corporate Governance (G): Examines a company's governance structure, transparency, accountability, and risk management practices.

Why Are Companies Adopting ESG?

Companies are increasingly adopting Environmental, Social, and Governance (ESG) practices for several compelling reasons:

1. Attracting Investments: Investors are now more focused on companies that implement sustainable and responsible practices. The ability to attract investments has emerged as one of the primary drivers behind the adoption of ESG initiatives.
2. Reducing Risks: Companies are aligning with ESG practices to mitigate risks and, consequently, lower their cost of capital. This encompasses a wide range of areas, including legal, regulatory, and labor risks.
3. Increasing Profitability: Embracing ESG principles can enhance a company's profitability by fostering better financial control and operational efficiency.

The Intersection of Agribusiness and ESG

The integration of ESG practices within agribusiness is not only advantageous for the environment and society but also bolsters the overall sustainability and profitability of the sector. By embracing ESG principles, agribusinesses can improve operational efficiency, minimise risks, and attract increased investments.

Investment Vehicles in Agribusiness

1. Certificates of Agribusiness Receivables (CRA): CRAs are fixed-income securities that represent a promise of future payment. They are ideal for long-term investments and can be structured in two ways:
   a. Pulverised: The risk is associated with a portfolio of credit from various debtors (e.g., farmers).
   b. Corporate: The risk is linked to a single debtor company, often utilised to finance production, commercial operations, or machinery.

   CRAs can offer either fixed or variable returns, indexed to economic indicators such as the CDI (Interbank Deposit Certificate) or the IPCA (Consumer Price Index).
2. Agribusiness Investment Funds (Fiagro): Fiagro consolidates resources from multiple investors to invest in agribusiness-related assets, which may include credit rights, real estate, securities, or company shares. The income generated from these investments is distributed periodically to shareholders. Fiagro can be structured as either open or closed-end funds, with the latter being listed on the stock exchange. Investors can exit their investments by selling shares in the secondary market.

Conclusion

Investments in Brazilian agribusiness present significant potential. The sector's substantial contribution to Brazil's GDP, along

with its competitive advantages and resilience during crises, makes it an appealing investment opportunity. By integrating ESG principles, agribusinesses can enhance their sustainability and profitability, thereby attracting more investments and reducing risks. Whether through CRAs, Fiagro, or other investment vehicles, agribusiness and ESG provide a variety of options suitable for all investor profiles.

Fintechs and New Participants in the Financial Market

Investing in the Future: The Potential of Brazilian Fintechs and the Financial Market

Brazil, the largest economy in Latin America, is emerging as one of the most promising markets for investments in fintechs and the financial sector. With a young and connected population, a favorable regulatory environment, and an increasing demand for innovative financial services, the country presents unique opportunities for British investors looking to diversify their portfolios and capitalise on the rapid growth of this sector.

In recent years, Brazil has distinguished itself as a key hub for financial innovation globally. Brazilian fintechs are transforming the way financial services are delivered, making them more accessible, efficient, and personalised. According to the Brazilian Association of Fintechs (ABFintechs), the number of fintechs in Brazil has surged by more than 200% in the past five years, reaching over 700 companies in 2023.

Main Segments of Fintechs

1. Payments and Transfers: Companies such as Nubank, PagSeguro, and PicPay are at the forefront of the digital transformation in the payments sector, providing solutions that facilitate fast and secure transactions for consumers and businesses alike.

2. Loans and Financing: Fintechs like Creditas and Geru are democratising access to credit, utilising technology to offer loans with more competitive rates and streamlined processes.
3. Investments and Wealth Management: Platforms like XP Investimentos and Warren are making capital markets more accessible to individual investors by providing wealth management tools and personalised financial advice.
4. Insurance: Insurtechs like Thinkseg and Youse are innovating the insurance sector by offering more flexible and personalised products, as well as fully digital policy contracting and management processes.

Success Stories:

1. Nubank

Founded in 2013, Nubank is one of the most remarkable success stories in Brazil's fintech sector. With over 40 million customers, the company has emerged as the largest independent digital bank in the world. Nubank offers a wide array of financial products, including credit cards, digital accounts, and personal loans, all accessible via an intuitive mobile app. In 2021, the company went public on the New York Stock Exchange, achieving a valuation of over $40 billion.

2. PagSeguro

PagSeguro, a subsidiary of the UOL group, stands out as another notable fintech in Brazil. The company provides digital payment solutions for merchants and consumers, including card machines, digital wallets, and online payment services. In 2018, PagSeguro went public on the New York Stock Exchange, raising over $2 billion. The company continues to grow its customer base and diversify its offerings, solidifying its position as a leader in the digital payments market.

3. XP Investimentos

XP Investimentos represents another success story in Brazil's financial landscape. Established in 2001, the company began as a brokerage firm and has since expanded its services to include financial advisory, asset management, and a comprehensive

investment platform. In 2019, XP went public on Nasdaq, raising over $2 billion. Today, it ranks among the largest investment platforms in Latin America, boasting over 3 million clients and R$ 800 billion in assets under custody.

The Favorable Regulatory Environment

The Central Bank of Brazil and the Securities and Exchange Commission (CVM) have played a pivotal role in creating a regulatory environment that supports innovation and the growth of fintechs. Initiatives such as the Regulatory Sandbox and Open Banking are fostering competition and collaboration between traditional financial institutions and fintechs, resulting in a more dynamic and inclusive ecosystem.

Regulatory Sandbox

The Brazilian Central Bank's (BCB) Regulatory Sandbox permits fintechs to test new products and services in a controlled environment under the oversight of regulatory authorities. BCB Resolution 50/2020 establishes regulations for the implementation of financial and payment innovations. This initiative not only accelerates the innovation process but also ensures that new solutions are safe and compliant with existing regulations. The strategic priorities of the Regulatory Sandbox include:

- Solutions for the foreign exchange market.
- Promoting the capital market through synergy mechanisms with the credit market.
- Supporting credit access for micro-entrepreneurs and small businesses.
- Developing solutions for the Brazilian Open Banking environment.
- Creating solutions for the Brazilian Instant Payment System (Pix).
- Fostering innovation in the rural credit market.
- Enhancing competition within the National Financial System (SFN) and the Brazilian Payments System (SPB).
- Financial and payment solutions aimed at promoting

financial inclusion.

- Advancing sustainable finance.

Open Banking

Launched in phases since 2021, Open Banking is transforming the manner in which financial data is shared between institutions. With customer consent, data can be shared securely, enabling fintechs to offer more personalised and competitive products and services. This initiative enhances transparency and empowers consumers while stimulating innovation in the financial sector.

Major Players in Brazil's Capital Markets

Stock Exchange

B3 (Brasil, Bolsa, Balcão) is the principal stock exchange in Brazil and ranks among the largest in the world by market value. B3 offers a diverse range of products, including stocks, derivatives, fixed-income securities, and commodities. The exchange has played an essential role in promoting transparency and efficiency within the Brazilian capital market.

Commercial and Investment Banks

- Itaú Unibanco and Itaú BBA: The largest bank in Brazil in terms of assets, offering a comprehensive range of financial services, including current accounts, loans, credit cards, and investments. Its investment banking division, Itaú BBA, provides financial advisory, underwriting, and asset management services.
- Bradesco and Bradesco BBI: Another major Brazilian bank, offering a wide array of financial services to both consumers and businesses. Its investment banking division, Bradesco BBI, is a leading provider of financial advisory and underwriting services.
- Banco do Brasil: The largest state-owned bank in Brazil, offering a broad range of financial services to consumers and businesses.
- BTG Pactual: One of the largest independent commercial and

investment banks in Latin America, providing a wide range of financial services to institutional and individual clients.

Investment Managers

- XP Asset Management: The asset management arm of XP Investimentos, offering a comprehensive range of investment products for institutional and individual clients.
- Itaú Asset Management: The asset management division of Itaú Unibanco, providing a variety of investment products for institutional and individual clients.
- Bradesco Asset Management: The asset management arm of Bradesco, offering a diverse range of investment products for both institutional and individual clients.

Credit Cooperatives

Credit cooperatives play a significant role in promoting financial inclusion in Brazil, delivering financial services to unbanked and underserved populations. Notable credit cooperatives include:

- Sicredi: One of the largest credit cooperatives in Brazil, providing a wide range of financial services to consumers and businesses.
- Sicoob: Another leading credit cooperative in Brazil, offering a variety of financial services to consumers and businesses.

Brokerage Firms

Brokerage firms are vital to the Brazilian financial market, facilitating the trading of stocks, fixed-income securities, derivatives, and other financial instruments. Key brokerage firms in Brazil include:

- XP Investimentos: One of the largest brokerage firms in Brazil, providing a comprehensive platform for trading various financial instruments and investment products.
- BTG Pactual: A prominent investment bank and brokerage firm, BTG Pactual offers a range of services, including equity and fixed-income trading, investment advisory, and wealth management.

- Clear Corretora: A digital brokerage firm known for its low-cost trading services, Clear provides a user-friendly platform for retail investors to trade stocks and other financial instruments.

Insurance Companies

- Porto Seguro: One of the largest insurance companies in Brazil, offering a wide range of products including auto, home, life, and health insurance.
- Bradesco Seguros: The insurance division of Bradesco, providing a broad spectrum of insurance products for both consumers and businesses.
- SulAmérica: Another leading insurance company in Brazil, specialising in various insurance offerings such as health, life, and auto insurance.

Advisory Financial Services

The Potential of Brazilian Investment and Wealth Management

Brazil, as the largest economy in Latin America, presents a dynamic and rapidly evolving financial landscape. The country boasts a growing middle class, a young and tech-savvy population, and a regulatory environment that promotes innovation and growth. These factors create fertile ground for investment opportunities that can yield significant returns for discerning investors.

Brazil's economy has demonstrated resilience and adaptability, with a diverse range of industries contributing to its growth. From agriculture and mining to technology and finance, the economic landscape is robust and multifaceted. This diversity provides a stable foundation for investment, mitigating the risks associated with market volatility.

The Brazilian government and regulatory bodies, such as the Central Bank of Brazil and the Securities and Exchange Commission (CVM), have instituted measures to foster a more transparent and efficient financial market. Initiatives like the Regulatory Sandbox and Open Banking are enhancing competition and innovation, leading to a more inclusive and dynamic financial ecosystem.

Brazil is at the forefront of financial technology (fintech)

innovation, with numerous startups and established companies revolutionising the delivery of financial services. This technological advancement enhances the efficiency and accessibility of financial planning and investment services, equipping clients with cutting-edge tools and solutions to effectively manage their wealth.

Comprehensive Financial Planning

Financial planning is the cornerstone of long-term financial success. It involves crafting a detailed strategy to achieve financial goals while considering factors such as income, expenses, investments, and risk tolerance. Brazilian financial planning firms excel in delivering personalised and comprehensive financial plans tailored to the unique needs of each client.

Personalised Financial Plans

Every individual has unique financial goals and circumstances. Brazilian financial planning firms adopt a personalised approach, working closely with clients to understand their aspirations and challenges. This tailored service ensures that each financial plan is designed to meet the client's specific needs, providing a clear roadmap for achieving their financial objectives.

Holistic Approach

A holistic approach to financial planning considers all aspects of a client's financial life, including income, expenses, investments, insurance, and estate planning. Brazilian firms are adept at creating comprehensive financial plans that address every facet of a client's financial situation, ensuring that all elements work together harmoniously to foster long-term success.

Continuous Monitoring and Adjustment

Financial planning is not a one-time event but an ongoing process. Brazilian financial planning firms continuously monitor their clients' financial plans, making necessary adjustments to account for changes in the client's life or the economic environment. This proactive approach ensures that clients remain on track to achieve their financial goals, regardless of any unforeseen challenges.

Investment Management

Effective investment management is crucial for growing and preserving wealth. Brazilian investment firms offer a wide array of investment options and strategies, leveraging their deep market knowledge and expertise to deliver superior returns for their clients.

Diverse Investment Options

Brazilian investment firms provide access to a diverse range of investment options, including equities, fixed income, real estate, and alternative investments. This diversity enables clients to build well-rounded portfolios capable of withstanding market volatility and achieving long-term growth.

Expertise and Market Knowledge

Brazilian investment firms are staffed by highly skilled professionals with profound knowledge of local and global markets. This expertise allows them to identify and capitalise on investment opportunities that may not be readily apparent to individual investors. By leveraging their market knowledge, these firms can generate superior returns for their clients.

Risk Management

Effective risk management is a critical component of successful investment management. Brazilian investment firms employ sophisticated risk management strategies to protect their clients' portfolios from market downturns and other risks. This proactive approach ensures that clients' investments are safeguarded, allowing them to pursue their financial goals with confidence.

Wealth Preservation and Estate Planning

Preserving wealth and ensuring its smooth transfer to future generations is a key concern for many investors. Brazilian financial planning firms offer comprehensive wealth preservation and estate planning services to help clients protect their assets and leave a lasting legacy.

Asset Protection

Protecting assets from potential risks, such as lawsuits, creditors, and market volatility, is crucial for wealth preservation. Brazilian financial planning firms employ a range of strategies to safeguard their clients' assets, ensuring that their wealth remains intact for future generations.

Estate Planning

Effective estate planning ensures that a client's wealth is transferred smoothly and efficiently to their heirs. Brazilian financial planning firms provide comprehensive estate planning services, including the creation of wills, trusts, and other legal instruments. These services help clients minimise estate taxes and ensure that their assets are distributed according to their wishes.

Philanthropy

Many clients aspire to leave a positive impact on their communities through charitable giving. Brazilian financial planning firms offer philanthropy services, assisting clients in creating and managing charitable foundations, donor-advised funds, and other philanthropic vehicles. These services empower clients to support causes they care about while also achieving their financial and tax planning goals.

Insurance and Risk Management

Insurance is a critical component of a comprehensive financial plan, providing protection against unforeseen events that could jeopardise a client's financial security. Brazilian financial planning firms offer a wide range of insurance products and risk management services to help clients safeguard their wealth.

Life Insurance

Life insurance provides financial security for a client's family in the event of their death. Brazilian financial planning firms offer a variety of life insurance products, including term life, whole life, and universal life policies. These products ensure that clients' loved ones are financially protected, offering peace of mind.

Health Insurance

Health insurance is essential for shielding against the high costs of medical care. Brazilian financial planning firms provide comprehensive health insurance plans that cover a wide range of medical services, ensuring that clients have access to necessary care without financial strain.

Property and Casualty Insurance

Property and casualty insurance protects clients' assets, such as homes, cars, and businesses, from damage or loss. Brazilian financial planning firms offer a variety of property and casualty insurance products, ensuring that clients' valuable assets are adequately protected.

Disability Insurance

Disability insurance provides income replacement in the event that a client is unable to work due to illness or injury. Brazilian financial planning firms offer disability insurance products that ensure clients can maintain their standard of living, even if they are unable to work.

Financial Education and Empowerment

Empowering clients with financial knowledge is a key aspect of successful financial planning. Brazilian financial planning firms are committed to educating their clients, equipping them with the tools and resources they need to make informed financial decisions.

Financial Literacy Programs

Financial literacy programs help clients understand the basics of personal finance, including budgeting, saving, investing, and debt management. Brazilian financial planning firms offer a range of financial literacy programs, ensuring that clients have a solid foundation of financial knowledge.

Workshops and Seminars

Workshops and seminars provide clients with in-depth knowledge on specific financial topics, such as retirement planning, tax strategies, and investment management. Brazilian financial

planning firms regularly host these educational events, helping clients stay informed about the latest financial trends and strategies.

One-on-One Coaching

One-on-one coaching offers personalised financial education, assisting clients in addressing their unique financial challenges and goals. Brazilian financial planning firms provide individual coaching sessions, ensuring that clients receive the tailored support they need to achieve financial success.

The Benefits of Investing with Brazilian Financial Planning and Investment Firms

Investing with Brazilian financial planning and investment firms offers a range of benefits for British investors. Below, we highlight some of the key advantages:

Access to Emerging Markets

Brazil is one of the largest and most dynamic emerging markets in the world. Investing with Brazilian financial planning and investment firms provides British investors access to this vibrant market, offering the potential for significant returns.

Diversification

Diversification is a key strategy for managing investment risk. Brazilian financial planning and investment firms provide a wide range of investment options, enabling British investors to diversify their portfolios and reduce exposure to market volatility.

Local Expertise

Brazilian financial planning and investment firms possess deep knowledge of the local market, allowing them to identify and capitalise on investment opportunities that may not be readily apparent to foreign investors. This local expertise ensures that British investors can achieve superior returns.

Comprehensive Services

Brazilian financial planning and investment firms offer a

comprehensive range of services, including financial planning, investment management, insurance, and estate planning. This holistic approach ensures that all aspects of a client's financial life are addressed, providing a seamless and integrated experience.

Personalised Service

Brazilian financial planning and investment firms adopt a personalised approach, working closely with clients to understand their unique needs and goals. This individualised service ensures that each client receives a tailored financial plan that aligns with their specific circumstances.

Commitment to Client Success

Brazilian financial planning and investment firms are dedicated to their clients' success, providing ongoing support and guidance to help them achieve their financial goals. This commitment to client success ensures that British investors can attain long-term financial security and prosperity.

Conclusion

The Brazilian financial market, along with its financial planning firms, offers unique opportunities for British investors seeking to diversify their portfolios and achieve long-term financial success. With a favorable regulatory environment, a dynamic and growing economy, and a commitment to innovation and client success, Brazilian financial planning and investment firms are well-positioned to deliver superior returns and comprehensive financial solutions.

Investing in Brazilian financial planning and investment firms not only represents an opportunity to achieve significant financial returns but also to benefit from personalised service, local expertise, and a holistic approach to financial planning. Therefore, we invite you to explore the investment opportunities within the Brazilian financial market and partner with a leading financial planning and investment firm to unlock your financial success.

Chapter 10

Competition Law

Comprehensive Guide to Brazilian Competition Law

Brazilian Competition Law

1. Introduction and Overview

Brazilian Competition Law, governed by Law No. 12,529/2011, is designed to maintain fair competition and prevent monopolistic practices that harm consumers and businesses. The law is enforced by the Administrative Council for Economic Defense (CADE), which investigates and adjudicates cases of anti-competitive conduct. This guide provides an in-depth analysis of Brazilian antitrust regulations, their enforcement mechanisms, penalties, and practical considerations for businesses, while also highlighting the law's international scope and application.

2. Anti-Competitive Behavior

Anti-competitive behaviors are prohibited in Brazil, regardless of intent or fault. This means that even if a company did not intend to violate the law or no harm was ultimately caused, the mere potential to produce anti-competitive effects is sufficient for an act to be deemed illegal.

The law targets acts that have as their object or potential effect the impairment of free competition or free enterprise; therefore, any actions that may limit, falsify, or otherwise harm free competition or free enterprise are prohibited.

- Illegally Dominating a Relevant Market: Illegally dominating a relevant market for goods or services is also prohibited. Dominance refers to a company's ability to control market conditions, prices, or supply, thereby restricting competition.

Examples: A company acquiring competitors to monopolize the market or using predatory pricing to eliminate competitors and gain control over a market segment.

- Arbitrarily Increasing Profits: Practices that arbitrarily increase profits are forbidden. This refers to unjustified price increases or cost manipulations that exploit consumers or hinder competition. Non-exhaustive examples of such practices are collusive agreements to raise prices simultaneously without economic justification or imposing unfair trading conditions.
- Abusive Exercise of Dominant Position: Exercising a dominant market position in an abusive manner is illegal. Abuse can occur through actions that exclude competitors or exploit consumers. Non-exhaustive examples of such practices are refusing to deal with certain suppliers or customers without justification, tying agreements, or exclusive dealing contracts that prevent competition.

Important Considerations

- No Requirement of Fault or Actual Harm:
  - The law applies regardless of whether the anti-competitive act was intentional (no fault required) or whether it actually resulted in anti-competitive effects (effects need not be

realised). Companies must be cautious, as the potential to harm competition is sufficient for liability.

- Presumption of Dominant Position:
  - A company or group of companies is presumed to hold a dominant position if it can unilaterally or collaboratively alter market conditions or if it controls 20% or more of the relevant market. The Administrative Council for Economic Defense (CADE) may adjust this percentage for specific economic sectors.
- Efficiency Exception:
  - On the other hand, if a company's market dominance results from natural growth due to greater efficiency compared to competitors, this is not considered illegal. Superior performance leading to increased market share is permissible, provided it's achieved through legitimate means such as innovation, better services, or improved products.
- Non-Exhaustive List of Liable Behaviors:
  - Collusion with Competitors:
    - Price Fixing: Agreeing on prices of goods or services offered individually.
    - Limiting Production or Sales: Coordinating to restrict the quantity of goods produced or services provided.
    - Market Division: Dividing market segments by allocating customers, suppliers, regions, or periods.
    - Bid Rigging: Fixing prices, conditions, or advantages, or agreeing to abstain in public bids.
  - Promoting Uniform Conduct:
    - Influencing competitors to adopt uniform or concerted commercial behavior.
  - Blocking Market Entry:
    - Limiting or preventing new companies from accessing the market.
  - Hindering Competitors or Partners:
    - Creating difficulties for the establishment, operation, or

development of competing companies, suppliers, buyers, or financiers.

- Restricting Access to Resources:
  - Impeding competitors' access to inputs, raw materials, equipment, technology, or distribution channels.
- Exclusive Advertising Rights:
  - Demanding or granting exclusivity for advertising in mass media outlets.
- Manipulating Prices Deceptively:
  - Using misleading means to cause price fluctuations of third parties.
- Regulating Markets:
  - Establishing agreements to limit or control technological research and development, production, or investments in goods or services.
- Imposing Resale Conditions:
  - Forcing resellers to adhere to prices, discounts, payment terms, minimum or maximum quantities, profit margins, or other commercialization conditions in their dealings with third parties.
- Discriminatory Practices:
  - Discriminating against buyers or suppliers by setting different prices or operational conditions for sales or services.
- Refusal to Deal:
  - Refusing to sell goods or provide services under normal payment conditions customary in commercial practices.
- Disrupting Business Relations:
  - Hindering or breaking off ongoing commercial relationships due to the other party's refusal to accept unjustifiable or anti-competitive clauses.
- Destruction or Hoarding of Resources:
  - Destroying or hoarding raw materials, intermediate or

finished products, or impeding the operation of equipment for their production, distribution, or transportation.

- Monopolizing Intellectual Property:
  - Hoarding or impeding the exploitation of industrial or intellectual property rights or technology.
- Below-Cost Selling:
  - Unjustifiably selling goods or services below production cost.
- Withholding Goods:
  - Retaining production or consumer goods without justification, except to cover production costs.
- Ceasing Activities Without Just Cause:
  - Partially or completely stopping company activities without proven justifiable reasons.
- Tying Arrangements:
  - Conditioning the sale of a good on the purchase of another or the use of a service, or vice versa.
- Abusive Exploitation of Rights:
  - Abusively exercising or exploiting industrial or intellectual property rights, technology, or trademarks.

Companies with significant market shares should be particularly mindful of their practices, as they are subject to greater scrutiny.

Penalties and Enforcement

Fines

- Companies: Fines can range from 0.1% to 20% of the company's gross revenue in the relevant market during the previous fiscal year.
- Individuals: Individuals, including executives and directors, can be fined from 1% to 20% of the fines imposed on companies. If gross revenue cannot be used as a basis, fines can range from

BRL 50,000 to BRL 2 billion.

- Recurrence: Fines can be doubled in cases of recidivism.

Other Sanctions

- Prohibitions: Companies may be barred from receiving public subsidies or participating in public tenders for a specified period.
- Dissolution: In severe cases, CADE can order the dissolution of the company or the divestiture of specific assets.
- Behavioral Remedies: These may include requirements to alter business practices, provide access to essential facilities, or change contractual terms with customers and suppliers.

Cease-and-Desist Agreements (TCCs)

Companies under investigation for anti-competitive practices can enter into a Termo de Compromisso de Cessação (TCC), or cease-and-desist agreement, with CADE. In exchange for admitting wrongdoing and committing to cease infringing conduct, companies can receive a reduction in fines and other penalties. These agreements often include compliance commitments and monitoring provisions to ensure future compliance with competition laws.

3. Merger and Acquisition (M&A) Control

Merger Control in Brazil

Merger control is a critical aspect of Brazilian competition law, ensuring market concentration does not harm competition. The process involves several steps:

Notification Thresholds

Companies must notify CADE of mergers and acquisitions

that meet specific criteria, such as combined annual turnover thresholds or significant market share. Failure to notify can result in fines and invalidate transactions. The current thresholds require notification if one of the groups involved has an annual turnover or total sales in Brazil of at least BRL 750 million, and another group involved has an annual turnover or total sales in Brazil of at least BRL 75 million.

Review Process

CADE conducts a detailed analysis of the proposed transaction, considering factors such as market concentration, potential anti-competitive effects, and efficiencies that the merger might bring. The initial review period is 240 days, which can be extended by an additional 90 days, making the maximum review period 330 days.

Remedies and Conditions

If CADE determines that a transaction could harm competition, it can impose remedies or conditions to mitigate these effects. These can include divestitures, access commitments, or behavioral remedies designed to maintain competition in the market. In some cases, CADE may approve the transaction conditionally, subject to the parties fulfilling specific obligations to address competitive concerns.

Post-Review of Non-Notified M&As

CADE has the authority to review mergers and acquisitions even if they were not initially notified but later found to meet the notification thresholds or raise significant competitive concerns. This post-review process ensures that all significant transactions are subject to scrutiny, maintaining a fair competitive environment. Companies found to have completed a merger without the necessary notification may face substantial fines and be required to take corrective actions, such as divesting assets or implementing behavioral remedies.

Agreements to Cease Investigations or Approve M&As

CADE offers mechanisms for companies to negotiate settlements in both conducting investigations and merger reviews. These agreements can lead to the cessation of investigations or conditional merger approvals.

Merger Control Agreements

In mergers, CADE may negotiate remedies with merging parties to address competitive concerns. These remedies can be structural, such as divestitures of business units, or behavioral, such as commitments to maintain certain business practices. The goal is to prevent anti-competitive outcomes while allowing beneficial aspects of the merger to proceed.

International Scope and Application

Brazilian competition law aligns with international standards, facilitating cooperation with antitrust authorities in other jurisdictions. This alignment is crucial in a globalised economy where anti-competitive practices often have cross-border implications.

International Cooperation Agreements

CADE has cooperation agreements with several international competition authorities, including those in the United States, the European Union, and other Latin American countries. These agreements enable information sharing, joint investigations, and coordinated enforcement actions.

OECD Guidelines

Brazil's adherence to OECD competition guidelines underscores its commitment to maintaining a competitive market

environment. The guidelines provide a framework for best practices in competition policy and enforcement, which Brazil incorporates into its regulatory approach.

Cross-Border Enforcement

CADE actively participates in international forums and collaborates with foreign competition authorities to address anti-competitive practices with a global impact. This cooperation is essential for tackling complex cases involving multinational companies and ensuring consistent enforcement across jurisdictions.

Conclusion

Brazilian competition law, established by Law No. 12,529/2011, plays a vital role in maintaining market fairness and protecting consumers. International businesses must understand and comply with these regulations to succeed in Brazil. By adhering to the regulations, implementing robust compliance programs, and seeking legal advice, companies can navigate the complexities of Brazilian competition law and contribute to a fair and competitive market environment.

Chapter 11

Public Utility Bids and Contracts

Public Bidding and Public Contracts

Government worldwide and in Brazil has increasingly positioned itself as an important buyer and contractor; in Brazil, in the first half of 2024 alone, the total estimated value of public contracts carried out is almost BRL 560 billion[1]. These purchases and contracts can range from common goods and services to engineering services and the purchase of innovative services or products.

Public contracts must be preceded by a selection process, or bids (except for specific cases, discussed below), to safeguard the public interest, select the most advantageous offer and ensure equal competition for interested individuals.

There are several statutes establishing rules on bidding processes in Brazil. Today, the most important are:

i) Public Procurement and Administrative Contract Act (Law Nº 14.133/21) which sets out the general rules for bidding procedures and government contracts.

ii) State's Companies Statute (Law Nº 13.303/16), which provides specific rules concerning public companies, mixed capital companies and their subsidiaries.

iii) PPP Act (Law Nº 11.079/03), which sets out the rules for Public-Private Partnerships - PPPs; and

iv) Concessions Act (Law Nº 8.987/95), which covers the rules for delegating the provision of public services to private sector companies through authorisations, permissions and concessions.

It is worth noting that some states have their own bidding and contract laws, however, they must follow the general principles and regulations set out by the Public Procurement and Administrative Contract Act.

In addition to the laws above, there are also laws setting specific rules for certain types of hiring or purchase, among which we highlight:

i) Complementary Law Nº 182/21, the Legal Framework for Startups and Innovative Entrepreneurship, that provides a special bidding process for testing innovative solutions, with or without technological risk, which will result in a Public Contract for Innovative Solution (CPSI);

ii) Law Nº 13.243/16, which altered Law Nº 10.973/04, known as the Innovation Act, adding the use of the government's purchase power as a principle for the innovation ecosystem, and creating Technological Orders, a special type of contract intended to hire entities focused on research and with recognised technological training in the sector to carry out research, development and innovation activities that involve technological risk, in order to solve a specific technical problem or obtain an innovative product, service or process;

iii) Law Nº 12.598/12, which sets out special standards for purchasing, contracting and developing products and defence systems, as part of Brazil's defence strategy (Decree Nº 6.703/08); and

iv) Complementary Law Nº 123/06, the National Statute of

1. Available at: https://www.gov.br/pncp/pt-br/acesso-a-informacao/painel-pncp-em-numeros

Microenterprises and Small Businesses, which sets out special conditions for these enterprises when participating in public bids.

Public Procurement and Administrative Contract Act (Law Nº 14.133/21):

The Public Procurement and Administrative Contract Act (Law Nº 14.133/21) came into effect on April 1, 2021, introducing a comprehensive regulatory framework for public bidding and administrative contracts in Brazil. Its main guidelines are intended to enhance transparency, efficiency, and competitiveness in the bidding process. The Act establishes the following key objectives for the bidding process: (i) ensuring selection of the most advantageous proposal; (ii) ensuring equal treatment for bidders as well as fair competition; (iii) avoiding overpriced or unfeasible contracts; and (iv) promoting innovation and sustainable development.

The Law tries to prioritise the overall value of the proposal rather than just the lowest bid, striving to enhance the quality and sustainability of public projects and services. This approach ensures the chosen proposals offer better long-term benefits, efficiency, and effectiveness.

Below, we address the main points of the law.

Principles

The Law reinforces the constitutional principle of equal protection under the law. A bidding procedure should be designed to select the most advantageous bid for the government. Moreover, a bidding procedure must be processed and decided upon in strict compliance with the basic principles of legality, impersonality, morality, transparency, efficiency, public interest, administrative probity, equity, planning, transparency, efficacy, segregation of duties, motivation, reference to the tender documentation, objective evaluation, legal certainty, reasonability, competitiveness, proportion, agility, economy, and sustainable national development,

These principles apply to all public procurement procedures.

Phases of the Bidding Process

A bidding process has the following phases: (i) preparatory phase; (ii) publishing the bidding notice; (iii) submission of proposals and bids, when applicable; (iv) judgment of the proposals; (v) qualification of the winning bidder; (vi) appeals; and (vii) ratification.

This represents a major change from the former public biddings and public contracts Act (Law Nº 8.666/93), as the new law introduced a significant change in the process by reversing the qualification and judgement phases of the proposals. Now, the submission of qualification documents occurs after evaluation of the proposals. This change aims to streamline the bidding process, reduce bureaucracy, and ensure that only the most promising proposals undergo detailed qualification scrutiny. This approach not only saves time but also increases the efficiency and competitiveness of the bidding process, as it focuses on the merit of the proposals before verifying the bidders' qualifications.

Article 62 defines qualification as the stage where necessary and sufficient information and documents are verified to demonstrate the supplier's ability to execute the object of the procurement process. It is classified into four categories: legal qualification, technical qualification, qualification based on tax, social-security, and labor laws and regulations, and economic and financial qualification.

Types of Bid

The five types of bid provided for by Law Nº 14.133/2021 are:

i) "*Pregão*": mandatory bidding format for acquisition of common goods and services, in which the selection criterion may be the lowest price or the highest discount;

ii) Competitive Procurement: procurement method for contracting special goods and services and ordinary and special engineering works and services in which the criterion may be: a) the lowest price; b) the best technique or artistic content; c) technique and price; d) the highest economic return; e) the highest discount;

iii) Contest: procurement method for choosing a technical, scientific, or artistic work, in which the criterion shall be the best technique or artistic content, and for granting an award or compensation to the winner;

iv) Auction: procurement method for disposal to the highest bidder of real or personal properties that are unusable or were legally seized;

v) Competitive dialogue: procurement method for contracting works, services, and purchases in which the government enters into a dialogue with suppliers that were previously selected using objective criteria in order to develop one or more alternatives capable of meeting its needs; the suppliers submit a final proposal after the end of the dialogues.

Criteria for the winning bid:

The winning bid is decided objectively based on the following criteria (Article 33, Law Nº 14.133/2021):

i) the lowest price;

ii) the highest discount;

iii) the best technique or artistic content;

iv) technique and price;

v) the highest bid in case of auctions;

vi) the highest economic return.

Non-Application and Waiver of Public Bids

As a rule, all public contracts must be preceded by a bidding process, except in cases of a waiver or when such a process does not apply. Waivers are optional in the bidding process, whereas non-application arises when a specific situation prevents formation of a common bid. There can be no bid where there is no competition within a given sector.

Examples of where the government can waive the need for a bid include:

i) When the contract involves less than one hundred thousand Reais for engineering works and services or maintenance of

motor vehicles, or fifty thousand Reais for other services and purchases.

ii) when the country is at war, in turmoil or undergoing an emergency or public calamity;

iii) where bids have attracted no interested parties - these bids cannot be repeated if they harm the government;

iv) whenever bids clearly exceed domestic market prices, or are inconsistent with official entities' fixed prices;

v) where domestic public entities acquire goods or services that a specially created government body or agency provides; and

vi) where there is an impending threat to national security Bids are inapplicable in the absence of competition. Examples include:

i) where only the manufacturer or producer of an exclusive commercial agent or company can supply the materials, equipment or items;

ii) contracts under Article 6, XVIII for specialised technical services. These include opinions, expert reports and appraisals; technical assistance or consultancy and financial audits, taking up the defense on judicial and administrative proceedings; and

iii) contracting a well-known artist.

Bonds

The government will normally demand a performance bond for contracting work, services and purchases. Such bonds might be submitted in cash, Government bonds or bank guarantees.

The bond cannot exceed 5% of the contract value, however, if the services are important or the contracts are technically complex and involve considerable financial risk, this limit may increase to 10%.

Foreign Participants and Jurisdiction

The new Bidding Law also altered the treatment of foreign

companies' participation in national bids. Unlike the previous legislation, the consortium leader need not be a domestic company. Additionally, the new law allows the submission of documents using simple translations during the bidding process. A sworn translation is ponly required on contract ratification. These changes aim to facilitate participation of foreign companies by reducing bureaucratic barriers and promoting a more competitive and inclusive environment.

The Article 9 prohibits differentiated treatment for Brazilian and foreign companies. This includes restrictions related to currency and place of payment. The law intends to guaranteeing fairness and equal opportunity in public procurement, promoting a level playing field for all participants regardless of origin. By mandating that no special advantages or disadvantages be granted based on a company's nationality, the law fosters a more competitive and transparent bidding process. This provision aligns with Brazil's broader efforts to integrate more fully into the global economy and adhere to international trade agreements.

As to jurisdiction over the public contracts, the parties must submit contract-related disputes to the courts with jurisdiction over the government's headquarters. This applies even to contracts with foreign entities, but not to:

i) international bidding processes for goods and services whose payment is made with the proceeds of funding granted by an international financial agency of which Brazil is part (such as the World Bank) or by a foreign cooperation agency;

ii) contracting with a foreign company to purchase equipment manufactured and delivered abroad preceded with authorisation of the Head of the Executive Branch; and

iii) acquisition of goods and services made by administrative units headquartered abroad.

Appeals

Administrative appeals aim to contest specific decisions, such as:

i) a decision granting or denying a request for pre-qualification of an interested party or registration in a register of

information, its amendment or cancellation;

ii) evaluation of the proposals;

iii) qualification or disqualification of a supplier;

iv) annulment or revocation of the procurement process; and

v) termination of the contract when determined by a unilateral written decision of the Administration.

Sanction

Failure to execute the contract may result in the following sanctions:

i) warning;

ii) fine;

iii) a ban on bidding and contracting with the contracting entity; and

iv) declaration of unsuitability to bid or contract with the Government.

State's Companies Statute (Law Nº 13.303/16):

Federal Law No 13.303/16 provides specific rules for public and mixed-capital companies and their subsidiaries, covering any and all such companies of the Federal Government, States, Federal District and Municipalities that produce or sell goods or services, even if the economic activity is a monopoly run by the Federal Government or the provision of public services.

When these companies do not hold a controlling portion of the shares in another company, they must adopt and supervise governance and control practices proportional to the relevance, materiality and risks of the business in which they are participants.

A public company, or a mixed-capital company and its subsidiaries must observe rules related to corporate governance, transparency and structures, risk management practices and internal controls, composition of management and, if there are shareholders, mechanisms for their protection.

Under Law No. 13,303/16, the development of

Integrity/Compliance Programs for such companies is now mandatory, as is the creation and disclosure of their Integrity and Conduct Codes.

Contracts with third parties to provide services to public companies and mixed-capital companies, or to acquire or rent assets, sell assets and assets that are part of their respective assets, or execute works to be integrated into such assets, as well as implementation of the real burden on such assets, must be preceded by a public bidding procedure.

The bids and contracts mentioned in this law must comply with the following guidelines;

i) Standardisation of the object of the contracting;

ii) Search for the greatest competitive edge for the companies related hereto;

iii) Division of the subject matter, seeking to increase the number of competitors;

iv) Preferred adoption of the reverse auction;

v) Observance of a compliance policy in transactions with interested parties.

The bids and contracts will also observe the rules related to:

i) Environmentally correct disposal of any solid waste generated;

ii) Mitigation of environmental damage through conditioning and environmental compensation measures;

iii) Utilisation of products, equipment and services that have been proven to reduce energy and natural resource consumption;

iv) Assessment of neighbouring impacts;

v) Protection for cultural, historic, archaeological and non-tangible equity;

vi) Accessibility for persons with disabilities or reduced mobility.

Bids may be waived in situations determined by law, especially:

i) for works and engineering services up to R$ 100,000.00 (one hundred thousand reais); and

ii) for other services and purchases of up to R$ 50,000.00 (fifty

thousand reais) and for disposals, in cases provided by Law;

Direct contracting will also be available when there is no competition in a given sector.

The bidding procedure must follow this sequence of steps: i. preparation; ii. disclosure; iii. submission of offers or proposals; iv. judgment; v. verification of the effectiveness of the proposal; vi. negotiation; vii. qualification; viii. filing of appeals; ix. adjudication; and x. ratification of the outcome or revocation of the procedure.

The following judgment criteria may be used: i. lowest price; ii. highest discount; iii. best combination of price and technique; iv. best technique; v. best artistic content; vi. highest price offer; vii. best economic return; or viii. best destination of disposed assets.

A guarantee may be required for works, services and purchases. The contractor shall choose one of the following forms of guarantee: i. security in cash; ii. performance bond; or iii. bank guarantee.

Public and the mixed-capital companies may request individual expressions of interest for the receipt of proposals and projects to meet previously identified needs.

Concessions Act (Law Nº 8.987/95):

Public services aim to satisfy certain basic public needs and demands, such as health, safety and transport. The Brazilian Federal Constitution recognises public services as essential and necessary. The government has an obligation to provide them. Such services may be rendered directly by the Government or by private parties contracted by the government under certain specific rules established by Federal Law No. 8,987/95, the so-called 'Concessions Act. It will provide these services directly or indirectly by delegating them to private entities in one of three ways: by concessions, permissions or authorisations. The law regulating public services provides the criteria for deciding which mechanism it must use in each case.

A concession is delegation of the performance of an Executive public service by the granting authority. The authority can delegate services by bid to a corporate entity or consortium of companies if it presents the capacity to carry out the services on its own account and risk, for a specific, renewable period.

A permission is discretionary and temporary. It is usually used in emergencies or transitory situations. It allows a private party to

perform public utility services or use public goods. The party receives its remuneration by being able to commercialise the services or goods. Unlike concessions, the party is not normally entitled to any indemnity if the administration terminates its permission.

Authorisations are the third mechanism. Because Brazil is reforming the way it regulates public utilities, authorisations are also receiving attention. They used to be revoked at any time at the granting authority's discretion. In the telecommunications sector for example, authorisations to provide private services are granted to companies that meet the requirements of the General Telecommunications Act and other specific regulations. The energy sector uses a similar system to grant authorisations for certain low-capacity, electricity generation services.

The Government is responsible for providing public utility services directly or by grant or permit. It will only grant these through a public bid.

The law defines:

i) the regime for public utility companies, the special nature and extension of their contract, and the conditions for forfeiture, control and termination of the grant or permit:

ii) the rights of users;

iii) the tariff policy; and,

iv) the obligation to maintain adequate services.

The Concessions Act governs how the Government authorizes third parties to perform public services. Under a concession, the services must meet the user's needs by satisfying requirements such as regularity, continuity, efficiency and safety.

The Government can only grant public service concessions following a bidding process and choosing a company to provide the services. The government will sign a concession agreement with that company. The draft of the concession contract is usually attached to the public notice. The government cannot substantially alter this after the bid or risk cancellation of the process. The law applies to many services.

These include concessions for operating:

i) Federal highways;

ii) Federal dams, locks, reservoirs and irrigation works;

iii) customs stations and terminals for public use, except those in ports or airports;

iv) air and space navigation and airport infrastructure;

v) interstate rail and water ways; vi. transport of passengers by road across State or national boundaries;

vi) ports;

vii) mining; and,

viii) sanitation services, rubbish removal and related activities.

The concession will end when the:

i) contractual term expires;

ii) the government expropriates the concession;

iii) the government forfeits the concession;

iv) the contract ends;

v) the contract is annulled; and

vi) the concession-holding company goes bankrupt or ceases trading, or if the owner of a sole-trader company dies or is incapacitated.

PPPs Law (Law Nº 11.079/03):

PPPs were introduced into Brazil by the PPP Act (Federal Law No. 11,079/03). The law created two new types of concession, which can be seen to supplement the Concessions Act (see above, Specific rules for concessions):

i) Sponsored concession (*concessão patrocinada*). This is basically similar to concessions under the Concessions Act. The state is allowed to supplement the concessionaire's revenues and/or share and mitigate risk with the concessionaire; and

ii) Administrative concession (concessão administrativa). This is a combination of providing long-term services to the state (and not end users) and private construction of the facilities necessary to provide the services.

While some provisions of the Concessions Act apply to PPP projects, the main differences between the PPP Act and the

Concessions Act are that under PPP law:

i) Its rules apply to all federal PPPs.

ii) It sets out general rules for the PPPs of states and municipalities (although some states, such as São Paulo, Rio de Janeiro and Minas Gerais, and even some municipalities, have their own laws on PPPs).

iii) The minimum value for a PPP is BRL10 million. The minimum duration is five years and the maximum duration is 35 years.

iv) Lenders have step-in rights. The state is authorised to pay the consideration arising from a PPP agreement directly to the lenders if the relevant financing agreements establish this.

v) The state's consideration can be paid to the concessionaire:

- in cash;
- in the form of non-tax credits or other rights against the state;
- through use of government real estate; or
- other lawful means provided in the concession agreement.

vi) The state can set out a performance-based compensation system.

vii) The state can only make payments to the concessionaire after the services are made available, although partial payments for partial availability of services are allowed.

viii) The state can provide guarantees for its payment obligations, in the form of:

- allocation of revenues;
- use of special funds;
- performance bonds with independent insurers;
- warranties provided by multilateral institutions or independent banks; or
- warranties provided by special funds or companies created by the state for this purpose.

The contract must also establish an objective basis on which the parties will share any risks. The Draft Bill No. 7,063/2017, which

aims to amend the current legal framework governing concessions and public-private partnerships (PPPs) in Brazil, remains under consideration in the National Congress and may bring important changes to the existing arrangements. If enacted, the proposed legislation could reshape the structure and operation of concession contracts, potentially altering the regulatory environment and influencing investment decisions for both domestic and international stakeholders involved in infrastructure and public service.

Specific Rules for Public Companies and Mixed-Capital Companies

Federal Law No 13.303/16 provides specific rules for public and mixed-capital companies and their subsidiaries, covering any and all such companies of the Federal Government, States, Federal District and Municipalities that pursue economic activity in the production or sale of goods or services, even if the economic activity is subject to the monopoly regime of the Union or the provision of public services.

When these companies do not hold the controlling portion of the shares when participating in another company, they must adopt, with the duty to supervise, practices of governance and control proportional to the relevance, materiality and risks of the business in which they are participants.

A public company, or a mixed-capital company and its subsidiaries must observe rules of corporate governance, transparency and structures, risk management practices and internal control, composition of management and, if shareholders, mechanisms for their protection.

Due to the provisions of Law No. 13,303/16, the development of Integrity/Compliance Programs for such companies is now mandatory, as is the creation and disclosure of their Integrity and Conduct Code.

Contracts with third parties to provide services to public companies and mixed-capital companies, for the acquisition and rental of assets, the sale of assets and assets that are part of their respective assets, or the execution of works to be integrated into such assets, as well as to the implementation of the real burden on such assets, must

be preceded by public bidding.

In the biddings and contracts refereed in this law, the following guidelines must be observed;

i. Standardisation of the object of the contracting;

ii. Search for the greatest competitive edge for the companies related hereto;

iii. Division of the object, seeking to increase the number of competitors;

iv. Preferred adoption of the reverse auction;

v. Observance of a compliance policy in the transactions with interested parties.

The biddings and contracts shall especially observe the rules related to:

i. Environmentally correct final disposition of the solid waste generated;

ii. Mitigation of environmental damages through conditioning and environmental compensation measures;

iii. Utilization of products, equipment and services that have been proven to reduce the consumption of energy and natural resources;

iv. Assessment of neighbouring impact;

v. Protection of the cultural, historic, archaeological and non-tangible equity;

vi. Accessibility for persons with disability or reduced mobility.

The bid may be waived in situations determined by law, especially:

i. for works and engineering services up to R$ 100,000.00 (one hundred thousand reais); and

ii. for other services and purchases of up to R$ 50,000.00 (fifty thousand reais) and for disposals, in cases provided by the Law;

Direct contracting will also be made when there is unfeasibility of competition.

The bidding procedure shall comply with the following

sequence of steps:

i. preparation;
ii. disclosure;
iii. submission of offers or proposals;
iv. judgment;
v. verification of the effectiveness of the proposal;
vi. negotiation;
vii. qualification;
viii. filing of appeals;
ix. adjudication; and
x. ratification of the outcome or revocation of the procedure.

The following judgment criteria may be used:

i. lowest price;
ii. highest discount;
iii. best combination of price and technique;
iv. best technique;
v. best artistic content;
vi. highest price offer;
vii. best economic return; or
viii. best destination of disposed assets.

A guarantee may be required in the engagement of works, services and purchases. The contractor shall choose one of the following modalities of guarantee:

i. security in cash;
ii. performance bond; or
iii. bank guarantee.

The public and the mixed-capital companies may adopt a procedure of private interest manifestation for the receipt of proposals and projects to meet previously identified needs.

Public Private Partnerships

Introduction

In Brazil, a public service is an activity that the State, by constitutional decree, must develop for the benefit of the public. Activities which are considered to be public services in Brazil include roads, railways, ports, airports, urban mass transportation, environmental services, etc. The State may provide such services directly or through concessions and permissions. The concept of concessions in not new in the Brazilian Legal System and the concession model in Brazil is currently based upon two main legal statutes: The Concessions Law[2] and the Public Private Partnership Law.

The Concessions Law establishes that Concession is the operation of public facilities and services, for a determined period, at the concessionaire's risk. This can involve the exclusive rendering of a service or the rendering of a service coupled with the construction of public works or facilities. The concessionaire may recoup its investment exclusively from the revenues collected from the users, within the term of the concession.

Such concession model worked very well for projects which had a substantial margin of safety, i.e. projects with low risk. It did not work, however, for projects with more risk involved. It barely worked for green field projects, except for the assumption and improvement of already existing facilities. This is because the Concession Law established that the concessionaire had to operate at its own risk.

Even though there were some projects to which the Government provided financial support, either in the form of financial support, construction of concession work/facilities, or risk mitigation, many advocate that this kind of support was illegal. Thus, given the understanding that the Concessions Law did not allow the State to either complement the concessionaire's revenue or assume or mitigate risk, the only solution was to enact a new statute.

In light of that, the Public Private Partnership was established in the Brazilian Legal System through the enactment of Law no. 11,079, dated December 30, 2004 ("Law no. 11,079/04") in which two kinds

of concessions were established that could be understood as a complement to the provisions of the Concessions Law.

Such new types of concessions are:

i. The Sponsored Concession ("*Concessão Patrocinada*"), which is basically a concession in the fashion of the Concessions Law in which the State is allowed to complement the concessionaire's revenues and/or share, and mitigate risk with the concessionaire; and

ii. The Administrative Concession ("*Concessão Administrativa*"), which is a modality of provision of long-term services to the State (and not to the end users) coupled with the private construction of the necessary facilities for the rendering of the services.

Law No. 1,1079/04 is applied to the Public Administration bodies of the Executive and Legislative Branches, Special Funds, autarchies, public foundations, public companies, economic societies and other companies controlled directly or indirectly by the Union, States, Federal District and Municipalities.

Main provisions of Law No. 11,079/04

Some of the provisions of the Concessions Law are applicable to PPP projects, but there are others that are exclusive to such types of concessions. In this sense, it is important to establish the main provisions in the Federal PPP Law:

i. The statute's rules are applicable to all Federal PPPs; it also provides general rules that are applicable to State and Municipality PPPs[3];

ii. The minimum value for a PPP is R$ 10,000,000.00 (ten million

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2. Law no. 8,987, dated February 13, 1995 - Such statute deals with the matter within the scope of Article 175 of the Brazilian Constitution. It is a Federal statute, applicable to all Federal Government concessions, and also sets out general rules that should be followed by the States and Municipalities, which can enact their own specific concession statutes.
3. Nevertheless, some States such as São Paulo, Rio de Janeiro and Minas Gerais, and even some municipalities, have their own laws regarding Public Private Partnerships.

reais); the minimum term is five (5) years and the maximum term is thirty-five (35) years;

iii. The lenders have step-in-rights and the State is authorised to pay the consideration arising from the PPP agreement directly to the lenders, if the relevant financing agreements so establish;

iv. The State's consideration may be paid to the concessionaire in cash, in the form of non-tax-credits, in the form of other rights before the State, use of Government real estate, or other lawful means provided for in the relevant concession agreement;

v. The State is authorized to establish a performance bond based upon the remuneration benefit of the concessionaire;

vi. The State may only make any payments to the concessionaire after the services are made available; partial payments for partial availability of services is allowed;

vii. The State may provide warranties to its payment obligations in the form of segregation of revenues, use of special funds, hiring of performance bonds with independent insurers, warranties posted by multilateral institutions or independent banks, warranties provided by special funds or companies created with this aim by the State;

viii. The Federal Government will establish a fund to provide warranties to its obligation pursuant to PPP concession agreements; and

ix. The concession agreement shall establish objective risk sharing between the parties.

The Agreement should provide the requirements and conditions under which the public partner will authorise the transfer of control or temporary administration of the special purpose company to its financiers and guarantors with whom it does not maintain a direct corporate bond, with the purpose of promoting its financial restructuring and ensuring the continued provision of the services.

It may also provide a variable compensation to the private partner linked to its performance, according to the quality standards and goals defined in the contract.

The Bid Process

According to clause 10 of Law No. 11,079/04, prior to a PPP agreement a competitive bidding procedure should take place, and this requires:

i. authorization by the public authority, based upon a technical study;

ii. an estimate of the budgetary and financial impact during the periods in which the PPP agreement shall be in effect;

iii. a statement by the party responsible for authorising the expenditure that the obligations undertaken by the PPP agreement are in line with the Budget Guidelines Act and have been considered in the Annual Budget Act;

iv. an estimate of long-term flow of public funds, necessary for fulfilling the financial obligations undertaken by the Public Administration throughout the term of the contract and in each fiscal year;

v. the project is included in the Multi-Year Plan in effect;

vi. submission of the draft invitation to tender and the draft contract for public consultation; and

vii. a prior environmental license or release of the guidelines for the environmental licensing of the project, as required by regulation.

Sponsored grants in which more than seventy percent (70%) of the private partner's remuneration is paid by the Public Administration will depend on specific legislative authorisation.

The engineering studies for the definition of the sum of the investment in the PPP should have a preliminary project detail level, and the investment value to define the reference price for the bid will be calculated based on market values considering the overall cost of similar works in Brazil or abroad or based on cost systems that use the input market values of the specific sector of the project, measured (in all cases) by a synthetic budget, and prepared by means of an expedited or parametric methodology.

Law No. 11,079/04 also established that the invitation to bid should contain a draft of the PPP agreement and may further provide:

i. the requirement of a bid bond;

ii. the use of private mechanisms for dispute resolution, including arbitration based upon Law No. 9,307, dated September 23, 1996.

The bidding notice shall specify, when applicable, the guarantees of the consideration from the public partner to be granted to the private partner.

Special Purpose Company

Before a contract is awarded, a special purpose company must be set up and this will be responsible for implementing and managing the PPP. Any transfer of control over the special company is subject to prior authorisation by the Public Administration. The Special Purpose Company may be a publicly traded corporation.

The SPE shall comply with corporate governance standards and adopt standardised accounting and financial statements.

The Public Administration is prohibited from holding a majority of the SPE voting capital, except in situations in which a majority of the SPE voting capital is acquired by a financial institution controlled by the Government in the event of default of financing agreements.

The judgment may be preceded by a stage of qualification of technical proposals, disqualifying the bidders that do not reach the minimum score, and this may adopt as criteria:

i. a lower value of the consideration to be paid by the Public Administration;

ii. the best proposal, considering a combination of the criteria above with the best technique.

College Management Body and the Investment Partnership Program

The Federal Government issued Decree no. 5,385 on March 4, 2005, creating a college management body[4] with the following main

responsibilities:

i. Establishment of bidding procedures;

ii. Making proposals to the Investment Partnerships Council[5] of the priority services to be the object of a PPP project;

iii. Authorisation for the opening of bidding processes;

iv. Approval of invitations to tender; and

v. Evaluation of contract performance reports.

The Investment Partnership Program created by Law 13.334, dated 2016, aims to expand and accelerate the PPP and Concessions programs at Federal level. The main objectives of the program are to:

i. expand investment to meet Brazil's social and economic development goals;

ii. ensure the expansion and quality of the public infrastructure;

iii. promote fair competition for those interested in providing services for the population; and

iv. ensure legal stability.

Limits for PPP projects

Article 28 of Law 11,079/05 establishes that the Federal Government may not grant guarantees in credit operations or make voluntary transfers to the States, Federal District or Municipalities if the sum of current expenditures derived from the partnerships already contracted by these authorities has exceeded, in the previous year, five per cent (5%) of the current net revenue for the fiscal year, or if the annual expenditures of the contracts in effect, in the ten (10) subsequent years, has exceeded five per cent (5%) of the net current revenue.

4. *Comitê Gestor de Parceria Público Privada.*
5. *O Programa de Parcerias de Investimentos* (PPI) - The Investment Partnerships Program, was created by Law 13,334 of 2016.

Technological Partnerships of the Unified Health System

The public healthcare sector managed by the Ministry of Health has been a pioneer in developing new legal frameworks to find contractual solutions for problems of the Unified Health System (SUS). The SUS is proving to be a prolific laboratory because healthcare challenges encompass matters of life or death that, as they require urgent solutions, encourage creativity and increase appetite for innovative solutions, even if there are no specific legal provisions to confer express legal basis.

For instance, this legal experimentation process in healthcare resulted in the models for: i) Partnerships for Productive Medicine Development (PDP); ii) Technological Orders in the Healthcare Area (ETECS); iii) Offset Measures in the Healthcare Area (MECS)[6]; iv) Risk Sharing Arrangements (ACR); and v) Public-Private Partnership for management of public pharmaceutical manufacturing plants (PPP). In addition, other little-used models might be identified, but they have massive potential in the healthcare sector provided for in the Technological Innovation Act (Law No. 10.973/2004), such as: i) Public Authorities as a partner in Specific Purpose Entities or startups for development of innovative products or processes (art. 5); ii) technology transfer and licencing contracts to grant rights of use or exploration of a creation separately developed by public institutes and laboratories or partnerships (art. 6 and 11); iii) partnership agreements with public and private institutions for joint scientific and technology research as well as technology, product, service or process development activities (art. 9 and 9-A); and iv) risk contracts for development of disruptive technologies (art. 20). These are all relevant investment opportunities for the pharmaceutical industry and medical devices and equipment.

In the healthcare industry the dependence on India and China is a weakness that has already been mapped by the Brazilian National Agency of Sanitary Surveillance[7]. Indeed, most of the Active Pharmaceutical Ingredients (API) used in the production of medicines in Brazil come from abroad and India and China are immensely prominent among the foreign suppliers (they are the main suppliers for Brazil and other countries). Since the 2000s, the topic has been addressed in two primary public policies: the Support Programme for the Pharmaceutical Production Chain (Profarma)

from the National Economic and Social Development Bank (BNDES) with financing line for investments in the healthcare industry and the SUS Technological Partnerships.

These initiatives, coupled with enactment of the Generic Drugs Act (Law No. 9.787/1999), boosted growth of the Brazilian pharmaceutical industry, but concentrated on low technology products. Such circumstance highlights these policies' failure to relieve the Health Balance of Trade (BCS), which depends on increased Brazilian technological autonomy. On the contrary, the trade deficit in the pharmaceutical sector grew considerably in the past two decades as the national capacity for manufacturing finished products has grown (the production of generic drugs grew by a factor of twelve between 2003 and 2016[8]), but Brazil remained dependent on foreign API[9].

One of the factors that explains this technology dependence in the healthcare sector is that investment in research and development (R&D) in Brazil, both by Brazilian manufacturers and multinationals with subsidiaries in Brazil[10], is still low. In this context, government action will be decisive, for example to promote development and production of commercially unattractive medicines for the treatment of the so-called "neglected diseases"[11] that predominantly affect

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6. PDP, ETECS and MECS are provided for in Decree No. 9.245/2017 and the subject matter of Bill of Law No. 1.505 from the Federal Senate.
7. RESENDE, Leandro. Dependência de insumos da Índia e China é 'problema estrutural', says former Anvisa. CNN Brasil, 17/01/2021. Available at: <https://www.cnnbrasil.com.br/saude/dependencia-de-insumos-da-india-e-china-e-problema-estrutural-diz-ex-anvisa/>. Access on: 19/03/2023.
8. PARANHOS, J.; MERCADANTE, E.; HASENCLEVER, L. *Os esforços inovativos das grandes empresas farmacêuticas no Brasil: o que mudou na última década? In: ENEI – ENCONTRO NACIONAL DE ECONOMIA INDUSTRIAL E INOVAÇÃO*, 4., 2019, Campinas, São Paulo. Anais... Campinas: Abein; *Instituto de Economia da* Unicamp, 2019, p. 4.
9. RODRIGUES, P. H. de A.; SILVA, R. D. F. da C.; KISS, C. *Mudanças recentes e continuidade da dependência tecnológica e econômica na indústria farmacêutica no Brasil. Cadernos de Saúde Pública*, v. 38, p. e00104020, 2022, p. 9.
10. VIEIRA, Fabíola Sulpino; SANTOS, Maria Angélica Borges. *O setor farmacêutico no Brasil sob as lentes da Conta-Satélite da Saúde – Text for Discussion. Instituto de Pesquisa Econômica Aplicada* – IPEA. Brasília: Rio de Janeiro: IPEA, 2020, p. 15.
11. BRASIL. Ministry of Health. Science, Technology and Strategic Inputs Office (SCTIE). *Doenças negligenciadas*: Ministry of Health's strategies. *Rev. Saúde Pública*, São Paulo, v. 44, n. 1, fev. 2010, p. 200-202.

patients with low purchasing power who suffer poor living conditions. However, the weakness shown by global supply chains and, specifically, the API chain, is indicative of the need for government funding in areas beyond those involving neglected diseases[12].

The 1988 Constitution (art. 196) attributed the challenge of warranting full pharmaceutical assistance (CF, art. 198, II; Law No. 8.080/90, art. 6, I, "d", art. 7, II and art. 19-M, I) in a country of continental proportions, large demographic diversity and striking social-economic differences to the Brazilian government. Such complexity is emphasised by the pace of innovation that is specific to the healthcare industry and the result has been the emergence of increasingly rare treatments. For this reason, the definition of technical treatment patterns in the scope of SUS (i.e., which medicines will be regularly provided to the population) involves important political and economic tensions, with significant legal effects (judicialisation of the public health)[13] as the government has to consider budgetary restrictions and the system's scale (reserve of the possible); citizens (represented by actively engaged patient associations) aspire to have access to more modern technologies and treatments to recover their health and welfare; and the pharmaceutical industry expects to have full access to the market for its entire portfolio, given the relevance of the government demand.

The standardisation of technologies used by the public healthcare system is carried out within the scope of the Clinical Protocols and Therapeutical Guidelines (PCDT) (Law No. 8.080/90, art. 19-N, II), documents that established criteria for SUS diagnosis and treatment with medicines, specifying the products that should be prescribed and offered to patients in each case. In 2011, Law No. 12.401 (which included articles 19-M to 19-U in Law No. 8.080/90) created the National Technology Incorporation Commission in SUS CONITEC (inspired by the National Institute for Health and Clinical Excellence (NICE), from the United Kingdom) which was responsible for providing advisory services to the Ministry of Health (MS) on incorporating technologies into the SUS (consolidated, in the case of pharmaceutical products, in the National List of Essential Medicines (RENAME), to comply with Decree No. 7.508/11 and Ordinance No. 533/12).

To ensure SUS supplies, different initiatives were adopted in

the past decades to mitigate the risks of foreign dependence and their effect on development of Brazilian healthcare services. The critical point of these projects is the incorporation of recent technologies into the SUS and absorption of this technology by domestic players (private and public) so they are able to produce strategic products, which is intended to have positive effects and strengthen healthcare production chains[14]. These projects revolve around the MS and the Brazilian structure of Official Pharmaceutical Laboratories (LFO), whose distinguished members included institutions like *Fundação Oswaldo Cruz* and *Instituto Butantan*.

The main initiatives here are the Partnerships for Productive Medicine Development, Technological Orders in the Healthcare Area, Offset Measures in the Healthcare Area, Risk Sharing Arrangements, Public-Private Partnerships with the pharmaceutical industry and technology partnerships under the Innovation Act. Importantly, PDP, ETECS, MECS and ACR do not rely on an express legal provisions but on institutional innovations driven by the Ministry of Health through non-statutory rules (ordinances) and contractual adjustments with private partners.

The most consolidated partnership models used to strengthen the CEIS, are the Partnerships for Productive Medicine Development. These adjustments channel demand from the Sole Healthcare System or a given product for public laboratories associated with the private industry to fulfill this demand. The gain in scale means technology transfers can be negotiated so that the public partners achieve productive independence at the end of the project.

PDPs started to be implemented in 2009, when 11 projects submitted to the MS[15] by the LFO were approved without any specific regulatory provision. Law No. 12.349/2010 included in Law No. 8.666/1993 (art. 24, XXXI) allows direct contracting to support

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12. PARANHOS, J.; MERCADANTE, E.; HASENCLEVER, L. Op. cit., p. 15.
13. VIEIRA, Fabíola Sulpino. *Direito à saúde no Brasil: seus contornos, judicialização e a necessidade de macrojustiça*. Brasília: IPEA, 2020, p. 25-47.
14. COSTA, L. S.; METTEN, A.; DELGADO, I. J. G. *As Parcerias para o Desenvolvimento Produtivo em saúde na nova agenda de desenvolvimento nacional. Saúde em Debate*, v. 40, n. 111, p. 279–291, out. 2016, p. 287.
15. GLASSMAN, Guillermo. *Parcerias para o Desenvolvimento Produtivo de Medicamentos.* Londrina: Thoth, 2021, p. 58.

technological co-operation projects (in compliance with Law No. 10.973/2004, art. 3) and Law No. 12.715/2012 included a specific contract waiver for transferring strategic product technologies to the SUS (art. 24, XXXII). The name "Partnerships for Productive Development" was created in the 2012 non-statutory regulations upon enactment of Ordinance No. 837 from the MS[16], which explained for the first time the rules for implementing these adjustments in an organised manner.

In 2014, MS Ordinance No. 2.531 repealed MS Ordinance No. 837, partially rephrasing the partnership guidelines. It was subsequently absorbed into the Consolidation Ordinance No. 5/2017, which has shown no innovation in view of the regulatory content already existing with respect to the matter. In 2017, through Decree No. 9.245/17, the general rules for implementing Partnerships for Productive Development were included in a regulation. However, there is still no express legal mention of the PDPs or their legal regime – Bill of Law No. 1.505/2022 will, if approved, set the issue down in law and is currently before the Commission of Constitution, Justice and Citizenship in the Federal Senate.

PDPs have stagnated waiting for a new regulatory framework and this will now change with the publication of GM/MS Ordinances No. 4.472 and No. 4.473, both dated 20 June 2024, which change the GM/MS Consolidation Ordinance No. 5, dated 28 September 2017, respectively, to provide for the Programme for Partnerships for Productive Development (PDP) and establish the Local Development and Innovation Programme (PDIL). Therefore, PDP policy is expected to be vigorously resumed.

The Partnerships for Productive Medicine Development model does not use the regime described in Law No. 11.079/2004 (Public-Private Partnerships Law). The PDPs consist of administrative technology transfer contracts between public and private laboratories, with a commitment from the federal government (Ministry of Health) regulating convergence with SUS requirements. For instance, these adjustments do not provide investments by the contracted private laboratory in the productive infrastructure of the public laboratory and this gap has been proving to be one of the main reasons for the failure of this kind of partnership.

The PDP model is complex and its legal and institutional

modelling continues to evolve[17]. However, a massive portion of public demand for medicines has already been filled in this category (between 2011 and the beginning of 2018, the purchase of medicines by the Ministry of Health through PDPs approximated R$18 billion[18]). On the other hand, the only pharmaceutical PPP effectively implemented in Brazil was contracted in 2013 for the purpose of managing, operating, modernising (infrastructure adequacy), maintaining public industrial plant and supplying medicines to the Foundation for Popular Medicine (FURP) (official laboratory of the State of São Paulo)[19].

Its modelling proved to be inappropriate to the regulatory specifications of the Brazilian pharmaceutical industry and the public medicine market, which was confirmed, for instance, in the early rescission occurred in December 2022. The weaknesses in the PPP concept can be identified in numerous elements of a modelling that did not address the fundamental challenges of the project, such as: i) quick technology gap in the pharmaceutical market; ii) rising medicine prices (trend of commoditisation in the open market vs. slow rise/drop of the CMED ceiling prices); iii) impacts from the demand control by the Concession Grantor (possibility "dehydration" through acquisition based on Price Registration Minutes); and iv) lack of specific pricing of the transferred technology.

Notwithstanding the failure of this experience, numerous lessons can be learnt from an in-depth investigation of the case. Analysis of the errors in the legal (in particular the risk allocation) and financial-economic modelling and a comparative study of the PPP structures successful in other economic sectors in Brazil and other

16. SUNDFELD, Carlos Ari; SOUZA, Rodrigo Pagani de. *Parcerias para o desenvolvimento produtivo em medicamentos e a Lei de Licitações. Revista de Direito Administrativo*, Rio de Janeiro, v. 264, set./2013, p. 117.
17. GLASSMAN, Guillermo. *A importância do PL 1505 para o Complexo Econômico e Industrial da Saúde*. Jota, 18/07/2023. Available at: <https://www.jota.info/opiniao-e-analise/artigos/a-importancia-do-pl-1505-para-o-complexo-economico-e-industrial-da-saude-18072022>. Access on 19/03/2023.
18. BRASIL. Comptroller General. Evaluation Report – Science, Technology and Strategic Inputs Office, Year 2018. Available at: < https://eaud.cgu.gov.br/relatorios/download/855691>. Access on: 01 Jan. 2023.
19. The public documents related to the PPP from FURP are available at: http://www.parcerias.sp.gov.br/Parcerias/Projetos/Detalhes/114.

countries, can help establish guidelines for a new and more viable model. The establishment of such alternative (a viable and efficient model for pharmaceutical industry PPPs) would help consolidate the law and strengthen the Healthcare Economic and Industrial Complex.

More recently, in 2019, through Ordinance No. 1.297, the MS experimentally adopted a new model for incorporating technology into the SUS, the Risk Sharing Arrangement (ACR). Just like the PDPs, the MS has innovatively established an unprecedented model in Brazil (called a "pilot" in the Ordinance) based on pre-existing public instruments. In this case, there was uncertainty about the cost/effectiveness, consumption estimates and budgetary impacts from adopting Spinraza (Nusinersena) for SUS treatment of the Spinal Muscular Atrophy (SMA 5q) Types II and III (the medicine was supplied through the public system but only to Type I patients).

The purpose of the ACR was to evaluate the effects of the medicine's incorporation under real-life conditions, with the manufacturer offering a lower price in exchange, in addition to agreeing to assume any unexpected additional costs if the number of patients served exceeded the maximum expected number expected based on the epidemiologic data available. Moreover, the ACR is a new social, political and economic tension management model that surrounds the incorporation of technologies into the SUS. The model seems to be aligned with broader state mediation and serving as an instrument of the administrative participation in a dialogic public administration[20].

