LEGAL GUIDE: BUSINESS IN BRAZIL

Coordinated by Durval de Noronha Goyos, Jr.

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LEGAL GUIDE: BUSINESS IN BRAZIL

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LEGAL GUIDE: BUSINESS IN BRAZIL

I. INTRODUCTION TO THE FIRST EDITION

As we approach the year 2000, we can be encouraged, even excited, about the promise of new opportunities. The world is changing politically and economically. Markets are expanding, and trade barriers are falling. As a result, business is becoming more competitive every day. For decision-makers, access to accurate and timely information is no longer a luxury, it is indispensable in today's business climate.

Brazil has the eighth-largest economy in the world. In the past decade, Brazil has had a continuously-sustained and significant surplus in its balance of trade in volumes only exceeded by a few other countries and, despite numerous difficulties, offers unique opportunities for success.

The Country's re-democratisation has provided the necessary institutional climate for economic activity; the democratic institutions have worked admirably well even under stress. The modernisation of the legal structure and the reduction of the presence of the State in the economy have enormous popular support and have been implemented gradually but firmly. Even more exciting for anyone doing business in or with Brazil is the Country's enormous potential for growth as it progressively reduces trade restrictions and moves toward free trade.

It is our belief that Noronha's "Legal Guide: Business in Brazil" provides relevant information to business leaders who need to plan investments in this fascinating part of the world. The Guide is designed as an introduction to doing business in or with Brazil, covering such basic areas as taxation, corporations, investments, intellectual property, informatics, finance, environment, public bids, Mercosul and others. We believe it contains valuable basic information for businessmen, lawyers, economists and anyone interested in learning more about Brazilian legislation affecting business. The Guide will also serve law students well as an introduction to Brazilian Business Law.

The Guide was written by some of the partners of NORONHA – ADVOGADOS, an international law firm based in São Paulo and with offices in Rio de Janeiro and Brasilia, Brazil; Miami, U.S.A.; London, U.K.; Zurich, Switzerland;

and Lisbon, Portugal. We have tried to strike a balance by making the Guide concise enough to enable the reader to absorb the information quickly, but broad enough in scope to cover all the basic questions most frequently asked by businessmen and lawyers. We hope the reader will find this guide informative and helpful in making business decisions.

September, 1992

Durval de Noronha Goyos, Jr.

II. INTRODUCTION TO THE SECOND EDITION

The first edition of "Business in Brazil -Legal Guide", published in 1992, was an instant success and was completely sold out by 1994. Thus, it was only with the greatest reluctance that we did not have a second printing of the first edition, in view of the fact that a good portion of the book had become outdated as a result of the enormous transformations in the Country' s legal structure since 1992.

In addition, there were a number of different bills underway in Congress that could have decisively affected a second edition, rendering it instantly outdated.

Therefore, we decided to wait until the major constitutional reforms passed in Congress and, as a consequence, the 2nd Edition of "Business in Brazil -Legal Guide" is not only completely updated as to the general constitutional framework but also the different legal areas it covers: taxation, company law, technology, etc. The book has a new chapter on competition law, inserted as a result of legal developments in 1994 and 1995. It also has a new more comprehensive chapter on the Brazilian financial system, following the liberalisation of the sector which took place in 1995. The chapter on international treaties addresses the latest developments of the World Trade Organisation (WTO) and MERCOSUL.

We are confident the second edition of "Business in Brazil- Legal Guide" will be of enormous assistance to all those interested in doing business in or with Brazil, as well as to law students and those who desire to become better familiarised with Brazil's legal structures.

Cortina, 18 February 1996

Durval de Noronha Goyos, Jr.

III. INTRODUCTION TO THE THIRD EDITION

The third edition of "Business in Brazil: Legal Guide" follows the success of the previous editions of 1992 and 1996, which met with remarkable success in Brazil and abroad, in both the private and public sectors, and were used not only by investors from abroad wishing to learn more about the Country's legal structures, but by government agencies involved in international negotiations, professionals, journalists and by university students.

The third edition became necessary not only because the second had been fully sold out, but also as an update was needed in order to consider the numerous legislative innovations introduced in Brazil during Mr. Fernando Henrique Cardoso's administration. Such new legislative initiatives have been brought about with a view to modernising the Country's legal structure and thus to facilitate the business climate, to enhance the competitiveness of the companies established locally, and to make Brazil more attractive for investments from abroad.

Among several of the alterations brought to the Brazilian legal system, we can cite the approval of Law 9.307 in September of 1996, which deals with arbitration procedures; the enactment of Law 9.457 in May of 1997, modifying Law 6.404/76, with relation to the question of company law and the rights of minority shareholders; as well as the approval of the new Brazilian Industrial Property Code of May, 1996, which replaces the previous Code of 1971. Apart from these domestic legal innovations, this guide also describes general events which have taken place affecting Brazil's foreign affairs. Mercosul has been enlarged, with the accession of Chile and Bolivia as associated States. International commitments, particularly those concerning the financial statements of banks, have advanced with the approval of Central Bank Resolution n. 2.302 of July, 1996, thereby complying with the Basel Convention. The area of corporate competition policy, regulated in the Country since 1962, has become very active and the Brazilian antitrust agency, CADE, has further regulated the matter by means of Resolution 05 of August, 1996. New anti-dumping rules have been adopted in Brazil, in accordance with the Country's WTO commitments. Not only does this third edition discuss these and other legal modifications, but it also describes the

recent federal level privatisation programme, which expanded throughout 1997 and is considered to be one of the largest undertakings in the world's developing economies. The programme covers the areas of telecommunications, oil and electric energy, producing policies to be implemented in each of these sectors, as defined in Laws 9.472/97, 9.478/97 and 9.427/96, respectively. This programme will also continue throughout 1998.

It gives us at Noronha Advogados great pleasure to launch the third edition of our "Business in Brazil: Legal Guide" at a moment when Brazil has become one of the world's favourite recipients of international investments and in the year we celebrate the 20th anniversary of our firm's foundation. We are confident the reader of "Business in Brazil: Legal Guide" will find the publication very practical and eminently useful.

São Paulo, January, 1998

Durval de Noronha Goyos, Jr.

IV. INTRODUCTION TO THE FOURTH EDITION 2000

Our book, "Legal Guide: Business in Brazil", has became the reference work for those interested in the Brazilian legal infra-structure. Its 1998 edition entirely sold-out within 18 months of its launch, in view of the growing international interest in Brazil. In fact, in 1998 and 1999 Brazil received foreign direct investments of approximately US$ 59 billion, which is not only a flagrant recognition by the international community of the enormous business opportunities the Country has to offer at present but also a firm perception that the legal reforms in progress under the present Administration are a clear indication that the prospects for the medium and long terms are even better.

During 1998 and 1999, the Brazilian legal environment was further liberalised. There were changes in areas of insurance; taxation; company law; foreign exchange; competition law; energy law; labour law; social security and banking, among others.

This Fourth Edition – 2000 of the "Business in Brazil: Legal Guide" has been entirely reviewed, up-dated and expanded with the inclusion of new chapters on insurance, on account of the liberalisation of the sector, labour law and consumer protection.

We at NORONHA ADVOGADOS are delighted to launch this Fourth Edition – 2000 of our Legal Guide in the year of the celebration of the 500th anniversary of the discovery of Brazil by the Portuguese navigator, Pedro Alvarez Cabral, on 23 April 1500. To mark this event, we have changed our traditional cover in order to insert photographs of two Portulans (navigation maps) dated 1561 and 1597, which belong to the art collection of NORONHA ADVOGADOS.

São Paulo, 11 January 2000

Durval de Noronha Goyos, Jr.
Senior Partner

V. INTRODUCTION TO THE FIFTH EDITION 2001

Fifth Edition – 2001 of "Business in Brazil: Legal Guide" is a complete revision of all the chapters of the fourth edition to the book, covering the areas of, inter alia, company law, banking, taxation, labour law, consumer protection, bids, competition law, insurance, intellectual property, litigation, arbitration, Mercosul, privatisation, energy, electronic commerce, anti-dumping and immigration. This effort was made to incorporate new information and to update the legislation references of the fourth edition.

We remain confident that this new edition will be of enormous assistance to all those interested in doing business in and/or with Brazil.

São Paulo, June, 2001.

Durval de Noronha Goyos, Jr.
Senior Partner

VI. INTRODUCTION TO THE SIXTH EDITION 2003

The sixth edition of our "Legal Guide: Business in Brazil" has undergone important up-dating as a result of the entry into force, in January of 2003, of the new Brazilian Civil Code, which brought important alterations "inter alia" in the matter of company formation. In addition, since the fifth edition was published, a new company law was enacted in Brazil in 2001.

Similarly, the alterations in taxation occurred since the fifth edition was published have been duly incorporated into this 6th edition. In the area of intellectual property, we have expanded our coverage to include the matters of technology supply and technical and scientific assistance services. A new item on franchising has been also included.

The chapter on the Brazilian financial system has been up-dated taking into consideration the recent legal developments including Constitutional Amendment number 40, of 2003 and National Monetary Council Resolution 3,040, of 2002. Totally new chapters on entertainment, internet and e-commerce and sports law have been inserted.

It has new been 11 years since the first edition of our "Legal Guide: Business in Brazil" was originally published in September of 1992. During this period, our book became the reference work in the area. We are confident that the new sixth edition will remain indispensable for those who wish to do business in or with Brazil and delighted to release it when our firm, NORONHA ADVOGADOS, completes its 25th Anniversary.

São Paulo, 6 October, 2003.

Durval de Noronha Goyos Jr.
Senior Partner

VII. INTRODUCTION TO THE SEVENTH EDITION 2008

It has been 15 years since the first edition of Business in Brazil: Legal Guide was published. During this time Brazil has taken great strides towards increasing the prosperity of its people and has made improvements as a nation despite all the political, social and economic problems it has faced. As a matter of fact, such problems reflect the Brazilian society´s struggle to preserve its heritage and culture whilst improving its way of life under the rule of Law.

The introductions to the past editions of Business in Brazil: Legal Guide provide a good notion of the advances made by the nation:

a) the introduction to the first edition (1992) noted that the country had just undergone its re-democratisation, with the enactment of the 1988 Federal Constitution, thus providing the necessary institutional climate for economic activity;

b) the introduction to the second edition (1996) underlined the enormous transformation to the Country's legal structure, noting the enactment of a new Competition Law, the liberalisation of the Brazilian financial system and the country's inclusion in the major foreign trade issues;

c) the introduction to the third edition (1998) showed the country immersing itself in its privatization programme as well as the enactment of other important laws such as those relating to the protection of Intellectual Property, arbitration and commercial defence;

d) the introduction to the fourth edition (2000) describes the further liberalization of the Brazilian legal environment in many areas such as insurance, taxation, company law, foreign exchange, competition law, energy law, labour law, consumer protection, social security and banking.

e) due to the short period of time since the previous edition, the introduction to the fifth edition (2001) reflects on the finalisation of this liberalization in various legal areas;

f) finally, the introduction to the sixth edition (2003) reports on a major legal change, the enactment of a new Civil Code, and gives an indication of the legal developments in new or expanding areas of business activities, such as the e-business, entertainment and sports.

It is no wonder that, after these considerable efforts, Brazil is now experiencing a a period of good fortune which benefits not only its people but also those of other nations who have been interacting with and profiting from the current Brazilian business environment.

Even though the ever changing legal environment is a constant phenomenon in a democratic nation, the most important laws for modern Brazilian society had already been established before the 2003 edition of this book and it is due to this that four years have passed since the last edition. Additionally, we have expanded the range of legal matters by covering the topics of Maritime, Aviation and Agrarian Law, so as to satisfy the respective interests in these areas of an ever expanding group of businessmen and governmental agents.

We are confident that this seventh edition of Business in Brazil: Legal Guide will be well received by those who wish to do business in or with Brazil and we are proud that the team at NORONHA ADVOGADOS is capable of following *pari passu* the legal transformation Brazil has undergone throughout these years and that we can offer this important tool to understand the same.

São Paulo, November, 2007

Durval de Noronha Goyos Jr.
Senior Partner

VIII. INTRODUCTION TO THE EIGHTH EDITION 2011

Once again we have the pleasure of coming to your presence, this time to introduce the expanded eighth edition of our **Legal Guide: Business In Brazil**.

Indeed, as time went by, we at Noronha Advogados can surely appreciate how steady Brazil's economic and social development has become. Now we have the proud and joy in also proclaiming the widespread news: Brazil is no longer a country of the future; Brazil is the present and future!

From the political perspective, the nations' still young democracy has been working quite well. Periodical elections of our representatives have taken place in an ideological, yet peaceful combat, and those politicians who deserved popular support have been able to run their mandates until the end of the term. No more *coupe de etat* or imposed governors and strong popular surveillance on the politicians have marked the political environment since the enacting of the prevailing Federal Constitution in 1988. We also realise that the public institutions have also being performing their duties in a correct fashion, even though there is still a lot of room for improvement.

On the social and economic side, in the last few years many signs of sustainable development can be noted. Millions of Brazilians have upgraded their lives as statistics show their inclusion in an ever increasing middle class. The way that nation handed the international 2008 financial crisis, being the last to be dragged in by its effects and the first to get release, is another sign of economic health. Therefore, it is no wonder that the eyes of the world's investors are focusing the ever increasing business opportunities the country offers in many economic segments like energy, oil & gas, communications, transport, agribusiness, banking, capital markets, ports and airports, environment and so on.

This Government that took office on 1st of January 2011 must take care of the expansion and improvement of the country's infrastructure so that it may keep the pace and rhythm with this strong and steady economic surge.

We hope you have the chance to participate in this unique moment of Brazil. In this case you can count on us by your side.

São Paulo, June 2011

Durval de Noronha Goyos Jr.
Senior Partner

BASIC INFORMATION

Brazil is fortunate to be located in the east-central part of South America, where it borders almost all other South American countries except Chile and Ecuador. Brazil is a large country that, with an area of approximately 3,286,488 square miles, covers almost 48% of South America.

Brazil's eastern seaboard extends some 7,408 kilometres along the Atlantic Ocean. The Country's major ports are Santos, Rio de Janeiro, Tubarão and Paranaguá.

Brazil is comprised of 26 states plus its capital, the Federal District of Brasília. The Country is divided geographically into 5 different regions: North, Northeast, Southeast, South and West-Central.

The Southeast region is the most prosperous and most highly industrialised and is where Brazil's major cities are located, as demonstrated by the Brazilian Institute of Geography and Statistics ("*Instituto Brasileiro de Geografia e Estatística*" – IBGE) in 2009:

São Paulo	–	11,037.593 inhabitants
Rio de Janeiro	–	6,186,710 inhabitants
Belo Horizonte	–	2,452,617 inhabitants

The Northeast is the least developed region, due in part to its harsh physical characteristics. In addition, there is a lack of investment in the Northeast because the South and the Southeast have better infrastructures for industry and manufacturing and thus are more attractive for doing business. This situation is likely to change as the South and Southeast become more and more saturated. Investments in infrastructure and tourism in the Northeast have also been increasing in a steady pace.

Brazil's soil consists mostly of settled earth, with mountainous areas higher than 900 meters representing only about 7% of the total surface area. Most of Brazil's terrain is composed of plateaus and prairies.

Both the Equator and the Tropic of Capricorn cross Brazil, making the climate primarily warm and tropical with an annual average temperature of 20°C (68°F).

The population of Brazil is currently estimated at 192,439,965 inhabitants, and this number is likely to double within the next 35 years. The population is young; 58% of Brazilians are under 30 years old. The country has a population density of 58 inhabitants per square mile with 81.2% of the population living in urban areas.

Brazil is a Federal Republic and has had 8 Constitutions. The first Constitution was signed in 1824, and the current one was enacted in 1988. The 1988 Federal Constitution is regarded as the most democratic in Brazilian history.

The Federal Government has 3 branches: the Executive, the Legislative and the Judiciary.