The incorporation of new pharmaceutical technologies is indeed one of the main challenges of the SUS[21]. CONITEC has been supporting analysis of incorporation on the cost/effectiveness binomial, but, in many cases, due to the lack of sufficient data, there is uncertainty as to the advantages of substitution of technologies, which delays the population access to these treatments through the regulatory public pharmaceutical assistance channels. This encourages the judicialisation of the matter by patients who wish to get access to more modern medicines. As an alternative to accelerate access to new treatments, the Bill of Law No. 677/2021 (PL 677) from the House of Representatives seeks to institutionalise the Risk Sharing Arrangements in Brazil based on the pilot MS project launched in 2019.

In turn, technological orders (ETEC) are a model that is not restricted to the healthcare sector, being specifically attributed to situations involving technology risk with respect to the purpose. In Brazil's experience, ETECs are legally supported by the Innovation Act (Law No. 10.973/2004)[22], regulated by Decree No. 9.283 in 2018 only (articles 27 to 33). Brazilian regulation is inspired by part 35 of the US Federal Acquisition Regulation (FAR) and Article 31 of Directive 2014/24/EU and final COM Communication (2007) 799 from the European Union[23].

The ETECs have been part of state innovation strategies in developed countries for many decades but only arrived in Brazil recently[24]. Unlike research financing granted through University scholarships for projects proposed by the researchers themselves, at ETECs the government, as contracting party, indicates the technology it wants to develop (for instance, a new item of military equipment) based on a problem (public interest) and which requires an innovative solution – not yet developed (therefore, as an investment in R&D, pre-commercial procurement[25]) or about to be introduced to the market (public procurement of innovation[26]). The ETECs use the scale gain to enable, from the economic-

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20. *Sobre administração pública dialógica, ver:* OLIVEIRA, Gustavo Henrique Justino de. Participação Administrativa. A & C R. de Dir. Administrativo e Constitucional, Belo Horizonte, ano 5, n. 20, p. 167-194, abr./jun. 2005, p. 190-191.
21. AITH, F., BUJDOSO, Y., NASCIMENTO, P. R. do; DALLARI, S. G. *Os princípios da universalidade e integralidade do SUS sob a perspectiva da política de doenças raras e da incorporação tecnológica. Revista De Direito Sanitário*, 2014, 15(1), p. 30-33.
22. However, there is no express mention or treatment of the Technological Orders in the Healthcare Area (ETECS), called as such and treated only in non-statutory rules.
23. RAUEN, André Torato; BARBOSA, Caio Márcio Melo. *Encomendas tecnológicas no Brasil: guia geral de boas práticas.* Brasília: IPEA, 2019, p. 13.
24. RAUEN, André Torato; BARBOSA, Caio Márcio Melo. *Encomendas tecnológicas no Brasil: guia geral de boas práticas*. Brasília: IPEA, 2019, p. 11-12.
25. RIGBY, J. Review of pre-commercial procurement approaches and effects on innovation. Manchester: Manchester Institute of Innovation Research, 2013. Disponível em: <https://bit.ly/2USyBBD>. Access on: 27/07/2023.
26. EDQUIST, C.; ZABALA-ITURRIAGAGOITIA, J. M. Public procurement for innovation as mission-oriented innovation policy. Research Policy, v. 41, n. 10, p. 1757-1769, 2012. Available at: < https://www.researchgate.net/publication/256921387_Public_Procurement_for_Innovation_as_mission-oriented_innovation_policy>. Access on: 27/07/2023.

financial standpoint, the contracting, considering the innovation policy from the demand side (demand-side innovation policies[27]) and differentiating, also because of this, from the promotion to innovation through scholarships or direct research project financing.

In the healthcare area, in spite of the projection of Technological Orders in the Healthcare Area (ETECS), the use of the model is not disseminated in Decree No. 9.245/2017. The most emblematic case in Brazil was Technological Order Contract No. 01/2020 between *Fundação Oswaldo Cruz* and *Instituto de Tecnologia em Imunobiológicos* (BIO-MANGUINHOS) and AstraZeneca UK Limited for industrial scale development and production of the APIe provision of technology for final processing of a non-replicating viral vector vaccine for 2019-nCoV[28].

In turn, the Offset Measures in the Healthcare Area, considered a variation of the offset agreements[29], are focused on large scale procurements of products for which there is little competition. Through the MECS, large scale procurement can be associated with technological offsets that promote competition between sector companies, strengthening the domestic market and increasing security of SUS supplies for a given product. To provide regulatory support for this model, Law No. 12.349/2010 introduced §11, art. 3 of Law No. 8.666/1993 allowing invitations to bid to require the "contractor to carry out "commercial or industrial offset measures" on behalf of the body or entity representing the government or those appointed by it". The emblematic (and possible sole) case in Brazil for the MECS was the Radiotherapy Expansion Plan in the SUS[30-31].

The Technological Innovation Law also provides for other technological partnerships, whose use in healthcare remains limited (or non-existent – nor properly studied). An example of this is the possibility, under art. 5 of the LIT, of government becoming a minority partner in a Specific Purpose Entity or innovation startup (for instance, for development of the vaccine for an endemic Brazilian disease). Once again, this has not been extensively researched from a legal standpoint.

Technological partnerships in the pharmaceutical area (PDP, ETECS, MECS, ACR and other models based on the LIT) are subject to some common assumptions that indicate the possibility

of their dogmatic systemisation. One example is the legal medicine pricing regime.

In the pharmaceutical area, the government performance with respect to the medicine prices is important because the individual responsible for choosing the product (physician) is not the same individual responsible for bearing the expense (patient), which makes the final consumer less sensitive to price fluctuations[32]. This is why the microeconomic balance between supply and demand is affected, and efficiency as a price control instrument (free) is reduced. That is why the regulation exerted by the government[33] is essential. The Medicine Market Regulation Chamber (CMED – Law No. 10.742/2003 and Decree No. 4.766/2003), the interministerial body responsible for defining the criteria to set and adjust the medicine prices to correct the distortions in this market.

One of the main instruments adopted by the Chamber here is to establish price ceilings that shall be observed by the medicine manufacturers. The "Factory Price" (FP) is the maximum price allowed for the sale of medicines by the industry to pharmacies, drugstores and government entities provided another specific ceiling

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27. OECD. Demand-side Innovation Policies. Paris: OECD Publishing, 2011, p. 27.
28. Contract available at: <https://portal.fiocruz.br/sites/portal.fiocruz.br/files/documentos/contrato_vacina_astrazaneca_fiocruz.pdf>. Access on: 27/07/2023.
29. TOSCAS, Fotini S.; GOMES JÚNIOR, Valdir; NASCIMENTO, Marco Aurélio C.; SANTOS, Thiago R. *A Gestão de Tecnologias em Saúde na implementação da Política Nacional de Inovação Tecnológica na Saúde*. In: BRASIL. Ministry of Health. Progress, challenges and opportunities in the Industrial Economic Healthcare Complex in technological services. Brasília: Ministry of Health, 2018, p. 145.
30. The invitation to bid of the Ministry of Health for adhesion of public and private non-profit healthcare establishments to the Radiotherapy Expansion Plan in SUS is available at: < https://www.gov.br/saude/pt-br/acesso-a-informacao/acoes-e-programas/per-sus/arquivos/edital-de-chamamento-publico-no-1-2019.pdf>.
31. The Radiotherapy Expansion Plan in SUS was evaluated by the Comptroller General in the Report 201701503 which is available at: < https://auditoria.cgu.gov.br/download/11209.pdf>.
32. GARCIA, Flávio Amaral. *Concessões, parcerias e regulação*. São Paulo: Malheiros, 2019, p. 266.
33. BARBOSA, A. L. Figueira. *Preços na Indústria Farmacêutica: Abusos e salvaguardas em propriedade industrial. A questão brasileira atual.* In: PICARELLI, Márcia F. S.; ARANHA, Márcio Iorio (org.). *Política de Patentes em Saúde Humana.* São Paulo: Atlas, 2001, p. 89-90.

is not applicable[34]. It is defined based on economic data provided upon the sanitary registration concerning the product costs and its market position (Law No. 6.360/1976, art. 16, VII). In addition to the FP definition and adjustment parameters, the CMED is also responsible for creating criteria to determine medicine sale margins by the other players participating in the supply chain of these products (Decree No. 4.766/2003, art. 2, V), which define, for instance, the Maximum Price to the Consumer, a ceiling to which all those participating in the retail medicine market, such as pharmacies and drugstores, are subject.

For sales to the government, the Chamber has created a discount system on the Factory Price. These discounts correspond to the public market specificities, such as the scale of procurements and the absence of sales costs (advertising and advertisers), as the selection of products shall be through bid. The discount percentage on the Factory Price in these cases is called the Price Adequacy Coefficient (PAC), which applies to certain medicines indicated by CMED. If a medicine is not on the PAC list, it will be subject to the general limits applicable to the market, i.e., the Factory Price.

The Maximum Sales Price to the Government (PMVG) is the result of applying the PAC to the Factory Price. All sales made to the direct and indirect Administration of any of these bodies must abide by the PMVG, either they are carried out by the own medicine manufacturers or distributors, representative, pharmacies or drugstores, including those acquired under lawsuits (CMED Resolution No. 3/2011, art. 1). In the technological partnerships of the SUS it is challenge to match the technology transfer cost to the limits of the PMVG.

Another important aspect is the high technology dynamics of the pharmaceutical sector. As the technology transfer process is a long-term process (five to ten years, based on the PDPs), the probability of incremental innovations either in the productive process or the final product (for instance, the pharmaceutical development or new presentation for the same active ingredient) appearing during the period is high. Thus, flexibility to adjust during the partnership is critical to the success of the solution desired for the SUS.

34. BRASIL. Federal Audit Court. Instructions for public medicine procurements. Brasília: TCU, 2018, p. 91.

Chapter 12

Environmental Law

The Legal Framework for Environmental Protection in Brazil

1. The National Environmental Framework (SISNAMA)

The Framework for Environmental Protection in Brazil has a legal time milestone Federal Law 6.938/81, which provides for the National Environmental Policy ("PNMA"). The PNMA sets out the main objectives, instruments and concepts of the Brazilian environmental protection policy.

Prior to the PNMA, some Brazilian states, in particular the State of São Paulo[1], already had local laws regarding environmental protection focused on pollution control, considering the growth of industrial activities, mainly beginning in the 70s, when the effects from the air quality and water resources degradation were already observed.

The merit of the PNMA was precisely the structuring, at federal level, of an environmental policy applicable to the entire Brazilian territory, after the creation and organisation of the National Environmental Framework ("SISNAMA"), comprised of bodies and entities from the federal, state, district and municipal government, as well as the foundations, institutes and agencies established by the Public Authorities, responsible for environmental protection and quality improvement.

Basically, the main federal environmental bodies are: the Federal Ministry of Environment (MMA)[2], the Brazilian Environment and Natural Renewable Resources Institute ("IBAMA")[3]; the Chico Mendes Institute for Biodiversity Conservation ("ICMBio")[4]; the National Agency of Water and Basic Sanitation (ANA)[5]; the Brazilian Forestry Service ("SFB")[6] the National Indigenous People Foundation (FUNAI)[7].

Each Brazilian State also has its respective environmental body, mainly the Environmental Company of the State of São Paulo ("CETESB"); the State Environmental Institute ("INEA") of Rio de Janeiro; the State Environmental and Sustainable Development Office ("SEMAD") of Minas Gerais; the Institute of Environmental Protection of Amazonas ("IPAAM"); the Environmental and Infrastructure Office ("SEMA") of Rio Grande do Sul, among many others. As part of the implementation of the national environmental policy, state bodies are responsible for inspecting and licencing

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1. State Law No. 997/96, https://www.al.sp.gov.br/repositorio/legislacao/lei/1976/alteracao-lei-997-31.05.1976.html
2. Responsible for the preparation of national policies and the co-ordination of environmental initiatives in Brazil.
3. Executive body subordinated to the MMA, responsible for the implementation of the national environmental policy and inspection
4. Also subordinated to the MMA, responsible for the management of the federal conservation units and biodiversity protection.
5. Regulatory body subordinated to the MMA which co-ordinates the management of the Brazilian water resources.
6. Responsible for the management of the public forests and the development of forest policies
7. Even though its main focus is the protection of the rights of indigenous people, FUNAI also plays an important role in the preservation of the natural areas where these people live.

economic activities with no national impact.

2. Distribution of legislative and administrative competencies in the National Environmental Framework

After the PNMA, the organisation of the SISNAMA allowed it to adopt numerous national, state and, in some cases even municipal instruments and rules, as regards the (i) establishment of environmental quality standards; (ii) environmental zoning; (iii) environmental impact evaluation studies; (iv) licencing and revision of activities effectively or potentially pollutant; (v) economic incentives for production and installation of equipment and creation or absorption of technology, oriented to improving environmental quality; (vi) creation of specially protected areas; (vii) records and logs of polluting and environmental protection activities; (viii) administrative, criminal and civil penalties for the indemnification and recovery of environmental damages.

These instruments and rules are implemented in numerous environmental laws of the interest of the private sector, allowing the rational and sustainable use of natural resources and, mainly, offering legal security to investments. However, legal knowledge and compliance with such legal framework is not trivial, while the profusion of rules at different public levels makes the analysis of the applicable law, its monitoring and interpretation of the applicable statutory obligations challenging.

According to the Federal Constitution of 1988[8], the federal government and States can concurrently legislate in relation to (i) forests, hunting, fishing, fauna, nature preservation, soil and natural resource protection, environmental protection and pollution control; (ii) protection of historical, cultural, artistic, tourism and landscaping heritage and (iii) responsibility for damages to the environment and assets and rights of artistic, aesthetic, historical, tourism and landscaping value. In general, the federal government determines general rules, and each State can legislate on a supplementary basis, not against the guidelines and principles established by federal law, but which can be more restrictive.

In turn, in relation to the implementation of administrative

actions, the federal government, States, Federal District and Municipalities have common authority in relation to the protection of notable natural landscapes, the environmental protection, the pollution combat in any of its forms and the preservation of forests, fauna and flora, as established in the Brazilian Federal Constitution of 1988.

For each task, the law[9] established rules of co-operation and distribution of competences among the member entities. Basically, the rationale is: specific, strict tasks were assigned to the federal government. The activities and initiatives that are not within the scope of these tasks shall be the responsibility of the States and, in case of confirmed local interest and qualification of the municipal environmental body, the municipalities can also act to ensure environmental protection and health.

Eventually, the States can operate alternatively and supplementarily to substitute or assist the federal government in connection with its legal duties within the scope of its legal competence. Co-operation between member entities can occur through public consortia, arrangements, technical co-operation agreements, three-party commissions and public and private monetary funds.

The main environmental administrative actions of the federal government are exemplified below: (i) prepare, implement and comply with, nationwide, the PNMA and exercise the management of the natural resources under its management; (ii) integrate the PNMA with other national policies on water resources, regional development and territorial organisation, (iii) prepare the national and regional environmental zoning; (iv) define territorial areas and their components to be specially protected; (vi) control the production, sale and use of techniques, methods and substances that pose risk to the life, life quality and environment.

Specifically in relation to the environmental licencing of these projects and activities :

a) are located or developed together in Brazil and a bordering country;

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8. https://planalto.gov.br/ccivil_03/constituicao/constituicao.htm
9. Supplementary Law No. 140/2011

b) are located or developed in territorial waters, at the continental shelf or exclusive economic zone;

c) are located or developed on indigenous land;

d) are located or developed in federal preservation units;

e) are located or developed in two (2) or more States;

f) are focused on researching, mining, producing, processing, transporting, storing and disposing of radioactive material, at any stage, or using nuclear power in any of its forms and uses.

Potentially polluting projects and activities that are not included in the list of competences of the federal government shall be, in theory, licenced by the state environmental bodies. Before, during and after the establishment of projects subject to environmental licencing, it is crucial that companies pay attention to and are up-to-date with respect to the environmental legal obligations related to its activity, and are also able to identify the proper legal interpretation to ensure legal compliance and avoid setbacks and liabilities that can hinder or delay investments.

2.1. Interaction with other public bodies responsible for environmental and human health, fauna and flora control.

Developing, selling, and using techniques, methods, and substances that pose a risk to life, quality of life and the environment must be controlled and licenced. This is because production technologies increasingly incorporate techniques related to biotechnology, natural resources and bioeconomy. At the same time, complex and integrated production chains, from the extraction of raw materials to waste disposal in a proper environment, challenge the integrity and efficiency of compliance policies.

In the human health area, for instance, the pharmaceutical biotechnology focuses on the development of medicines, gene therapies, vaccines, diagnoses and medical imaging techniques. Nanotechnology applications in biological and medical processes, such as development of drug delivery systems and biomolecular sensors, are also a reality.

It is possible to observe biotechnology being applied in agriculture, such as the creation of plague- and disease-resistant genetically modified plants (transgenic), and the development of biopesticides and biofertilizers. For the industrial sector, the production of chemicals, materials and fuel on a more sustainable basis is growing, including the production of bioplastics, biofuel (such as ethanol and biodiesel) and industrial enzymes.

Bioremediation and bioaugmentation techniques remediate polluted environments, waste and wastewater treatment and environmental preservation. The maritime environment is experiencing a growing interest in medicine derived from marine organisms, sustainable aquaculture and bioprospecting of bioactive compounds.

The food sector has been increasingly seeking to offer healthier, more functional and sustainable food in the entire production chain, including solid evidence of socio-environmental traceability. Topics such as transgenic, new industrial enzymes, probiotics and prebiotics, bio-conservation, among others, are included in the daily agenda for the food industry.

In view of this scenario of transformation and innovation, the challenges of the National Environmental Framework are expanded to combine efforts and regulatory policies that are appropriate to promote research and development with legal security and protection of Environmental Health.

The participation of other public bodies in regulating potentially polluting activities has already been observed, however it seems to be happening more actively and routinely now, requiring more corporate institutional policies and coordination efforts. Indeed, it is not possible to talk about Environmental Health without considering human health aspects, including life quality, determined by physical, chemical, biological, social and psycho-social factors in the environment, but also the preservation of fauna, flora and ecosystem balance.

In the domestic market, many times the offer and sale of products in the human, animal, vegetal health and environmental area may be subject to environmental and regulatory licencing with other oversight bodies, such as the Ministry of Agriculture and Livestock ("MAPA"); the National Agency of Sanitary Surveillance

("ANVISA"); the National Technical Biosecurity Commission ("CTNBio"), the Genetic Heritage Management Council (CGen), among others.

These bodies shall operate within the scope of their competence. For instance, ANVISA[10] shall be responsible for establishing rules and patterns about contaminant, toxic waste, disinfectant, heavy metals and other thresholds involving risk to human health, and also for authorising the operation of controlled product manufacturing, distribution and import companies[11].

CGEN is responsible for co-ordinating the preparation and implementation of policies to manage access to the genetic heritage of the Brazilian biodiversity and the associated traditional knowledge and distribution of benefits. To this end, R&D and finished product initiatives that incorporate the genetic heritage of Brazilian biodiversity shall be registered with and notified to the CGEN. They will also have access to the associated traditional knowledge of original people.

MAPA[12] is responsible for inspecting and supervising products for preservation and improvement of the animal health, vegetal sanity and safety, identity, quality and food security. Secure food derive from production systems with environmental quality, a factor that integrates the agricultural defence policies[13] with actions adopted within the scope of SISNAMA.

In turn, CTNBio implements the federal rules related to the security and inspection mechanisms about the construction, cultivation, production, manipulation, transportation, transfer, import, export, storage, research, sale, consumption, discharge in the environment and disposal of genetically modified organisms ("GMO") and their byproducts, based on the promotion of scientific progress in the biosecurity and biotechnology area, the protection of life and human, animal and vegetal life, and compliance with the principle of precaution for the protection of the environment.

The responsible and rational use of GMOs, based on strict risk and benefit assessments, can be a valuable tool to promote sustainable agriculture and protect the environment, such as reducing the use of pesticides, making plantations more resistant to adverse weather; reducing the need to expand land for production, among others. The SISNAMA also acknowledges valid concerns

regarding biodiversity, unintended changes to ecosystems due to gene transfer, resistance against plagues and weeds, among others.

In this scenario, the Brazilian law requires strict environmental risk assessments before the GMOs are approved for cultivation, including possible impacts on human health and the environment. Moreover, there are administrative and legal discussions regarding the extent and method of labelling for informed, knowledgeable decisions by consumers. Economic sectors related to the GMO shall maintain consistent institutional and regulatory policies in relation to the long-term impacts of GMOs on the environment and develop risk mitigation strategies.

3. Main Environmental Laws of the Foreign Investor Interest

The Federal Constitution of 1988 is the main legal milestone for environmental regulation in Brazil. Article 225 establishes the right to an ecologically balanced environment as a fundamental right of all citizens, imposing to the public authorities and everyone the obligation to preserve and defend the environment for present and future generations.

The constitutional rule requires prior environmental impact studies for potentially degrading activities and stipulates that mineral resource exploration, in some cases, can only occur with

10. https://www.planalto.gov.br/ccivil_03/leis/l9782.htm
11. Examples of products controlled by ANVISA include: medicines for human use, their active ingredients and other inputs, processes and technologies; food, including beverages, bottled water, their inputs, packages, food additives, organic contaminant thresholds, pesticide and veterinary drug residues; cosmetics, personal care products and perfumes; sanitisers for sanitisation, disinfection in residential, hospital and collective environments; sets, reagents and inputs for diagnosis; medical and hospital, dental and hemotherapeutical laboratory diagnosis and imaging equipment and materials, among others.
12. https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2022/lei/L14515.htm
13. Agricultural defence means the framework comprised of rules and actions comprising public and private systems, for the preservation or improvement of animal health, vegetal sanity and safety, identity, quality, security of food, inputs and other agricultural products.

authorisation from the National Congress and licence from the competent environmental body. It also establishes that activities harmful to the environment subject the infringing parties to penal and administrative sanctions, in addition to the obligation to repair the damages caused.

Numerous laws and decrees emerged after such article, regulating environmental protection at different levels, comprising from the already mentioned PNMA to specific areas such as the protection of the flora, water resources, solid waste, payment for environmental services, biodiversity and environmental crimes and infringements.

3.1. The Forest Code

Federal Law No. 12.651/2012 established the Brazilian native vegetation protection regime, through general rules about the vegetation protection, Permanent Preservation areas and Legal Reserve areas; forest exploration, the supply of forest raw materials, the control of forest product origins and wildfire prevention. It also provides economic and financial instruments for the attainment of these goals.

To this end, the Forest Code declares that the forests in the national territory and other forms of native vegetation are assets of common interest to all Brazilian inhabitants. The right to private property is recognized and exercised in line with the limitations set forth in the Forest Code for the Brazilian biomes[14].

The main aspects and legal protection of the Forest Code are:

a) Permanent Preservation Areas (APPs): such as riverbanks, steep hillsides and mountaintops, where vegetation must be preserved to maintain environmental stability and prevent natural disasters;

b) Legal Reserve maintenance: percentage of rural property maintained with native vegetation. The percentage varies according to the biome: 80% in the Amazon, 35% in the savanna inside the Legal Amazon and 20% in other biomes;

c) Rural Environmental Record: mandatory electronic record for all rural properties, which contains information on PPAs, Legal

Reserves, forests and remaining native vegetation, for purposes of environmental control, monitoring and planning;

d) Environmental Regularisation Programmes: initiatives from the states to promote the regularisation of properties that do not comply with environmental requirements, offering deadlines and conditions for the recovery of degraded areas;

e) Legal Reserve Quotas: instrument of environmental offset that allows rural owners to offset the Legal Reserve owned by it in other equivalent areas, inside the same biome;

f) Protection of Springs and Watercourses: Requirement of maintenance of native vegetation in protection areas surrounding springs and watercourses to ensure the quality and quantity of water resources.

3.2. Water Resource Law

The Brazilian Water Resource Law[15] (Federal Law No. 9.433/1997) establishes the National Water Resource Policy and creates the National Water Resource Management System. This law seeks to ensure the availability of water of appropriate quality and quantity for different uses, promoting its rational and sustainable use.

To this end, water is qualified as a public domain asset with economic value, and its use shall be charged, except in cases of insignificant use.

In water shortage situations, water resources must be mainly used for human consumption and animal watering. Hence, the rational and strategic use should be included in the daily agenda of the industries as, in theory, the law does not ensure priorities.

Water resource management must be decentralised, with the participation of the public authorities, the users and the

14. Brazilian biomes include: Amazon, savanna, Atlantic Forest, Caatinga, Pampa and Pantanal. There are specific laws for the protection of each one of the national biomes, such as, for instance, the Atlantic Forest law (Federal Law No. 11.428/2006)
15. https://www.planalto.gov.br/ccivil_03/leis/l9433.htm

communities. To this end, the law provides for the role of hydrographic basin committees, responsible for planning and managing water resources; deciding on the uses of the water; defining the classification of water bodies; promoting the collection for the use of the water and mediating conflicts. It is composed of representatives from Public Authorities; water users and civil society.

In times of environmental disasters such as the recent floods in the State of Rio do Sul, the water resource law plays a fundamental role to prevent and defend against critical hydrological events; ensure water availability in quantity and with quality and sustainably manage the use of such environmental resources.

3.3. Solid Waste Law

The Solid Waste Law[16] (Federal Law No. 12.305/2010) establishes the National Solid Waste Policy in Brazil, establishing guidelines and instruments for the management of solid waste and the protection of public health and the environment. To this end, the Law encourages not only the generation, reduction, reuse, recycling and treatment of solid waste, but also the environmentally friendly disposal of waste that causes environmental contamination of the soil and water.

Based on the concept of joint responsibility, the manufacturers, importers, distributors, merchants, consumers and owners of urban solid waste handling services are responsible for the life cycle of the products and their packages. In this sense, some productive sectors shall implement reverse logistics systems, understood as an important instrument of economic and social development, characterised by a set of actions, procedures and means to enable the collection and return of solid waste to the corporate sector, for reuse in its cycle or other productive cycles, and other environmentally friendly final disposals.

In Brazil, it is necessary to implement reverse logistics systems for the sectors concerning pesticides and their packaging, stacks and batteries, tyres, lubricant oil and its packaging, fluorescent, sodium-vapour and mercury and mixed-light lamps; electronic products and their components; products sold in plastic, metallic or glass packages; other products and packages, mainly

considering the level and extent of the impact on public health and the environment arising from the waste generated.

The reverse logistics systems are implemented and charged through sector agreements entered into between the production sector and the Public Authorities, through regulatory decrees or through instruments of commitment entered into with environmental bodies. These instruments establish quantitative and qualitative collection goals for solid waste disposal in the domestic market. Also, structuring measures are expected to include support for cooperatives of recycling material pickers, implementation of voluntary delivery points and environmental education campaigns.

In some States, such as, for instance, São Paulo, CETESB has required compliance with the reverse logistics as a condition to the issuance or renewal of environmental operating licences, making it mandatory the submission of the Annual Performance Report of the Reverse Logistics System by the companies or their sector representatives. Based on the competence of the member entities to legislate on the matter, the quantity of regulations about solid waste in the national territory is growing, challenging the companies to keep their environmental compliance measures up-to-date and responsive.

The National Solid Waste Policy defines the extent of joint responsibility for each link of the production chain:

a) Companies and Industries: develop solid waste management plans, implement reverse logistics systems and ensure environmentally friendly final waste disposal;

b) Public Authorities: responsible for the collection, treatment and final disposal of the urban solid waste and the inspection and regulation of the solid waste-related activities;

c) Consumers: collaborate on proper waste separation and disposal, participate in selective collection and reverse logistics and receive information on conscious consumption.

16. https://www.planalto.gov.br/ccivil_03//_ato2007-2010/2010/lei/l12305.htm

3.4. Payment for Environmental Services

The Law on Payment for Environmental Services[17] (PSA - Federal Law No. 14.119/2021) established public policies to promote and encourage the conservation and improvement of the environmental quality. Its main objective is to encourage the preservation of ecosystems, such as forests, rivers and natural areas, through the payment for environmental services provided by nature, through the landowners and other individuals and entities, including the maintenance of the carbon inventory.

Environmental services include: maintenance of biodiversity, weather regulation; hydrological regulation; soil fertility; pollination; maintenance of natural habitats for beauty and recreation; erosion controls; plague and disease controls; cultural services associated with nature, among others.

The PSA has enabled numerous public and private programmes and initiatives at the federal, state and municipal levels, to implement and manage payments for environmental services. One recognized example of a public PSA initiative in the State of São Paulo is the Spring Programme[18], co-ordinated by the Infrastructure and Environment Office. This programme is focused on the conservation and recovery of river springs, which are essential for the maintenance of water quality and quantity in river basins in São Paulo. Within the scope of their environmental obligations, many companies have joined the PSA programmes established by the public authorities, and have also been developing their own programmes, including for purposes of compliance with their climate goals and obligations.

In general, the PSA programmes always encompass: (i) the participation of landowners and users, to implement conservation and sustainable handling practices in their properties, based on the criteria set out in the PSA programmes, with financial support, technology and know-how; (ii) the Public Authorities, to prepare policies, rules and regulations to promote and regulate the payments for the environmental services, in addition to monitoring and assessing the results achieved; (iii) the Private Sector, to align its activities with the sustainable development principles. Promote environmental offsets, comply with legal

requirements and boost their ESG strategies.

3.5. Environmental Crime Law

The Environmental Crime Law[19] (Federal Law No. 9.605/1998) establishes penal and administrative sanctions for behaviours and activities harmful to the environment, so as to promote the responsibility of individuals and entities causing damages to the environment or adopting irregular conduct pursuant to the environmental law.

To this end, the Law defines an extensive range of activities that characterise environmental crimes, from pollution and deforestation to illegal hunting and fishing, to wildlife trafficking and protected area degradation.

Penal sanctions include imprisonment varying from a few months to many years, depending on the severity of the crime. Penalties can be increased in cases of recurrence or when the crime results in significant damage to environmental or human health.

In turn, administrative sanctions include fines, suspension of activities, embargoes on construction projects, seizure of products and instruments used in the infringement. At the civil level, the infringing parties can be sentenced to adjust their conduct through affirmative and negative covenants, and also to repair the collective environmental damages of property and moral nature caused, mainly due to the present action of the General Attorneys' Office in connection with the filing of Civil Class Actions.

The Environmental Crime Law provides for the penal and administrative responsibility of legal entities (companies and corporations), and may result in significant fines, temporary or definite discontinuance of activities and other penalties that ensure the repair of environmental damage.

To curb harmful conduct and promote environmental repair,

17. https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2021/lei/l14119.htm
18. https://semil.sp.gov.br/sma/programanascentes/
19. https://www.planalto.gov.br/ccivil_03/leis/l9605.htm

it is possible to execute Instruments of Conduct Adjustment between the environmental inspection bodies, including the State and Federal General Attorneys' Office. Generally, these Instruments establish terms and conditions for adjustment of activities and payment of applicable indemnities.

The most common types of environmental crimes include (i) pollution that results or may result in damages to human health, animal death or significant destruction of the flora; (ii) illegal deforestation: Destroy or damage native forests or those planted in permanent preservation areas or in public domain land without authorisation; (iii) wildlife trafficking: Export, sell, display for sale, hold in captivity wildlife species without the proper permission, licence or authorisation; (iv) illegal fishing: Fish during the period in which fishing is prohibited or in places interdicted by a competent body; (v) damages to Conservation Units: Cause direct or indirect damage to Conservation Units and environmental protection areas.

Without prejudice, the practice indicates that the most common criminal conduct between companies is to install and operate polluting or potentially polluting activities without the applicable authorisations and legal licences. In addition to environmental crime, such practice usually leads to fines and suspension of activities until the licence is obtained, without prejudice to the payment of indemnities in case of identification of environmental damages.

The inspection is carried out by federal, state and municipal environmental bodies, such as the Brazilian Institute of Environment and Natural Renewable Resources (IBAMA), CETESB, Civil Police Precincts, Military Environmental Police Battalions and the General Attorneys' Office.

Investigations are normally launched in response to complaints from the communities and reports from employees and service providers. Unaddressed complaints, petitions and other control mechanisms, especially through the social networks, have caused significant concerns to corporate managers, in particular due to the possibility of personal responsibility of those involved.

Good practices include the constant monitoring of the effectiveness, renewal and compliance with the conditions of

environmental licences, including controlled and dangerous products that must be authorised by the Army, the Civil Police or the Federal Police. Maintaining a constant dialogue with several stakeholders to advance and address sensitive aspects of social-environmental responsibility helps mitigate risks and environmental infractions. Finally, it is important to address all variables and environmental repercussions in corporate contracts, in particular in relation to the use, exploration of natural resources and solid waste.

Enforcement of Laws and Regulations: The Question of Liability

1. The Three Types of Environmental Liability

In Brazil, there are three types of environmental liability — i.e., civil, administrative and criminal — as prescribed by article 225, paragraph 3, of the 1988 Constitution: "conducts and activities deemed to be harmful to the environment shall subject the offender, either a natural or a legal person, to criminal and administrative penalties, regardless of the obligation to repair the damage", that is, civil liability. A single act of harm to the environment may entail three separate, parallel and independent liabilities for the same individual.

2. Civil Liability

The 1981 National Environmental Policy Act (NEPA), passed by Law No. 6,938/1981, established a strict civil liability regime for environmental damages, which may be claimed by several actors, through individual and collective lawsuits. This liability has the following main features:

a) Strict liability

Civil liability for environmental damages is strict, i.e., it is applied regardless of fault on part of the polluter. According to article 14, § 1, of Law No. 6,938/1981, "the polluter is obliged to, regardless of fault, indemnify or recover the damages caused to the environment and to third parties affected by its activity". And article 927, sole paragraph, of the Civil Code, states that the "obligation to repair the damage shall be imposed, regardless of fault, either when established by law, or when the activity normally carried out creates, by its own nature, risk to others' rights". In other words, liability is imposed apart from intent to cause environmental harm or a breach of a duty to exercise reasonable care (negligence).

It is therefore irrelevant, for example, the fact that the polluter acted with due care to develop an activity, or that the best available technology was used. There must be the following four elements to justify civil liability: (i) environmental damage, (ii) conduct (act or omission), and (iii) causal link between them.

b) Absolute liability doctrine ("*teoria do risco integral*")

It is widely accepted by the Brazilian High Court ("Superior Tribunal de Justiça - STJ") the so-called "teoria do risco integral" (i.e., absolute liability doctrine), according to which typical defenses based on intervening causes (such as third parties' conducts or acts of God, whether or not foreseeable) are not admitted (See, for example, STJ, 2nd Panel, REsp 1.644.195-SC, Justice HERMAN BENJAMIN, 27 April 2017, and 4th Panel, AgInt no AREsp 2.139.816-GO, Justice MARIA ISABEL GALLOTTI, 13 May 2024).

Thus, whoever creates a risk of damage to the environment and third parties, due to this sole fact (= mere existence), may be held liable when such risk materializes. Based on this theory, shareholders, although not directly linked to the harmful event, might be subject to liability, mainly if one considers the far-reaching concept of causation, addressed below.

c) Far-reaching concept of causation ("indirect polluter")

The notion of causation is not explicit in the law, but rather inferred from the legal definition of polluter, who is "the natural or legal, public or private person, directly or indirectly responsible for an activity that causes environmental degradation" (article 3, IV, of Law No. 6,938/1981). Because it encompasses persons indirectly connected to the harm, causation has a large, abstract scope. And the Brazilian courts, displaying a strong aversion to environmental risks, have applied a far-reaching notion of "indirect polluter". See, for instance, the following STJ ruling:

> "to determine the cause of an urban-environmental damage and hold co-defendants jointly and severally liable, the following persons must be treated equally: whoever acts; whoever fails to act when they should have taken action; whoever is indifferent to others' actions; whoever remains in silence when they should have been denounced; whoever finances others' actions; and whoever enjoys benefits from others' actions" (STJ, 2nd Panel, REsp 1.071.741-SP, Justice HERMAN BENJAMIN, 24 March 2009).

Thus, anyone who falls into this vast array of conditions and persons (which encompass shareholders, who finance and enjoy benefits from others' activities) may be held liable, not only strictly, but also jointly and severally, as described below.

d) Joint and several liability

Under Law No. 6,938/1981, the polluter is the person directly or indirectly responsible for an activity that causes environmental degradation. Courts generally infer from this provision that liability for environmental damages is not only strict, but also joint and several. This interpretation is based on the express reference to "indirect polluters" by the law (STJ, 1st Section, REsp 1.953.359-SP, Justice ASSUSETE MAGALHÃES, 26 September 2023), and, additionally, on the rule provided by the Brazilian Civil Code according to which joint and several liability should be applied when multiple persons have caused a single harm (article 942: "if there is more than one offender, all of them shall be jointly and individually liable for reparation").

In a 2007 precedent, the STJ ruled that, although shareholders might be held jointly and severally liable for environmental damages as "indirect polluters", the obligation to repair and/or compensate for such damages should, firstly, be borne by the "direct polluters". If they failed to fulfill this obligation, shareholders could be required to undertake it (STJ, 2nd Panel, REsp 647.493-SC, Justice JOÃO OCTÁVIO DE NORONHA, 22 October 2007).

In any event, the one who pays for the entire damage is entitled to reimbursement from the other co-polluters.

e) Obligation Propter Rem

According to the STJ ("Súmula 623"), environmental obligations have a propter rem nature, being enforceable against the current owner or possessor and/or the previous ones, at the plaintiffs' choice. An obligation propter rem (i.e., an obligation attached to an asset) is one that accompanies the asset, becoming the obligation of the new owner when they purchase the property.

This rule has been particularly applied in cases involving deforestation of areas protected by law. According to the STJ, the current owner who remains inactive in relation to environmental degradation, even if pre-existing, also commits an unlawful act, as permanent preservation areas and legal reserves are "general impositions, directly resulting from the law", and "intrinsic assumptions or internal limits of property and possession rights". Thus, according to case law, "those who benefit from others' environmental degradation, aggravate it, or continue it are not less degraders" (STJ, 1st Section, REsp 1.962.089-MS, Justice ASSUSETE MAGALHÃES, September 13, 2023).

f) Environmental damages

The damages to be repaired and/or compensated due to an incident or activity that causes environmental damages cover not only the ecological harms (i.e., damages to natural resources, such as fauna, flora, air, water, soi), but also individual and social (=

collective) harms, including actual damages ("danos materiais") and moral damages ("danos morais" or "extrapatrimoniais"), which may comprise punitive damages. Although strict liability disregards fault, when fixing the value of moral and punitive damages, courts take into account the blameworthiness of the polluter's conduct.

g) Burden of proof

On 24 October 2018, the STJ recognized the shifting of the burden of proof as a comprehensive, binding rule applicable to all civil lawsuits involving environmental damages ("Súmula 618"). This consolidated the understanding that defendants should bear the burden of proving that (i) there is no damage and/or (ii) they are not responsible for (= linked to) the damage.

According to Justice FRANCISCO FALCÃO (STJ), "whoever creates or takes the risk of environmental damage has a duty to repair the damage and, in this context, bears the burden of proving that his conduct was not harmful. In this case, the burden of proof is appropriately shifted to society" (STJ, 1st Panel, REsp 1.049.822-RS, Justice FRANCISCO FALCÃO, April 23, 2009).

h) Piercing the corporate veil ("disregard doctrine")

According to article 4 of Law No. 9,605/1998 (Environmental Crimes Act), "the legal entity may be disregarded whenever its personality is an obstacle to the reimbursement of damages caused to the environment".

However, in the 2007 precedent, the STJ ruled that the 'disregard doctrine', which requires proof of fraud, could eventually prevent the damage from being repaired or compensated. Therefore, the Court acknowledged that shareholders might be held jointly and severally liable for environmental damages as "indirect polluters".

However, as seen, the obligation to repair and/or compensate for such damages should, firstly, be borne by the "direct polluters". If they fail to fulfill this obligation, shareholders could be required to comply.

2. Administrative and Criminal Liabilities

a) Punitive goals

Both administrative and criminal liabilities target those whose practices are deemed in violation of the environmental law.

Administrative liability is applied by the relevant environmental agencies (either federal, state or municipal), within an administrative proceeding, and, once characterized, usually results in the imposition of fines on the wrongdoers and embargos on the activities (other sanctions may be imposed, such as warnings, suspension of activities, limitation of rights, among others, pursuant to article 3 of Decree No. 6,514/2008).

Criminal liability is applied by the Criminal Court, within a judicial proceeding filed by the Public Prosecutor's Office, and, once characterized, may result in the imposition of (i) fines on companies (articles 21 to 24 of Law No. 9,605/98), and, in some cases, involving at least gross negligence, (ii) imprisonment for natural persons (articles 7 to 13 of Law 9,605/98). It should be noted, however, that criminal liability normally takes place in cases of significant relevance and reprehensibility of one's behavior, and is deemed to be the utmost and extreme form of liability.

b) Main regulations

At the federal level, environmental administrative liability is governed by Decree No. 6,514/2008, which sets forth administrative infractions and sanctions regarding the environment, and establishes the federal regulatory procedure to investigate such infractions. Environmental criminal liability (including, but not limited to, violations related to the oil and gas industry) is governed by Law No. 9,605/1998 (Environmental Crimes Act).

c) Selected administrative infractions and crimes

The rules mentioned above have several provisions describing conduct as administrative infractions or crimes against

the environment, and setting forth the respective penalties. It should be noted that, in some cases, the same conduct is treated both as an administrative infraction and a crime.

- **Pollution**

  Administrative infraction: "Causing any sort of pollution at such levels that they lead or may lead to damage to human health or provoke death of animals or significant destruction of biodiversity" (Fine: R$ 5,000.00 - R$ 50,000,000.00) (Decree No. 6,514/2008, article 61). The same penalty may be imposed for "disposing of solid, liquid or gaseous residues or refuse, oils or oily substances that disrespect the requirements set down in laws or normative acts" (Decree No. 6,514/2008, article 62, V).

  Crime: "Causing any sort of pollution at such levels that they lead or may lead to damage to human health, death to animals or significant destruction of flora" (Intentional conduct: Imprisonment for 1 to 4 years, plus a fine – Law No. 9,605/1998, article 54, caput; Faulty conduct: Imprisonment for 6 months to 1 year, plus fine – Law No. 9,605/1998, article 54, § 1). If this crime "occurs because of disposal of solid, liquid or gaseous residues or refuse, oils or oily substances, in disrespect of the requirements set down in laws or regulations", the penalty is different (Intentional conduct: Imprisonment for 1 to 5 years) (Law No. 9,605/1998, article 54, § 2, V).

- **To carry out polluting activities without the relevant environmental permit**

  Administrative infraction: "Building, reforming, expanding, installing or operating facilities, activities, works or services that use environmental resources held to be effectively or potentially polluting, without a proper permit or authorization from the competent environmental agencies, in disrespect of the permit obtained or failing to observe the pertinent legal norms and regulations" (Fine: R$ 500.00 - R$ 10,000,000.00) (Decree No. 6,514/2008, article 66).

  Crime: "Building, reforming, expanding, installing or operating anywhere on national territory potentially polluting facilities, activities, works or services without a proper license or in disrespect of the pertinent legal norms and regulations"

(Intentional conduct: Imprisonment for 1 to 6 months, or a fine, or both penalties cumulatively) (Law No. 9,605/1998, article 60).

d) Limited scope of causation and the role of fault

The STJ has acknowledged a critical difference between, on one side, civil liability, and, on the other side, administrative and criminal liabilities: civil liability, as seen, may reach a vast array of persons that are indirectly connected to a third party's activity that gives cause to an environmental damage, while administrative and criminal liabilities are, as a rule, limited to those who actually perform the conducts described as infractions in the applicable rules.

It should be noted, however, that those who occupy positions that entitle and require them to avoid that others violate the environmental rules (such as, in some cases, shareholders) may, depending on the actual facts, also be punished by the relevant authorities if they failed to exercise their duties of care (either because of negligence or intent), and if such failure was deemed to be a cause of the environmental damage or infraction (v.g., operating without the relevant license).

According to Decree No. 6,514/2008, an administrative infraction is "every act or omission that violates the legal rules" of environmental protection (article 1).

Moreover, it should be emphasized that, pursuant to Law No. 9,605/1998, both legal and the natural persons may be criminally prosecuted for environmental crimes.

According to article 3 of Law No. 9,605/1998, "legal persons shall be held liable in the administrative, civil and criminal spheres, as provided for in this Act, in cases in which a violation is committed by a decision of its statutory or contractual representative, or its collegiate body, in the interest or benefit of the legal entity".

Article 2 of that same Law provides that, "whoever in any way contributes to the practice of the crimes provided for in this Act is liable to the pertinent penalties to the extent of his fault, as well as the director, administrator, member of the board and technical body, auditor, manager, agent or representative of a corporate entity who,

being aware of the criminal conduct of others, failed to prevent such practice when it was within his power to do so".

e) Criteria to set the penalties

When it comes to environmental violations, both administrative and criminal liabilities have the same criteria to set the penalties to be imposed on the wrongdoers: (i) the graveness of the fact, taking into account the reasons for the infraction and its consequences for public health and the environment; (ii) the antecedents of the wrongdoer as regards complying with the legislation on environmental matters; and (iii) the economic situation of the wrongdoer, in the case of a fine (article 4 of Decree No. 6,514/2008, and article 6 of Law No. 9,605/98).

f) Burden of proof

As a rule, administrative acts — including those that impose administrative penalties — are presumably valid, and the alleged violator has the burden of repealing such presumption ("the consequence of the presumption of legitimacy and veracity (...) shifting the burden of proof of invalidity of the administrative act to whoever invokes it" - 2nd Federal Court of Appeal, 6th Specialized Panel, AC 247.325, Judge CLAUDIA MARIA BASTOS NEIVA, 17 May 2010).

As to criminal liability, according to the Brazilian Constitution, "no one shall be considered guilty before the rendering of a final (res judicata) penal sentence" (article 5, LVII). In criminal cases, the plaintiff (Public Prosecutor's Office) has the burden of proving that the alleged violator committed the crime.

g) Piercing the corporate veil ("disregard doctrine")

According to the 1988 Constitution, in both the criminal and administrative spheres, "no penalty shall be imposed on any person other than the offender" (article 5, XLV). According to the STJ, one

should not be punished for third parties' unlawful behaviors (STJ, 2nd Panel, REsp 1.251.697-PR, Justice Mauro Campbell Marques, 17 April 2012).

Brazilian Biodiversity and the ABS Laws

1. Brazilian Biodiversity

1.1. ABS[20] Laws

The importance of a balanced and preserved environment is crucial to humankind's survival. Environmental awareness only gained strength in the twentieth century and discussions about biodiversity would only surface much later.

Biological diversity, or biodiversity, is the variety of life on earth. It comprises variances within species, among species, and between ecosystems. It also refers to the complex relationships among living things and between living things and their environment[21].

In 1987, biodiversity gained greater international prominence, propelled by Decision No. 14/26 by the United Nations Environment Program ("UNEP"). The referred provision was responsible for creating a working group of specialists on biological diversity, who were assigned the duty of consolidating existing efforts and turning them into global mechanisms for environmental conservation. In 1992, after several meetings, the Convention on Biological Diversity ("CBD") was approved, during the United Nations Conference on Environment and Development ("UNCED"), also known as the Rio de Janeiro Earth Summit.

The CBD has three main goals: the preservation of biological diversity; the sustainable use of its components; and the fair and equitable sharing of the benefits arising from genetic resources.

Brazil is known for its rich biodiversity and ranks first on the list of the 17 megadiverse countries[22]. Due to the importance of

biodiversity to the country, Brazil is an important player in the international scenario, especially in relation to access to genetic resources and associated traditional knowledge.

Associated traditional knowledge is knowledge, know-how, skills and practices developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity[23].

Indigenous and/or local communities have been the holders and providers of traditional knowledge for centuries. Access to traditional knowledge has been used as a faster way to achieve results in the development of commercial products, because it is possible to save years of work and research by using the information possessed by these communities. According to IBGE (Brazilian Institute of Geography and Statistics)[24], Brazil has almost 1.7 million indigenous people and various traditional communities (communities of descendants of enslaved people, rubber tappers, babassu breakers, amongst others). Furthermore, indigenous and traditional communities play a unique role to the conservation and sustainable use of biodiversity.

CBD also recognises that the results and economic benefits obtained by accessing genetic resources and traditional knowledge must be shared on a fair and equitable basis.

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20. On the international level, access to genetic resources and traditional knowledge and benefit sharing are referred to by the acronym ABS Access and Benefit Sharing.
21. Business and the 2010 Biodiversity Challenge: Introduction to the Convention on Biological Diversity. A background paper for the Business and the 2010 Biodiversity Challenge Meeting, London, 20-21 January 2005.
22. The group of "Like-Minded Megadiverse Countries" was created in Mexico in 2002 and made official by the "Cancun Declaration". The term "like-minded" is justified by the fact that the group not only includes countries rich in biodiversity, but also those with similar social, economic, political and cultural interests. The 17 megadiverse countries are: Brazil, Indonesia, Colombia, Mexico, Australia, Madagascar, China, the Philippines, India, Peru, Papua New Guinea, Ecuador, United States, Venezuela, Malaysia, South Africa, and Congo. Together, those countries contain about 70% of the planet's genetic diversity.
23. Source: http://www.wipo.int/tk/en/tk/
24. Source: https://agenciadenoticias.ibge.gov.br/agencia-noticias/2012-agencia-de-noticias/noticias/37565-brasil-tem-1-7-milhao-de-indigenas-e-mais-da-metade-deles-vive-na-amazonia-legal.

Brazil ratified the CBD, undertaking the obligation to establish domestic law regarding access to genetic resources under its jurisdiction, and to protect the traditional knowledge of local communities and the indigenous population.

The CBD provisions became a part of the Brazilian legal system through: (i) Decree No. 2,519/1998, followed by Decree No. 4,339/2002, which established principles and guidelines for the implementation of the National Biodiversity Policy; (ii) Decree No. 1,354/1994, responsible for creating the National Biodiversity Program ("PRONABIO") and the National Biodiversity Commission (CONABIO); and (iii) Provisional Measure No. 2,186-16, dated August 23, 2001.

ABS achieved its first legal milestone with Provisional Measure 2,186-16/2002. During the years of its validity, it was criticised for the bureaucracy it established once required prior authorisation from CGEN - Council for Genetic Heritage Management for every research, bioprospecting and technological development and execution of a Benefit Sharing Agreement without the certainty that a viable product would result from the research. However, it is important to recognise that the regulations allowed companies and universities to access genetic resources and associated traditional knowledge and its respective benefits were indeed shared.

The Provisional Measure remained in effect up to 2015, when Federal Law No. 13,123 (known as the 'Biodiversity Law') was enacted. In 2016, Federal Decree No. 8,722 was issued to regulate the rules of the referred Law. Afterwards, the Nagoya Protocol on Access and Benefit-sharing (an supplementary agreement to the CBD signed in 2011) was established in Brazil´s legal system in 2023 through Decree No. 11,865.

The Biodiversity Law includes, among others, access to the country's genetic heritage and the traditional knowledge associated with this genetic heritage. Foreign companies and institutions can only research and develop products jointly with Brazilian legal entities.

For purposes of the law, genetic heritage is the information arising from the genetic origins of flora, fauna, microbial or other nature species, including those originating from living beings' metabolism, whilst the associated traditional knowledge is information or actions from the indigenous population, local

communities or traditional farmers regarding the properties, and direct or indirect uses associated with genetic heritage.

Genetic heritage "…covers physical (molecules or substances) and intangible (genetic or biochemical information taken from a sample) components. All native species are considered part of Brazilian genetic heritage, including traditional local and creole plant varieties or animal breeds and microorganisms isolated in Brazilian territory. The list excludes non-native species unless they have been introduced into Brazil, grown spontaneously and developed distinctive properties"[25].

If a certain company or university intends to research or develop products using Brazilian Biodiversity, it is no longer required to obtain prior authorisation. Now an online Registration before SisGen - National System for the Management of Genetic Heritage and Associated Traditional Knowledge must be filled in. The registration must be performed before remittance of samples abroad, commercialising by-products or final products, applying for intellectual property rights or publishing research results.

The benefits resulting from the economic exploitation of finished products or reproductive material (from agricultural activities) derived from access to genetic heritage or its associated traditional knowledge, even if the products are produced outside the country, must be distributed in a fair and equitable manner.

Benefit sharing is due only when the component of genetic heritage or the associated traditional knowledge is the main element contributing to the adding of value to the product[26]. Product manufacturers are responsible for benefit sharing regardless of whom provided access.

If the finished product or reproductive material has not been produced in Brazil, the importer, controlled company, subsidiary, affiliate or commercial representative of the foreign manufacturer is

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25. "ABS in Brazil" - Paper elaborated by UEBT – Union for Ethical Biotrade, GSS – Sustentabilidade e Bioinovação and the Environmental Law Team of TozziniFreire Advogados. Source: https://tozzinifreire.com.br/site/conteudo/uploads/uebt,-gss-and-tozzini-freirebrazil-abs-fact-sheetfinal-hd-5a00a2d32f9bf.pdf
26. This is the element whose presence in the finished product is essential to the existence of its functional features or to the creation of the marketing appeal.

jointly and severally responsible for benefit sharing with the manufacturer of the finished product or reproductive material.

As a general rule, one percent (1%) of the net revenue obtained from the commercialisation of the product or reproductive material for agricultural activities is the amount due for the purpose of sharing benefits derived from access to genetic heritage. The amount will now be destined for the National Fund for the Distribution of Benefits (FNRB) and is no longer paid to the provider of the genetic resource as established by the revoked law. It is possible to reduce this percentage to 0.1 (one tenth) by entering into a sectoral agreement rather than contributing to the FNRB. In addition, in order to encourage non-monetary distribution, companies may choose to implement projects and reduce benefit sharing by 25%.[27]

When there is benefit sharing related to access to traditional knowledge from an identifiable source, the manufacturer of the final product must negotiate and share benefits directly with the providers. However, in addition, 0.5% of the net income from sales of the final product must be paid to the National Fund for Benefit Sharing, since the Biodiversity Law recognises the collective nature of traditional knowledge. Furthermore, the FNRB must receive the same percentage of 1% of the net revenue owed by access to traditional knowledge from non-identifiable sources.

Enforcement of the Biodiversity Law is guaranteed by IBAMA (Brazilian Institute of Environment and Renewable Natural Resources), an arm of the Ministry of Environment. In order to execute the legal provisions, IBAMA is entitled to:

- Impose administrative penalties, which range from (i) BRL 1,000 to BRL 100,000 when the infraction is committed by an individual; and (ii) from BRL 10,000 to BRL 10,000,000 when the infraction is committed by a legal entity;
- Seize (i) the samples containing the accessed genetic heritage; (ii) the instruments employed in the acquisition or processing of the genetic heritage or of the associated traditional knowledge that has been accessed; (iii) the products deriving from access to the genetic heritage or associated traditional knowledge; or (iv) the products obtained from information regarding the associated traditional knowledge;

- Temporarily suspend the manufacturing and sale of the finished product or reproductive material derived from access to the genetic heritage or to the associated traditional knowledge up to its regularisation;
- Suspend (fully or partially) the specific activity related to the infraction; and
- Suspend or cancel any certificate or authorisation granted.

It is important to mention that due to the sensitiveness of the subject, when information about a breach of biodiversity laws is published by the press, it is usually connected to the practice of "biopiracy". Although the word or the concept of "biopiracy" does not exist in Brazilian Legislation this reference is commonly used by the press. Therefore, in addition to administrative penalties, it should be noted that companies that violate the law may have their names associated with "biopiracy", which threatens reputational risk to their brands and images.

Recent years have been characterised by ongoing climate change, species extinction, and social inequality. Sustainable use of biodiversity and benefit sharing by companies within their industrial sectors is a competitive edge and a solid way to implement CBD principles. It also merges with environmental policies, stimulates socioeconomic development, increases public health, and encourages research, development and innovation.

1.2. Kunming-Montreal Global Biodiversity Framework

The historic Kunming-Montreal Global Biodiversity Framework (GBF), agreed at the 15th meeting of the Conference of Parties to the CBD (COP 15) by the end of 2022, seeks to respond to the Global Assessment Report of Biodiversity and Ecosystem Services issued by the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), the fifth edition of the Global Biodiversity Outlook, and many other scientific documents that provide ample evidence that, despite ongoing efforts, biodiversity is

27. In reality it is not a reduction because this is the estimated amount spent to support the costs of non-monetary projects.

deteriorating worldwide at rates unprecedented in human history[28].

The final text of GBF, building on the Strategic Plan for Biodiversity 2011–2020, its achievements, gaps, and lessons learned, and the experience and achievements of other relevant multilateral environmental agreements, sets out an ambitious plan to bring transformation in societies' relationship with biodiversity by 2030, in line with the 2030 Agenda for Sustainable Development and its Sustainable Development Goals, and ensure that, by 2050, the UN's shared vision of living in harmony with nature is fulfilled[29].

The GBF has four long-term goals for 2050 related to the 2050 Vision for biodiversity. Goal C specifically requires that the monetary and non-monetary benefits from the utilisation of genetic resources, and digital sequence information (DSI) on genetic resources, and of traditional knowledge, as applicable, are shared fairly and equitably, including, as appropriate with indigenous peoples and local communities, and substantially increased by 2050, while ensuring traditional knowledge is appropriately protected, thereby contributing to the conservation and sustainable use of biodiversity, in accordance with internationally agreed ABS instruments.

The GBF also has 23 action-oriented global targets for urgent action by 2030. Among them, targets 3, 13 and 15 are worth highlighting and will be addressed below.

Target 3: Ensure and enable that by 2030 at least 30% of terrestrial and inland water areas, and of marine and coastal areas, especially areas of particular importance for biodiversity and ecosystem functions and services[30], are effectively conserved and managed through ecologically representative, well-connected and equitably governed systems of protected areas and other effective area-based conservation measures (OECMs), recognising indigenous and traditional territories, where applicable, and integrated into wider landscapes, seascapes and the ocean, while ensuring that any sustainable use, where appropriate in such areas, is fully consistent with conservation outcomes, recognising and respecting the rights of indigenous peoples and local communities, including over their traditional territories.

Well-governed, effectively managed and representative protected areas and OECMs are a proven method for safeguarding both habitats and populations of species and for delivering important ecosystem services and multiple benefits to people. They

are a central element of biodiversity conservation strategies at local, national and global levels and can take various forms, ranging from strictly protected areas to areas that allow sustainable use consistent with the protection of species, habitats and ecosystem processe[31].

Target 13: Take effective legal, policy, administrative and capacity-building measures at all levels, as appropriate, to ensure the fair and equitable sharing of benefits that arise from the utilisation of genetic resources and from DSI (Digital Sequence Information) on genetic resources, as well as traditional knowledge associated with genetic resources, and facilitating appropriate access to genetic resources, and by 2030 facilitating a significant increase in the benefits shared, in accordance with applicable international ABS instruments.

This target is important because it directly relates to one of the three objectives of the CBD and is a key pillar for its implementation. It builds an equity dimension among countries providing and using biodiversity with the dual objective of providing incentives for conservation and sustainable use of biodiversity and mobilising new resources redirected towards biodiversity. The adoption of the Nagoya Protocol aimed to increase legal certainty, clarity and transparency for both users and providers of genetic resources and associated traditional knowledge. At COP 15, Parties agreed to develop a solution for the sharing of benefits arising from DSI and established a way forward to advance the consideration of this issue under the CBD[32].

Target 15: Take legal, administrative or policy measures to encourage and enable business, and in particular to ensure that large and transnational companies and financial institutions: (a) Regularly

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28. Source: https://www.cbd.int/doc/decisions/cop-15/cop-15-dec-04-en.pdf
29. Source: https://www.unep.org/news-and-stories/story/towards-vision-2050-biodiversity-living-harmony-nature
30. According to the guidance notes prepared by the Secretariat for Target 3, areas particularly important for biodiversity include areas high in species richness or threatened species, threatened biomes and habitats, areas with particularly important habitats and areas that are important for the continued provision of ecosystem functions and services.
31. Source: https://www.cbd.int/gbf/targets/3
32. Source: https://www.cbd.int/gbf/targets/13

monitor, assess, and transparently disclose their risks, dependencies and impacts on biodiversity including with requirements for all large as well as transnational companies and financial institutions along their operations, supply and value chains and portfolios; (b) Provide information needed to consumers to promote sustainable consumption patterns; (c) Report on compliance with access and benefit-sharing regulations and measures, as applicable; in order to progressively reduce negative impacts on biodiversity, increase positive impacts, reduce biodiversity-related risks to business and financial institutions, and promote actions to ensure sustainable patterns of production.

According to the guidance notes prepared by the Secretariat for Target 15, all businesses are dependent in some way on biodiversity, however these dependencies are not always acknowledged or accounted for. By assessing and monitoring their impacts on biodiversity, businesses can better understand their relationship with biodiversity and determine the impacts of their activities on it and the risks posed by biodiversity loss to their operations and supply chains. Once these relationships, impacts and risks have been assessed and disclosed, it becomes easier to address them[33].

Target 15 deserves special attention because, for the first time in history, an international treaty includes has a target where the Parties (the States) agreed to create rules and future obligations to the private sector, applying to businesses as a whole and placing special emphasis on large and transnational companies and financial institutions. Decree 4,703/2003 defined CONABIO's purpose and competences, allowing the commission to take this important step towards compliance at national level with what had been agreed at international level. Although some competences were revoked by Decree No. 10,235/2020, later Decree No. 12,017/2024 expressly stated CONABIO's purpose of promoting the implementation of the GBF, adopted under the CBD.

All the GBF targets must be fulfilled by Brazil and the other signing States through a National Biodiversity Strategy and Action Plan (EPANB). As part of the EPANB update to reflect the GBF, CONABIO Resolution No. 09/2024 was published, establishing the National Biodiversity Targets for 2030 and proposing its implementation by the federal government, with the voluntary cooperation of civil society organisations and private entities.

1.3. Bioeconomy

In commemoration of World Environment Day (06/05), the Federal Government created the National Bioeconomy Strategy through Decree No. 12,044/2024, for coordinating and implementing public policies to develop the bioeconomy, in cooperation with civil society and the private sector.

The National Bioeconomy Strategy will be implemented by the Federal Government in cooperation with states, municipalities, the Federal District, civil society organisations and private entities, through the National Bioeconomy Development Plan, with the support of the National Bioeconomy Information and Knowledge System.

Through Interministerial Ordinance MMA/MDIC/MF No. 10/2024, the National Bioeconomy Commission - CNBio was established, on a permanent basis and of a consultative and deliberative nature, as the central governance body of the National Bioeconomy Strategy, with the purpose of preparing and monitoring the implementation of the National Bioeconomy Development Plan.

The concept of the bioeconomy is defined as a model of productive and economic development based on values of justice, ethics and inclusion, capable of efficiently generating products, processes and services based on the sustainable use, regeneration and conservation of biodiversity, guided by scientific and traditional knowledge and its innovations and technologies, to add value, generate work and income, sustainability and climate balance.

The strategy's objectives include expanding the inclusion of bioeconomy products in national markets and global value chains and proposing the creation and targeting of financial and economic instruments to stimulate and promote the bioeconomy. Among the guidelines is the fair and equitable sharing of benefits from access to genetic heritage and traditional knowledge associated with it, under Biodiversity Law.

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33. Source: https://www.cbd.int/gbf/targets/15

Chapter 13

Real Estate and Property

Applicable Legislation

Brazil's key real estate legislation includes the following:

1. **1988 Federal Constitution** (Constitution)
2. **Civil Code** (Federal Law No. 10,046/2002) (Código Civil)
3. **Urban Land Statute** (Federal Law No. 10,257/2001) (*Estatuto da Cidade*)
4. **Rural Land Statute** (Federal Law No. 4,504/1964) (*Estatuto da Terra*)
5. **Public Register Law** (Federal Law No. 6,015/1973) (*Lei de Registros Públicos*)
6. **Real Estate Development Law** (Federal Law No. 4,591/1964) (*Lei de Incorporações*)
7. **Urban Lease Law** (Federal Law No. 8,245/1991) (*Lei de Locações*)
8. **Real Estate Finance System Law** (Federal Law No. 9,514/1997) (*Lei do Sistema de Financiamento Imobiliário*)
9. **Mutual Recission Law** (Federal Law No. 13,786/2018)

10. **Acts of Concentration in the Real Estate Record Law** (Law No. 13,097/2015)
11. **Sharing Property Law** (Law No. 13,777/2018)
12. **Agribusiness Law** (Law No. 13.986/2020)

Right of Title

The primary form of in rem right over real estate is ownership. Ownership represents an absolute title to property, encompassing the rights of use, exploitation, disposal, and recovery from any unlawful possessor. Real estate includes the land with its surface, accessories, and surroundings, such as buildings, trees, and hanging fruit, as well as the air and subsoil. Mines, subsoil products, and waterfalls are considered separate from the land for exploitation purposes.

In exceptional cases, ownership of the land and its accessories may be separate, such as when trees are planted by a tenant. Surface rights also create two distinct ownership rights over the same area: the ownership of the soil and the ownership of the surface. However, there is no separate registration for titles to real estate accessories and surroundings.

Surface Rights

Brazilian law provides for surface rights, allowing the real estate owner to transfer ownership of the surface for construction or planting over a specific area for a limited time. This creates two separate ownership rights over the same area: the ownership of the soil and the ownership of the surface, including plantations and constructions. There is no separate registry for titles to real estate accessories and surroundings.

Rights of Possession

The right of possession includes:

1. The right to claim, explore, maintain, or recover possession of the property.

2. The right to receive benefits such as rent and income.
3. The right to keep possession of the real estate.

Limits to the Right of Title

The right of title may be limited by third-party rights or public interest. Examples include:

1. Municipal zoning controls on building constructions, industrial installations, or commercial properties, and State environmental zoning controls.
2. National security and interest regulations.
3. Controls against insolvent individuals or bankrupt companies disposing of property.
4. Government controls, such as compulsory purchase orders of private property.
5. Rights of use by others.
6. Title must be exercised in accordance with social and economic purposes, preserving fauna, flora, natural beauty, ecological balance, and cultural heritage, and avoiding air and water pollution.

Extinction of the Right of Title

The right of title is extinguished upon:

1. Transfer of title to a third party.
2. Expropriation by the Government, where the authority transfers title and pays compensation.
3. Waiver.
4. Property destruction or abandonment.

Real Estate Register

Brazil's land registration system is based on real estate record files, managed by a Real Estate Registry Office with jurisdiction over specific regions. The acquisition of title to real estate is effective upon registration of the transfer instrument with the relevant Real Estate Registry Office. Examples of transfer instruments include:

1. A public deed of purchase and sale.
2. A court decision in an expropriation proceeding.
3. Any document related to the transfer of real estate, such as corporate documents on paid-in capital.

Other in rem rights allowing occupation or use of real estate include:

1. Surface rights.
2. Usufruct.
3. Use.

Information in the Public Registry

The real estate record file contains information such as:

1. Ownership title.
2. Past transactions.
3. Liens and encumbrances.
4. Built area.
5. Limits and boundaries.

All acts that create, modify, extinguish, or transfer rights to real estate must be recorded, including:

1. Acquisition and award at public auction.
2. Acquisition by adverse possession (continuous and uncontested possession).
3. Creation of rights over real estate (e.g., mortgages, rights of way).

Purchase and Sale of Real Estate

Main Stages and Documents

The real estate acquisition process typically includes:

1. **Pre-Contractual Stage:** Commercial negotiations where key aspects of the transaction are discussed, often governed by a non-binding term sheet or letter of intent. This stage is typically governed by a memorandum of understanding, addressing

issues like the definition of the real estate, terms for due diligence, base price, and conditions for binding the parties.

2. **Contractual Stage:** The parties may execute:
    - A public deed of purchase and sale, granting ownership.
    - A purchase and sale commitment, either public or private, granting the right to seek ownership upon satisfaction of conditions precedent.
3. **Post-Closing Stage:** The relevant document must be registered with the Real Estate Registry Office to transfer title or create in rem rights. The Real Estate Registry Officer must register the change within 30 days or request additional information.

Adjudication of the Sale and Purchase Agreement

If either party refuses to execute the definitive deed after signing a valid agreement registered in the Real Estate Record File, compulsory adjudication may be pursued. This process compels the seller to transfer the property through a judicial or administrative decision.

Seller's Liability

The seller must act in good faith, providing documents and information requested by the buyer. The Brazilian Civil Code requires the seller to indemnify losses if ownership is lost due to a bad title.

Due Diligence

The buyer typically performs legal due diligence, including:

1. Ownership verification by analysing real estate records.
2. Examination for potential fraud.
3. Review of title deeds and restrictions.
4. Checking liens, encumbrances, and lease agreements.
5. Assessing operational licenses, municipal records, and environmental liabilities.

Seller's Warranties

The seller usually warrants:

1. Ownership and possession.
2. Absence of liens and encumbrances.
3. Proper occupancy.
4. Absence of legal disputes.
5. Adequate operational licenses.
6. Compliance with environmental regulations.

Buyer's Liability

Post-acquisition, the buyer inherits liability for matters such as liens, encumbrances, unpaid taxes, and environmental issues.

Buyer and Seller Costs

Buyer Costs:

1. Lawyer, real estate broker, and other professionals.
2. Execution and registration of public deeds.
3. Taxes on the transfer of title and on the property post-transfer.

Seller Costs:

1. Lawyer's fees.
2. Preparation of documents for due diligence.
3. Taxes on the property before transfer.

Condominium and Joint Ownership

Real estate can be owned by multiple individuals, forming a civil condominium where each co-owner has a percentage share and pays corresponding charges. Co-owners have the right of first refusal on each other's portions. Joint ownership involves exclusive and common areas, governed by a Joint Ownership Contract, which must be registered with the Real Estate Registry Office.