As a former Portuguese colony, the official language is Portuguese, which is spoken by 97% of the population. Amerindian languages are spoken by 2% of the population and 1% speaks other languages.

1. FORMS OF FOREIGN INVESTMENT

1.1. General Features

Foreign capital in Brazil is governed by Law no. 4.131 (the Foreign Capital Law) of 03 September 1962 and the respective subsequent amendments. The referred law is regulated by Decree n. 55.762 of 17 February 1965, as amended.

The law defines foreign capital as "any goods, machines and equipment coming into Brazil with no initial foreign currency expense, for the production of goods or services, as well as financial and monetary funds coming into Brazil to be invested in economic activities, provided that in both cases these assets belong to individuals or legal entities either domiciled or headquartered abroad." (Law n. 4.131/62).

Until March, 2005, the exchange markets in Brazil were (i) the Commercial Floating Exchange Rate Market and (ii) Tourism Floating Exchange Rate Market. However, currently the Commercial Floating Exchange Rate Market and the Tourism Floating Exchange Rate Market were subsequently merged into a single Exchange Market[1].

The single Exchange Market encompasses:

(i) transactions involving either the purchase or the sale of foreign currency;

(ii) transactions involving national currency between residents in Brazil and residents abroad; and

(iii) transactions involving other exchange mechanisms, carried out through the intermediation of institutions authorised by the Central Bank of Brazil to operate in the single Exchange Market.

1. National Monetary Council Resolution n. 3.568/2008.

In addition, any individual or company can purchase and/or sell foreign currency or perform international transfers of Brazilian currency, of any nature, without any limitation in amount, observing the legality of the operation, including its taxation aspects, as long as the economical basis and the respective responsibilities are set out in the documents of the respective transaction.

Accordingly, the Central Bank of Brazil enacted Circular n. 3.280/05, by which it issued the International Capital and Foreign Exchange Market Regulation (RMCCI). Additionally, since the enactment of Circular n. 3.280/05, RMCCI has been constantly updated.

As with remittances from a foreign country to Brazil, remittances originating from Brazil must be processed through institutions authorised to operate with foreign exchanges under the supervision of the Central Bank.

1.2. The Central Bank of Brazil and Foreign Capital

The Central Bank of Brazil is responsible for maintaining a special register of all foreign capital, irrespective of the procedure used to bring it into or out of the Country. Records are kept of the following transactions:

(a) direct investments and loans, whether in cash or goods;

(b) remittances effected as return of capital or as earnings of such capital, profits, dividends, interest, amortisation, as well as royalties for payment of technical assistance, or by means of any other title which represent the transfer of earnings to a foreign country;

(c) reinvestment of foreign earnings; and

(d) capital increases of companies, effected in accordance with the Law.

Foreign capital is registered in the currency received in Brazil and, in the case of financial imports and investments in the form of goods, in the currency of the location of the creditor's or investor's domicile or head-office. In special cases, foreign capital may be registered in the currency of the country of origin

of the goods or financing, but only if a previous approval is granted by the Central Bank.

Once registration is complete, the foreign investor is permitted to remit profits and dividends abroad, pursuant to Law n. 4.131/62 and other norms in force.

Repatriation of foreign capital invested in Brazil is also permitted at any time up to the limit of the amount registered with the Central Bank, which may request an assessment report prepared in accordance with the prevailing regulation, as well as other information as it may think relevant for the perfect characterization of the operation and assessment of the reasonability of amounts involved.

For foreign investment in a financial institution and institutions authorised by the Central Bank of Brazil, the registration shall need a prior opinion of the Financial System Organization Department (DEORF) of the Central Bank of Brazil.

For new foreign investment in Brazilian companies in Brazilian currency, the registration shall also be made with the Central Bank of Brazil.

1.3. Foreign Direct Investment

1.3.1 Cash Investments

No preliminary official authorisation is required for remittances of funds relating to investments in Brazilian territory. Such funds can be used to subscribe for or purchase shares in Brazilian companies. The funds must be remitted to Brazil through a banking establishment authorised to deal in foreign exchange in Brazil.

In August 2000, the Central Bank of Brazil issued the present rules on the registration of foreign investments in Brazil. According to Central Bank of Brazil Circular n. 3.491/2010, a Brazilian company which is the recipient of the foreign investment must obtain a number from the Electronic Declaratory Registry of Direct Foreign Investment (RDE-IED), corresponding to the Foreign Investor/ Brazilian Company pairing, through the Information System of the Central Bank of Brazil (SISBACEN). Such RDE-IED number must be indicated in the exchange agreement relating to the foreign direct investment.

The Brazilian company must then register the foreign direct investment before the Central Bank of Brazil through the SISBACEN RDE-IED system within 30 days from the closing of the exchange agreement. In the case of reinvestment of profits, within 30 days from the date the capitalisation of the profits is effected by the Brazilian company.

Reinvestment of earnings is allowed by the Central Bank. Reinvestment of this type is registered with the RDE-IED. Reinvestment necessarily implies that the Brazilian company must realise profits on the original investment. Such profits must be earned by the company located within Brazilian Territory and reinvested in the same company or in another company also located within Brazilian Territory.

1.3.2 Conversion of Foreign Credits into Direct Investment in the Corporate Capital of a Brazilian Company

The conversion of foreign credits into direct investment in the corporate capital of a Brazilian company is regulated by Central Bank Circular n. 3.491/2010. In order to achieve such a conversion the Central Bank of Brazil requires the following documents:

(a) Declaration by Creditor whereby the foreign creditor confirms and specifically acknowledges the respective credits which will be converted into direct investment in the corporate capital of the Brazilian company; and

(b) Declaration by Creditor whereby the foreign creditor expressly and irrevocably agrees with the conversion of the credits into direct investment in the corporate capital of the Brazilian Company.

Furthermore, the Brazilian exchange regulations require that any conversion of foreign credits into direct investment in the corporate capital of a Brazilian company must be carried out through a symbolic exchange operation. This operation entails two separate operations, the first simulates the remittance abroad of funds to repay the foreign credits, while, simultaneously, the second simulates the immediate return of the funds in the form of foreign direct investment. These operations can only be carried out by financial institutions duly authorised by the Central Bank of Brazil and the respective

exchange agreements are signed by the chosen financial institution and the Brazilian company.

1.3.3 Capital Contribution through the Import of Goods without Exchange Coverage

Capital investments made by importing goods without exchange coverage require registration with the SISBACEN and the Electronic System of Foreign Trade (SISCOMEX). The investments in the form of goods shall be registered with the Central Bank of Brazil within 90 days from the entry of the goods.

1.4. Stock and Securities Market

The markets are regulated by the stock exchanges and a governmental agency, the Securities Commission (CVM), under the Ministry of Finance and the National Monetary Council (CMN), while CMN has a regulatory function, CVM has the powers to oversee the markets; suspend participants; suspend trading of shares; authorise issues; audit public companies and exchanges; apply sanctions and promote liquidation.

There are three different categories of operations at the major Brazilian stock exchanges:

(a) the spot market;

(b) the options market; and

(c) the forward market.

With respect to the spot market, as elsewhere, securities are bought for immediate delivery against payment.

With respect to the options market, puts and calls are negotiated for a given price, on a certain date. The buyer pays a premium to the writer as soon as the transaction is made. The buyer then has the right to either buy or sell the shares at the exercise price of the option. In the event the option is a put, the exercise is only possible on the exercise date. In the event the option is a call, the exercise will be possible at any time until the exercise date. The payment of the exercise price

takes place only if the option is exercised. Sellers of options are required to either deposit the shares with the stock exchange or an initial margin equal to twice the amount of the premium options or such greater amounts as the stock exchanges may establish and are required to make daily settlements of the respective positions. Buyers are not required to make deposits.

Forward market operations are transactions by which a seller and buyer agree on the value of a purchase and sale of shares to be affected in the future. The seller must deposit the full value of the transaction. The buyer is obliged to deposit a marginal amount that may vary from 20% for the shares of greater liquidity to 100% for those of more restricted liquidity. A variation of the stock forward operations is the so-called financial futures.

1.4.1 Foreign Investors in the Stock Exchange in Brazil

The foreign investors (ordinary and qualified) are able to invest in the same products that are available to the resident investor in Brazil.

According to Resolution 2.689/2000 of the National Monetary Council (CMN), the foreign investor must retain the services of an institution that will work as his legal representative before tax authorities, and also as keeper of the investor's securities.

The legal representative is responsible for giving all the register information that is required to the Brazilian authorities. If the representative is neither an individual registered with the Central Bank to operate in the financial markets nor a financial institution, the foreign investor must hire a financial institution duly authorized by the Central Bank of Brazil, to be co-responsible for the accomplishment of the investor's obligations. Many financial institutions are authorized by the Securities Commission (CVM) and by the Central Bank of Brazil to work custodians for foreign investors, legal representative and legal representative before taxes authorities.

The custodian is responsible for updating the documents and controlling all the assets of the foreign investor in separate bank accounts. The custodian also has to supply any information required by the Brazilian authorities or by the foreign investor.

Additionally, the foreign investor will then choose a stock-broker to represent him and to execute his orders. In Brazil there is no minimum period to keep investments in the Stock Exchange.

It is also important to mention that the foreign capital invested in the country has to be registered by the Central Bank of Brazil, as already referred to in item 1.2 above.

1.5. Foreign Loans

Loans in any currency are made by remittance from the foreign source to Brazil for conversion into the Brazilian currency – the *Real* (*Reais* in the plural).

Pursuant to Central Bank Resolution n. 3.844/2010, no previous authorisation is required for a Brazilian private sector borrower to obtain a foreign loan. However, prior to the remittance of the funds, the borrower must register the parties, the financial conditions and terms, and other information relating to the transaction with the Registry of Financial Operations (ROF) of the Electronic Declaratory Registry (RDE) of SISBACEN.

A registration number is provided by ROF (RDE-ROF number) for the registration of any further information relating to the respective transaction.

The obtaining of the RDE-ROF number is vital for either the closing of the exchange agreement or for the international remittance of national currency relating to the inflow of resources into Brazil or remittance abroad. Each RDE-ROF number is valid for 60 days. After this term, if there is no flow of resources into Brazil, the RDE-ROF number is automatically cancelled.

After the inflow of funds, the borrower must carry out the registration of the payment scheme in ROF.

There is a withholding tax of 15% at source on the remittance abroad of interest and there is IOF (Financial Transaction Tax), at a rate of 5% over cash loans with average minimum terms of less than 90 days. The interest charged must be considered "reasonable" in the judgement of the Central Bank of Brazil. It is important to note that when the foreign loan comes from a tax haven jurisdiction, the withholding tax is due at the rate of 25% on the remittance of interest.

There are 2 types of loans: cash loans and credit loans for importing goods. The former is reflected by the entry of cash into Brazil and the latter by credit abroad to pay for the import of machinery or equipment.

Cash loans may be contracted directly by the borrower with the foreign financing agency or through private development banks, investment banks, the National Economic and Social Development Bank (*Banco*

Nacional de Desenvolvimento Econômico e Social – BNDES) and banks authorised to operate with foreign exchange in Brazil. Transactions of this nature must be effected at the prevailing interest rates practiced in the international market.

Imports of goods financed for a period of approximately 360 days are subject to prior registration with the Central Bank of Brazil.

Remittances of principal and interest may be affected by the simple presentation of the ROF number to any Brazilian commercial bank which will make the exchange contract.

1.6. "Contaminated Capital"

Despite the procedures mentioned above, there are cases in Brazil in which the foreign capital, either foreign direct investment or foreign credit has not been registered before the Central Bank of Brazil, even though it is accounted for as such in the accounting records of the respective Brazilian companies. This anomaly is the so-called "contaminated capital".

Article 5 of Law n. 11.371/2006 proposes an alternative to clean-up "contaminated capital", taking into consideration the figures duly recorded in the accounting records of the Brazilian company. This lawl, later confirmed by the National Monetary Council's Resolution n. 3.447, of 5 March 2007, and by the Central Bank of Brazil's Circular n. 3.344, of 7 March 2007, is, primarily, a device to solve the problems associated only with non-registered foreign investments into Brazilian companies, such as the impossibility of repatriating dividends, the re-payment of interests, and the sale of investments.

Nevertheless, these two rules were subsequently amended, respectively, by the National Monetary Council's Resolution n. 3.455, of 30 May 2007, and by the Central Bank of Brazil's Circular n. 3.350, of 8 June 2007. According to these rules, not only foreign direct investments, but also foreign credits derived from capital inflow made in Brazilian Reais, which have not been registered with the Central Bank of Brazil, must have been regularized. For this purpose, the accounting records of the Brazilian company shall be equally taken into consideration.

It is important to note that the referred foreign capital, duly accounted for in the Brazilian companies' records, in Brazilian currency, which was not able to

be registered with the Central Bank of Brazil, as explained above, shall now be registered in the RDE-IED or in the RDE-ROF by: (i) 30 July 2007, for the existing capital by 31 December 2005; or (ii) last day of the subsequently year of the balance sheet of the transaction, for the capital after 31 December 2005.

As a consequence of the aforesaid Law, all companies which maintain any kind of foreign investments at its corporate stock are obliged to register such investments under the penalty of fine.

Therefore, given this measure, the intention of the financial authority to legalise all foreign capital brought into Brazil is noted, either as foreign investment or foreign credit, regardless of whether it was not previously registered, as long as the ownership of such capital is accounted for and the respective amounts have been duly accounted for in the Brazilian company, in accordance with the relevant legislation.

1.7. Foreign Capital Restrictions

1.7.1. Introduction

The concept of foreign capital under Brazilian law is defined by Law n. 4.131/62 and its amendments. This legislation together with RMCCI[2] govern foreign investment and repatriation of profits abroad, giving foreign capital invested in Brazil identical treatment and equal conditions as domestic capital.

Brazilian Federal Constitution[3] stipulates that a company will receive privileged treatment provided it is established under Brazilian law and is small in size. Brazilian law will, according to the national interest, regulate foreign investment, stimulate reinvestment, and regulate repatriation of profits.

1.7.2. Foreign Capital Restrictions Imposed by Brazilian Law

1.7.2.1. Credit Restrictions

Law n. 4.131/62[4] establishes that the National Treasury and the official credit entities may only guarantee, by means of a prior Decree, the foreign lending

2. Circular n. 3.280/05.
3. Article 170, item IX, of the Brazilian Federal Constitution, amended by Constitutional Amendment n. 6 of 15 August 1995.
4. Articles 37, 38 and 39 of Law n. 4.131/62.

or the financing to companies whose controlling interest are in the hands of non-residents of Brazil. Foreign-owned controlling interests, or even subsidiary companies, will not have access to such credits until their operations begin. And Law n. 4.728 of 14 July 1965, which regulates the capital market, provides that when there is a serious unbalance in the balance of payments, as determined by the National Monetary Council (CMN), the Central Bank of Brazil may limit foreign access to the Brazilian financial system. These limitations apply to companies that have access to international financial markets because of their status as foreign company subsidiaries, and companies whose capital belongs to foreign individuals.

1.7.2.2. Restrictions on Financial Institutions

Foreign banks authorised to operate in Brazil are subject to the same restrictions applicable to Brazilian banks. In summary, the National Monetary Council through decrees, has the power to limit the amount of the foreign capital in Brazilian Financial Institutions.

Article 52 of the Transitory Provisions of the Federal Constitution, provides that until some conditions stipulated by the Congress are fulfilled, new agencies of financial institutions domiciled abroad are not permitted to incorporate in Brazil and, in addition, individuals and legal entities domiciled abroad are not permitted to increase their participation in the capital of the financial institution. Article 192 of the Federal Constitution provides that the national financial system will be regulated by legislation determining the conditions for foreign capital participation in financial institutions through a complementary law approved by Congress, which shall consider the national interests and the international agreements. However, this restriction does not apply to authorisations to establish banks as a result of international agreements of reciprocity or governmental interest. The Central Bank of Brazil must be previously consulted on the possibility of foreign participation in transactions involving acquisition of quotas or shares of companies making up the National Financial System[5].

5. Central Bank of Brazil Circular n. 3.317/06.

1.7.2.3. Restrictions on the Acquisition of Rural Real Estate and Frontier Area Real Estate

Foreign individuals resident in Brazil as well as foreign legal entities authorised to operate in the country who desire to invest foreign capital in the acquisition of rural properties must follow the rules established in Law n. 5.709 of 7 October 1971 and Decree n. 74.965 of 26 November 1974. The law permits the acquisition of rural property for approved industrial, agricultural or cattle-raising projects exclusively. Further, such rural property acquisition must be approved by INCRA (the National Institute of Colonisation and Agrarian Reform), as well as other regulatory agencies, depending on the nature of the project. Acquisition of rural property above a certain size will also depend on the approval of the National Congress. Purchases of rural real estate for other purposes or without a recorded deed are void under Brazilian law.

Brazilian legislation also imposes certain restrictions on the purchase by foreigners of property located in border areas, which are considered essential to national security. The border area consists of a strip of land 150 km wide which runs along the Country's borders. Foreign individuals and legal entities may purchase real estate situated in essential (border) areas only after priorevious approval by Brazilian national security authorities.

1.7.3. Other Restrictions

The Brazilian National Congress, in 2002, amended Article 222, §1, of the Federal Constitution, so that although foreigners are supposed to be precluded from owning interests in the written and broadcasting media, foreigners are permitted to hold 25% of the voting capital, while 75% must be directly or indirectly held by Brazilian citizens., Also in accordance with Article 7 of Law n. 8.977 of 06 January 1995, the concession of cable television services will be granted to companies with at least 51% of the voting capital directly or indirectly held by Brazilian citizens. It is important to mention that foreigners that have adopted and held Brazilian citizenship for less than 10 years are not permitted to hold more than 30% of the social capital of media and broadcasting corporations (Article 6, Law n. 10.610/02).

The final restriction is related to Nuclear Energy, which is an issue reserved exclusively for development by the Brazilian Government.

2. FORMS OF ASSOCIATION

2.1 Types of Companies

Brazilian law provides for several types of companies. The most frequently used corporate types are the *Sociedade Anônima* (S.A.) and the *Sociedade Limitada* (Ltda.). This is due to the fact that in both cases the participants have limited liability. The law grants legal entity status to these companies separate from that of their participants.

Brazilian Law also provides for other forms of association such as joint ventures and consortia or special types of partnership which do not acquire a legal entity status. In this case the parties' contract rights and obligations individually for the common benefit of the group. These other contractual structures are usually adopted to fulfil specific purposes or for non corporate business.

2.2. The *Sociedade Anônima*: "S.A."

2.2.1. Incorporation

By legal definition, the S.A. is always a commercial entity and its capital is represented by shares.

The liability of a shareholder is limited to the amount of the issue price of the subscribed shares. Once their subscription is paid up, the shareholder does not have any further liability to the company or to its creditors. In theory the S.A. is considered to be an impersonal company; i.e., a company in which the relation between its shareholders is less important than personal contribution.

The S.A.'s name must be either preceded or followed by the Portuguese expression *Sociedade Anônima* (or its abbreviation S.A.), or preceded by *Companhia* (or its abbreviation Cia.). The name must be composed of a fantasy name or a given name followed by a short indication of the company's main objectives.

There are two types of S.A.: (i) the Listed S.A., the issued shares of which are publicly held and traded in the stock market, and (ii) the Closed Capital S.A., which obtains its capital through private offering of shares.

Notwithstanding the type chosen, there are five basic requirements to incorporate an S.A.:

(a) subscription by at least two persons (legal entities or individuals) of the entire allotted share capital;

(b) payment at least 10% of the subscribed capital to be paid in cash;

(c) deposit with *Banco do Brasil S.A.*, or any other financial institution authorized by the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários* – CVM), of 10% of the amount of subscribed shares;

(d) registration of the Minutes of Incorporation Meeting and By-laws with the Commercial Registry (*Junta Comercial*); and

(e) publication of the minutes of Incorporation Meeting and By-laws in the Official Gazette of the Federal District or State Government and in a widely circulated newspaper, within 30 days after its registration.

Listed S.A.'s are subject to additional regulations and supervision by the CVM.

Law n. 6.385/76 instituted the CVM and established that its main objectives are the following:

(a) to assure the proper functioning of the exchange and over-the-counter markets;

(b) to protect all securities holders against fraudulent issues and illegal actions performed by company managers, controlling shareholders, or mutual fund managers;

(c) to avoid or inhibit any kind of fraud or manipulation which may give rise to artificial price formation in the securities market;

(d) to assure public access to all relevant information about the securities traded and the companies which have issued them;

(e) to ensure that all market participants adopt fair trading practices;

(f) to stimulate the formation of savings and their investment in securities; and

(g) to promote the expansion and efficiency of the securities market and the capitalization of Brazilian publicly held companies.

CVM has the power to investigate, prosecute and punish irregularities in the stock market. With any suspicion CVM can initiate an administrative inquiry, through which it collects information, takes testimony and evidence together in order to clearly identify the person responsible for illegal practices, offering full rights of defence.

In terms of policy action, CVM pursues its objectives through self-regulation and self-discipline, intervening effectively in the activities of the market, according to Law.

The Law provides that the directors of Listed S.A.s must disclose relevant information on the company and its business, given that resolutions taken by the Shareholders Meetings or some facts regarding its business can significantly affect the decision to buy or sell securities of the company. CVM regulates the registration of the company for trading its securities in the stock market or over the counter (OTC) market. This forces the company to maintain a permanent system of disclosing regular information to the market. A long series of regulations have been enacted by CVM in order to improve the transparency of the company and its business to the market.

Some institutional and governmental initiatives have been implemented in order to ensure the improvement of corporate practices of Brazilian companies, which include:

(a) the approval of Law n. 10.301/01, extending the legal protection to the minority shareholders;

(b) the creation of the "Novo Mercado" and Levels 1 and 2 corporate governance by the Stock Exchange of São Paulo – Bovespa, and;

(c) new rules defining the limits of application of the resources of pension funds.

The *Novo Mercado* is a special listing segment for shares of companies that voluntarily undertake to adopt the best practices of corporate governance. The "Novo Mercado" linked to so-called Levels 1 and 2 establish undertakings regarding the increasing adoption of best corporate governance practices.

The companies that undertake Level 1 are especially compromised with improvements in providing information to the market and the widespread ownership of shares. For classification as a Level 2 company, in addition to accepting the obligations contained in Level 1, the company and its shareholders have a much broader set of governance practices and additional rights for minority shareholders.

2.2.2. Capital

The capital of an S.A. is divided into shares representing parts or fractions of the capital. The rendering of services is not admitted as a form of paying up the capital. Shares can either have par value or no par value. An S.A. which issues shares with par value cannot issue shares at a price lower than the par value of its outstanding shares. As regards the shares without par value, they also have a price: their issue price. The issue price of shares without par value is set at the time the company is formed, or by the Shareholders' Meeting or the Board of Directors at the time of a capital increase, observing the criteria established by the Law.

An S.A.'s capital may be:

I – increased, after the payment of at least ¾ (three quarters) of the previously established corporate capital:

(a) by resolution of the Shareholders or of the Board of Directors, subject to the provisions of the S.A.'s By-laws relating to capital increases;

(b) by conversion of debentures or founders' shares into shares or by exercise of rights conferred by subscription warrants or stock options; and

(c) by resolution of the Shareholders' Meeting when prior authorisation for an increase of the capital does not exist or when the limit of the prior authorised capital has already been exhausted; or

II – decreased:

(a) for the purpose of reimbursing a dissenting shareholder;

(b) upon the forfeiture of shares where a holder has failed to meet subscription obligations; and

(c) when the company capital has been eroded by losses or when the capital stock exceeds the amount necessary to achieve company objectives.

Either the listed S.A. or the closed capital S.A. may have its capital structure organised as an authorised capital S.A. An authorised capital S.A. may be incorporated with less capital than that established by its by-laws, which will merely represent the limit within which the subscribed capital may be raised without the necessity of an amendment to its by-laws. In authorised capital S.A.s, the by-laws usually confer upon the Board of Directors the authority to increase the subscribed capital within such authorised limit, thus avoiding the necessity of holding a Shareholders' Meeting and accelerating the funding of the company.

2.2.3. Shares

Brazilian law does not permit bearer shares. Ownership of all shares must be registered in the Nominative Shares Registry. The transfer of shares

is registered in the corporate book in accordance with the corresponding legal evidence of such transfer (agreements, succession, etc.). The law also permits the transfer of the responsibility for registration of shares to a financial institution. This a common practice in Listed S.A's. which generally appoint an agent, usually a financial institution, as the responsible for the shares registration.

In principle, shares are freely transferable to third parties without any requirement that preference be given to anybody. In a Closed Capital S.A., however, the by-laws or a Shareholder Agreement can impose some restrictions on the transfer of shares, provided that any restrictions do not prohibit the transfer or require approval of any such transfer by a majority of the shareholders or by the Board of Directors. In a Listed S.A., shares can only be transferred after at least 30% of the shares' issue price has been paid. In a Closed S.A. there is no such requirement.

Shares may be ordinary, preferred or fruition shares, depending on the rights they confer on their holders. Shares of the same class confer the same rights on their owners.

Ordinary shares entitle the holder to common or essential shareholder's rights, including the right to vote in Shareholders Meetings. Preferred shares have special rights of financial or political nature. Usually, the preference share confers to its holder financial advantages *vis-a-vis* the ordinary share as a compensation for the lack of the right to vote. Preferred shares cannot account for more than 50% of an S.A.'s outstanding shares. Fruition shares result from amortisation of common or preferred shares.

All shareholders are guaranteed the following essential rights notwithstanding the type of share held:

(a) the right to a proportional share in the company's profits;

(b) in the event of liquidation, the right to a proportional share of the company's assets remaining after debts are paid;

(c) the right to supervise the management of the company's business;

(d) the right of first refusal in the subscription of shares (including shares converted from founders' shares, debentures and subscription warrants); and

(e) the right to withdraw from the company in the cases permitted by law.

In addition to these essential rights, there are also special rights that are reserved for holders of certain types of shares. For example, the rights of preferred shareholders, according to Law n. 10.303 of October 2001, consist of:

a) In a Closed Capital S.A.:

(i) the priority right in the distribution of fixed or minimum dividends, accumulated or not with item (ii) below; and

(ii) in the event of liquidation, the priority right in the return of capital, with or without premium.

b) In a Listed S.A.:

(i) in the event of liquidation, the right to priority in the return of capital, with or without premium, accumulated with at least one of the rights referred to in items (ii), (iii) and (iv) below;

(ii) the right to receive dividends of at least 25% of the annual net profit, with a minimum priority dividend of at least 3% of the net value of the share, and the right to participate in the distribution of dividends on the same terms as the ordinary shareholders after receiving priority dividends;

(iii) the right to receive dividends at least 10% greater than those granted to ordinary shareholders; or

(iv) the right to be included in public offers for the sale of a controlling interest in the company, being assured of a dividend at least equal to that provided to holders of ordinary shares (tag along).

2.2.4. Shareholders Agreement

The law expressly permits shareholders to enter into Shareholders' Agreements dealing with the transfer of shares, pre-emptive rights to purchase shares, and the exercise of voting rights or controlling powers.

The obligations set out in a Shareholders Agreement can be subject of specific performance for their compliance, and the Chairman of the general meeting of shareholders shall not take into account any vote, given by a shareholder under a Shareholders´ Agreement, that is inconsistent with the terms of said agreement.

The shareholders under a Shareholder Agreement shall appoint an individual to be their representative before the company, with powers to provide and receive information from the company, whenever necessary.

To become enforceable before the company and third parties, the Shareholders' Agreement must be filed at the company's head-offices and registered in the proper corporate book.

Shares subject to a Shareholders' Agreement cannot be traded on the stock market.

A Shareholders Agreement is an extremely useful tool in joint-ventures companies organized as S.A., as it provides the parties the opportunity to set out many covenants and details of their corporate relationship.

2.2.5. Shareholders Meetings

There are two kinds of Shareholders' Meetings: (i) Ordinary, which shall be held at least once a year in order to discuss the company's management report and financial statements and to elect members of the Board of Directors, Executive Board and Audit Council; and (ii) Extraordinary, which can be held at any time to deliberate any issues which do not fall within the competence of an Ordinary Shareholders' Meeting.

Both types of meetings are summoned and conducted in the manner prescribed by Law and the By-laws. The authority to summon Shareholders' Meetings normally rests with the Executive Board or the Board of Directors, but the Law also foresees cases in which they can be summoned by the Audit Council or one or more shareholders.

Summons of the meeting is made by the publishing of a notice at least 3 times in the Official Gazette of the Federal or State Government and in a

widely circulated newspaper appointing the local, date, time and the agenda of the meeting. The publication of the first notice must be made at least 8 days in advance, in a Closed Capital S.A. and at least 15 days in advance in a Listed S.A. Notwithstanding, the absence of prior notice through the newspaper can be deemed unnecessary if all shareholders attend to the meeting.

Shareholders' Meetings may be called to order, on first summoning, only if shareholders representing at least 1/4 (one quarter) of the voting shares are present. If the purpose of the meeting is to amend the by-laws, however, shareholders representing at least 2/3 (two thirds) of the voting shares must be present.

Shareholders can be represented in Shareholders' Meetings by an administrator of the company, another shareholder, or an attorney who has been granted a power-of-attorney less than one year before the date of the meeting.

With few exceptions, decisions voted at Shareholders' Meetings must be approved by absolute majority (50% plus one) of all votes cast. Minutes of all meetings must be drawn up, registered in the appropriate books and filed with the Commercial Registry in order to ensure enforceability against third parties of the decisions taken.

2.2.6. Administration

The administration of an S.A. is conducted by one or two corporate bodies, each with specific authority and responsibilities: the Board of Directors (*Conselho de Administração*) and the Executive Board (*Diretoria*).

However, from a managerial perspective, the Shareholders' Meeting may also be considered an administrative body as it is its legal responsibility to establish the general business, financial and administrative guidelines for the company.

Every S.A. is required to have an Executive Board. The Board of Directors is mandatory in Listed S.As and authorised capital S.As, but optional in a Closed Capital S.A.

The Board of Directors is a non-executive body. It must be composed of at least three members. The members must also be shareholders but do not have to be resident in Brazil. The members are elected and can be removed at any time by the Shareholders' Meeting. Their term of office may not exceed three years, but re-election is permitted.

The Board of Directors is responsible for (i) establishing the general business, administrative and financial policies of the company in accordance with guidelines established by the Shareholders' Meeting, (ii) electing and dismissing the members of the Executive Board, (iii) supervising the carrying on of the business by the members of the Executive Board, (iv) examining the company books and papers, (v) monitoring the company's contractual relations and negotiations, (vi) and any other acts relating to the company's business.

The Executive Board is the executive body responsible for the routine operations of the company and for representing the company before third parties in the ordinary course of business.

The Executive Board is composed of at least two officers, who do not have to be shareholders, but who must be resident in Brazil. Officers are appointed, and may be removed at any time, by the Board of Directors or by the Shareholders' Meeting if the company has no Board of Directors. The maximum tenure for officers is 3 years, but re-election is permitted.

The law permits that 1/3 (one third) of the members of the Board of Directors serve as members of the Executive Board.

2.2.7. Audit Council

The S.A. may have an Audit Council, which is created when a Shareholders' Meeting deems it necessary to maintain strict control over the company's management. The Audit Council is elected at a Shareholders' Meeting and must be composed of a minimum of three and a maximum of five members (with an equal number of alternates).

The Audit Council shall perform it functions on a permanent or non-permanent basis as the S.A.'s By-laws may set forth.

Whenever the Audit Council is organized on a non-permanent basis, it will only become active when the Shareholders, representing at least 10% of the ordinary shares or 5% of the preferred shares, deems it necessary to maintain a strict control over the company's management.