Real Estate Leases

Negotiation and Execution of Leases

Urban real estate leases in Brazil are governed by Federal Law No. 8,245/91 (Urban Lease Law). Leases can be written or oral, but written agreements are preferred for clarity and to secure tenant rights, such as commercial lease renewal. Registration of lease agreements with the Real Estate Registry Office is not mandatory but necessary for enforcing certain rights against third parties.

Rent Reviews

After three years, either party can request court adjustments to rent based on market prices. Indexation of rent, based on a legally accepted index, is common and can be done annually.

Lease Term

The Urban Lease Law and Civil Code do not specify minimum or maximum lease terms. Non-residential leases of at least five years can be renewed for an equal period at the tenant's discretion, provided the tenant is not in default and follows certain procedures.

Assignment and Sub-Lease

Assignments or sub-leases require the landlord's prior written consent. For non-residential leases, changes in tenant control may also require landlord approval.

Maintenance of Leased Real Estate

The landlord must handle structural repairs, while the tenant is responsible for maintaining the premises in good condition, excluding ordinary wear and tear.

Termination of the Lease

The landlord cannot terminate a lease for a determined term except in cases of breach, failure to allow emergency repairs, or mutual agreement. The tenant can terminate the lease with or without cause, subject to penalties for early termination without cause.

Rural Property

Urban and rural properties are distinguished by their use and location. Rural properties are those suited for agricultural use and cattle breeding, as defined by the Land Law (Law No. 4,504/64).

Restrictions on Ownership or Possession of Real Estate by Foreigners

There are no restrictions on the ownership or possession of urban real estate by foreigners in Brazil.

However, there are restrictions concerning the ownership and possession of rural real estate. These restrictions are categorised as follows:

1. **Acquisition and Lease:** Foreign individuals or entities are subject to limitations on acquiring or leasing rural real estate as per Federal Law No. 5,709/71 and Federal Law No. 8,629/93.
2. **Proximity to Borders:** Federal Law No. 6,634/79 imposes restrictions on acquiring possession, ownership, or any other in rem rights over rural properties located within 150 kilometers of Brazilian borders. This applies to foreign individuals or entities, as well as Brazilian entities with foreign-majority capital.

There is ongoing national debate regarding the application of the restrictions set forth by Federal Law No. 5,709/71 to Brazilian entities controlled by foreigners. Many legal experts and scholars argue that these restrictions may conflict with the Brazilian Federal Constitution of 1988.

On July 13, 2010, the National Board of Justice (CNJ) issued a recommendation for real estate registry officers to comply with Federal Law No. 5,709/71. Subsequently, on August 23, 2010, the Brazilian Federal Attorney General (AGU) released a legal opinion aiming to reinforce the restrictions on the acquisition of rural real estate by Brazilian entities with foreign ownership.

In response, AGU and the National Institute for Colonisation and Agrarian Reform (INCRA) filed a lawsuit with the Brazilian Supreme Court challenging a decision from the São Paulo Court of Appeals that deemed the AGU's 2010 legal opinion unconstitutional.

The lawsuit, filed on June 25, 2014, seeks an injunction to

suspend and ultimately annul Opinion No. 461-12-E issued by the Administrative Branch of the São Paulo Court of Appeals on December 3, 2012. This opinion exempted notaries and Real Estate Offices in São Paulo from adhering to Federal Law No. 5,709/71, effectively allowing unrestricted acquisitions of rural land in the state by Brazilian companies with foreign-majority capital.

The Supreme Court's final decision will likely set a significant precedent on this contentious issue. Since the issuance of Opinion No. 1 by AGU in 2010, this topic has been the subject of intense debate due to its impact on Brazil's agro-industrial sector and its reflection of broader political debates.

Additionally, Law No. 13,986/2020 amended Law No. 5,709/71 to allow the transmission of rural property through fiduciary consolidation or transactions with foreign legal entities. Property transmission may occur through the realisation of real guarantees on the rural property, payment in kind ('*dação em pagamento*'), or other forms.

Real Estate Investment Funds

The formation, operation, and management of Real Estate Investment Funds (REIFs) in Brazil are regulated by Law No. 8,668/93 and Instruction No. 175/2022, as amended ("Instruction CVM 175"), issued by the Brazilian Securities Commission (CVM). These regulations govern the organisation, operation, registration, and incorporation of REIFs.

A REIF must be established as a closely held condominium and is not classified as a corporate entity, distinguishing it from U.S. real estate investment trusts. The capital of a REIF is divided into "quotas" (i.e., securities under Law No. 6,385/76 – Capital Markets Law), typically sold to investors such as pension funds and other large institutional investors.

There is no legal restriction on the public to whom quotas can be sold. The REIF's charter can specify the target investors, and the offer can be structured to attract the desired investor base.

A REIF can be established for either a definite or indefinite term. Its formation requires prior authorisation from CVM, which also oversees all REIF operations. REIF resources, raised from

Brazilian or foreign investors through the securities distribution system, must be primarily invested in real estate ventures. These ventures may include:

1. In rem rights over real estate assets.
2. Shares, debentures, and other securities issued by entities whose main activities are permitted for REIFs.
3. Shares or quotas of real estate companies.

Chapter 14

Regulated Sectors

Telecommunications, Media and Internet

Not unlike other countries, Brazil is faced with the constant tension between the speed of technology development and the slow pace of the corresponding legal framework. Telecommunications, media and the internet also face the challenge of having been regulated in different decades and even though they are highly convergent, they present significantly contrasting approaches.

Telecommunications

The current Brazilian telecommunications market started to take shape in 1997 when state-owned carriers were privatised and the National Telecommunications Agency (ANATEL) was created.

The General Telecommunications Law provides the regulatory framework for telecommunications in Brazil and is

based on two fundamental pillars: universal access and market competitiveness. It also sets out fundamental rights of telecommunications service users. ANATEL is governed by a five-member board of directors, appointed by the President of the Republic and subject to approval by the Federal Senate. Its mandate includes implementation of the Brazilian telecommunications policies adopted by the Executive and the Legislative Branches; granting telecommunication services licenses; and controlling radio spectrum and orbital slots. ANATEL is also affiliated with the Ministry of Communications, meaning it operates under constant supervision of the Executive Branch, is required to follow its directives and sectoral plans, and is accountable for its performance. This is because ANATEL provides a public service and must align with the goals of public administration. In addition to regulating telecommunications, ANATEL collects funds from the Telecommunications Inspection Fund (Fistel) and the Fund for the Universalisation of Telecommunications Services (Fust). Fistel funds are used to cover expenses overseeing telecommunications services and improving supervision techniques. Meanwhile, Fust funds are allocated to cover costs associated with ensuring universal access to telecommunications services.

Telecommunications licenses are primarily issued and regulated according to a service's function (private versus public) and reach (collective versus restricted interest). Each different telecommunications offering requires a license subject to the corresponding regulations. The main telecommunications services addressed by current regulations are fixed telephony, mobile, broadband and pay TV. The internet is not viewed as a telecommunications service but as a value-added service that avails itself of a telecommunications platform. Internet applications and other over-the-top offers are therefore not regulated by ANATEL.

There are no foreign ownership restrictions of telecommunication companies. Cross-ownership restrictions between free-to-air and telecommunication companies were established in 2011.

Mergers and acquisitions in the telecommunication sector may require ANATEL's prior clearance. ANATEL adopts a comprehensive definition of control to monitor changes of control for regulatory compliance. Antitrust review is carried out separately by the

Administrative Economic Defence Council (CADE).

In order to provide publicity, predictability, transparency and efficiency in the regulatory process, ANATEL publishes its regulatory agenda biennially. For the 2023-2024 biennium, 25 regulatory initiatives have been established, classified into seven macro areas: telecommunications service offerings; regulatory oversight; economic offer management; offer resources; finance and revenue collection; internal management; simplification and regulatory transparency, and sector data. Among these initiatives, the following priority projects stand out:

- RFP for wireline telephony to ensure service continuity under the current concession contracts scheduled to expire in 2025;
- simplification of regulations, given the convergence of telecommunications networks and services, as various services are offered through the same platform or as bundled offerings even if through different platforms. ANATEL's objective is to unify the rules concerning telecommunications services of collective interest;
- evaluation of the need for regulations regarding the obligations of telecommunications service users, with the aim of developing objective parameters and criteria;
- reassessment of regulations concerning the rights telecommunications service consumers;
- evaluation of the need to revoke various regulatory provisions whose scope is not included in other initiatives on the regulatory agenda; and
- reassessment of the Spectrum Usage Regulation to establish the "use it or share it" concept as a basic premise.

In recent years ANATEL has been praised for countering the consequences of inevitable corporate consolidation with regulatory measures that effectively prompted competition in the fixed broadband market with the rise of smaller players and introduction of neutral networks. It concurrently led a successful 5G auction in 2021 that coupled fund raising with socially aware commitments from the winners in relation to mobile footprints in several areas of the country.

Media

Pay TV regulations were overhauled in 2011 by introduction of a new telecommunications service named Subscription-based Access Service (SeAc). Significant programming requirements were also created, including mandatory Brazilian content. These requirements are overseen by the National Film Agency (ANCINE), the audiovisual market regulator in Brazil.

Streaming services are considered an internet application and are not yet regulated by a specific law or subject to ANATEL's regulation, although the Brazilian Congress has been discussing a number of bills for several years.

Radio and TV free-to-air services are regulated by the Ministry of Communications (not by ANATEL) and are not subject to the General Telecommunications Law. Regulation of free-to-air services mostly dates from the 1960s.

Foreigners cannot own more than 30% of the total and voting capital of free-to-air companies. Intellectual guidance must be held by native Brazilians or those who have held Brazilian citizenship for more than 10 years. Intellectual guidance includes editorial responsibility and selection and direction of programming.

In geographical terms, a free-to-air license is typically limited to a city. Licensing is preceded by an auction carried out by the Ministry of Communications and subject to approvals of the Brazilian President and the National Congress.

Internet

The internet went largely unregulated until 2014, when the Civil Rights Framework for the Internet (Marco Civil da Internet) was enacted in Brazil. This legal framework places access to internet as essential for exercising citizenship and establishes basic principles, guarantees, rights and obligations for use of internet in Brazil. It includes enforcement, liability for third-party content, and net neutrality.

There are no general restrictions on ownership by foreign

entities unless the business offered through the internet is itself regulated.

There are currently several bills of law regulating different aspects of the internet under debate in the Brazilian Congress.

Power

The current state of the Brazil's electricity service reflects the privatisations efforts that the Brazilian economy has undergone in recent years. These efforts primarily involved the sale of state-owned electricity companies to private corporations.

Currently, the Brazilian government is focused on (i) opening the electricity trading market to captive consumers and (ii) promoting development of renewable energy projects such as hydro, wind (inshore and offshore - with the issuance of Decree No. 10.946 of January 25, 2022), photovoltaic and thermal based on biomass.

Main Entities

Federal Law No. 14.600, enacted on June 19th, 2023 organised the Brazilian ministerial structure, creating the existing ministries and their respective attributions ("Federal Law No. 14.600/2023"). Notably, the Ministry of Infrastructure (Ministério de Infraestrutura - "MI") and the Ministry of Mines and Energy (Ministério de Minas e Energia – "MME") play crucial roles in shaping infrastructure policies, which includes the power sector.

Besides the Ministries, other authorities in Brazil are responsible for defining policies applicable to the power sector:

(a) the National Energy Policy Council (*Conselho Nacional de Política Energética* – "CNPE"), which monitors and evaluates power supply continuity and security across national territory;

(b) the Electric Sector Monitoring Committee (*Comitê de Monitoramento do Setor Elétrico* – "CMSE"), which oversees general planning of the country's power sector;

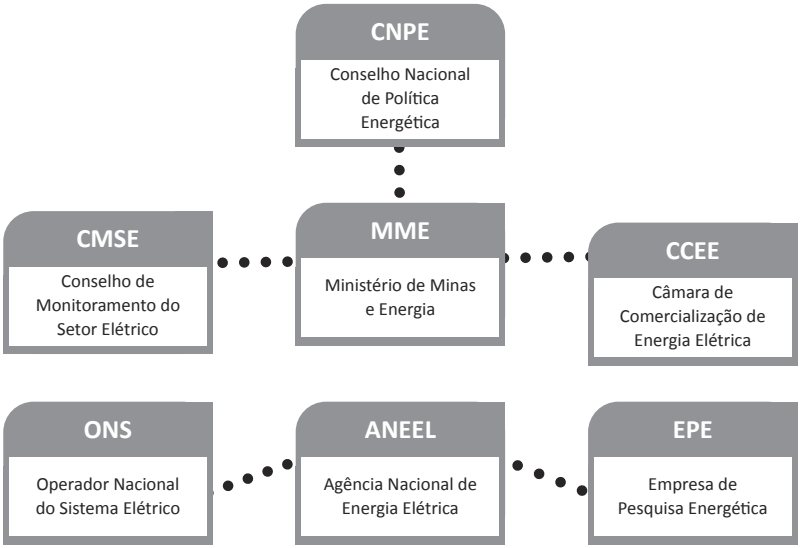
(c) the National Electric Energy Agency (*Agência Nacional de Energia Elétrica* – "ANEEL"), which regulates and oversees the power industry as per the MME's guidelines;

(d) the National System Operator (*Operador Nacional do Sistema* – "ONS"), which coordinates and controls power generation and transmission systems;

(e) the Power Trading Chamber (*Câmara de Comercialização de Energia Elétrica* – "CCEE"), which accounts for transactions in the power generation market; and

(f) the Energy Research Company (*Empresa de Pesquisa Energética* – "EPE"), which conducts studies and research to support the power sector's planning of MME and CMSE.

The power sector authorities are organised in the follow structure:



Notwithstanding the organisational structure illustrated above, the power authorities hold special status within the administrative structure, which is designed to protect them from short-term political influence. This safeguarding ensures long-term implementation of policies and maintains the technical nature of their roles.

Main Activities

Within the constitutional framework, local or foreign entities participate in Brazilian's power projects by means of concessions, permits or licenses granted by the Federal Government ("Permits"). These Permits pertain to the construction, the operation and the trading of power.

The process for obtaining a Permit depends on the type of Permit to be granted.

Before awarding public service concessions, a competitive bidding process takes place resulting in the execution of concession agreements. Under these agreements, the Federal Government - acting as the granting authority and represented by ANEEL - transfers responsibility for the executing the public service to the private entity that wins the relevant auction. The possibility of renewing the concession depends on the terms and conditions defined in the concession agreement, as well as applicable regulations and the MME's discretion.

Licenses and authorisations, on the other hand, may be granted by ANEEL or the MME via a public auction or administrative proceeding.

Segments of the Power Sector

Power generation involves the construction, operation and power trading of power generation facilities. The type of Permit applicable varies based on the energy source involved and the installed capacity of each project (i.e. hydropower, solar power, wind power, and so on), as briefly described below:

- Concession in Public Service format: this applies to hydroelectric plants with an installed capacity exceeding 50MW. Concessions are awarded through public bidding procedures and formalised via concession agreements.
- Licenses format: these apply to (a) thermal, solar and wind power plants with an installed capacity between 5MW and 300MW, or hydroelectric power plants with installed capacity between 5MW

and 50MW. These projects operate under an independent energy producer or self-production regime.

As a general practice, MME conducts "power generation auctions", "new energy auctions" and/or "reserve energy auctions". Entrepreneurs with power plants projects present their projects to EPE for technical accreditation purposes, to participate in the auction and compete under the lowest energy price criteria. Winning bidders are granted concession agreements or power generation licenses (if not previously granted) and are entitled to execute power purchase agreements for medium or long-term power supplies, depending on the type of power auction.

Power distribution involves delivering low voltage electricity directly to end consumers and operates as a natural monopoly. ANEEL's regulations and supervision play a crucial role in ensuring service quality and reasonable tariffs for consumers. Since power distribution is a public service, delegating it to private entities requires a public bidding process, resulting in a 30-year concession agreement.

Similarly, power transmission involves transporting high voltage electricity from power generators either to distribution substations or free consumers. This service also qualifies as a public service and must respect the same rules applicable to power distribution.

Lastly, power trading involves buying and selling electricity. In the free market, power generation companies and traders negotiate prices freely through power purchase agreements. In the regulated market, however, distributors purchase power through public auctions to meet the needs of their captive consumers' power demands.

Distributed Generation of Electricity

Brazil is a country abundant in electricity, and its energy matrix is predominantly clean—about 85% of the energy produced in Brazil comes from low-carbon sources. Even so, the country is increasingly adopting alternatives for self-generation of electricity, particularly through solar panels, which have become increasingly affordable.

Electricity in Brazil can be acquired in two main ways. Low-voltage consumers[1], or those with demand[2] less than 0.5 MW—such as most homes, stores, and offices—are part of the Regulated Contracting Environment, where they purchase energy directly from power providers at prices previously approved by the '*Agência Nacional de Energia Elétrica* (ANEEL),' the regulatory agency.

On the other hand, high-voltage consumers with demand equal to or greater than 0.5 MW can purchase energy either in the regulated environment or, if they prefer, directly from a producer or trader in the Free Contracting Environment, also known as the Free Energy Market.

Consumers in the Regulated Contracting Environment have an alternative option to produce their own energy through renewable sources, a system referred to as 'distributed generation.'

Initially, distributed generation was regulated by ANEEL's simple rules (Normative Resolution No. 482/2012), but it gained such prominence in Brazil that it is now governed by Law No. 14,300/2022, supplemented by ANEEL's Normative Resolution No. 1,000/2021.

The current legislation is quite flexible, allowing for local (i.e., at the point of consumption) or remote installations, as long as the point of generation and the point of consumption are served by the same power provider. Additionally, a single generation point can serve one or more consumption points. These consumption points can belong to a single consumer, such as a parent company and its subsidiaries, or a group of consumers, brought together via an association or cooperative, among other arrangements provided for in the legislation. Again, this is contingent on the generation and consumption points being served by the same power provider.

The limit of installed power at the generation point is 3 MW, which can be increased to 5 MW if dispatchable sources, such as small hydroelectric plants, are used. The legislation also allows for both on-grid and off-grid installations, with or without energy storage in batteries.

Projects with generation power less than or equal to 75kW are classified as microgeneration, while projects with higher power are classified as mini-generation under the legislation.

The interconnection process begins by submitting a

standardised application to the local power provider, along with legal and technical documents such as the installation project. In most cases, this procedure can be completed online.

Once the project's feasibility is confirmed (through an 'access opinion' provided by the power provider in response to the application), the consumer is authorised to begin installation. For mini-generation projects, the power provider may charge additional costs for interconnection to the public grid. If the project exceeds 500 kW of power, the consumer may be required to provide guarantees in accordance with ANEEL standards.

The installation and interconnection process concludes with a technical inspection by the power provider, at which point the unidirectional meter will be replaced with a bidirectional meter. From that point on, any surplus energy not consumed in a given month generates credits for the consumer, which can be used to offset consumption for up to 60 months. If not used within that period, the credits expire without the consumer being entitled to any reimbursement.

In general, these credits cannot be sold, but Law No. 14,300/2022 allows power providers to acquire them from customers through public calls, subject to specific ANEEL rules.

Distributed Generation as a Business

Electricity generation in Brazil is a regulated activity, and the legislation favors centralised generation through hydroelectric, wind, photovoltaic, thermoelectric, and nuclear plants. However, distributed generation can also serve as a business opportunity.

One obvious modality is the production and sale of equipment for distributed generation, which does not require specific regulatory authorisation (while facilities are regulated, the production and sale of equipment are not, although some equipment may require certification).

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1. Supply voltage up to 2.3kV.
2. Average of the active or reactive electrical powers, injected or required from the electrical distribution system.

It is also possible to lease plants to interested consumers, provided that the lease is not directly tied to the amount of energy generated (i.e., the rent should not be calculated per unit of energy produced, such as kWh or MWh).

Additionally, distributors may contract ancillary services of distributed microgeneration or mini-generation to supply their distribution networks or microgrids, in compliance with specific ANEEL rules.

All these business models are available to foreign investors without restrictions. As with any market, the economic viability of each project will depend on its rate of return in relation to the investment.

Conclusion

By opting for distributed generation, consumers can eliminate or significantly reduce their energy costs, avoiding tariff peaks that typically occur during periods of water scarcity, even being subject to costs associated with interconnection to the electric grid. These interconnection costs were subsidised until the approval of Law No. 14,300/2022, but these subsidies will be gradually phased out by 2029.

Even with the eventual elimination of subsidies, distributed electricity generation remains an economically viable option for many consumers, including businesses. It is also environmentally sustainable and legally safe for those wishing to adopt this model.

The elevation of distributed generation to the level of formal law, transitioning from regulatory treatment, reflects its growing importance, aligned with the United Nations Sustainable Development Goals and the decarbonisation commitments of the Paris Agreement. This is a path worth considering.

Oil & Gas

Introduction

The history of the oil and gas industry in Brazil can be

divided into three very distinct periods: (i) the pre-World War II period, when petroleum was not the focus of Brazilian economic policies; (ii) the State monopoly period, characterised by the creation of Petrobras in 1953 as a result of a strong popular nationalist movement; and (iii) the open market period, after Constitutional Amendment No. 9, dated 1995, which allowed the State to retain exploration and production companies other than Petrobras to perform petroleum activities in Brazil.

These periods reflect the increasing importance that the petroleum industry achieved on the international stage. Brazil, following this trend, has made significant investments in this sector, particularly in the development of its extensive offshore resources.

During the State monopoly period, *Petróleo Brasileiro S.A.* - Petrobras played a major role developing the knowledge of the Brazilian sedimentary basins at a time when Brazilian potential was widely discredited and no other company would bear the high risks and costs involved.

Law No. 9,478 ("Petroleum Act"), enacted in 1997 to regulate the changes provided in Constitutional Amendment No. 9/95, introduced the concession regime in Brazil responsible for expanding Brazil's proven oil reserves from 7.1 billion barrels in early 1998 to 14.2 billion barrels by the end of 2010.

As a result of such a significant improvement, Brazil has developed one of the world's most advanced offshore petroleum industries, which in turn has led to the discovery of vast oil fields in the pre-salt layer, an area of ultra-deep water that already holds proven reserves of more than 9 billion barrels of oil equivalent.

Seeking to increase the country's control over the exploration of such huge potential, in late 2010 the Brazilian Government approved a new regime applicable specifically to the exploration of reserves located in the pre-salt area with adoption of a production sharing model. Since then, Brazil has had a mixed regulatory regime.

Since 1999, multiple bidding rounds - auctions by means of which the Federal Government grants the right to explore and produce oil and natural gas - have been carried out in Brazil: 21 for exploratory blocks and 4 for marginal accumulations under the concession regime, and 10 in the pre-salt area, under the production sharing format.

In 2017 and 2018, the National Council for Energy Policy ("CNPE") established guidelines for planning bidding rounds until 2021, which included the open acreage process (*oferta permanente*) which later became the preferred system for the offering fields and exploration blocks, as explained in more detail below.

In addition, the Brazilian Government started to employ efforts to promote and accelerate development of the domestic natural gas market. Two programs were launched in 2016 and 2019, respectively: the "Gas for Growth" program (*Gás para Crescer*) and the "New Gas Market Agenda" (*Agenda do Novo Mercado de Gás*), both aimed at increasing competition in the sector. The latter resulted in the 2019 publication of CNPE's Resolution No. 16, which set forth guidelines and enhancements in energy policies aimed at promoting free competition in the natural gas market.

Those were the foundations of the discussions that resulted in the issuance of the new gas law in 2021 (Law No. 14,134/21 – "New Gas Act"), which altered the previous legal framework to open the gas sector up to more competition. The New Gas Act also set the grounds for a Brazilian 'gas release' program, granting ANP the authority to adopt a mechanism involving compulsory assignment of volumes of gas by agents who have large shares of the market. This is currently being evaluated by the agency. The idea is to reduce concentration in the gas market by cutting Petrobras' current market share in the trade sector.

The New Gas Act was followed by another federal program, "Gas to Employ" (*Gás para Empregar)*, launched in 2023 with the goal of improving utilisation of national gas and increasing the socioeconomic returns from national production.

In addition to the measures adopted by the Government and the CNPE, from 2016 to 2024 Petrobras implemented a massive divestment plan that resulted in the sale of dozens of mature onshore and onshore fields, the majority of the country's gas transportation and distribution infrastructure and some of the company's refineries.

With the conclusion of Petrobras' divestment program, new opportunities have been arising in a "second stage" of transactions for these same assets, this time involving the private parties that acquired said assets from Petrobras and are divesting less strategic assets or implementing partnerships to increase their potential.

Recent years have also brought new opportunities in the gas sector, particularly for LNG projects, with increasing demand for LNG terminals and development of small-scale LNG distribution projects, as well as CNG projects, which have also been attracting the attention of investors considering, among other factors, the potential association with biomethane.

The Petroleum Act

The Petroleum Act introduced a new National Energy Policy in Brazil, based upon free competition and focusing on expanding the country's competitiveness internationally.

The law created a basic regulatory framework applicable to all levels of the Brazilian oil industry, determining how the market can access and perform regulated activities including:

(i) exploration and production of oil and natural gas;

(ii) refining of oil and processing of natural gas;

(iii) transportation of oil, its derivatives and natural gas; and

(iv) importats and exportats of oil and natural gas.

One of the major changes introduced by the Petroleum Act was the adoption of a concession regime for oil and natural gas exploration and production activities. According to the Petroleum Act, such activities may be awarded to any company via specific bidding rounds following which concession agreements are signed.

The Petroleum Act also created two important entities, namely the CNPE and the ANP.

The CNPE is a council linked to the President of the Republic, with, inter alia, nine Ministers holding seats. It is chaired by the Minister of Mines and Energy. The council is responsible for advising the Government on energy policies and guidelines, and, among its most important duties, it defines which exploration blocks are to be offered to the market in bidding rounds conducted by the ANP.

The ANP is the regulatory agency responsible for regulating and supervising all petroleum activities in Brazil. Among its other duties, the ANP is responsible for (i) promoting studies to define exploration blocks; (ii) conducting bidding rounds to award oil and

natural gas exploration and production rights, either under concession agreements or production sharing agreements; and (iii) authorising oil and natural gas refining, liquefaction, processing, transportation, storage, imports and exports.

Exploration and Production Regimes

As mentioned above, the exploration and production activities in Brazil are currently governed by two legal regimes, namely the concession agreement regime ("Concession Regime") and the production sharing agreement regime ("PSA Regime"). The regime applied depends on the location of the deposits.

To different extents, both regimes allow any company to acquire exploration and production rights provided it meets certain qualification requirements established by the ANP, as detailed below. Acquisition may be direct, via participation in the bidding rounds conducted by the ANP, or indirect, through acquisition of participating interests assigned from other companies, subject to ANP approval.

Concession Regime

The Concession Regime has been in effect since 1997 and the Petroleum Act and is based on concession agreements awarding oil and natural gas exploration and production rights in exploration blocks offered during the bidding rounds regularly conducted by the ANP.

Access to the bidding rounds is open to any company or consortium of companies that meet the ANP's legal, technical and financial requirements. The criteria used by the ANP to determine winning bidders are based on the amount of the signing bonus, which corresponds to 80% of the final grade, and the minimum exploratory program (except for marginal accumulation areas), which represents the remaining 20% of the final grade. The local content offered by each bidder used to be one of the criteria considered for determining the winner; however, the percentage of local content is no longer a bidding criterion and fixed percentages are applicable to each area depending on its environment and stage asper CNPE Resolution No. 11/2023.

The concession agreement is signed by ANP and the

concessionaires. In addition to the payment of the signing bonus offered during the bidding round, the concession agreement determines payment of: (i) a retention fee proportional to the size of the concession area awarded; (ii) royalties, in amounts that may vary from 5% to 10% of production depending on the geological risks, production expectations and other factors, as determined by the ANP; and (iii) a special participation tax, a type of extraordinary royalty applied to blocks with high levels of production or profitability. A landowner's participation fee is also applicable for onshore areas, varying from 0.5% to 1% of production.

Under a concession agreement with ANP, a company or consortium of companies has the obligation to perform a minimum exploration program within the area of each block, at its own cost and risk, and owns the production in case of success. A concession agreement establishes two distinct phases:

(i) The Exploration Phase, during which the concessionaires are obliged to perform all activities defined in the minimum exploratory program, such as conducting seismic works and eventually drilling at least one exploratory well; and

(ii) The Production Phase, which may last up to 27 years and will only begin upon issuance of a declaration of commercial viability after completing appraisal of a discovery by the concessionaire(s). This phase can be extended proportionally to the capacity of the reservoirs.

PSA Regime

At the end of 2010, a new regulatory framework regime was approved in Brazil under Law No. 12,351 ("PSA Act") specifically for the exploration of the pre-salt reserves, with the adoption of a production sharing agreement model.

According to the PSA Act, the new regime only applies to fields located within the pre-salt areas and such other areas the Government may eventually deem strategic.

The PSA Act used to define Petrobras as the sole operator of all blocks under the production sharing agreement regime, with a minimum participating interest of 30% in each new block within the

pre-salt area. The remaining 70% interest used to be offered to other companies in competitive bidding rounds.

In 2016, though, Law No. 13,365 revoked the obligation of Petrobras to be the sole operator of these fields. Instead, the company now has a preemptive right to be operator of the blocks under the production sharing agreement regime. After defining the areas that will be offered in a bidding round, the CNPE must issue a communication to Petrobras to give the company the opportunity to exercise its preemptive right within 30 (thirty) days. Should Petrobras express a desire to participate as operator, it should indicate the percentage participation it intends to have in the consortium, which cannot be less than 30%. After Petrobras responds, the CNPE will determine Petrobras' percentage in the consortium, taking into account the minimum of 30% and the percentage indicated by Petrobras.

In addition, should Petrobras exercise its preemptive right to be the operator, it will only be obliged to participate in the consortium with the winning bidder if the percentage of the profit oil (as defined below) offered by the winner is equal to the minimum percentage established in the Tender Protocol. If the percentage of the profit oil offered by the winner is higher than the minimum percentage established in the Tender Protocol, Petrobras may decide not to participate in the consortium. In this case, the winner shall indicate an operator and the percentage participation of each member of the consortium.

When Petrobras exercises its preemptive right and also participates as operator, the other companies must form a consortium with Petrobras and *Pré-Sal Petróleo S.A.* ("PPSA"), a non-operating entity created by Law 12,304, dated 2010, to act as Government representative in the production sharing agreements. On the other hand, if Petrobras decides not to participate in the consortium, the remaining companies will only need to form a consortium with PPSA.

The main roles of PPSA are to manage and supervise production sharing agreements and represent the Government on the operating committees. PPSA has the right to appoint half of the members of the operating committees, including their chairmen, who will have veto powers.

Similar to the Concession Regime, exploration activities under the PSA Regime will be undertaken at the sole cost and risk of the

partners in the consortium, except for PPSA, which bears no risks. In case of a commercial discovery, these companies will be entitled to: (i) a share of production as reimbursement for exploration costs (known as "cost oil"); and (ii) a share of the surplus production (known as "profit oil"), which is the production after deducting the cost oil and 15% royalty payments.

In addition to royalties, the PSA Regime also establishes payment of a signing bonus. However, unlike the Concession Regime, the value of the signing bonus will be determined in advance in the relevant production sharing agreement, but will not be one of the criteria used to determine the winning bidder in each round.

The criteria used by ANP to determine the winning bidders during the PSA Regime's bidding rounds is based exclusively on the highest share of profit oil the companies offer to the Government.

The PSA Act also determined the creation of a social fund maintained with revenues from pre-salt production. The purpose of this social fund is to permanently benefit the country by means of investments in projects to reduce poverty and develop areas such as education, science and environmental sustainability, including mitigation of climate changes.

PPSA is responsible for managing the agreements for commercialisation of the oil belonging to the Government under the PSA regime, including agreements signed on behalf of the Government with sale agents or for directly commercialising oil, preferably through a bidding process.

Transfer of Rights

In addition to the two legal regimes described above, in 2010, Law No. 12,276 authorised the Government to assign Petrobras right to extract up to 5 billion barrels of oil equivalent from non-granted areas located in the pre-salt area. Payment by Petrobras was made using federal public debt bonds. Law No. 12,276/2010 also authorised the Government to underwrite Petrobras' shares and to pay for the shares using federal public debt bonds. Such direct contracting of specific areas from the Government to Petrobras is known as "Transfer of Rights" (*Cessão Onerosa*).

In 2010, Petrobras and the Government entered into a Transfer of Rights Agreement, pursuant to which 6 blocks of the pre salt area were assigned to Petrobras subject to the limit on the maximum volume to be extracted, which was 5 billion barrels of oil equivalent.

As there were volumes exceeding the maximum volume contracted, in 2019 the CNPE authorised the ANP to hold specific bidding rounds for volumes exceeding those contracted under the Transfer of Rights Agreement. The bidding rounds were held in 2019 and 2021 under the production sharing regime.

Permanent Offer

In 2017, based on CNPE Resolution No. 17/2017, ANP created a new open acreage bidding process for offering areas, called Permanent Offerings (*Oferta Permanente*), which consists of continuously offering exploratory blocks and relinquished fields. Initially, the Permanent Offerings were limited to areas subject to the concession regime.

In 2021, CNPE Resolution No. 27/2021 made Permanent Offerings the preferred system for the offer of fields and exploration blocks, including for pre-salt areas under the production sharing regime.

The Permanent Offerings are divided into cycles. Unlike the previous bidding round system, under the new rules a bidding cycle will start with submission of a declaration of interest from a potential bidder, which must be accompanied by a bid bond. After approval of this declaration of interest, the ANP will then announce a schedule for a Permanent Offering cycle, which will typically take four months from initial announcement until the public session held for the submission of bids.

As per the latest versions of the regulation applicable to Permanent Offering applicable from July 2024, all companies willing to participate in the Permanent Offering system must initially be enrolled with the ANP. Initial enrolment is mostly a formal requirement and does not require technical qualification or any type of binding commitment.

All registered bidders will be allowed to participate in the

Permanent Offering cycles. Upon commencement of a cycle, bidders will have the opportunity to request inclusion of any specific sector from the list of all available areas. After confirming the sectors included in that cycle, all registered bidders will be allowed to submit a bid for any of the blocks and fields included in those sectors during the public bidding session, provided the bid is followed by a bid guarantee.

During the last cycle of the Permanent Offering, a total of 955 exploratory blocks were available under the concession regime and 6 blocks were available under the production sharing regime. Furthermore, CNPE Resolution No. 11/2023 recently authorised inclusion of an additional 10 blocks under the production sharing regime (also subject to specific commercial conditions). In addition to that, a total of 1177 exploratory blocks under the concession regime are currently under analysis by ANP and may be included in future cycles.

The Permanent Offering system ensures potential bidders will have lengthy periods of time to evaluate each of the blocks or areas and to express their interest, depending on each company's size and portfolio, while also making offerings of these areas more practical and faster.

New Gas Act

As mentioned above, the Petroleum Act created the basic regulatory framework for all levels of the Brazilian petroleum industry, including the refining of oil and processing of natural gas, transportation of oil, its derivatives and natural gas, and the import and export of oil and natural gas.

Although most of the rules contained in the Petroleum Act are also applicable to natural gas activities, given the various characteristics of the natural gas market, including the high costs of building transportation and distribution networks, as well as its natural-monopoly features, in 2009 activities related to the natural gas market were specifically regulated under Law 11,909, which was later replaced by the New Gas Act in an attempt to increase competitiveness in the sector.

Among other provisions, the New Gas Act categorises natural gas pipelines as: (i) transfer pipelines, when used to move natural gas

between upstream and/or midstream facilities belonging to the same owner; (ii) gathering pipelines, when used to carry natural gas from producing wells to treatment, processing, liquefaction or storage facilities; and (iii) transportation pipelines, when used to import or export gas, to carry gas between different federal states, to connect LNG terminals or gas treatment/processing or storage facilities to transportation pipelines, to connect two transportation pipelines, or when the pipeline supersedes certain diameter, pressure, and extension thresholds established by ANP.

The New Gas Act also provides for non-discriminatory third-party access to essential infrastructure, which can be regulated or negotiated and subject to the owner's priority right, depending on the facility, and it grants ANP the power to monitor such access. The following facilities are subject to third-party access rules: (i) transportation pipelines, which are subject to the regulated access format explained below; (ii) gas treatment/processing facilities, LNG terminals, and gathering pipelines, subject to the negotiated access format, which involves a period of negotiation between the owner of the relevant facility and the third parties interested in hiring capacity, resulting in the general terms and conditions which shall be made available to the public and are to be applicable to other users; and (iii) gas storage facilities, for which the applicable format is still to be determined by ANP.

Transportation

The Petroleum Act states that any company or consortium of companies incorporated under Brazilian law may be authorised by the ANP to construct and operate any type of oil and natural gas transportation facilities, either for domestic supply or for import or export. The relevant authorisation will depend upon the applicant's prior qualification based on specific regulations established by the ANP.

The New Gas Act extinguished the concession regime for pipeline transportation of natural gas, which now operates solely under the authorisation regime. It also established the entry-exit regime for booking gas transportation capacity, allowing an interested party to hire capacity for specific entry or exit points in the transportation network independently.

The law also simplified the concept of open season for capacity booking and ANP's regulation established a simplified procedure by which interested parties can submit a request for capacity booking and adhere to the published terms and conditions of the Gas Transportation Agreement of the relevant gas transportation companies.

The New Gas Act also provides an unbundling rule for gas transportation companies, determining that they shall not operate in competitive activities in the gas sector (i.e., E&P, import, carriage or trade) and shall maintain corporate and operational independence from any companies or consortia that engage in such activities.

Refining, Processing and Storage

According to the Petroleum Act and the New Gas Act in relation to natural gas, the activities of refining oil and processing, treatment, liquefaction, regasification or underground storage of natural gas may be performed by any company or consortium of companies incorporated under Brazilian law, subject to ANP regulation.

ANP recently simplified the regulatory authorisation procedure for refining oil and processing natural gas (by ANP resolution 852/2021). Authorisation to undertake these activities will depend upon: (i) submission of a project to the ANP (which no longer needs to approve it beforehand) complying with the technical, financial and legal conditions determined by the agency, as well as the applicable environmental and safety requirements; and (ii) an operating authorisation.

Currently, refining capacity in Brazil is still highly concentrated in Petrobras. Approximately 80% of the country's refining capacity is owned by Petrobras, with the remainder coming from refineries operated by independent entities, despite the sale of 3 refineries as part of Petrobras' divestment program.

Distribution

The distribution of oil and its derivatives is subject to registration with, and authorisation from, the ANP. A company

intending to become a distributor must comply with several requirements established in specific ANP regulations.

Distribution of natural gas, on the other hand, is regulated solely by the States under article 25 of the Brazilian Federal Constitution, and therefore is not regulated by the Petroleum Act or the New Gas Act. Nevertheless, the New Gas Act authorizes certain categories of consumers (free consumers, self-importers and self-producers) to build their own distribution infrastructure if their needs cannot be fulfilled by the local distributor. In such cases, the local distributor will be responsible for operation and maintenance of the facilities. The State will ultimately become the owner of any such facilities after compensation is paid to the relevant builder.

States regulations usually divide the distribution sector between the free market, in which specific agents (free consumers, self-importers and self-producers) can acquire gas directly from any gas traders authorised by the ANP, and the regulated market, in which consumers may only acquire gas from the local distributor. In this context, States have been gradually updating their regulations to adopt best regulatory practices aiming at making agents' migration between the regulated and the free markets more flexible and, at the same time, developing a legal framework that is harmonised with federal regulation.

Imports and Exports

Both the Petroleum Act and the Gas Act determine that oil and natural gas imports and exports require ANP authorisation. To obtain authorisation, a company has to register with the ANP as an importer or exporter of oil and natural gas, which will require submission of a variety of information and documents to the agency certifying the company is in good legal and financial standing.

Underground Gas Storage

The New Gas Act also extinguished the concession regime for underground storage of natural gas, which is now subject to the

authorisation regime. Even though ANP regulation already provides for granting such authorization to E&P concessionaires in the context of their field development plans, many elements are yet to be regulated by the agency, such as the authorisation for the provision of underground storage services to third parties, the non-discriminatory third-party access to storage facilities and the simplified regime for residual extraction of hydrocarbons during performance of underground storage activities.

Petrobras Divestment Program

The Petrobras Divestment Program was created in 2014 to increase short term liquidity and reduce investment. The program initially followed a divestment methodology based on the Regulations for the Petrobras Simplified Bidding Procedure approved by Decree No. 2,745, of August 24, 1998.

The divestment program included sale of equity interests in subsidiaries, assignments of exploration rights, sales of mature fields, and sales of refineries in Brazil. Specifically for the refining and gas transportation segments, the program involved two agreements with Brazil's antitrust authority, CADE, which determined the sale of 8 refineries (the Refining TCC), and the sale of 3 gas transportation companies (the Gas TCC), respectively.

From 2015 through 2024, as part of the divestment program Petrobras sold its interest in dozens of E&P assets, completed the sale of 3 refineries under the Refining TCC and 2 gas transportation companies under the Gas TCC.

For the remaining assets, including refineries that were meant to be sold under the Refining TCC, CNPE recently revoked its previous Resolution No. 09/2019, which had been responsible for establishing the main guidelines for Petrobras' refining divestments. Additionally, Petrobras' strategic plan for years 2024-2028 focused on value maximisation and improvements to Petrobras' refining park. As a consequence, in May 2024 the Refining TCC was amended so as to exclude Petrobras' obligation to sell the remaining refineries. However, the amendment also established new obligations to ensure the company was non-discriminatory in the refining segment.

The Gas TCC was also amended so as to exclude Petrobras'

obligation to sell the remaining gas transportation company in its portfolio (TBG), and to include new obligations strengthening its independence.

The main result of the divestment program was to create a strong independent market in Brazil, with several E&P companies investing billions of dollars in to develop, expand or redevelop onshore and offshore fields. This new market has also boosted exploration investments in the country, expand exploration activity in mature basins and potentially create new exploratory frontiers in less developed areas.

Energy Transition in Brazil

Brazil stands out for its energy matrix, which is characterised by a high proportion of renewable sources. According to MME data, 48,6% of the country's domestic energy supply comes from renewable sources - nearly four times the world average of 14%.

Remarkably, 89% of power generated in 2023 was from renewable sources, compared to the global average of just 28%. As a large emerging country with abundant natural resources, Brazil has unique potential to lead the energy transition.

However, Brazil faces significant challenges to assume this pivotal role. While progress has been made creating a favorable environment for the energy transition, gaps remain in developing robust regulation that can attract substantial investment to accelerate the transition.

Brazil must establish solid financing structures, including innovative financial instruments like green, social, sustainability-linked bonds. Additionally, a legal-regulatory framework that encourages new technologies is essential.

At the current stage of Brazilian energy transition, each technology has a distinct regulatory status and market development phase outlined below:

- **Onshore Wind Power:** Brazil's onshore wind market is rapidly growing and already represents around 13% of the domestic energy supply. Development of this market was driven by the

enactment of Law No. 9,427/1996, which offers specific tariff discounts for transmission and distribution from renewable projects, including wind power plants.

- **Offshore Wind Power:** although the legal and regulatory framework for offshore wind generation is still evolving, Brazil benefits from a mature energy industry. At the current stage, Decree No. 10,946/2022 allows the identification and assignment of physical spaces for development of offshore energy production projects, subject to MME and ANEEL permits. A broader regulatory framework is expected to be enacted by Bill of Law No. 576/2021, which still needs approval from the Brazilian Federal Senate.
- **Solar Power:** close to reaching 40 GW of installed capacity, the solar power industry becomes more relevant for the domestic power supply every year. This renewable source is becoming increasingly popular due to the enactment of Law No. 14,300/2022 and ANEEL's Resolution No. 1,059/2023, by which solar power projects may be classified as micro and mini net metering systems (in Portuguese, *geração distribuída*), empowering consumers to produce renewable energy independently and enjoy regulatory tariff benefits.
- **Biomass Power:** given the significance of the farming industry in Brazil's economy, biomass power has emerged as a relevant alternative for domestic generation. As Law. No 9,074/1995 encompassed biomass, sources like biogas and sugarcane, bagasse have begun to be utilised for independent power production projects.
- **Carbon Capture Usage and Storage ("CCUS"):** regulation on CCUS is still under development, as Bill of Law No. 1,425/2022 requires the Brazilian House of Representatives' approval. The purpose of this bill is to establish a legal framework for managing CO2 storage and define safety guidelines, procedures, and technical requirements. If enacted, Brazil would have its first regulatory framework for CCUS, a pivotal step towards the energy transition and meeting national greenhouse gas reduction targets. It also proposes monitoring, control and accountability mechanisms for CO2 storage projects, along with criteria for obtaining licenses and authorisations.

Mining

Introduction

According to the Brazilian Federal Constitution, all mineral resources located within Brazilian territory are owned by the Federal Government and considered detached from the surface area where they are located. Private companies can obtain title to exploit minerals in certain areas and keep ownership thereof.

In order to conduct mining in Brazil, a company must be incorporated under Brazilian law and headquartered in Brazil, but, as a general rule, it does not need to be controlled by Brazilian individuals.

The most relevant pieces of legislation that govern regulatory aspects of mining activities are the Decree-Law No. 227, of February 29, 1967 (the "Brazilian Mining Code"), Decree No. 9.406, of June 12, 2018 ("Brazilian Mining Code Regulation"), and ANM's Order No. 155, of May 12, 2016.

Mining Regimes

Mining may only be carried out once the applicant mining company is granted the applicable title by means of an administrative procedure conducted by the National Mining Agency (*Agência Nacional de Mineração* – "ANM"). There are four legal regimes that allow mining in the country: (a) exploration permit (*autorização de pesquisa*) followed by a mining concession (*concessão minerária*), (b) mining licensing (*licenciamento mineral*), (c) artisanal mining permit (*permissão de lavra garimpeira*); and (d) mining monopoly (monopolização). The most common regime for foreign investors is the exploration permit and mining concession regime.

Exploration Permit and Mining Concession Regime

ANM may grant an exploration permit (*autorização de pesquisa*) over a certain area to an applicant mining company on a

first-come, first-served basis, for an initial period that may vary from 1 (one) to 4 (four) years. The applicant does not need to own the land or any type of surface right over the area relating to the application.

The initial term of an exploration permit may be renewed, at ANM's discretion, for up to 4 (four) years, subject to submitting a justified request and presenting a partial exploration report. ANM may allow an additional extension of the exploration permit term if the title holder provides evidence that (a) access to the exploration area was impeded, or (b) it could not obtain consent, authorisation or licences from the competent environmental authority, provided that it has complied with the orders and notices issued by the environmental authority and that it has not contributed, by action or omission, to restricting access to the area or to the decision not to issue the environmental consent, authorisation or licence.

Upon completion of the mineral exploration campaign, the exploration permit holder must submit a final exploration report (*relatório final de pesquisa*) to ANM (whether the results are negative or positive). If such a report reveals the existence of an economically viable mineral deposit, ANM will approve the report and the company will have one year to apply for a mining concession (*concessão minerária*) for the area in which the reserve has been identified.

The mining concession application filed by the mining company needs to be supported by a Mine Economic Plan (*Plano de Aproveitamento Econômico* – "PAE"), which is basically a document setting out the mining company's exploitation plan for the intended mine. Once the mining concession is granted, exploitation of the economically feasible mineral reserve identified shall be performed in accordance with the approved PAE and applicable law.

Before the mining concession is granted, ANM may grant permits to extract limited volumes of minerals.

Even though new mining permits are granted on a first-come, first-served basis, areas relating to titles that have been lost by the previous titleholder (e.g. due to failure to submit the exploration report in timely fashion or if the exploration campaign resulted in an uneconomic outcome) may be auctioned off by ANM periodically.

Transfer, lease and pledge of mineral titles

The holder of a mineral title can freely negotiate and transfer the title to another company, subject to prior approval from the Ministry of Mines and Energy (*Ministério de Minas e Energia* – "MME") or ANM, depending on the title. The area of a title may be split, so the title holder can transfer only a portion of the area comprised by the existing title, in which case certain requirements have to be met, including submission of a new mining plan for the two areas resulting from the split to ANM and approval thereof.

Mining concessions may also be leased. The lease of a mining concession is conceptually analogous to a temporary transfer of the mineral rights, in which, even though the lessor remains the title holder of record, the lessee undertakes all rights and obligations relating to the leased mining concession during the term of the lease. The lessee shall become liable for all environmental and regulatory liabilities relating to the mine, although the lessor shall remain jointly liable. Mining concession leases also have to be approved in advance by ANM in order to become effective.

The area relating to a mining concession may also be partially leased, in which case the parties must obtain prior approval from ANM for the mining plan in each of the new areas resulting from the split.

Mineral titles may be pledged to secure obligations. Even though ANM's prior approval is not required, the pledge agreement must be registered before ANM to become effective.

Mining Royalties

In addition to other taxes generally payable by companies in Brazil, the mining is also subject to a royalty known as Financial Compensation for the Exploration of Mineral Resources (*Compensação Financeira pela Exploração de Recursos Minerais* – "CFEM"), which the concessionaire pays to ANM.

The CFEM is based on (i) in case of sale of products, the gross sales revenue, less sales taxes, (ii) in case of consumption by the concessionaire, gross revenue calculated on the basis of the current price of the mineral on the local, regional, national or

international market, (iii) for exports, the revenue calculated on the basis of its reference value, (iv) in case of a mineral title acquired in a public bid, the value of the bid, or (v) in case of minerals produced under an artisanal mining permit, where the CFEM is payable by the first acquirer instead of the miner, the value of the first purchase of the mineral.

The currently applicable rates vary depending on the substance: (a) 1% for rocks, sand, gravel, clay and other civil construction mineral substances, as well as ornamental rocks and mineral water; (b) 1.5% for gold; (c) 3% for bauxite, manganese, niobium and rock salt; (d) 3.5% for iron; and (e) 2% for diamonds and any other mineral substances not listed in the previous items.

Mining Easement

If the mining company that holds a mining concession does not own the land where the mineral resources or mining-related infrastructure are located, it is required to enter into an agreement with the landowner. If an agreement is not reached, the mining company is entitled to obtain access and/or occupy the land owned by third parties by means of mining easements (*servidões minerárias*) granted by ANM.

A mining easement is a type of administrative easement over areas covered by the mineral resources and mining-related infrastructure required for the mine, i.e., areas for ancillary mining works, water capture, tailings dams, processing facilities and other structures required for the operation of the mine. Mining easements may be granted by ANM even without the consent of the landowner. Nonetheless, the mining company needs to reach an agreement with the landowner to define the amount to be paid as indemnity for damages and losses that the mining activity causes the landowner, as well a as compensation for use of the land.

Landowner participation in the results of the mine

If the mining company is not the owner of the land from which minerals are extracted, it is required pay to the landowner an amount equal to 50% of the CFEM paid in relation to that specific

amount of minerals extracted from a certain area. This amount is not due to owners of land from which minerals are not actually extracted, such as the areas occupied by processing plants and other ancillary structures of the mine.

Restriction on Border Zone

Mining activities within the border zone, which corresponds to a 150km-wide strip parallel to the Brazilian borders, require prior approval from the National Defence Council (*Conselho de Defesa Nacional* – "CDN") and certain restrictions apply, such as: (a) direct or indirect foreign investment is limited to 49% of the capital stock of the company; (b) at least 51% of the capital stock must be directly or indirectly held by Brazilian citizens; (c) at least two thirds of workers must be Brazilian; and (d) management of the mining company must be carried out by a majority of Brazilian citizens.

Penalties

In case mining companies do not adhere to mining legislation, mainly the Brazilian Mining Code, the Federal Decree No. 9,406, of June 12, 2018, as amended, as well as the Mining Rulings issued by ANM, especially the ANM Resolution No. 122, of November 28, 2022, they are subject to certain penalties imposed by ANM that may vary from a simple notification warning to amend the identified conduct, up to the imposition of fines, but non-compliance could also ultimately lead to the temporary or permanent suspension of exploration or mining activities, as applicable, depending on the title (i.e., exploration permit or mining concession) held by the mining company in question. In extreme cases, it could also result in the respective exploration permit or mining concession being revoked.

Mining Licensing

The mining licensing (*licenciamento mineral*) regime allows extraction of specific minerals, such as sand, gravel, and clay, for immediate use in civil construction without the need for prior

exploration. A specific license issued by the local administrative authority of the municipality where the deposit is located with a set expiry date must be registered with ANM. Upon expiration, the holder must request a new license; otherwise, the area will become available to new title requests by third parties.

Only the landowner or those authorised by the landowner can benefit from this regime, except (i) when the property belongs to a public legal entity, or (ii) if the property is located in areas corresponding to canceled license registrations. In these cases, the landowner is entitled to compensation for the area's occupation. Mineral extraction by mining licensing is restricted to a maximum area of fifty (50) hectares (50 ha).

Artisanal mining permit

Artisanal mining permit (*permissão de lavra garimpeira*) is a simplified regime, as it is intended for immediate exploitation of mineral deposits generally not requiring prior exploration, except when requested by ANM on a case-by-case basis. ANM is responsible for defining the areas where the artisanal mining permit is applicable based on criteria related to mineral sector interests, social order and the environment.

Such regime applies to gold, diamonds, cassiterite, columbite, tantalite and other substances defined by the ANM and the permit is granted to Brazilians and mining cooperatives for up to 5 (five) years, renewable for a similar period at the discretion of the ANM. The permitted area may not exceed fifty (50) hectares (50 ha), except when the licence is granted to a mining cooperative.

Mining monopoly

The Brazilian Mining Code also allows for mining monopolies if the federal government has a direct or indirect interest in exploitation of a given substance.

In Brazil, there is monopoly on exploration, exploitation, industrialisation and trade in nuclear minerals and ores and their derivatives, nuclear elements and their components and radioactive

substances, which are subject to the rules from the National Nuclear Energy Commission (*Comissão Nacional de Energia Nuclear* – "CNEN") and the National Nuclear Safety Authority (*Autoridade Nacional de Segurança Nuclear* – "ANSN").

In addition, if a holder identifies the existence of nuclear minerals or ores in its deposit with greater economic value than the original ore, *Indústrias Nucleares do Brasil S.A.* ("INB") will have the prerogative to decide whether to mine the deposit in partnership with the original holder or to have it expropriated by INB, at its discretion. If the nuclear minerals or ores are economically viable but their economic potential is lower than the ore originally extracted, INB and the holder of the deposit will jointly determine how to hand over these nuclear elements to INB. This is a matter still subject to future regulation.

Critical and Strategic Minerals in Brazil

Introduction

The commitments made by various countries and companies to seek a reduction in the speed of global warming have led to changes in the world's energy matrix. The trend commonly referred to as "energy transition" has been bringing about profound changes in various sectors, from changes in the way of life of populations, through companies' investment strategies, to sectoral and industrial policies of countries that contemplate the means for the globally assumed commitments to be met.

A determining feature of the energy transition is the decarbonisation of the economy. New technologies are being developed and employed in energy generation involving lower carbon emissions. Similarly, means of transportation are being altered to reduce carbon emissions, as is the case with electric vehicles or, at least, hybrids. One of the implications of these changes involves the raw materials used in new technologies. There are different demands for photovoltaic panels that enable solar energy or onshore and offshore

wind turbines. Similarly, the batteries and other materials used in electric vehicles are different from traditional vehicles.

A study by the International Energy Agency indicates that, for technologies involving so-called clean energy, there will be a greater demand for a series of minerals. An electric vehicle requires more than double the amount of copper and manganese compared to a traditional vehicle, in addition to significant quantities of lithium, nickel, cobalt, and graphite, which are substances that have no significant use in traditional cars. In the field of energy generation, wind and solar power plants will require much more copper, manganese, chromium, zinc, and rare earths compared to traditional energy generation plants.

This projection of increased demand for minerals linked to the energy transition in the coming years has had significant impacts on the mining sector, with several mining companies and investors adopting new strategies and directing investments to the so-called critical minerals. Similarly, some countries have developed policies for critical minerals. This article reviews the current initiatives in Brazil regarding special treatment to critical and strategic minerals.

Policies for Critical Minerals

From the moment the availability of certain minerals becomes at risk, they are treated as critical. Their criticality can arise from any one (or a combination) of factors such as:

(i) depletion of domestic deposits or deposits that until then guaranteed the uninterrupted supply of a certain mineral;

(ii) supply chain risks that may cast doubt on the constant availability of such minerals, such as risks generated by armed conflicts between countries, the increased concentration of reserves by some countries and/or the existence of controls on the export of certain products;

(iii) concentration of certain stages of the supply chain, such as processing, in certain countries or companies, which would then have a greater influence on the availability of such products;

(iv) high price volatility, making supply chains unstable;

(v) significant changes in the demand profile for minerals, either as

a result of new demands (such as those generated by the energy transition) or as a result of the behavior of certain market participants seeking to control reserves or restrict the trade of mineral products in certain regions or for certain countries; and

(vi) unavailability of substitutes or low recycling rates, which would also contribute to their supply not satisfactorily meeting demand.

On the other hand, from the perspective of the user and consumer of minerals, the greater the dependence of certain economic sectors on certain mineral substances, the greater their criticality. The exposure of industry or economic sectors to minerals whose availability is uncertain jeopardises the continuity of the industry itself, bringing risks to the economy.

As seen, a mineral is considered critical not only because of its use in technologies related to the energy transition, but also because of its importance for certain sectors of the economy combined with uncertainties about its availability. Therefore, each country has its own assessment of which minerals would or would not be critical to its industry and economy. Similarly, the criticality of each mineral may vary depending on the reality of the moment being considered, meaning that, over time, a mineral may become critical or cease to be critical for a country.

The concept that there are some minerals that are critical, therefore, does not arise exclusively from the energy transition. However, the energy transition combined with unfavorable geopolitical context has increased the criticality of certain minerals, demanding strategies from companies and policies developed by states to reduce risks regarding the supply of such minerals.

Critical Minerals and Strategic Minerals

An important point to be addressed is the distinction between critical minerals and strategic minerals. As seen above, critical minerals are related to uncertainties about their availability, which takes on another dimension due to the importance of these minerals for sectors of a country's economy.

On the other hand, strategic minerals have their concept related to concerns of national security, especially in terms of warfare

and national defense. The notion that certain mineral substances should have a different treatment from others began to gain ground at the end of the First World War, when the US listed certain materials (which did not only include minerals) that presented difficulties of access and the lack of which could adversely affect performance in a conflict.

Naturally, the concept of strategic minerals has evolved to encompass other objectives of national relevance that are not limited to defense. In other words, minerals that should be the subject of specific policies for a country, but not necessarily rare or at risk of availability, would have their strategic nature recognised. The essential distinguishing feature between strategic minerals and critical minerals is therefore their availability: critical minerals may become unavailable in the market due to economic, geopolitical, or logistical issues. This subtle distinction is relevant to Brazil and may have an impact on the different initiatives applicable to minerals, as described below.

Brazilian Initiatives for Critical and Strategic Minerals

The concern regarding critical minerals is related to their availability and the consequences that the lack of these minerals could bring to the economy and industry of the country in question. Therefore, the mere definition of lists of so-called critical minerals, without associated government policies and measures, would be of little effectiveness in these cases.

Brazil does not have a critical minerals policy. At the time of preparing this chapter, the current Administration has indicated the intention of presenting some initiatives targeted at the exploration and development of critical and strategic minerals, but its details have not been unveiled so far. Therefore, the main initiatives that have been put in place at this point are the Policy to Support the Environmental Licensing of Strategic Mineral Investment Projects - Pro-Strategic Minerals and a couple of initiatives regarding finance.

(i) Licensing

The Pro-Strategic Minerals Policy was established in 2021 with

the objective to "coordinate actions among public bodies in order to prioritise government efforts for the implementation of strategic mineral production projects for the development of the Country". This is an initiative to improve interinstitutional dialogue at different levels (federal, state, and municipal), especially with the aim of streamlining communications between the different bodies involved in the mineral project licensing process. In other words, the Pro-Strategic Minerals Policy recognises that, in the licensing process, there may be difficulties to be overcome through more intense and effective dialogue among the various spheres involved in the process, under the coordination of the Investment Partnerships Program – PPI, which sits withing the Office of the Chief of Staff of the Federal Government.

Only those mineral projects relevant to the country's development can be enrolled in the Pro-Strategic Minerals Policy. Relevance is based on the project's dimensions, as well as the involved mineral. This mineral must fit into at least one of the following hypotheses: (a) a mineral on which the country depends on imports to a high percentage for the supply of vital sectors of the economy; (b) a mineral that is important for its application in high-technology products and processes; or (c) a mineral that holds comparative advantages and is essential for the economy due to generating a trade surplus for the country.

The Interministerial Committee for the Analysis of Strategic Mineral Projects defined which substances fit into each of the criteria:

- Minerals on which the country depends on imports to a high percentage for the supply of vital sectors of the economy: sulfur, phosphate, potash, and molybdenum;
- Minerals that are important for their application in high-technology products and processes: cobalt, copper, tin, graphite, platinum group minerals, lithium, niobium, nickel, silicon, thallium, tantalum, rare earths, titanium, tungsten, uranium, and vanadium;
- Minerals that hold comparative advantages and are essential for the Brazilian economy due to generating a trade surplus for the country: aluminium (bauxite), copper, iron, graphite, gold, manganese, niobium, and uranium.

These criteria, in fact, did not arise with the Pro-Strategic Minerals Policy. They were already present in the National Mining Plan

2030 (PNM-2030), edited in 2011, which dedicated a topic specifically to the issue of so-called strategic minerals. It is interesting to note that one of the concepts used in PNM-2030 and reproduced in Pro-Strategic Minerals Policy presents points of similarity to current policies of other countries directed at critical minerals, but only in relation to the first item. Here the essential concern lies precisely in the availability of certain mineral substances. In the Brazilian case, at the time PNM-2030 was conceived, it can be said that what was critical was the availability of phosphate and potash to be used in the production of fertilisers, which "required an effort from the Government and the private sector". The justification itself aligns with what is now known globally as critical minerals, although, at that time, topics such as energy transition had not yet reached the same relevance as today.

On the other hand, the other two criteria established by the Pro-Strategic Minerals Policy and by PNM-2030 do not align with the concept of critical minerals as they are known globally today - which does not mean that they are not relevant to the country, hence their strategic nature. The second item of the list is that of minerals that will grow in importance in the coming decades due to their application in high-tech products. In that respect, rare earths, lithium, cobalt, tantalum, among others, were referred to in PNM-2030 as "future-bearing materials". In this case, the risk is not the availability of the minerals that fit into it, but rather the opportunity for the development of production chains, through initiatives related to research, development, and innovation. Therefore, the treatment to be given to this second group may not be identical to the treatment given to the first group of essentially critical minerals.

Finally, the third item of the list described above presents a set of minerals relevant to the country from an essentially economic point of view, in order for its exportations to contribute to the trade surplus. There is no risk of availability of these substances; on the contrary, it is a situation where there is an abundance of certain minerals that make the country a global player in those markets, which can represent an opportunity for generating foreign exchange for the country, hence its strategic importance. Classic cases of this category are iron ore and niobium, especially in the case of the latter, which is also considered a critical mineral in other countries (for example, the USA, the European Union, and the United Kingdom), despite having high availability and not representing a supply risk in Brazil.

In other words, each of the three situations described in the PNM-2030 and reflected in the Strategic Minerals Pro-Policy has its own particularities and demands specific policies. Not all minerals included in the Policy can be treated as critical, especially because availability in the market and supply chains is only a sensitive issue for some of them. This is to say that the concept of strategic minerals adopted by Brazil is broader than the concept of critical minerals employed by other countries. Accordingly, the list of minerals in Brazil with 24 substances may be broader than that of some other countries, not because of the number of substances, but from a conceptual point of view. Only some of the so-called strategic minerals in Brazil would be considered critical.

Common to the three situations provided for in the PNM-2030 and in the Strategic Minerals Pro-Policy is the fact that the production of minerals relevant to the country should be encouraged. This involves, among other factors, special attention to the licensing process, which is often much more time-consuming than necessary. This is what the Strategic Minerals Pro-Policy sought to combat, without reducing the level of requirement in licensing, but rather by assisting in articulating it in a more rational and effective manner. In this sense, other countries have also identified licensing as a point that deserves attention regarding critical minerals and the time to put projects into operation, such as Canada, the United Kingdom, and Australia. In Brazil, it would be no different.

From its inception, 19 projects have been enrolled with the Pro-Strategic Minerals Policy. However, since the current Administration took office in January 2023, no further projects were included. As mentioned above, the Administration is considering new initiatives which may contemplate programs targeted at licensing projects, but nothing has been unveiled at the time of this research.

(ii) Financing

Two main initiatives concerning critical and strategic minerals may be referred to: (a) the creation of a fund for investment in projects involving such commodities by the National Bank for Economic and Social Development (BNDES); and (b) the possibility of financing projects of critical and strategic minerals with debentures with tax breaks.

BNDES Fund

Earlier in 2024, BNDES announced the creation of a fund to encourage projects considered strategic for the energy transition, decarbonisation and food security. The main purpose of the fund is to financially support exploration – including by junior companies – aiming at new discoveries and the development of projects of cobalt, copper, graphite, lithium, manganese, rare earths, platinum group metals, molybdenum, niobium, nickel, silicon, tantalum, tin, titanium, tungsten, uranium, vanadium, zinc, phosphate or potash. BNDES will invest approximately USD 50 million in the fund, which is expected to reach around USD 200 million with the involvement of other sponsors. The fund is at the stage of implementation and is expected to become operational in 2025.

Debentures

The new regulation on debentures incentivised and for infrastructure, which enjoy certain tax benefits, was issued in March 2024. Such regulation establishes criteria and conditions for projects to be eligible as priorities in the area of infrastructure or intensive economic production in research, development and innovation, which would allow the project company or its parent to issue such debentures.

Companies that have projects for transformation of strategic minerals for the energy transition became eligible to issue those debentures, which may also be used to finance the project un the development and mining stages. The Ministry of Mines and Energy shall issue further regulations to define what development, mining and transformation entail, as well as which minerals will be considered strategic for the purposes of financing via debentures with tax benefits.

The draft regulations disclosed for public consultation only identified lithium, nickel, copper, cobalt and rare earths as those minerals that can have projects financed via such type of debentures. As the regulations are still under review by the Ministry of Mines and Energy, the industry would expect that other minerals equally as important for energy transition be included, such as graphite, niobium, manganese, silica, uranium, zinc and bauxite (aluminium).

(iii) Public Interest and National Security Approval

Given the risks presented by unreliable sources and/or supply chains of critical minerals for industries and sectors of the economy, some countries like Canada and the United States apply a requirement for governmental approval for transactions that may directly or indirectly involve critical minerals. The test for qualifying to such screening and the level of scrutiny can be far-reaching, especially in the Canadian example. Moreover, the criterion for the approval is subjective and may involve different analyses considering the nationality of the investors involved in the transaction.

Unlike the examples above, Brazil does not impose the requirement for prior investment approval or governmental approval regarding public interest or national security in deals involving critical (or strategic) minerals. Naturally, depending on the particulars of the transaction, other approvals may be required, such as antitrust approval. In addition, if the mineral project is located withing the border area (that being understood as the 150pm-wide buffer area parallel to the Brazilian terrestrial borders), the prior consent of the National Defense Council may be required for the transaction in order to ensure that the project remains under the control of Brazilian nationals. Such consent usually does not consider the type of commodity of the project, nor the nationality of the investor, but simply the fact that the investor may be a non-Brazilian.

Concluding Remarks

This article described the current state of affairs in the Brazilian environmental as it concerns critical and strategic minerals, as well as why the distinction between critical and strategic minerals is relevant for the purposes of policy- and law-making in the country. Although Brazil does not have a policy for critical and strategic minerals in place at the time of preparation of this article, there are certain initiatives in the country that may streamline licensing and encourage financing of projects.

These initiatives, although positive, lack more consistency precisely due to the fact that there is not a comprehensive approach to critical and strategic minerals, which is a consequence of the absence

of a specific governmental policy. Yet, the current Administration is working on other initiatives that may further encourage investment in projects of critical and strategic minerals in Brazil.

The Brazilian mining sector in general enjoys a reputation of stability and has presented cases of success. Important players of the international industry have been in operation in the country for decades. The track record of Brazil and the new role to be played by mining in making viable the energy transition, decarbonisation and food security may be enhanced by increasing investment in projects of critical and strategic minerals.

Agribusiness

Agribusiness refers to all business activities involving agricultural products. Brazil plays a particularly significant role in this sector, given its vast variety and volume of agricultural products. In this context, having a solid and predictable regulatory framework is of paramount importance.

The Ministry of Agriculture and Livestock ("MAPA") is responsible for formulating and overseeing public policies and regulations related to agricultural matters in Brazil.

MAPA's public policies are aimed at strengthening national agricultural and livestock production in a sustainable manner. MAPA regulates a wide range of products, including feed and pet food, pesticides, alcoholic beverages (like spirits and wine), fertilisers, organic products, veterinary products, seeds, crops, and more.

Additionally, MAPA is tasked with setting guidelines for the evaluation of technological innovations in the production of animal products, best practices, animal welfare, pathogen control, plant quality, product traceability, registration of establishments and products, agricultural technology, and both national and international animal transportation, among others.

MAPA Regulation

Feed and Pet Food

Law No. 6,198/1974 outlines the compulsory inspection and supervision of these products, regulated by Decree No. 12,031/2024. MAPA's inspection and monitoring of feed and pet food products is mandatory throughout Brazil, covering the entire process from production to commercialisation.

As a general rule, only establishments registered with MAPA can engage in activities such as receiving, handling, preparing, packaging, storing, distributing, or selling feed, pet food, or their raw materials. Certain activities are exempt from these requirements, such as raising live animals for feed in Brazilian territory or processing human food products whose solid residues can be used for animal feed, as detailed in Decree No. 12,031/2024.