The Audit Council is elected by a Meeting of the Shareholders and needs to be composed of a minimum of three and a maximum of five members (with an equal number of alternates) resident in the Country, with a university degree or persons who have been a member of the Board of Directors, of the Executive Committee or of the Audit Council of the company for at least three years.

The members of the Audit Council need not be shareholders and cannot be members of the Board of Directors or Executive Board, employees of the company nor of its subsidiaries or companies belonging to the same Economic Group, and also spouse or relative up to third degree of a director of the company.

The duties of the Audit Council comprises, *inter alia*: (i) to oversee the acts of the directors and officers; (ii) to analyze the management annual report; (iii) to give opinions on the issuance of securities by the company; (iv) to report any misconduct of the company's officers and directors; and (v) to analyze and issue opinion about the company's balance sheet and financial statements.

2.2.7.1. Financial Statements

The financial reporting period of an S.A. is one year, the closing date being established in the by-laws.

In the case of Listed S.A.s, the financial statements must: (i) follow the rules established by CVM and be prepared in conformity with international accounting standards adopted in the major securities markets; (ii) be audited by an independent auditor or auditing company duly registered with CVM; and (iii) must be published in the Official Gazette of the Federal District or State and in a widely circulated newspaper.

In the case of a Closed S.A.s, the auditing of financial statements is optional, but the statements must be published. However, a Closed S.A. which has a net equity of R$ 2 million or less on the date of its financial report is not required to publish its financial statements, if properly registered with the Commercial Registry.

2.2.8. Dissolution

The dissolution of an S.A. may take place: (i) at the end of its term as specified in the By-Laws; (ii) by resolution of the Shareholders' Meeting; (iii) by the existence of only one shareholder in an Annual Shareholders' Meeting, if the minimum of two is not re-established prior to the subsequent Annual Shareholders' Meeting; or (iv) by Court decision or the administrative decision of a competent public authority.

The liquidation of the company's assets in order to pay off outstanding debts precedes dissolution. Any assets remaining are distributed to shareholders in proportion to their investment (subject to any priority rights granted to preferred shareholders). The liquidation may be voluntary or imposed by judicial action.

2.3. The *Sociedade Limitada*: LTDA.

2.3.1. Incorporation

The LTDA is established by the partners' signatures in the respective Articles of Association (*Contrato Social*) and has only a single class of partners, the limited liability quotaholders. Depending on the nature of the corporate objectives set forth in the respective Articles of Association, the LTDA may be a commercial (*sociedade empresária*) or non-commercial company (*sociedade simples*) and, accordingly, will be registered with the commercial or civil Companies Registries.

2.3.2. Name

The company name of a LTDA must always be followed by the expression "*Limitada*" (or its abbreviation Ltda.). The name must be composed by a fantasy name or a given name followed by an indication of the company's main objectives.

2.3.3. Quotaholders' Liability

The capital of a LTDA is divided into quotas. The quota represents the amount (in money or other assets) that a quotaholder contributes to the formation of the company. The Law expressly forbids contribution through the rendering of services. The quotaholders are jointly liable for the payment of the entire amount of the company's capital. After the payment of the capital the quotaholders do not have further responsibilities towards third parties who contract with the company, but this limitation is not absolute with respect to the company's tax, labour and social security dues.

2.3.4. Capital

The capital of a LTDA may be:

I – Increased:

(a) after being fully paid up, by resolution of quotaholders representing at least 3/4 (three-quarters) of the company's capital.

II – Decreased

(a) when the capital has been eroded by losses;

(b) when the capital exceeds the amount necessary to achieve the company's objectives; or

(c) when a quotaholder fails to pay-up his subscribed quotas.

2.3.5. Administration

The LTDA can be managed by one or more individuals who must be resident in Brazil. The manager can be one of the quotaholders or not. However, before the company's capital is fully paid up, appointing a manager who is not a quotaholder requires the approval of all quotaholders. After the full payment of the capital the decision to appoint a manager who is not a quotaholder can be taken by quotaholders representing 2/3 of the company's capital.

The manager is not personally responsible for the company's liabilities. A manager can however, be held personally liable before the company or third parties for any acts which exceed the limits of his or her authority or which violate the Law or the company's Articles of Association.

The Articles of Association can also provide for the creation of an Audit Council, in case the quotaholders deem it necessary to closely supervise the management of the company.

2.3.6. Amendments to the Articles of Association

The Articles of Association may be amended by resolution of the quotaholders to, *inter alia*:

(a) increase or decrease the company's capital;

(b) extend the term of the company's duration;

(c) change the company's name;

(d) change the company's head-offices;

(e) admit or exclude quotaholders; or

(f) change the company's objectives.

Quotaholders who disagree with an amendment to the Articles of Association have the right to withdraw from the company.

Quotas are not represented by securities or certificates but instead their ownership is conferred by the Articles of Association. Consequently, any transfer of title of the quotas requires an amendment to the Articles of Association. The Law requires the approval of quotaholders representing at least 3/4 of the total company's capital to amend the Articles of Association.

2.3.7. Quotaholders Meeting

Decisions requiring the approval of quotaholders must be made in a formal meeting, convened pursuant to the terms of the Articles of Association and the Law.

In addition, at least once a year the quotaholders must hold a Quotaholders' Meeting to discuss the management report and financial statements and, if the case, elect the company's managers.

Meetings are called and conducted in the manner prescribed by the Articles of Association (or, if the Articles are silent, in the manner specified in the Law). The general manager usually has the authority to call meetings, but the

Law also provides that in some cases quotaholders representing at least 1/5 (one fifth) of the company's total capital can also summon the meetings.

Prior summoning will be deemed unnecessary if all quotaholders declare in writing that they knew that a meeting would be held, actually attend such meeting or unanimously decide in writing any matters on the agenda.

2.3.8. Dissolution

The dissolution of a LTDA may take place in the following cases: (i) at the end of its term as set forth in the Articles of Association; (ii) by the unanimous resolution of all quotaholders; (iii) by the resolution of quotaholders representing an absolute majority, in companies established for an undetermined term; (iv) by the existence of only one quotaholder, if the minimum of two is not re-established within 180 days; and (v) in case of bankruptcy.

The death of a quotaholder does not bring about dissolution of an LTDA if the succession by the quotaholder's heir(s) or the company's continuity with the remaining quotaholders is provided for in the Articles of Association.

2.3.9. Supplementary Legal Framework

The Brazilian Civil Code has provided for a number of company structures and established specific legal framework for each structure. In the case of the LTDA, the legal dispositions governing companies in general will be applied to any issues not covered by either the company's Articles of Association or the specific legal regime of the LTDA. However, the quotaholders may choose to alternatively establish in the Articles of Association that Law n. 6.406/76, which governs the S.A., will be applicable for the issues not covered by the LTDA specific legal framework or by the Articles of Association.

As of the enacting of Law 11.638, dated of 28 December 2007 all companies with assets exceeding R$ 240,000,000.00 (two hundred and forty million Reais) and/or annual gross revenue over R$ 300,000,000.00 (three hundred million Reais), despite adopting the LTDA. corporate type, must comply with the rules set in article 176 Law 6.406/76 regarding the preparation and audit of their financial statements.

2.4. Rules Common to the S.A. and the LTDA.

2.4.1. Corporate Registration

All companies may transform into another type of entity, spin-off a portion of their assets, merge into or consolidate with another legal entity.

A transformation alters a company's legal type to another without dissolving it. A merger is an operation by which one or more companies are absorbed by another. A consolidation unites two or more companies to form a new company which will succeed the consolidated entities' rights and obligations. A Spin-oOff is an operation whereby a company transfers all or part of its assets and liabilities to one or more companies, already in existence or to be incorporated. If a company spins-off all of its assets and liabilities, it will be dissolved.

2.4.2. Representation of the Foreign Shareholders

Foreign entities or individuals holding shares or quotas in Brazilian companies must maintain an attorney resident in Brazil with powers to receive service of process in legal actions involving its holding of shares or quotas, as well as be enrolled before the Brazilian Internal Revenue Service.

2.4.3. Trade Name

Prior to registering the Articles of Association, a name search must be performed to determine the availability of the proposed trade name. Priority is given to the company that first registers a trade name, without consideration of any existing trademark registration(s) or application(s). Reservation of a trade name is not possible in Brazil.

Trade names are protected in Brazil under Law n. 8.934, of 18 November 1994 and Law n. 10.406, of 10 January 2002. This protection is granted automatically in the State where the company's head-offices will be located upon registration of the acts of incorporation with the State Commercial Registry. However, as Brazil is composed of 26 States plus Federal District, to extend the protection to any additional State after the incorporation, specific applications must be made before the Commercial Registry of each State where the protection is intended.

2.5. Incorporation Procedures

Incorporation of a company in Brazil requires registration with several governmental authorities. The mandatory registrations are the following:

As a first step, the Articles of Association or By-laws must be filed with the Commercial Registry or the Civil Registry (depending on the company's objectives), in the State where the company is headquartered. After this registration, the newly incorporated company acquires a legal entity status different from those of the holders of its shares or quotas. However, at this stage, the company cannot yet start up its operations yet.

After registration of the Articles of Incorporation or By-laws, the company must be enrolled with the Legal Entities Taxpayers Registry of the Brazilian Internal Revenue Service ("CNPJ"). To become fully operational, companies involved in commercial activities must also register with State and Municipal taxpayers' registries, as well as, if the case, specific agencies regulating its activities. Companies that only render services need not to register with the State Taxpayers' Registry, except those which render transportation services.

Foreign shareholders or quotaholders must present the Brazilian authorities documents showing their regular existence abroad. In order to be enforceable before third parties in Brazil, foreign documents must first be signed before a notary public in their country of origin and legalised before the Brazilian Consulate with jurisdiction. In Brazil, these foreign documents must be translated into Portuguese by a public sworn translator and registered at a Deeds and Documents Registry Office.

2.6. Additional Considerations

Brazilian law also provides for the formation of civil associations, foundations and co-operative associations which, due to their non-profit nature or to the particular characteristics of their formation or objectives, are not commercial organisations and accordingly receive different legal treatment.

3. TAXATION

3.1. The Brazilian Tax System

The current Brazilian Tax system was established by the Federal Constitution of 1988, in force since 1st March 1989. Prior tax laws not compatible with the Constitution remain in force as long as the "complementary laws" (enabling legislation) described in the Constitution are not enacted. The Income tax regulations are set out in Decree n. 3.000 of 26 March 1999, as amended.

Among other subjects, complementary laws establish general tax norms, especially with regard to the definition of taxes, tax basis, taxpayers, tax obligations, assessments, and statutes of limitations.

The Federal, State and Municipal governments may raise revenue through the use of:

(a) taxes;

(b) fees; and

(c) contributions for improvements resulting from public works.

The Constitution provides that "whenever possible" taxes should be personal and progressive.

3.2. Taxation of Individuals

3.2.1. Taxpayers

All individuals residing or domiciled in Brazil are liable to income tax and capital gains[6]. As a general rule, individuals resident or domiciled abroad are liable to tax on income and capital gains arising in Brazil.

6. Pursuant to Article 2 of Decree n. 3.000/99.

3.2.2. Tax Domicile

The tax domicile of the taxpayer is the place where the individual maintains a permanent home. As mentioned above, Brazilian law provided different treatments for resident individuals and non resident individuals.

3.2.3. Individual Taxpayer's Registry (CPF)

The following individuals must be enrolled before the Individual Taxpayer's Registry (CPF):

a) individuals required to file a tax return;

b) individuals whose income is subject to withholding tax at source;

c) independent professionals;

d) lessors of real estate;

e) those who participate in real estate operations;

f) individuals obliged to withhold tax at source;

g) individuals who own a bank account or financial applications;

h) individuals who operate on stock exchanges, the commodity and futures markets;

i) individuals registered as contributors to the National Institute of Social Security (INSS);

j) individuals who pay income to other persons who are subject to withholding tax at source; and

k) individuals domiciled abroad who own in Brazil assets or rights subject to public registration, including: real estate; vehicles; ships; planes; shareholdings; bank accounts; and financial investments.

The individual is enrolled only once and a second enrolment is not permitted.

3.2.4. Foreigners who Transfer Their Domicile to Brazil

The tax treatment of foreigners who transfer their domicile to Brazil varies depending on the type of Visa. There is a legal assumption that a foreigner holding permanent visa or temporary visa has transferred his/her domicile to Brazil

For a holder of a permanent visa income will be taxed as any other resident in Brazil, as of the date of arrival in Brazil.

A holder of a temporary visa who enters Brazil under an employment relationship will be liable to taxation, as any other Brazilian resident, from the date of his/her arrival in the Country. Those arriving for any other reason will be considered resident for tax purposes on completion of a stay of 183 days, whether consecutive or not, within a 12-month period.

Holders of business visas (90-day visa) are not subject to taxation in Brazil on the basis of their physical presence in the Country, as such type of visa does not include a work permit and the foreigner is not entitled to receive income in Brazil.

3.2.5. Transfer of Residence Abroad

Individuals domiciled or residing in Brazil who leave the country permanently must, in addition to filing a tax return, file a declaration of definitive departure and obtain a certificate from the tax authorities confirming that all taxes have been paid, likewise enabling the individuals to request Central Bank authorization to repatriate all assets held in local currency, provided these assets have been properly reported in the annual tax return. In the event that the referred declaration is not made, the individual will be considered resident in Brazil for tax purposes for the first twelve months following his departure

3.2.5.1. Employees of Foreign Governments and International Organisations

The following individuals are exempt from tax on earned income:

a) diplomatic personnel of foreign governments;

b) employees of international organisations of which Brazil is a member, and with which it has agreed to grant the exemption; and

c) non-Brazilian employees of embassies, consulates and government agencies of other countries in Brazil, as long as there is reciprocity of treatment.

3.2.6. Taxable Income in Brazil

The gross income received by an individual is subject to income tax with deductions for alimonies, dependants, contributions to the social security and medical expenditures plans of the federal, state, municipal governments, and the exempt portion of the retirement and pension plan income.

Gross income includes earned income, alimony, child support and pensions received in cash, as well as income of any nature, including increases in assets that are not explained by the income declared. The following forms of income are taxable:

a) earned income;

b) income earned by professionals;

c) income from rents, royalties, leases and licenses;

d) income and capital gains received from abroad;

e) one-quarter of the earned income received from the Brazilian government, in the case of employees of the government serving abroad;

f) bonuses and special dividends;

g) other income and capital gains not subject to withholding tax.

The following income is subject to withholding tax exclusively at source:

a) lottery winnings in general paid in cash;

b) net benefits resulting from the lottery element of capitalisation securities;

c) short-term financial operations initiated and closed on the same day;

d) gross income from any fixed interest financial investment;

e) gross income from financial operations carried out in the stock market, commodities market, or futures market and any other market of a similar nature;

f) capital gains on the alienation of rights or property which exceed R$ 35,000.00;

g) capital gains on the alienation of stocks negotiated in the Over-the-Counter Market (*Mercado de Balcão*) which exceed R$ 20,000.00; and

h) income from stock market, commodities market, or futures market operations, and any other market of a similar nature.

Individuals must present an annual income tax return which will determine additional tax payable or excess tax refundable, depending on their respective income nature as mentioned above.

Any tax due by resident individuals will be calculated by use of the following table, which shall correspond to the sum of the values listed in the 12 monthly tables for the calculation of the withholding tax that were in force during the preceding tax year.

For the year 2010 (related to the Tax Return to be presented in 2011) the prevailing marginal income tax rates are:

Annual Income – R$	*Tax Rate*
0 – 17,989.80	0%
17,989.81 – 26,961.00	15%
35,948.41 – 44,918.28	22.5%
Over 44,918.28	27.5%

3.3. Taxation of Legal Entities

Brazilian tax legislation has in recent years undergone constant modifications not only at the federal level but also at the state and municipal levels.

3.3.1. Income Tax

The principal legislation regulating Income Tax in Brazil is set out in Decree n. 3.000/99 and Laws nos. 8.981/95, 9.065/95, 9.249/95, 9.430/96, 9.532/97, 9.779/99, 11.196/05 and 11.941/09.