All establishments must report monthly to MAPA, providing data on the quantity of products manufactured, imported, exported, and sold. They are also required to appoint a responsible technician, implement self-control programs, adhere to MAPA's good practices, maintain traceability records, and have recall programs in place.

Regarding product standards, feed and pet food must comply with MAPA's minimum and maximum requirements for aspects such as microbiology, physical-chemical properties, and residues. MAPA also specifies permissible ingredients, raw materials, additives, and applicable limits for feed and pet food production. Furthermore, products must meet packaging and labeling standards as outlined in Decree No. 12,031/2024 and specific MAPA regulations.

Currently, most categories of feed and pet food are exempt from registration with MAPA, although exceptions include additives, processing aids, dietary supplements for pets, and products intended for equine use. Registration obligations apply to both local manufacturers and importers, and even exempt imported products must be enrolled with MAPA.

Pesticides

Pesticides represent another key sector under MAPA's jurisdiction. The new Pesticides Law (Law No. 14,785/2023) recently came into effect in Brazil, governing activities related to pesticides, such as research, production, packaging, and labeling.

MAPA is responsible for registering these products and setting requirements related to:

- Product and establishment registration procedures.
- Guidelines for reducing pesticide risks and their components.
- Labeling specifications.
- Methods for determining pesticide residues in plant and animal products, water, and soil.

MAPA also issues specific regulations on pesticides and oversees quality control, inspections, and supervision of pesticide production, import, and export, as well as monitoring the establishments involved in pesticide-related activities.

Due to their impact on human health and the environment, pesticides are also reviewed by the National Health Surveillance Agency (ANVISA) and the Brazilian Institute for the Environment and Renewable Natural Resources (Ibama).

Products of Plant Origin

This category encompasses general plant products, as well as spirits, wine, and related products, each governed by different laws.

Plant products and their by-products or economically valuable residues are regulated by Law No. 9,972/2000, which establishes their classification procedures based on official standards. Classification is mandatory for plant products intended for human consumption or when bought or sold by public authorities, as well as at ports, airports, and borders.

All whole vegetables or their parts, by-products, and residues with economic value, whether in their natural or processed state, and products of agricultural interest must undergo classification, which is conducted by authorised entities. MAPA defines the technical standards for classification, identity, and quality requirements, as well as sampling and labeling rules. MAPA also conducts inspections related to the classification of plant products.

For spirits and wine products, Laws No. 8,918/1994 and No. 7,678/1988 regulate the sector, with MAPA responsible for inspecting and monitoring the production and commercialisation of these items.

Establishments involved in these activities and the products themselves must be registered with MAPA.

Edible plant-based products are also subject to ANVISA regulations, as they qualify as food.

Products of Animal Origin

Products of animal origin are governed by Law No. 1,283/1950, Decree No. 9,013/2017, and MAPA's specific resolutions. These products include animals raised for slaughter, their by-products, raw materials, fish and derivatives, dairy products, eggs, honey, beeswax, and other derivatives. Such products are monitored by different agricultural authorities within the country, depending on the establishment's activities.

For example, a plant that processes milk or factories producing dairy or fish products must be registered with MAPA. Decree No. 9,013/2017 offers comprehensive guidance on registration requirements for establishments and products, good practices, pre- and post-mortem animal inspections, and reinspection throughout the production and transportation chain.

Fertilisers, Soil Correctors, Inoculants, Stimulants, Biofertilisers, and Similar Products

MAPA is responsible for inspecting and regulating fertilizers and related products, overseeing their manufacture, import, export, and commercialization. According to Law No. 6,894/1980, these products must be registered with MAPA. Any establishment involved in manufacturing or trading fertilizers must also be registered and appoint a responsible technician. Registration procedures and requirements are further outlined in Decree No. 4,954/2004.

MAPA issues numerous Normative Instructions to establish specific rules regarding fertilizers, including packaging, labeling, and advertising requirements.

Organic Products

The production and sale of organic products in Brazil are governed by Law No. 10,831/2003 and Decree No. 6,323/2007. Organic agricultural systems utilise natural resources and promote cultural, biological, and mechanical methods to ensure sustainability and minimise the use of non-renewable energy. Organic production prohibits the use of synthetic materials, genetically modified organisms, and ionising radiation at any stage of production, processing, storage, distribution, and marketing.

Organic products must be certified by accredited bodies under MAPA. Certification verifies that production or processing methods comply with current organic standards.

Agricultural Securities, Payments, and Investments

Traditionally, Brazil's agricultural sector has been financed through a combination of government initiatives, private banks, trading companies, and input suppliers (seeds, fertilisers, and agrochemicals). Since 2004, several innovative agribusiness financial instruments have become available to support the sector, including:

- Agricultural and Cattle Breeding Deposit Certificate (CDA)
- Agricultural and Cattle Breeding Warrant (WA), issued by warehouses
- Agribusiness Credit Rights Certificate (CDCA), issued by rural producers' cooperatives and certain legal entities in the agribusiness sector
- Agribusiness Credit Note (LCA), issued by financial institutions
- Agribusiness Receivables Certificate (CRA), issued by securitisation companies

Among these, CRA (Agribusiness Receivables Certificate) is the most important tool for attracting financial resources from public investors. The CRA is governed by Brazilian Securities and Exchange Commission Instruction No. 60/2021 and Law No. 14,430/2022, which introduced a clear legal definition of securitization in Brazil for the first time. The law defines securitisation as "the acquisition of credit rights

to back the issuance of Receivables Certificates or other securities to investors, with payment primarily dependent on the receipt of funds from those credit rights and other associated assets, rights, and guarantees." This conceptual definition provides legislative certainty, ensuring that new regulations can uniformly cover all types of securitisation based on this shared concept.

On October 2, 2019, the Brazilian Federal Government enacted Law No. 13,986/2020, which introduced numerous innovations to agribusiness financing. One of the most significant changes was the ability to issue Rural Financial Product Notes (CPR-F), which can be indexed to foreign currency exchange rates. This new feature allows CPR-Fs to back the issuance of Agribusiness Receivables Certificates (CRA) abroad. Additionally, the law permits the issuance of CRA to non-resident investors, subject to certain regulatory requirements. It also introduced the possibility for rural producers to allocate their rural property (or a portion of it) as segregated collateral (known as "*patrimônio de afetação*") in credit transactions linked to a Real Estate Note, paving the way for the creation of the Rural Real Estate Note (CIR).

Further enhancing these reforms, Rural Product Notes (CPR) can now be issued for both primary agricultural production and products derived from the first processing of those goods (agro-industrial products). This change allows biofuel producers and the forestry sector (conservation, management, and implementation) to issue CPRs, expanding their use beyond traditional rural producers.

In relation to the CPR, Decree No. 10,828/2021 was enacted by the Brazilian Federal Government to regulate the issuance of Rural Product Certificates linked to the conservation and restoration of native forests and biomes. These CPRs can be issued for rural products obtained through activities related to forest conservation and restoration that result in:

- Reductions in greenhouse gas emissions
- Maintenance or increase of forest carbon stocks
- Decreased deforestation and degradation of native vegetation
- Biodiversity conservation
- Protection of water resources

- Soil conservation
- Other ecosystem benefits

Essentially, instead of the producer committing to deliver the results of agricultural production in exchange for financial resources, they can guarantee the investment by maintaining a certain forest area.

Additionally, Brazil recently introduced the concept of an Investment Fund in Agro-Industrial Production Chains (Fiagro). This fund pools resources from various investors to invest in assets related to agribusiness, including rural real estate and activities across the agricultural production chain.

According to the Brazilian Securities and Exchange Commission (CVM), Fiagro grew by 315% between December 2022 and December 2024, while the market as a whole grew by 17.4% over the same period, and its net worth jumped from R$10.5 billion (Dec/2022) to R$43.7 billion (Dec/24). Initially, the CVM authorised the development of Fiagro on an experimental basis, but on September 30, 2024, the agency published CVM Resolution No. 214, which contains specific rules for setting up Fiagros.

Health

The National Health Oversight System

According to Law No. 8.080/90, Health Oversight can be understood as a set of actions aimed at eliminating, reducing, or preventing health risks that arise from the environment, production, distribution of consumer goods, and the provision of healthcare services. In essence, Health Oversight seeks to regulate, monitor, inspect, and supervise processes, products, and services to minimise any potential harm or risk to public health. This involves promoting, preventing, and protecting health broadly. Consequently, Health Oversight can be categorised into two major areas: healthcare products/goods and services.

Brazil's regulatory healthcare sector operates within a federated system. The National Health Oversight System (SNVS),

established by Law No. 9.782/99, involves the coordinated efforts of institutions from the Federal Government, States, Federal District, and Municipalities. These institutions have specific competences and activities, working in a cooperative manner rather than in a hierarchical relationship.

The National Health Surveillance Agency (ANVISA) was created to operate at the federal level within the SNVS framework. Its primary role is to safeguard public health by overseeing the production and sale of products and services subject to Health Oversight. ANVISA operates as an autonomous entity under the Ministry of Health, with administrative independence, stability for its officers, and financial autonomy.

ANVISA's responsibilities include: (i) coordinating the SNVS; (ii) establishing regulations, proposing, monitoring, and implementing health oversight policies, guidelines, and actions; (iii) issuing authorisations, licenses, and certificates to companies in the sector; (iv) registering products subject to Health Oversight; (v) regulating and overseeing the import and export of products; and (vi) monitoring and inspecting activities related to companies and products under Health Oversight, as stipulated by Law No. 9.782/99.

Corporate Requirements to Operate in the Regulatory Healthcare Sector

For a company to operate in the regulatory healthcare sector, it must obtain several licenses and authorisations depending on the activities involved.

Generally, an establishment must acquire: (i) an Operation Authorisation (AFE) from ANVISA; and (ii) a sanitary license (LS) from the local Health Oversight body where the establishment is located.

ANVISA sets generic sanitary requirements for establishments, while specific requirements, such as physical characteristics, are defined by state or municipal Health Oversight rules.

Both certifications ensure that the establishment meets the necessary sanitary standards for its operation. For products/goods,

this includes activities such as import, export, manufacturing, storage, and distribution.

After securing the necessary licenses and authorisations for the establishment, specific authorisations for the products subject to Health Oversight must also be obtained.

Overview of Products Subject to Health Oversight

Products subject to Health Oversight can be broadly categorised into: medicines, healthcare products, food, personal care products, cosmetics and perfumes, and sanitisers.

Medicines are highly regulated goods defined as pharmaceutical products intended for prophylactic, curative, palliative purposes, or for diagnostic use.

Medicines are classified mainly by category and prescription requirements. Categories include: (i) reference medicines, which are innovative products registered with ANVISA; (ii) similar medicines, which have the same active ingredient, concentration, pharmaceutical form, administration method, dosage, and therapeutic indications as a reference medicine, identified by a brand; and (iii) generic medicines, which have the same active ingredient, dosage, and pharmaceutical form as the reference medicine, are equivalent in efficacy and safety, and are interchangeable with the reference medicine without a brand. Prescription classifications include: (i) over-the-counter medicines (MIPs), available without a prescription; and (ii) prescription-only medicines, which require a prescription, including those under special control.

Healthcare products include equipment, devices, implants, software, and materials used for prevention, diagnosis, treatment, monitoring, recovery, or contraception, and do not rely on pharmacological, immunological, or metabolic means for their primary function. This category covers a wide range of products, from wheelchairs to implantable devices.

Healthcare products are categorised into four risk classes based on ANVISA regulations, particularly RDC 751/22. Products in Classes III and IV are considered high and maximum risk,

requiring sanitary registration with ANVISA, valid for ten years and subject to renewal. Products in Classes I and II are low and medium risk, subject to ANVISA notification with indefinite validity.

Food regulated by ANVISA includes industrialised food, food additives, technological coadjuvants, packaging, equipment, and utensils in contact with food. Certain types of food are exclusively regulated by the Ministry of Agriculture and Livestock (MAPA) and are not covered here.

Depending on the type of food, it must be registered with ANVISA (valid for five years and renewable) or the initiation of manufacturing/import must be communicated to the Local Health Oversight (state or municipal) per RDC 27/10. ANVISA also sets technical regulations for food products, defining their identity and minimum quality standards.

Personal care products, cosmetics, and perfumes are defined as preparations of natural or synthetic substances for external use on the human body, to clean, perfume, alter appearance, correct body odors, and/or protect or maintain good condition.

These products are categorised as follows by RDC 752/22: (i) level 1, for products with basic properties that do not require detailed use information or restrictions; and (ii) level 2, for products with specific indications that require confirmation of safety and effectiveness, including detailed use instructions and restrictions. Some products require registration with ANVISA, valid for ten years and renewable, while others only require prior communication to ANVISA.

Sanitisers are substances or preparations used for cleaning, cleansing, sanitising, and disinfecting objects, fabrics, surfaces, and environments. They are classified by risk and sale/use categories.

By risk, sanitisers are divided into: (i) risk I, subject to notification; and (ii) risk II, requiring registration, valid for ten years and renewable. By sale/use, they are categorised as: (i) professional use, restricted to professionals or specialised companies; and (ii) free sale, available to the public.

The National Sanitary Surveillance System

Pursuant to Law No. 8.080/90, the Sanitary Surveillance can be understood as a set of actions to eliminate, reduce or prevent risks to the health, resulting in problems arising from the environment, production, circulation of consumer goods and provision of healthcare services. In other words, the Sanitary Surveillance seeks to regulate, monitor, inspect and supervise processes, products, services, to reduce any harmfulness or risk to the population health, operating in the promotion, prevention and protection of health in general. Therefore, the area of operation of the Sanitary Surveillance may be divided into two major groups: healthcare products / goods and services.

The regulatory healthcare sector in Brazil shall be analysed under the viewpoint of a federated country. In this sense, the National Sanitary Surveillance System (SNVS), established by Law No. 9.782/99, relies on the coordinated operation of institutions from the Public Administration of the Federal Government, States, Federal District and Municipalities, with specific competences and activities. There is no subordination relationship between the entities, but rather of negotiation and sharing of competencies.

The National Agency of Sanitary Surveillance (ANVISA) was created to operate at the federal level of the SNVS, promoting the protection of the population health, through sanitary control of production and sale of products and services subject to the Sanitary Surveillance. The ANVISA is an instrumentality, subordinated to the Ministry of Health, with administrative independence, stability of its officers and financial autonomy.

ANVISA's duties include: (i) coordinate the SNVS; (ii) establish rules, propose, monitor and implement sanitary surveillance policies, guidelines and actions; (iii) grant authorisations, licences and certificates to companies operating in the area; (iv) grant registrations of the products subject to the Sanitary Surveillance; (v) regulate and agree with the import and export of products; (vi) monitor, control, inspect and monitor activities and actions involving the companies and products subject to the Sanitary Surveillance, as prescribed by Law No. 9.782/99.

Corporate requirements to operate in the regulatory healthcare sector

For a company to operate in the regulatory healthcare sector, it is necessary to obtain some previous licences and authorisations according to the activity to be performed.

Overall, the establishment shall obtain: (i) Operation Authorisation (AFE), issued by ANVISA; and (ii) sanitary licence (LS), issued by the Sanitary Surveillance body, where the establishment is located.

The sanitary requirements for the establishment are defined on generic basis by ANVISA, being specified locally (rules of the state or municipal sanitary surveillance determine the specific physical characteristics of the establishments, for instance).

Both certifications attest that the establishment itself complies with the sanitary requirements necessary for its operation, according to the activity. In the case of products / goods, the activities include: import, export, manufacturing, storage and distribution.

After obtaining the necessary licences and authorisations in the name of the establishment, it is necessary to obtain the specific authorisations for the products subject to the Sanitary Surveillance that will be involved in the corporate activities, according to the item below.

Overview of the products subject to the Sanitary Surveillance

The products subject to the Sanitary Surveillance can be classically summarised as: medicines, healthcare, products, food, personal care products, cosmetics and perfumes and sanitisers.

The medicines are goods highly regulated, understood as pharmaceutical product, obtained or prepared for prophylactic, curative, palliative purposes or for purposes of diagnosis.

Medicines can be mainly classified according to the category and prescription. The categories of medicines are: (i) reference: innovative medicine registered with ANVISA; (ii) similar: medicine with the same active ingredient, which presents the same

concentration, pharmaceutical form, administration method, dosage and therapeutical indication and which is equivalent to the medicine registered with ANVISA, identified by a brand; and (iii) generic: medicine with the same active ingredient, dosage and pharmaceutical form, administered using the same method and with the same dosage and therapeutical indication of the reference medicine, presenting efficiency and security equivalent to the reference medicine and interchangeable with it. The generic medicine has no brand. In turn, the classification according to the prescription are two: (i) exempt from prescriptions (MIPs): medicines available for self-service in pharmacies and drugstores, which do not require doctor's prescription for sale; and (ii) subject to prescription: medicines whose dispensation is restricted to the presentation of a prescription, including those subjects to special control.

The healthcare products are equipment, devices, implants, software, materials, for prevention, diagnosis, treatment, monitoring, recovery or contraceptive, and which do not use pharmacological, immunological or metabolic mean to achieve its main function. They include an extensive list of products in various categories, comprising from wheelchairs to implantable products.

Healthcare products are divided into four risk classes, according to the classification by the own company, based on the ANVISA law, mainly RDC 751/22. The products under Classes III and IV are considered of high and maximum risk, subject to sanitary registration with ANVISA, valid for ten years, and which can be successively revalidated for an equal period. The products under Classes I and II are considered of low and medium risk, subject to ANVISA's notification, which validity is indeterminate.

The food regulated by ANVISA is that industrialised in general, food additives and technology co-adjuvants, packages, equipment and utensils in contact with food. There are types of food that are exclusively regulated, standardised and inspected by the Ministry of Agriculture and Livestock (MAPA), which are not part of these comments.

Depending on the food, it shall be registered with ANVISA (valid for five years, subject to renewal) or the beginning of its manufacturing / import shall be communicated to the Local Sanitary Surveillance (state or municipal), pursuant to RDC 27/10. ANVISA also

determines the technical regulation of the food products by determining their identity and minimum quality characteristics.

The personal care products, cosmetics and perfumes can be defined as preparations of natural or synthetic substances, for external use in the human body, to clean, perfume, change its look and/or correct body odours and/ or protect or maintain in good shape.

These products are also divided into categories, determined by RDC 752/22: (i) level 1: products with basic or elementary properties, whose confirmation would not be necessary and would not require detailed information on their method of use and restrictions for use; and (ii) level 2: products with specific indications, whose characteristics require confirmation of security and/ or effectiveness and information and care, methods of use and restrictions for use. According to the list provided for in RDC 752/22, some products are subject to registration with ANVISA, which is valid for ten years, subject to renewal. The products not comprised in said list are subject to prior communication to ANVISA.

Sanitisers are the products understood as a substance or preparation for use in objects, fabrics, surfaces and environments, for cleaning, cleansing, sanitisation and disinfection. Basically and among other categories, sanitisers are classified in terms of risk and sale and use.

With respect to the risk, sanitisers can be divided into (i) risk I, which are subject to notification; and (ii) risk II, which are subject to registration, valid for ten years, subject to renewal. With respect to the sale and use, sanitisers can be divided into: (i) professional use, whose direct sale to the public is prohibited and shall be exclusively applied or manipulated by a professional or specialised company; and (ii) free sale, the product is sold to the public.

Hydro Resources

Water Resources and Sanitation Regulation

1. Water Resources Management

Brazil holds 12% of the world's freshwater reserves, yet these

resources are unevenly distributed across the country. This disparity necessitates the intervention of an official body to balance and compensate for regional differences and user needs.

The National Water and Sanitation Agency (Agência Nacional de Águas e Saneamento Básico – ANA) was established in July 2000 by Law No. 9,984. It operates under the Ministry of Integration and Regional Development. ANA's Board comprises five members, appointed by the President and confirmed by Congress, serving a four-year term. The agency is administratively and financially autonomous and is responsible for implementing the objectives and guidelines set forth by Law No. 9,433/1997, also known as the Waters Act.

In 2020, Brazil updated its sanitation framework with Law No. 14,026/2020, which expanded ANA's responsibilities to include creating guidelines for regulating sanitation services. Although sanitation services are managed by municipalities, ANA is designated as the central body for establishing sanitation regulations to be applied locally.

ANA's primary responsibilities are:

1. Regulating access to and use of water resources under Federal jurisdiction, including public water systems and untreated water supply, and ensuring compliance with applicable laws.
2. Monitoring water resources through initiatives such as coordinating the National Hydro-meteorological Network, which collects data on water levels, flow, rainfall, and river sediments.
3. Enforcing laws by coordinating the implementation of the Waters Act, supporting projects and programs, managing offices, and establishing committees for Federal river basins and agencies.
4. Planning through the development of strategic studies, such as Water Basin Plans and Water Resources Situation Reports.
5. Creating regulatory guidelines for sanitation services.

ANA's powers include:

- Granting authorisation for the use of water resources in Federal bodies of water and discharging effluents.
- Planning and promoting actions to mitigate the effects of droughts and floods, in collaboration with the Central Office of the National System of Civil Defense, to support States and municipalities.

- Defining and monitoring reservoir operation conditions to ensure the multiple use of water resources as outlined in watershed plans.
- Regulating and inspecting public irrigation services under Federal jurisdiction, including untreated water supply, setting standards of efficiency, and establishing fees where applicable. ANA is also responsible for managing and auditing concession agreements.
- Organising and managing the National Program for Information and Safety of Dams.
- Promoting coordination between dam supervisory bodies.
- Coordinating the preparation of the Dam Safety Report and addressing claims related to potential non-compliances or accidents involving dams.

The grant of water resource usage rights and effluent discharge in Federal water bodies is an administrative act that specifies the conditions under which the grantee may use these resources for a defined period. These grants outline the conditions for water resource collection or effluent discharge.

In the planning phase of new ventures in Brazil, it is advisable to assess the availability of: (i) connection to public water and sewage systems; and/or (ii) the need for Federal water resources. If Federal water resources are required, a water grant from ANA will be necessary. Additionally, the entrepreneur must verify if State jurisdictions also control water resources, which would require a grant from the relevant State Agency.

The following water resource uses require a grant:

1. Abstraction or collection of water from a body for final consumption, including public supply or industrial processes.
2. Collection of groundwater for final consumption or industrial processes.
3. Discharge of sewage and other effluents or flue gases, treated or untreated, for dilution, transport, or disposal.
4. Hydroelectric use.
5. Other uses that alter the flow, quantity, or quality of the water body.

Typically, grants for the use of Federal water resources are limited to thirty-five years. For public service concessionaires, permission holders, and hydroelectric power producers, the grant terms align with the concession agreements or administrative acts.

Given the uneven distribution of water resources across Brazil, the availability of water resources will influence the granting process.

There is also an option for an "anticipatory grant" (*outorga preventiva*), which provides a certificate from the public authority indicating that water resources are available for the intended purpose. This grant does not authorise immediate exploitation but reserves water flow for future use, allowing investors to better plan their projects. This type of grant is valid for up to three years.

2. Transport Regulation

Introduction

The late 1980s and early 1990s in Brazil were marked by significant political instability due to the transition from military to democratic government. The military era was characterised by heavy state intervention and bureaucratic inefficiency. However, the 1988 Federal Constitution emphasised free initiative and social values of work.

This period saw three major developments in the early 1990s that impacted the transportation sector: (i) market opening; (ii) fiscal adjustment; and (iii) the creation of the National Privatisation Program (Programa Nacional de Desestatização – PND). The PND facilitated the privatisation of state-owned enterprises in various sectors, including roads, power, telecommunications, and airports.

In 1995, President Fernando Henrique Cardoso initiated an Administrative Reform aimed at improving public management efficiency and attracting private sector involvement. This reform resulted in increased political and social demand for public interest services.

In response to international investor demands for administrative efficiency and regulatory commitment, the Federal

Government established several regulatory agencies to oversee the transition to private provision of public services, stimulate competition, and ensure service quality.

Three main regulatory agencies in the transportation sector were created: ANTAQ, ANTT, and ANAC, each with distinct responsibilities.

National Waterway Transportation Agency – ANTAQ

Before the early 1990s, Brazil's port sector was entirely state-controlled. Ports were operated by the Federal Government through Portobrás - Empresa Brasileira de Portos S.A. and its subsidiaries, the Companhias Docas.

Federal Law No. 8,630/1993 marked a significant shift, allowing private entities to construct, renovate, expand, and operate port terminals, though with limitations on handling third-party cargo.

Waterway transportation has been expanding annually. Despite road transport being the primary method for cargo movement, cabotage (coastal shipping) has grown significantly, from 172 million tons in 2019 to 213 million tons in 2023, as reported by ANTAQ. Exports and imports continue to be predominantly maritime.

In response to these changes, ANTAQ was established by Federal Law No. 10,233 in June 2001. The agency regulates and oversees (i) services in the water transport sector and (ii) waterway and port infrastructure.

Private entities can now build, expand, operate, and maintain port terminals through lease agreements (for public terminals) or ANTAQ authorisations (for private terminals). Leases are negotiated between the private operator and the Federal Government following a public bidding process. Authorisations apply to private terminals located outside organised port areas, on privately-owned or legally controlled land.

Currently, domestic waterway transportation is primarily handled by private terminals. In 2023, public terminals managed 451 million tons of cargo (34.6% of the total), while private terminals handled 852 million tons (65.4%), according to ANTAQ.

The 2020 "mini-reform" of the port sector (Law No 14,047/2020) aimed to modernise the framework, streamline bidding processes, and allow greater flexibility in public port area usage.

National Ground Transportation Agency – ANTT

Cargo transportation in Brazil predominantly relies on roads, accounting for 62.2% of the total transport matrix, with railways handling 27%, according to Fundação Dom Cabral (FDC). Many roads and railways are operated by private concessionaires, following the privatisation program initiated in the 1990s.

ANTT, established by Federal Law No. 10,233/2001 (the same law that created ANTAQ), is responsible for granting public concessions, permissions, and authorisations for railroads, highways, pipelines, multimodal transportation, terminals, and routes. The Ministry of Transportation sets policies for these sectors.

Several States, including Bahia, Pernambuco, Espírito Santo, Minas Gerais, Paraná, and São Paulo, have highways operated and maintained by private entities. Each State regulates these concessions through its transportation department or regulatory agency.

ANTT oversees and adjusts service tariffs, authorises infrastructure and service improvement projects, and manages the related investments.

National Civil Aviation Agency – ANAC

According to the International Air Transport Association (IATA), Brazil's air transport sector contributes 1.1% to its GDP. However, the air transport mode accounts for less than 1% of cargo transport.

The Brazilian airport sector is predominantly private, operated through concession agreements, particularly for major airports. Regional and smaller airports are primarily operated by INFRAERO, the federal state-owned company, although there are plans to extend the concession model to these airports as well.

INFRAERO holds stakes in some private concessionaires operating Brazilian airports. This approach reflects the transition from public to private operation, as the Federal Government initially retained control over strategic airports, involving INFRAERO as a significant shareholder. This model is less common in recent concession rounds.

ANAC, established by Federal Law No. 11,182/2005, is the federal regulatory agency for civil aviation, overseeing the sector and its infrastructure. The Secretary of Civil Aviation (SAC), created by

Federal Law No. 12,462/2011 and part of the Ministry of Transportation, sets policies for the aviation and airport sectors. SAC provides guidelines for ANAC, INFRAERO, and other governmental and private entities operating airport infrastructure.

The Brazilian Aeronautical Code (Law No. 7,565/1986) outlines airport operations and infrastructure. The Federal Government may delegate commercialisation of airport infrastructure to States or Municipalities through public conventions.

INFRAERO and private concessionaires must follow SAC's guidelines. Their services include passenger and baggage control, security, airport cleaning and maintenance, and sometimes expanding airport infrastructure.

Brazil contains 12% of the world's freshwater reserves, but such resources are distributed in a quite uneven manner across the territory, meaning there is the need for an official intervening party to balance and promote compensations between regions and users.

The National Water and Sanitation Agency ("ANA") was created in July 2000, through Law No. 9,984. Currently, ANA occupies a position within the structure of the Ministry of Integration and Regional Development, and its Board is composed of five members, appointed by the President and approved by the Congress, for a four-year term. It is an administratively and financially autonomous Agency and, ultimately, is responsible for the execution of the goals and guidelines set forth by Law No. 9,433/1997, which established the National Water Resources Policy, popularly known as the Waters Act.

ANA had a recent update in its scope. In 2020, Brazil enacted the new sanitation framework (Law no 14,026/2020, which updated La No. 9,984) and ANA had its competence enlarged to encompass the creation of guiding rules for regulation of sanitation services. Although sanitation services are under the responsibility of municipalities (and ANA is a federal agency), the statute puts the agency as the core body for standardisation of sanitation rules to be applied in the local level.

ANA is in charge of four main assignments:

(i) **regulating** the access and use of water resources under the Federal domain, the public water system and untreated water adduction, and also issuing and monitoring compliance with the applicable laws;

(ii) **monitoring** the situation of water resources, through initiatives such as coordination of the National Hydro-meteorological Network which collects data such as water level, flow, rain levels, and river sediments;

(iii) **enforcing** the law, coordinating the implementation of the Waters Act, by carrying out and supporting projects and programs, for instance, managing offices, and the instalment of committees for the basins of Federal rivers and agencies;

(iv) **planning**, which is achieved by means of the elaboration or participation in strategical studies, such as the Water Basins' Plans, and Water Resources' Situation Report; and

(v) **creating regulatory guidelines** for sanitation services.

The assignments outlined above give ANA, among other things, the power to:

- grant, through authorisation, the right to use water resources in water bodies under Federal jurisdiction and also allow discharge of effluents;
- plan and promote actions to prevent or minimise the effects of droughts and floods, as part of the National Water Resources Management together with the Central Office of the National System of Civil Defence, in support of the States and municipalities;
- define and monitor the conditions of operation of reservoirs for public and private use in order to ensure the multiple use of water resources, as set forth in the plans for water resources of their watersheds;
- regulate and inspect, under Federal jurisdiction, the provision of public irrigation under concession and the adduction of untreated water when bodies of water are involved. It is also responsible for disciplining the provision of such services, setting standards of efficiency, and establishing fees whenever applicable, as well as managing and auditing all aspects of any concession agreements;
- organise, implement and manage the National Program for Information and Safety of Dams;
- promote coordination between the dam supervisory bodies;
- coordinate the drafting of the Dam Safety Report and receive

claims on potential non-compliances that may present risks, or on accidents that have occurred involving dams.

The granting of the right to use water resources and to discharge effluents in the Federal bodies of water is an administrative act issued by the public authority upon which it allows the requesting party to use them for a determined period under the conditions provided in the act. Therefore, the grants define the conditions that must be observed when collecting water resources or discharging effluents.

Within the context of the new ventures in Brazil, in the planning phase, it is advisable to have information about the availability of: (i) connection to public water systems and public sewage systems; and/or (ii) the need to use water resources that are under Federal jurisdiction. This second scenario will require a water grant from ANA. Besides ANA (in charge of federal water resources), the entrepreneur must also check if there are resources that are under State jurisdiction. In these cases, the granting of the right to use water resources must be obtained from the relevant State Agency.

The following uses of water resources depend on the obtaining of a grant:

(i) the abstraction or collection of water from a body for final consumption, including public supply or input from a production process;

(ii) collection of water from a groundwater aquifer for final consumption or input from a production process;

(iii) discharge of sewage and other effluents or flue gases, treated or not, intending to definitively dilute, transport, or dispose of such;

(iv) use for hydroelectric purposes; and

(v) other uses that incur in alterations of the regimen, quantity or quality of the water of a certain body.

Usually, the granting of use of water resources that are under Federal jurisdiction has definite terms, which do not exceed thirty-five years. With respect to the granting of the right to use water resources to public services concessionaires or permission holders and hydroelectric power producers, the term of the authorisations will be the same as that pertaining to concession agreements or administrative acts.

As mentioned before, the distribution of water resources in the Brazilian territory is very uneven. Therefore, it is important to point out that the granting of water resources will also depend on the availability of such asset in the region.

There is also the possibility of requiring an "anticipatory grant" (outorga preventiva), which, in general terms, aims to obtain a certificate from the public authority stating that there are water resources available for the intended purpose. Such license does not grant the right to actually exploit water resources but withholds the water flow that is possible to be granted in the future. This kind of grant enables the investors to better plan their ventures and has a definite term, limited to three years.

Transport

Introduction

The period between the 1980s and 1990s in Brazil was marked by great political instability resulting from the transition from a military to a democratic government. The heritage from the military period was one of strong state intervention and excessive bureaucracy in the economy. Notwithstanding, in 1988, the current Federal Constitution was published and focused on free initiative and the social values of work.

This scenario resulted in three main developments in the early 1990s with major impact in the transportation sector, deemed as being necessary to bring economic stabilisation: (i) opening of the market; (ii) fiscal adjustment; and (iii) the creation of the National Privatisation Program (*Programa Nacional de Desestatização* - PND). PND promoted the privatisation of state-owned companies in several sectors such as roads, power, telecommunications and airports.

In 1995, then President Fernando Henrique Cardoso initiated an Administrative Reform, aimed at achieving greater results and more efficient public management control. It was a decentralisation measure designed to attract the private sector, which later resulted in the growth of political and social demands for public interest services.

Responding to international investors' demand for administrative efficiency and regulatory commitment, the Federal Government decided to create several regulatory agencies, focused on regulating and overseeing the transition to the private provision of public services, a new economic environment to stimulate competition and, simultaneously, guaranteeing the quality of the services.

Specifically in connection with the transport sector, three main regulatory agencies have been set up: ANTAQ, ANTT and ANAC, which are briefly described below.

National Transportation Agency – ANTAQ

Up to the early 1990s, the port sector was entirely in the hands of the public sector. Ports in Brazil were operated by the Federal Government through its Government-controlled entity, *Portobrás - Empresa Brasileira de Portos S.A.*, and its subsidiaries, the so-called *Companhias Docas*, federal state-controlled companies that served as port authorities in the state level.

The enactment of Federal Law No. 8,630/1993 was the first step towards a dramatic change in the dynamics of Brazilian ports. The statute assured any private party the right to construct, reform, expand, improve and operate port terminals (although with limitation to companies' ability to move third parties' cargo).

Waterway transportation continues to expand annually. Although road transport remains the primary method for cargo movement, cabotage has experienced significant growth, increasing from 172 million tons in 2019 to 213 million tons in 2023, as reported by the National Water Transportation Agency (*Agência Nacional de Transportes Aquaviários* – ANTAQ). In contrast, exports and imports are predominantly conducted by sea.

These changes led to the creation of ANTAQ, set up by Federal Law No. 10,233 on June 2001. The agency holds the competence to regulate and oversee (i) services provided in the water transport sector, (ii) waterway and port infrastructure.

Under the current regime, private parties have the right to build, expand, operate and maintain port terminals either by means of a lease agreement (public terminal) or an authorisation from ANTAQ

(private terminal). In case of a lease agreement, it will be entered into by the private operator and the Federal Government after a mandatory public bidding procedure. On the other hand, when it is a case of authorisation from ANTAQ, it refers to private terminals located outside the organised port area, built on privately-owned land or, at least, on land whose legal rights for use are held by the private interested party.

Today, domestic waterway transportation is mostly made in private terminals, as result of the change in the port legal framework described above. In 2023, public terminals facilitated the transport of 451 million tons of cargo, accounting for 34.6% of the total. In comparison, private terminals handled 852 million tons, representing 65.4% of the overall cargo volume, according to ANTAQ.

In 2020, the National Congress passed the bill that became known as the 'minireform' of the port sector (Law No 14,047/2020). It sought to modernise the framework to make bids more agile (for example, waving the bid when there is competition envisaged) and allow flexibility in the exploration of areas in public ports.

National Ground Transportation Agency – ANTT

The transportation of cargo in Brazilian territory is majorly conducted through roads, which accounts for 62,2% of Brazilian matrix. A smaller amount uses railways, which are responsible for 27% of the total amount of cargo transported in Brazil, according to research by *Fundação Dom Cabral* (FDC). A substantial portion of Brazilian roads and railways are operated by private concessionaires, following a major privatisation program started in the 90s.

At Federal level, the National Ground Transportation Agency (*Agência Nacional de Transporte Terrestres* – ANTT, created by Federal Law No. 10,233/2001, the same that created ANTAQ) is the regulatory agency in charge of granting public concessions, permissions and authorisations for railroads, highways, pipelines and multimodal transportation, terminals and routes, while the Ministry of Transportation sets forth policies for these sectors.

Several States, including Bahia, Pernambuco, Espírito Santo, Minas Gerais, Paraná and São Paulo have highways operated and maintained by private entities. These concessions are regulated in each State by their respective transportation department or regulatory agency.

ANTT is also responsible for overseeing and readjusting the tariffs for the services provided, as well as authorising projects and investments to improve existing infrastructure and services.

National Civil Aviation Agency – ANAC

According to the International Air Transport Association (IATA), the air transport sector in Brazil represents 1,1% of its GDP – Gross Domestic Product. However, the participation of air modal in the cargo transport matrix is extremely low (less than 1%).

Brazilian airport sector is majorly a private business, operated through concession agreements. This is true for the biggest and busiest Brazilian airports. Regional and small sized airports are mostly operated by INFRAERO (the federal state-owned company that operates federal airports still not subject to concession), but there are ongoing plans to spread the concession model to those assets too.

INFRAERO is also a shareholder in some of the private concessionaires currently operating some of the Brazilian Airports. This peculiarity results from the transition from public to private operation, since the Federal Government in the early 2000's was skeptical of losing its control over this strategic sector and structured privatisations with INFRAERO as a relevant shareholder. This model is not seen in most recent concession rounds.

The National Civil Aviation Agency (*Agência Nacional de Aviação Civil* - ANAC) is a federal regulatory agency responsible for regulating and supervising the civil aviation sector and its infrastructure. ANAC´s main jurisdictions are set forth by Federal Law No. 11,182/2005, while the Secretary of Civil Aviation (SAC), set up by Federal Law No. 12,462/2011, and currently incorporated as part of the Ministry of Transportation, establishes policies for the

airport and aviation sectors. SAC also sets forth guidelines to be complied with by ANAC, INFRAERO and other governmental entities and private concessionaires that operate airport infrastructures.

The Brazilian Aeronautical Code (Law No. 7.565/1986) establishes the main aspects of airport operations and infrastructure. Pursuant to the Brazilian Aeronautical Code, it is possible for the Federal Government to delegate the power to commercialise airport infrastructures to States or Municipalities, by means of public conventions.

Both INFRAERO and the private concessionaires are subject to guidelines issued by the SAC. Services rendered by INFRAERO and private concessionaires include the control of passengers and baggage, the security, cleaning and maintenance of airports, as well as expansion of the airport infrastructure in some cases.

Sanitation

The sanitation sector encompasses public services such as: (a) supply of drinking water; (b) sewage; (c) urban cleaning and solid waste management; and (d) drainage and management of urban rainwater. These services are under municipal jurisdiction, which means the Municipalities are responsible for the services and can provide them directly or delegate them to the private sector through concessions.

Recently, the sector has undergone profound changes. In general, the sector is subject to Law No. 11,445/2007, which establishes national guidelines for basic sanitation. This law was significantly changed by Law No. 14,026/2020 (New Legal Framework for Basic Sanitation), which also brought its own major rules.

The goal of the reform brought in the New Framework was to enable universalisation of basic sanitation services, setting the goal of serving 99% of the population with drinking water and 90% of the population with sewage collection and treatment by 2033.

To make water and sewage services universally available across the country by 2033, according to a forecast by ABCON

SINDCON (Association and National Union of Private Concessionaires of Public Water and Sewage Services) in partnership with KPMG, around R$ 893.3 billion in investment will be needed.

Before enactment of the new legislation, basic sanitation services, especially those related to water and sewage, used to be provided by state-owned companies through so-called "program contracts" signed with Municipalities. These were not preceded by a bidding process. To achieve the universal access goals, the New Legal Framework for Basic Sanitation prohibited provision of basic sanitation services under program contracts. Indirect services (i.e., not provided directly by the service holder) must now be rendered by means of concession contracts, subject to prior bidding procedures. Both new and existing concession contracts (that is, those which are not program contracts) which have been preceded by bidding procedures must be signed and/or adapted in order to reflect the goal of achieving universal access.

Furthermore, the New Legal Framework for Basic Sanitation provides those contracts in force, as well as those preceded by a bidding procedure, are conditioned on proof of the contractor's economic-financial capacity based on its own funding or through loans, with a view to enabling the universal access.

Another significant feature of the New Legal Framework for Basic Sanitation is the incentive for regionalised services, i.e., covering a region that includes more than one Municipality, which can be structured as a metropolitan region, regional basic sanitation unit or reference block. Regionalised provision is even a condition for allocation of federal funds or funds managed by the Federal Government.

Furthermore, the New Legal Framework for Basic Sanitation changed the name of the National Water Agency to "National Water and Basic Sanitation Agency" (ANA), giving it authority to establish reference standards for the sector. Although the adoption of such rules is not mandatory by service holders and their respective local regulatory agencies, it is encouraged, as it constitutes a condition for financing using federal funds or funds managed by the Federal Government.

Cinema

The High Cinema Council ('Conselho Superior do Cinema')

The High Cinema Council (HCC) is linked to the Ministry of Culture and aims to define the National Film Policy, setting guidelines for the development of the national film industry, with a view to promoting its self-sustainability and stimulating the presence of national content in the various market segments, including international markets.

The HCC was once subordinated to ANCINE, but currently, the attributions of each body are well separated, being the Council a policy-making body and ANCINE an implementing and inspecting body.

The National Cinema Council is composed of 12 representatives of ministries, one of them, who chairs the Council, from the Ministry of Culture, 7 representatives of the Brazilian film industry, with notorious knowledge in their field of expertise and five representatives of society, with an interest in the development of the national film industry.

The Nacional Cinema Agency (ANCINE)

The National Cinema Agency - ANCINE was created in September 2001. ANCINE is linked to the Ministry of Culture and is administratively and financially autonomous. It is independent of the direct administration and is based on a collegiate board made up of a Chairperson and three commissioners. They are all Brazilian and appointed by the President of the Republic, but subject to approval by the Federal Senate. They serve non-concurrent four-year terms of office.

ANCINE's core purpose is to foster training and technological development in these industries, respecting the copyright of national and international works. Brazilian and foreign companies wanting to do business and benefit from public funds or tax incentives for these industries must register with ANCINE.

Complementary Regulation Rules

In December 2024, the President of the Republic issued Decree No. 12,323/2024 which, in addition to establishing the screen quotas for the year 2025, introduced new guidelines for regulating the promotion and protection of Brazilian audiovisual activity—likely inspired by the success of the film I'm Still Here, which, in 2025, would go on to win the Oscar® for Best International Feature Film.

Under the new rules, ANCINE was expressly authorised to regulate the treatment of Brazilian feature-length films that have won awards at festivals of recognised importance, as well as the continued screening of Brazilian titles during peak sessions in each cinema complex.

Tools of the National Film Policy

Tools critical to the working of the National Film Policy include:

- Film and Video Industries Information and Control System (Information System);
- Contribution for Developing the National Film Industry (CONDECINE);
- Funds of the National Film Industry (FUNCINES); and
- National Film Development Programme (PRODECINE).

By means of regular reports, controls of box offices, and publishing copyright notices, the Information System gives ANCINE:

- the overall volume of Brazilian and foreign film, video and audio-visual works shown or sold;
- the profitability of these operations; and
- information on the copyright holder in Brazil.

With this system, ANCINE can regulate and decide whether businesses are running under the National Film Policy general guidelines and its own goals.

The taxable events of the CONDECINE tax are:

- production, licensing and distribution of film and video works

for business purposes; and

- payment, credit, use, remittance or delivery to distributors or intermediaries abroad, of earnings from film and video works, or their acquisition or import at a fixed price.

As a rule, the CONDECINE contribution is charged every five years, for each market segment and by film, video or audio-visual work title or chapter. The CONDECINE contribution on advertising is payable yearly. In these cases, individuals or legal entities showing, broadcasting or advertising the works will be jointly liable for any failure to pay the contribution.

Under certain circumstances, the CONDECINE contribution is charged annually at 11% on the earnings from exploiting film and video work per market segment in which they are promoted.

CONDECINE is a tax of questionable constitutionality and is a matter of countless judicial disputes.

Foreign films or video advertising work may only be broadcast in Brazil, in any market segment, if adapted to the Portuguese language by a Brazilian production company registered with ANCINE, and consequent payment of the CONDECINE contribution.

However, Law No. 10,454 dated May 13, 2002, provides that the following are CONDECINE-free:

- film and video works aimed for exclusive presentation at festivals, so long as they have the prior approval of ANCINE;
- film and video works with journalistic and sports purposes;
- previews of programmes and film and video works;
- exportation of Brazilian film and video works and Brazilian programming broadcast abroad;
- Brazilian audio-visual works;
- the payment, credit, use or delivery, to producers, distributors or intermediaries abroad, of earnings from exploiting film and video works, or their takeover or import at a fixed price, plus the amount matching the takeover or licensing rights to national programming, even of foreign audio-visual works, if they are created and broadcast directly in Brazil by companies based in the country;
- Brazilian advertising film and video works for charity,

philanthropic and political advertising purposes; and

- the payment, credit, use or delivery to producers, distributors or intermediaries abroad, of earnings from exploiting film and video works, or their takeover or import at a fixed price, plus the amount matching the takeover or licensing of rights to international programming created, made available and broadcast from abroad to Brazil, provided the benefiting company chooses to use 3% of the amount earned for producing Brazilian full, mid and short length films, and provided the film is approved by ANCINE.

The Brazilian Securities Exchange Commission - CVM - runs and oversees the FUNCINES and invests in projects and programmes designed for Brazilian independent production of films, and the construction, remodelling and restoration of cinemas. It also buys shares in Brazilian publicly-held companies that produce, market, distribute or show Brazilian independently produced films. FUNCINES earnings cannot be used in works whose majority shares the Fund holds - in order to avoid a massive concentration of investment funds in one work.

Companies choosing to take part in the FUNCINES, and being taxed on their taxable income, may deduct their investment in FUNCINES quotas from income tax.

PRODECINE aims to raise and invest funds to encourage the production, distribution, marketing and presentation of Brazilian independently produced films and video works and technical infrastructure projects for the film business. Those that produce, distribute and show a Brazilian independently produced motion picture that is a blockbuster can receive an Additional Income Award.

Clearly, lawmakers intend to encourage the national motion picture, video and television industries, as well as raise investment for them.

Filming in Brazil

Brazilian Law requires that the filming of foreign productions in Brazil is reported to ANCINE in advance, which will mediate, along with the Brazilian diplomatic representations abroad, the visa

concession for cast and crew to participate in the shooting.

Before filming, the foreign production company must engage in a contractual partnership with a Brazilian production company, which will be responsible under Brazilian Law for the production in this country.

Therefore, the Brazilian production company will submit the Communication of Foreign Audio-visual Content Production in National Territory to ANCINE. This communication is a requirement for obtaining the relevant visa for the foreign cast and crew. ANCINE has a period of five working days to respond to this request.

The Brazilian producer is responsible for ensuring compliance with Brazilian legislation and for providing assistance for customs clearance of equipment, among other things.

Filming of foreign productions of a journalistic nature must be reported directly to the respective Brazilian diplomatic representations abroad.

Screen Quota Policy

The screen quota policy was revoked in 2021 but reinstated in 2024.

It requires film exhibition companies to include a minimum number of Brazilian feature films in their programming, which is assessed by the number of days of exhibition and the variety of films that must be exhibited. These parameters are established annually by means of a Presidential Decree.

The implementation of the screen quota policy, as in the past, will be closely monitored by ANCINE.

The screen quotas for the year 2025, regarding the exhibition of Brazilian films, are established in Decree No. 12.323/2024 and range from 7.5% to 16.0% of screenings, depending on the number of screens in the exhibitor's chain. Furthermore, the decree requires the exhibition of 4 to 32 different titles, depending on the number of screens in each cinema complex. Finally, if an exhibitor's complex has more than two screens and the same film, regardless of its nationality (other than Brazilian), occupies more than 60% of the sessions (for

exhibitors that have 3 to 5 screens), or more than 50% of the sessions (for exhibitors that have 6 or more screens) , the screen quota will be increased based on the excess sessions beyond the respective threshold, according to the parameters established in the decree.

Regarding award-winning works, ANCINE published Normative Instruction No. 172/2025 in January 2025, which amended Normative Instruction No. 172/2024. The new regulation made it easier for exhibitors to meet the screen quota while also encouraging the daily exhibition of both award-winning and non-award-winning Brazilian films during peak viewing times.

According to the new rules, the daily exhibition of Brazilian films that meet certain eligibility criteria, in sessions held after 5 PM, is credited with an additional tenth (0.1) for the purposes of screen quota compliance. If the film has been awarded at festivals recognised by ANCINE, that screening is credited with an additional fifteen hundredths (0.15).

Pay TV Regulation

ANCINE is also in charge of regulating Pay TV operations in Brazil and all operators and cable channel programmers (including foreign channels and programmers) must register with the agency (operators must also register with ANATEL) and comply with Brazilian regulations.

A foreign channel programmer must appoint a Brazilian representative (an individual or a company) for ANCINE and a Brazilian born individual must undertake "editorial" responsibility for the programming (even when the programmer already has someone entrusted with the programming tasks abroad).

The registration of the foreign programmer/channel will be conducted by the representative who needs to register himself with ANCINE before registering his represented entities.

The registration process is done online, through the agency's web-based system.

Each channel programmer, through their representative, must submit a monthly report to ANCINE containing the complete playlist

of programs broadcasted in the previous month and such report must comply with the layout defined by the agency.

From time to time, each channel is also required to submit to ANCINE (through its respective representative) the current number of its subscribers, together with some other market information.

Failure to comply with these report requirements subjects the representative and the foreign programmer to fines and other sanctions.

Local content for Pay TV

Brazilian regulations require that all qualified space channels must show at least 3:30h of Brazilian content per week during prime time and that 50% of such content should be produced by an independent Brazilian producer.

A qualified space channel is one whose programming during prime time is predominantly intended for entertainment, i.e., made up of films, TV shows, documentaries, etc.

Prime time for channels focused on children's programming is from 7h to 11h and from 17h to 21h (Brasília time) each day. Prime time for the remaining channels is from 18h to 24h (Brasília time).

An independent Brazilian producer is a Brazilian company that is not an affiliate of, or contractually controlled by, a programmer, packager, distributor or broadcaster and that is not bound by any exclusivity agreements in a way that prevents it from marketing its production to third parties.

Provided certain circumstances are met, such as the nature of the channel or the size of the relevant programmer, ANCINE, upon application, may reduce or even waive this obligation for the channel.

Local content requirements are also closely monitored by ANCINE and failure to comply with them also subjects the representative and the foreign programmer to fines and other sanctions.

Streaming

Streaming services are not yet regulated in Brazil, but Bill

No. 2331/2022, already approved by the Federal Senate, which seeks to regulate video-on-demand services, is pending in the National Congress.

The bill grants ANCINE the power to supervise video-on-demand activities and seeks to impose on streaming platforms the obligation to increase the visibility of Brazilian audiovisual content, in addition to imposing the gradual availability in their catalogues of about 5% of Brazilian audiovisual content.

In addition, the project provides for the collection of CONDECINE, in a percentage equivalent to 3% of the revenues obtained in the Brazilian market, but 60% of the amount due under this tax may be directed to activities to stimulate Brazilian audiovisual content, such as the training of professionals, the production of local content, the licensing of independent Brazilian content and the implementation of infrastructure for the production of audiovisual content in Brazil.

There is no guarantee of approval, no fixed deadline for the implementation of these changes and even the content of the project can still be modified by legislators.

ANCINE Sanctions

ANCINE can penalise companies showing, distributing and renting videos if they fail to follow its guidelines.

If companies fail to show Brazilian works for twenty years, they must pay a 5% penalty of the daily box office sales for the six months before the violation, multiplied by the number of days the failure continues to be in effect.

Failure to pay the CONDECINE fee or comply with the Information System requirements or any other ANCINE rules on implementing the general guidelines and the National Film Policy, results in a fine of between two thousand and two million Brazilian Reals.

If a project misuses PRODECINE and FUNCINE funds, it may have to return them with delinquent interest at the Special Clearance System reference rate plus a fine of 20% on the total funds.

Chapter 15

Social Security

Public Social Security

The public Social Security system consists of rights and obligations established by the Federal Constitution that comprises an integrated combination of actions implemented by the Government and society, designed to ensure healthcare, Social Security and welfare rights. The essential goal of Social Security in Brazil is to provide benefits and services to workers, retired persons, pensioners and people in need.

The Brazilian social security system is organised under the General Social Security Regime (RGPS), which is mandatory system of mandatory contributions. The funding sources for this system are diverse, including contributions from workers and employers, as well as funding from the budgets of the Union, States, Federal District, and Municipalities.

Workers' contributions are made through payroll deductions, while employers contribute with rates on payroll, revenue, and profit.

Article 195 of the Brazilian Federal Constitution establishes that the financing of the Social Security system must come from the

following sources: (i) Federal Government, States, the Federal District, and Municipalities; (ii) taxes collected from Employers, Companies and other equivalent entities; (iii) taxes collected from workers and other taxpayers; (iv) funds from Prognostic Contests (lottery, betting etc.); and (v) from importers of goods and services from abroad or from whomsoever legislation determines as their equivalent.

The taxes collected from employers, companies and other equivalent entities are based: (i) on the payroll and other types of work income (regardless of an employment relationship); (ii) on income and revenues (Contribution for the Financing of Social Security – COFINS); and (iii) on profits (Social Contribution on Net Profit – CSLL).

Social security contributions paid by companies are as follow:

Basic Rate: Companies must contribute 20% of the total remuneration paid, due, or credited in any form to employees and casual workers. This includes salaries, tips, regular earnings in the form of utilities, and advances resulting from salary adjustments;

Work Environmental Risk (RAT): In addition to the basic rate, companies must contribute an additional percentage ranging from 1% to 3%, depending on the risk level of their business. This percentage is intended to finance benefits resulting from work accidents and occupational diseases;

Accident Prevention Factor (FAP): The FAP is a multiplier that ranges from 0.5 to 2.0 and is applied to the RAT rate. It is calculated based on the frequency, severity, and cost indices of work accidents at each company. Companies with better safety indices may enjoy a reduced contribution, while those with worse indices may face an increase;

Additional Contributions: Companies that hire workers under special conditions, such as unhealthy or dangerous activities, must contribute additional rates of 6%, 9%, or 12% on their compensation.

There are also the Social Security Contributions classified as differentiated, which include: (i) Contributions paid by financial institutions, agribusiness and any sporting association that maintains professional football clubs; (ii) any special matter related to the civil

construction sector; and (iii) some sectors exempt from payroll tax and for which contributions are calculated based on gross revenues (and not on employees' compensation).

Contributions are paid not only by legal entities but also by workers and other people who are insured by Social Security and provide their part of the contribution based on the compensation they receive.

When it comes to the Social Security structure, costing is considered to be one of the most relevant components. The available funds depend directly on the list of benefits granted to taxpayers and their dependents and how well this distribution system is organised.

The basis for calculating Social Security Contributions is the amount upon which a certain percentage is applied that will define the amount received by Brazilian Social Security Authority (and potential conversion into a benefit or service). In the Brazilian General Social Security System (RGPS) the calculation basis is called the 'contribution-salary'.

It is important to note that the contributions paid by employers, companies and other equivalent bodies based on payroll and other types of work income have no minimum or maximum limits. However, when it comes to employees and independent workers, there is a minimum limit for the contribution-salary: (i) the baseline salary of the worker category (established by legislation or by a Collective Bargaining Agreement) or; (ii) the state baseline salary (according to Complementary Law No. 103/2000) or; (iii) if none of the previous baselines exist, the minimum threshold is the National Minimum Wage (monthly, daily or hourly) based on the effective number of hours worked during the month.

For domestic employees, the minimum threshold is established in state legislation (Complementary Law No. 103/2000) or, if there is no state legislation on the matter, the National Minimum Wage (monthly, daily or per hour) based on the effective number of hours worked during the month.

As for the so-called insured individual taxpayers and insured optional taxpayers, the minimum contribution-salary limit is the national Minimum Wage.

The maximum limit of the contribution-salary is the same for

all types of taxpayers and is defined by the Ministry of Social Security (MPS). The amount is frequently readjusted using the same indexes used to regulate Social Security continued benefits and payments.

All this Social Security funding ends up being used to cover the cost of certain benefits. The main benefits covered are:

Disability Retirement

The disability retirement pension is granted in the following situations: (i) when the taxpayer is considered no longer able to perform his work duties (either because of disease or injury); or (ii) when the taxpayer is consider in no condition for rehabilitation in order to return to their current position or to provide useful and efficient services.

However, in order to receive this benefit there must be an assessment of the taxpayer'sactual disability. There are specific medical tests carried out by Social Security-designated doctors to verify a taxpayer's disability and after the results are disclosed, a decision is made on whether to grant or deny the benefit (the benefit is paid as long as the disability persists). It is also possible for a taxpayer to ask for a private doctor to participate in the medical assessment (but the taxpayer will have to bear the cost).

Retirement by Age

Taxpayers are entitled to retirement by age when they turn sixty years old (for men) or fifty-five years old (women).

Social Security Convention No. 102 from the General Conference of the International Labour Organisation determines that:

> "Article 26
>
> 1. The contingency covered shall be survival beyond a prescribed age.
>
> 2. The prescribed age shall be not more than 65 years or such higher age as may be fixed by the competent authority with proper regard to the working ability of elderly persons in the country concerned".

The proof of the taxpayer age must be made based on one of the following documents:

(a) Birth or marriage certificate disclosing the date of birth;

(b) Army reservist certificate (granted to those who received exemption from mandatory army duties) or voter registration card; and

(c) Identity card or any other document that is issued based on the civil registry of birth or marriage and as long as there is no doubt regarding the legitimacy of the document.

Retirement based on the time the taxpayer has contributed to Social Security

Taxpayers may claim this retirement plan after thirty-five years of contributions (for men) and thirty years of contributions (for women). There are several discussions around this type of retirement plan, especially if it is a viable cost for the Social Security structure over the next few years.

The 'contribution period' is understood as the period running from the first Social Security contribution paid to the date of the retirement application or when the paid work activity ceases. The legislation also provides certain periods that are not considered when calculating the contribution period (e.g. when an employment contract is suspended). As a general rule calculation of the total 'contribution period' includes:

(a) the period of paid activity covered by social security legislation;

(b) the period of contributions paid by the taxpayer when he is no longer in a remunerated activity;

(c) the period in which the taxpayer received sickness benefit or disability retirement payments (between periods of working activity);

(d) the period in which the taxpayer received payments for maternity leave benefit;

(e) the length of service provided by rural workers prior to November 1991; and

(f) the period of working activity as a rural worker, as long as there is proof of the payment of contributions under Law No.

6,260 (dated November 6, 1975) with indemnification of the previous period.

Special Retirement

To be eligible for Special Retirement, there are certain legal requirements that the taxpayers have to meet. Among these requirements is continued work for a certain period of time (that may vary depending on the agent to which the taxpayer was exposed) under circumstances that pose a danger or a threat to health.

These taxpayers are those who have to prove to the Social Security Authority that they were exposed to chemical, physical or biological agents, or any other condition that may have affected their health or physical integrity for a period equivalent to that required to grant the benefit.

Sick Leave

Sick Leave is granted to taxpayers who are considered disabled (meaning they are in no condition to perform their regular working activities) for more than 15 consecutive days.

For cases of taxpayers who already had a previous disease or injury before the period they started to contribute to Social Security, Sick Leave will not be available. The exception to this is when there is proof the disability occurred due to the progression or an intensification of a pre-existing disease or injury.

Sick Leave is available to taxpayers who have had an accident of any type, regardless of how long they are unable to work.

In terms of Bilateral Agreements, Brazil has Social Security Agreements with the following countries: Germany, Belgium, Cabo Verde, Canada, Chile, Korea, Spain, United States, France, Greece, Italy, Japan, Luxembourg, Portugal and Quebec.

Supplementary Social Security

The Brazilian Federal Constitution regulates not only the mandatory public pension plan, but also provides regulation for the private pension plan system (article 202 of the Federal Constitution). This type of private pension structure has the following characteristics: (i) it is supplementary; (ii) self-ruled (separate from the government's official pension plan system); (iii) non-compulsory (optional); (iv) contract defined; (v) has a financial capitalisation system; (vi) transparency; (vii) does not require an employment relationship with participants; and (viii) is based on cooperation and consensus between the parts.

The main purpose of Private Pension Entities (that are classified as 'open' or 'closed') is to provide supplementary or even equivalent benefits to those granted by the government's official pension plan.

Since they offer benefits to supplement the official pension plan, it is the responsibility of those Private Pension Entities to ensure that their plans are supported by actuarial calculations and that there is full coverage of the proposed social risks involved. Therefore, the guaranteed benefits for each participant enrolled in the private plan plus the ability to meet social security needs creates the reason for the Private Pension Institute.

There has been a significant increase in interest for private pension plans since they normally offer better benefits to participants than the official pension plan (which does not provide a final salary benefit).

Any Private Pension Entities, either 'open' or 'closed', may create and operate pension plans as long as they have specific authorisation to do so, which basically consist of having the rules of the plan approved by the regulatory and supervisory authorities. These authorities must recognise the entities are capable of meeting the minimum standards of transparency, solvency, liquidity and economic-financial and actuarial balance.

It is important to clarify that entities can demonstrate their

solvency, liquidity and economic-financial and actuarial balance when they can prove to have enough funds to offer benefits that are intended to supplement the official pension plan. The actuarial calculation is a scientific technique used to guarantee this, and part of it also considers the consolidation of investment funds (FIEs), which are regulated by articles 49 and 50 of Law No. 4,728/1965.

There is also a difference between the Private Pension Entities classified as 'open' and 'closed'. One of the different characteristic between these two classifications is the profit-oriented nature of 'open' entities.

'Closed' Private Pension Entities can pool resources into investment funds and also pool resources through real estate or even through participation in Special Purpose Entities (SPEs). However, unlie the 'open' Private Pension Entities, the 'closed' Private Pension Entities are not intended to generate, nor do they provide services or products to consumers (LC No. 109/2001, article 31).

As a general rule, the benefits offered by Private Pension Entities are:

- Retirement – A benefit that participants receive after ceasing their working activities. The benefit is paid as an income for a long period or even for the rest of the participant's life;
- Specific payments (e.g. insurance) – This type of payment normally corresponds to a benefit that is paid due to certain events that may occur, and can either be paid in a lump sum or in instalments for a short period of time;
- Death Pension – This refers to a benefit that is paid to dependants in case of the participant's death. The contract can establish payments for a certain period of time or even for the dependant's lifetime.

Benefit plans may be created and managed by 'open' entities (LC No. 109/2001, article 36) as well as by 'closed' entities (CGPC Resolution 8/2004). These plans will set individualised accounts for each participant as well as non-individualised funds that are structured to offer all the different types of benefits (lifetime monthly income; temporary monthly income; survivor's pension; or multiple wage payment).

While individualised accounts must comply with the rules

governing the financial capitalisation system, non-individualised funds adhere to the allocation or capital cover financial system.

Considering the different types of financial systems, 'open' entities may offer: (i) individualised plans; and (ii) collective plans. The individualised plan, as the name suggests, is agreed upon by an individual and the main purpose is to guarantee certain benefits to the participant or their dependants. The collective plan established with legal entities to benefit a group of people (e.g. employees of a certain company).

A broad range of basic benefits may be set up in the individual and collective plans of 'open' entities, such as:

(a) **Survivor's income:** this refers to the income paid to the participant who survives for the period established in the contract;

(b) **Disability income:** income paid to the participant in case of a total and permanent (irrecoverable) disability that may appear after the participant concludes the minimum eligibility period established in the plan;

(c) **Death pension:** the income paid to the participant's dependants (or anyone else indicated in the contract) due to the participant's death (after the minimum eligibility period is fulfilled). This can be a payment made for a lifetime or for a specific period of time;

(d) **Savings paid in case of death:** the amount paid in a lump sum to the dependants or others indicated in the contract as the participant's beneficiary in case of death (after the eligibility period established in the contract); and

(e) **Savings paid in case of disability:** the amount paid in a lump sum to the dependants or others indicated in the contract as the participant's beneficiary in case of total and irrecoverable disability (after the eligibility period).

All the benefits listed above, with the exception of the first (a – 'Survivors income') are considered benefits of risk or based on risk.

As for 'closed' entities, there are two types of benefits that may be agreed: (i) benefits of risk; and (ii) benefits for a pre-agreed period.

The benefits of risk are those are those in which the trigger event for payments may occur at any time (illness, disability or death) while the benefits for a pre-agreed period are those in which the trigger event is already known between the parties since it refers to a date previously agreed by them (e.g. being alive after the date specified in the contract). Also, as with 'open' entities, 'closed' entities may offer basic types of benefits such as survivor's income, disability income, death pension, savings paid in case of death, and savings paid in case of disability.

Chapter 16

Insurance & Reinsurance

Insurance

Insurance and reinsurance are regulated activities in Brazil.

BRAZILIAN (RE)INSURANCE REGULATOR

Superintendence of Private Insurance (SUSEP)

➢ supervises the insurance and reinsurance markets, overseeing the companies authorized to operate with private insurance (life and non-life products), capitalization, private pension (open pension plans) and reinsurance, including the incorporation, organization and operation of such companies.

SUSEP also regulates the rules enacted by the CNSP - the normative body of insurance and reinsurance activities in Brazil, which sets forth the guidelines and rules of the governmental policy for private insurance, capitalization, private pension (open pension plans) and reinsurance.

The ANS (National Supplementary Health Agency)

regulates health insurance and health care plans, which are not covered in this paper.

Legal Framework

(Re)insurance matters are addressed within the framework of the insurance regulators (SUSEP and CNSP), the Brazilian Civil Code and other sparse legislation. On December 10, 2024, Law No. 15,040 was published, establishing rules for private insurance. Known as the Brazilian Insurance Act, the new framework will come into effect one year after its publication.The Brazilian Insurance Act consists of 134 articles, divided into the following topics:

- General Provisions
- Property Insurance
- Life and Physical Integrity Insurance
- Mandatory Insurance
- Statute of limitations
- Final and Temporary Provisions

Articles 757 to 802 of the Civil Code, which currently regulate the insurance contract, will be revoked starting December 2025, as well as item II of paragraph 1 of article 206 of the same law, in addition to articles 9 to 14 of Decree-Law No. 73, dated November 21, 1966, which establishes the National System of Private Insurance.

The Brazilian Insurance Act brings significant new provisions that impact the insurers' operations in Brazil, including new rules on underwritting, products, policy wordings, reinsurance contracts and statute of limitations, imposing new obligations, deadlines and legal consequences for insurers, reinsurers and insurance brokers.

A full review of the regulatory norms issued by CNSP and SUSEP is expected following the legal framework.

MAIN PLAYERS

Insurance companies

- Only companies incorporated as corporations (also known as "*sociedade anônima*" or "S.A.") are allowed to operate as an

insurance company in Brazil, upon authorization granted by SUSEP;

- The regulation establishes the minimum capital requirements for granting authorization to operate and provisions to guarantee their operations, pursuant to the criteria set forth by the CNSP and further rules enacted by SUSEP;
- Insurance companies are segmented according to their size.

Reinsurance companies

3 types of reinsurers:

Local Reinsurer

A stock corporation headquartered in Brazil and subject to the same rules as insurance companies.

Admitted Reinsurer

Headquartered abroad, with an office in Brazil (which may be exercised directly, through its own office, or third-party legal entities under contract).

Occasional Reinsurer

Headquartered abroad, without a representation office in Brazil, duly registered before SUSEP. Registration of companies headquartered in tax havens is prohibited.

** There are rules regarding the limit on cessions and preferential offers in the law.

*** The purchase of reinsurance and retrocession in Brazil or abroad can be made through direct negotiation between the cedent and the reinsurer or through a legally authorized reinsurance broker. Reinsurance brokerage activities are regulated.

INSURANCE PRODUCTS

Large Risks X Consumer Risks

Property and Casualty Insurance Policy: divided into large risks and consumer risks

Large risks - insurance policies purchased by legal entities that present, at the time of contracting and renewal, at least one of the following characteristics:

(i) maximum guarantee limit greater than R$ 15,000,000.00;

(ii) total assets exceeding R$ 27,000,000.00, in the immediately preceding fiscal year; or

(iii) gross annual revenue exceeding R$ 57,000,000.00, in the immediately preceding fiscal year. Oil/Petroleum Risks, Named Perils and Operational Risks, Global Banking, Aeronautical, Maritime and Nuclear Risks, as well as Internal Credit and Export Credit.

Life Insurance Policies: consumer risks and specific rules.

**Each insurance line (non-life and life) has a specific rule that must be followed.

Mandatory insurance

Brazilian Legislation provides for some mandatory insurance, such as fire insurance, carrier's civil liability insurance, transport, among others.

Purchase of insurance abroad

Brazilian residents can only purchase an insurance policy abroad if the insurance is not offered in Brazil or falls within the restrictive exemptions stated by the Legislation.

Distribution of insurance products

- Licensed insurance brokers – strongly regulated by SUSEP (although brokerage is optional)
- Policyholders ("*estipulantes de seguros*")
- Insurance Representatives ("*representantes de seguros*")
- Managing General Agent ("MGA") - is expected to be better regulated in the future but is currently considered an insurance representative.

ESG

As of August 2022, SUSEP requires insurance companies, local reinsurers and other companies under supervision to observe sustainability requirements (set of environmental, social and governance risks).

Insurance Risk Letter

Inspired by the international market (ILS – Insurance Linked Security), Brazilian insurance legislation enables insurance risk securitization.

Innovation

SUSEP introduced a regulatory sandbox. Additionally, insurtechs are on the rise. In July, 2024, SUSEP launched the third edition of the regulatory sandbox.

Open Insurance

Brazil is in an advanced stage of Open Insurance, a data sharing process that allows the distribution of insured data, insurance products and services (such as claim adjustment proceedings) in a very innovative way.

Reinsurance

Types of reinsurance companies

Supplementary Law No. 126/2007 allows three different types of reinsurance companies to operate in Brazil: (a) local reinsurers; (b) admitted reinsurers; and (c) occasional reinsurers. Supplementary Law No. 126, dated January 15, 2007, sets out the guidelines for each of these reinsurers.

Admitted and occasional reinsurers are foreign companies that are registered with SUSEP and must fulfil specific obligations,

such as: (i) having net equity of at least USD 150 million, (ii) having an individual attorney-in-fact domiciled in Brazil and (iii) submitting various documents, including their financial statements. A new rule (Circular No. 700/2024) was issued by SUSEP to provide a new regulation on the documents foreign reinsurers must submit to obtain or renew their licenses.

The differences and specific provisions of (a) local reinsurers; (b) admitted reinsurers; and (c) occasional reinsurers are, inter alia,:

(a) **Local Reinsurers** ("*Resseguradores Locais*") - are companies registered in Brazil and structured as joint-stock companies (S.A.s - Sociedades por Ações) having the sole purpose of acting as a reinsurer and/or retrocessionaire. The provisions of Decree-Law No. 73, dated November 21, 1966, are applied to such reinsurers whenever applicable. Furthermore, investment and capitalisation rules for thesereinsurers is set out in separate regulations issued by the CNSP. A local reinsurer must have at least BRL 60 million in capital stock and must meet risk-based capital and solvency-margin requirements determined by SUSEP.

(b) **Admitted Reinsurers** ("*Resseguradores Admitidos*") - despite being registered abroad, these companies must have representative offices in Brazil, which may be (i) a Brazilian company or a branch office, owned by the admitted reinsurer; or (ii) a third party contracted to represent them. The sole purpose of the representative office must be to represent the admitted reinsurer in Brazil.

Among other rules, the admitted reinsurer must (i) maintain an account in foreign currency linked to SUSEP holding a minimum amount of USD 1 million for operating life/health insurance and USD 5 million for operating in all fields; and (ii) regularly submit its financial statements.

The representative office of an admitted reinsurer must have as its only corporate purpose the intention of acting as a representative of the foreign reinsurer in Brazil and must have in its corporate name the expression "Representative Office in Brazil" ("*Escritório de Representação no Brasil*").

Finally, admitted reinsurers must submit a Periodic Information Form (FIP) to SUSEP monthly, which is a set of

tables to be completed by each company with information describing their structure, financial statements, and operations.

(c) **Occasional Reinsurers** ("*Resseguradores Eventuais*") - these reinsurers are also foreign companies but they do not have a representative office in Brazil. In order to operate here, they need to be enrolled with SUSEP and comply with the Supplementary Law and applicable regulations.

In contrast to admitted reinsurers, occasional reinsurers are not required to have a representative office nor to maintain reserves under any circumstances in Brazil, however their headquarters cannot be in tax havens (i.e., countries and territories in which there is no income tax or income tax is levied at a rate lower than 20%).

Admitted and local reinsurers must maintain a proper internal control system. There is no minimum structure for this, but rather minimum elements that must be considered when each reinsurer creates its internal controls as per CNSP Resolution No. 416/2021. The size and complexity of such structures depends on the complexity of each company's operations.

Reinsurance Contracts

As for reinsurance contracts, local regulations establish requirements for writing and structuring contractual documents, such as (i) requiring an insolvency clause; and (ii) prohibiting direct-payment clauses (except in cases of insolvency of the cedant, provided that payment of indemnity has not been made from the reinsurer to the cedant or from the cedant to the insured party in case of treaty contracts, or in other cases whenever there is a clause that, in such a case, calls for direct payment).

If there is an intermediary to the contract, the intermediation clause cannot limit or restrict the direct relationship between cedants and reinsurers, nor grant powers to reinsurance brokers beyond those needed and appropriate to perform their role. Regulations stipulate that, among other prerequisites: (i) the contract between the reinsurer and cedant must be ratified/signed within 180 days from the risk

coverage start date. After this period, if no contract is signed the reinsurance agreement will be construed as non-existent from the outset; and (ii) reinsurance contracts that cover risks in the national territory must be governed by Brazilian law. However, if there is an arbitration clause, it may apply foreign law.

Notwithstanding the above, if local, admitted, and occasional reinsurers do not have the capabilities required to reinsure the risk as requested by the insurer, Supplementary Law No. 126/2007, as amended by Supplementary Law No. 137/2010, provides that the reinsurance risk may be transferred to foreign reinsurance companies.

Assigning risks

Insurance companies should preferably offer at least forty percent (40%) of their reinsurance assignments to local reinsurers.

Further, insurers must retain at least 10% of the premiums issued relating to the risks they have subscribed to, although it is possible to transfer an amount greater than 90% upon presentation of a technical explanation to SUSEP.

In the case of local reinsurers, the limit for retrocession is 70% of the premiums relating to the underwritten risks (except for financial, rural, and nuclear risks), based on the reinsurer's total operations per calendar year.

Chapter 17

Intellectual Property

The protection of intellectual property in Brazil was significantly enhanced by important statutory reforms, including the current intellectual property legislation, Law 9,279, which became effective on May 14,1997. Law 9,279 was implemented with the objective of raising intellectual property protection in Brazil to international standards, including those enunciated in the Trade Related Aspects of Intellectual Property Rights (TRIPS) of the Uruguay Round of the General Agreement on Tariffs and Trade, the Paris Convention, the Patent Cooperation Treaty (PCT) and the Berne Convention, the most important international regulatory treaties to which Brazil is a signatory. In the business community, the law heightened corporate appreciation of the importance of intellectual property issues, thus elevating investment in the area.

Patents

Patents are an extremely important asset for doing business both in Brazil and around the world and, as mentioned above, Brazil is a signatory of the most important international treaties related to

the protection of patents.

Under Brazilian law, inventions and utility models are patentable. To obtain a patent for an invention, the inventor must prove its **novelty, industrial applicability** and the **inventive activity**. To obtain a patent for a utility model, the object in question or a part thereof must have a functional use and industrial application. It should also present a new shape or arrangement and must involve an inventive process resulting in a functional improvement in its use or production.

(i) Priority

To be valid in Brazil, a patent must be filed with the Brazilian Patent and Trademark Office ("INPI") and, as a general rule, the contents of the patent should not be published in other countries before the filing of an application in Brazil. As a result, it is important to file in Brazil all patents that may be relevant for the Brazilian market as soon as they are filed in other countries.

Although there are exceptions in which one can enforce unregistered rights, the principle of first applicant prevails under the law. Owners of patent applications that have been filed in countries which are signatories to the Paris Convention may claim priority when applying for a patent in Brazil. The priority period is 12 (twelve) months from filing the first patent application. Within the priority periods mentioned above, other applications for the patent or its use are not considered a breach of the novelty requirement.

(ii) Secrecy period and publication

After the filing, the application is kept confidential for up to 18 (eighteen) months from the priority date. After this period the application is published in the Brazilian Official Gazette.

(iii) Request for examination

A request for examination must be requested by an applicant within 36 (thirty-six) months of the filing date.

Voluntary amendments to the original application may be submitted prior to the date examination is requested, as long as such amendments do not broaden the scope of the application as it was originally filed.

(iv) Examination

The Brazilian Patent Office will then publish either an action notice in the Brazilian Official Gazette, or a decision granting or rejecting the application.

A response to the notice must be filed by the applicant within a mandatory 60 or 90-day period, depending on the nature of the action, otherwise the application will be considered abandoned.

The application will then be allowed, rejected or a new action may be formulated by the Examiner.

The invention must not fall into one of the categories prevented from being patented under Brazilian law, such as scientific theories, computer software, surgical techniques, and nuclear-derived compounds, among others.

Non-patentable subject matter and subject matter not considered to be an invention:

According to Article 10 of the Brazilian IP Law, the following are not considered to be inventions or utility models:

I. discoveries, scientific theories or mathematical methods;

II. purely abstract concepts;

III. schemes, plans, principles or methods of a commercial, accounting, financial, educational, publishing, lottery or fiscal nature;

IV. literary, architectural, artistic or scientific works, or any aesthetic creation;

V. computer programs per se;

VI. the presentation of information;

VII. rules of games;

VIII. operating or surgical techniques, and therapeutic or diagnostic methods, for use on human or animal bodies; and

IX. natural living beings, in whole or in part, and biological material, including the genome or germ plasm of any natural living being, when found in nature or isolated there from, and natural biological processes.

In addition, in light of Article 18 of the Brazilian IP Law, the following are also not patentable:

I. anything contrary to morals, good customs and public security, order and health;

II. substances, matter, mixtures, elements or products of any kind, as well as the modification of their physical-chemical properties and the respective processes for obtaining or modifying them, when they result from transformation of the atomic nucleus; and

III. living beings, in whole or in part, except transgenic micro-organisms meeting the three requirements for patentability - novelty, inventive activity and industrial application – as provided for in article 8 and which are not mere discoveries.

For the purposes of this law, according to sole paragraph of article 18, transgenic microorganisms are organisms, except the whole or part of plants or animals that exhibit, due to direct human intervention in their genetic composition, a characteristic that cannot normally be attained by a species under natural conditions.

The applicant can also ask the BPTO for a preliminary analysis of its patent application in order to confirm if the application has a chance of becoming a patent. In order to request this preliminary analysis, the applicant and the patent must meet the requirements provided by Resolution INPI PR No. 123, dated November 29, 2013.

Until 2021, patent applications in connection with pharmaceutical products or processes were dependent on obtaining prior consent from the National Health Regulator (*Agência Nacional de Vigilância Sanitária* - ANVISA). In this field, the BPTO would forward the application to the Regulator for analysis considering aspects involving the public health.

On August 26, 2021, Law 14,195/2021 was published, ending the need of a prior consent from ANVISA for patent applications in connection with pharmaceutical products and processes by revoking Section 229-C of Law 9,279/1996. ANVISA Resolution No. 168/2017, which regulated the prior consent process within the Agency, was also revoked the following year. Such changes meant to further accelerate the patent granting process in Brazil.

(v) Post-examination amendments

Although not stated in Article 32 of the Brazilian IP Act, Resolution 93/2013 of the BPTO establishes that amendments submitted after an examination is requested may be accepted in certain specific cases. Specifically, post examination amendments are only acceptable if they are intended to correct formal issues and/or to further limit the claimed matter for which examination was requested.

As per an Opinion No. 19/2023 issued by the BPTO, the applicant may not submit amendments to a claim in an administrative appeal against a decision rejecting his/her patent application.

(vi) Divisional application

According to Article 26 of the Brazilian IP Law, a patent application may be divided, ex officio or on request of the applicant, before the end of the examination of the parent application in the first instance, that is, before a final decision is issued by the Brazilian PTO allowing or rejecting an application or final dismissal of an application.

However, the same limitations for post examination amendments imposed by Resolution 93/2013 also apply to divisional applications filed after a request to examine a parent application. Specifically, the claims of a divisional application filed after the request for examination must be restricted to the claims of the parent application, which means it cannot exceed the matter disclosed in the original application. In practice, this means that a divisional application may only be filed to split a set of claims in the parent application.

Normative Instruction 30, dated December 4, 2013, also provides rules for acceptance of divisional applications.

(vii) Rejections - Appeals

If the application is rejected by the BPTO, the applicant will have 60-daysfrom publication of the rejection in the PTO Official Gazette to appeal.

(viii) Allowance and Granting of Applications

Within 60 days of the publications of a granting decision in

the PTO Official Gazette, payment of the BPTO's issuing fee should be made by the applicant to obtain issuance of the Letters patent (an additional subsequent 30-day grace period is available for payment of the issuing fee subject to paying a surcharge). A few months thereafter the Letters-Patent is issued. Administrative annulment proceedings can be started by third parties, or even by the Patent Office itself, within a period of 6 months counting from the publication of the issuance of the Letters-Patent.

(ix) Patent validity periods

Patents of Invention in Brazil are valid for 20 years starting on the filing date.

Utility Model Patents are valid for 15 years starting on the filing date.

Patent rights are extinguished by: (i) expiration of the term; (ii) waiver by the patent owner; (iii) forfeiture ex officio or at the request of any person with a legitimate interest, if two years after concession of the first compulsory license, any abuse or non-use is not prevented or remedied; (iv) failure to pay applicable annual fees; or (v) failure of a patent owner who lives abroad to appoint an attorney-in-fact in Brazil to carry out administrative acts and receive service of process. Upon extinction of patent rights, the object of such rights will return to the public domain.

While the patent is valid, the patent owner (whether an individual or legal entity, with the possibility of co-ownership) has the exclusive right to make, use or sell the patented product or process. The owner may also prevent third parties from importing products covered by the patent or products obtained directly through the patented process. A patent may be licensed or assigned by its owner for consideration or not. It is also possible to assign the title of the patent partially, but the patent itself is indivisible.

(x) Opposition and Administrative annulment proceedings

Any interested party may, at any time during examination, present documents and information to support examination of a patent application. Should the Examiner consider the information

relevant, he will then issue an official action inviting the applicant to present a submission.

In order to delimit the term for presenting subsidies, the Brazilian Patent Office states, in Normative Instruction 30/2013, that "the end of the examination is deemed to be the date of a conclusive opinion regarding patentability, or the thirtieth day prior to publication of a decision of acceptance, rejection or definitive abandonment, whichever of these is last to occur".

As stated above, should the application be allowed regardless of the additional information presented, it is no longer possible to file a regular appeal against the decision. However, any interested party may request administrative annulment of a granted patent within 6 months of the date the patent approval is published.

The request will be examined by the President of the Patent Office, who will invite the patentee to file a submission within 60 days.

Thereafter, an opinion will be issued and both the third party and patentee will be invited to respond within 60 days.

The final decision will then be published and the administrative proceedings will be terminated.

(xi) Working requirements

Brazilian law requires a patentee to make use of the patent or allow others to do so. In accordance with the Brazilian Industrial Property Law, a Patentee who has not started to use a patent in the country within 3 (three) years, counting from the date on which the patent was issued, or has discontinued use for more than 1 (one) year, may be forced to grant a compulsory license at the request of any third party.

The licensee should initiate actual use within 1 (one) year after the grant of the license otherwise the license may be cancelled at the request of the patentee.

In the case that use has not started 2 (two) years after granting of a compulsory license, the patent may be declared forfeited, either "ex-officio" or at the request of any interested party.

Please bear in mind that actual use may only be replaced or supplemented by importation in cases where local production is

considered economically unfeasible.

Finally, please note that nominal use may be performed through an offer of license that should be published in the Brazilian Official Gazette. This option also has the interesting advantage of reducing the annual fees to half their normal amount while the offer is pending.

(xii) Marking of Products

The Brazilian law has no specific requirements regarding the marking of a product indicating the patents or patent applications protecting such product.

(xiii) Maintenance

Every year, annual fees must be paid in connection with applications and patents. However, the fees only become due at the beginning of the third year of the life of the application/patent or, in other words, 24 (twenty-four) months after the filing date and should be paid until the patent expires.

Annual fees must be paid within 3 months of the anniversary of the filing date. After said initial period, an additional grace period of six months is available. However, a fine of 50% must be added to the annual fee in this case.

After the end of the grace period, if payment has still not been made, then a notice communicating the abandonment of the application, or forfeiture of the patent, will be published in the Official Gazette. This triggers a 3-month period within which the patent may be restored through payment of a specific fee. After this last opportunity, the patent will be irrevocably abandoned or forfeit.

(xiv). Accelerating examination in Brazil

The Brazilian Patent and Trademark Office has been adopting a number of initiatives to accelerate patent examination in Brazil. One of them is the possibility of accelerating examination for patent applications involving matters related to: characteristics or situation of the applicant or owner; the scope of the patent; international cooperation.

Below is a summary of cases warranting priority examination:

- The applicant is a natural person older than 60 years of age.
- The applicant has physical or mental disability, or serious illness.
- The applicant is a small business company (EPP) or startup company.
- The applicant is a Scientific, Technological and Innovation Institution (ICT).
- The patent is a condition precedent for obtaining funding.
- The invention as covered by the patent application is allegedly being infringed or third parties are being accused of counterfeiting.
- The scope of the patent application involves diagnosis, prophylaxis or treatment of specific diseases (e.g. AIDS, cancer, Neglected diseases (Chagas disease, Malaria, Tuberculosis, etc.).
- The scope of the patent application involves products for treatment of Covid-19.
- The scope of the patent involves technology processes resulting from public financing or that technology available in the market. The scope of the patent includes environmentally friendly technologies, the so called "Green Patents Program".

The BPTO's resolutions provide a list of technologies that may benefit from the green patents program, related to alternative energy, transportation (e.g. electric and hybrid cars), energy conservation, waste disposal and treatment, sustainable agriculture, etc.

The Brazilian PTO has also signed Patent Prosecution Highway (PPH) agreements with several other patent offices. Each PPH agreement is ruled by a specific resolution, which have in common the following requirements that applications must meet to participate in the PPH Programs:

- The application must belong to a family whose older patent application has been filed with the Brazilian Patent Office or the Cooperating Patent Office, or under the PCT, have the Brazilian (RO / BR) or the cooperating patent office as their receiving office;
- The Cooperating Patent Office, acting as a national institute, has

examined an application of the same family, clearly indicating which claims meet the patentability requirements (novelty, inventive step and industrial application), and has subsequently issued a letter of "Intention to Grant" or "Notification of Grant"; and

- Each PPH agreement established with the cooperating patent offices is limited to specific technical fields listed with certain IPC symbols.

The Brazilian PTO currently has PPH agreements with Argentina, Austria, Canada, Chile, China, Colombia, South Korea, Costa Rica, Denmark, El Salvador, Ecuador, Spain, United States of America, Europe, France, Finland, Japan, Nicaragua, Panama, Paraguay, Peru, Portugal, United Kingdom, Dominican Republic, Singapore, Sweden and Uruguay.

Trademarks

Trademark protection in Brazil is obtained by registering a trademark with the Brazilian Patent and Trademark Office (BPTO).

There is no intent-to-use trademark filing in Brazil. An application can be filed at any time, whether the trademark has been used in Brazil or not.

The Brazilian Industrial Property Law ("LPI") introduced two exceptions to this rule:

- For well-known trademarks, special protection is granted, regardless of whether they have been registered in Brazil. This provision is aimed at protecting holders from piracy of well-known trademarks that are registered outside of Brazil, but not in Brazil. It also reinforces the protection of Article 6 bis of the Paris Convention, which has long granted protection for well-known trademarks regardless of their registration.
- For any person who, in good faith, at the date of priority claim or of the application filing with the BPTO by a third party, was using an identical or similar trademark for at

least six months in Brazil, to distinguish or certify a product or service that is identical, similar or akin, will in such instances, have preferential right to registration.

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

According to the LPI, a trademark must be visually perceptible to be registered. Based on such definition, the BPTO included the possibility of registering the following traditional categories of trademarks:

- **Word** - when the sign consists of one or more words, provided that these elements are not associated with any figurative element.
- **Compound** - when the sign is made up of a combination of nominative and figurative elements or even just nominative elements whose spelling is presented in fanciful or stylised form.
- **Figurative** - when the sign consists of drawings, images, figures and/or symbols.
- **Tridimensional** - when the sign is constituted by a distinctive plastic form itself, capable of individualising the products or services to which it applies.
- Recently, the BPTO started to accept a new modality, the **position** mark, in which the protection is characterised by the application of a sign in a singular, specific, and invariable position of a given support object, resulting in a set capable of identifying the business origin and distinguishing products or services from others that are identical or similar.

Although not required prior to filing an application with the BPTO, a search on the trademark database of the BPTO is recommended. The purpose of this search is to check whether any trademarks have already been registered and/or applied for by third parties which in any manner conflict with the trademark sought, and thus develop strategies to avert scenarios that may block the application. Therefore, it is highly recommended that a foreign company perform a clearance search before using a trademark in

Brazil in order to evaluate the possible scenarios and strategies.

The application for a trademark registration is made using the appropriate form, upon payment of the respective fees set by the BPTO, and submission of documents and information on the trademark and the applicant.

The application submitted to the BPTO will be subject to a preliminary formal examination and subsequently filed and published in the Official Gazette. Once the application for trademark registration has been published in the Official Gazette, the period for third parties interested in filing any objections will start. Should there be any opposition, a period to file a reply will start.

Once the deadline to file an opposition and the deadline to reply, in case there is an objection have elapsed, the BPTO will conduct a technical examination. Upon completion of the examination, the registration will be allowed or rejected by the BPTO.

If registration is allowed, the deadline to prove payment of the fees to issue the certificate and the first-ten-year protection will commence. Upon proof of payment of such fees, registration will be granted via publication in the Official Gazette.

A trademark registration may be cancelled if:

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

If the application is rejected, a 60-day appeal period will start.

Foreign companies must take into consideration that Brazil is a signatory of the Paris Convention for the Protection of Industrial Property and, therefore, trademarks which have been registered in signatory countries take priority over registration in Brazil. Priority, however, will only be granted if claimed within six months of the foreign application, as per the Paris Convention and the Brazilian Industrial Property Act.

Brazil has also implemented, through Decree No. 10,033/19, the Protocol on the Madrid Agreement for the international

registration of trademarks, which was signed in Madrid, Spain, on June 27, 1989.

With this Protocol now in effect in Brazil, Brazilian trademark holders can register their trademarks directly with the BPTO in any of the 120 countries that are part of the Agreement. Registration requires filing a single international application and paying only one fee. Likewise, the BPTO also receives trademark applications from international and Brazilian companies that enter the Protocol and choose Brazil as their designated country.

After joining the Madrid Protocol, Brazil has sought to harmonise trademark registration procedures. In this regard, two significant changes have been emphasised: Brazil adopted the trademark regime in a multiclass system and co-ownership. The BPTO's system, however, has yet to allow national applications to be filed through the multiclass system.

Trademark infringement, by or against a foreign company, can result in court proceedings. The infringer could be ordered to stop using the trademark in Brazil and pay damages to the injured party.

In 2024, the BPTO revised its Trademark Examination Guidelines to permit the registration of trademarks that include advertising elements, such as slogans, as long as they meet the distinctiveness requirement.

This change stems from a new interpretation of Article 124, item VII of the Brazilian Industrial Property Law (Law No. 9,279/1996), which previously prohibited the registration of signs or expressions used solely for advertising purposes.

Under the new guidelines, a slogan can now be registered if it serves both a distinctive and an advertising function. This development is significant for companies aiming to strengthen their trademark portfolios by incorporating marketing phrases that enhance trademark differentiation.

Well-known trademarks

The Brazilian Industrial Property Act affords special protections to famous (highly renowned) trademarks in all fields of activity. Once a trademark is recognised as well-known, the BPTO duly records this status and the trademark will have special protection that extends to all classes of products and services, enforceable for 10 years.

A trademark is considered well-known if it brings incontestable knowledge and prestige to the Brazilian public in view of its market tradition and qualification.

With publication of Resolution 107, on August 19, 2013, a party interested in obtaining this special protection can file a specific petition with the BPTO claiming such status. Since its publication, Resolution 107 has been amended and has now been replaced with Ordinance/INPI/PR No. 8, of January 17, 2022.

Ordinance/INPI/PR No. 8 defines "well-known" as a "registered trademark whose performance in distinguishing the products or services it designates and whose symbolic effectiveness lead it to extend beyond its original scope, thus exceeding the 'principle of specialty, is deemed highly renowned due to its distinctiveness, its recognition by a large portion of the public, the quality, reputation and prestige associated with it and its flagrant ability to attract consumers by virtue of its mere presence."

Proof of the alleged high renown must be linked to three fundamental requirements:

- recognition of the trademark by a large portion of the Brazilian public in general;
- the quality, reputation and prestige that the Brazilian public in general associates with the trademark and the products or services it marks; and
- the degree of distinctiveness and exclusivity of the trademark sign in question.

Nevertheless, to be accepted the petition claiming the well-known status must include evidence of renown, for example:

- Temporal extension of disclosure and effective use of the trademark in the national market;
- Profile and fraction of the user of the products or services to which the trademark applies, and the profile and fraction of the public that immediately and spontaneously identifies the trademark with the products or services to which it applies;
- Profile and fraction of the user of the products or services to which the trademark applies, and the profile and fraction of the public that immediately and spontaneously identifies the trademark due to its tradition and classification in the market;
- Means of sale of the trademark in Brazil;
- The geographical extent of recognition and sale of the trademark;
- Means of publicising the trademark in Brazil and, potentially, abroad;
- Amount invested by the titleholder in advertising in the last five years;
- Sales volume of the product or service revenue in the last five years;
- Economic value of the trademark;
- Profile and number of people in Brazil reached by the media in which the owner advertises its brand;
- Indication that non-protection of the trademark under this special status is causing its dilution;
- Information that shows the public can identify the trademark values;
- Information that demonstrates the confidence of the public.

The well-known status of the trademark will be analysed by a special commission at the BPTO. The party claiming special protection, or interested third parties, can file an appeal with the President of the BPTO against a decision which recognises or denies the well-known status.

Trademarks which are simply well-known in their field of activities also receive special protection in Brazil, but their status in the BPTO's database will not change, as is the case for well-known trademarks.

Law for Innovation in Technology

Local Innovation Incentives Framework

Brazil has a strong academic research environment, international-grade workforce and services, national and international companies with local manufacturing facilities, and not just the biggest but also the most sophisticated consumer market in Latin America. Nevertheless, due to past policies limiting IP Rights, barriers to foreign products, state intervention and inability to compete in international markets, it is still struggling to create a local environment that can develop a broad range of innovative products and solutions. Successes in specific areas are not enough, regardless of how impressive they may be.

Brazilian citizens and expanding groups in Government are increasingly dissatisfied with this situation, meaning there has been a move towards creating policies and legislation to attract local and international businesses to invest in R&D in Brazil.

We can point out three groups of such incentives:

a) Preference for Government Acquisition:
   a. Products/services with degrees of local content;
   b. Products/Services that rely on locally developed technology.

b) Tax Incentives:
   a. Deduction of operating expenses from research and development designed for technological innovation;
   b. 50% cut in IPI taxation on acquisitions of machinery, devices and instruments for technological research and development;
   c. Full tax depreciation in the year of the assets' acquisition of fixed assets used for research and development in technology;

d. Full tax amortisation in the year of the assets' acquisition for intangibles exclusively tied to research and development activities focusing on technological innovation.

e. Support for Innovation, Research and Development
   i. Funding
   ii. R&D and IP Filing Structure
   iii. Government Supply Challenge

Government Acquisition Preference – 'Buy Brazil Act'

Although the concept of local content has been employed for some time already for purchases in specific sectors such as Oil and Gas, the Government Acquisition preferences were established in the Government Procurement and Government Contracts Law, dated 2010, which creates preferential price margins for suppliers of products and services that meet the requirements to be classified as local or locally developed production.

The legislative amendment known as the "Buy Brazil Act" has been benchmarked against similar policies in the USA, China and other countries. In Brazil, the Government Purchasing Body has discretion on whether or not to grant certain preferences in a competitive procurement process and has to justify the decision in terms of the social benefits of incurring this additional financial burden. So far, due to restrictions on the government budget, combined with the established requirements, these preferences did not achieve widespread practice in Government Procurement.

Tax Incentives

Provided that certain requirements are satisfied, Brazilian legislation (particularly Law No. 11,196/2005) sets forth a number of tax breaks for local entities that carry out research and development to achieve technological innovation.

Operating expenses incurred in the conception of new

products or manufacturing processes and/or aggregation of new functionalities or characteristics to existing products or processes are deemed to be deductible for corporate income taxes purposes in Brazil.

Equipment, machinery, devices and instruments for research and development in technology are also the target of tax breaks. The acquisition of such items is taxed by the Tax on Manufactured Products ("IPI") with a 50% cut on the amount due. For fixed asset items, the legislation also allows full depreciation for corporate income tax purposes in the year of the assets' acquisition.

Furthermore, intangible assets exclusively tied to research and development activities for technological innovation may be fully amortised for corporate income tax purposes in the year of the assets' acquisition.

The Law for Innovation and Law No. 11.196/2005 strengthen the fact that technological innovation is an aggregation of quality and an essential requirement for a competitive, prosperous and sustainable economy, with better jobs and salaries, and less dependency on commodities and royalties paid overseas.

Innovation, Research and Development Support – Innovation Law

The Law for Innovation in Technology (Law Nº 10.973/2004), enacted in December 2004 and significantly amended in 2016 in an attempt to make it more effective, is based upon three pillars:

- the fomenting of an environment conducive to strategic partnerships between universities, technology institutes and companies;
- stimulating science and technology institutions to innovate; and
- promoting innovation within companies.

According to the Law, the Federal Government, the States, the Federal District, the Municipalities and respective development agencies can stimulate and support formation of strategic alliances and development of cooperation projects involving companies, non-profit private entities dedicated to research and development

activities aimed at creating innovative products, processes and services and the transfer and diffusion of technology, and Scientific, Technological and Innovation Institutions – ICTs. Such ICTs are defined as a body or entity of the direct or indirect public administration or a private, non-profit entity legally existing under Brazilian law, headquartered and domiciled in Brazil, that includes scientific or technological research or the development of new products, services or processes as part of its institutional mission or its social or statutory purpose.

The expected support may be rendered to international technological research networks and projects, technological entrepreneurship actions and creation of innovation environments, including incubators and technology parks, and the training and qualification of qualified human resources.

The Federal Official Agencies for funding, fostering and supporting Research and Development may establish agreements and contracts with the purpose of giving funding and management support to the projects, with the express consent of the supported institutions.

Public administration bodies and entities, in matters of public interest, may directly contract ICTs, non-profit private entities or companies, alone or in consortiums, that are focused on research activities and recognised technological qualification in the sector, with the aim of performing research, development and innovation involving technological risk, for the solution of a specific technical problem or obtaining an innovative product, service or process.

As a way of encouraging technological development, increasing competitiveness and the interaction between companies and ICTs, the Federal Government, the States, the Federal District, the Municipalities, the respective development agencies and the ICTs will support creation, implementation and consolidation of environments promoting innovation, including technology parks and centers and business incubators.

Business incubators, technology parks and technological poles, and other innovation-promoting environments will set their own rules for fostering, designing and developing projects in partnership and for company selection.

The Federal Government, the States, the Federal District, the

Municipalities, the respective development agencies and the public ICTs will be able to:

I. transfer the use of real estate for creation and consolidation of innovation-promoting environments, directly to the interested companies and ICTs, or through a profit-making or non-profit entity whose institutional mission is the management of technology parks, technological centers or business incubators, by means of compulsory, financial or non-financial consideration, in the form of regulation;

II. participate in the creation and governance of technology park management entities or business incubators, provided that they adopt mechanisms to ensure segregation of financing and execution functions.

One of the missions of the Federal Government, the States, the Federal District and the Municipalities is to attract research and development centers of foreign companies, promoting their interaction with ICTs and Brazilian companies and offering them access to the instruments of development.

The Federal Government, the States, the Federal District, the Municipalities, the ICTs and their development agencies should promote and encourage the research and development of innovative products, services and processes in Brazilian companies and in private non-profit Brazilian entities, through the granting of financial, human, material or infrastructure resources to be determined in specific instruments and designed to support research, development and innovation activities, in order to meet national industrial and technological policy priorities.

The granting of financial resources, in the form of economic subsidies, financing or equity interest, aimed at the development of innovative products or processes, will be preceded by project approval by the grantor body or entity.

The tools to stimulate innovation in companies are, among others:

I. economic subsidy;

II. financing;

III. equity interest;

IV. technological bonuses;

V. technological challenges;

VI. tax incentives;

VII. scholarships;

VIII. use of the purchasing power of the State;

IX. investment funds;

X. participation funds;

XI. financial securities, with or without tax incentives;

XII. investment in research and development in public service concession contracts or in sectoral regulations.

In addition, Public ICTs may, for a fixed term, under the terms of a contract or agreement:

I. share their laboratories, equipment, instruments, materials and other facilities with an ICT or companies as actions aimed at technological innovation to provide incubation activities, without negatively affecting its end activity;

II. allow use of its laboratories, equipment, instruments, materials and existing facilities on its own premises by an ICT, companies or individuals engaged in research, development and innovation activities, provided that such permission does not directly interfere with its primary activity or conflict with it;

III. allow use of its intellectual capital in research, development and innovation projects.

The Federal Government and other federative entities are authorised to hold a minority stake in private companies for the purpose of developing innovative products or processes that meet the guidelines and priorities defined in the policies of science, technology, innovation and of industrial development in each sphere of government.

The intellectual property on the results obtained will belong to the company, as defined by the legislation and its articles of association.

A government partner may make any equity participation via a capital contribution conditional on licensing the resulting intellectual

property licensing to serve the public interest.

The proceeds received as a result of a future sale of the equity must be invested in research and development or in new equity for the purpose of this public policy.

In the companies in question, the bylaws or articles of association may confer special powers on the shares or quotas held by the Federal Government or its entities, including vetoing the decisions of any other members in any matters it specifies.

The minority interest referred to in the lead paragraph will be provided by means of a financial or non-financial contribution, provided it is economically measurable, and may be a form of remuneration for the transfer of technology, IP licensing, or the granting of the right to use or explore the ownership held by the Federal Government and its entities.

The support provided to companies must comply with the priorities, criteria and requirements approved and disseminated by the public body, subject to availability and equal opportunities for companies and other interested organisations.

Patenting has been encouraged, since the law determines that scholars should be evaluated not only upon published texts but also upon the number of patent applications that are filed, as well as offer them a share in any profits that their patent might generate.

An independent inventor who can prove the filing of a patent application is entitled to request the adoption of its creation by a public ICT, which will decide on the appropriateness and the opportunity provided by the request, as well as the elaboration of a project aimed at the evaluation of the creation for future development, incubation, industrialisation and insertion in the market.

Once the invention is adopted by an ICT, the independent inventor will undertake, under contract, to share the economic gains obtained from the industrial exploitation of the protected invention.

The Federal Government, the States, the Federal District, the Municipalities, the development agencies and the public ICTs should support the independent inventor who can prove the patent deposit of his/her creation, among other forms, by means of:

I. analyzing the technical and economic feasibility of the invention;

II. assisting transforming the invention into a product or process using the financing and credit mechanisms provided in legislation;

III. assist in creation of a company producing the invention;

IV. provide guidance for the transfer of technology to already constituted companies.

Domain Names

Securing domain names in different countries is currently a priority for most companies, since the domain has become more than simply a virtual representative of a company, but also an important marketing tool for ensuring corporate visibility.

The more similar a company name is to its domain name, the more easily it will be located on the web. Therefore, companies should aim to ensure the best possible domain for their business in all countries where they have a presence.

In Brazil, the registration of ".br" domains is regulated by NIC.br (*Núcleo de Informação e Coordenação do Ponto BR* - Information and Coordination Center of the dot-BR), which has the responsibility for organising, centralising and avoiding any duplication of registered domain names.

It is worth mentioning that registering a domain in Brazil does not demand any specific requirements during the process. It is enough for a domain to be available to be claimed via the registro.br website.

Although this freedom is seen as positive because it fosters competition, ease of registration can cause challenges in adjacent spheres, including trademark rights and possible consumer confusion.

Finally, there is a significant difference between ownership of a domain and ownership of a trademark. Even if a domain is owned by a third party, the only person who has the right to use a trademark is the one who registered the trademark with the relevant body, the INPI.

Domain name registration by foreign companies and individuals in Brazil

The registration of .br domains is available to foreign individuals and corporate entities, provided an attorney-in-fact is appointed to legally represent them in Brazil.

It is also possible to register domains under several TLDs (Top Level Domains), such as "adv.br", "agr.br", "art.br", "edu.br", etc, however applicants, whether individuals or legal entities, must, in these cases, demonstrate their eligibility to secure the chosen category.

To register a domain name, a foreign company or individual must first register with NIC.Br, by submitting the following documentation:

(a) A Power of Attorney granting powers to a Brazilian individual to act on behalf of the foreign company or individual as local attorney-in-fact, with specific authority to perform all necessary actions associated with registering domain names;

(b) An Affidavit evidencing the applicant's field of activities of the products or services commercialised;

(c) An Affidavit confirming that the applicant (if it is a corporate entity) will incorporate a Brazilian subsidiary within twelve months of the submission the documentation; and

(d) The attorney-in-fact's identification document.

The documentation will have to be notarised and apostilled (if the country in which the foreign applicant is domiciled has ratified the Hague Convention), or legalised at the nearest Brazilian Consulate (if the country has not ratified the convention). Upon arrival in Brazil, the legalised documents will have to be translated into Portuguese by a certified translator and registered with a local Registry of Titles and Deeds. These steps are necessary to ensure any foreign document is acceptable in Brazil.

After the foreign entity or individual is duly registered with NIC.br, they may apply for a ".br" domain under their own name, which is a straightforward online exercise. It must be noted that the maintenance fee (that may be annual or valid for up to 10 years) charged by NIC.br must be paid locally in Brazilian currency.

If a foreign company has already incorporated a Brazilian subsidiary, or if the foreign company incorporates a subsidiary during or at the end of the 12 month-period mentioned in item 'c' above, it is mandatory that the domain name be registered in the subsidiary's name. Alternatively, the company may also register a domain name in its own name and thereafter transfer it to the Brazilian subsidiary once incorporated, to comply with the NIC.br rule. Failure to comply with these rules may trigger cancellation of the domain registration.

Lastly, when a foreign company allows its Brazilian subsidiary to register a domain name containing its trademark, a license agreement should be executed in order to fully protect its intellectual property rights.

Dispute Resolution

Pursuant to applicable law, the priority of a domain record is given on a first-come first-served basis.

This rule invites registration of domain names by opportunists, who wish to register well-known trademarks and negotiate such domains with their rightful owners.

Likewise, the practice of 'cybersquatting', which consists of registering a domain similar to a trademark to profit from it, and 'typosquatting' when the domain name has typos in it, are also very popular. Both practices are illegal in Brazil, but this has not stopped the practice.

In order to try and resolve these issues, NIC.br adopted an administrative dispute resolution procedure named SACI-Adm. When disputes over a specific domain arise, this mechanism may be used to secure ownership of the domain primarily for the holder of a relatable trademark registered in the real world. The procedure is filed electronically and requires the plaintiff to declare the existence of registered trademarks or company names that are identical or sufficiently similar to the extent that they could cause confusion. SACI-Adm decisions may trigger cancellation or suspension of domain(s).

The SACI-Adm system, although an alternative, simpler mechanism for dispute resolution, does not prevent a foreign company

or individual from securing or recovering a specific domain name by filing legal proceedings with a competent court.

IP and the Internet

The use of the internet has been continuously increasing in Brazil, with more and more daily transactions being handled online. According to the Information and Communication Technology (ICT) module of the Continuous National Household Sample Survey (PNAD), released by the IBGE in 2022, 87.2% of the Brazilian population used the internet in 2022, a significant rise from 66.1% in 2016 and surpassing the 84.7% recorded in 2021.

With the rise of artificial intelligence and especially how generative AI tools have been incorporated to our daily routines, the trend is likely to continue.

While the internet offers numerous advantages, it also brings risks to its users, providing opportunities for increasingly sophisticated criminals to mislead and deceive consumers.

This essay explores the key aspects of IP regulation in Brazil concerning the internet, highlighting the Brazilian Internet Bill of Rights, copyright laws, and the challenges faced in enforcing these regulations.

Brazil's Internet Bill of Rights & IP infringement

The Brazilian Internet Bill of Rights, established by Federal Law 12.965/14, is a cornerstone in the regulation of the internet in Brazil, particularly concerning application provider liability for third-party content. Article 19 of this law, which is intended to safeguard freedom of speech and avoid censorship, stipulates that application providers are not liable for third-party content unless they fail to remove it following a specific judicial order.

Consequently, as a rule, Brazil does not adopt the "notice-and-

takedown" system as the standard for user-generated content removal and application providers are not required by law to exercise prior content moderation – rather, a judicial order is deemed necessary for takedown, albeit with a few exceptions.

However, despite being clear in relation to the general rule of liability, the Internet Bill of Rights addressed copyright issues in a particular manner, referring to a specific legal provision which does not yet exist.

Over the years, in the absence of clear definitions in existing laws, the Superior Court of Justice ("STJ") explained its understanding of some of the most controversial matters, as detailed below.

In relation to what is considered an application provider, it clarified that e-commerce, e-commerce intermediation platforms (marketplaces) and any company offering internet application services in Brazil are included within the scope of the Internet Bill of Rights.

The STJ has also recently ruled that in the absence of a specific provision on copyrights (article 19, second paragraph of the Internet Bill of Rights), Law No. 9,610/1998 (the "Brazilian Copyright Law") applies to cases of copyright infringement by application provider users. This means marketplaces are subject article 104 of the Brazilian Copyright Law, which determines that if the application provider fails to take the necessary measures after being notified, offering a copyrighted work for sale generates joint and several liability between the person who offers it and the counterfeiter.

Conversely, social media providers are held to a different standard by the STJ – although these entities are also considered application providers, the STJ's position is that only specific situations can trigger liability for copyright infringement committed by their users.

In a paradigmatic decision from 2015 that does not mention the Internet Bill of Rights, the court determined that copyright liability exists when (i) the provider has intentionally induced or encouraged users to directly practice copyright infringement (contributory liability), or (ii) the provider obtained profits arising from illicit acts committed by users due to the provider's refusal to control or limit damages whenever able to do so (vicarious liability).

Finally, the STJ has also addressed issues related to trademark

violations in recent decisions, ruling that the Internet Bill of Rights does not apply to infringement cases stemming from the use of keywords in search engine marketing that correspond to registered trademarks or business names (further explained in the section below). In these instances, liability is not attributed to user-generated content but rather to the search engine provider's commercialisation of marketing services utilising third-party trademarks.

Sponsored Links

Although it is lawful to use sponsored links on search engines, the unauthorised use of third-party trademarks or business names as keywords in search engine marketing tools can generate intellectual property disputes. This practice is considered trademark infringement when it potentially harms the trademark's dual function of protecting both its owner and consumers from confusion and wrongful association.

Recent rulings by the STJ have clarified that the use of sponsored links constitutes an act of unfair competition only if certain conditions are met. These include instances where a search engine marketing tool is utilised to buy a keyword that matches a trademark or business name when both the trademark or business name owner and the keyword purchaser offer similar products or services, and when the keyword's use could damage the owner's investments or the distinctiveness of the trademark or business name. Liability may also extend beyond a purchaser of keywords to encompass the search engines themselves. The STJ has taken the stance that search engines, as providers of marketing services, have to implement measures that prevent potential damages their services could cause. Failure to do so could result in the search engine being held accountable for trademark infringement and unfair competition.

Generative AI & IP

The development and popularization of generative artificial intelligence (AI) tools has challenged traditional intellectual property

frameworks. These tools' ability to create content by using complex algorithms trained with large volumes of data raises questions about both the lawfulness of unauthorised use of this data as a training input and the ownership and authorship of said output, i.e. the content delivered by the tools.

When interpreting the Brazilian Copyright Law, Brazilian courts do not differentiate between works available on the internet and works in a physical format. As a rule, unauthorised use of third-party works, even if they are in the public domain, can be considered copyright infringement.

Relevant legal exceptions include (a) the reproduction, in any works, of small excerpts from pre-existing works, of any nature, or of an entire work, in the case of plastic arts, provided the reproduction itself is not the main purpose of the new work and that it does not prejudice the normal exploitation of the reproduced work or cause unjustified harm to the legitimate interests of the authors, (b) paraphrases and parodies that do not merely reproduce the original work or discredit it, and (c) works permanently located in public places, which can be freely represented by means of paintings, drawings, photographs and audiovisual procedures.

The exceptions above do not directly address the nuances of AI-generated content, which is neither a mere reproduction nor a representation of existing works. The matter on how to fill this gap is still being discussed by the Brazilian National Congress in Bill 2338/2023, which aims to comprehensively regulate AI in Brazil.

Though no law has been enacted yet, the only copyright exception today is text and data mining performed by research, journalism and educational organisations and institutions, in addition to museums, archives, and libraries, on a non-commercial basis.

As for ownership and authorship of the AI's output, both the Brazilian Industrial Property Law and the Brazilian Copyright Law are structured specifically for works and inventions created by individuals. An author is defined in the Brazilian Copyright Law as a natural person who creates a literary, artistic or scientific work, and an inventor's right to be named, as per Brazilian Industrial Property Law, stems from personality rights present in the Brazilian Civil Code – the latter position was confirmed by the Brazilian National Institute of Industrial Property (INPI) in an opinion issued on 2022.

In view of this, the current legal framework allows for debate on how AI-generated content could and should be protected under intellectual property laws. It also permits discussion on whether the use of complex AI prompts – which requires creative effort – could have any weight in attributing this protection.

Due to the rapid expansion of generative AI tools, Brazilian courts and Congress will soon have to address these questions. Striking a balance between encouraging innovation and protecting intellectual property rights will be key to the sustainable development of AI and its beneficial integration into society.

Biotechnology

Brazil's biodiversity is amongst the largest in the world. One of its attributes is the high degree of endemism, in other words, species that exist only here, which puts the country top of the list of the world's 17 megadiverse countries.[1] However, transformation of the country's natural potential into wealth is still incipient. Such biodiversity can be considered a window of opportunity for scientific development. Estimates of the value of Brazil's biodiversity range from a billion to a trillion dollars. Irrespective of whether these estimates reflect reality, what we do know is that global social-economic interests converge around biodiversity, as it constitutes a source for feeding of the world's population and the active ingredients for medicines. In light of this, Biotechnology is important to enable the use of living beings or parts of living beings, modified or not, to create new products with specific purposes.

The impact of biotechnology has been mainly in areas such as medicine, agricultural science, biochemistry, genetics and molecular

1. The group of "Like-Minded Megadiverse Countries" was created in Mexico in 2002 and made official by the "Cancun Declaration". The term "like-minded" is justified by the fact that the group not only includes countries rich in biodiversity, but also those with similar social, economic, political and cultural interests. The 17 megadiverse countries are: Brazil, Indonesia, Colombia, Mexico, Australia, Madagascar, China, the Philippines, India, Peru, Papua New Guinea, Ecuador, United States, Venezuela, Malaysia, South Africa, and Congo. Together, those countries contain about 70% of the planet's genetic diversity.

biology. New plant varieties, drugs and vaccines, and also research in the field of immunology, with development of monoclonal antibodies, have brought a new dimension to the field of biotechnology.

Genome analysis has been used for isolation and characterisation of genes supposedly involved in biological processes controlling characteristics of extreme economic relevance in plants, animals and microorganisms. Thus, pest resistant, genetically engineered plants, capable of producing drugs and biopolymers, can be obtained.

Biotechnological inventions require significant investment, specialised infrastructure and detailed regulatory analyses, as detailed below. Therefore, for such inventions to be stimulated, adequate protection is necessary to at least guarantee a return on the time and capital spent on research and development (R&D).

With respect to this field, Brazil protects the biotechnology inventions by means of patents issued by the INPI. New plant varieties, comprising said biotechnological inventions, are entitled to protection from the SNPC.

When (i) new seeds derived from access to reproductive material or (ii) new products, drugs, vaccines derived from access and/or the technological development to Brazilian genetic resources and/or associated traditional knowledge its mandatory, under the Biodiversity Act (Law 13,123/2015 and Decree No. 8,722/2016) the registration with SisGen (National System for the Management of Genetic Heritage and Associated Traditional Knowledge) and in specific cases obtaining prior authorisations from CGEN (Management Council for the Genetic Heritage) are required.

INPI introduced years ago questions on its initial patent forms about access to Brazilian genetic resources and associated traditional knowledge and the same connection has been made by SisGen. Please refer to Chapter 12 for more information on Brazilian Biodiversity and the ABS Laws.

Brazilian Law

As previously mentioned at the beginning of this chapter, patent protection is regulated by Law 9,279/96 (Brazilian IP Act) and protection is also provided under Brazil's Federal Constitution. Two

articles of the Brazilian IP Act specifically limit the protection for inventions resulting from biotechnology and/or derived from access to genetic resources. These are Article 10, items VIII and IX and Article 18, item III:

> *"Article 10 - The following are not considered to be inventions or utility models: (…)*
>
> *VIII - operating or surgical techniques and therapeutic or diagnostic methods, for use on the human or animal body; and*
>
> *IX - natural living beings, in whole or in part, and biological material, including the genome or germ plasm of any natural living being, when found in nature or isolated therefrom, and natural biological processes."*
>
> …
>
> *"Article 18 - The following are not patentable: (…)*
>
> *III - living beings, in whole or in part, except transgenic micro-organisms meeting the three patentability requirements - novelty, inventive activity and industrial application - provided for in article 8 and which are not mere discoveries;*
>
> *Sole Paragraph - For the purposes of this law, transgenic micro-organisms are organisms, except the whole or part of plants or animals, that exhibit, due to direct human intervention in their genetic composition, a characteristic that cannot normally be attained by the species under natural conditions."*

Regarding new plant varieties, the "Law of Plant Varieties" came into force in 1997. Brazil is a signatory of the Act of 1978 and follows some precepts of the UPOV Act of 1991 as well.

The regulation of aspects related to biosafety, such as the use of genetic engineering and the release into the environment of genetically modified organisms, is based on the Biosafety Act (Law 11,105/05), Decree 5,591/2005 and is detailed in norms enacted by the National Technical Commission on Biosafety ("CTNBio").

In this respect, it should be noted that Article 6 (VII) of the Biosafety Act prohibits patenting of genetic use restriction technologies (GURTs). According to the sole paragraph of that article, genetic use of restriction technologies refers to any human intervention for generation or multiplication of genetically modified plants to produce sterile reproductive structures, as well as any form of genetic

manipulation aimed at activating or deactivating genes related to plant fertility by external chemical inducers.

Brief comments on regulatory matters

Biosafety regulation

The Biosafety Act is the major federal legislation on genetic engineering and genetically modified organisms ("GMOs"). The law creates safety rules and monitoring mechanisms for activities that involve GMO.[2-3]

Important definitions set by law include:

1. **GMO**: organism (all biological entities capable of reproducing or transferring genetic material, including viruses and other classes that may yet become known) whose genetic material – DNA/RNA has been modified by any genetic engineering technique. This does not encompass organisms resulting from techniques that imply direct introduction of hereditary material, as long as it does not involve the use of recombinant DNA/RNA molecules or GMO, including in vitro fertilisation, conjugation, transduction, transformation, induction of polyploidy and any other natural process.[4]
2. **Genetic engineering**: activity of manufacturing and manipulating recombinant DNA/RNA molecules[5].
3. **GMO derivative**: product obtained from GMO and that does not have independent replication capacities or that do not contain viable GMO form. This does not encompass pure, chemically defined substances, obtained by biological means and that do not contain GMO, heterologous protein, or recombinant DNA.[6]
4. **Commercial activity involving GMO and derivatives**: activity that does not classify as research activity, and that encompasses the cultivation, production, manipulation, transportation, transference, commercialization, importation, exportation, storage, consumption, release and disposal of GMO and derivatives for commercial purposes.[7]

The rule does not apply when genetic modification is obtained by means of (i) mutagenesis, (ii) formation and use of somatic cells from animal hybridoma, (iii) cellular fusion, including protoplasm, plant cells, that may be carried out by traditional cultivation methods and (iv) self-cloning nonpathogenic organisms carried out naturally, as long as in any cases the modification does not involve the use of GMO as a receptor or donor.[8]

Also, regarding exemptions applicable to genetically modified organisms, products obtained via Precision Breeding Innovation ("PBI") techniques are regulated specifically by CTNBio Resolution No. 16/2018 (which provides examples of PBI), provided the final product does not present recombinant DNA/RNA or, as expressly permitted by CTNBio Resolution No. 16/2018, as long as the conditions provided therein are met. CTNBio assesses whether products obtained via PBI are GMO or not, after interested parties file this specific consultation.[9]

Inter alia, CTNBio also issues technical safety rules and technical opinions regarding authorisation of activities involving research and commercial use of GMO and derivatives, based on a risk assessment on health of animals and plants, of human beings and of the environment.[10]

Per CTNBio's classification, GMO are categorized into four

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2. Biosafety Law, Section 1, caput.
3. In 2005, Attorney General filed Direct Unconstitutionality Suit (ADI) No. 3526 before the Brazilian Supreme Court (STF) contesting the constitutionality of certain sections of Biosafety Law, due to competence and environmental issues, mainly in relation to States and Municipalities – given the Law restricts competence only to CTNBio, a public federal entity. This suit is ongoing: rapporteur Minister Nunes Marques and Minister Edson Fachin have expressed their votes, in disagreement. In 2021 Minister Gilmar Mendes has requested copies of the suit are remitted to him for close examination before he or other 8 Ministers cast their votes. Regardless, Biosafety Law is enforceable and applied daily in Brazil, including by registration and surveillance entities.
4. Biosafety Law, Section 3, I, V and §1st.
5. Biosafety Law, Section 3, IV.
6. Biosafety Law, Section 3, VI and § 2nd.
7. Biosafety Law, Section 1, § 2nd.
8. Biosafety Law, Section 4.
9. CTNBio Resolution No. 16/2018.
10. Biosafety Law, Section 10.

risk-based groups – the probability of an adverse effect occurring to the environment or to human, animal, or plant health, as scientifically justified, arising from processes or situations involving GMO and derivatives:[11]

1. Risk class 1 GMO (low individual risk and low risk to community): GMO that contain sequences of DNA/RNA that do not cause harm to human and animal health or adverse effects to plants and the environment.
2. Risk class 2 GMO (moderate individual risk and low risk to community): GMO that contain sequences of DNA/RNA with moderate risk to human and animal health, with low risk of dissemination or causing adverse effects to plants and the environment.
3. Risk class 3 GMO (high individual risk and moderate risk to community): GMO that contain sequences of DNA/RNA with high risk to human and animal health, with low or moderate risk of dissemination or causing adverse effects to plants and the environment.
4. Risk class 4 GMO (high individual risk and high risk to community): GMO that contain sequences of DNA/RNA with high risk to human and animal health, with high risk of dissemination pr causing adverse effects to plants and the environment.

Accordingly, activities are also categorised into Biosafety Levels, i.e. the level of restraint necessary to safely carry out activities and projects involving GMO, with minimum risk to the operator and the environment:[12] NB-1 is adequate for activities and projects that involve risk class 1 GMO, and so on.[13]

The Biosafety Law stipulates that activities and projects involving GMO and derivatives can only be performed by corporate entities – thus, natural persons cannot take part.[14] Such legal entities (i) at whose facility activities with GMO and derivatives are performed or (ii) who are administratively, technically, or scientifically responsible for such activities are responsible for complying with relevant laws and regulations and are liable for any consequences or effects arising from non-compliance.[15]

In order to perform any such activities, interested parties must request applicable permits from the CTNBio and comply with the regulations specific to each intended activity.[16]

CTNBio holds regular monthly meetings to rule on activities carried out with GMOs and define guidelines for the national biosafety policy.[17]

According to public data released by CTNBio up to 2021, CTNBio has approved an average of around twenty-five (25) applications a year for commercial release, and around seventy-five (75) for human and animal research projects.

In 2021, for instance, CTNBio approved twenty-eight (28) GMOs and derivatives for commercial release – ten (10) applications for microorganisms; seven (7) for plant-based products, four (4) for veterinary vaccines; three (3) for human vaccines; two (2) for animal products; and two (2) for gene therapies. With regard to human and animal research projects, CTNBio has approved one hundred and thirteen (113) requests.

In 2020, there were sixty-eight (68) approvals for human and animal research projects, while there were twenty-five (25) commercial release approvals: eight (8) applications for microorganisms; seven (7) for plant-based products, six (6) for veterinary vaccines; three (3) for human medicines; and one (1) related to the aedes bug.

Finally, in 2019 and 2018, respectively, sixty-seven (67) and fifty (50) approvals were issued in connection with human and animal research projects, and sixteen (16) and thirty (30) for commercial release.

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11. CTNBio Resolution No. 18/2018, Sections 3, XXII and 8.
12. CTNBio Resolution No. 18/2018, Section 3, XVI.
13. CTNBio Resolution No. 18/2018, Section 10.
14. Biosafety Law, Section 2, caput and § 2nd.
15. Biosafety Law, Section 2, caput and § 1st.
16. Biosafety Law, Section 2, § 3rd.
17. Ministry of Science, Technology and Innovation Ordinance No. 4,128/2020, Section 42, caput.

The Brazilian landscape and international treaties in the biotechnology scenario

Current Brazilian legislation does not preclude industrial property protections for inventions in the biotechnology area, as mentioned in the previous item. A comparative analysis between the Brazilian legislation and the TRIPs agreement does not show any inconsistency between the two texts, specifically when comparing Articles 10 and 18 of Law No. 9,279 and the corresponding provisions of TRIPs.

The TRIPs agreement prohibits legal exclusions from protecting any area of technology, with the exception of a few specific cases. In the area of biotechnology, patent protection exclusions by member countries may apply to inventions (as provided in section 5, Article 27 of TRIPs):

a. that are contrary to public order or morality, including to protect human, animal or plant life and health, or to avoid serious harm to the environment;
b. involving methods of diagnosis, treatment and surgery on animals or humans;
c. involving animals or plants other than micro-organisms;
d. that are essentially biological processes for the production of animals and plants, other than non-biological or microbiological processes.

Patentability requirements
Patent Protection in Biotechnology

According to Law No. 9.279/96, the following requirements must be observed before granting a patent: 1) originality; 2) inventive step; 3) industrial application; 4) descriptive sufficiency; and 5) support of the claims in the specification.

Regarding articles 10, items VIII and IX, and Article 18, item III, of Law No. 9.279/96:

"*Article 10 (VIII)*

Operating or surgical methods, as well as therapeutic or diagnostic

methods for application in the human or animal body are not deemed invention. Diagnostic methods out of the human body are eligible for patent protection if the aforementioned patentability requirements are observed.

…

Article 10 (IX)

Subject-matter found in nature, even isolated therefrom, is not considered invention. However, formulations and/or compositions containing such subject-matter are entitled to patent protection.

…

Article 18 (III)

All or part of living organisms, except transgenic microorganisms, are not patentable. The sole paragraph of the same article defines that transgenic microorganisms are organisms, except the whole or part of plants or animals, that exhibit, due to direct human intervention in their genetic composition, a characteristic that cannot normally be attained by the species under natural conditions."

According to the Guidelines for Examination of Patent Applications in the Field of Biotechnology (INPI Resolution No. 118/2020), the term "microorganism" is used for bacteria, archaea, fungi, unicellular algae not classified in the Kingdom Plantae and protozoa.

The guidelines for examination of patent applications in the biotech area address issues such as single nucleotide polymorphism (SNP), promoters, complementary DNA (cDNA), expressed sequence tags (EST), open reading frames (ORF) and fusion proteins, chimeric/humanised antibodies. Such guidelines, for example, state that if a SNP is described as being natural, it cannot be protected. However, its use for an in vitro diagnostic method is entitled to protection. Concerning promoters, the presentation of experimental data proving that they are able to promote the expression of a gene sequence is necessary, not to mention that such sequence must be represented by its SEQ ID NO. It should be noted that cDNAs and ESTs should be protected whenever they are not equal to natural sequences. Moreover, it is necessary to associate said sequence with a function. Furthermore, it is not possible to protect ORFs, since they are considered a natural product.

Concerning fusion proteins, it is important to emphasise that all functional parts that form the final protein must be described in a patent application. Finally, the characterisation of humanized antibodies requires the presentation of a SEQ ID NO containing the amino acid sequence of the variable portion of the antibody and the definition of the other elements (Fc portion). Examples of inventions comprising the abovementioned subject-matter are SNPs as markers for predisposition of multifactorial diseases, cDNA or EST sequences for the detection of early cancers, and antibodies for chemotherapy.

To be sufficiently described, Hybridomas must be filed in an international depositary institution recognised by the Budapest Treaty and are not included under the prohibition in article 18, item III, of Law 9,279/96.

Protection of New Plant Varieties

Plants, even if genetically modified, are excluded from patentability under Law 9,279, but are subject to protection by Law No. 9,456 (Law of Plant Varieties).

The necessary conditions for protecting plant varieties are:

1) distinctiveness;

2) homogeneity;

3) stability;

4) originality (commercial); and

5) appropriate denomination.

Protection is intended to apply to the reproductive or vegetative propagation material of the entire plant. In other words, protection may encompass anything from the seed (in the case of sexual reproduction) or seedlings and shoots, up to the entire plant in case of vegetative multiplication (asexual reproduction).

Piracy

When crafting a business plan, whether for establishing a company or evaluating the financial viability of investments in specific markets, it is crucial to go beyond analysing the target audience, competitors, and return on investment. Risk assessment is fundamental to the success of the venture. This encompasses both operational and market compliance aspects, as well as regulatory and legal risks.

Business success can generate consequences beyond capturing the target audience. It can attract the attention of new competitors seeking to explore the same niche, which, in turn, drives the economy and attracts investment. However, this visibility can also pique the interest of ill-intentioned individuals. Piracy, for instance, is a significant and lucrative risk for investors and companies.

Intellectual Property Rights in Brazil

Safeguarding creations through intellectual property (IP) is paramount to the success and recognition of ideas and innovation. In Brazil, two distinct yet complementary laws provide this protection: the Copyright Act (Lei 9.610/1998) and the Industrial Property Act (Lei 9.279/1996).

The Copyright Act safeguards the expression of creations, including literary, musical, artistic, cinematographic, phonographic, or software works. This protection extends for 70 years after the author's death and grants exclusive rights over the work, including:

- **Reproduction**: Control who can copy, publish, or distribute your work.
- **Adaptation**: Authorise the creation of derivative works, such as translations or remakes.
- **Public Communication**: Permit the exhibition, presentation, or transmission of your work to the public.
- **Distribution**: Control the sale or rental of copies of your work.

Industrial Property: Safeguarding Inventions and Innovations

The Industrial Property Act aims to protect inventions and innovations with industrial or commercial applications. This protection is granted through patents that are valid for 20 years from the application filing date. To be patentable, an invention or innovation must:

- **Novel**: Have not been previously disclosed.
- **Inventive**: Exhibit an inventive level that distinguishes it from existing knowledge.
- **Susceptible of Industrial Application**: Have the potential to be applied in industry or commerce.

Copyright versus Patent: Essential Differences

While both laws protect intellectual property, the main distinction lies in the protected creation:

- **Copyright**: Protects the expressive form of an idea, such as a text, a song, or a painting.
- **Industrial Property**: Protects the idea, the invention, or innovation with industrial or commercial application.

Registration under the Copyright Act is not mandatory but highly recommended to facilitate proof of authorship and uphold your rights. Patents, on the other hand, require registration with the Brazilian National Institute of Industrial Property (INPI).

Legal Treatment of Copyright Infringement in Brazil

The Brazilian Criminal Code establishes a penalty of 3 months to 1 year in prison for copyright infringement. However, if infringement occurs through a copyrighted work distribution with intent to profit, the penalty increases to 2-4 years in prison.

This crime punishes those who seek to profit from the

improper use of another's intellectual property. It is important to emphasise that intent to profit is a fundamental factor, as simple personal use is not punishable by Brazilian criminal law. However, this does not prevent fines from being applied and damages being sought through civil action.

Brazilian legislation is extensive and allows different applications for crimes in the same situation, depending on the procedural aspects involved. Federal Act 8,137/90, also known as the Law on Crimes Against the Tax Order, the Economy, and Consumer Relations, provides a penalty of 2 -5 years in prison for those who mislead a consumer when purchasing a service or product. In other words, deceiving a person into believing that they are acquiring an original product when it is a mere imitation constitutes the crime of misleading consumers, the maximum penalty for which is higher.

Police and members of the Public Prosecutor's Office have sought to frame copyright crimes under consumer relations law precisely because of the higher penalty.

Important Distinction: User vs. Pirate

It is important to highlight that Brazilian law does not intend to punish the end user of a pirated product or service, but rather anyone who pirates, distributes, or profits in some way from the criminal practice.

Act enforcement

In the Brazilian criminal system, there are two main ways in which crimes are investigated and prosecuted:

- **Public Unconditional Claim**: This claim occurs independently of the victim's wishes. As soon as a crime is reported to the authorities, an investigation and prosecution process begins. Applicable when the copyright infringement involves physical products or products accessible through physical media, such as CDs, DVDs, Blu-ray discs, flash drives, memory cards, etc.

- **Public Conditional Claim**: This type of claim requires the victim to request that the police and the Public Prosecutor's Office take action to hold the perpetrators accountable. Applicable when copyright infringement occurs in digital format and copyright holders must file a complaint to initiate the appropriate Public Conditional Action.

Economic Impact of Piracy

According to Fórum Nacional contra a Pirataria (FNCP) the financial impact of the black market, including piracy, on Brazilian private enterprise in 2024 was R$328 billion (approximately US$58,5 billion). However, the negative effects of piracy extend beyond private companies. This criminal practice also deeply impacts Brazilian tax revenues, hinders economic growth, and leads to job losses.

The report also indicates the most affected segments:

- **Audiovisual (Films)**: Piracy of films, including unauthorised distribution and streaming, causes substantial losses for the film industry.
- **Scales**: Counterfeit and pirated scales can lead to inaccurate measurements, potentially causing financial losses and even safety issues in industries that rely on precise measurements, in commercial and laboratory settings, among others.
- **Alcoholic Beverages**: The sale of counterfeit and pirated alcoholic beverages poses health risks to consumers, as these products may contain harmful substances or be incorrectly labeled. It also undermines legitimate businesses in the beverage industry.
- **Toys**: Counterfeit and pirated toys often contravene safety standards, increasing the risk of injuries to children.
- **Cell Phones**: The sale of counterfeit and pirated cell phones not only affects the revenue of phone manufacturers but also raises concerns about the quality and safety of such devices.
- **Cigarettes**: Counterfeit and pirated cigarettes may contain harmful substances and pose health risks to smokers.

- **Fuels**: The sale of adulterated or counterfeit fuels can damage vehicles and pose environmental risks.
- **Cosmetics and Personal Hygiene Products**: Counterfeit and pirated cosmetics and personal hygiene products may contain harmful substances that could cause skin irritation, allergic reactions, or even more serious health problems.
- **Pesticides**: Counterfeit and pirated pesticides may be ineffective or contain harmful substances, potentially leading to crop losses and environmental damage.
- **Sports Equipment**: Counterfeit and pirated sports equipment may not meet safety standards and could increase the risk that athletes injure themselves.
- **Eyeglasses**: Counterfeit and pirated eyeglasses may not provide adequate vision correction and could even damage the eyes.
- **Personal Computers (PCs)**: Counterfeit and pirated PCs may have poor quality, limited functionality, or contain malware.
- **Imported Perfumes**: Counterfeit and pirated imported perfumes are often of inferior quality and may not contain authentic fragrances.
- **Pay-TV**: Piracy of pay-TV signals deprives pay-TV providers of revenue and undermines their ability to invest in quality content and services.
- **Clothing**: Counterfeit and pirated clothing items are often of poor quality and may not fit properly.
- **Pharmaceuticals**: Counterfeit and pirated pharmaceuticals can be ineffective or contain harmful substances, posing serious health risks to patients.

Combating Piracy in Brazil

The Brazilian justice system takes the fight against crimes of this nature seriously. The Global Organised Crime Index positively highlighted the country's effective measures in dealing with such crimes and pointed out Brazil's membership in the Financial Action Task Force of Latin America and the Financial Action Task Force as a positive factor in combating piracy.

Examples of Act Enforcement Actions

- **Operation 404**: In March 2024, the Civil Police of the Federal District, in cooperation with the US and UK embassies, launched Operation 404, an initiative to repress and combat online piracy, specifically the availability of copyrighted games. The police action resulted in the more than 200 websites being blocked, 64 applications for accessing illegal content, and the arrest of one person.
- **Operation Animes**: In April 2024, in a coordinated action involving the Civil Police of São Paulo, Minas Gerais, Rio Grande do Sul, Alagoas, and Ceará, the police seized computers, hard drives, and other equipment involved in distribution of Japanese and Korean I.Ps, in addition to blocking access to 11 websites.

Profit from Piracy

Even though the cases mentioned involved freely available IPs, those responsible for the websites profited from the activity by displaying online advertisements. The games or anime were just bait to attract visitors to their domains.

Social Perception of Piracy

Piracy as a means of democratizing cultural access

In Brazil, despite the significant financial losses caused by piracy, a substantial portion of the population wrongly views it as a means of democratising access to culture. This perception stems from historically high prices for cultural goods, such as music, movies, and software, which has made it difficult for many people to afford legal access to them. As a result, piracy has emerged as an alternative, allowing individuals to consume these goods without paying full price.

Challenges in Combating Piracy

This widespread perception that piracy is a harmless or

beneficial practice poses a significant challenge for copyright holders and anti-piracy initiatives. It creates a social environment where piracy is not universally condemned, making it difficult to enforce copyright laws and discourage individuals from engaging in the practice.

Despite these challenges, there are opportunities to shift the social perception of piracy and promote respect for copyright. Educational campaigns can raise awareness about the harm piracy causes to the creative industries and to consumers themselves. Additionally, efforts to make cultural goods more affordable and accessible can reduce incentives for individuals to resort to piracy.

Prevention and Combat Strategies

While there is no single solution to eliminate piracy, a combination of preventive measures and enforcement strategies can effectively reduce its prevalence and protect intellectual property rights.

Expanding Access to Legal Alternatives

The rise of streaming services has demonstrated the effectiveness of providing convenient and affordable access to copyrighted content. These platforms have successfully attracted a significant portion of consumers away from pirated sources by offering a large library of content, easy-to-use interfaces, and a variety of subscription plans to suit different budgets.

Embracing Technological Innovations

Technological advancements can play a crucial role in combating piracy. Smart contracts can automate licensing agreements and enforce copyright restrictions, making it more difficult for unauthorised content distribution.