Companies domiciled in Brazil are liable to Corporate Income Tax on profits arising both in Brazil and abroad. Brazilian branch offices, agencies or representative offices of companies domiciled abroad are subject to income tax on income arising in Brazil.

For 2010 the basic rate of Income Tax on corporate profits (including capital gains), as adjusted for tax purposes, is 15% with an additional surtax of 10% on taxable profits exceeding R$ 240,000.

Article 219 of the Decree n. 3.000/99 determines that Income Tax will be payable based on either the real, presumed or imputed profits (*lucro real, presumido ou arbitrado*).

The so-called "real profit" is represented by accounting profit as adjusted for tax purposes, while the "presumed" or "imputed" profits are calculated by applying a percentage over the company's turnover to determine the "profit" figure, upon which Income Tax is calculated at the rates indicated above. The imputed profit basis is used when a company fails to produce proper accounting or to make annual tax returns and is calculated based upon the application of certain percentages fixed by law as to the company's turnover.

3.3.2. The Real Profit Basis

Article 246 of Decree n. 3.000/99 determines that the following legal entities are required to compute their tax assessment based on real profits:

a) those with gross revenue, including capital gains, exceeding R$ 48 million in the calendar year, calculated pro-rata when appropriate;

b) financial institutions or their equivalent;

c) those with profits, income or gains from abroad;

d) those who enjoy tax exemptions and reduction;

e) those which during the fiscal year made monthly payments on the basis of estimated profits;

f) those who render continuous and cumulative consultation services relating to credit, marketing, credit management, risk selection, management of accounts payable and receivable, and acquisition of credit rights resulting in either credit sales or the rendering of services (factoring).

Under the "real profit" regime, a company may opt for its final tax liability to be determined either on an annual basis or on a quarterly basis. On the quarterly basis, a company is required to produce quarterly accounts and calculate and pay income tax based on the adjusted profit or loss arising within such quarter. A significant disadvantage of this regime is that it is not possible to compensate profits arising in one quarter with losses arising in a subsequent quarter, even within the same accounting year, given that each quarterly period is considered a separate and distinct period for tax purposes. Consequently, the majority of companies opt for taxation on the so-called "annual real profit" basis (*lucro real anual*).

On this annual basis, a company's final tax liability is determined according to its financial statements drawn up at the end of the fiscal year. Income tax, however, must be paid monthly and is calculated based on estimated profits

(determined as a fixed percentage of turnover) plus capital gains. The taxation rates are those set out in item 3.3.1 above with the additional surtax payable on monthly profits which exceed R$ 20,000.00. In such a scenario, when the yearly accounts are prepared any additional tax due must be paid by 31 March of the following year, with any surplus tax paid available for set-off in the following tax year.

The fixed percentages for the determination of the monthly taxable profits depend upon the company's activities. The prevailing regulations[7] determine the application of the following percentages to a company's turnover:

a) 8% on the sale of goods and merchandise;

b) 1.6% in relation to the sale, for consumption, of petroleum, derivatives and natural gas;

c) 16% on transport, except cargo services for which the rate is 8 %;

d) 32% for other services, except hospitals for which the rate is 8%;

e) 16% for services rendered by legal entities with gross revenue up to R$120,000.00 except for hospitals, transports, and regulated professions; and

f) 8% on development, construction and sale of real estate by real state companies.

Income and expenses are recognised on an accrual basis, and the general rule for the deduction of expenses is that they should be "necessary to the activity of the company and the maintenance of the respective income producing source." Necessary expenses are considered to be those "paid or incurred and which may be considered normal or usual in the company's transactions, operations or activities." Certain expenses, such as medical assistance, are only considered deductible when the benefit is extended to all the company's employees and are not permitted if only extended to, for example, the company's directors.

7. Article 15 of Law n. 9.249/95.

According to Brazilian legislation, the losses originating in an accounting period may be carried forward for relief against future profits, without time limit, but relief is limited to a maximum of 30% of the profit of each fiscal year. No carry back of losses is allowed under Brazilian legislation.

3.3.3. The Presumed Profit Basis

Companies which are not obliged to adopt the real profit basis may opt for taxation on the presumed profit basis.

On such basis, tax will be calculated and paid on a quarterly basis ending 31 March, 30 June, 30 September and 31 December. The basis for calculation of the presumed profit is the application of the percentages referred above to the quarterly turnover of the company.

3.3.4. Annual Tax Return

Whatever the basis adopted for the determination of taxable profits, every company is legally obliged to prepare and deliver a tax return covering its results for the period ending 31 December. The return (DIPJ) shall be delivered in the subsequent year by the last working day of June.

3.3.5. Social Contribution on Net Profits

In addition to the liability for income tax as referred above, the operating profit of a company is also liable to a social contribution (*Contribuição Social sobre o Lucro Líquido – CSLL*) on its income and capital gains. This social contribution is not deductible in calculating either corporate income tax or the contribution itself and, generally, the tax basis for the contribution is the same as that for corporate income tax.

Since 1st January 2003 the CSLL has been levied at the rate of 9%.

In relation to companies which opt for taxation on the basis of the "annual real profit" or "presumed profit", the social contribution is payable monthly or quarterly as appropriate, and the basis for the calculation is generally 12% of the operating profit plus any capital gains realized in the base period, except for service providers in which case the basis for calculation is 32%.

3.3.6. Income from Abroad

Prior to the introduction of Law n. 9.249 of 26 December 1995, Brazilian companies were taxed on the principle of territoriality. Under this principle, Brazilian tax law was only considered applicable to activities carried out in Brazil. Hence, Brazilian companies were only liable to taxation in Brazil on their profits earned in Brazil, and profits earned abroad were therefore exempt.

Pursuant to Law n. 9.249/95 the concept was changed from territoriality to universality ("world-wide income"), thus subjecting profits and income earned abroad to taxation in Brazil as well.

Under Law n. 9.249/95, the following kinds of income are liable to taxation in Brazil:

a) foreign-source operating income;

b) foreign-source non-operating income, including interests, royalties and dividends; and

c) income earned indirectly abroad through branches, subsidiaries and affiliates.

3.3.7. Taxation of Subsidiary and Affiliates

With respect to the taxation of foreign subsidiaries' and affiliates' earnings, Article 25 of Law n. 9.249/95 states:

"Article 25 – The profits, income and capital gains earned abroad will be included in the determination of real profits in relation to the accounts prepared on 31 December each year…

Paragraph 2 – The profits earned abroad by branches or subsidiaries of legal entities domiciled in Brazil will be included in the determination of real profits in accordance with the following:

I.– the branches and subsidiaries will determine their profits for each fiscal year in accordance with the norms of Brazilian legislation.

II.– the profits referred to in item I above will be included in the net profit of the parent company in the proportion of its shareholding for the determination of real profits.

Paragraph 3 – the profits arising abroad from affiliates of legal entities domiciled in Brazil will be included in the determination of real profits in accordance with the following:

I.– the profits earned by the affiliate will be included in the net profits in the proportion of the shareholding held…."

In view of the controversy and legal argument that arose from such legislation was subsequently amended by determining that the profits arising abroad will only be included in the determination of the real profit (*lucro real*) for the calendar year in which such profits are "made available" (*disponibilizados*) to the Brazilian company. The profits of a subsidiary are considered "available" to the parent on the date of payment or credit. Furthermore, a rule was introduced providing that interest paid to an overseas subsidiary in respect of loans contracted with the same will not be deductible for tax purposes by the Brazilian company whilst the accounts of the subsidiary contain profits not "available" to the Brazilian company. Additionally, an increase in capital of the subsidiary through a capitalisation of reserves is also considered a "payment" for the purposes of such legislation.

Later on the rules were further tightened providing that in the event that a subsidiary, which has accumulated undistributed profits, makes a loan to its parent, then such loan will be considered as a distribution of profits for the purposes of taxation.

Finally, in 2001, the Brazilian tax authorities endeavoured to close any loopholes in the prevailing legislation through the issue of a Provisional Measure which remains in force and states that for the purposes of calculating income tax and social contributions on profits (CSLL) the profits of overseas subsidiaries and associated companies will be considered "available" to the Brazilian company on the date of the financial statements in which such profits arise.

It is important to emphasize that the taxation of the overseas profit is under analysis by the Federal Supreme Court (STF) which, as of September 2007, has not reached a definitive decision in relation to its constitutionality.

The aforementioned provisions however should not apply in relation to the profits arising in a country with which Brazil has signed a double taxation treaty. In such scenario said profits will generally only be taxable in Brazil if and when remitted to Brazil.

3.3.8. Withholding Tax on Remittances Abroad

In addition to taxation on income and profits, certain remittances of funds from Brazil are subject to deduction of tax at source (*Imposto de Renda Retido na Fonte* – Withholding Income Tax and Contribution for Intervention in the Economic Domain – CIDE).

In principle, unless specifically exempt under prevailing legislation, all payments from sources located in Brazil to legal entities or individuals abroad are subject to withholding tax in Brazil. Until late 1998, the applicable rate of withholding tax, depending on the nature of the payment, was either 0 or 15%. However, as a consequence of the then prevailing economic crisis affecting Brazil at that time, the Brazilian Government introduced legislation increasing the rate of withholding tax, for certain remittances, to 25%.

Pursuant to the prevailing legislation[8], no tax is deductible at source on the remittance of profits and dividends by a Brazilian company to shareholders domiciled abroad or on the remittance of profits by Brazilian branches or representative offices of foreign companies. No withholding tax is applicable on the return of foreign capital up to the amount of the foreign investment registered before the Central Bank of Brazil. Capital gains, however, from investments in Brazil are subject to tax at source at 15%.

Pursuant to the current Income Tax Code[9] all amounts paid, credited, or remitted, from a source situated in Brazil, to individuals or legal entities resident abroad, are subject to tax at source at the rate of 25% when the payment relates to the provision of labour, with or without an employment relationship, and from the rendering of services.

Additionally such provisions[10] further provides that, save for certain specific exemptions, the income arising from any operation, in which the beneficiary is resident in a favourable tax jurisdiction will be subject to tax at source at the rate of 25%.

8. Article 10 of Law n. 9.249/95.
9. Article 685 of Decree n. 3.000/99.
10. Article 685.

The notion of a "favourable" tax jurisdiction arose in Brazilian transfer pricing legislation and is defined as a jurisdiction which taxes income at a maximum rate lower than 20% and/or imposes secrecy on the disclosure of shareholders ("tax havens"). In this regard the Brazilian authorities have listed on 4 June 2010 the following jurisdictions: Andorra, Anguilla, Antigua and Barbados, Aruba, Ascension Island, Bahamas, Bahrain, Barbados, Belize, Bermuda, Brunei, British Virgin Islands, Campione D'Italia, Cayman Islands, Channel Islands (Alderney, Guernsey, Jersey and Sark), Cyprus, Singapore, Cook Islands, Costa Rica, Djibouti, Dominica, Dutch Antilles, Gibraltar, Granada, Hong Kong, Kiribati, Labuan, Lebanon, Liberia, Liechtenstein, Luxembourg (in relation to 1929 Holding Companies), Macau, Madeira Islands, Maldives Islands, Malta, Isle of Man, Marshall Islands, Mauritius, Monaco, Montserrat Islands, Nauru, Niue Islands, Sultanate of Oman, Panama, Pitcairn Island, Polynesia, Queshm Island, San Marino, St. Cristovao and Nevis Federation, St Helena Islands, Saint Kitts and Nevis, St. Lucia, St Peter and Miguelão, St. Vincent and Grenadines, Seychelles, Solomon Islands, Swaziland, Switzerland, Tonga, Tristan da Cunha, Turks and Caicos Islands, Western Samoa, United Arab Emirates, United States Samoa, Vanuatu, and US Virgin Islands.

The list referred to above also includes countries with corporate secrecy legislation. It is also important to emphasize that the Federal Tax Bureau has also issued on 4 June 2010 its first list of so-called "privileged" tax regimes. Transactions with such "regimes" will also be subject to Brazilian transfer pricing rules.

The referred regimes are Uruguay (as regards the SAFI); Luxembourg (holding company); Denmark (holding company); Netherlands (holding company); Iceland (ITC); Hungary (KFT); USA (non-resident LLC); Spain (EVTE); and Malta (ITC and IHC).

Since 1st January 2002, the Contribution for Intervention in the Economic Domain (CIDE) is also due on the amounts paid, credited, delivered, used or remitted, on a monthly basis, to non-resident beneficiaries, for royalties and remuneration in the following types of contracts:

a) licensing and assignment of patents;

b) technical support (in relation to technical assistance and specialized technical services);

c) assignment and licensing of trademarks;

d) software supply (only when occurs the transfer of its technology);

e) technology supply; and

f) contracts for the supply of technical services, administrative assistance and other similar services.

This contribution is levied at rate of 10% over the amounts paid, delivered, credited, used or remitted per month as payments under the types of agreements mentioned above to beneficiaries who are resident abroad.

Due to its specific tax application, the provisions of treaties to avoid double taxation to which Brazil is a signatory cannot be used to permit any reduction or exemption in relation to this base.

In view of the above, the principal withholding tax rates applicable in Brazil, in the absence of a lower rate available under a prevailing treaty (only in relation to Income Tax), are as follows:

(i)	Dividends	Exempt
(ii)	Interest	15%;
(iii)	Royalties	25% (15% Income Tax plus 10% CIDE);
(iv)	Technical Assistance	25% (15% Income Tax plus 10% CIDE);
(v)	Tax Havens and	35% (25% Income Tax plus 10% CIDE);
(vi)	Other Services	25%.

Besides CIDE in relation to payments for royalties and technical assistance, the Brazilian Federal Government has enacted various other forms of CIDE, each with their own specific regulations and rates, as follows:

(i) CIDE to the Telecommunications Technological Development Fund (FUNTEL);

(ii) CIDE for the Universal Telecommunications Service Fund (FUST);

(iii) CIDE levied on imports and marketing of oil products, natural gas, petrol, ethylic alcohol fuel, ethylic alcohol (CIDE-*Combustíveis*); and

(iv) CIDE for the Development of the Cinematographic Industry (CONDECINE).

3.3.9. Social Contribution on Invoicing – COFINS

Complementary Law n. 70 of 30 December 1991 instituted the Social Contribution on Invoicing (COFINS) to help finance the social security program. Pursuant to the current regulations[11], this tax is levied on a non-cumulative basis at a general rate of 7.6% on the gross revenue from sales of merchandise and the rendering of services.

For those companies that ascertain their profits using the "presumed profit basis", and for some kinds of revenue arising from some specific business activities, this tax is levied on a cumulative basis at a general rate of 3% on the gross revenue from sales of merchandise and the rendering of services.

Since 2004 COFINS is also levied on imports of products, equipment and services from abroad at general rate of 7.6%. In relation to services, COFINS is levied on those rendered by a foreign-base legal entity or individual even if those services are rendered directly in Brazil and for services whose results can be "verified" in the country.

In both systems (cumulative and non-cumulative) gross revenues arising from exportation of goods, equipment and services shall not be taxed by COFINS as long as such exportations result in the receipt of monies from abroad.

11. Article 2 of Law n. 10.833 of 29 December 2003

3.3.10. Contribution to the Social Integration Program – PIS

The contribution to the Social Integration Program (PIS) was instituted in 1970. All private commercial undertakings that are classified as such by the income tax regulations are liable for this tax. This contribution is generally charged on a non-cumulative at rate of 1.65% on the gross revenue from sales of merchandise and the rendering of services.

For those companies that ascertain their profits using the "presumed profit basis", and for some kinds of revenue arising from some specific business activities, this tax is levied on a cumulative basis at a general rate of 0.65% on the gross revenue from sales of merchandise and the rendering of services.

Since 2004 PIS has also been levied on imports of products, equipment and services from abroad at general rate of 1.65%. In relation to services, PIS is levied on those rendered by a foreign-base legal entity or individual even if those services are rendered directly in Brazil and for services whose results can be "verified" in the country.