Market-Based Strategies

Adopting pricing strategies that align with local market conditions can significantly reduce the appeal of pirated alternatives.

Enforcement and Legal Action

Strong enforcement measures are crucial to deterring piracy and sending a clear message that copyright infringement will not be tolerated. This includes criminal prosecutions, civil lawsuits for damages, and effective seizure and takedown procedures to remove pirated content from online platforms.

Collaboration among copyright holders, government agencies, law enforcement, and technology companies is essential to develop comprehensive anti-piracy strategies and share information effectively. Industry-led initiatives like the Business Software Alliance (BSA) and the Motion Picture Association of America (MPAA) have played a significant role in combating piracy globally.

Conclusion

Despite the ongoing challenges posed by piracy, Brazil's position, according to the OECD, as the second-highest recipient of foreign direct investment in 2023 highlights a strong level of confidence in the country's economy. This positive outlook is further reinforced by the government's active pursuit of international cooperation to combat piracy and mitigate its detrimental effects on tax revenue.

While the existing legal framework may have some shortcomings, it provides a solid foundation for effectively confronting piracy-related crimes. Brazil's proactive approach to international cooperation, as evidenced by its engagement in global anti-piracy initiatives, demonstrates its commitment to addressing this issue at a broader scale.

Chapter 18

Consumer Rights

Brazilian Consumer Law - Overview

Introduction

01. The Consumer Defense Code, or "CDC", (Federal Law No. 8,078/90) governs consumer relations in Brazil.
02. In accordance with article 2 of the CDC, "a consumer is every individual or company that acquires or uses a product or service as an end user".
03. The definition of a supplier, in turn, is provided in article 3, lead paragraph, of the CDC. "A supplier is every individual or public or private company, whether national or foreign, as well as unincorporated organisations, which engage in the production, assembly, creation, construction, transformation, import, export, distribution or marketing of products or provision of services."
04. The Brazilian Courts agree that a consumer may only be

considered as an individual/company that acquires a product/service in order to use it in its own interest, meet a private need, and not to use it in any business, or productive or professional activity.

05. Thus, should an individual/company acquire a product/service in order to develop a business activity such as, for instance, integrating it into the production process, transformation, marketing or provision of services to third parties, then said product/service will be characterised as an input and such legal relationship will be governed by the Civil Code rather than the CDC.

06. The law assumes that the consumer is the more vulnerable party in a commercial relationship and thus puts the burden of proof on the supplier.

Duty of Information - Contracts

07. The CDC imposes a duty to provide information on suppliers, this being one of the most important duties established in the law. Suppliers must provide consumers with clear, correct, accurate and ostensive information, in Portuguese, about the characteristics, attributes, quantity, composition, price, warranty, shelf life and origin, among other relevant details of the products and services, as well as any risks to the health and safety of consumers.

08. Additionally, pursuant to article 31 of the CDC, all sufficiently accurate information provided by the supplier to the consumer constitutes a binding obligation on the supplier and shall be included in any subsequent agreement that may be executed.

09. Contracts governing consumer relations are not binding on consumers if they have not been given the chance of previously being acquainted with their contents or when they are written in such a way that it is difficult to understand their meaning and scope. Also, contractual clauses will be interpreted in favor of consumers.

10. In most of the cases involving consumer contractual relationships, the agreements are adhesion contracts, where the

clauses are established unilaterally by the supplier, without the consumer being able to bargain or substantially modify the contents thereof. Written adhesion contracts must be worded clearly, and presented in easy to read, legible print, thereby facilitating their comprehension by the consumer. Clauses limiting consumer rights should be prominently displayed (written in bold, for example) for immediate comprehension.

11. Moreover, the contract must be printed in a size-12 font.

Product Liability

12. Consumers are protected by a legal, mandatory warranty derived from the CDC rules, regardless of whether the supplier agrees upon a contractual warranty with the consumers.
13. No contractual clause agreed upon between suppliers can release them from their responsibility to consumers under the CDC. Nevertheless, a supplier that is liable to the consumer is entitled to ask for compensation from the supplier that effectively caused any harm suffered by the consumer.
14. The legal warranty implies joint and strict liability, i.e. all participants in the supply chain answer jointly and strictly for any product/service defect and the consumer may opt to file their complaint with one or all the suppliers.
15. Also, in case of harm caused by products/services, consumers have five (5) years to claim compensation for damages in Court; this period of time starts being counted from the date on which such the harm and those responsible for it become known. Consumers are entitled to file an action for damages in the jurisdiction where they are domiciled.

Advertising

16. The activity of advertising in relation to consumer relations is addressed in article 37 of the CDC. According to this article any kind of advertising information or communication containing misleading or abusive content is prohibited:

a. misleading advertising means advertising that is false, whether in whole or in part, even due to omission, and which may lead consumers into error as to the nature, characteristics, quality, quantity, properties, origin, price, dangers or any other essential details about products/ services; and

b. abusive advertising means discriminatory advertising of any kind, which may encourage violence, resort to fear or superstition, take advantage of a child's lack of judgment and experience, or disrespect environmental values, or which may induce consumers to behave in a way that is damaging or dangerous to their health or safety.

17. However, it should be noted that "puffing advertising" – the use of exaggerated expressions, such as "the best taste", "the most beautiful", "stunning" – is not considered abusive and nor does it compel the supplier to fulfill it, given the subjective (and not objective) nature of such expressions. On the other hand, former court decisions have ruled that puffing advertising will bind the supplier if associated to the idea of price – "the cheapest on the market", for example.

E-Commerce

18. E-Commerce operations in Brazil are regulated by Decree 7,962/13. The Decree's main objective is to establish rules aimed at protecting consumers who make online purchases. Among other provisions, it defines obligations and rights for both consumers and sellers operating in this sector, ensuring transparency in transactions and ensuring that consumers are properly informed about their rights and the conditions of online purchases. For example, the Decree also reinforces a seven-day period applicable in cases of distance selling during which the consumer can exercise a "right of regret" in accordance with the CDC.

19. Please note that general consumer protection and contract laws also apply to e-commerce operations.

20. State consumer laws at the regional level also play a significant

role in e-commerce operations. For instance, in Rio de Janeiro, sellers engaged in distance selling are required by State Law No. 3,669/2001 to disclose the specific date and time of delivery to consumers. Similarly, in São Paulo under State Law No. 13,747/2009, sellers must offer consumers the ability to select their preferred delivery time at no extra charge.

Penalties

21. Civil, administrative and criminal penalties may be imposed in case of non-compliance with Brazilian consumer law, as described below:

(i) Civil Penalties - Litigation

22. In the civil sphere, consumers may bring individual legal actions seeking indemnity from the supplier. Claims can be filed in the Small Claims Courts or in Civil Courts. Small Claims Courts have jurisdiction over less complex cases representing claims worth up to 40 minimum wages.

23. In Brazil, the Attorney General (Ministério Público), the Federal, State and Municipal consumer protection agencies as well as private associations for consumer protection, are entitled to bring class actions for breach of consumer laws, and they are indeed commonly filed.

24. All kinds of remedies are permitted in individual and collective litigation, the most common being injunctive relief, the imposition by the court of an obligation against the defendant, and monetary compensation. With respect to material damage, the general rule is that any damages award should correspond to the actual harm caused, which includes loss of profits. Brazilian Courts normally restrict awards to direct and immediate damages, therefore excluding indirect or consequential damages.

25. In the case of non-material damages, there is no specific economic loss that can serve as the basis for the indemnification amount. As a result, indemnification for non-material damages will operate as a financial compensation for the suffering experienced by a party. The Court will be

ultimately responsible for defining that the amount of compensation suitable in the particular circumstances. Unlike material damages, the criteria used to define the amount of non-material damages will be necessarily subjective. With the evolution of different Court precedents, certain parameters in terms of indemnification amounts have been created to be applied in specific situations. These parameters, although originally created through subjective analyses, serve as objective references for future cases. However, they may not act as a substitute for consideration of reasonableness by the Court on a case-by-case basis.

26. Also, punitive damages (i.e. awarding an additional indemnification to serve as punishment and to discourage similar actions in the future) are not permitted in Brazil and they have not been recognised as an autonomous category of damages. However, factors such as the economic status of the offender and a disincentive to repeat the violation in the future can be considered when setting awards, especially because in practice, the discretionary range afforded to the Court when it comes to non-material damages prevents an exact identification of different damages components. In any event, indemnifications in Brazil have not been set at substantially high levels compared to other jurisdictions that embrace the concept of punitive damages.

(ii) Administrative Penalties

27. In the administrative sphere, a supplier that fails to comply with consumer law may be subject to administrative penalties under article 56 of the CDC, regulated by Decree No. 2181/97:

"Article 56.

Violation of the consumer defense rules are cause, depending on the case, for the following administrative penalties, in addition to civil or criminal, penalties or others defined in specific regulations:

I. a fine;

II. confiscation of the product;

III. destruction of the product;

IV. annulment of the product's registration with the

competent agency;

V. a bar on manufacturing the product;

VI. suspending supplies of the product or service;

VII. temporary suspension of business activites;

VIII. revoking the usage permit or concession;

IX. revoking the license for the business or activity;

X. a total or partial shutdown of the establishment, project or activity;

XI. administrative intervention;

XII. imposition of counter advertising".

28. In accordance with article 57 of the CDC, fines will be always graded according to the seriousness of the violation, the advantage obtained and the supplier's financial status and will be set at an amount not less than BRL 900 (approx. US$ 164.00) and no greater than BRL 13 million (approx. US$ 2,3 million).

29. The criteria used to impose a fine, i.e. the severity of the violation, the advantage received and the supplier's financial situation, will also guide the imposition of the remaining administrative penalties pursuant to article 56 of the Consumer Defense Code, as described above.

30. Any penalty of an administrative nature can only be imposed by the competent administrative agency after an administrative proceeding has been concluded, wherein the defendant is assured of the right to a full defense. Additionally, any administrative decision is always open to review.

(iii) Criminal Penalties

31. The CDC also sets forth several crimes involving consumer relations, but the penalty of imprisonment is rarely imposed.

Over-indebtedness

32. Law 14,181 of 2021, also known as "Brazilian Over-Indebtedness Law", was published on July 1, 2021 and represented not only a significant improvement in terms of protection of the most

vulnerable consumers, it also modernised the Consumer Protection Code in line with international consumer protection policies.

33. Discussions for the law began in 2010, leading to Senate Bill 283/2013 on over-indebtedness and culminating in the publication of Law 14,181/21 in July 2021 amidst an economic crisis. The purpose of the law is to prevent Brazilian citizens' from progressively higher debt and help develop and recover the Brazilian economy, which was significantly impacted by the COVID-19 pandemic.
34. The key aspects of the law include defining over-indebtedness, protecting consumers from fraudulent debts, offering financial education, providing transparent information and responsible credit evaluation.

Chapter 19

Aviation

Air Services

Article 21, XII, 'c' of the Federal Constitution of Brazil states that regulation of commercial air navigation, use of airspace and operation of airport infrastructure, under concession, permit or authorisation, is incumbent on the Brazilian Civil Aviation Authority (Brazilian CAA), in Portuguese: Agência Nacional de Aviação Civil or "ANAC".

The Brazilian Aeronautical Code (CBA)[1] defines air services as economic activities of public interest subject to regulation by the civil aviation authority, in accordance with specific legislation. ANAC rules regulate scheduled and non-scheduled air services subject to the international agreements to which Brazil is a signatory.

Air services can be private or commercial (public). Private air services are those performed without remuneration for the benefit of the aircraft's operator, whereas commercial air services encompass specialised air services as well as commercial air transportation of passengers, cargo or mail, whether scheduled or not and operating domestically or internationally.

Those interested in operating scheduled or non-scheduled domestic and international flights in Brazil must submit a Certification Application to ANAC. Usually, airlines apply for certification to operate commercial air transportation services with aircraft having a certified maximum passenger seating configuration exceeding 19 seats, or a maximum payload capacity exceeding 3,400 kg, as per RBAC (Brazilian Civil Aviation Regulation) No. 121 and RBAC No. 119.

Following some guidelines from the International Civil Aviation Organisation (ICAO), the ANAC certification process under RBAC No. 121 is divided into 5 stages:

I. Preliminary Application.

II. Formal Application.

III. Document Evaluation.

IV. Demonstrations and Inspections.

V. Certification.

Moreover, domestic commercial transportation is defined as transportation where the starting, intermediate and destination points are located within national territory. International commercial transportation involves the movement of goods or passengers between different countries.

Scheduled and non-scheduled commercial air services are conducted under authorisation from ANAC, granted to companies that have head offices and management teams based in Brazil.

Airlines are usually certified with ANAC under RBAC No. 121 provided operations involve mainly scheduled flights. Generally, these companies are organised as corporations (*sociedade anônima*).

Air taxis and air charter services are typically operated by companies certified with ANAC under RBAC No. 135 if they operate small and medium aircraft with up to 19 seats. Here, the regulatory requirements are lower than those established by RBAC No. 121.

Companies interested in ANAC certification under RBAC No. 135 will be classified into one of these three groups, according

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1. Law 7,565, dated December 19, 1986.

to their intention to operate, and classification will determine the operating requirements:

- Group I: Maximum fleet of 3 aircraft of the same family, with conventional engines and configuration for up to 9 passengers, limited to domestic and on-demand operation;
- Group II: Maximum fleet of 10 aircraft from up to 3 different families in the same category, with configurations for up to 19 passengers, and limited to domestic and on-demand operations; and
- Group III: Other cases.

Before formally initiating an airline certification process, a company must present their operational plans and the air transport service they intend to operate to ANAC. This is done in order to receive guidance, explanations, and/or clarification on any issues that may arise during the certification process under RBAC No. 121 or RBAC No. 135. In this case, the applicant must request the scheduling of a Preliminary Orientation Meeting (POM).

Foreign Carriers

In order to operate international air services to or from Brazil, a foreign company must first be designated by the Government of its own country and then obtain an operating permit from ANAC in accordance with the agency's regulations. There is no need for the prior set-up license referred to in art. 1,134 of Law No. 10,406/2002 (Brazilian Civil Code). Foreign airlines planning to operate scheduled flights should open a local branch in Brazil. Any application for registering a foreign company with the Commercial Registry must comply with the provisions set out by an act of the National Department of Business Registration and Integration (DREI). [Article 205 (head and §2) of CBA].

ANAC has published some regulations in the recent years relaxing and simplifying the authorisation process for foreign airlines, such as Resolutions No. 692/2022, 694/2022 and Ordinance No. 9,715/2022. Since then, operating specifications are no longer approved by ANAC, for example.

The estimated time needed for granting authorisation to operate scheduled flights, which used to be more than 200 days and include issuance of a local AOC, has been reduced to approximately 30 days from the date all necessary documents are filed by the applicant. Nowadays, authorisation is granted by ANAC by merely recognizing the foreign AOC and checking certain documents.

Authorisation for scheduled and non-scheduled operations does not entitle a foreign airline to fly between points in Brazil, which is called "cabotage". However, recent parliamentary discussions aim some flexibilization on this prohibition. For example, the Brazilian Federal Senate recently approved Bill No. 4.715/2023, which amends the CBA (Brazilian Aeronautical Code) to allow cabotage with origin or destination in the Brazilian Legal Amazon - an area that covers 59% of Brazil's territory and encompasses 9 states -, by foreign airline companies, permitting the use of foreign crew on these flights. The bill is currently under review at the House of Representatives. Once approved, it will be sent for presidential sanctioning. If the bill is passed and signed into law, it will a great business opportunity for foreign companies in Brazil.

OBTAINING AUTHORISATION TO OPERATE SCHEDULED FLIGHTS

An application to obtain authorisation to conduct scheduled operations involves submission of some mandatory documentation, such as:

- an application addressed to ANAC and the foreign company registration form;
- a copy of applicant's corporate documentation duly registered with the Commercial Registry in Brazil;
- Air Operator Certificate (AOC) and Operations Specifications issued by the airline's country of origin;
- legal representation documents;
- information on aircraft (list of aircraft registrations and insurance certificates);
- operational plan for flights to/from Brazil;

- information on handling service providers;
- information on maintenance services;
- General Operations Manual (if applicable, requirement waivers issued to the airline);
- AVSEC professional registration form; and
- company registration in the FGTS (Employee Layoff Fund) system.

Moreover, depending on the case, information on aircraft covered by an agreement under article 83 bis of the Convention on International Civil Aviation and information on aircraft under interchange agreements may be required.

The airline should also obtain the necessary slots for flight operations, providing the required information to the respective airport operators. All scheduled flights must be registered in the ANAC's Operations Registration System (SIROS). Flights must be also registered with DECEA (Brazilian Department of Airspace Control).

There are some minor regulatory requirements and actions the airline should take in order to start operations in Brazil.

OBTAINING AUTHORISATION TO OPERATE NON-SCHEDULED FLIGHTS

ANAC's authorisation for non-scheduled operations applies to companies wishing to operate up to 4 (four) monthly flights for up to 9 (nine) months or up to 15 (fifteen) monthly flights for up to 3 (three) months, in every 12 (twelve) month period. Companies wishing to exceed these limits must apply for authorisation for scheduled operations.

ANAC authorisation to conduct non-scheduled operations also requires certain documents:

- an application addressed to ANAC and foreign company registration form;
- Air Operator Certificate (AOC) and Operations Specifications issued by the airline's country of origin;
- legal representation documents; and

- information on aircraft (list of aircraft registrations and insurance certificates).

As above, information on aircraft covered by an agreement under article 83 bis of the Convention on International Civil Aviation and information on aircraft under interchange agreements may be required.

DURATION OF ANAC'S ASSESSMENT

If there is total compliance with all regulatory requirements, authorisation will be issued by ANAC after it concludes a review that usually takes up to thirty (30) days for scheduled operations and ten (10) days for non-scheduled operations.

The Brazilian Aeronautical Registry

The Brazilian Aeronautical Registry (the *Registro Aeronáutico Brasileiro* or "RAB") is the Brazilian aircraft register. The registration of aircraft is regulated by Chapter V of the Brazilian Aeronautical Code. The RAB is maintained by ANAC. Its primary functions include:

I. Issuance of certificates of registration, airworthiness, and nationality.

II. Recognition of domain acquisition through transfers and real rights related to enjoyment and guarantee, under the provisions of CBA.

III. Ensuring the authenticity, integrity, and preservation of registered and archived documents.

IV. Annotation of uses and aeronautical practices compliant with law and public order, along with general registration as specified by the civil aviation authority regulations.

V. Initial registration of aircraft upon their first entry into the country.

VI. Assignment of nationality marks and identifying registration marks to aircraft.

VII. Registration of aircraft documents pertaining to: a) domain; b) other real rights; c) abandonment; d) loss; e) extinction;

and f) essential alterations.

Registration grants Brazilian nationality to the aircraft and replaces any prior registration. Registration services are initiated upon request by the applicant, involving submission of required documentation and payment of corresponding fees stipulated by ANAC's regulations.

This legal framework provides a comprehensive structure for aircraft registration in Brazil, ensuring compliance with Brazilian law and international standards.

Effects of Registering Aircraft with the RAB

The registration of aircraft with the RAB grants Brazilian nationality to the aircraft[2]. Aircraft can only be registered with the RAB in the name of Brazilian individuals, foreign individuals domiciled in Brazil or legal entities operating in Brazil. Should the owner of the aircraft be a foreign entity, either an authorisation decree to operate in Brazil needs to be obtained[3], or provisional registration of the aircraft can be requested with the consent of the foreign owner provided the user or lessee of the aircraft satisfies the Brazilian citizenship or residence criteria mentioned above. According to the Brazilian Aeronautical Code, registering title to the Aircraft with the RAB is one means of acquiring ownership of an aircraft.

Provisional Registration of a Foreign Aircraft with the RAB

The Brazilian Aeronautical Code allows provisional registration of an aircraft in the event it is made in the name of the operator, user, lessee, future buyer or anyone who, although not the owner of the aircraft, has the express consent of the owner to use the aircraft. In this case, registration must also identify the owner of the aircraft.

Deregistering Aircraft from the RAB

The Brazilian nationality and registration marks will be cancelled upon deregistration of an aircraft. The express written

consent of the beneficiary of any liens or encumbrance on an aircraft will be required for deregistration.

By means of Decree No. 8,008, dated May 15, 2013, Brazil implemented the CTC, which is regulated by ANAC´s Resolution No. 309. Due to the implementation of the CTC, deregistration may occur upon request of a creditor in cases where an Irrevocable Deregistration and Export Request Authorisation ("IDERA") has been filed with the RAB.

Deregistration may also be carried out by judicial decision, or on an ex officio basis in cases where an aircraft has been registered in another country.

Aircraft Agreements

Charter Agreement

The Brazilian Aeronautical Code defines a charter as an agreement by which one of the parties, the registered operator of the aircraft, undertakes before the other party, the so-called charterer to carry out one or more pre-established flights, or for a certain period of time, in exchange for payment with the registered operator maintaining control over the crew and technical operation of the aircraft at all times.

The charter may be executed by private agreement or public deed - registration with the RAB is optional.

The registered operator is obliged to:

- put the duly equipped and airworthy aircraft and a crew at the disposal of the charterer, together with all necessary documents;
- provide the agreed flights or maintain the aircraft at the disposal of the charterer during the agreed period.

The charterer is obliged to:

2. Ibid. arts 108 and 109.
3. Brazilian Aeronautical Homologation Rules - NSMA (Norma de Serviço do Ministério da Aeronáutica) 58-47. Chapter 47-85(4).

- limit use of the aircraft to the purpose specified in the agreement and in accordance with the conditions thereof;
- pay freight in accordance with the terms, place and conditions agreed upon.

Operating Lease Agreement or 'Dry Lease' Agreement

The Brazilian Aeronautical Code defines an operating lease as an agreement by which one of the parties undertakes to grant the other the use, for a determined period of time, of an aircraft or its engines, for a certain sum in remuneration.

Under Article 128 of CBA, the operating lease agreement must be executed by private agreement or public deed and registered with the RAB.

The lessor is obliged to:

- deliver the aircraft or the engine to the lessee, at the agreed time and place, with the documentation required for flight operation, in proper condition for its intended use. Unless otherwise provided in the lease, the lessor shall be responsible for maintaining the aircraft in such condition during the term of the lease;
- assure the lessee regular enjoyment of the aircraft or the engines during the lease term.

The lessee is obliged to do the following:

- use the leased aircraft for the agreed purpose and to care for it as if it were its own;
- pay the lease sum punctually in accordance with the terms, place and conditions agreed upon; and,
- return the aircraft or the engine to the lessor in the same condition in which it was received, except for wear and tear resulting from normal use.

An operating lease or sublease can only be assigned by written document with the express consent of the lessor and it must be registered with the RAB.

If the operating lease or sublease is not registered with the

RAB, the lessor, the lessee and the sub-lessee will be jointly and severally responsible for any losses or damage caused by the aircraft.

In the case of operating leases, foreign aircraft may be brought into Brazil under the temporary admission regime, subject to payment of import taxes and duties proportional to the length of the stay of the aircraft in Brazil.

International operating leases are subject to the approval from the Central Bank of Brazil in order to allow remittance of lease payments abroad.

Financial Lease Agreement

In accordance with Brazilian Leasing Law, a financial lease is an agreement between the lessor and the lessee to lease assets purchased by the lessor as per specifications set forth by the lessee[4].

The Brazilian Aeronautical Code provides that financial lease agreements may be executed by private agreement or public deed and must include the following provisions:

- descriptions of the aircraft and its respective value;
- term of the agreement, amount of each periodic instalment (or the criterion for its calculation), date and place of payment;
- clause establishing the purchase option or the renewal term, as a right of the lessee;
- indication of the place where the aircraft shall be registered during the term of the lease;
- in the case of imported aircraft, the consent of the lessor to register it with the RAB.

Besides these express provisions from the Brazilian Aeronautical Code, the Brazilian Leasing Law imposes certain additional requirements. The most relevant requirements concerning international leases are:

- reasonableness of the lease payments;

4. Law No. 6,099, dated September 12, 1974, as amended.

- criteria for determining the useful life of the goods being leased;
- compatibility between the term of the lease and the useful life of the goods;
- consistency between the international market price of the goods and the total cost of the lease;
- no affiliation or interdependence between the foreign lessor and the Brazilian lessee.

Foreign aircraft leased in Brazil are subject to the country's importation rules. Like cross border operating leases, international financial leases are must also be approved by the Central Bank of Brazil.

Conditional Sale Agreement

Although not specifically mentioned in the Brazilian Aeronautical Code, Conditional Sale Agreements are also a very common structure used in aircraft transactions. In such cases the seller retains title to the aircraft until all payments specified in the document have been settled.

Aircraft Mortgages

The Brazilian Aeronautical Code provides for two types of mortgages on aircraft:

- statutory mortgage; and
- contractual mortgage.

Statutory Mortgage

In accordance with the Brazilian Aeronautical Code, a statutory mortgage will be instituted on an aircraft in favour of the Brazilian State itself whenever the purchase of the aircraft (or parts of it) abroad is in any way guaranteed by the National Treasury. Registration of this type of mortgage will be made ex officio with the RAB.

Contractual Mortgage

Brazilian law recognises contractual mortgages, which are based on the mutual consent of both parties. Such mortgages can be made by public deed in Brazil (or registered with the Brazilian consul overseas) or by private or public agreement in accordance with the laws of the foreign country in which the aircraft is registered. In this case, the instrument must be notarised and/or apostilled or consularised, as the case may be, at the nearest Brazilian Consulate in the jurisdiction where the agreement is signed and later translated into Portuguese by a Brazilian sworn translator.

The aircraft, even one under construction, including any engines, parts and accessories, may be the object of a contractual mortgage. Only the owner of an aircraft is entitled to grant a mortgage on it. When it is owned by more than one person, the express consent of all co-owners is required.

Aircraft mortgages must be registered with the RAB to be considered duly constituted under Brazilian Law. The Aircraft Certificate of Registration will be amended to reflect the mortgage.

The Brazilian Aeronautical Code provides that the mortgage must contain the following details:

- the name and domicile of the contracting parties;
- the principal amount of the mortgage debt together with the applicable interest rate thereon, as well as any other charges;
- the date and place of payment;
- the nationality and registration marks of the aircraft together with the serial numbers of any components (such as the engines);
- the insurance certificate/policy with respect to the aircraft.

The mortgage may contain the usual covenants on the part of the mortgage or in relation to the aircraft providing they do not offend legal concepts of public policy. Covenants which have the intent or effect of attempting to convey title to the mortgagee (except in the case of the statutory mortgage) will, however, be null and void.

The Brazilian Aeronautical Code also typifies chattel mortgages (*alienação fiduciária*).

As with other mortgages, a chattel mortgage must be formally constituted by means of a written instrument, executed by the parties and two witnesses and registered with the RAB. Once concluded, fiduciary ownership of the aircraft is transferred to the creditor and returns to the debtor/owner upon fulfilment of the secured obligations.

Unlike other mortgages, which normally have to be enforced via the courts, chattel mortgages are subject to out-of-court enforcement. Also, in an insolvency, claims secured by mortgages are subject to any recovery plan, while claims secured by chattel mortgages are considered *extraconcursais* and are not subject to the effects of insolvency, including stay periods and enforcement of rights.

Foreign Registered Mortgage

Brazil has ratified the 1948 Geneva Convention. In accordance with Article I of such Convention, Brazil will recognise a foreign mortgage as being valid if:

- the mortgage was duly created according to the law of the Contracting State in which the mortgaged aircraft was registered; and
- the mortgage is duly registered in the public register of the Contracting State wherein the aircraft is registered.

Where the foreign mortgage is that of a State which is not a party to the Geneva Convention, a Brazilian court will determine its validity on the basis of the law of the country where the aircraft is registered (*lex registri*).

Mortgage and Chattel Mortgage registered in Brazil

The Brazilian Aeronautical Code provides that in rem rights on an aircraft will be determined by the law of the aircraft's nationality. It also provides that an aircraft will be considered to have the nationality of the State in which it is registered. Thus, a mortgage or a chattel mortgage on a Brazilian registered aircraft will be governed by Brazilian law. However, the capacity of the contracting parties to enter into the mortgage will be governed by the law of their domicile.

Formalities

Documents drafted in a language other than Portuguese must be translated into Portuguese by a sworn translator before being filed with the RAB. If executed abroad, as a rule, the document must be notarised and legalised at the nearest Brazilian Consulate or apostilled, as the case may be, in the jurisdiction of execution.

Brazil enacted Decree No. 8,660, dated January 29, 2016, in order to become a signatory to the Hague Apostille Convention ("Apostille Convention"). Due to the implementation of the Apostille Convention, legalisation at the consulate is not mandatory if the document was executed in a signatory country, in which case only notarisation and apostille being necessary.

Repossession and Foreclosure

In Brazil, aircraft lease agreements are governed by specific laws, including the rules in CBA and civil aviation regulations. These provisions detail the rights and procedures on repossession and foreclosure if lessees default on their lease obligations.

In the event of default by the airline or operator (lessee), the owner of the aircraft (lessor) must follow specific procedures stipulated in lease agreement and Brazilian law. This typically involves issuing a notice of default to the lessee, outlining the breach of contract and providing an opportunity to remedy the situation within a specified timeframe.

Repossession

In the event of default under the lease, the lessor may commence a repossession claim ("*ação de reintegração de posse*") against the lessee.

In order to comply with the requirements under Brazilian law for such a claim, the lessor must serve the lessee with an extrajudicial notice delivered by an officer of a Registry of Titles and Documents from the city where the lessee is located, notifying them that an event of default has occurred and is continuing under the terms of the lease, and demanding that the lessee remedy the event

of default or the lease will be considered automatically terminated in accordance with the specific provision to that effect included therein ("*cláusula resolutória expressa*").

If the lessee does not remedy the default, a repossession claim will then be presented to the court based on the fact termination of the lease has now made continued possession of the aircraft by lessee unlawful. If the judge is satisfied with the documentation presented with the initial claim, s/he may grant provisional repossession of the aircraft to the lessor, without hearing the lessee.

In the event the judge is not satisfied with the documentation presented with the initial claim, s/he will request the lessor justify its allegations and summon the lessee for a hearing where these justifications will be presented. If the judge is satisfied with the justification, s/he will issue an order for provisional repossession.

Whether or not the provisional repossession is granted, the claim will proceed in accordance with the ordinary rite described in the Code of Civil Procedure until a final decision by the court.

Foreclosure

Mortgages and chattel mortgages are regarded as extra-judicial enforceable titles (*título executivo extra judicial*). Such a title is enforceable through an enforcement action (*ação de execução*).

The enforcement action will commence with attachment of the aircraft and its subsequent sale. Where the aircraft is attached by the mortgagee or otherwise detained, this will be noted with the RAB. In the case of aircraft engaged in a regular commercial transportation route, the judge may determine that the attachment should be made without interruption of the service.

In this type of procedure, the mortgagor is granted three (3) days to pay the debt or to offer property for attachment covering the amount of the debt. Once this period has elapsed without the mortgagor having paid, the court will order attachment of the mortgaged aircraft.

The mortgagor will have the right to file for a stay of execution (*embargos*). The enforcement will be suspended until the court decides on the defence arguments presented by the mortgagor.

If the court rules against the mortgagor, it will order a valuation and sale of the aircraft at a public auction.

At the first auction, the minimum bid cannot be less than the valuation and the aircraft will be sold to the party who makes the highest bid.

Should there be no bidders, the enforcing mortgagee is entitled to adjudication of the aircraft during the auction as payment for the mortgage debt in the amount of the valuation.

Should the mortgagee be able to prove there is an imminent risk of it not being able to recover the mortgage debt after an event of default by the mortgagor, it may file a petition for writ of prevention. This is an interim judicial measure to protect a creditor from imminent risks (such as loss of aircraft by reason of the mortgagor taking it out of the jurisdiction) and other abuses.

Hence, understanding the procedures and legal framework governing repossession and foreclosure in aircraft lease agreements is crucial for airline operations.

Air Transport Contract and Consumer Rights

In Brazil, air transport contracts are also governed by the CBA and ANAC regulations, ensuring that both passengers and airlines are cognizant of their specific rights and responsibilities.

TICKETING AND TERMS OF CONTRACT

Airlines must provide clear and transparent information about ticket pricing, including all fees and taxes. Air transport contracts include terms regarding baggage allowances, flight schedules, and conditions under which tickets may be exchanged or refunded.

Based on Resolution No. 400 and Brazilian Consumer Defence Code (CDC), it is important to note some passenger rights, such as:

- right to information: passengers have the right to clear and accessible information about their flight, including delays, cancellations, and schedule changes;
- clarity and transparency: airlines must provide clear and

accurate information regarding services offered and terms of the contract;

- fair treatment: passengers are entitled to fair treatment and protection from abusive airline practices;
- right to refund: passengers have the right to request a refund for unused tickets under certain conditions outlined by ANAC;
- right to compensation: in cases of flight cancellations, delays, or when denied boarding, passengers may be entitled to compensation or assistance according to ANAC regulations; and
- right to compensation: passengers have the right to seek compensation for damages resulting from the airline's actions or negligence.

Airlines are responsible for ensuring safety and comfort for passengers throughout their journey. They must adhere to schedules and provide reasonable assistance and compensation in case of disruptions.

In lawsuits brought by passengers against airlines, damages cannot be presumed as a consequence of a mere delay or cancellation of a flight, which, although they constitute fortuitous circumstances, are often caused by force majeure, so the passenger must prove any damages suffered. The Brazilian High Court of Justice ("*Superior Tribunal de Justiça*"), recently deciding an appeal on a lower state court decision issued in a consumer lawsuit against an airline for delays due to mechanical problems, held that "*[…] the effective production of the non-contractual damage (non-material damage) suffered has not been accredited, a circumstance that excludes the claim for compensation because, according to this Court, non-pecuniary damage is not presumed as a consequence of a mere delay or cancellation of a flight, which, although they constitute fortuitous circumstances, are often caused by force majeure […]*".

CONSUMER ASSISTANCE IN CASE OF FLIGHT DISRUPTIONS

Airlines have a clear obligation to inform passengers promptly and comprehensively about any flight disruption - such as cancellation, delay, or overbooking -, and to provide suitable

alternatives in cases of significant inconvenience.

Article 20 of ANAC's Resolution No. 400 of 2016 ("Resolution No. 400") imposes specific duties on airlines concerning how they communicate flight delays, cancellations and interruptions to passengers. The key provisions are as follows:

- **Immediate Communication:** airline must promptly inform passengers through available communication channels of flight delays when deviating from the originally contracted schedule, specifying the revised and estimated departure time; and of any flight cancellations or service interruptions.
- **Frequency of Updates:** when flights are delayed, the airline must update passengers at least every 30 minutes providing the latest estimated departure time.
- **Written Information:** upon request by a passenger, airlines must provide written information regarding the reasons for the delay, cancellation, interruption of service, or denial of boarding.

Article 21 of Resolution No. 400 outlines the passengers' rights in cases of significant flight disruptions, such as delays exceeding four hours, flight cancellations, interruptions, or passenger denial of boarding. The airline is required to offer the following alternatives:

- Providing alternative flight options for rebooking.
- Offering reimbursement of the ticket price.
- Providing carriage by another mode of transportation.

These alternatives must be immediately offered to passengers when the airline has prior knowledge that a flight delay will exceed four hours from the originally contracted schedule, as provided by Article 21(sole §).

In cases of "flight delay", "flight cancellation" or "denial of boarding", airline must provide "material assistance" to passengers under Article 26, Resolution No. 400, which includes meeting the passenger's needs and such assistance must be provided free of charge by airlines based on the waiting time, even if passengers are on board the aircraft with the doors open, in line with Article 27 of this resolution:

- More than 1 (one) hour: communication facilities;

- More than 2 (two) hours: food, according to the schedule, by offering a meal or an individual voucher (for use in restaurants); and
- More than 4 (four) hours: accommodation, in case of overnight stay, and roundtrip transfers.

Under Article 27 (§§1, 2) of Resolution No. 400, airlines may discontinue accommodation service for passengers residing near the departure airport, but provide round trip transfers. For Passengers with Special Needs (PNAE) and their companions, in accordance with Resolution No. 280 of 2013, assistance must be provided regardless of the requirement for an overnight stay, unless it can be replaced by accommodation at a place that meets their needs and subject to obtaining the passenger's or companion's agreement.

Furthermore, under Article 27 (§3) of the same resolution, airlines may discontinue "material assistance" when a passenger chooses rebooking on another flight of its own, which must be taken at the date and time agreed upon by the passenger, or provide a full refund of the air ticket.

PROVIDING A SEAT ON ANOTHER FLIGHT

When applicable under Brazilian law, if an airline provides alternative flight options for rebooking, it must do so free of charge, not invalidate previously signed carriage contracts, and take priority over the signing of new carriage contracts. The passenger will choose whether: I - to take one of the airline's flights or another airline's flight to the same destination, as soon as possible; or II - an airline flight to be taken at a date and time convenient for the passenger. (Article 28)

Passengers with special needs (PNAE) under Resolution No. 280 will have priority in rebooking.

BRAZILIAN CONSUMER DEFENCE CODE (CDC) AND CASE LAW ON OVERBOOKING

In Brazil, a passenger is considered a consumer and, as such, enjoys all guarantees derived from the Brazilian Consumer Defence

Code (CDC), which establishes the basic right of the consumer to receive adequate, efficient, safe, and continuous air transport services. In Brazil, air services are considered an economic activity of public interest.

ANAC's regulatory framework used to be aligned with international conventions on civil aviation and ICAO standards and best practices, including the Montreal Convention and Chicago Convention.

The Montreal Convention (1999) applies in many situations including delays, cancellations, overbooking, injury caused as a result of a flight, and loss and damage to luggage.

Under ANAC Resolution No. 400, passengers are entitled to claim non-material damages from overbooking, alongside the 500 SDR (Special Drawing Rights) compensation provided for international flights. This right applies even if airline has reimbursed or reaccommodated the passenger on another flight. Brazilian courts understand that the practice of overbooking is unlawful and subject to claims for non-material damages, in which case the passenger is not required to prove emotional distress. Passengers may also claim for material damages.

Courts take the view overbooking causes inconvenience beyond mere delays. By failing to provide the service, passengers may have suffered non-material damages such as missing appointments or experiencing embarrassment and stress. Thus, in cases of overbooking, airlines usually prioritise voluntary passenger re-accommodation on another flight or negotiated compensations.

Thus, air transport contracts and consumer rights in Brazil are a delicate matter and should be addressed by airlines with proper legal advice from attorneys with experience in the civil aviation sector. It is imperative that all airline staff be familiarised with basic guidelines to ensure compliance and to ensure they provide excellent customer service. By understanding and adhering to the relevant guidelines, airlines can meet their commitments to customer satisfaction and regulatory compliance.

Chapter 20

Sports Law in Brazil

The emergence of Sports Law in Brazil

"Sports" and "Law" have long remained in opposite fields in Brazil, progressing as two completely separate matters.

Over time, however, sports has become a mass commercial phenomenon, furthering a substantial increase in economic interest related not only sports themselves, but also to marketing, licensing rights, athletes' transfers and other rapidly developing markets connected to its globalization. As such, all fields relating to sports have been increasingly subject to State laws governing matters inherent to sports professionalization, and to related litigations. This transformation, from a legal perspective, has driven the emergence of Sports Law in Brazil.

The Brazilian Sports Law landscape

Today's world of sports has become increasingly professional, competitive, and corporate. The sports field has clearly become a

business that creates multiple legal relationships of great economic significance and social repercussion, which expands the definition of "sports business".

It is under the definition of "sport business" that the Brazilian legislators have introduced several new regulations.

Despite legislative precedents dating from as far back as 1941, such as Executive Law 3,199, which remained in force until it was superceded by Executive Law 6,251/75, Brazilian sports legislation only started to see any significant progress with publication of the 1988 Brazilian Federal Constitution, which was the first law to broach the subject. It stated that the Federal Government, the states and the Federal District are responsible for sports legislation.

This legal foundation also established that the judiciary will only accept lawsuits pertaining to discipline and competitions after all sports court instances have been exhausted, and that it is the duty of the State to encourage the practice of sports as an individual right, setting out:

- the autonomy of ruling sports associations as regards the structure and operation of their respective sports;
- the provision of public funding primarily to promote educational sports and, in specific cases, high-performance sports;
- differential treatment for professional and amateur sports; and,
- protections and incentives for Brazilian-created sporting activities.

Once Brazilian sports reached a constitutional level (1988), a new legislative cycle geared toward sports was initiated with Law No. 8,672/93 ("Zico's Law"). This law represented the first attempt to adapt Brazilian Law to the modern worldwide system for the development of sport. In this regard, it facilitated investment partnerships for sports, upheld autonomy and established legal procedures for sports courts.

This law remained in force until 1998, when Law No. 9,615 ("Pelé's Law") was published, during former soccer player Pelé's term as Brazil's Extraordinary Minister for Sports.

Law No. 9,615/98 is currently the general law for Brazilian

sports, supplemented by the Brazilian Consolidation of Labor Laws (CLT) for labor issues and the Brazilian Civil Code (CC/2002) for civil issues, among other pieces of legislation. Pelé's Law absorbed and amended a large part of Zico's Law, while also providing relevant innovations in Brazilian legislation. This law was regulated by Decree No. 2,574/98.

Pelé's Law revolutionized the relationship between sports organizations and professional athletes in Brazil by establishing that an athlete's sporting link to a sporting organization is accessory to the employment relationship between these parties. This replaced the former "*passe*" system, where an athlete would remain bound to a sporting entity even after their employment contract was terminated and brought Brazil up to par with modern standards for the athlete transfer market. This law also identified basic sporting principles; defined the nature and purpose of sports; introduced the Brazilian system of sports; ruled upon professional sporting practices; set standards for transparency and compliance in administration of sporting entities; regulated sports courts; established rules for the public funding of sports; and created other rules for sports in general.

In recent years, Law No. 9,615/98 has undergone several amendments. These are among the most important:

- Law No. 9,981/00 re-established the option for clubs to become companies (subsequently reformed by Law No. 12,395/11).
- Provisional Measure 2,141/00 (subsequently renumbered 2,193 and repealed by Law No. 10,672/03) amended flaws in Law No. 9,615/98.
- Law No. 10,264/01("Piva's Law"), together with Decree No. 7,984/13, provided funds for Olympic and Paralympic sports.
- Law No. 10,672/03, known as the "professional sports accountability law".
- Law No. 12.395/11 provided changes regarding the transfer of athletes, including the training sports entities' right of first refusal to renew an athlete's first professional employment contract; established new rules to govern licensing of athletes' image rights and arena rights; among other changes.
- Law No. 13,155/15, the latest law to bring major changes to

PelÈ's Law, created important transparency standards and compliance mechanisms applicable to sporting entities (including "Profut" and "APFUT"), and further amended the rules that govern licensing of an athlete's image rights.

Over the last years, considerable innovations have been adopted in Brazilian Sports Law to resolve certain deficiencies and bring the legislation into line with international sports law. Among these innovations is Law No. 14,193 ("*Sociedade Anônima de Futebol*" – "SAF"), which allows football clubs to become corporations.

This aims to modernize and professionalize corporate management in Brazilian football. The SAF Law was created to guarantee legal security for investors, meet market demands for raising funds, establish a favorable tax regime and provide opportunities for restructuring club debts.

Nearly 30 years after publication of Pelé's Law, a new general sports law – Law No. 14,597/2023 ("*Lei Geral dos Esportes*"- "LGE") – was enacted to consolidate sports regulation in Brazil. The LGE instituted the National Sports System (Sinesp), aiming to collaborate in the creation and improvement of public sports-related policies. One important matter addressed by the law are broadcasting and image rights. The LGE consolidated the position already set out in the Pelé Law that the right to exploit and commercialize images belongs to the sporting organizations hosting the games.

The LGE also maintains the compensation cap on athletes' image rights. It is of the utmost importance to emphasize that image rights are an extremely significant matter, given that clubs exploit their players' image to promote events, run advertising campaigns, promote championships, etc. The LGE establishes that sports organizations cannot pay an athlete an amount exceeding 50% of the compensation specified in their employment agreement.

Another innovation that significantly impacted the Brazilian sports scene was approval of Law No. 14,790/2023, which authorized fixed-odds betting on sports events and online games. These sports betting activities must be carried out in a competitive environment, subject to prior authorization by the Ministry of Finance.

Evidently, in a short amount of time, Brazilian Sports Law became a full body of legislation. In this regard, other noteworthy laws include:

- Law No. 8,650/93, which creates rules governing a professional football coach's employment;
- Law No. 10,220/01, which raised the status of a rodeo rider to that of professional athlete;
- Law No. 10,671/03, which, alongsideDecree No. 6,795/09, instituted the Supporter's Defense Statute, which provide rules on specific consumer rights relating to fans;
- Resolution No. 01, dated December 23, 2003, which approved the Brazilian Sports Law Code, which applies to all sporting competitions held after its publication;
- Law 10,891/04, which, together with Decree No. 5,342/05, provided athlete scholarships within the domestic sports scene, creating an incentive for athletes involved in Olympic and Paralympic Sports as well as non-professional athletes and underage athletes ;
- Decree 6,653/08, which incorporated the International Convention against Doping in Sports to Brazilian Law, and Decree 8,829/16, which created the Brazilian Doping Control Authority.

Furthermore, modern Brazilian Sports Law is also supplemented by regulations that did not come from the State, but were issued by international sporting federations (i.e. the Fédération Internationale de Football Association [FIFA]'s regulations) and Brazilian sports federations and leagues (i.e. the Brazilian Football Confederation [CBF]'s regulations and statutes), which have limited effect and apply only to those professionally registered with such entities. In later years, the case law drawn from the prior decisions pertaining to discipline and competitions from each Sports Court, such as the Brazilian Football Superior Court of Sports Justice, also became increasingly relevant for improvement of Brazilian Sports Law and the formal practice of all kinds of sports in Brazil.

Conclusion

According to recent estimates, the sports market in Brazil already represents almost 2% of the Brazilian Gross Domestic Product, a percentage that is likely to increase with every passing year. With

the financnial impact of local sports soaring, interest in all aspects of Brazilian Sports Law is set to continue to increase in the future, as will the complexity of legislation and jurisprudence in this area.

These new laws demonstrate legislative engagement in modernizing the Brazilian sports scene and aligning Brazilian sports law with international best practices, to thereby foster a more professional and sustainable sports management structure in Brazil, and ensure legal certainty and attract financing for sports development nationwide.

Betting Regulations

Introduction:
The legal treatment given to games of chance and skill

Historically, Brazilians have had a keen interest in gaming and betting. Following legalisation of gambling and games of chance in Brazil by President Getúlio Vargas, the country experienced a "Golden Age" of casinos. This period led to a surge in tourism, job opportunities and global interest in Brazil as a “must go” destination. Casinos provided entertainment with games such as roulette and blackjack, drawing in the Brazilian elite.

However, everything changed in 1946, when then-President Eurico Gaspar Dutra signed Decree-Law 9,215, which prohibited the practice or exploitation of games of chance and gambling nationwide. This decree resulted in the loss of thousands of jobs and had a severe economic impact, as the government forfeited a substantial source of revenue. Throughout the remainder of the 20th Century, the federal government endeavoured to legalise and regulate gaming and betting in Brazil, but these efforts were largely unsuccessful.

Only in the late 1990s, Law No. 9,615/98 legalised bingo machines and bingo parlours, which rapidly gained popularity. However, in December 2001, another law was passed prohibiting these activities, which are now considered a misdemeanour. Since then, Brazil's legal approach to games involving skill and chance has undergone significant changes.

In this regard, Federal Decree-Law No. 3,688/1941, known as the Criminal Contraventions (or Misdemeanour) Act, prohibits games of chance where outcomes depend primarily or solely on luck. With the advent of the digital age and widespread access to the internet, mobile phones and other online devices, internet gaming became extremely popular, especially in Brazil. This trend was observed not only by online gaming and casino operators but also served as the primary catalyst for the exponential growth of grey-market gambling.

Until recently, Brazilian law has treated games of skill and games of chance differently. Games of skill, where winning or losing depends predominantly on the player's skill rather than on random chance, are lawful and do not require a license. In contrast, games of chance, where the outcomes depend predominantly or exclusively on luck are prohibited under the above-mentioned Criminal Contraventions Act (Misdemeanour Act).

A major breakthrough in legalisation was achieved in 2018 with enactment of Law No. 13,756/2018, which legalised fixed odds sports betting as a form of lottery. Five years later, Law No. 14,790/2023 was enacted, further regulating fixed odds sports betting and legalised online games of chance, also as a form of lottery. Such federal legislation is being regulated by Ordinances issues by the Prizes and Betting Secretariat from the Ministry of Finance (SPA), which has acted as the Brazilian regulator.

Fixed odds sports betting and iGaming

Until recently, one of the few legal forms of authorized games in Brazil were State-run lotteries (at Federal, State and Municipal levels). Initially being a federal government monopoly, this changed in November 2020 following a Federal Supreme Court (STF) decision allowing States and Municipalities to run/operate their own lotteries.

In parallel, even before the enactment of Law No. 13,756/2018, a strong "grey market" involving the online provision of games of chance by offshore operators was in operation. The two main points of contention are: (i) whether the restriction on games

of chance and betting applies to licensed offshore online operators located in jurisdictions where gaming and betting is legal; and (ii) to what extent it could be argued that the infraction is, at least partially, practised in Brazil, thereby resulting in the application of Brazilian law to offshore operators.

In general terms, since the Criminal Contraventions Act would only apply to wrongdoing committed on Brazilian territory, the lack of extraterritorial application would allow the provision of such gaming and betting services to the Brazilian market until licenses are made available locally. This scenario has now changed, with the cut-off date set as 31st December 2024. Since 1st January 2025, unlicensed offshore online operators will be considered to be operating a black market and are subject to advertising and payment restrictions.

The Ministry of Finance released Normative Ordinance No. 1,330/2023, providing general conditions for operation of fixed-odds sports betting in Brazil. This ordinance enabled operators interested in applying for a license for fixed-odds sports and/or online gaming (when available) to submit Prior Expressions of Interest. As a result, 134 (one hundred and thirty-four) companies submitted their Expressions of Interest to apply for such a license. In early 2024, these operators have proceeded to a subsequent testing phase.

This Testing Phase was to be conducted by SIGAP, a governmental department linked to the Ministry of Finance, focusing on technological solutions aiming to facilitate regulation, monitoring and inspection of the betting market in Brazil. This phase was set up to test the system being developed to communicate with future licensed operators' platforms for transmission of bettors' and bets' data.

At the very end of 2023, Law No. 14,790/2023 was enacted, outlining the general conditions for operation of fixed-odds lotteries in Brazilian, including sports betting and online gaming. The Law provides the framework necessary for betting operators to incorporate companies in Brazil. However, the details of the licensing process were to be established in several Normative Ordinances (Portarias) to be issued by the Ministry of Finance.

To this end, the Ministry of Finance created the SPA to regulate and monitor bets, bettors, operators and the gambling operations in general. The SPA is responsible for issuing the

Normative Ordinances regulating the various aspects of the operation and, initially, for licensing betting and gaming operators, for which the Ministry of Sport must also provide its consent.

The Ordinances started to be published in February 2024, and so far, the following have been released:

- **Normative Ordinance No. 300/2024** – Provides requirements for accrediting the operational capabilities of betting system certification entities. Laboratories already certified are:
  - Gaming Laboratories International LLC;
  - eCogra Limited;
  - BMM Spain Testlabs;
  - Gaming Associates Europe Ltd;
  - Quinel Limited; and
  - Trisgma B.V.
- **Normative Ordinance No. 561/2024** – Creates the Regulatory Policy of the Prizes and Betting Secretariat of the Ministry of Finance and the Regulatory Agenda for 2024.
- **Normative Ordinance No. 615/2024** - Sets out general rules for payment transactions conducted by operators authorized to operate fixed-odds lotteries nationwide.
- **Normative Ordinance No. 722/2024** - Provides technical and security requirements for betting systems, as well as sports betting and online games platforms, to be employed by operators of fixed-odd betting lotteries.
- **Normative Ordinance No. 827/2024** – Establishes rules and conditions for obtaining a license for the commercial operation in Brazil of afixed odds lottery by private economic operators. Some of the most relevant information in this ordinance includes:
  - The Ordinance requires the operator to have a minimum share capital of BRL30 million, and to maintain a minimum net worth of the same amount and a financial reserve of BRL5 million;
  - Applicants must be Brazilian companies, with at least 20% Brazilian ownership/participation and list "Operation of Fixed Betting Systems" as their main activity and use

CNAE 9200-3/99.

- Foreign operators can satisfy this requirement by establishing a local two-tier corporate structure, first incorporating a local holding company held 100% by the foreign operator and the holding company incorporating a wholly owned subsidiary to act as the operator applying for the license.

- In order for operators to obtain their license by the end of 2024, the application must be submitted by 20th August 2024. Operators without a license by 31st December 2024 will be classified as operating on the black market as of 1st January 2025.

- **Normative Ordinance No. 1,143/2024 –** Provides for internal policies, procedures and controls for the prevention of money laundering, terrorism financing, and the proliferation of weapons of mass destruction.
- **Normative Ordinance No. 1,207/2024 –** Establishes technical requirements for the operation and certification of online games and live game studios.
- **Normative Ordinance No. 1,212/2024 –** Establishes procedures for the payment of social allocations provided for Law No. 13,756/2018.
- **Normative Ordinance No. 1,225/2024 –** Regulates the monitoring and supervision of activities related to the operation of the fixed-odds betting lottery modality and the betting operating agents.
- **Normative Ordinance No. 1,231/2024 –** Establishes rules and guidelines for responsible gambling and for communication and marketing actions, and regulates the rights and duties of bettors and operating agents.
- **Normative Ordinance No. 1,233/2024 –** Regulates the sanctioning regime within the scope of the commercial operation of the fixed-odds betting lottery modality.
- **Normative Ordinance No. 1,475/2024 –** Establishes the conditions under which a company may participate in the transition period of the fixed-odds betting regulation and sets forth the rules for the cessation of operations of companies that

do not meet these conditions.

- **Normative Instruction No. 11/2024** – Regulates the registration of the domain ".bet.br" for use in electronic channels provided by authorised operators of the fixed-odds lottery betting modality.
- **Normative Ordinance No. 1,857/2024** – Regulates the transfer of data and funds from fixed-odds bettors between legal entities belonging to the same economic group, in preparation for the launch of the regulated market.
- **Normative Instruction No. 4/2024** – Provides for the application for authorisation to use the Financial Activities Control System (Siscoaf) by operating agents authorised to explore the fixed-odds lottery betting modality.
- **Normative Ordinance No. 2,104/2024** – Grants provisional authorisation for the commercial operation of fixed-odds betting and regulates deadlines related to technical certification and the submission of information or documents.
- **Normative Instruction No. 3/2025** – Establishes rules to be followed by fixed-odds betting operators authorised on a provisional basis.
- **Normative Ordinance No. 41/2025** – Establishes rules for the distribution of social allocations levied on the gross revenue from fixed-odds betting operations, benefitting sports entities and athletes, as well as the Ministry of Sports and related bodies.
- **Technical Note No. 229/2025** – Informs the inclusion of non-withdrawable financial rewards in the GGR (Gross Gaming Revenue) calculation base, and provides guidelines on how such rewards should be accounted for and reported in betting systems, as well as for data submission to SIGAP.
- **Normative Instruction No. 9/2025** – Provides for the collection of the supervision fee due for the commercial operation of fixed-odds lottery betting and sets the deadline for payment of the allocations provided in Law No. 13,756/2018.
- **Normative Ordinance No. 566/2025** – Regulates the enforcement of the prohibition on financial and payment institutions, and payment arrangement companies, from processing or allowing financial operations by companies that illegally operate fixed-odds betting.

- **Normative Ordinance No. 754/2025** – Extends by 90 days the deadline for authorised fixed-odds operators who have previously expressed interest in forming associations to centralise the payment of image rights to athletes and sports entities, allowing them to set aside the necessary funds until the associations begin regular operations.
- **Normative Ordinance No. 817/2025** – Establishes the Regulatory Agenda for the 2025–2026 biennium of the Prizes and Betting Secretariat from the Ministry of Finance. The Agenda includes the following initiatives and expected publication timelines:
    - Development and implementation of a platform with rules for data consultation and sharing regarding self-excluded bettors and those prohibited from betting – Planned for Second quarter of 2025.
    - Enhancement of the implementation model for the allocation of funds in return for the use of athletes' images, names, and nicknames, as well as sports symbols, anthems, and other related rights – Planned for Second quarter of 2025.
    - Definition of parameters for the creation of a distinctive seal for authorised Operators – Planned for Second quarter of 2025.

      Modernisation of regulations and procedures related to commercial promotions – Planned for Third quarter of 2025.
    - Review of regulations concerning the Exclusive Instant Lottery (LOTEX) – Planned for Third quarter of 2025.
    - Regulation of the economic chain associated with betting operators: online gaming providers and other service providers – Planned for Third quarter of 2025.

      Establishment of a National Betting System – Planned for Fourth quarter of 2025.
    - Improvement of support services for consumer-bettors and family members affected by gambling addiction or other disorders related to problem gambling – Planned for Fourth quarter of 2025.
    - Consolidation and enhancement of inspection and

enforcement procedures – Planned for First quarter of 2026.

- Review of the authorisation procedure for operators – Planned for First quarter of 2026.

  Review of requirements and procedures related to the recognition of the operational capacity of certifying entities – Planned for Second quarter of 2026.

- Review of regulations and implementation of procedures related to the early collection modality of popular savings – Planned for Third quarter of 2026.
- Review of the sanctioning regime applicable to the commercial operation of the fixed-odds lottery modality – Planned for Fourth quarter of 2026.

In addition to the ordinances issued by the Prizes and Betting Secretariat, other federal public administration bodies have also enacted relevant regulations, with the aim of complementing the regulatory framework applicable to the operation of fixed-odds betting. The following acts are particularly noteworthy:

- **Normative Ordinance of Ministry of Sports No. 109/2024 –** Defines measures to promote sports integrity and monitor competitions to combat match-fixing in the context of sports betting.
- **Interministerial Ordinance of Ministry of Finance, Ministry of Health, Ministry of Sports and Secretariat for Social Communication of the Presidency of the Republic No. 37/2024** – Establishes the Interministerial Working Group on Mental Health and the Prevention and Harm Reduction of Problem Gambling, aimed at planning actions for prevention, harm reduction, and support for individuals and social groups experiencing problem gambling behavior.
- **Normative Ordinance of Ministry of Sports No. 125/2024 –** Regulates the sports and sports organisations that may be the subject of betting in the fixed-odds lottery.
- **Normative Ordinance of Ministry of Education No. 1,240/2024 –** Establishes procedures for the collection, allocation, and breakdown of the revenue from fixed-odds lottery betting.
- **Joint Ordinance of Federal Revenue and SPA No. 3/2025 –**

Creates a Working Group between the Special Secretariat of the Federal Revenue of Brazil and the Prizes and Betting Secretariat to monitor the gaming and betting sector.

One of the most relevant actions taken by the SPA in 2024 was to create a Q&A page named "*Autorização de Aposta de Quota Fixa*", responding to questions received by operators and interested parties and offering clarifications on topics mentioned in Law No. 14,790/2023 or in any of the published Ordinances.

Following the above-mentioned Supreme Court decision of 2020, many states and municipalities launched their own lottery legislation and started to provide local licenses to interested operators. The most controversial has been the regulator in the State of Rio de Janeiro (LOTERJ) that has made available a very attractive and more beneficial license allowing operators to accept bets from outside the state. This has triggered litigation against LOTERJ by other state regulators and the federal government, but it may take a long time reach some sort of conclusion.

Land-based casinos, bingo parlours and *jogo do bicho*

High expectations exist for the revival of the golden era of casinos and other forms of gambling in Brazil. Following the enactment of the Sports Betting Law (Federal Law No. 14,790/2023) in December 2023, discussions surrounding authorization for additional forms of gambling, such as the approval of land-based casinos, bingo halls and the popular Brazilian lottery-style draw game known as "*Jogo do Bicho*," have taken on a more intense tone. The Federation of Hotels, Restaurants, and Bars of the State of São Paulo forecasts an injection of more than R$380billion into the Brazilian economy upon legalization of such new types of gambling.

At the time of writing this article, Brazil stood on the cusp of overturning a long-standing ban on games of chance dating back to the 1940s. During that period, Brazilian law, specifically Decree-Law No. 9,215/1946, prohibited operation of casinos and all forms of gambling, leading to the closure of all land-based casinos . In June 2024, the long-debated Bill of Law No. 2234/2022, which aimed to legalize operation of brick-and-mortar casinos, bingo halls,

videobingos, *Jogo do Bicho*, and other forms of gambling, including online platforms, was approved by the Brazilian Senate Constitution and Justice Committee (CCJ). This approval positioned the bill for voting before the full Senate. If the text is approved without amendments, it will proceed to either be sanctioned or vetoed by the President. The Lower House will review any amendments and vote on them, sending the finalized text for presidential approval or veto.

Among other provisions, the Bill enables the operation of casinos in tourist hubs or integrated leisure complexes, defined as upscale hotels with a minimum of 100 rooms, with restaurants, bars, and spaces for meetings and cultural events. The Bill also includes restrictions on the number of casinos allowed within each State, based on population or territorial size. Consequently, every Brazilian State and the Federal District could host at least one physical casino, and some of them already have permits for more (São Paulo, which could have up to three, and Minas Gerais, Rio de Janeiro, Amazonas, and Pará, which could have up to two each). Additionally, the Bill introduces the potential for up to ten floating casinos on designated sea and river vessels, like cruise ships, subject to specific regulations.

Bingo halls, on the other hand, would be permitted in every Brazilian city, restricted to one for cities with fewer than 150,000 residents. According to the regulations, there would be an allowance for an additional bingo parlor for every 150,000 inhabitants in a city - each required to have a minimum area of 1,500 m², up to 400 videobingo machines, and a capacity of 250 seats.

Jogo do Bicho, a uniquely Brazilian game that, based on estimates, generates over R$ 12 billion Reais annually, would be authorized in all Brazilian cities, with one license each for cities with populations below 700,000 residents. As per the regulations, an additional license would be granted for every additional 700,000 residents within a city.

All licensed operators must be legal entities incorporated in Brazil and structured as corporations. Furthermore, specific minimum capital and technical requirements apply depending on the type of game. For example, bingo and *Jogo do Bicho* operators must have a minimum capital of R$10,000,000, while casino operators are required to meet a minimum threshold of

R$100,000,000. Companies seeking licensing in Brazil will also need to demonstrate the lawful origin of funds.

The duration of the license also varies. Bingo and *Jogo do Bicho* licenses are valid for 25 years and casino licenses for 30 years, with the option to renew them for the same period in all instances.

Operators will be closely overseen by the Ministry of Finance, which was named to regulate the sector in the Bill of Law. To illustrate, officers and directors require prior regulatory approval. The regulator will not endorse candidates who do not hold Brazilian residency (irrespective of nationality), those with insufficient technical proficiency or integrity, individuals with convictions for corruption, tax evasion, or offenses against the National Financial System, and persons barred from public office, among other criteria.

Additionally, the Ministry of Finance will take the leading role of regulating the sector, inter alia, organizing and standardizing poilicy, supervising and inspecting gaming operations. Other institutions might also assist in the sector regulation, such as the National Gaming and Betting System (Sinaj).

It is worth mentioning the upcoming law's focus on aspects that are globally recognized as key factors for the gaming industry: responsible gaming, AML rules, and crimes and penalties that would apply for violations of the rules. When it comes to responsible gaming, the bill also provides creates a National Registry of Banned Players ("RENAPRO"), a database with the name of individuals prohibited from gambling, which will be managed by the licensed operators and to which the Ministry of Finance will have full access. The government's focus on money laundering and terrorist financing is notably heightened, as shown by the requirement for operators to designate an individual solely responsible for this issue. This person must be officially appointed by the Ministry of Finance.

The Bill also prohibits use of banknotes, coins and financial and payment institutions not authorized by the Central Bank, Brazil's banking watchdog, in alignment with the rules set forth by the Sports Betting Law.

The tax on GGR, known as CIDE-Jogos, has been set at 17%. The revenue generated will be allocated to various entities and programs. For instance, the Brazilian Agency for the International Promotion of Tourism will receive the largest share (12%), followed by

funding for sports-related programs and initiatives (10%), the National Culture Fund (10%), health-related programs and initiatives (4%), and programs aimed at combating gambling addiction, among others.

Tax on net prizes exceeding R$10,000 (an amount updated annually in accordance with the Selic rate for the previous year) must be withheld by the operator at a rate of 20%. "Net prizes" are defined as the total of all prizes received and losses incurred by a specific bettor within a 24-hour period.

The Bill is expected to be voted on by the Senate in the second semester of 2024.

E-sports and Fantasy Sports

The Sports Betting Law (Federal Law No. 14,790/2023) explicitly exempts operators from requiring government approval and fantasy games managed to escape the regulatory surge that has recently swept the betting and gambling industry

The law further clarifies that fantasy games are not classified as lotteries, commercial promotion, or fixed-odd bets , but rather as an electronic sport with the following defining elements:

(i) virtual teams must consist of at least two real people and their performance must primarily depend on the players' knowledge, analysis, strategy, and skills;

(ii) rules must be pre-determined;

(iii) the guaranteed prize value must be independent of the number of participants or registration fees; and

(iv) outcomes must not depend on the result or activity of a single person in real competition.

Therefore, in accordance with the current Brazilian legal framework, fantasy games would be considered a type of e-sports, albeit with distinct elements. This is perhaps unsurprising for a jurisdiction that treats sports betting and gaming as a type of lottery.

However, Brazil still lacks a legal definition of what constitutes an e-sport.

According to Bill No. 70/2022, currently being processed in

the Lower House, electronic sports are defined as activities that, using electronic artifacts, characterize the competition of two or more participants or teams, in the ascension system and mixed descent competition, using round-robin tournament systems and knockout systems. According to the proposal, those who practice electronic sports will be classified as "athletes", but there is no formal recognition of e-sports as a sport.

A second Bill of Law (Nº 205/2023) offers a slightly different definition: "e-sports" or 'electronic sports' involve competitions in electronic games where individuals, whether professional athletes or not, engage in online or in-person matches using information and communication technology resources. The outcome is primarily determined by their intellectual skills and dexterity". This bill, however, takes a significant step by defining that "for all intents and purposes, 'esports' or 'electronic sports'" is "a sport."

If e-sports are recognized as a sport for all legal purposes, the industry would then be subject to the laws regulating sports, such as Law 14.597/23 (New General Sports Law), which aims to modernize and regulate the sports sector in Brazil.

Explicitly acknowledging e-sports as a sport would have significant implications. For example, the e-sports confederation could gain access to Sinep, the National Sports System created by the New General Sports Law, and potentially benefit from lottery funding. Nonetheless, authorised sports betting and igaming operators are currently allowed to offer bets on e-sports tournaments that are licensed or authorised by the developers or holders of IP rights.

Chapter

International Trade

21

Brazilian International Relations

Brazil has a long history of supporting multilateralism and it has always been an active member of the World Trade Organisation ("WTO") and other multilateral organisations. The country has also focused on promoting Latin American integration. Brazil is part of the Mercosur and the Latin American Integration Association ("ALADI-LAIA") and it has trade agreements with most Latin American countries. More recently, mainly due to the difficulties in the multilateral and regional spheres, Brazil also started seeking to negotiate preferential trade agreements with countries outside the Latin American region.

WTO

Brazil is a founding member of the GATT and the WTO, and it actively participates in trade negotiations as well as the dispute settlement system.

However, due to the inoperative dispute settlement system since December 2019, Brazil has sought negotiated solutions to the disputes to which it is a party and has encouraged alternative means of settling disputes, such as arbitration. To this end, it participates in the Interim Appeal Arbitration Arrangement (MPIA) along with 24 WTO Members.

Also, in May 2022, the Brazilian Congress approved Law No. 14,353/2022 which authorised CAMEX to suspend rights and concessions (covering goods, services, and IP rights) against another WTO Member found to be in violation by a panel report but having chosen to appeal to the deadlocked WTO Appellate Body (the so-called "appeal in the void").

Brazil has participated as complainant in the WTO Dispute Settlement System in several cases. It participated in 34 cases as a complainant, 17 cases as a respondent, and 168 cases as a third party.

Brazil submitted its application to accede to the Agreement on Trade in Civil Aircraft in June 2022, providing its proposed tariff commitments. Since then, Brazil's application has been considered at several meetings of the Committee on this matter.

Brazil started its accession to the WTO Agreement on Government Procurement (GPA) in May 2020 but decided to withdraw the market access offer it made in the process of accession to that agreement in May 2024. The Brazilian offer included coverage equivalent to and even superior to that offered by the current GPA members. Its terms would impose severe limits on use of the government's purchasing power as an instrument to induce the country's economic and social development, particularly in areas such as public health, technology, and innovation.

Brazil remains committed to and is an active participant in, the multilateral trading system. The country participated in all WTO joint statement initiatives, i.e. e-commerce, investment facilitation for development, MSMEs (micro, small, and medium-sized enterprises), and services domestic regulation.

OECD

In January 2022, the OECD Council decided to open accession discussions with Brazil. This follows careful deliberation by OECD Members based on its evidence-based Framework for Consideration of Prospective Members and the progress made by Brazil since its first request for OECD membership.

Following Brazil's adherence to the values, vision and priorities reflected in the OECD's 60th Anniversary Vision Statement and the 2021 Ministerial Council Statement, the 38 OECD Members adopted on 10 June 2022 the Roadmap for the Accession of Brazil to the OECD Convention setting out the terms, conditions and process for its accession.

Engaged with the OECD since 1994, Brazil became an active key Partner of the Organisation on 16 May 2007, following the OECD Council (at the Ministerial level) resolution to strengthen the cooperation with Brazil, China, India, Indonesia and South Africa, through a programme of enhanced engagement that defined these countries as "Key Partners" of the OECD. As a Key Partner, Brazil has had access to Partnerships in OECD Bodies, adherence to OECD instruments, integration into OECD statistical reporting and information systems, and sector-specific peer reviews, and has been invited to all OECD meetings at the Ministerial level since 1999. Brazil has contributed to the work of OECD Committees and has participated on an equal footing with OECD Members in several significant bodies and projects.

Brazil has already adhered to the largest number of the Organisation's legal instruments (105).

Brazil should become the first non-member country to complete the process of adhering to the Codes of Liberalisation of Capital Movements and Intangible Current Transactions, the Organisation's flagship instruments.

Mercosur

Mercosur was created in 1991, with the signing of the Treaty of Asuncion, and current members include Brazil, Argentina,

Paraguay and Uruguay.

This regional bloc was created to enable the free circulation of goods, services, people and capital, through the reduction of trade barriers, harmonisation of the regulatory framework related to trade matters, as well as coordination of several policies that affect trade flows. Ultimately, the bloc aimed to become a free market, inspired by the European Union integration process.

Currently, Mercosur has the status of a customs union, with no import tariffs for products originating from its members, a common external tariff, and some degree of regulatory harmonisation.

An important feature of this customs union is the Decision of the Council of the Common Market No. 32/2000, which states Mercosur members must negotiate agreements that affect the Mercosur Common External Tariff as a bloc. This aimed to enhance the customs union, but it later became a sort of barrier to trade negotiations, since there were several instances when there was no consensus among the members regarding the advancement of new trade agreements.

Venezuela acceded to Mercosur in 2012, meaning it would have had to follow certain steps before fully incorporating Mercosur's framework in the country. However, Venezuela was suspended from the bloc in December 2016 because it had not fulfilled its obligations under the adhesion protocol and it was suspended again in August 2017, due to the "rupture of the democratic order", which violated Mercosur's Democratic Compromise under the Ushuaia Protocol of 1998.

The Brazilian Congress just approved Bolivia's entry into the bloc at the end of 2023 and Bolivia is currently in its accession process.

ALADI-LAIA and Regional Trade Agreements

ALADI-LAIA (the 'Latin American Integration Association') was created in 1980 to promote progressive economic integration among Latin American countries. One of the pillars of this integration process was established as the negotiation of several bilateral or plurilateral free agreements among its members, called Economic Cooperation Agreements ("ACE"). Mercosur itself is inserted under

the LAIA framework as ACE 18.

During the 1990s, Mercosur concluded free trade agreements with Chile and Bolivia and, in the following decade, with Mexico, Peru, Colombia, Ecuador, Venezuela, and Cuba. Brazil has also executed agreements with Saint Kitts and Nevis and Suriname.

In general, these agreements provide a reduction of tariffs for a vast list of products, but they do not contain significant rules on non-tariff barriers, services, government procurement and other trade rules.

Since January 2019, with conclusion of the last ACE-58 tariff reduction schedule, there has been a free trade area covering most of South America - Guyana and Suriname are not members of ALADI. Currently, 95 per cent of the trade negotiated between the South American ALADI countries is fully tariff-free.

In 2022, the trade flow between Brazil and the ALADI countries reached US$ 46.3 billion (exports - US$ 29.1 billion; imports - US$ 17.2 billion; Brazilian surplus of US$ 11.8 billion). In quantitative terms, the region is Brazil's fourth largest trading partner, behind China, the European Union and the USA. This is a strategic relationship for Brazil, as the region mainly absorbs Brazilian exports of industrialised products (91% of the total), with a strong presence of micro, small and medium-sized companies, and has fostered creation of regional production chains (for example, in the automotive sector).

Extra-regional free trade agreements

In the past decade, although the priority for Brazil has been to negotiate trade provisions under the WTO, Brazil has also sought, with Mercosur, to negotiate free trade agreements with countries outside the Latin America Region.

Mercosur currently has free trade agreements with India, Israel, the Southern Africa Customs Union (South Africa, Namibia, Botswana, Lesotho and Swaziland), and Egypt.

Mercosur also concluded negotiations on free trade agreements with Singapore, Palestine, and the European Free Association (EFTA, composed of Switzerland, Norway, Iceland and

Liechtenstein), but they are not in force yet.

The most important negotiation was conducted with the European Union and it lasted 25 years. Although the text of the Agreement was technically finalised in 2019, it is currently being refined in the rounds of negotiations that started in 2023, especially regarding sensitive issues, mainly concerning market access to agricultural products, environmental concerns, and others.

Currently, the bloc is also negotiating agreements with Canada, and South Korea.

International Trade and Customs Regulations

As a member of the WTO, Brazil is bound by the organisation's framework and it has internalised the WTO Agreements through Decree No. 1,355/1994.

Nonetheless, Brazilian trade and customs regulations can be complex and challenging for foreign companies intending to do business in Brazil.

It is important to highlight that on 19/11/2024, a General Foreign Trade Law (LGCE) officially began to process under Bill No. 4423, 2024, in the Federal Senate. Authored by the Committee on Foreign Relations and National Defence, this bill aims to consolidate and modernise the general regulations governing foreign trade of goods in Brazil, enhancing clarity and efficiency in import and export operations.

The proposal seeks to align Brazilian legislation with best international practices, fostering a more effective integration of Brazil into global value chains, while ensuring the protection of national interests. The progression of this bill represents a crucial step towards improving the business environment, making it more competitive and sustainable, with the ultimate goal of strengthening the national economy.

The full text of Bill No. 4423/2024 is available at the following

link: https://lnkd.in/dzqMgsFu. This legislative initiative aims not only to optimise the internationalisation process of Brazilian companies but also to provide a more modern, efficient, and globally aligned legal environment.

Market access

Because Brazil is part of the Mercosur Customs Union, the country's import duties are established under the Mercosur Common External Tariff. The tariff rate for each product is based on the Mercosur Common Nomenclature (NCM), an 8-digit code derived from the Harmonised System.

Duties usually range from 2% to 20%, but may reach up to 35% for industrial products.

Despite the customs union, each Mercosur member is maintaining a list of exceptions until December 2028, meaning the adoption of tariff rates that are higher or lower than the Common External Tariff for certain tariff lines. Furthermore, there are other exceptions involving the possibility of adopting reduced rates for capital goods and information technology goods, as well as a temporary reduced rate for goods in case of domestic supply shortages.

Importers may also benefit from lower tariffs for imports originating in countries with which Brazil and Mercosur have free trade agreements. As mentioned in the previous section, the bloc currently has agreements in force with most Latin American countries, as well as India, Israel, Egypt and the Southern Africa Customs Union. In order to benefit from preferential tariffs under free trade agreements, importers must present the Certificate of Origin of the product.

Import-Export procedures

The Brazilian Internal Revenue Service controls imports of goods with specific laws and regulations and imposes penalties for not complying with them.

Laws and regulations related to imports are intended to

restrict the entry and exit of illegal and dangerous products and the application of duties and fees are intended to protect domestic industry.

Radar

Under Brazilian law, only legal entities established in Brazil may act as importers or exporters.

Companies intending to operate in international trade must hold a RADAR, which is a permit that provides access to the SISCOMEX/Portal Único, the system where all import and export operations must be recorded.

There are three types of RADAR – Limited, Unlimited and Express. The 'Express RADAR' permit is suitable for companies that intend to import goods corresponding to up to US$ 50,000.00 CIF in a six-month period, for companies certified as Authorised Economic Operators, and for public or semi-public companies. The 'Limited RADAR' permit allows a company to import goods corresponding to up to US$ 150,000.00 CIF in a six-month period. The 'Unlimited RADAR' permit allows unlimited imports. The three types allow exports without any limit on their value.

The Express RADAR requires fewer formalities than the Limited and Unlimited formats, which require an estimate of the company's financial capacity based on the federal taxes paid in the preceding five years.

If a company is granted a RADAR format which is deemed insufficient for its intended import activities, it may request a review of its financial capacity estimate based on the capital available in the current assets of the company.

Import procedures

After being registered with a RADAR permit, a company must check the tax rates and administrative controls for importing goods on SISCOMEX/*Portal Único* based on the corresponding NCM.

Administrative controls are imposed by several governmental bodies, such as: the National Agency for Sanitary Vigilance; the National Institute of Metrology, Quality and Technology; the Brazilian

Institute for the Environment and National Resources; the Ministry of Agriculture; the Ministry of Science, Technology and Innovation; the Federal Police; and the Brazilian Army. Each body establishes its own requirements for granting an import license for products subject to their administrative controls.

When imports are subject to licensing, in general terms the importer must provide the SISCOMEX system with the information required by each competent authority prior to shipping the goods overseas, or in some cases before the registering the Import Declaration, depending on the case.

If there is no administrative control applicable to the operation, the company can start the import procedure by registering the import declaration in the system.

The import documents include the commercial invoice, bill of lading/airway bill, and packing list.

According to Brazilian Law, a commercial invoice must contain, at least:

- full name and address of the exporter and importer or final owner;
- characteristics of the goods, including marking and numbering, and reference numbers for the different volumes;
- quantity and type;
- gross and net weight;
- country of origin, country of acquisition, and country of departure;
- total price and price per unit of each type of goods, and the value and nature of any given discounts;
- transportation cost;
- conditions and currency of the payment; and
- condition of sale (Incoterms).

After all documents are prepared and, usually, after arrival of the products in Brazil, the importer must register the Import Declaration on SISCOMEX. Registration initiates the customs clearance procedure.

A change is underway in the current import system aimed at facilitating import processing. The Foreign Trade Secretariat of the

Ministry of Development, Industry, Trade and Services (Secex/MDIC) and the Federal Revenue Service have announced that import operations currently handled through the Siscomex LI/DI system will transition to the Single Import Declaration (Duimp) within the Single Foreign Trade Portal from October 2024 onwards.

Export procedures

Before exporting, a company must hold a RADAR permit. The exporter must also check with the SISCOMEX/*Portal Único* system to determine whether there are any administrative controls required for exports of specific goods based on the NCM. As for imports, controls are imposed by several governmental bodies and each body imposes its own requirements.

If controls do exist, the exporter must comply with the necessary procedures to obtain export approval from the competent governmental body via SISCOMEX.

The company must then register the Single Export Declaration on the SISCOMEX/*Portal Único* and will then, if needed, submit the Export License, Permit, Certificate or Other. ("LPCO").

Export controls and economic sanctions

Brazilian laws on export controls, sanctions and embargos apply to products exported or re-exported from Brazil.

Brazilian export controls include both analysis by the governmental bodies of both the company and the goods for each export operation.

Law 9,112/95 regulates controls on "sensitive goods", such as those with potential military applications and, consequently, also regulates the export of goods or related services with potential application in development of weapons of mass destruction, whether nuclear, chemical or biological, as well as their delivery vehicles, such as missiles.

SECEX Ordinance 23/2011 contains lists of "countries with peculiarities", meaning import and export restrictions. The list of forbidden goods must be checked whenever a sale is made to an embargoed country.

Brazil imposes restrictions or embargoes on exports to certain countries based on decisions from the United Nations and other International Organisations. Brazil does not impose sanctions unilaterally, and there are no individuals or specific companies subject to financial sanctions.

Trade facilitation

Brazil is currently implementing the WTO trade facilitation agreement. Amongst the most important initiatives are implementation of the Single Window Program and the Authorised Economic Operator.

The Single Window ("*Portal Único*") will allow the whole customs clearance process to be concluded using a single system to which all governmental bodies involved in international trade controls will have access. The program should reduce customs bureaucracy and reduce deadlines for customs clearance on imports from the current average of 13 days to an estimated average of 8 days, thereby reducing operational costs. The Single Window has already been implemented for exports and is being implemented for imports.

The Authorised Economic Operator ("AEO") certifies international trade operators that present reduced risks of security and/or non-compliance with customs regulations, depending on the format involved. The program offers benefits to certified importers and exporters and provides a faster customs clearance process.

The program has already been implemented for importers, exporters and other trade operators, in the AEO Security and AEO Conformity levels 1 and 2 formats. AEO Integrated is currently under implementation and will allow certification from other governmental bodies involved in international trade controls (such as the Ministry of Agriculture, ANVISA, etc.). The first agency to implement AEO Integrated was the Ministry of Agriculture. Furthermore, AEO certification will also allow these operators to benefit from the program in other countries, as Brazil is negotiating mutual recognition agreements with other partners.

On 4th March 2024, following the signing of Joint Ordinance RFB/Anvisa No. 400 establishing guidelines for Anvisa's accession to the complementary module of the Integrated Authorised Economic Operator (OEA-Integrated), the agency's participation in the program

was formally recognised.

The OEA-Integrated Anvisa aims to certify logistics chain stakeholders who already hold compliance and security certificates in the main RFB module. The objective is to unify initiatives to prevent duplicating import procedure controls. Implementation of this complementary module represents a significant step twoards modernising and integrating Brazilian foreign trade operations, offering improved security, efficiency, and trade facilitation.

Collegiate Board Resolution – RDC No. 845, dated 22nd February 2024, regulates the Anvisa Integrated AEO Programme and covers topics such as the accession process, eligibility requirements, certification categories, and benefits. This regulation came into effect 90 days after its publication.

It also reflects the collaborative efforts and synergy between the RFB and Anvisa to enhance Brazil's integration into international trade.

Trade Remedies

Trade remedies were developed to protect a country's domestic industry from imports that harm it due to unfair practices such as dumping and subsidies, or an increase in imports.

There are three trade remedies: anti-dumping measures, countervailing measures, and safeguarding measures.

Trade remedies are covered by WTO agreements, and each country has its domestic laws regulating these measures and detailing the procedures.

In Brazil, administrative procedures for application of trade remedies are pursued by the Trade Defense Department ("DECOM") of the Secretary of Foreign Trade ("SECEX"), and trade remedies are applied by the Chamber of Foreign Trade ("CAMEX"), a collegiate body composed of several ministries.

An outline of the administrative procedures for the application of each of these measures is provided below.

Antidumping

Anti-dumping measures intend to neutralise the negative effects of imports involving dumping that harms domestic industry. These measures involve a surcharge applied to imports of the product from the source where the dumping practice was detected.

In Brazil, the issue is regulated by Decree No. 1,355/1994, Law 9.019/1995, which internalizes the WTO Anti-Dumping Agreement, and Decree 8.058/2013.

Dumping occurs when the export price of a certain product is lower than the price of the same product in the exporter's domestic market ("normal value"). Dumping analysis covers a 12-month period.

The analysis of harm is based on assessment of the domestic industry's performance, which includes: the actual or potential drop in sales, profit, output, market share, productivity, return on investments and degree of utilisation of installed capacity; factors affecting domestic prices, including the breadth of the dumping margin; and the actual or potential negative effects on cash flow, inventories, employment, wages, domestic industry growth, and ability to attract investment. The performance analysis covers the last five years.

An anti-dumping investigation is initiated at the request of a domestic industry. The petitioner must file a petition with the Trade Defense Department containing evidence of dumping in imports from the investigated source, harm caused to domestic industry and the causal link between the dumping and the resulting harm. The Trade Defense Department will evaluate if the petition meets the legal requirements, and if so, it will publish a SECEX Circular in the Official Gazette initiating an anti-dumping investigation.

After starting the investigation, exporters and importers of the product under investigation will be notified and receive a questionnaire to provide information on domestic sales, exports/imports and production costs, amongst others.

Besides responding to the relevant questionnaires, the Trade Defense Department usually makes visits to check the premises of domestic companies and exporters participating in the procedure to

confirm the data provided.

Exporters participating in the investigation are able to influence the outcome of the investigation and ensure that eventual duties will be imposed based on accurate data and not just on the best information available. Moreover, cooperating exporters may be subject to individual dumping margins, which tend to be lower than the "all others" margin and benefit from application of the "lesser duty", which is the lowest value necessary to repair the harm caused to the domestic industry by dumping.

The period for submitting new information is limited to 120 days from publication of a preliminary determination by the Department of Trade Defense. The period for submission of statements on the data and information thereby submitted is limited to 20 days once the period for submitting information has concluded. Investigations should be finished within 10 to 18 months. The Chamber of Foreign Trade will rule whether to impose trade remedies as soon as it receives the final recommendation from the Trade Defense Department.

Measures are imposed for five years and may be renewed after a sunset review procedure, which determines whether ending the measure will result in continuity or resumption of dumping and injury.

Sunset reviews can extend anti-dumping measures beyond the initial five-year term for a subsequent five-year period. This extension must be requested by the domestic industry, which must provide a prima facie case that suspending the trade remedy would result in dumping and injury would resume or continue. Under Decree No. 8,058/2013, sunset reviews may take 10 to 18 months.

Decree No. 8,058/2013 also provides other procedures such as new shipper reviews, an anti-circumvention review, and a restitution review.

The new shipper review provides that new producers or exporters of a product subject to anti-dumping measures which did not export the product to Brazil during the period investigated for dumping may request an individual dumping margin. Based on a special authorisation by CAMEX, the exporter may export to Brazil without application of anti-dumping duties for a certain period so that DECOM has enough data to calculate the dumping margin for the new shipper.

The anti-circumvention review aims to address exporters' attempts to avoid anti-dumping duties through small changes in the production chain or product. The review may result in extension of anti-dumping duties to (i) parts and components originating from the country subject to anti-dumping measures, destined for industrialisation in Brazil of the product subject to the measures; (ii) products of third countries, produced with parts and components originating from the country subject to anti-dumping measures, resulting in the product that is the object of the measure; and (iii) products originating from a country subject to anti-dumping measures, which presents marginal changes in the product subject to the measure, but which does not change its use or final destination.

The restitution review allows importers to request the restitution of duties paid if they can prove the margin calculated for the restitution period is inferior to the duties in force.

Countervailing measures

Countervailing measures intend to offset subsidies directly or indirectly granted to the exporter by a foreign country that causes harm to domestic industry. Countervailing measures are surcharges applied to imports of products from the source where the subsidies were granted.

The issue is regulated in Brazil by Decree No. 1,355/1994, Law No. 9,019/1995, which internalised the WTO Agreement on Subsidies and Countervailing Measures, and by Decree No. 10,839/2021.

An investigation is initiated at the domestic industry's request and the petition must present evidence of the subsidies, harm to the domestic industry and the causal link between the subsidies and the harm caused.

The Department of Trade Defense will evaluate the petition and, if all requirements are met, it will publish a SECEX Circular in the Official Gazette, initiating an investigation. In the meantime, the exporting country's government will be invited to consultations to provide clarifications on the alleged subsidy, and the countries will attempt to reach a satisfactory solution.

After starting the investigation, exporters and importers of the

product under investigation, as well as the governments involved, will receive a questionnaire and they may submit information, documents and other evidence relevant to the case. In addition to sending the questionnaires, the Department of Trade Defense may undertake visits to confirm the data received.

The investigation is concluded in 12 to 18 months. If the Trade Defense Department makes an affirmative decision confirming the subsidies, harm and causal link, CAMEX will decide on the application of countervailing duties for a period of five years.

Safeguards

Safeguarding measures may be applied to an import if it increases in such quantities and under such conditions that they cause or threaten to cause serious harm to domestic industry.

Safeguarding measures consist of increased import duties, in addition to the Common External Tariff, quantitative restrictions on the imports or of a combination of both.

In Brazil, the issue is regulated by Decree No. 1,355/1994 and Decree No. 1,488/1995.

Unlike the anti-dumping and countervailing measures, safeguards are not restricted to certain origins, they apply to all imports of the product under investigation.

A safeguarding investigation is initiated upon publication of a SECEX Circular and interested parties (importers and exporters) will have an opportunity to participate in the procedure and submit their views.

If DECOM decides that there has been an increase in the volume of imports and there is serious harm or a threat of serious harm and a causal link, the Chamber of Foreign Trade will decide whether to apply safeguarding measures for an initial four-year period.

Analysis of Public Interest

In some exceptional cases, the application of antidumping or

countervailing measures may have more negative than positive impacts on other economic players in the production, distribution, sales and consumption chain where the domestic industry is located, including its upstream and downstream chain; or it may cause the total or partial interruption of the manufacture and supply by a domestic producer of a domestic product similar to the one subject to the anti-dumping or countervailing measure, provided that it is significant and of permanent or temporary duration.

DECOM is responsible for conducting administrative procedures to analyse public interest matters in light of any trade defense measures in place that are more transparent and that allow defense by all interested parties.

The procedure is requested by the interested parties (importers and domestic producers), domestic industrial companies that are users of the product subject to the anti-dumping or countervailing measure or suppliers of raw materials and inputs for its manufacture and the trade organisation that represents them; or domestic users whose interests are adversely affected by the anti-dumping or countervailing measure that is the subject of the public interest assessment petition. In exceptional circumstances, SECEX may initiate a public interest assessment of its own accord based on an opinion drawn up by DECOM.

Based on DECOM's opinion, CAMEX may suspend application of or modify the antidumping or countervailing duties based on the public interest.

The legal framework for the public interest evaluation procedure has evolved significantly since then and the number of public interest analyses has increased in recent years.

Ordinance No. 282/2023 currently regulates the procedure for public interest analyses.

Customs Regime

In Brazil, the standard import and export regime involves the permanent acquisition or sale of goods. Generally, taxes are imposed on import transactions, whereas export transactions are

exempt from such taxes.

However, Brazilian legislation provides for special customs regimes applicable in specific situations where goods are not intended for permanent stay or departure from the country. These regimes are designed to promote economic activity and address potential fiscal and operational inefficiencies, offering more advantageous conditions compared to the usual ancillary obligations and tax burdens.

Below are the key aspects of the most commonly used special customs regimes in Brazil, along with their relevance to specific activities or sectors. It is important to note that other special customs regimes are also in effect under Brazilian legislation. The impact of the Tax Reform on Consumption on these special customs regimes will be considered, though the complementary law regulating the tax aspects of this reform is pending approval as of the time of this writing.

Customs Transit Regime

The Customs Transit Regime allows the movement of goods under customs control from one point to another within the national territory while suspending the payment of taxes. This regime encompasses the following modalities:

- Transport of goods arriving from abroad, from the point of unloading within the customs territory to the location where customs clearance is required.
- Transport of national or nationalised goods, verified or released for export, from the point of origin to the destination, either for shipment or storage in a customs area for later shipment.
- Transport of foreign goods cleared for re-export, from the point of origin to the destination, either for shipment or storage in a customs area for later shipment.
- Transport of foreign goods from a bonded warehouse in the secondary zone to another location.
- Passage through the customs territory of goods destined for or arriving from abroad.

- Transport of foreign goods carried by vehicle on an international journey to the point of unloading.
- Transport through the customs territory of foreign, national, or nationalised goods, verified or cleared for re-export or export, carried by a vehicle destined for abroad.

This regime facilitates the transport of goods between customs bonded locations within the country, suspending tax payments until customs release for consumption, export, or other special customs regimes.

Bonded Warehouse Regime

The Bonded Warehouse Regime permits the storage of foreign goods in bonded warehouses (imported with or without exchange coverage) with the suspension of import taxes until the definitive importation of these goods. The storage period is up to one year, extendable for an additional year, with a general limit of two years and an exceptional limit of three years.

Goods admitted under this regime can be used for storage, exhibition, demonstration, performance testing, maintenance, repair, or authorised industrial processes. Activities may occur within the bonded warehouse or involve removal for exhibition at fairs, reconditioning, or industrialisation for export.

The regime also covers exports in both common and extraordinary modalities. The common modality allows storage in public-use locations with suspended export taxes, while the extraordinary modality allows storage in private-use locations before export, with the possibility of tax benefits and incentives. The extraordinary modality is reserved for export trading companies authorised by the Brazilian Federal Revenue.

Temporary Admission Regime

The Temporary Admission Regime allows the import of goods with total or partial suspension of import taxes for a fixed period, provided they are intended for specific temporary uses such

as service supply, production of other goods, or other legislative purposes.

The tax treatment under this regime depends on the goods' intended use and includes:

- General Rule: Import with total tax suspension for events, assembly, maintenance, exhibition, etc.
- Temporary Admission for Active Improvement: Import with tax suspension for processing, assembly, refurbishment, or repair, with goods to be subsequently exported. Compliance with regime requirements results in non-levy of taxes.
- Temporary Admission for Economic Use: Import for service supply or production of goods for sale, valid for up to 100 months, with proportional tax payments based on 1% of the original import taxes.

Temporary Export Regime

The Temporary Export Regime permits the export of goods with suspension of Export Tax, conditioned on their return within one year for use in events, operating lease agreements, service provision, etc. It includes the 'temporary export for passive improvement' modality, allowing temporary export for transformation, processing, or assembly abroad, with subsequent return and payment of taxes on the value added.

Certified Bonded Deposit

The Certified Bonded Deposit Regime allows national goods deposited in a public-use bonded warehouse and sold to an overseas buyer to be considered exported for tax, credit, and exchange purposes. This regime can also apply to mixed private-use port facilities, provided Brazilian Federal Revenue conditions are met. Goods under this regime may not remain beyond one year. The regime ends through proof of export, customs release for consumption, or transfer to another special customs regime.

Drawback

The Drawback regime is an export incentive for industrial companies using imported or domestically acquired raw materials to manufacture products for export. It includes three modalities:

- Suspension-Drawback: Import or domestic acquisition of raw materials for export production with suspended taxes. The regime lasts one year, extendable once, with exceptions for capital goods.
- Exemption-Drawback: Exemption or reduction of taxes on imported or domestic goods equivalent to those used in the industrialisation of exported products.
- Refund-Drawback: Refund of taxes on imported or domestic goods used in manufacturing exported goods. This modality is rarely used in Brazil.

Special Customs Regime for Industrial Warehouse under Computerised Customs Control ("RECOF")

The RECOF allows import (with or without exchange coverage) or domestic acquisition of goods with suspended taxes for industrialisation destined for export, avoiding tax on importation or domestic commercialisation. It includes RECOF and RECOF-SPED modalities, with RECOF allowing the use of a custom computerised system for regime control, and RECOF-SPED using the public digital bookkeeping system. The regime lasts one year, extendable for another year, with a maximum of five years for long manufacturing cycles.

Special Customs Regime for Importing and Exporting Goods for the Exploration and Drilling of Oil and Gas (“REPETRO-Sped”)

The REPETRO-Sped regime facilitates the import and export of goods for oil and gas research and exploration with suspension or exemption of federal and state taxes. It includes:

- Temporary REPETRO-Sped: Allows temporary import with or without proportional tax payments, exempt from state tax (ICMS).
- Permanent REPETRO-Sped: Allows definitive import with suspended federal taxes, converting to exemption or zero rate after five years, and ICMS reduction to 3%.

- REPETRO-Sped-Industrialisation: Allows domestic acquisition with suspended federal taxes and ICMS reduction.

The REPETRO-Sped regime is valid until December 31, 2040.

Chapter 22

Dispute Resolution

Traditional Dispute Resolution

Settling a dispute in court in Brazil has always been considered by scholars of the Brazilian legal system and the respective civil/commercial structures as complex, time consuming and not infrequently frustrating.

The purpose of this Section is not to take sides, but to provide an outline of the abovementioned systems forming the structure of the Judiciary in the country and the main types of proceedings available, whilst also highlighting the most relevant requirements for a person or legal entity intending to commence legal proceedings in Brazil or facing court litigation as a defendant in Brazil.

I. Civil and Commercial Disputes

Jurisdiction of the Brazilian Courts

Courts in Brazil hold jurisdiction over individuals and legal entities domiciled in Brazil, regardless of their nationality (the word "domiciled" in this case may also comprise companies headquartered abroad which have branches, agencies or subsidiaries in Brazil[1]). In addition to this, from a civil or commercial perspective, Brazilian courts hold jurisdiction to hear claims in which: (i) Brazil is the place of performance for the obligation in question or the main obligation of the agreement in question; (ii) the dispute results from an event or act that took place in Brazil; and/or (iii) Brazil was chosen by the parties in a forum selection agreement. Furthermore, Brazilian courts have jurisdiction to try disputes (iv) for the collection of alimony, when the creditor is domiciled in Brazil or the defendant owns assets in Brazil and (v) arising from consumer relations, when the consumer is domiciled in Brazil[2].

In such cases, if the parties involved in the dispute in Brazil also initiate legal proceedings abroad, these simultaneous foreign claim do not have the power to prevent the Brazilian court from examining the case, subject to any contrary provisions in international treaties and bilateral agreements in force in Brazil[3] (and except when the claimant in the foreign suit starts identical legal proceedings in Brazil and abroad, in which case the Brazilian courts may find that the second proceeding was a breach of duty of good faith and dismiss it). However, when the foreign proceeding reaches its final decision, the interested party can apply to have the foreign judgment recognised in Brazil[4] and, if successful, the ongoing Brazilian proceeding will be dismissed without prejudice. Brazilian

1. Article 21, §1º of the Brazilian Civil Code procedure.
2. The instances of jurisdiction of Brazilian Courts are provided for in Article 21 and following of the Brazilian Code of Civil Procedure.
3. Article 24 of the Brazilian Civil Code procedure.
4. The requirements for the recognition of a foreign judgement are: (i) the decision must have been rendered by a competent authority; (ii) the parties must have been served or the default of appearance must have been legally verified; (iii) the decision must be effective in the country where it was rendered; (iv) it must not violate Brazilian res judicata; (v) it must be translated by an official translator, unless waived by treaty; and (vi) it must not violate public policy (Article 963, Brazilian Code of Civil Procedure).

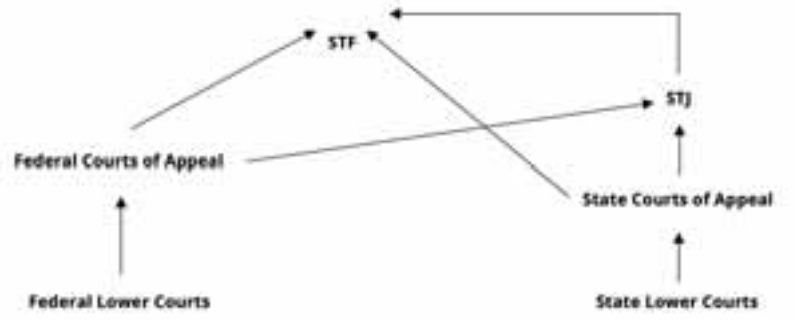
courts will also not grant anti-suit injunctions or interfere in any way in lawsuits filed abroad.

Finally, Brazilian courts also hold exclusive jurisdiction on disputes: (i) concerning real estate located in Brazil; (ii) for the distribution of a deceased person's assets located in Brazil to the heirs and creditors, even if the deceased is of foreign nationality or is domiciled outside the national territory (since 2007, however, in certain cases, heirs have been able to settle distribution of assets amicably, through use of a public deed in Brazil, without having to start legal proceedings); and/or (iii) related to divorce, legal separation or dissolution of a stable union, to proceed with the division of assets located in Brazil, even if the owner is of foreign nationality or is domiciled outside Brazil. In such cases, Brazilian courts will regard their jurisdiction as exclusive and therefore will refuse recognition of foreign decisions concerning these issues, on the grounds the foreign court lacks jurisdiction[5].

The Structure of the Brazilian Court System

When it comes to civil and commercial disputes (not including maritime disputes, since the jurisdiction to rule over such disputes is held by the Brazilian Naval Court – 'Tribunal Marítimo'), the Brazilian Court system can be depicted as follows (the arrows indicating the standard potential path of a lawsuit):

To provide a better understanding of the diagram above, this



Section begins with the lower courts, where most cases start. But first, it is important to highlight that in disputes involving commercial or civil matters, the two sub-branches of the Brazilian Judiciary -

Federal courts and State courts[6] - may have (non-overlapping) jurisdiction.

The jurisdiction of the Federal courts, established by the Brazilian Federal Constitution, depends on the subject matter under dispute (ratione materiae) and/or the legal nature of the parties (ratione personae). In this sense, Federal courts rule on most of the cases involving the Federal government, Federal agencies or Federal public companies or cases that somehow involves Federal interests.

On the other hand, State courts are responsible for judging cases that do not fall within the jurisdiction of the Federal courts and rule on most of the cases involving private parties.

Federal Lower Courts ("Varas Federais")

These courts are spread throughout the capitals and major cities of the country. They have jurisdiction to hear (i) disputes of interest to the Federal Government, Federal agencies or Federal public companies, as plaintiffs, defendants or third-parties, except in judicial recovery, bankruptcy andor workplace accidents, whose jurisdiction is always held by the State courts and (ii) disputes between a foreign Government or organism and a municipality or person domiciled or resident in Brazil.

State Lower Courts (including the Brazilian Federal District/Capital) ("*Varas Cíveis dos Estados e do Distrito Federal*")

Each State is empowered to organise its own branch of the judiciary. These courts are distributed throughout almost the entire country and have jurisdiction to hear disputes that do not fall under the jurisdiction of the Federal courts. Also, the Brazilian Federal Constitution expressly gives the State courts jurisdiction to try cases of interest to social security, bankruptcy proceedings and disputes related to workplace accidents. Furthermore, these lower courts have jurisdiction over disputes involving Government-owned or controlled corporations ("Sociedades de Economia Mista", such as

5. Article 23 of the Brazilian Civil Code procedure.
6. Municipalities do not have their own court system in Brazil.

Petrobras, for example), disputes based on private law or State and Municipal environmental laws, disputes involving the Government of the respective State, as well as state-owned companies, municipal administrations and companies. The territorial jurisdiction of each of these State lower courts is provided in the Brazilian Federal Constitution and the laws of the respective States. State courts are fully independent from Federal courts.

Federal Courts of Appeal
("*Tribunais Regionais Federais*")

Currently, there are six of these courts in the country, divided according to the different territorial regions. Mostly, these courts try appeals filed against decisions rendered by Federal lower courts (see above) located in their respective region.

State Courts of Appeal
("*Tribunais de Justiça dos Estados e do Distrito Federal*")

Each State and the Brazilian Federal District/Capital have a Court of Appeal. Mostly, these courts hear the appeals filed against decisions rendered by the lower courts (see above) of the State where the respective court of appeal is located.

Superior Court of Justice
("*Superior Tribunal de Justiça* - STJ")

The main role of this court is to rule on matters involvoing possible violations of Federal law. In this sense, the STJ hears appeals filed against decisions rendered either by a Federal or State court of appeal whenever such decisions (i) contravene a treaty, convention or Federal law; (ii) validate a local government act that contradicts Federal Law; or (iii) interpret a Federal law differently from (an)other court(s) of appeal (and/or the Superior Court of Justice and/or the Federal Supreme Court) on the same matter[7].

In addition, this court will hear appeals filed against Federal lower court decisions in disputes involving a foreign Government or organism and a private party domiciled in Brazil or a Brazilian municipal administration.

In most cases, the STJ does not review facts or evidence, but

essentially assesses whether the interpretation of Federal law was correct. Thus, for example, one cannot re-assess arguments referring to the facts or interpretation of a given contract's provisions when appealing to the STJ.

Also worthy of mention is the power of this court to recognise foreign decisions (either judicial or arbitral) effective and enforceable in Brazil (or not) and to authorise, through exequatur in letters rogatory from foreign courts, services of process, depositions or other procedural acts originating in foreign courts that must take place in Brazil, as long as such decisions or letters rogatory do not contravene Brazilian public policy ("ordem pública") and provided they comply with any other requirements that may apply.

This court is composed of, at least, 33 justices, appointed by the President of the Republic.

Federal Supreme Court
("*Supremo Tribunal Federal* - STF")

This is the apex of the Brazilian legal system, known as the "guardian of the constitution". In this sense, one of the main roles of this court is to try appeals against decisions rendered by a Federal or a State court of appeal or even decisions rendered by the Superior Court of Justice, whenever these decisions:

- Directly contravene the Brazilian Federal Constitution and involve legal, economic, social or political matters relevant not only to the dispute itself, but also to the nation as a whole;
- Declare a given treaty, convention or Federal law unconstitutional;
- Deem a law issued by one of the Brazilian States or municipalities to be valid, to the detriment of the Brazilian Federal Constitution; and/or
- Deem a law issued by one of the Brazilian States or municipalities to be valid to the detriment of Federal Law[8].

7. Article 105, III, a, b and c of the Brazilian Federal Constitution.
8. Article 102, III, a, b, c and d of the Brazilian Federal Constitution.

Furthermore, the STF is empowered to hear any conflicts of jurisdiction between itself and the Superior Court of Justice or other Brazilian superior courts (Superior Labour Court - "*Tribunal Superior do Trabalho* - TST" and Superior Military Court - "*Superior Tribunal Militar* - STM") and disputes between these superior courts.

Just like the Superior Court of Justice, the STF does not analyse facts or evidence, but rather assesses whether a given act or decision violates the Constitution.

This court is composed of 11 justices, appointed by the President of the Republic.

Small Claims Courts
("*Juizados Especiais*")

Along with the courts mentioned above, the Brazilian legal system also has small claims courts, which are empowered to rule on less complex civil and commercial disputes where the monetary amounts involved are (i) equal to or less than, 60 minimum wages in the Federal courts (Federal Small Claims Courts - "*Juizados Especiais Federais*")[9] and (ii) equal to or less than 40 minimum wages in the State courts (State Small Claims Courts "*Juizados Especiais dos Estados e do Distrito Federal*")[10]. When the value of the claim is under 20 minimum wages, parties can file suit without assistance of a lawyer.

The small claims courts do not have jurisdiction over cases of alimony payments, bankruptcy, tax or those of interest to the Public Treasury, or those related to workplace accidents, waste or the capacity of individuals. Moreover, the Small Claims Courts cannot try cases that require expert examination.

Effects of decisions from the Federal Supreme Court, Superior Court of Justice and Courts of Appeal

From the perspective of civil and commercial disputes, as of today, binding court precedents in the Brazilian legal system are: (i) the decisions rendered by the Federal Supreme Court by means of concentrated control of constitutionality; (ii) "*Súmulas Vinculantes*", which are certain case law decisions that will function as stare decisis (precedent) that are issued from time to time by the Federal Supreme Court; (iii) the decisions in repetitive claims resolution proceedings

(when the court acknowledges legal issues that are repeatedly discussed in different lawsuits all over the country, chooses one or a small batch, as leading cases and instructs the pertinent courts of appeals where identical appeals have been detected to suspend them until the trial of the leading case or cases has taken place); (iv) binding precedents of the Federal Supreme Court on constitutional matters and of the Superior Court of Justice on infra-constitutional matters; and (v) guidelines from the full bench or special body to which the respective court is bound[11].

Of course the Superior Courts and Courts of Appeals set a number of precedents and these (especially those set by the Federal Supreme Court and the Superior Court of Justice) clearly influence judges of the lower courts (even allowing the superior courts or courts of appeal to immediately dismiss an appeal when its grounds clearly conflict with such precedents). However, except for the binding decisions referred to above, these judges are not tied to such precedents and may rule on a dispute as they see fit.

Examples of Proceedings and Injunctions

The New Brazilian Code of Civil Procedure, enacted on March 18, 2016, provides a number of different types of legal proceedings that are filed and conducted online. Most of these are devised to cope with specific disputes (land disputes, tax matters, repossession of assets etc.). However, most civil and commercial disputes are carried out in court by means of two types of lawsuits:

Enforcement Proceeding ("Execução") – Proceeding designed to be more expeditious, allowing the claimant to enforce their credit immediately, regardless of discussions about the merits of the executed enforcement title. To be entitled to file this (theoretically) more expeditious lawsuit, the obligation to be enforced must be unconditional and clearly described in writing in

9. For further information, reference is made to Law nº 10.259, dated as of July 12, 2001.
10. For further information, reference is made to Law nº 9.099, dated as of September 26, 1995.
11. Article 927 of the Brazilian Code of Civil Procedure.

an extrajudicially enforceable instrument, e.g. a promissory note or a contract or other instrument signed by the defendant and at least two witnesses[12]. The defendant's defence takes place in a separate lawsuit (motion to stay execution - "*Embargos à Execução*"), which has a limited range of formal arguments (e.g., overstatement of the debt) and does not stay the course of the enforcement proceeding (*Execução*), unless the court considers: (i) the requirements for interim protection have been met; (ii) the defendant's line of defence to be solid; (iii) the existence of the risk or certainty of damage that is difficult to remedy should there be any further enforcement; and (iv) the claimant's credit is duly secured by attachment of the defendant's (or a guarantor's) assets. The evidentiary phase in this type of lawsuit is limited, not usually comprising, for example, hearings or depositions.

***"Rito Ordinário"* -** This is the most popular legal vehicle to bring a dispute before the Brazilian (lower) courts. Most of the special types of lawsuits borrow at least one of the characteristics of this standard proceeding. Torts and other disputes that usually demand a comprehensive evidentiary stage are brought to court by means of this proceeding.

Injunctions - The Brazilian Code of Civil Procedure provides two types of injunctions - based either on 'urgency' or 'evidence' - to prevent losses to the party which requests relief or to secure satisfaction of a final judgment. Provided a party can prove the likelihood of the alleged claim succeeding (the "smoke of good law" or "*fumus boni iuris*") and/or the risk of loss or injury to the useful outcome of the lawsuit ("*periculum in mora*"), the judge (either from a lower court, court of appeal, STJ or even from the STF) is entitled to grant protection without even hearing the other party that will be affected by such an order ("*inaudita altera parte*").

Urgent injunctions can be anticipated or precautionary, being requested to avoid damages that might be caused to the party by a delayed judicial decision. It is filed in the main lawsuit and the decision that grants an injunction can be revoked after a complete analysis of the case. A precautionary injunction ensures a right of the claimant and may comprise sequesters, attachments, restraining orders, disclosure of documents, accounting records and other advance production of evidence typical of the evidentiary stage but that needs to be immediately secured due to risks of such evidence

being destroyed or disappearing

Evidentiary injunctions are based on the credibility of the documentary evidence presented and can be granted to the claimant, in summary judgment, when there is prima facie evidence of the claimant's right exists. It is a non-urgent injunction, since it does not require proof of *periculum in mora*, being based solely on evidence, that is, on the sufficient documentary demonstration of the facts constituting the claimant's right.

It is important to highlight that, notwithstanding the fact Brazilian arbitration law allows parties to request injunctions from the arbitration court, it is possible to file for injunction before the arbitral tribunal is constituted (depending upon the type of injunction, the claimant may start the arbitration proceedings within 30 days of the enforcement of the injunction).

Costs and Attorney's fees - The Brazilian Code of Civil Procedure establishes that the loser shall: (i) refund the court expenses incurred by the successful party; and (ii) pay the opposing party attorneys' fees set by the court (which do not comprise the contractual fees possibly charged by counsel: in principle, contractual fees are not reimbursed by the losing party). Said attorneys' fees may vary from 10% to 20% of the economic benefit of the case (or if it is not possible to measure the economic benefit, this percentage will be applied to the value of the case), taking into account aspects such as the "level of professional effort", the place where the lawsuit took place, the "nature and importance of the case", the kind of service rendered by counsel and the time spent by counsel providing services. However, in a declaratory action, the tendency is not to use percentages and/or the economic benefit of the dispute as a criterion for setting the fee awards because the scope of a declaratory suit is limited to a judgment recognising (or not) the existence of a given relationship and does not directly involve any award of damages or compensation. In this type of suit, the court usually sets fees for the winning party's counsel according to the level of professional effort of the counsel involved and the nature and complexity of the dispute.

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12. Public deeds and certain kinds of private instruments do not require witness signatures.

It is also important to highlight that in an enforcement proceeding ("*Execução*"), the abovementioned attorneys' fees are set by the court immediately after filing the initial complaint in favour of the claimant's counsel. If the defendant voluntarily complies with the obligation being enforced within three days of being served, the amount of the attorneys' fees will be reduced by 50%[13]. In cases where the defendant decides to challenge the claimant's alleged cause of action and respective claims (through a motion to stay execution - "*Embargos à Execução*") and loses, the defendant will have to bear additional fees set by the court in favour of the claimant's counsel (increased by up to 20%).

Evidentiary Stage

Any licit type of evidence and means of producing it can be used prior or during a lawsuit and the judge shall determine what evidence that he he or she requires to form an opinion. The judge may deny the production of evidence he considers useless or dilatory[14]. Nevertheless, unless forced by a court subpoena or similar, anyone asked to surrender a piece of evidence has the right to refuse.

A court can order tax authorities or banks to surrender privileged information regarding a defendant's financial activities or authorise court experts to break file (including electronic) codes and seise information. In any of these cases, the party which asks the court for such drastic orders must present at least some preliminary evidence to justify such acts and it will be liable for misuse of such evidence (unless misuse results from the courts or third parties gaining improper access to such findings).

Brazilian court proceedings are normally public, but any lawsuit dealing with privileged information must be sealed. Hence, only the parties involved, their respective counsels, the court and party-appointed experts, will be allowed to handle the records of the case.

The Brazilian legal system also provides for the possibility of inverting the burden of proof so it lays with the party for which the obtaining the proof is easier.

Along with documentary and testimonial evidence, there are other forms of evidence including appraisals, construction exams, medical and other scientific exams, proof borrowed from other

lawsuits and the production of notarial minutes. These are the main types of evidence that can be produced and which will have a material influence on the outcome of a lawsuit.

When it comes to civil and commercial disputes, although important, witness or party depositions (individual or legal representatives in the case of legal entities) are a subsidiary form of evidence. In fact, depositions under oath regarding the merits of the dispute will not apply to the parties or their legal representatives (in the case of legal entities, for example) and some witness depositions may not be accepted or may be deemed potentially biased if provided by one of the party's family members, close friends, employees or recognised enemies. Also, if it is found an alleged witness has an interest in the outcome of the dispute, the testimony might be considered potentially biased.

It is important to highlight that the judge will not be tied to the evidence shown or requested by any of the parties and may, regardless of any request, order additional evidence or restart the evidentiary stage all over again or even rule against the weight of available evidence.

The evidentiary stage may also comprise evidence (documents, witnesses, etc.) located abroad. In this case, the judge will ask the applicable foreign court, through letters rogatory, to produce such evidence.

Finally (although the intention of this Section is not to exhaust the matter), as already covered in section I.4 ("Injunctions"), in cases where there is evidence of urgency one can file an injunction requesting the immediate production of evidence to be used later in a lawsuit.

Situation of a Foreign Domiciled Company or Individual in a Dispute

The Brazilian legal system and the courts' alleged domestic/cross border jurisdiction may be a cause of concern to a foreign legal entity or individual, even those with some experience with Brazil. Engaging a local lawyer to support and represent the

13. Article 827, §1 of the Brazilian Code of Civil Procedure.
14. Articles 369 and 370 of the Brazilian Code of Civil Procedure.

foreign legal entity or individual in a dispute in Brazil is of paramount importance, even in a dispute relating to a contract with a provision selecting a foreign court as having exclusive jurisdiction.

Brazilian courts may not refuse to hear a dispute due to a choice of foreign court agreement in the cases where the law grants them jurisdiction (although there is conflicting case law on this issue).

Especially when it comes to product or service liabilities involving a Brazilian domiciled individual or legal entity as the true end user, according to Brazilian consumer defence law Brazilian courts may consider themselves as having jurisdiction to hear any claim (or counterclaim) filed by such a Brazilian plaintiff.

As Claimant

One of the peculiarities of Brazilian legislation is that an individual domiciled or foreign legal entity based overseas should be aware that prior to initiating judicial proceedings in Brazil they need to provide the court with a bond for costs, judicial fees and attorneys' fees (normally a deposit in an escrow account)[15].

This will not be necessary when the foreign claimant: (i) is domiciled or located in a country which has treaties with Brazil waiving such requirements; or (ii) has valuable real estate in Brazil (in certain cases, courts waive such requirements if there are other valuable assets in Brazil, such as shares in Brazilian companies); (iii) in cases of enforcement proceeding ("*Execução*" - see Chapter I.4) or counterclaim ("*reconvenção*")[16].

Security can be ordered by the court regardless of any requests from the defendant and usually amounts to around 10% and 20% of the economic value of the claim as determinable at that point in the proceeding. In case of non-compliance, the suit will be dismissed without prejudice.

Recently, there have been a number of decisions from the STJ (Superior Court of Justice) that exclude the obligation of a foreign domiciled and headquartered legal entity providing such a bond when the legal entity has a representative in Brazil.

When the dispute has to be settled by foreign law, the Brazilian judge may order the party which raised the issue to provide the court with evidence of of the law's content and enforceability,

such as certified and officially translated copies of the foreign statute and affidavits from counsel or scholars qualified in the foreign jurisdiction.

As Defendant

As already mentioned above, an individual or a company domiciled abroad, but which, at any given time, has done business with someone in Brazil (even through active websites) could be sued in Brazil, especially when this involves product liability in cases in which the Brazilian claimant is deemed to be the end user and thus protected by Brazilian consumer law.

Recognition and Enforcement of Foreign Judgements

Any final (res judicata) foreign arbitration award or court judgment can be recognised (wholly or partially) and enforced in Brazil, provided it meets certain mandatory requirements. The proceeding is heard by the Brazilian Superior Court of Justice - STJ. Upon recognition, the foreign judgment will become effective in Brazil and enforced accordingly (see Chapter I.4).

The STJ will only recognise a foreign judgment provided the foreign court had jurisdiction to render it according to Brazilian rules of private international law (see I.1 above). Also, court judgments rendered in lawsuits where the defendant located in Brazil has not been served by means of a letter rogatory will not normally be confirmed by the STJ (there is no such requirement for arbitral decisions when the agreement, institutional rules or the law of the seat of the arbitration provide for other means of service). Furthermore, it will also not recognise a judgment that is contrary to Brazilian public policy or that offends national sovereignty or the dignity of a human being or that is not duly translated into Portuguese[17].

The Court will refuse recognition of a foreign judgment when there is already a final (*res judicata*) decision on the merits

15. Article 83 of the Brazilian Code of Civil Procedure.
16. Article 83, §1º of the Brazilian Code of Civil Procedure.
17. Reference is made to article 963 of the Brazilian Civil Code Procedure.

rendered by a Brazilian court applying to the same parties and the same matter, even if the Brazilian suit was filed afterwards. Otherwise, the STJ will recognise the foreign judgment, which will then become final and effective (*res judicata*) in Brazil and the pending lawsuit filed in Brazil will be dismissed without prejudice.

Litigation against Public Bodies, Government-Owned Entities

There is no legal immunity for these entities in Brazil. However, it is important to highlight that when it comes to litigation against public bodies (Government and its branches, governmental agencies and other public legal entities), whether Federal, State or Municipal, although some restraining orders can be requested, no sequester, attachment or similar can be granted by the courts, even to secure satisfaction of a final judgment. The courts receive deposits from these public bodies and, with few exceptions, make payments to settle the debts of said public bodies in chronological order.

When it comes to Government-owned enterprises ("*Empresas Públicas*") or Government owned or controlled corporations ("*Sociedades de Economia Mista*"), the situation is different: such entities, no matter whether under Federal, State or city administration, are deemed by the Brazilian Federal Constitution as subject to the laws applicable to private companies. Therefore, injunctions can be freely requested against such entities.

II. New Code of Civil Procedure

The New Brazilian Code of Civil Procedure, enacted on March 18, 2016, brought about a number of modifications, some of the most important being: (i) all cases dealing with disposable rights may have a conciliation hearing before the defendant presents its defence in an effort to shorten the duration of proceedings ; (ii) attorneys' fees are also due in the appeal stage of the case (the Court of Appeal can increase the opposing party's attorneys' fees, up to a limit of 20% of the amount involved in the claim); (iii) unification of the procedural deadlines for all kinds of appeals (15 working days, with an exception made for the motion for clarification ("*Embargos de Declaração*" – five working days); (iv) deadlines are now counted

in working days; (v) deadlines for lawsuits are suspended, each year, from December 20 to January 20; (vi) the possibility of including the debtor's name in the Public Default Register ("*Cadastro de Inadimplentes*"); (vii) disregarded of a legal entity can be requested in the initial statement of a claim.

III. Labour Disputes

Labour litigation in Brazil is handled by a separate division of the Judiciary, structured in three levels: (i) the labour courts (spread across almost the entire country); (ii) the labour courts of appeal, almost every State has one of these specialised courts of appeal (the exceptions being: the State of São Paulo, which has two, as well as the States of Amazonas and Roraima, which share the same labour court of appeal, as do the States of Rondônia and Acre); (iii) the Superior Labour Court. Labour disputes and decisions involving constitutional matters may eventually lead to appeals to the Federal Supreme Court - STF.

Labour disputes are governed by the Consolidated Labour Laws - CLT, with subsidiary application of the Code of Civil Procedure. As opposed to other kinds of litigation (either tax, civil or commercial), the claimant, as well as the defendant, does not need to hire an attorney-at-law to represent his or her interests before the lower courts (labour courts and labour courts of appeal). The dispute starts with the filing of an initial complaint and a local lower court will be selected randomly. At this point, the court selected to hear the dispute schedules a date for what is called a "unified hearing" and issues the respective service of process documentation containing the date of said hearing. This hearing is called "unified" because it comprises a conciliation phase, during which the judge will encourage the parties to settle. If the parties fail to settle, the second phase of the hearing begins with the defendant submitting their reply, at which point both claimant and defendant may present their respective witnesses.

If the conciliation phase is unsuccessful or if there is an excusable absence of one of the witnesses, the judge may postpone the discovery phase until a later date. However, as a rule, the parties and available witnesses are heard on the same date. If the case is

simple and the reply submitted by the defendant is short, the judge can issue a decision on the merits at the same hearing, although it is more typical for a new date to be set for the decision.

In labour litigation, the burden of proof falls heavily on the defendant (the alleged reason for this is that the defendant is normally the employer, thus holding most of the information and records referring to the labour relationship under dispute) and the discovery phase is focused on documents as well as the depositions of the parties and witnesses (although the parties may submit written opinions from their own expert witnesses when the complexity of particular technical aspects of the case requires expert evidence).

Upon receiving official notice of the decision, the parties have five days to file a clarification motion (addressed to the lower court judge, requesting clarification on given aspects of the decision deemed obscure and/or contradictory and/or omitting relevant points of the dispute) or eight days to lodge an appeal to the pertinent labour court of appeal. If the defendant or plaintiff have not been awarded legal aid, on appeal they will have to deposit a sum in a court-controlled escrow account, equivalent to the amount of the financial penalty imposed on the party presenting the appeal (if any), up to a cap currently equivalent to £ 1,872.00. In cases where the court denies the appeal, besides meeting very strict requirements the defendant, may need to make an additional deposit (up to the amount in local currency equivalent to £ 3,747.00) in order to file an appeal with the Superior Labour Court.

Once the appeal phase has expired, if any of the plaintiff's claims remain granted by the Court (either in full or in part), a new phase begins to determine the amount of the credit adjudged against the defendant. Once the amount is determined, collection starts and if the defendant fails to comply with the decision, the court will normally freeze the defendant's bank accounts up to the amount of the credit being collected. Furthermore, whenever the defendant presents itself as a legal entity and no property is found to guarantee the credit, labour courts commonly pierce the corporate veil and proceed to freeze any shareholder and/or management bank accounts until the credit is guaranteed.

Collective Labour Disputes take place before the pertinent labour court of appeal, which will settle the dispute rendering a

decision binding on all (employers' and employees') unions or associations involved. There are three main reasons for starting Collective Labour Disputes in Brazil: (i) when there is a dispute over the interpretation of a given legal provision or a provision in a collective bargaining agreement, among inter alia; (ii) disputes resulting from claims by employees' unions; and (iii) strike-related disputes. The enforcement of decisions settling a Collective Labour Dispute require a specific proceeding.

Alternative Dispute Resolution

Arbitration in Brazil: Context and Statistics

The Firm Establishment of Arbitration in Brazil

Arbitration has become well-established in Brazil as a relevant method for dispute resolution, especially for highly complex cases involving large companies.

The Brazilian Arbitration Act (Law 9.307/96), enacted on September 23rd, 1996, represented a historic milestone for dispute resolution in the country. Inspired by the UNCITRAL Model Law, the Brazilian rule provides a safe and efficient legal environment for arbitration, encouraging its adoption by national and foreign companies, given its similarity to the internationally accepted and practised legal regime for arbitration.

Constitutional Affirmation

In 2001, the Federal Supreme Court (STF) - Brazil's Constitutional Court - recognised the constitutionality of the Arbitration Act when it ruled on the homologation and enforcement of Foreign Award SE 5.206, in which it was debated whether the parties could waive courts' jurisdiction in favour of a private solution to their disputes. The Supreme Court confirmed the validity of arbitration clauses and dismissed any doubts about the conformity of arbitration with the Federal Constitution.

Legislative Improvements

In 2015, following nearly 20 years of increasing use of arbitration governed by Law 9.307/96, the rule was improved by Law 13.129/15, which introduced important changes. These included the provision for arbitral disputes involving the State and its public entities (already widely accepted by scholars and case law), more detailed regulations on the enforcement of foreign arbitral awards (Brazil is a signatory to the New York Convention) and provisions regarding interim measures granted by courts prior to the commencement of arbitration. Those crucial amendments enabled the legal framework to meet contemporary demands and fostered an even more supportive environment for arbitration.

It is important to emphasise that Brazil has a Civil Law tradition. Thus, although case law plays an extremely important role in guiding the interpretation of statutory law, precedents are not binding - unless they fall within the scope of certain procedural requirements and circumstances defined by law. Consequently, judges and arbitrators have the discretion to decide cases submitted to them according to their own interpretation of the relevant legal framework - which can make parties' selection of arbitrators even more critical than it is in jurisdictions with a Common Law tradition.

The Superior Court of Justice (STJ) - the highest court for non-constitutional matters - has played a fundamental role consolidating arbitration in Brazil, especially by recognising arbitral jurisdiction and giving prestige to the kompetenz-kompetenz principle (e.g., AREsp 1276872/RJ; AgInt no REsp 2045629/SP). This principle, enshrined in Article 8 of the Arbitration Act, establishes that the arbitrators are competent to decide on their own jurisdiction, including issues relating to the existence, validity and effectiveness of the arbitration agreement. Only after the arbitrator's decision on these matters can the courts assess the issue, and even then, only to the (narrow) extent authorised by the Arbitration Act.

The Brazilian Judiciary's respect for the institute of arbitration is confirmed by the low percentage of arbitration awards overturned in lawsuits.

National Courts Respect Arbitration

The Brazilian Arbitration Act provides a mechanism for courts

to set aside an arbitral award (annulment action under Art. 33), which can be declared null and void only if (i) the arbitration agreement is null and void, (ii) the award exceeds the limits of the arbitration agreement, (iii) it was made by a person who could not act as an arbitrator (as in the case of impediments - and, as will be seen below, the IBA Guidelines on Conflict of Interest are frequently adopted as soft law in Brazil), (iv) it is rendered on account of corruption by the arbitrator, (v) the time limit set for the award has not been respected, or (vi) the principles of adversarial proceedings (guaranteed by the Federal Constitution), equality of the parties, impartiality of the arbitrator and his/her discretion have been violated.

According to a recently released survey, which analysed data from 2018 to 2023, only 6.3% of the cases that reached the STJ resulted in the full annulment of arbitral awards (and in 3.1% of cases, the award was only partially annulled).

Arbitrators' duty to disclose

With regard to arbitrators' duty to disclose, at the end of 2023 the Brazilian Arbitration Committee (CBAr) published Guidelines designed to assist various arbitration players (parties, arbitrators, lawyers, arbitral institutions, challenge committees and the judiciary) before, during and after arbitral proceedings. This initiative comes at an opportune time and has already won the support of several relevant institutions in the country.

Alignment with International Standards

These directives are aligned with the IBA Guidelines on Conflict of Interest in International Arbitration, thus creating national guidance that incorporates internationally recognised standards of excellence into the Brazilian arbitration legal system, which are already well-known to those who practise arbitration.

Active Party Participation and Disclosure

Two aspects of the Guidelines deserve special mention: the recognition of the active participation of the parties in the disclosure process and the burden placed on the parties regarding the scope and timeframe of disclosure.

Two provisions of the CBAr Guidelines mention the need for the parties to collaborate in the arbitrators' disclosure process. In practical terms, this means the arbitrator can (and is encouraged to) request clarifications from the parties in order to have more information for a thorough conflict check, thus addressing issues that are of real concern to the parties in the specific case.

Another item places the burden on the parties to inform themselves about "public and easily accessible facts", such as facts published on social media and news, CVs published on public platforms and the writings of potential arbitrators that may give rise to "justified doubt" (the expression is expressly adopted in the Arbitration Act) as to the independence and impartiality of the professionals being appointed arbitrators. Therefore, not all information necessarily needs to be disclosed by the arbitrators. In other words, examination of the timing of a potential conflict must take into account not only what the party actually knew, but what they could have known given their duty of diligence, especially in an age of easy access to information.

Another important point covered by the Guidelines is the possibility of raising a conflict of interest with the aim of challenging the award only after arbitration has ended. In this case, the parties "must justify the reasons why such information was not (or could not be) obtained and presented beforehand at the first opportunity". The aim is not to prevent the parties from challenging the award after it has been made, when the law adequately allows them to do so, but to prevent parties from using a conflict (which is often known or accessible to the parties before the procedure concludes) as an illegitimate tool to annul the award.

The combination of elements highlighted here - and others set out in the CBAr Guidelines - points to the full capacity for self-regulation of the Brazilian legal community, including the consolidation of concepts traditionally accepted at international level and ratified by the extensive Brazilian arbitration doctrine and the already considerable case law on issues that gravitate around the subject.

Statistics

Recently, two reports were released with important statistics on dispute resolution in Brazil.

The National Council of Justice (CNJ) released the Justice in Numbers Report 2024, which analyses data from the Judiciary through 2023. The Centre for Arbitration and Mediation of the Brazil-Canada Chamber of Commerce (CAM-CCBC) - an entity that manages approximately 40% of arbitrations in the country (as per 2022 data) – also released its Facts and Figures for 2023.

The comparison between those reports reveals essential information for commercial decisions on the main dispute resolution mechanisms - especially involving complex issues and the need for objective metrics to help assess, among other things, opportunity costs.

Judicial and Arbitral Data Comparison

In 2023, both State and Federal Courts together received more than 7.7 million new civil lawsuits. Also in 2023, both State and Federal Courts had more than 20 million cases pending judgement.

CNJ reports that on average across the country, court cases have been pending for around 4.5 years - this figure, however, takes into account small claims court procedures, which are considerably quicker than those in the ordinary courts (which are not comparable to the more complex, long-lasting cases typically taken to arbitration)

The Justice in Numbers Report also indicates a "slight increase in the average time taken for a judgement in the Judiciary" and "an increase in the time taken for a case to be judged and closed", especially with regard to "cases that are more difficult to resolve" - as a rule, complex cases in which resolution by arbitration is an alternative that is usually considered.

The CAM-CCBC averages 1 year and 9 months for the arbitrations under its administration - less than half the average length of a court case (regardless of its complexity).

The discrepancy becomes significantly greater when analysing the processing time in some of the country's main courts (disregarding small claims court procedures): a final ruling (i.e. including appeals to the Higher Courts) in cases filed before the Rio de Janeiro Court of Justice takes an average of 6.3 years; in Minas Gerais it is 6.4 years; in the São Paulo Court the duration increases to 10 years. At the Federal Courts competent for cases in Brasília, São

Paulo and Rio de Janeiro, the timeframe is of eight, 7.5 and five years respectively.

Those are precisely the judicial bodies with jurisdiction over the parties that resorted most to CAM-CCBC arbitration in 2023. The Facts and Figures reveal that of the arbitrations requested last year, 47% of parties are based in São Paulo, 9.94% in Rio de Janeiro and 4.76% in Minas Gerais.

Considering this data, a dispute submitted to arbitration tends to last less than 20% of the time it would take to be concluded if processed before the São Paulo State Court; and less than 30% of the duration of a case handled by Rio de Janeiro or Minas Gerais State Courts.

It should be noted that 8 of the 117 arbitrations initiated in 2023 at the CCBC had parties based in the UK.

The ICC Center for Dispute Resolutions presented some other interesting data: the 2023 ICC Dispute Resolution Statistics report shows that of the 890 proceedings requested last year, (i) 34 took place in Brazil – 19 of which in São Paulo (a state which, not coincidentally, has four Lower Courts specialising in arbitration-related disputes) –, (ii) 60 Brazilian arbitrators were appointed, and (iii) 29 of the disputes were governed by Brazilian law. This data underscores Brazil's growing prominence and relevance in the global arbitration landscape, evidenced further by the ICC's decision to establish an office in Brazil.

Conclusion

Arbitration in Brazil has evolved significantly, with a robust legislative framework, favourable case law and the incorporation of international guidelines that ensure the independence and impartiality of arbitrators. A comparative analysis of the costs and speed of arbitration compared to the judicial process reveals that, despite the higher initial costs, the efficiency and speed with which disputes are resolved make arbitration an attractive option for companies looking for expedite effective solutions to complex disputes.

Chapter 23

Compliance

Introduction

When compliance first became a trend, and for a while after that, it was considered something that companies needed to deal with, in light of the streak of enforcement and new legislation coming into force around the world. Because of that, compliance became the focus of many businesses, with companies needing to implement rules and controls to try and prevent bribery and corruption. Brazil was no exception. Of course, some might say it took slightly more time than it should have, given the seriousness of the issue in the country. It took several protests and movements around the country, in 2013, for the National Congress to realise that it needed to do something about it and, finally, settle a long-existing debt that the country had with the OECD and the Working Group on Bribery (WGB). That is how Federal Law 12,846/2013 (the "Brazilian Clean Company Act" or "BCCA") came into force.

Importantly, the fight against corruption in Brazil started before the BCCA, with the latter being simply a statute that – having

arrived at the right moment – enhanced the compliance scenario for companies. But corruption was, of course, already a crime in Brazil, under the Brazilian Criminal Act (Federal Decree 2,848/1940), although it applied solely o individuals. Also, 'administrative misconduct' – defined, simply put, as acting against the principles of the public administration, illicitly enriching oneself, or embezzling public money – have also been against the law, and applicable to companies, since 1992 (Federal Law 8,429/92). Also assisting in the fight against corruption, Federal Law 9,613/98 (as amended by Federal Law 12,8683/2012) enacted the Brazilian regime for money-laundering –which has long been an aspect of many of the corruption cases that have come to light to date.

Despite all that, the protests and demands called for a stricter and more comprehensive approach to corruption, specifically for companies, especially following the several scandals that were regularly being reported in the country. It had been a long time coming, ever since Brazil signed the United Nation's Convention against Corruption (ratified internally in 2006) or joined OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in 2000.

Regardless of the delay, however, once the BCCA came into force an increase in anticorruption enforcement came with it. That was also due to the very well- known *Lava Jato* Operation, in 2014. While there is a lot that can be said about *Lava Jato* (good and bad), it worked very well as a way to "jump start" the compliance era in Brazil. For the first time in perhaps the country's history top politicians and multinational companies were suffering legal implications for misconduct related to corruption, money laundering and other fraudulent activities. Funnily enough, it was not the BCCA that was being enforced at first, as misdemeanours needed to have been committed from 2014 onwards for it to be applicable. So, for many of the misdemeanours committed at the time, the enforcement was under the previous legislation. But the stage had been set, which caused compliance and anticorruption to become a priority and focus for companies, afraid of being caught in the enforcement net.

With that, companies started to understand the relevance of having internal controls and rules, building a compliance culture and training employees to act within the law – as they realised what price would be paid otherwise.

The BCCA and its ancillary regulations

In that sense, it is important to see what the BCCA entails for companies doing business in Brazil. One initial point to be clarified is that the BCCA is a statute that sets forth administrative and civil liability of companies for the misdemeanours mentioned therein. That is a big difference from other international laws (such as in the UK or the US), which define corporate corruption to be a crime. Important to note, however, that despite not qualifying corruption as a crime, the penalties under the BCCA are very stringent, as shown below.

Also, the BCCA stipulates companies are strictly liable for the acts of their employees, and the liability persists even in case of M&A transactions, although limited to financial penalties proportional to the amount invested. Joint and several liability is also set forth in the BCCA, for any controlling, controlled, or 'linked' company, although sanctions are also limited to financial penalties.

In terms of the behaviors penalised by the BCCA, a few considerations are relevant. Many have opted to refer to the BCCA as the 'Brazilian Anticorruption Law.' This, however, does not hold true to the legislation's intent, nor does it cover all the legal rights that the BCCA encompasses and protects. The BCCA covers a range of misdemeanours that go beyond bribery and corruption. Namely, according to Article 5: (I) to promise, offer or give, directly or indirectly, an undue advantage to a public official or to a third party related to him/her; (II) to demonstrably finance, defray, sponsor or in any way subsidise the performance of the wrongful acts established in the BCCA; (III) to demonstrably make use of a third party, either an individual or a legal entity, in order to conceal or dissimulate the entities' actual interests or the identity of those who benefited from the conducts; (IV) to, in any way, defraud a public bidding process or government contract; (V) to hinder investigations or inspections carried out by public agencies, entities or officials, or to interfere with their work, including the activities performed by regulatory agencies and by inspection bodies of the national financial system.

As one can see, it of course covers corruption and bribery, but it is not limited to it. Defrauding a public bidding process or hindering government inspections and/or investigations are punishable under the BCCA, and companies need to be aware and

prepared to mitigate related risks. As history has shown, several of the misdemeanours investigated in the Lava Jato Operation, and other government investigations, involved bribes paid to defraud public bidding processes or government contracts. Additionally, one of the main and largest government investigations, around the same time of *Lava Jato*, involved bribe payments made to hinder government inspections (Operation *Carne Fraca*).

This level of enforcement assisted with the development of compliance in Brazil, and caused companies to understand its relevance. But another aspect of the BCCA also helped: its lofty standards in terms of penalties.

Administrative fines under the BCCA can range from 0.1% to 20% of a company's gross revenues in the year prior to launching the administrative proceeding (and never less than the undue advantage obtained by the company if it is possible to estimate). The BCCA also defines full compensation must be paid for damages caused and requires publication of the administrative decision.