Likewise COFINS, in both systems (cumulative and non-cumulative) gross revenues arising from exportation of goods, equipment and services shall not be taxed by PIS as long as such exportations result in the receipt of monies from abroad.

3.3.11. Tax on Industrial Products – IPI

Tax on industrial products (IPI) is a federal tax charged on industrialized products at selective rates varying according to the class of products in accordance with the classification set out by IPI regulations[12].

According to specific regulations[13], products for export can leave the industrial establishment with suspension of the IPI when:

a) acquired by an export trading company, with specific purpose of export; and

b) remitted to customs deposit areas or other places where the customs brokerage takes place.

12. Law n. 4.502/64 and Decree-Law n. 34/66
13. Law n. 9.532/97.

An industrialised product is considered as being a product resulting from an operation that modifies the nature, function, finish or appearance of a product. The rate varies and depends on the classification of the goods as specified by the law.

The IPI tax on the wholesale purchase price of goods is registered as a credit in the books of the purchaser and, on the sale of the finished product, the amount of tax shown in the invoice is registered as a debt. The balance which results each month is the tax to be paid to the federal authority.

IPI is also levied on the importation of goods and equipment.

3.3.12. Tax over Operations on the Circulation of Merchandise and Services – ICMS

The tax over operations on the circulation of merchandise and services (ICMS) is a state tax charged on all products. In the State of São Paulo, the rate is generally 18% of the value of the merchandise or services. When materials/goods are purchased, the ICMS tax is already included in the price. In operations between the South of Brazil and the Southeast, the rate is 12%, and between the North, Northeast, Middle-West regions and the state of *Espírito Santo* the rate is 7% (Article 52 of State Decree n. 45.490/00). ICMS and IPI calculations are identical.

ICMS is also levied on the importation of goods and equipment.

3.3.13. Import Tax – The Common External Tariff – CET

Mercosur introduced the Common External Tariff – CET, created by the Protocol of Buenos Aires and in confirmed Brazil by Decree n. 1.343 of 23 December 1994 as amended.

The CET tariff applicable to trade between any signatory of Mercosur with third-party countries and varies between 0 and 35% depending upon the product.

The Brazilian Government's most recent modifications to the CET and its exception list were established by the Chamber of Foreign Trade (CAMEX)[14], wherein certain products are labelled as "sensitive" and thus are not designated

14. Resolution n. 42, of 26 December 2001.

to compete with similar products of other countries. Each calendar year the number of products on this list is reduced.

For imports from other countries, the rates vary based on the fiscal classification of the product[15].

3.3.14. Service Tax – ISS

ISS is a tax charged by the municipal authorities on the rendering of services. In the city of São Paulo, according to the prevailing regulations[16], the tax is generally charged at rate of 5% on the services value. For some activities there are lower rates (2% and 2.5%) and there are special tax regimes for specific services such as legal, accounting, medical etc.

Since January 2004, ISS has also been levied on the purchase of foreign services. Based on that, the Brazilian beneficiary is liable for the payment of this tax. In addition, ISS is also levied on exportation of services when the results occur in Brazil (despite the fact that payment is made by a foreign resident).

3.3.15. Taxes over Real Estate Transfer, Inheritances and Donations

The tax is charged in three situations: on an "*inter-vivos*" transfer of a real estate property, inheritances and donations.

In the first case, the tax is named ITBI and it is regulated by municipal law. The rate in São Paulo varies from 0.5% to 2% in the event that the real estate is financed by the Housing Finance System (SFH); in other cases, the rate is 2%.

In the other two cases, the tax is named ITCMD and the legislative competence is that of the States pursuant to Article 155, paragraph I of the Federal Constitution. This tax is levied on transfer of bank deposits, financial investments, shares (and the like) and real estate. For the year 2007, inheritances up to R$ 71.150,00 and donations up to R$ 35.575,00 are exempt. However, due to specific regulations in relation to its exemptions and taxable basis, it is very important to analyze the assets to be transferred individually. On the above mentioned values, this tax is levied at rate of 4%.

15. Decree-Law n. 37/66.
16. Municipal Law n. 13.701/03, of 24 December 2003.

3.3.16. Tax on Urban Property

The Tax on Urban Property (IPTU) is a municipal tax which charges the ownership, control or possession of urban land or buildings, based on the market value of such real estate and it is levied on an annual basis.

Due to the fact that it is a municipal tax, IPTU's applicable rates vary according to each city legislation and the type of real estate involved.

3.3.17. Tax on Financial, Exchange and Insurance Operations (IOF)

IOF is the tax levied on operations of Credit, Exchange, Insurance and the ones related to securities.

IOF's rates vary according to the transaction to be carried out by the taxpayers. Set out below are IOF rates in relation to certain exchange transactions:

a) Amounts related to the import of services – 0.38 per cent

b) Amounts related to the import of goods, products and equipment – zero per cent (exempt);

c) Amounts related to the export of services, goods, products and equipment – zero per cent;

d) Amounts related to cross-border loans to companies domiciled in Brazil (with the maximum term of payment in 90 days) – 5.38 per cent;

e) Amounts related to cross-border loans to companies domiciled in Brazil (with the term of payment higher than 90 days) – 0.38 per cent;

f) Amounts related to the remittance of dividends abroad – 0.38 per cent.

The tax basis for calculation of the IOF due is the amount of the national currency received or delivered to the interested party domiciled in Brazil, which

means that the Brazilian company or individual shall be liable for the payment of this tax. In relation to exchange operations, the financial institution in charge of performing this transaction shall withhold the respective amounts of IOF.

3.4. Double Taxation Treaties Entered into by Brazil

Brazil has signed double taxation treaties with Argentina, Austria, Belgium, Canada, Chile, China, the Czech and Slovak Republics, Denmark, Ecuador, Finland, France, Hungary, India, Israel, Italy, Japan, Luxembourg, Mexico, Netherlands, Norway, Peru, Philippines, Portugal, South Africa, South Korea, Spain, Sweden and Ukraine.

In April 2005, the German Government terminated the double taxation treaty signed with Brazil, with effect from 1 January 2006.

3.5. Transfer Pricing

Transfer Pricing regulations are adopted worldwide to avoid the transfer of profits that should be taxable in the jurisdiction where a permanent establishment is located to a "friendlier" tax environment.

In Brazil Transfer Pricing regulations were introduced by Law n. 9.430/06 and apply to the import and export of goods and services carried out between "related parties" and between unrelated parties when the overseas party is established in a so-called "tax haven" jurisdiction[17].

The definition of "related parties" for the purposes of this legislation is provided by Article 23 of Law n. 9.430/96 and includes subsidiaries, associated companies, companies under common control and also situations where the foreign company has an exclusive agency or distribution agreement with the Brazilian company and vice-versa.

The legislation specifies the conditions under which a Transfer Pricing adjustment must be made and the methods to calculate the same. The result of such calculation shall be added to the Brazilian entity's taxable profits for the period in question. The taxes to be levied on such adjustments are Income Tax (IRPJ) and the Social Contribution Levied on Net Profits (CSLL) at top rates of 25% and 9%, respectively.

17. These jurisdictions are listed in item 3.3.8 above.

The regulations[18] provide that a Transfer Pricing adjustment shall apply when the costs, expenses and duties of the Brazilian company's imports of goods and services from a "related party", during the period in question, is higher than the guide price determined by the use of one of the Transfer Pricing methods.

In the event that more than one of the methods are used, the lowest value shall be used for any Transfer Pricing adjustment.

The Law provides three methods to ascertain a guide price to be set in relation to imports performed by Brazilian companies:

a) Comparable Uncontrolled Price Method which is defined as the average price of identical or similar goods, services or rights obtained either in Brazil or abroad in buy/sell transactions using similar payment terms. For this purpose, only buy/sell transactions conducted by non-related parties may be used;

b) Resale Price Method which is defined as the average resale price of the resale of imported goods, services or rights less unconditional discounts, taxes on sales, commissions and a profit margin of: (i) 60% calculated based on the resale price and the value added in the country in case of imported goods used in production; or (ii) 20% calculated based on the resale price for all other cases. For this purpose, only prices charged by the company to non related buyers may be used (please see further comments below); and

c) Cost Plus Profit Method which is defined as the average production cost of identical or similar exported goods or services in the country where the goods were produced, plus the taxes paid in the exporting country and a profit margin of 20% over the total cost plus taxes.

The importer can opt for any one of these three methods in order to ascertain the guide price. In the case of more than one method being used, only the highest value ascertained shall be taken into account and used throughout the assessment[19].

18. Article 18 of Law n. 9.430/96.
19. As stated by Article 18, paragraph 4 of Law n. 9.430/96 and article 4 of Normative Instruction SRF n. 243/02.

The guide price ascertained shall be compared to the price used in the import documents. When the guide price is lower than the import price between related parties, the difference shall represent a Transfer Pricing adjustment taxable.

It is important to emphasize that on 29 December 2009 the Brazilian Executive Branch has enacted Provisional Measure n. 478 which among other provisions has revoked the Resale Price Method and inserted a new calculation method which is the Resale Price Less Profit Method.

Resale Price Less Profit Method is defined as the average sale price in Brazil of the imported goods, services or rights to be calculated using the following methodology:

a) Net sale price: the average sale price of goods, services or rights less unconditional discounts, taxes on sales and commissions;

b) Percentage of the imported goods, services or rights in the total cost of the goods, services or rights sold: the percentage resulting from the comparison of the average cost of the imported goods, services or rights and the average total cost of the goods, services or rights sold, to be calculated in accordance with the company's costs' sheet;

c) Participation of imported goods, services or rights in the sale price of these goods, services and rights: to be ascertained by applying the percentage of total cost provide in item 'b' over the net sale price provided in item 'a' above;

d) Profit margin: 35% (thirty five per cent) over the participation obtained through the methodology provided in item 'c' above;

e) Parameter Price: the difference between the participation obtained through the methodology provided in item 'c' above and the profit margin calculated through the methodology provided in item 'd'.

Since the Resale Price Less Profit Method was introduced by a Provisional Measure it is subject to the approval of the Brazilian National Congress which is still pending.

In relation to exports, Brazilian taxpayers are subject to adjustments whenever the average sales price in these operations is lower than 90% of the average sales price in the domestic market in the same period and under the same payment terms ("Safe Harbour").

In case this average price performed between related parties is lower than 90% of the price practiced with non-related parties, the income arising from the exports shall be adjusted. For such adjustments, the Brazilian legislation provides four different methods as follows:

a) Export Sales Price Method which is defined as the average of the export sales price charged by the company to other customers or other national exporter of identical or similar property, services or rights during the same tax year using similar payment terms;

b) Wholesale Price in Country of Destination Less Profit Method which is defined as the average wholesale price of identical or similar property, services or rights in the country of destination under similar payment terms reduced by the taxes included in the price imposed by that country and a profit margin of 15% of the wholesale price.

c) Retail Price in Country of Destination Less Profit Method which is defined as the average retail price of identical or similar property, services or rights in the country of destination under similar payment terms reduced by the taxes included in the price imposed by that country and a profit margin of 30% of the retail price.

d) Acquisition or Production Cost Plus Taxes and Profit Method which is defined as the average cost of acquisition or production of exported property, services, increased for taxes and duties imposed by Brazil plus a profit margin of 15%, calculated based on the sum of the cost, taxes and duties.

Since the enactment of Transfer Pricing regulations, the Brazilian taxpayers and the Federal Tax Bureau have been challenging each other before the Federal Administrative Court (*Conselho de Contribuintes*) which has held several important decisions in favour of the taxpayers to compel the

Government not to claim amounts without legal grounds, provided, however, that such decisions continue to be challenged by the Federal Tax Bureau in all possible ways.

Nevertheless, up to the present moment, these regulations have not been analyzed either by the Superior Court of Justice or the Federal Supreme Court (respective highest level courts of Brazil's Judicial System), which means that there remain several issues to be settled in order to allow a more balanced application of such regulations in light of the Arm's Length Principle recognized worldwide.

3.6. This Capitalization Rules

On 16 December 2009 the Executive Branch enacted Provisional Measure n. 472 which, among other relevant provisions, has introduced in Brazil the so-called "Thin Capitalization Rules". Such rules aim to limit the tax deductibility of interest and other amounts remitted abroad for the ascertainment of Corporate Income Tax (IRPJ) and the Social Contribution Levied on Net Profits (CSLL).

This limitation applies to the deductibility of interest paid or credited by Brazilian sources to:

(i) related individuals or legal entities (as defined as 'related parties' in the prevailing legislation), which are not domiciled in a country or its dependency that is considered as a favourable tax jurisdiction or which operates under a favourable tax regime; and,

(ii) to individuals or legal entities that are domiciled in a favourable tax jurisdiction or which operates under a favourable tax regime, regardless of being considered as a 'related party'.

Considering that the Thin Capitalization Rules aim to restrict the general practice characterized as a disproportional supply of capital into legal entities through loans and other debt transactions, rather than actual equity contributions, the Brazilian Federal Bureau has established determined criteria in relation to the quantitative ratio to be considered:

(i) between the debt and the equity share of the foreign legal entity into the net worth of the Brazilian legal entity, in case of payments to a 'related party'; and,

(ii) between the debt and the actual value of the Brazilian company's net worth, in event the foreign beneficiary is located in a favourable tax jurisdiction. Furthermore, it is important to emphasize that the interest paid or credited must also be considered as a necessary expense in order to be deductible for IRPJ and CSLL purposes, according to the prevailing legislation.

Further to the provisions aforesaid, the Provisional Measure has also introduced new specific rules in relation to the deductibility of any amounts paid, credited, delivered or remitted, directly or indirectly, to either individuals or legal entities located in a favourable tax jurisdiction, regardless of whether the beneficiary is considered a 'related party' of the Brazilian source.

In order to become a deductible amount for IRPJ and CSLL purposes, some requirements must be met as follows:

a) identification of the effective beneficiary of such amounts remitted abroad;

b) evidence of the operational capacity of the individual or legal entity domiciled abroad to perform the related transaction; and,

c) evidence of both the actual payment of the price and the receipt of assets, rights or the use of services.

Considering that such rules were introduced by a Provisional Measure they are effective since its publication on the Official Gazette but they must be duly approved by the Brazilian National Congress later on.

However, it is important to emphasize that considering that such rules interfere directly with the ascertainment of IRPJ and CSLL due by the legal enti-

ties domiciled in Brazil[20], they may result in the increase of the tax burden whichmeans that the taxpayers shall be able to challenge these provisions, grounded on the Anteriority Principle, in order to avoid their application prior to 16 March 2010 (in relation to CSLL) and prior to 1 January 2010 (in relation to IRPJ).

20. Please see item 3.3.1.

4. INTELLECTUAL PROPERTY

In the past few decades, industrial property, a sub-classification of the more comprehensive term "intellectual property", has been the focus of attention of Brazilian scholars and lawmakers. Laws have been drafted and enacted aiming at the protection of this type of property right in the fields of industry and commerce, as well as in subjects relating to preventing unfair competition.

The first step for the foreign investor wishing to undertake business in Brazil is to obtain appropriate protection for the industrial property rights of its products or services. The investor also should become acquainted with the legal ramifications of entering into agreements and contracts that may affect the company's industrial property rights.

In Brazil, the INPI (National Institute of Industrial Property) is the agency to which all requests concerning the protection of rights relating to industrial property should be addressed, as well as requests for the registration of technology transfer contracts. This kind of contract, once in effect, also produces taxation effects.

According to the Brazilian laws in force, technology transfer contracts are classified for the:

(a) use of patents;

(b) use of trademarks and geographic indicators;

(c) technology supply; and

(d) technical and scientific assistance services.

Besides these, computer programs can also by registered at the INPI, even if the protection of the rights relating to these programs do not depend on registration. The intention is to grant more safety to copyright relating to computer programs.

The Brazilian legislation also protects copyright, another sub-classification of intellectual property. However, the protection of artistic, literary and sci-

entific workmanships does not depend on registration, unlike with other industrial property[21].

4.1. Patents

A patent is a privilege granted for the protection of inventions and utility models. The protection granted by a patent extends to 20 years for inventions, and 15 years for utility models, from the date the request for protection is filed at the INPI.

The protection granted by a patent cannot be extended for a period of less than 10 years for inventions and 7 years for utility models from the date the protection is granted by INPI, except in the event INPI is prevented from the examination of the request by court order or by *force majeure*.

In Brazil there is no law specifying categories of inventions. On the other hand, those which are not subject to patent protection are described in detail as, for example, scientific inventions, games, rules, software and inventions designed to infringe laws or which are against the moral, health and public safety interests of the society.

4.2. Trademarks

Trademarks include every sign which, when connected with products, goods or services, identifies and separates them from others of an identical or similar class. Brazilian law establishes four categories of trademarks eligible for protection: products, services, certifications and collective trademarks. Law n. 9.279, from 14 May 1996, puts geographic indicators into a special classification.

The registration of a trademark before the INPI creates the exclusive right to use the trademark in connection with the class in which it has been registered. Trademark use signifies the exclusive right to use the mark, especially in documents and papers, to distinguish products, services and activities which are offered. This right is exercised basically for the economic exploitation of the sign and/or registered name.

21. Article 18 of Law 9.610/98.

Brazilian law establishes several categories in which one may apply for the registration of trademarks for services, products, certifications, and collective and geographic indicators with the INPI. Such categories are: the name (*nominative*); the design (*figurativa*); and the word and design (*mista* and *tri-dimensional*).

INPI adopts a classification of products and services based on the Nice Convention on International Classification: Trademarks are registered according to the products or services classes to which they are related.

On 10, August 2006, INPI enacted a new Normative Act[22] which established the e-INPI, an Electronic System for Management of Industrial Property. Through this system the INPI users can require services and practice acts by electronic forms, using the internet. Today a module of this system already exists, which is intended for trademarks, called e-MARCAS.

4.3. Microchip Designs

Recent Law n. 11.484/07 established protection of intellectual property for the design of microchips. With this law, Brazil started to consider microchips and their designs as elements of intellectual property.

The microchip is a microelectronic device that is able to develop many functions. Their components are formed by pieces of semiconductor material.

The designs of these microchips are the representational figures of the position of those elements and connections in an unit.

The protection granted by Law is for the design of the microchips, that is to say, for the description of the single physical structure.

Such protection can be given to an original design as a result of the intellectual effort from its creator, and for the results that are not common to technicians, experts or manufacturers of microchips. This protection is granted for 10 years, from the date the request for protection is filed at the INPI or from the date of the first exploitation, whichever takes place first.

4.4. Technology Supply and Technical and Scientific Assistance Services

The laws in force have created two categories – (a) Technology Supply and (b) Technical and Scientific Assistance Services – to cover all transfers of

22. Normative Act n. 126/06.

know-how and technical and scientific services directed towards the production of consumer goods and the manufacture of industrial equipment.

The INPI controls industrial property and technology transfer. The guidelines adopted by the INPI for its inspection of technology supply and technical assistance contracts are described in Normative Act n. 135/97 and in Law n. 9.279/96. These laws determine that the validity of these contracts against third parties is dependent upon registration with INPI. The parties can freely negotiate the contract terms provided that Brazilian national sovereignty, public order and morality are observed. However, the registration of these contracts is dependent upon meeting several INPI requirements, which are: (a) the observance of applicable limits – as to the prevailing tax and exchange control regulations regarding deductibility for income tax purposes and the remittance in foreign currency of the contractual payments; (b) the specification of the costs and the detailed specification of the remuneration of the technicians per hour; (c) the term for the performance of the services or the evidence that the service has already been performed; and (d) specification of the total cost of the services, even if estimated.

Law n. 8.383/91 permits the remittance and tax deduction of royalties paid by a Brazilian subsidiary to its controlling company abroad if the contract is registered with the INPI and the Brazilian Central Bank. Besides that, Law n. 11.452/07 establish that CIDE (Contribution of Intervention on Economical Domain), created by Law n. 10.168/00, is not levied on contracts of technology transfer and use license of software, performed between a legal entity and a foreign company.

4.5. Copyright

The expression of human ideas, through artistic, literary and scientific workmanship, is also protected by intellectual property. Such rights are regulated by Law n. 9.610/98, which sets out that to use or explore any workmanship, the author's authorization is essential.

As referred to previously, according to Brazilian legislation, copyright protection does not depend on prior registration.

4.6. Software

According to the Brazilian legislation[23], software is protected by copyright. Also, the software protection does not depend on any prior registration.

In this way, the software registration is part of the software's title as it is evidence of originality and identity of the software.

By that, the software registration assures the author of his exclusive rights of production, use and commercialization of his creation.

The responsibility for the software registration, in Brazil, is given to INPI.

The validity of the rights are for 50 (fifty) years, counting from January 1st of the subsequent year to the "Date of Creation" – which is the time that the software became capable of performing the function for which it was projected.

23. Law n. 9.609/98

5. INTERNATIONAL TREATIES

5.1. Preamble

International treaties are all formal agreements made by legal entities of public international law with the purpose of being legally enforceable.

To be part of the Brazilian legal system, all international treaties must go through a specific proceeding, as provided by the Brazilian Constitution of 1988. Firstly, international treaties have to be signed by the legal representative of the country[24].

Following their signature the treaties must be approved by the Brazilian National Congress[25]. Once treaties are approved by the National Congress they are formally considered as part of the Brazilian legal system.

Generally, when treaties are incorporated into the Brazilian legal system, they have the status of ordinary law. Notwithstanding, Constitutional Amendment n. 45 of 2004 established that international agreements related to Human Rights should have constitutional status, as long as they are approved in each house of the National Congress in two rounds by 3/5 (three fifths) of the members' votes.

Brazil is a signatory of many major international treaties, including most relevant treaties of the United Nations system, Bretton Woods system and the General Agreement on Tariffs and Trade (GATT), as well as the World Trade Organization treaties. Brazil also plays an important role in the Latin America's regional integration process. It is also a member of ALADI and Mercosur and additionally has signed several bilateral agreements with various Latin American countries.

5.2. United Nations

In 1945, representatives of 50 countries met in San Francisco at the United Nations Conference on International Organization to draw up the United Nations Charter. Those delegates deliberated on the basis of proposals

24. Article 84 of Brazilian Federal Constitution.
25. Article 49, I of Brazilian Federal Constitution

worked out by the representatives of China, the Soviet Union, the United Kingdom and the United States at Dumbarton Oaks, United States, in August-October 1944. The Charter was signed on 26 June 1945 by the representatives of the 50 countries, including Brazil.

Brazil has signed and incorporated to its legal system most of the agreements signed within the United Nations, such as the UN Letter itself, the Universal Declaration of Human Rights of 1948 and ratified by Brazil in 10 December 1948, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both signed in 1966, in force since 1976 and ratified by Brazil in 24 January 1992.

On 15 October 2009, the General Assembly of the United Nations elected Brazil, together with Bosnia and Herzegovina, Gabon, Lebanon and Nigeria to serve as five non-permanent members of the Security Council for two-year terms, beginning on 1st January 2010.

5.3. Bretton Woods Agreements

In 1947, delegates from 44 nations gathered at the United Nations Monetary and Financial Conference in Bretton Woods, New Hampshire. They met to discuss the post-war recovery of Europe as well as a number of monetary issues, such as unstable exchange rates and protectionist trade policies.

The delegates at Bretton Woods reached an agreement known as the Bretton Woods Agreement to establish a post-war international monetary system of convertible currencies, fixed exchange rates and free trade. To facilitate these objectives, the agreement created two international institutions: the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (the World Bank).

Brazil participated in the original meetings and it is an original signatory of the agreements.

5.4. General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO)

Since 1947, the General Agreement on Tariffs and Trade (GATT) has been the world's primary multilateral treaty for trade, despite the fact that technically the treaty was only "provisional" in nature. GATT was established after

the Second World War following other new multilateral institutions dedicated to international economic co-operation, notably the "Bretton Woods" institutions now known as the World Bank and the International Monetary Fund.

GATT's objective was the liberalisation of world trade, with the consequent prosperity and development which could result there from. The treaty was originally signed by 23 countries, including Brazil, in 1947 and came into force in January 1948. Over the years, GATT was updated and had its scope broadened by way of amendments resulting from "round" negotiations. Today, there have been 9 GATT rounds, the Uruguay Round negotiations having taken place from 1986 until 1994. The Doha Round is in discussion and has not produced any results in the world trade scene.

By the end of 1994, GATT had been signed by 128 countries and has represented more than 4/5 of the world trade.

The end of the 8th year of the Uruguay Round of trade negotiations, in 1994, brought a profound change to the legal structure of the institutions for international trade. The rush of new members joining the GATT during the Uruguay Round demonstrated that the multilateral trading system was recognised as the foundation for world-wide development, economic and trade reform. The results of the Uruguay Round have created a new and more clearly defined international organisation – a World Trade Organisation (WTO) – to carry forward GATT's work.

The WTO was established on 01 January 1995. Governments had concluded the Uruguay Round negotiations on 15 December 1993 and Ministers had given their political backing to the results by signing the Final Act at a meeting in Marrakech, Morocco, in April 1994. The "Marrakech Declaration" of 15 April 1994 affirmed that the results of the Uruguay Round would "strengthen the world economy and lead to more trade, investment, employment and income growth throughout the world".

The WTO has the same structure as GATT, modified by the Uruguay Round, and comprises all the agreements and understandings concluded under its auspices, together with the complete results of the Uruguay Round. Thus, the WTO provided a common institutional structure for the conduct of commercial relations between the member-states in case of disputes on the object of the agreements and other legal instruments of the Agreement that established the WTO. As of 23 July 2008, 153 countries were WTO members.

5.4.1. Discussions at GATT 1994

(a) Discussions on the Interpretation of Article II: l (b), which charts the concessions made in the round;

(b) Discussions on the Interpretation of Article XVII, which increases the control over commercial public corporations;

(c) Discussions on balance-of-payments provisions specified in articles XII and XVIII:B, which stipulate that if the contracting parties impose restrictions, in view of problems in the balance of payments, they should act in a manner that least compromises trade;

(d) Discussions on the Interpretation of Article XXIV, which establishes rules concerning Customs Union and Free Trade Zones;

(e) Discussions on the Interpretation of Article XXXV, which discusses waivers to the obligations assumed in the Agreement;

(f) Understandings on the Interpretation of Article XXVIII, which considers the changes in the reciprocal concessions between the contracting parties; and

(g) Discussions on the Interpretation of Article XXX, which deals with the non-application of the agreement in relation to bilateral negotiations, which ought to be multilateral.

5.4.2. Marrakech Protocol – GATT 1994

The Marrakech Protocol charts the results of the concessions formulated by the contracting parties during the Uruguay Round for the purpose of Multilateralisation; in other words, the equal application of conditions for all member-countries.

The Protocol contains in its 6 appendices the arrangements made by the parties with the objective of tariff reduction, as well as the elimination of non-tariff barriers. The appendices are as follows:

Appendix I Section A: Agricultural Products/tariff concessions;
Appendix I Section B: Agricultural Products/tariff quotas;
Appendix II: Tariff Concessions for other products, based on the most favoured nation principle;
Appendix III: Preferential Tariffs;
Appendix IV: Concessions on non-tariff measures;
Appendix V: Agricultural Products/agreements to limit subsidies;
Section I: Domestic Support;
Section II: Subsidies for Exports/agreements for the reduction of values; and
Section III: Subsidies for Exports/agreements for the reduction of the area of jurisdiction.

5.4.3. Other Agreements

The WTO agreements cover goods, services and intellectual property. The agreements demonstrate that the principle of liberalisation and the permitted exceptions are in the core of the WTO.

The agreements include individual countries' commitments to lower customs tariffs and other trade barriers, as well as to open and keep open services markets. They set procedures for settling disputes. They prescribe special treatment for developing countries. They require governments to make their trade policies transparent by notifying the WTO about laws in force and measures adopted, and through regular reports by the secretariat on countries' trade policies.

Examples of other agreements can be found below.

(a) Uruguay Round Protocol of the General Agreement on Tariffs and Trade of 1994;

(b) Agreement on Agriculture;

(c) Agreement on Sanitary and Phyto-Sanitary Measures;

(d) Agreement on Textile and Clothing;

(e) Agreement on Technical Barriers to Trade;

(f) Agreement on Trade-Related Investment Measures;

(g) Agreement on the Implementation of Article VI of GATT;

(h) Agreement on the Implementation of Article VII of GATT;

(i) Agreement on Pre-shipment Inspection;

(j) Agreement on Rules of Origin;

(k) Agreement on Import Licensing Procedures;

(l) Agreement on Subsidies and Countervailing Measures;

(m) Agreement on Safeguard;

(n) General Agreement on Trade in Services;

(o) Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods;

(p) Understandings on Rules and Proceedings Governing the Settlement of Disputes; and

(q) Trade Policy Review Mechanism.

5.4.4. WTO Secretariat Report on Trade Policies and Practices in Brazil

In March 2009, the WTO prepared and published a report on Brazil's trade policies and practices, which demonstrated the progress that the country has made as regards to trade policies. The report stated that since its last review in 2004, Brazil has continued with the gradual modernisation and streamlining of its trade regime.

The report also pointed out Brazil's favourable environment to grow, at an annual average rate of 4.5% during the period 2004-2007, and 6.3% on the 12 months to September 2008.

5.4.5. WTO Functions

The objective of the WTO is to facilitate the implementation, administration and operation of the founding Agreement, and any other legal instruments of which it is comprised, as well as to promote a forum for negotiation on multilateral trade among the member-states. The WTO also has the function of administrating Arrangements on the Rules and Proceedings Governing the Settlement of Disputes and on the Trade Policy Review Mechanism.

5.4.6. The WTO Structure

Every member of the WTO has accepted the terms and conditions of GATT 1947, as well as GATT 1994 without reservation, in their entirety. The highest body of the WTO is the Ministerial Conference, composed of representatives of all members, which meets at least once every 2 years and decides as authorised by the Agreement and other relevant legal instruments.

There is also a General Council, ranked immediately below the Ministerial Conference and composed of representatives of all members, which meets whenever necessary in between meetings of the Ministerial Conference. The General Council acts as the Body for Settlement of Disputes and the Trade Policy Review Mechanism. The General Council orients the activities of the Council for Trade in Goods; the Council for Trade in Services; and the Council for the Trade-Related Aspects of Intellectual Property Rights.

The WTO has a secretariat, directed by a director-general appointed by the Ministerial Conference, which also determines its powers, duties, conditions of service and terms of its mandate. In strict fulfilment of its duties, neither the director-general nor any other member of the secretariat shall be instructed by any government or authority apart from the WTO. According to the current organizational structure, all the committees and councils are directly subordinated to the director-general.

The WTO is a corporate entity and has legal capacity to develop its activities; its operatives have all privileges and immunities necessary to exercise its functions.

5.4.7. Decision-making Process

The WTO continues with the practice of taking decisions by consensus as established by GATT 1947. If it is impossible to reach a decision by consensus, the subject is submitted to a vote, each member having one vote. Generally the decisions of the Ministerial Conference and of the General Council are taken by a majority of votes. Such statement is altered if specific quorums are demanded.

In exceptional circumstances, the Ministerial Conference can excuse a member from the fulfilment of an obligation assumed under the Agreement and of the legal instruments signed concurrently. In such circumstances, the quorum will be 75% of the member-states. Similarly, interpretations of the Agreement are taken with a quorum of 75% of the member-states.

The Agreement can be amended, on the initiative of any member of the WTO, through the submission of a proposal to the Ministerial Conference for approval by consensus. If there is no such consensus, the amendment is approved by a 2/3 majority vote by the members, in which case the amendment only applies to the 2/3 of the members that voted in favour; or by 75% of the members in cases that apply to all the members. The member-state that does not conform must withdraw from the WTO, unless a special waiver is granted.