Civil penalties may also be applied by the courts under the BCCA, and these are also severe: they can include disgorgement of profits or other amounts obtained from misconduct, suspension of the company's activities, compulsory dissolution of the company, and prohibition from receiving incentives, subsidies, donations or loans from government or government-owned entities from 1 to 5 years.

The administrative penalties are applied following an 'administrative liability proceeding' ("PAR"), run by the Brazilian General Comptroller's Office ("CGU" - the regulatory and enforcement body responsible for the BCCA), or the highest-ranking authority of each government entity from the Executive, Legislative and Judiciary branches the misdemeanours affected – although a majority of PARs so far have been conducted by the CGU. The civil penalties, on the other hand, shall only be applied by the courts.

However, penalties may be substantially reduced in case of cooperation and signing of a leniency agreement with the CGU. This is possible should the company's cooperation lead to identification of others involved in the misconduct, and prove the misconduct happened. Another requirement for signing a leniency agreement is admission of the company took part in the misconduct, after, of course, halting its participation in the wrongful act. If cooperation is

deemed successful, the company can (i) receive up to 2/3 reduction of its fine; (ii) exemption from publication of the decision against it; and (iii) exemption from the prohibition against receiving governmental incentives or subsidies. It does not, however, exempt the company from compensating damages caused by the misconduct.

On a practical note, negotiation of any such leniency agreement in Brazil may require the involvement of other authorities, depending on the misconduct and jurisdictional competence. Such coordination of authorities in Brazil has never been an easy task, and that remains soothe case. Nonetheless, and whilst there is room for improvement, there has, indeed, been an effort from authorities to facilitate it, for example with a cooperation agreement between the CGU, the Federal Supreme Court (STF), the Attorney General's Office (AGU), the Federal Court of Accounts (TCU), and the Ministry of Justice and Public Safety (MJSP) (notably and regrettably, however, the Federal Prosecution Office (MPF) did not take part).

In addition, and following the BCCA, the government also enacted Decree 11,129/2022 (which substituted Decree 8,420/2015), and which set out additional regulations for the BCCA. The statute sets out the procedures and rules for enforcing the BCCA and – importantly – set forth the compliance principles that were to be used by companies as guidance for implementing controls to prevent misconduct.

Decree 11,129/2022 also establishes the specific rules and regulations for the administrative liability proceedings, for the application of judicial penalties, as well as for negotiating leniency agreements with the CGU.

Aside from the Decree, several smaller – but also relevant – regulations establish rules and guidelines for dealing with conflicts of interests, offering of gifts or hospitality, or donations and sponsorships in connection with the government or government officials.

What Having a Compliance Programme Means in Practice

What all the abovementioned legislation did was incentivise companies to implement internal controls and rules to prevent or mitigate risks of bribery and corruption-related misconduct. Several were guidelines and regulations that set what companies should

consider when implementing such compliance programme.

As noted above, Decree 11,129/2022 sets the high-level aspects that companies should aim to implement. But that is not all. The CGU became a much more active regulator following the BCCA and published several guidebooks to direct companies in their efforts to build compliance programmes. The type and size of the internal controls and rules that are recommended for each company vary according to various factors, including, but not limited to (i) the nature of the company (government-owned or private); (ii) the size of the company; (iii) the nature of the business that it runs. The key aspect is that the compliance programme needs to be tailored to the company's business and circumstances and address the company's specific risks.

Despite that, there is a baseline of what companies need to have and implement in their compliance programmes. These are based on the CGU guidance, but are also largely in line with international compliance standards:

(i) Management commitment to compliance.

(ii) Standards and rules of conduct, including a code of conduct, internal policies, and procedures, applicable to employees and third parties, as applicable.

(iii) Training and communication measures.

(iv) Adequate risk assessment and management.

(v) Books and records that are precise and accurate.

(vi) Internal controls to ensure compliance with internal rules and procedures.

(vii) Procedures to prevent fraud or illicit activity in public bidding processes or government contracts.

(viii) Independence, structure and adequate resources for the compliance department or function.

(ix) Whistleblowing hotlines allowing for anonymity and confidentiality.

(x) Adequate measures in case of violations.

(xi) Continuous monitoring and improvement of the compliance programme.

One of the main CGU guidelines is also available in English on this link: https://www.gov.br/cgu/pt-br/centrais-de-conteudo/publicacoes/integridade/arquivos/integrity-program.pdf.

One aspect is important to reinforce here: as noted, and as can be seen above, there is no substantial difference between the standards set by the CGU and international compliance standards. This, however, leads to an issue commonly seen in multinational companies that establish a Brazilian subsidiary: a global compliance programme is established and cascades down the multinational group, without accounting for or adapting to local risks or realities.

However, although not substantial in the big picture, there are relevant differences (e.g., the bid-rigging provisions) that need to be accounted for specifically when implementing a compliance programme. That is why (i) a global compliance programme does not provide an effective set of internal controls and rules; and (ii) having a compliance programme tailored to the company's specific circumstances, as noted above, is so important.

One final note about the continuous monitoring and improvement aspect is relevant. It is common for companies to implement compliance programmes but, once it is done, the programme is not comprehensively monitored or continuously developed. Such monitoring is essential to any company that wants to build a proper compliance culture. Compliance cannot be fixed in time, especially in Brazil, where (i) regulators are now upscaling their demands and requirements; and (ii) bribery and corruption is a substantial risk.

Such a compliance culture is also a new feature in Decree 11,129/2022, which noted that a compliance programme should aim to "foment and maintain a culture of compliance in the organisational environment". Companies doing business in Brazil should thus take note of it. And the CGU is increasingly focussing on the importance of creating a compliance culture and it is developing programmes to incentivise companies to do that. These will be addressed in the following section.

An engaged, and stringent, CGU

In the past few years, the CGU has become a much more

active regulator and engaged in both the guidance and enforcement spheres. Ever since enactment of the BCCA, the CGU has launched guidance materials to direct companies along the compliance path. It has made available the above-noted guidance on compliance programmes, compliance guidance for government-owned companies, guidance on how to manage conflict of interests, etc.

The CGU has also launched programmes to reward or recognise companies that have compliance measures and controls in place at a certain level. In 2010 the CGU launched the Pro-Ethics Programme, a programme that aims to make the private sector more conscious of the importance of preventing and detecting fraudulent or corrupt conduct, and to incentivise companies to implement measures to that effect. Companies that are approved in the programme receive a stamp, and have their names publicised by the CGU as being up to the programme's compliance standards.

Important to note, however, that the 2010 programme was entirely different from the one currently running. That is because in 2015 the programme was revamped, following enactment of the BCCA, with new evaluation criteria and method. The programme was also recognised internationally by the OECD and the UNODC as a positive measure by the Brazilian government to invest in compliance and anticorruption efforts.

The CGU also very recently launched – in December 2023 – the Pro-Ethics Panel, which provides detailed information on the profiles and evaluations of the participating companies in the 2022-2023 Pro-Ethics cycle. The panel is significant as it includes information on previous editions, company profiles and compliance evaluations, and it will help corporates understand where companies in Brazil need to improve from a compliance perspective.

In addition to the Pro-Ethics Programme, the CGU has very recently launched the 'Brazilian Pact for Business Integrity' ("Brazilian Pact"). Companies adhering to the Brazilian Pact will receive reputational benefits, with their name being published on the programme's website, and receive authorisation to use the "Brazilian Pact for Business Integrity" brand on their website and institutional materials. Unlike the Pro-Ethics Programme, the Brazilian Pact involves a self-assessment by companies of their own compliance programmes, based on the "Self-Assessment Guide - Brazilian Pact

for Business Integrity" developed by the CGU. Companies fill in the self-assessment reports (both a profile report and a compliance report) on the CGU's system, and the system grades the company's compliance programme.

Importantly, the Brazilian Pact has minimum requirements for a company's compliance programme, but these are recognisably lower standards than the Pro-Ethics Programme, and intentionally so: those not at a stage where the compliance programme is developed enough for the Pro-Ethics Programme, can start with the Brazilian Pact. And perhaps, with time, the company's compliance programme can develop up to the Pro-Ethics' standard. That development process is also facilitated by the Brazilian Pact, as the self-assessment reports are guided by the standards provided by the CGU and companies can (and should) redo the process periodically, allowing them to continuously monitor and develop their compliance programmes.

One other aspect, which became known in a more obvious way via the Brazilian Pact, was the inclusion of ESG-related requirements for companies. The CGU has recently been taking a position that it is not possible for a company to reference itself as 'having business integrity' without acting socially and environmentally responsibly in addition to preventing bribery and corruption. The Brazilian Pact referred to it specifically by listing compliance alongside environmental legislation as one of its minimum requirements.

As can be seen, the CGU has provided companies with plenty of material and guidance to help them do business with integrity.

However, while it gives a lot of information and assistance, the CGU is also stringent towards companies in practice. That is something that is expected to continue, especially as compliance has evolved from being a competitive advantage for companies, to something that is simply expected. As that happens, regulators are expected to continue raising standards. As an example, in arange from 1 to 5, it is rare, in practice, to see companies receive a grade of more than 2 for their compliance programmes in the context of settlement agreements. Also, statistics from the Pro-Ethics Programme show that despite the continuous increase in the number of companies evaluated by the CGU, the number of approved companies did not rise proportionally and the approval rate actually decreased at times.

For example, in 2015, 33 companies were evaluated, and 19 approved (57% approval rate). In 2016, 74 companies were evaluated and 25 approved (33%). In 2017, 171 were evaluated and only 23 approved (13%). This 'decreasing scenario' slightly changed in the 2020/2021 edition, in which 195 companies were evaluated and 67 approved (34%), which shows the rate increasing. However, for the 2022/2023 edition, there has been a small decrease again, with the CGU having evaluated 254 companies, and 84 having been approved (33%).

This shows the CGU maintaining its stringent approach towards its assessment of company compliance programmes, so this should be a focus and priority for companies doing business in Brazil.

Conclusion

Brazil's fight against bribery and corruption, and for compliance and integrity, has been evolving throughout the years and this has provided companies with incentives to do business in Brazil, despite the compliance risks involved. In that sense, companies that come to do business in Brazil should be aware of the legal and regulatory requirements and what is expected by the regulators.

While enforcement has had its difficulties ever since enactment of the BCCA, the CGU has become more active and exigent and this can be seen by the way it is evaluating companies and their compliance programmes. Also, practice has shown that Brazil has seen a high (and increasing) number of PARs being conducted by the CGU and other government entities in recent years, which shows that enforcement should very much still be on the radar of companies doing business in Brazil.

At the same time, however, as one can see with the guidelines and programmes noted above the CGU has been giving companies a wide range of guidance as to how to implement and continuously improve their compliance programmes, Thus, companies doing business in Brazil, aware that regulators are acting more stringently and enforcement is still very much active, should take advantage of the assistance provided by the CGU to make their businesses safer and more compliant.

Cybersecurity framework in Brazil: A Comprehensive Overview

Introduction

In an interconnected world, cybersecurity has become a critical concern for businesses of all sizes and sectors. Data breaches can have devastating consequences for business, leading to financial losses, reputational damage, and legal repercussions.

Brazil, recognising the importance of cybersecurity, has established a comprehensive legal framework to address these concerns. This guide provides a high-level overview of Brazil's cybersecurity landscape, highlighting key regulations, industry-specific requirements, and best practices for compliance.

The Cost of Cyberattacks: A Stark Reality

The Ponemon Institute's 2023 study, sponsored by IBM Security, paints a grim picture of the financial impact of data breaches. The survey reviewed the data of 553 organisations located in 16 countries that suffered data leaks between March 2022 and March 2023.

The average cost of a data breach reached US$4.45 million, representing a 2.3% increase from 2022 and a staggering 15% from 2020.

According to the survey, 82% of all breaches involved data stored in the cloud, and the sector with the greatest losses was healthcare, with an average cost of $10.93 million per data leak.

Only a third of the companies discovered the data breach through their security teams, with 67% of the violations reported by benign third parties or hackers.

An interesting finding was that companies that didn't involve a regulatory agency in ransomware incidents had a 9.6% higher cost and the breach lifecycle lasted 33 days longer compared to the companies that notified them.

Beyond Financial Losses: Reputational Damage and Legal Risks

The repercussions of cyberattacks extend far beyond financial losses. Data breaches can erode customer trust, tarnish a company's reputation, and lead to lost business opportunities. For publicly traded companies, a data breach can trigger a sharp decline in stock prices, further exacerbating the financial impact. Moreover, companies that fail to comply with cybersecurity regulations may face legal penalties and enforcement actions.

In a scenario of data protection, especially personal data considered as fundamental rights by the Federal Constitution and protected by the General Personal Data Protection Act (LGPD), transparency and security will be the areas that determine the course and success of some companies.

Failure to comply with cybersecurity standards could lead to commercial isolation, as companies with robust data protection practices may be hesitant to do business with those lacking similar safeguards.

Brazil's Cybersecurity Legal Framework

Brazil has taken a proactive approach to cybersecurity, establishing a robust legal framework to protect citizens and businesses from cyber threats. The cornerstone of this framework is the National Cybersecurity Policy (established by Decree 11.856/23 enacted on 26 December 2023), which outlines a comprehensive strategy to enhance cybersecurity resilience, promote technological sovereignty, strengthen operational capacity, and foster global cooperation.

National Authority for the Protection of Personal Data (ANPD)

Applicable to all economic sectors, the ANPD published Resolution 15, enacted on 26th April 24, which regulates the reporting of security incidents to the ANPD by the controller whenever a

security incident might cause significant risk or damage to the data subjects.

A security incident is considered to pose a relevant risk or harm to data subjects when it can significantly affect the interests and fundamental rights of data subjects and, cumulatively, involves at least one of the following:

I - sensitive personal data pursuant to LGPD definitions;

II - data on children, adolescents, or the elderly;

III - financial data;

IV - authentication data in systems;

V - data protected by legal, judicial, or professional secrecy; or

VI - large-scale data.

The deadline for reporting a security incident to the ANPD is three (03) working days unless there is another deadline for reporting provided in more specific legislation.

It should be noted, therefore, that in some cases, if it involves personal data, a security incident will have to be reported to the ANPD and the specific regulator responsible for the company's sector of the economy.

The security incident report must contain the following information:

I - a description of the nature and category of personal data affected;

II - the number of data subjects affected, itemising, where applicable, the number of children, adolescents or elderly people;

III - the technical and security measures used to protect personal data before and after the incident, with due regard for commercial and industrial secrets;

IV - the risks related to the incident, identifying the possible impacts on the data subjects;

V - the reasons for delay if the communication has not been made within the period of 03 days;

VI - the measures that have been or will be adopted to reverse or

mitigate the effects of the incident on the data subjects;

VII - the date on which the incident occurred, when this can be determined, and the date on which the controller became aware of it;

VIII - the details of the person in charge or whoever represents the controller;

IX - identification of the controlling shareholder and, if applicable, a declaration that it is a small processing company;

X - the identification of the operator, where applicable;

XI - a description of the incident, including the main cause, if this can be identified; and

XII - the total number of data subjects whose data is processed in the processing activities affected by the incident.

Considering the short deadlines offered by the ANPD, it is clear the controller will have to adopt all the measures needed to comply with the General Data Protection Law (LGPD) before the data leakage.

Usually, to effectively comply with the LGPD, there are three different phases, namely: (1) Assessment; (2) Implementation; and, (3) Governance.

(1) In the assessment phase, the flow of personal data within a company is checked. At this stage, the IT team, whether internal or external, is usually required to help map personal data. A true snapshot is taken of the company's current scenario. Based on this data mapping, suggestions are made for improvements, both to the systems and to the data flow.

(2) In the implementation phase, internal and external contracts and policies adopted by the company are reviewed, adjusting or drawing up new documents when necessary. Contracts with clients and suppliers are reviewed (including cyber insurance, contracts for the supply of outsourced and temporary workers, etc.), with employees (including contracts for the loan of corporate laptops and mobile phones, home office policy, employee health policies, etc.), as well as policies on data governance, data privacy, and cookies on social networks, international data transfer, including if the transfer

takes place via cloud computing with servers located abroad.

(3) In the third phase, i.e. data governance, training takes place for all those involved with personal data within a company. Notifications are also drawn up in the event of a possible leak, as well as the impact report, a document that portrays the entire implementation of the LGPD within the company.

Sector-Specific Regulations: Tailored Cybersecurity Requirements

In addition to the overarching National Cybersecurity Policy and ANPD´s rules, Brazil has implemented sector-specific cybersecurity regulations to address the unique risks and challenges faced by industries. These regulations, often issued by regulatory agencies, impose additional obligations on companies operating in specific sectors.

Considering the scope of this guide, we will indicate, by way of example, just a few sectors of the economy that have specific legislation on cyber security without going into all the complexity that the subject requires.

Financial sector – Central Bank (BACEN)

BACEN's Resolution No. 4,893/2021 includes stringent cybersecurity requirements for financial institutions authorised to operate by the Bacen (except consortium administrators, payment institutions, securities brokerage companies, securities distribution companies, and foreign exchange brokerage companies). These requirements include:

(1) Comprehensive Cybersecurity Policy

These companies must maintain and publish a cyber security policy for their employees and third party service providers under the responsibility of a specific director appointed by the company. The policy must include:

I - the company's cyber security objectives, indicating its ability

to prevent, detect, and reduce vulnerability to incidents related to the cyber scenario;

II - the procedures and controls adopted to reduce the company's vulnerability to incidents and meet other cyber security objectives, which should include, at a minimum, authentication, encryption, intrusion prevention, and detection, prevention of information leaks, periodic testing and scanning to detect vulnerabilities, protection against malicious software, the establishment of traceability mechanisms, access controls and segmentation of the computer network and the maintenance of backup copies of data and information;

III - specific controls, including those aimed at information traceability, which seek to guarantee the security of sensitive information;

IV - recording, and analysing the cause and impact, as well as controlling the effects of incidents relevant to the company's activities, including information received from third parties and outsourced workers;

V - guidelines for:

a) the development of incident scenarios considered in business continuity tests;

b) the definition of procedures and controls aimed at preventing and dealing with incidents to be adopted by companies providing services to third parties that handle sensitive data or information or that are relevant to the conduct of the company's operational activities;

c) the classification of data and information according to relevance; and

d) defining the parameters to be used when assessing the relevance of incidents;

VI - the mechanisms for disseminating the cyber security culture in the company, including:

a) the implementation of training programs and periodic staff appraisals;

b) the provision of information to clients and users on

precautions when using financial products and services; and

c) the commitment of senior management to the continuous improvement of procedures related to cyber security; and

VII - initiatives to share information on relevant incidents with other financial institutions.

(2) Incident Response Plan

In addition to the cyber security policy, financial companies authorised to operate by BACEN must establish an action and incident response plan which must contain at least the following:

I - the actions to be taken by the company to adapt its organisational and operational structures to the principles and guidelines of the cyber security policy;

II - the routines, procedures, controls, and technologies to be used in preventing and responding to incidents, according to the guidelines of the cyber security policy; and

III - the department responsible for recording and controlling the effects of relevant incidents.

(3) Annual Report

Financial companies must also draw up an annual report regarding the action and incident response plan implementation.

(4) Cloud computing services provided abroad

It is important to note that financial companies can only contract processing, data storage, and cloud computing services provided abroad if they fulfill the following requirements:

I - there is an agreement to exchange information between the BACEN and the regulatory agencies of the countries where the services may be provided;

II - the contracting company ensures provision of the services does not jeopardise its regular operations or hinder the actions of the BACEN;

III - the contracting company defines, before contracting, the

countries and regions in each country where the services may be provided and the data may be stored, processed, and managed; and

IV - the contracting company provides alternatives for business continuity whenever it is impossible to maintain the service contract.

This Resolution does not set specific deadlines for submitting a data breach notification to BACEN. However, it does determine the need for the cybersecurity documentation to be drawn up, updated, and training sessions offered to the company's employees and third parties who handle their data.

Security Markets – Securities and Exchange Commission (CVM)

CVM Resolution 35/21 egulates the intermediation of securities transactions on regulated securities markets and provides broader definitions about data leaks and cyber security controls, including rules for contracting relevant third-party services and notifying security incidents.

The cyber security policy must contemplate the frequency with which employees and service providers must be trained and must contain at least:

I - the identification and assessment of internal and external cyber risks to which the intermediary is exposed;

II - the measures that should be adopted to reduce the company's vulnerability to cyber attacks;

III - procedures and internal controls adopted to: a) verify the implementation, application, and effectiveness of the measures adopted; and b) carry out continuous monitoring and timely detection of cyber attacks;

IV - measures adopted to deal with cyber incidents and recover data and systems;

V - the frequency with which the cyber security program should be tested and reviewed to (a) assess the company's vulnerability to cyber attacks and identify new cyber risks; and

(b) verify the need to improve existing rules, procedures, and internal controls; and

VI - ways of participating in initiatives aimed at sharing information on relevant threats and vulnerabilities.

Telecommunications sector – National Telecommunications Agency (ANATEL)

ANATEL has also issued Resolution No. 740/2020 (Cybersecurity Regulation), which applies to public interest telecommunications services, except for service providers classified as small or, depending on prior authorisation from Anatel's Board of Directors, companies that hold the right to use satellites to transport telecommunications signals and other companies in the telecommunications ecosystem involved directly or indirectly in the management or development of telecommunications networks and services.

Similar to the regulated sectors mentioned above, ANATEL also requires a cyber security policy to be drawn up which must necessarily undergo periodic independent auditing. Companies must also submit a report to ANATEL on implementation of the cyber security policy on an annual basis or when requested by ANATEL.

Telecommunications companies will also have to carry out cycles to assess vulnerabilities related to cyber security and send Anatel information about their Critical Telecommunications Infrastructures.

Failure to implement, update and deliver the required rules and policies may result in application of administrative sanctions under Law 9.472/97, such as:

I - a warning;

II - a fine not exceeding R$ 50,000,000.00 (fifty million reais) for each violation;

III - a temporary suspension;

IV - forfeiture;

V - declaration of unfitness.

Energy Sector – National Electrical Energy Agency (ANEEL)

ANEEL Normative Resolution No. 964/2021 sets out the cyber security policies companies in the electric energy sector should adopt.

According to ANEEL Resolution no. 964/2021, energy concessionaires, permit holders and others authorised to provide electricity services or installations and the entities responsible for operating the system, selling electricity, and even managing resources from sector charges must draw up a Cyber Security Policy to prevent, mitigate and recover from cyber incidents on their critical information network or installation network so that, inter alia, such incidents do not affect operations.

ANEEL has also adopted Cyber Accident Notification. Companies must notify the designated sector coordination team of major cyber incidents that substantially affect security of facilities, operations, services to users or data.

Large-scale cyber incident notifications must include an analysis of the cause and impact, as well as the mitigating actions taken, as appropriate.

Large-scale cyber incident notifications do not exclude compliance with other reporting obligations laid down in laws, rules, and other regulations.

The notification must be made as soon as the company is aware of the incident and its scale.

Private Insurance Sector – Brazilian Private Insurance Authority (SUSEP)

SUSEP published Circular No. 638/2021, which sets out cybersecurity requirements that insurance companies, pension companies (EAPCs), capitalisation companies, and local reinsurers.

These requirements align with a broader public agenda to strengthen cybersecurity and data governance at Brazil's financial institutions. SUSEP Circular No. 638/2021 sets out guiding principles for internal cybersecurity policies, new guidelines for identifying and

limiting risks, failure prevention, and security measures for information security incidents. It also redefines requirements and procedures, as well as the extent to which entities are liable for incidents.

It also requires creation of a cyber security policy that involves even third parties that provide services and includes the need for training for all those who access the company's data.

Medical Devices equated with products and medicines by the National Health Surveillance Agency (ANVISA)

Anvisa makes recommendations for medical device manufacturers and mandates adoption of security requirements and security risk control measures in the AAMI TIR57:2016, IEC TR 80001-2-2, IEC TR 80001-2-8, the ISO 27000 family and resources published by the National Institute Standards and Technologies2 (NIST) (e.g. Secure Software Development Framework - SSDF), the Open Web Application Security Project3 (OWASP) (e.g. Security by Design Principles) and the US Healthcare and Public Health Sector Coordinating Council (HPH SCC) Joint Cyber Security Working Group (JCWG) (e.g. the Joint Security Plan).

A manufacturer must draw up risk management documentation containing policies that clearly describe cybersecurity threats and vulnerabilities, an estimate of the associated risks, descriptions of the controls in place to mitigate these risks, and evidence to demonstrate that these controls have been tested.

Conclusion

As indicated above, the Brazilian legal framework for cyber security is a complex one, which requires specific studies by specialised personnel who understand both the legal nuances and the technical standards on cyber security, such as NBR ISO/IEC 27032 from June 2024, which provides guidelines on the relationship between Internet security, web security, network security and cybersecurity; an overview of Internet security; identification of interested parties and a description of their roles in Internet security; high-level guidance for addressing common Internet security issues.

Brazilian General Data Protection Law (LGPD)

Introduction

In today's data-driven world, protecting personal data has become a top priority for businesses operating globally. Brazil, with its growing economy and tech-savvy population, is no exception. The Brazilian General Data Protection Law (LGPD), Law nr. 13,709/2018, enacted in 2018 and fully effective since 2021, establishes a strong framework for safeguarding personal data and giving individuals control over their information.

Understanding the LGPD

The LGPD aims to protect personal data from misuse by data controllers. It applies to all information, online or offline, that can identify an individual, such as names, identification numbers, addresses, and IP addresses. The law also provides heightened protection for "Sensitive Personal Data," including information related to race or ethnic origin, religion, health, sexual orientation, health or medical records, genetic or biometric data, and affiliations to trade unions or religious organisations, philosophical, or political purposes.

Processing of personal data comprises all operations performed with personal data, such as collection, production, reception, classification, use, access, reproduction, transmission, distribution, filing, storage, deletion, evaluation, control, modification, communication, transfer, diffusion or extraction of data or information

LGPD Applicability: Navigating the Scope

The LGPD's reach extends to data processing activities conducted within Brazilian territory and beyond its borders under specific circumstances:

1. **Data Collection in Brazil:** When personal data is collected within

Brazil, the LGPD applies regardless of the data controller's location or the data's intended use.

2. **Data Relating to Individuals Located in Brazilian Territory:** Even if data processing occurs outside Brazil, the LGPD governs the handling of personal data pertaining to individuals located in Brazil.
3. **Targeting Brazilian Consumers:** If the purpose of data processing is to offer products or services to individuals in Brazil, Brazilian or foreign, the LGPD's requirements must be met.

Exemptions: Understanding the Exclusions

While the LGPD casts a wide net, certain data processing activities fall outside its purview:

1. Personal and Non-Economic Purposes;
2. Journalistic, Artistic, or Academic purposes.
3. Public Security, National Defense, and State Security;
4. Criminal Investigations or to suppress criminal offenses;
5. Data Passing Through Brazil: Data processing activities that merely pass through Brazilian territory without any substantive processing within the country.

Data Subject Rights: Empowering Individuals

The LGPD grants data subjects a set of fundamental rights regarding their personal data:

1. **Right to Confirmation:** Data subjects have the right to confirm whether their personal data has been processed or transferred to third parties by the controller.
2. **Right to Rectification:** Data subjects have the right to request the rectification of inaccurate or incomplete personal data.
3. **Right to Erasure:** Data subjects have the right to request the erasure of their personal data under certain circumstances, such as when the data is no longer necessary for the purpose for which

it was collected or when the data subject withdraws consent.

4. **Right to Anonymisation of personal data.**
5. **Right to Data Portability:** Data subjects have the right to receive their personal data in a structured, commonly used, and machine-readable format and transmit it to another controller without hindrance from the controller to which the personal data have been provided.
6. **Right to Object:** Data subjects have the right to object to the processing of their personal data in certain circumstances, such as when the processing is for direct marketing purposes or profiling.
7. **Right to Withdraw Consent:** Data subjects have the right to withdraw their consent to the processing of their personal data at any time.

International Data Transfers: Navigating Cross-Border Flows

The LGPD permits international data transfers under specific conditions that aim to safeguard the protection of personal data:

1. **Transferring to Countries with Adequate Data Protection Levels:** Data transfers can occur to countries that offer an adequate level of personal data protection, as recognised by the Brazilian National Data Protection Authority (ANPD).
2. **Implementing Specific Contractual Clauses:** Data transfers can be made based on specific standard contractual clauses approved by the ANPD, binding corporate rules, or regularly issued seals, certificates, and codes of conduct, ensuring that the data will be adequately protected.
3. **International Legal Cooperation:** When the transfer is necessary for international legal cooperation between government intelligence, investigations, and prosecution authorities, according to instruments of international law, or when it is the result of a commitment established in an international cooperation agreement
4. **ANPD authorisation:** When the transfer is authorised by the

National Data Protection Authority.

5. **Public services**: When the transfer is necessary for the execution of public policies or public service activities
6. **Obtaining Explicit Consent from Data Subjects:** Data subjects can provide explicit consent for international data transfers, acknowledging the risks involved and the safeguards in place.
7. **Legal or Regulatory compliance:** When it is necessary for the fulfillment of a legal or regulatory obligation on the part of the controller.
8. **Contract Execution:** For the execution of a contract or procedures related to the contract in which the data subject is a party, as long as required by the data subject himself.
9. **Regular exercise of rights:** including contractual performance and in court, administrative, or arbitration proceedings.

Controller Obligations: Ensuring Responsible Data Handling

The LGPD imposes a range of obligations on data controllers to ensure the responsible handling of personal data:

1. **Demonstrating Consent Compliance:** Data controllers must demonstrate that consent was obtained under the LGPD's requirements, including clear and specific information about the processing purposes and the data subject's right to withdraw consent.
2. **Maintaining Processing Records:** Data controllers must maintain records of personal data processing activities, including the purpose of processing, the categories of data processed, the recipients of the data, and the transfer mechanisms used.
3. **Conducting Privacy Impact Assessment Report:** When required by the ANPD, data controllers must submit a privacy impact assessment report to demonstrate the risks associated with specific processing activities and the mechanisms implemented as appropriate safeguards.
4. **Informing Data Subjects of Changes:** Data controllers must inform data subjects of any changes in the purposes of data

collection, ensuring transparency and enabling informed decision-making.

5. **Implementing Technical and Organisational Measures:** Data controllers must implement appropriate technical and organisational measures to protect personal data from unauthorised access, use, disclosure, alteration, or destruction, considering the nature of the data and the risks involved.
6. **Developing Internal Processes and Policies:** Data controllers must establish internal processes and policies to ensure compliance with the LGPD, including data breach notification procedures, employee training, and data retention policies.
7. **Appointing a Data Protection Officer (DPO):** For certain types of processing or when deemed necessary by the ANPD, data controllers must appoint a Data Protection Officer (DPO) with expertise in data protection law and responsible for overseeing compliance within the organisation.

Consequences of Non-Compliance: The Price of Neglect

Pursuant to the European GDPR, violations can lead to fines of up to 20 million euros or 4% of a company's global turnover. In Brazil, companies that violate the LGPD are subject to warnings, fines, suspensions, and partial or total bans for performing their activities by the Brazilian National Data Protection Authority (ANPD). Fines can reach up to 2% of the organisation's revenue, up to R$50 million per violation. Please note that Brazilian authorities haven´t established the exact meaning of "per violation" which can increase the penalty to be paid.

Furthermore, failure to comply with the LGPD can result in significant additional legal and reputational consequences for businesses:

1. **Civil, Criminal, and Labour Liabilities:** Data subjects may file civil and labour lawsuits against data controllers for damages caused by non-compliant data processing practices. In severe cases, criminal charges may be brought against individuals responsible for intentional violations.
2. **Reputational Damage and Market Isolation:** Non-compliance

can tarnish a company's reputation, erode consumer trust, and hinder business opportunities, particularly considering growing consumer awareness of data privacy rights.

Beyond Compliance: Embracing Data Protection as a Competitive Advantage

LGPD compliance should not be viewed as a mere regulatory burden but as an opportunity to enhance a company's reputation, strengthen customer trust, and gain a competitive edge:

1. **Demonstrating Commitment to Data Privacy:** By proactively complying with the LGPD, companies can showcase their commitment to data protection and ethical data handling practices, fostering trust among data subjects and stakeholders.
2. **Building Stronger Customer Relationships:** Respecting data privacy and empowering individuals with control over their data can lead to stronger customer relationships, increased customer loyalty, and enhanced brand reputation.
3. **Gaining a Competitive Edge:** In a data-driven world, businesses that prioritise data protection and demonstrate responsible data handling practices are likely to gain a competitive advantage in attracting and retaining customers, partners, and investors. In this regard, for example, it is important to highlight that many companies in Brazil, like Petrobras (the biggest Brazilian oil company), have increasingly made LGPD compliance a prerequisite for partnerships and supplier contracts.

Additional Considerations for Foreign Businesses

While the LGPD shares similarities with the European GDPR, it also has unique aspects that foreign businesses should consider that simply translating existing data protection policies and procedures from a foreign language into Portuguese may not be sufficient for LGPD compliance. Several factors necessitate a more comprehensive approach:

1. **Legal Nuances:** The LGPD has specific legal requirements and terminology that may not have direct equivalents in other languages. Accurate translation and interpretation are essential to avoid misinterpretations and legal risks. A classic example is the incorrect use of terminology to describe the relationship between a company and its workforce. In Brazil, there are significant legal distinctions between employees, contractors, collaborators, partners, and third-party service providers. Failure to accurately identify the appropriate terms can lead to mischaracterisation of the employment relationship and potentially expose companies to legal challenges.
2. **Cultural Context:** Data protection principles and practices may need to be adapted to align with Brazilian cultural norms and expectations. A one-size-fits-all approach from a foreign policy may not be effective in the Brazilian context. An example of this is the excessive use of social media by Brazilians, which could cause significant risks and losses to the company if it does not adopt a specific policy on the use of social media.
3. R**egulatory Landscape:** Brazil's data protection landscape is evolving, and new regulations or interpretations may emerge. Ongoing monitoring and adaptation of policies are crucial to maintain compliance.
4. **Data Subject Rights:** Understanding and respecting the rights granted to data subjects under the LGPD is paramount. Translation alone may not capture the nuances of these rights and the procedures required to fulfill them.

Conclusion: Proactive Compliance for a Thriving Future in Brazil

The LGPD represents a significant step forward in Brazil's data protection landscape, safeguarding the rights of individuals and establishing a framework for responsible data handling practices. For businesses operating in Brazil or seeking to enter this dynamic market, proactive compliance with the LGPD is not just a legal obligation but a strategic imperative to build trust, enhance reputation, and gain a competitive edge in the increasingly data-driven world.

By understanding the LGPD's requirements, implementing robust data protection measures, and fostering a culture of data privacy within the organisation, businesses can navigate the Brazilian data protection landscape with confidence and position themselves for sustainable growth and success.

Artificial Intelligence

Introduction

Artificial Intelligence (AI) is rapidly evolving, with applications increasingly widespread. This has led to a growing interest in the legal and ethical implications of AI.

What is AI?

It's important to distinguish AI from Robotic Process Automation (RPA). Unlike RPA, which automates repetitive tasks, AI learns and adapts, mimicking human intelligence. While RPA can improve efficiency, it's not true AI.

AI is a branch of computer science, that aims to develop tools and systems capable of performing tasks normally requiring human intelligence, such as recognising patterns, making decisions, and interacting with the environment. The rapid growth in data processing has fueled advancements in AI systems, prompting discussions on legal and ethical frameworks to guide the entire AI lifecycle (training, development, use, improvement, etc.).

Brazil's Path to AI Regulation

Brazil joined the global discourse on AI regulation in 2020 with Bill No. 21/2020. This bill took a principles-based approach, outlining responsibilities for AI usage. As the bill progressed through the Senate, a dedicated commission delved deeper into the topic.

After public hearings, expert consultations, and a compiled report led to Bill No. 2338/2023.

Inspired by the European AI Act, Bill No. 2338/2023 adopts a more specific approach, establishing a Regulatory Authority and focusing on risk-based regulation.

Key Aspects of Bill No. 2338/2023:

- **Definitions of AI Agents:** While some experts advise against rigid definitions due to the dynamic nature of technology, the bill defines terms like:
  - AI System Supplier: A natural or legal person (public or private) who develops the AI system directly or on commission, placing it on the market or applying it to a service offered under their name or trademark, with or without a fee.
  - AI System Operator: A natural or legal person (public or private) who employs or uses an AI system on their behalf or for their benefit, unless used in a personal and non-professional capacity.
  - AI Agents: Refers to both AI system suppliers and operators collectively.
- **Risk-Based Regulation:** The bill categorises AI systems based on potential risk levels (low to high), with higher-risk systems facing stricter oversight and requirements.
- **Regulatory Authority:** The bill establishes the National Data Protection Authority (ANPD) as the Regulatory Agency responsible for overseeing AI implementation and ensuring compliance with the proposed regulations.
- **Forbidden Applications:** The bill outlines specific scenarios where AI usage is forbidden, such as applications aiming to manipulate or induce certain behaviors. This could impact companies involved in digital marketing, online games and bets, and other activities deemed harmful or unethical.
- **Liability of AI Agents:** As a rule, an AI agent causing damage to property, morals, or individual rights will be held liable (collectively or individually) and obligated to make full reparation, regardless of the system's autonomy level.
- **Principles:** The bill highlights the following principles for using

and developing AI systems in Brazil:

1. Human participation in the AI cycle, effective human supervision, and traceability.
2. Non-discrimination, transparency, and reliability.
3. Accountability, responsibility, and full reparation of damages.
4. Precaution, prevention, and mitigation of systemic risks.

- **Rights Granted to People Affected by AI Systems:** The main rights guaranteed by the Legal Framework for AI include:
  1. The right to explanation, information, contestation, and human participation.
  2. Right to privacy and data protection.
  3. Right to non-discrimination and correction of discriminatory biases.
- **Governance and Security Measures:** AI agents must establish governance and security structures, including internal processes promoting transparency in the development and use of the AI system, adequate data management measures to mitigate discriminatory biases, and privacy by design and default measures.
- **Sanctions:** The bill proposes fines (limited to R$50 million per offense) and suspension of the development, supply, or operation of the AI system.

Businesses operating in Brazil, particularly those involved in data-driven activities and AI applications, must closely monitor this evolving regulatory landscape.

The debate surrounding AI regulation in Brazil is ongoing, with various stakeholders actively participating in shaping the final framework. Brazil's approach reflects a commitment to responsible innovation while safeguarding individual rights and societal well-being.

Legal discussions

Intellectual Property

The National Institute of Industrial Property ("INPI" - the

authority responsible for granting industrial property assets such as trademarks and patents) has already ruled that it is impossible to indicate or nominate an AI system as a patent inventor, in line with the recent interpretation adopted in decisions handed down by the industrial property offices of the United States, the United Kingdom, and South Korea since the Brazilian intellectual property law is based on the concept of human creations. Nevertheless, please note that there is no uniform case law position in our Brazilian Courts.

Civil Law

If there is a consumer relationship between the AI agent and the user affected by the AI system, the Brazilian Consumer Defense Code ("CDC") will be the main law to regulate this relationship. The CDC establishes that agents who are part of the consumer chain for a given product or service will be held objectively liable for defects or the fact of the product or service (e.g. breach of the duty of care, safety, violation of consumer privacy, etc.). Thus, once a consumer relationship has been established, the agents that make up the supply chain of an AI system will be liable for damages caused to "consumers" under the terms of the CDC, notably the users affected by the AI system.

On the other hand, given the complexity of the AI system and the multiplicity of agents involved, liability exclusions may apply in the specific case, including the following hypotheses: (a) if the supplier demonstrates the exclusive fault of the consumer; or (b) if the supplier demonstrates the exclusive fault of a third party.

Criminal Liability

Another legal issue involves when AI makes decisions independently, without human interference. In cases of so-called uncontrolled deviations, it is debated:

- whether the individual who originally programmed the AI could be held criminally liable, even if they were at fault;
- in such cases, it would be necessary to demonstrate the violation of a duty of care on the part of the individual, which

may not always have occurred; or

- whether it would be necessary to create a separate (and unprecedented) legal system to regulate the accountability of the AI system itself.

AI Adoption in the Brazilian Public Sector

Public sector entities in Brazil are increasingly embracing AI to streamline processes, enhance efficiency, and improve citizen services. The Supreme Federal Court and the Attorney General's Office, for instance, have implemented AI tools to assist in analysing and categorising cases, retrieving precedents, and performing other tasks. These initiatives have demonstrated positive outcomes, such as reduced processing times and improved decision-making.

Bill 2338/2023 proposes AI use in public security, particularly for processing biometric data and identifying individuals in public areas. This application holds immense potential, especially considering that personal data processing in the context of criminal investigations and state defense is not subject to the provisions of the General Data Protection Law (LGPD).

Use of AI in investigation, prosecution, and enforcement activities

It's important to remember that in criminal proceedings, the principle of the physical identity of the judge applies, which means that the human aspect is important in the judge's decision-making process in criminal matters. In this context, the National Council of Justice (CNJ) has already ruled that:

- The use of AI models in criminal matters should not be encouraged, especially in the case of suggested predictive decision-making models; and
- This restriction does not apply to the AI use tools and systems in criminal matters exclusively to calculate sentence penalties, statutes of limitations or check recidivism (if it does not indicate a conclusion that is more harmful to the offender).

Competitive Law Aspects

From a competition law perspective, these transformations may be reflected in enforcement trends for Brazilian competition authorities, such as the Administrative Council for Economic Defense ("Cade"). Regarding the prior competitive analysis of mergers and acquisitions, authorities have already expressed concerns that the intensive use of AI systems by large technology companies could give them competitive advantages or create barriers to entry in certain markets for smaller competitors.

Further, there is also a risk that AI technologies could be used to carry out behavioral practices like establishing prices with competitors to create "algorithmic cartels". Automation would supposedly allow these coordination methods to operate in a manner more efficient and subtle, making it difficult for the competent authorities to detect and combat them. In this regard, antitrust authorities have adapted, including using AI systems, to identify and punish more sophisticated cartels.

Tax Aspects

The use of AI systems can become an important tool for tax management, facilitating both the activities carried out by the tax authorities about tax inspection and collection, as well as taxpayer compliance and tax planning.

For tax authorities, AI systems and tools can make it possible to cross-check data between systems and controls of different entities, monitor transactions that give rise to tax-generating events, centralise compliance with ancillary obligations, and facilitate inspection, litigation, and tax collection. For taxpayers, AI systems and tools can be used to monitor new legislation and map relevant precedents, facilitate the fulfillment of ancillary obligations, map opportunities for the taxpayer, and even calculate taxes, identify tax credits to be refunded, and automate tax litigation.

Labor Aspects

AI's ability to automate tasks and analyse vast amounts of

data has led to fears of job displacement, particularly in occupations that involve routine tasks and data processing.

A study by the Kellogg School of Management at Northwestern University suggests that professions that rely heavily on data analysis but lack a requirement for complex judgment or interpretation are at the highest risk of transformation or even disappearance. This potential displacement extends to customer service roles, call center operations, and creative fields like scriptwriting and writing. The recent Hollywood writers' strike, in part, stemmed from concerns over low wages and the use of AI-generated scripts.

In this regard, the growing use of AI in the workplace and hiring processes necessitates a comprehensive legal framework to ensure responsible and ethical implementation. This framework should address issues such as:

- Bias and Discrimination: AI systems must be designed and implemented to prevent biases and discrimination against individuals based on race, gender, or age.
- Transparency and Explainability: AI systems should be transparent and explainable, allowing users to understand the decision-making processes and identify potential biases.
- Data Privacy and Protection: AI systems must adhere to data privacy regulations for the protection of personal information collected and processed.
- Accountability and Liability: Clear guidelines are needed to establish accountability and liability for damages caused by AI systems.

New York City has taken a proactive approach to regulating AI in hiring practices. The recently enacted law requires employers to use AI-based hiring systems to inform candidates and provide them with access to the data used in the decision-making process. Independent auditors must annually review the systems for bias, and non-compliant companies face penalties.

The adoption of AI in the job market presents both opportunities and challenges. While AI can enhance efficiency and productivity, it is crucial to address the potential for job displacement, bias, and discrimination. A robust legal framework, coupled with responsible implementation practices, is essential to

ensure that AI benefits both workers and employers in the evolving digital landscape.

Conclusion

The adoption of AI in Brazil presents both opportunities and challenges. As AI technologies continue to evolve, it is essential to develop a robust legal and regulatory framework that promotes responsible innovation while safeguarding individual rights and societal well-being. By fostering collaboration among stakeholders from the public, private, and academic sectors, Brazil can harness the power of AI to drive economic growth, enhance social progress, and build a more inclusive and sustainable future.

Chapter 24

Capital Markets

Capital Markets and Securities an Overview

National Financial System

In Brazil, the financial and capital markets are governed by two main laws, Federal Law No. 4,595, enacted December 31, 1964, as further amended, (the "National Financial System Act") and Federal Law No. 6,385, enacted December 7, 1976, as further amended (the "Securities Act").

The National Financial System Act establishes the National Financial System (*Sistema Financeiro Nacional*), including governmental bodies, state-owned institutions and private financial institutions and sets out the authority of the main governmental bodies responsible for regulating the banking and financial markets: the National Monetary Council (*Conselho Monetário Nacional*) and the Central Bank of Brazil (*Banco Central do Brasil*).

The National Monetary Council is the main body responsible for formulating monetary and credit policy and issues rules to guide use of funds by financial institutions, oversee liquidity and solvency

of financial institutions and coordinate public policies on credit, currency, budget and internal and external public indebtedness. Currently, the National Monetary Council is a three-member council formed by the President of the Central Bank of Brazil, the Ministry of Finance and the Ministry of Planning and Budget.

The Central Bank of Brazil is a multirole institution, responsible for executing monetary policy, acting as the primary issuer of currency, setting the base interest rate in interbank funding, receiving compulsory deposits and extending primary funding to financial institutions, as well as acting as the main regulator for financial institutions and issuing authorisations to various types of entities, as well as overseeing its operations.

The Securities Act is the main law regulating capital markets, which sets out the concept what a security is under Brazilian law, establishes the Securities Commission (*Comissão de Valores Mobiliários* or CVM) as the main securities market regulator in Brazil, which also sets out the registration regime for issuers of securities and public offerings of securities, as well as rules on administrative and criminal liability for malfeasance in securities and capital markets.

Securities Market

Particularly with respect to securities markets, the Securities Act establishes that the National Monetary Council is responsible for:

- defining the policies for organisation and functioning of the securities market;
- regulating the use of financing in securities markets;
- establishing the general guidelines to be followed by the Securities Commission;
- defining activities to be exercised by the Securities Commission and the Central Bank of Brazil in coordination;
- approving the headcount and compensation for the Securities Commission Board of Directors (*Diretoria*) and its personnel; and
- establishing specific conditions for trading derivative contracts, including margin deposits on notional amounts of the contracts and limits, terms and conditions to trade derivative contracts.

The CVM is a public body directed by a Board of Directors (*Colegiado*), formed by five members, the Chairperson (*Presidente*) and four Directors (*Diretores*) appointed by the President and approved by the Senate, who must be persons in good standing with noted expertise in capital markets. They serve a five-year term. It is a staggered board, meaning that one (1) member must be replaced annually. Early removal of members may only occur in case of resignation or unappealable conviction in a judicial or administrative procedure.

The CVM is responsible for:

- regulating the matters set out by the Securities Act pursuant to the policies established by the National Monetary Council,;
- granting registration to issuers, market participants, securities offerings and tender offers;
- overseeing the activities and services in securities markets, as well as disclosure of information related to the market, agents and the securities traded;
- proposing potential limits to commissions and other compensation payable to market intermediaries to the National Monetary Council; and
- overseeing and supervising listed companies.

The CVM has policy powers over a wide variety of market participants: administrators of regulated securities markets, such as exchanges and organised over-the-counter markets; market intermediaries, such as securities distributors, broker-dealers and independent agents; issuers of securities such as companies and investment funds; and service providers such as custodians, consultants, securities analysts and independent auditors.

The CVM issues regulations applicable to market participants, oversees their conduct and may take action to impose administrative sanctions participants violate their legal obligations or fail to comply with the Securities Act, the Corporation Act or CVM regulation. Such sanctions include: (i) warnings; (ii) fines; (iii) suspension or cancellation of registration or authorisation to trade in the securities markets; (iv) temporary prohibition to act in the securities markets; (v) suspension or removal of directors and officers of listed companies or other market participants.

The CVM is a well-known securities regulator with many

links to multilateral organisations dedicated to global securities markets. The CVM is a member of the Council of Securities Regulators of the Americas and the International Organisation of Securities Commissioners – IOSCO, as well as has entered into memoranda of understanding and framework agreements with several securities regulators in countries such as Argentina, Bolivia, Chile, Ecuador, Paraguay, Peru, Mexico, Canada (Province of Québéc), the Cayman Islands and the United States of America (in the Americas); Portugal, Spain, France, Italy, Germany, Luxembourg, Greece, Romania and Russia (in Europe); China, Malaysia, Singapore, Thailand and Taiwan (in Asia); South Africa and Israel (in Africa and Middle East); and Australia (in Oceania).

Securities Exchanges

The main securities exchange in Brazil is administered by B3 – Brasil, Bolsa, Balcão S.A. ("B3"). B3 is the current corporate name of the entity that succeeded the former *Bolsa de Valores de São Paulo* (BOVESPA), the *Bolsa de Mercadorias e Futuros* (BM&F) and CETIP S.A., the administrator of the main organised over-the-counter market for debt securities, prior to its merger with BM&FBOVESPA, as B3 was formerly known. B3 is a listed company, with shares listed in the stock market administered by itself, since 2008.

B3 is subject to regulation and oversight by the CVM as administrator of a securities exchange market and is also a self-regulator of the markets under its administration. The main rules and regulations issued by B3 include the Trading Regulations (*Regulamento de Negociação*), the Trading Operation Procedures Manual (*Manual de Procedimentos Operacionais de Negociação*), which applies to the trading conducted in the markets administered by B3; as well as the Issuers' Regulations (*Regulamento de Emissores*) and the Issuers' Manual (*Manual de Emissores*), which apply to the issuers that have debt and equity securities listed in the markets administered by B3.

Special Listing Segments

As a response to the widely acknowledged position at the end of the last century that the Brazilian stock market could benefit from stronger corporate governance practices, BOVESPA developed special

listing segments for equity issuers that voluntarily commit to adhere to stricter corporate governance practices and rules. In 2000, three new listing segments were launched by the Brazilian stock exchange: N*ovo Mercado, Nível 1 de Práticas Diferenciadas de Governança Corporativa* and *Nível 2 de Práticas Diferenciadas de Governança Corporativa*. In recent years, two new special listing segments were added: *Bovespa Mais and Bovespa Mais Nível 2*, both aimed at smaller-cap companies, with a less stringent set of mandatory requirements. Twenty-five years later, one could say the B3 special listing segments, particularly Novo Mercado, have being highly successful, with over 250 companies listing in the intervening period.

Novo Mercado Listing Requirements

As the vast majority of new issuers list shares on the Novo Mercado segment, below is a description of the main requirements applicable to the companies listing there.

Common shares

All shares of capital stock in the company must be common, voting shares. The company cannot issue preferred stock.

Minimum Free Float

As a general rule, the company must have at least twenty percent (20%) of its shares held by minority free float shareholders, or fifteen percent (15%) in case the average daily trading volume of the shares is at least R$20 million within a 12-month trading period. Free float shareholders are defined as any shareholder other than the controlling shareholder, the shareholders with a link to the controlling shareholder (*pessoas vinculadas ao controlador*) or management.

In certain cases in which a listing is made in connection with an initial public offering, the company must initially have at least fifteen percent (15%) of free float shares, if the value of the initial public offering is over R$2 billion and it is allowed to maintain this percentage to the extent it reaches an average daily trading volume of at least R$20 million within eighteen (18) months from the initial trading date, based on the volumes achieved in the 12 months preceding that date.

Arbitration Clause

The by-laws of the company must select arbitration as the method for resolving disputes among shareholders, management and the company regarding application of by-laws provisions, the provisions of the Novo Mercado Listing Requirements and company and securities laws, rules and regulations applicable to the company.

Dispersion Efforts in Public Offerings of Shares

Any public offering of shares must provide dispersion efforts, in such a way that at least ten (10%) of the offering shares are preferentially destined to retail investors.

Board of Directors

In order to be listed on the Novo Mercado, companies must have at least twenty percent (20%) of the board members (but no less than two members) qualifying as independent members, serving a unified (i.e., non-staggered) term of up to two (2) years, with the possibility of re-election.

According to the *Novo Mercado* Rules, a member of the Board of Directors is deemed not to be independent when:

- he/she is the direct or indirect controlling shareholder of the company;
- their voting rights in the Board of Directors meetings are bound by a shareholder's agreement concerning matters related to the company;
- he/she is a spouse, companion or direct or indirect relative to the second degree of the controlling shareholder or a manager of the company or the controlling shareholder;
- he/she was an employee or officer of the company or of its controlling shareholder in the preceding three years.

The following situations must be analysed in order to certify there is no loss of a director's independence:

- if he/she is related to the controlling shareholder, to an executive of the company or to an executive of the controlling shareholder up to the second degree of consanguinity;
- if he/she has been, in the last three years, an employee or officer of the company's subsidiaries, affiliates or entities under

common control;

- if he/she maintains any commercial relationship with the company, its controlling shareholder or with the company's subsidiaries, affiliates or entities under common control;
- if he/she has a decision-making position in a corporation or entity that trades with the company or its controlling shareholder;
- if he/she receives any other compensation from the company, its controlling shareholder or the company's subsidiaries, affiliates or entities under common control other than the compensation related to his/her function as a member of the Board of Directors or a member of any committee of the company, its controlling shareholder or the company's subsidiaries, affiliates or entities under common control, except for cash proceeds arising from his/her equity interest in the company's capital stock and benefits resulting from supplementary pension plans.

Under the *Novo Mercado* Rules, the same person may not hold the position of Chairperson of the Board of Directors and Chief Executive Officer of the Company, except during specific situations when such positions fall vacant.

Audit Committee

A Novo Mercado company must have an Audit Committee, which is an advisory body to the company's Board of Directors, with operational autonomy and its own budget approved by the company's Board of Directors.

The Audit Committee may be a corporate body instituted by the by-laws (*comitê estatutário*) or by a resolution of the Board of Directors (*comitê não-estatutário*). If established by the by-laws, the Committee is a permanent corporate body of the company and therefore institution of the Audit Committee must be approved by a general shareholder's meeting by means of an amendment to the company's bylaws. From the perspective of minority shareholders, it is preferable that the existence and duties of the Audit Committee are provided for in the by-laws. In addition, if the company has a *comitê estatutário*, independent auditors are able to provide services for the same company for a ten-year period, instead of the usual five-year period.

The requirements imposed by the Novo Mercado Rules for

both statutory and non-statutory audit committees are substantially similar. However, we note the additional obligation of the *comitê não-estatutário* to submit a quarterly report to the Board of Directors, in addition to the mandatory annual report.

The Audit Committee must also have its own internal rules (*regimento*), governing its functions and operational procedures. The Audit Committee is responsible for: (i) opining on the hiring and dismissal of independent auditing services; (ii) evaluating quarterly information, interim financial statements and financial statements; (iii) monitoring the activities of the internal audit department and the internal control area; (iv) evaluating and monitoring the company's risk exposure; (v) evaluating, monitoring and recommending any corrections or improvements on the company's internal policies to management; (vi) receiving and processing information about noncompliance with legal and regulatory provisions applicable to the company, in addition to internal regulations and codes, including specific procedures to protect whistleblowers and ensure their disclosures remain confidential.

The Audit Committee must have at least three members, of which: (i) at least one must be an independent member of the company's Board of Directors; (ii) at least one must have recognised experience in corporate accounting matters, in accordance with applicable regulations issued by the CVM. The same member may meet both the requirements in items (i) and (ii) above. In addition, executive officers of the company, any controlled company, controlling shareholder, affiliate or company under common control cannot serve as members of the Audit Committee.

Internal Audit Department

An internal audit department must be created, with responsibilities set by the Board of Directors for assessing the quality and effectiveness of the company's risk management, control and governance processes. The internal audit department must report to the Board of Directors, either directly or through the Audit Committee. The internal audit department must have a proper structure and sufficient budget to perform its duties, as determined by the Board of Directors or the Audit Committee at least once a year.

As an alternative to creating an internal audit department, the company may hire independent auditors registered with the CVM to

undertake the functions originally designated to the internal audit department.

Compliance, Internal Controls and Corporate Risks

The company must also implement compliance, internal controls and corporate risks functions. Such functions must not be performed cumulatively with any operational activities, i.e., those performed by, among others, the areas responsible for law enforcement, accountability, internal audit and investors' relation.

Mandatory Policies

The company must prepare and disclose the following policies or equivalent documents, all approved by the Board of Directors: (i) Compensation Policy; (ii) Management Nomination Policy; (iii) Risk Management Policy; (iv) Related Parties Transactions Policy; (v) Trading Policy; (vi) Disclosure Policy; and (vii) Code of Conduct.

In addition, the company must approve Internal Rules for the Board of Directors, its advisory committees and for the Fiscal Council (*Conselho Fiscal*), if applicable, which must include the duties, services and operating procedures of each corporate body.

Delisting from Novo Mercado. In order to delist from Novo Mercado, the controlling shareholder or the company must launch a tender offer to all free float shareholders at a fair price supported by a valuation report produced by an independent financial expert. Alternatively, business combinations or corporate reorganisations in which the surviving entity is not listed in Novo Mercado may be approved by vote of the majority of the free float shareholders at a special shareholders' meeting convened for the specific purpose of waiving the tender offer requirement.

Public Offerings of Securities

Under the Securities Act, the issuer and the offering are subject to two different registrations with the CVM. By registering the issuer, all its securities are eligible for listing and public trading and by registering the offering, all the securities sold in the offering may be offered to the public and will be fungible with other securities of the

same type and class previously issued and listed.

For an issuer to be registered as a public company, it must apply to the CVM for registration in one of the two classes of issuers of tradable securities, A or B, pursuant to CVM Resolution 80, which is the main rule that applies to listed securities issuers. While Class A registration authorises the trading of any equity and debt securities issued by the company for trading in regulated securities markets, Class B registration only authorises the trading of debt securities issued by the company for trading on regulated securities markets, excluding equity securities such as shares, warrants and share depositary receipts, as well as securities convertible into shares.

CVM Resolution 160 is the rule that applies to public offerings of securities of all kinds. As a baseline rule, any public offering under the terms of CVM Resolution 160 requires:

- a prospectus (*prospecto*), which primarily includes summarised information about the offeror and full information on the offering and securities offered, including the plan of distribution, terms and conditions of the securities, use of proceeds, capitalisation table, dilution and risk factors related to the offering.
- an offering summary (*lâmina*) which includes summarised information from the prospectus using a standardised template to allow better comparison among different offerings of the same security class of different issuers.

The regulatory requirement is that the offering documents must contain complete, precise, truthful, clear, objective information regarding the issuer and the offering, using non-technical and easily understood language.

Offers of securities in public offerings aimed at professional investors (*investidores profissionais*) – which comprise institutional investors, asset managers and individuals with a securities portfolio in excess of R$10 million – are exempt from presenting a prospectus and an offering summary.

Additionally, CVM Resolution 160 requires an announcement of commencement and closing. An announcement of commencement provides information about the procedures related to the public offering, including a timetable, the number of securities offered and a reference price range. A closing announcement mainly reveals the

quantity of securities allocated to each investor and the type of investor that accepted the offering, with the respective amount of securities acquired. Both announcements must be published by the lead underwriter in major newspapers or made available on the websites of the offering participants, the relevant stock exchange and the CVM.

The application for registration of a public offering under the terms of CVM Resolution 160 must be submitted to the CVM jointly by the offeror (whether an issuer or a selling shareholder) and the lead underwriter and must be accompanied by supporting documents, including drafts of the offering documents.

After the offeror has applied to the CVM for registration of the public offering distributed under the terms of CVM Resolution 160, it may release a preliminary prospectus and initiate its book-building activities and roadshow presentations. In the case of ordinary registration procedures, the offeror and lead underwriter may prefer to wait for an indication from the CVM that no major issues are anticipated in relation to the proposed public offering. In case of automatic registration procedures, the offering is launched simultaneously with the submission to CVM, as registration is granted with no prior review by the CVM.

No sales may be made until the CVM has granted registration for the public offering, certain statutory announcements are published or made available on the appropriate websites and a final prospectus is available. Upon granting registration for the public offering, the final prospectus must be released and made available on the websites of the issuer, the offeror, the underwriters, the CVM, the relevant stock exchange - and ANBIMA, in the case of follow-on offerings.

Ordinary registration proceeding in initial public offerings

Two separate registration applications for the issuer and for the offering must be filed with the CVM for an initial public offerings by a first-time issuer. Upon the first filing of required documents, the CVM has twenty (20) business days to review and suggest improvements and adjustments to the documents. The issuer has up to forty (40) business days to address the requirements. After the second filing, the CVM has 10 business days to review the documents and certify its suggestions were implemented. The day of the second filing is also the day the commencement announcement is published.

If the CVM is still not satisfied, the issuer has another three days to adjust the documents. After final submission, the CVM will grant the registration and communicate the price per security offered.

For a registration application by an issuer, the main supporting documents include:

- the issuer's by-laws;
- disclosure documents, including the *Formulário de Referência* – an annual report on the periodic reporting applicable to public companies – and the *Formulário Cadastral*.
- minutes of shareholders' meetings held during the preceding 12 months;
- copies of the shareholder agreements;
- the board resolution appointing an investor relations officer;
- audited financial statements for the preceding three fiscal years; (ii) reflecting any material change in the company's equity structure after the end of the latest fiscal year, if applicable; and (iii) annual financial reports prepared for the most recent fiscal year;
- quarterly financial reports, as applicable;
- ancillary documents, such as statements relating to the issuer's securities held by management; policies for disclosure of material facts.

The offering registration application must include the draft prospectus, the draft announcements to be released to the market during the offering period. The underwriting agreement and other contractual documents, executed by the price-stabilising agent and by the investors are submitted after registration is granted.

The reference form is the main disclosure document provided by the issuer and its table of contents is stated in CVM Resolution 80. The reference form must be filed with the CVM when applying to register the issuer and annually thereafter and is subject to review if certain material information needs to be updated pursuant to CVM Resolution 80.

The reference form provides a complete profile of the company, covering aspects such as its business, products, processes, risks, contingencies, financial condition and operating results,

including a management discussion and analysis section where a comparison of the past three annual financial statements of the company is reviewed.

Considering the importance of the reference form for investors' decisions to invest in the company and the liability standard imposed to the issuer, the offerors and underwriters, it is crucial that the due diligence process be conducted by legal teams representing the company and the underwriters. During the public offering process, the legal teams, the underwriters and auditors carry out procedures to give the offerors and underwriters comfortable reasonable degree of comfort that, as of the effective date of the company registration, the reference form and the prospectus will contain no materially untrue or misleading information and no material information has been omitted.

Lastly, the company's independent auditors will provide the underwriters with comfort letters regarding the financial information stated in the reference form and prospectus. If any information is not provided by the independent auditors in the comfort letter, the company will have to provide backup support to the satisfaction of the underwriters.

The Securities Act states that a qualified underwriter must participate in the marketing and placement of any public offering of securities. Both in equity and debt offerings, the lead underwriter, bookrunners and any co-managers will typically enter into an underwriting agreement with the issuer or selling shareholder.

Underwriters in equity offerings usually give firm commitments to settle any securities offered in a public offering not effectively settled by the investors. The group of bookrunners will enter into separate agreements with members of the selling group, by which the members of the selling group accede to the underwriting agreement and provide their own commitment to settle any shares purchased but not settled by investors. In debt offerings, the underwriters give a firm commitment to place and purchase any securities offered in public equity offerings that are not purchased by market investors.

In equity offerings, the lead underwriter and issuer elaborate a distribution plan that must ensure fair and equitable treatment for investors in the offering. The special listing segment rules of B3, such

as *Novo Mercado, Nível 1 and Nível 2*, generally require that Brazilian issuers seek to disperse their shares widely among investors. Typically, issuers meet this requirement via a retail offering primarily targeting individual investors.

Underwriters will usually receive orders from retail investors in anticipation of the pricing of a public offering, while the preliminary prospectus is made available to the public. After the public offering has been registered and formally initiated, each retail investor will receive a number of shares calculated by dividing the monetary amount of the investment order by the offering price. Any investor may withdraw its order ifthe final prospectus, including the reference form, contains a materially different disclosure compared with the preliminary prospectus and reference form.

Automatic Registration with Prior Review by a Self-Regulatory Entity

CVM Resolution 160 also provides that companies that have already registered with the CVM as issuers of listed securities and intend to offer equity or debt securities to the general public (i.e. including retail investors) have an option to file a preliminary registration application with a self-regulatory entity, for further submission to CVM, which will grant registration via the automatic registration procedure.

In Brazil, the sole self-regulatory entity that provides prior reviews of public offerings is the *Associação Nacional das Entidades dos Mercados Financeiro e de Capitais* (ANBIMA). Nearly all Brazilian investment banks and broker-dealers have pledged to comply with the ANBIMA rules. Under this registration route, ANBIMA conducts the document review using a procedure that includes two rounds of revisions within a 11-business day period. Once cleared by ANBIMA, the issuer is allowed to file an automatic registration application with the CVM.

Automatic Registration Procedure

CVM Resolution 160 describes several cases in which automatic registration is available to issuers and offerors, such as:

- Equity and debt offerings by issuers with wide market exposure (*emissores com grande exposição ao mercado*), as defined under in CVM Resolution 80;

- Debt offerings from frequent issuers of debt securities (*emissores frequentes de renda fixa*), as defined in CVM Resolution 80;
- Equity and debt offerings aimed solely at professional investors.

Main Securities Issued by Corporations

Shares. The Brazilian Corporations Act (Law No. 6.404, as of December 13, 1976, as further amended) is the main statute regarding companies that may have shares listed and traded as securities, know as corporations (*sociedades por ações*). A corporation may issue common and preferred stock,

Common shares grant voting rights to their holders; to each share corresponds one vote in general meetings. The by-laws may establish limits on voting rights of shareholders that hold shares above a certain percentage and a recent amendment included a set of provisions that allow the by-laws of corporations to establish a class of common stock with supervoting rights (*voto plural*). Given the current requirements of special listing segments, no Brazilian listed company has yet issued shares with supervoting rights.

Preferred shares, in turn, may or may not grant voting rights; the "preference" granted to such shares is often at the expense of full voting rights. Among the preferences admissible for listed shares, the Brazilian Corporations Act provides for:

- Right to receive a dividend per share at least ten percent (10%) higher than the dividend per share payable to holders of common shares;
- Right to receive fixed or minimum dividends; or
- Tag-along rights in case of a transfer of corporate control.

Debentures

The Brazilian Corporations Law regulate debenture issuance by corporations. Debentures are negotiable instruments that represent a loan to their corporate issuers, issued pursuant to deeds of issuance of debentures (*escrituras de emissão*), which set forth the terms and conditions of the issuance (principal amount, interest payable, maturity dates, covenants, events of default, resolutions by debenture holders).

As a general rule, issuance of debentures is a matter to be decided by the general shareholders' meeting, but in case of publicly-held companies, the Board of Directors may decide to issue non-convertible debentures that are not secured by in rem security interests, or convertible debentures, within the limit of the authorised capital stock as stated in the by-laws.

Each issuance of debentures may be divided in series and all debentures of the same series are fungible, have the same par value and give their holders the same rights. Par value is usually expressed in Reais, although the law allows in certain cases that face value be expressed in foreign currency. Par value may be adjusted by financial indexes applicable to public debt instruments, exchange rate variations and other financial indices not disallowed by applicable banking regulations.

Debentures may be guaranteed by guarantors, usually subsidiaries or the parent company of the issuer and may be secured by in rem security interests such as pledges, mortgages or fiduciary transfer of title in guaranty (*alienação fiduciária em garantia*), or by floating charge guarantees (*garantia flutuante*), i.e., a general privilege upon the issuers' assets, without constraining the issuer's ability to transfer such assets.

Unsecured debentures grant their holders credit rights equivalent to the issuer's general unsecured creditors (unsubordinated debentures), or rights that rank after them (subordinated debentures).

Commercial notes

Commercial notes are a new type of security created by Law No. 14,195, defined as a negotiable instrument, non-convertible into shares, that represents a credit against the issuer. Commercial notes may be issued by publicly-held corporations, closely-held commercial companies and cooperatives and are solely issued in book-entry form. The terms and conditions of the issuance of commercial notes are established in the deed of issue (termo de emissão) and the law provides fewer requirements, giving issuers greater flexibility to set out issuance conditions.

Securitisation

Law No. 14,430 (the "Securitisation Act") regulates all types

of securitisations instruments and securitisation companies.

Securitisation companies are companies subject to the Corporations Act that acquire receivables for the purpose of issuing securities backed by such credits and issuing and offering receivables certificates. The CVM has the power to regulate the registration, functioning and permitted activities of securitisation companies, the information disclosure requirements applicable to securitisation offerings, which includes exempting such companies from certain specific requirements provided in the Corporations Act if not detrimental to the public interest, investor protections and information disclosure.

The most popular types of securitisation instruments in Brazil are the real estate receivables certificates (*certificados de recebíveis imobiliários*), agricultural receivables certificates (*certificados de recebíveis agrícolas*), both of which were created by specific statutes enacted prior to the Securitisation Act and receivables certificates (*certificados de recebíveis*) for multiple types of receivables.

The Securitisation Act regulates the fiduciary regime under which receivables are acquired by securitisation companies and back the issuance of securities. Securitisation instruments are issued by securitisation companies under a securitisation deed (*termo de securitização*), which sets forth the terms and conditions that apply to securitisation receivables.

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