There are various other specific quorum provisions for the legal instruments which form part of the Agreement.

Finally, it is worth mentioning that there are certain other waivers which stem from GATT 1947 and are conferred according to the terms of Article XXV and form part of the Agreement. US imports on the terms of the Caribbean Basin initiative, as well as the agreements of the United Kingdom with countries of the British Commonwealth for preferential access, are examples of such dispensations.

5.5. ALADI

The Latin American Integration Association, known as ALADI for its acronym in Spanish and Portuguese, was created in 1980 by the Treaty of

Montevideo, replacing the ALALC regional association. The goal of ALADI is to gradually develop a Latin American Common Market through preferential tax and duty treatment and other mechanisms encouraging free trade.

ALADI member-countries are Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay, Venezuela and Cuba. The Association is organised into a Political Branch and a Technical Branch.

The core mechanisms established with a view to promote integration amongst the member-countries are:

(a) A Regional Tariff Preference, which applies to products originating from member-countries, as opposed to tariffs applicable to products originating in third countries;

(b) Regional Scope Agreements, common to all member countries, such as, opening lists of markets for the relatively less developed member-countries; agreements on scientific and technological cooperation; etc; and

(c) Limited Scope Agreements, involving two or more countries in the area. There are nearly 100 such agreements and of different natures: trade promotion, economic and industrial complementation, agricultural, and so on.

The Political Branch is composed of the Foreign Relations Minister Council, the Evaluation and Convergence Council, and the Representatives Committee.

The Foreign Relations Minister Council is the leading body of ALADI and forms the guiding polices of the Association's economic integration process.

The duties of the Evaluation and Convergence Council include examining and monitoring the operation of the different trade mechanisms provided by the treaty, as well as promoting activities that lead to greater integration.

The Representatives Committee is ALADI's permanent political body. It is responsible for the adoption of whatever measures are necessary to accomplish the goals of the Treaty of Montevideo and to create ALADI's governing rules.

The Technical Branch consists of the Secretary General, which is responsible for the evaluation and management of measures to best accomplish ALADI objectives.

Trade is governed by some basic guidelines, including a commitment by members to work toward uniformity in trade policies, to develop flexible policies of differing treatment based on the development level of member countries, and to allow for various ways of concluding commercial agreements.

Many ALADI member countries still suffer severe problems in commerce and financing. Among the main problems are the likelihood of continuing protectionism policies in the developed countries, economic instability and the slow recovery of international trade and the high cost of basic products. Flexibility in the ongoing ALADI negotiations is seen as a key element in overcoming obstacles and concluding successful short-term agreements.

The treaty provides various mechanisms to provide tariff and tax relief and stimulate trade, including several types of bilateral and multilateral agreements, such as:

(a) Regional Duty Preferences: ALADI provides for reciprocity among member countries concerning tariffs and duties. Duties on goods from non-member countries are applied according to the policies in force in those countries;

(b) Limited Scope Agreements: These involve trade arrangements in which only some countries may participate for the specific purpose of strengthening the regional integration process. The contracting parties are governed exclusively by the rights and liabilities established by these contracts;

(c) Regional Comprehension Agreements: Because development levels vary among member countries, all members grant special non-reciprocal tax and duty concessions to lesser-developed member countries; and

(d) Limited Scope Commercial Agreements: The industrial sectors of member countries may participate under the ALADI framework in

commercial agreements. These agreements usually contain exclusive advantages for the signatory countries, especially for the lesser-developed countries of Bolivia, Ecuador and Paraguay.

5.6. MERCOSUR

5.6.1. Purpose

In view of the formation of large trading associations such as the European Union and the North American Free Trade Association, the southern Latin American countries have been working since July 1986 on a means to stimulate trade between the region and the rest of the world, and to encourage foreign investment.

In July 1990, a timetable for the formation of a Common Market between Brazil and Argentina was established. After December 1990, Brazil and Argentina signed a treaty incorporating all previous agreements liberating trade between the 2 countries. This agreement already reflected the characteristics and objectives of what was to become Mercosur.

On 26 March 1991, Argentina, Brazil, Paraguay and Uruguay signed the Treaty of Asunción formalising the decision to integrate the economy of these countries into a Common Market of the South (MERCOSUR), effective as from 01 January 1995.

Mercosur's main purpose is to provide the co-ordination of macroeconomic and policies amongst its members, as well as to provide the free transit of goods, services and means of production; the establishment of joint customs duties; and the adoption of a common commercial policy towards other countries and communities.

The Treaty of Asunción of 1991 establishes the legal basis of Mercosur whilst the *Ouro Preto* Protocol of 1994 recognizes the legal existence of the block under international law, ascribing it with the authority to negotiate agreements with third parties on its own behalf.

5.6.2. Administration

The Treaty of *Asunción* establishes that the administration and resolutions adopted by Mercosur will be carried by the Common Market Council and

the Common Market Group[26]. The Council, which is composed of the Foreign Affairs Minister and the Minister of the Economy of each of the signatory countries, is the highest-level decision-making body. It is responsible for the political guidance of the Common Market and for assuring that the purposes and terms established for the implementation of Mercosur are met. The Common Market Group is the executive body. It is co-ordinated by the Ministry of Foreign Affairs of each country and is composed of 4 members and 4 substitute members per country. These members are representatives of the Ministry of Foreign Affairs, the Ministry of the Economy and the head of the Central Bank of the respective member-states.

It is important to note that the mentioned group is allowed to create work subgroups, whenever necessary, in order to accomplish the obligations of the Common Market Group[27]. Each work subgroup will have a national co-ordinator, indicated by each signatory country, and while its commission may have the participation of private sector members, private sector members are not allowed to participate in decision making.

Also the Administrative Secretary is to carry out a quarterly review of the practice and application of the Decisions of the Common Market Council and the Common Market Group[28].

The Administrative Secretary of Mercosur was created by the Protocol of *Ouro Preto*[29] with the main purpose of maintaining the files of all Mercosur Documents, to facilitate the organisation's publicity, and to facilitate the direct contact of the authorities of the Common Market Group. The Administrative Secretary also functions as a centre of communication and exchange of information related to Mercosur and guarantees the legal effect in each signatory country of the decisions reached by the different bodies of Mercosur.

The Council will be presided over by a turnaround plan, in alphabetical order, between the countries members, in a period of six months. It will be made up of the Ministers for foreign relations and the ministers of the Economy. The meeting will take place as many times as necessary or, at least, once a year.

26. Clause 9 of Treaty of *Asunción*.
27. Article 17 of Internal Rules of the Common Market Group.
28. Resolution n. 8/93 of Common Market Group.
29. Article 31 of Protocol of *Ouro Preto*.

5.6.3. Legislative Procedures

The decisions of Mercosur may operate as follows[30]:

(a) Once a rule is approved, the signatory countries will adopt the necessary measures to incorporate that rule in their national legislation and communicate its incorporation to the Administrative Secretary of Mercosur;

(b) When all the signatory countries have communicated the incorporation mentioned in item (a) above, the Administrative Secretary of Mercosur will communicate such act to the other signatory countries; and

(c) The approved rule will simultaneously come into force within the signatory countries 30 days after the communication described in item (b) above.

For the purpose of implementing and following such rules the Common Market Group, in its XII Meeting held in Montevideo on 13 and 14 January 1994, it was decided that the subgroups will report quarterly on the degree of implementation of the decisions and resolutions adopted by Mercosur in each signatory country.

5.6.4. Dispute Resolution

The Protocol of Dispute Settlement, signed by the signatory countries of Mercosur in *Brasilia* on 17 December 1991 and promulgated in 10 September 1993[31], recognises the importance of the Treaty of *Assunción* and is an effective mechanism to guarantee the fulfilment of the treaty.

On 18 February 2002, the four member countries signed the Protocol of *Olivos* for a Dispute Settlement Body in Mercosur, which was further amended in 19 January 2007. This Amendment, named Protocol of Amendment of the Protocol of *Olivos*, was issued in order to make the Protocol of *Olivos* more suitable to meet any eventual alterations in the country members of Mercosur.

30. Chapter VI of Protocol of *Ouro Preto*.
31. Decree n. 922, of 10 September 1993.

5.6.5. Protection of Competition

The Protocol of Protection of Competition (Decision n. 18/96) was defined during the *Fortaleza* Meeting held in the second half of 1996[32]. The Protocol determines the restrictive practices to competition (imposition of prices and conditions of selling and buying of goods, barriers to access to the market, manipulation of the market in order to determine prices, etc.) and the applicable penalties, such as fines. Taking into consideration the need for regulating Mercosur's Protocol of Protection of Competition, the signatory states signed the Agreement on the Regulation of the Protocol of Protection and Competition on 5 December 2002, which currently has been waiting for notifications from its parties.

5.6.6. Safeguards

During the *Fortaleza* Meeting, the signatory countries of Mercosur also determined the rules on safeguard measures before third parties. The approval of Decision 17/96 permits protection to the industries of the regional market against the increase of unfair imports from non-signatory countries. By means of a common understanding present in the Agreement of *Asunción* and in Decision 17/96, the members agreed not to apply intra-zone measures. The Committee of Commercial Defence and Safeguards was recently created with the purpose of co-ordinating such matters.

5.6.7. Dumping and Subsidies

In August 2002, by means of Decisions nos. 13 and 14 of the Council of the Common Market of Mercosur (CMC), the Antidumping Agreement and the Agreement on safeguards and Compensatory Measures of the WTO were adopted in the ambit of Mercosur, regarding the treatment of dumping and subsidies within intra-zone trade.

Considering such decisions, the CMC disciplined the procedures and rules for antidumping investigations and subsidy solutions in the intra-zone trade, by means of Decree n. 22/02.

32. Decree 3.602, on 18 November 2000.

5.6.8. Common External Tariff – CET

One of the most important instruments to motivating the signatory countries to become externally competitive is the Common External Tariff (CET) created by the Protocol of Buenos Aires and introduced in Brazil by Decree n. 1.343 of 23 December 1994, which also created the Mercosur Common Nomenclature (NCM), which specifies all products to be traded between the signatory countries.

In Brazil, the prevailing regulation indicates[33] the exception list to the CET which contains products labelled as "sensitive" and which thus are not designated to compete with similar products of other countries. This exception list is reduced after each calendar year.

The CET represents, generally, tariff levels from 0 to 21.5%, which can in some cases rise to 35%. The main objective of the CET is to avoid deflections in trade flow between member-states, as this would cause problems on a macroeconomic level with damaging consequences to the development of Mercosur.

5.6.9. Rules of Origin

Mercosur's rules of origin, which were established by the Agreement of Economic Complementation n. 18, were replaced by the Eighth Additional Protocol of the Agreement of Economic Complementation (ACE/18), signed by the signatory countries of Mercosur on 30 December 1994, and updated with later modifications.

This important issue for Mercosur concerns rules of origin defining the proportion of domestic components (originating in Mercosur) which products must contain. To this end, a program had been established to achieve the convergence of individual country rules to be implemented on a uniform and gradual basis to reach the general norm[34].

Furthermore, in compliance with the Decision 37/05 of CMC, Brazil[35] intends to eliminate the Double Charge of CET and the Distribution of Customs Revenue.

33. Resolution CAMEX n. 82, of 15 December 2009, in accordance with Decree n. 4.732, of 11 June 2003, Resolution n. 28/09 of the CMC, and Resolutions n. 30/09 and 39/09 of the GMC.
34. 39th Additional Protocol of ACE/18, incorporated in Brazil by Decree n. 4.106 of 28 January 2002.
35. Decree 5,738 of 30 March 2006.

5.6.10. International Contracts

Decree n. 2.095 of 17 December 1996 promulgated in Brazil the text of the Protocol of Buenos Aires on International Jurisdiction in Contractual Subjects, concluded in Buenos Aires on 05 August 1994. Under this decree, the signatory countries of Mercosur adopted common rules concerning international jurisdiction related to contracts of a civil or commercial nature signed between individuals and legal entities.

5.6.11. Banking

Concerning the banking sector, Mercosur Sub Group n. 4 intends to consolidate the supervision of global banking through a convention of the Central Banks of the signatory countries, reducing the differences existing between the banks with regard to national treatment of the signatory countries or harmonisation of the practice of insurance and reinsurance, etc.

Through Decision CMC n. 11/94, the signatories of Mercosur approved the Protocol for the Promotion and Reciprocal Protection of Investments of Non-Signatory Countries. Such Decision establishes that investors of non-signatory countries will be given the same treatment as local investors.

Also, Decision CMC n. 12/94 has adopted the Principles of the Consolidated Global Banking Supervision, in force in Brazil owing to Resolution of the National Monetary Council n. 2.723 of 31 May 2000.

5.6.12. Environment

As the world concerns itself with environmental protection measures which can affect the comparative advantages of some countries, creating barriers to the access of some markets and altering their competitiveness by an increase in production costs, Mercosur signatory countries, by means of Work Sub Group n. 6 and taking into account the results of the International Summit on Sustainable Development, held in Johannesburg, South Africa, in 2002 and Resolution n. 45/02 of the CMC, agreed to:

(i) permanently analyse the restrictions and non-tariff measures which relate to the environment;

(ii) increase the industrial and economic competition and environmental preservation by means of a greater efficiency in the use of raw materials and in the procedures used for the production of goods and services, by the year 2005;

(iii) permanently incorporate the environmental factor in the other sectorial policies of the Mercosur;

(iv) permanently implement the "Environment Agreement of the Mercosur" (Decision of the CMC n. 2/01), through developing instruments which assure its execution;

(v) create instruments and mechanisms for the improvement of the environmental management, by December 2004;

(vi) permanently operate the "Environmental Information System", created with the purpose of maintaining the public well informed;

(vii) formulate initiatives of sustainable development which contribute to the economic growth, by December 2005;

(viii) protect and administrate a base of natural resources for the economic and social development, by December 2005;

(ix) administrate, in an adequate manner, dangerous chemical substances and products, by December 2003; and

(x) permanently follow the International Environmental agenda.

Taking into consideration the importance of mutual cooperation during environmental emergencies, CMC has issued an Additional Protocol on Environmental Cooperation of Mercosur and Welfare Environmental Emergencies (Decision 14/04), by which its signees agree to provide support whenever an emergency or potential dangerous situation might affect the environment or the people within its territory or of the other Member-States.

5.6.13. Industry

Concerning industry, Mercosur Sub Group n. 7 has as its priority the realisation of an evaluation of the competitiveness of sectors that are sensitive to the economy of the signatory countries; the identification of the opportunities to make foreign alliances; implementation of mechanisms which will allow the continuation of the industrial incentives adopted by each signatory country for its own industry; the promotion of the co-operation of the productivity of the signatory countries; implementation of a project for the integration of small, medium and large-sized companies of the signatory countries; development and support of the regional industrial arts and the protection of intellectual property.

5.6.14. Agriculture

In order to facilitate the free circulation of combined agriculture and stock raising, as well as agricultural and industrial products, Mercosur Sub Group n. 8 will harmonise the Mercosur Health and Sanitation Agreement with the rules of the WTO. In order to determine the basis of co-ordination at regional levels, the actions and instruments for the agriculture areas, Mercosur will analyse the agricultural policies of each signatory country, as in the example of "Negotiations Agenda" of the Sub Group n. 8, approved by Resolution n. 22/01 of the GMC.

Furthermore, through Resolution 25/07 of the GMC, Mercosur has set Guidelines for the Recognition and Identification of family farming.

5.6.15. Labour

Mercosur will also continue to follow the rules established by the International Labour Organisation. Work Sub Group n. 10 will analyse the reports prepared by the BIRD (Inter-American Development Bank) on labour costs and labour migration and make proposals related to these matters. It is also the intention of Mercosur to sign multilateral agreements on Social Security and to implement a system of technical co-operation in the area of professional education.

Thus, the Multilateral Agreement on Social Security of Mercosur, drafted in Montevideo in December of 1997, and ratified by Brazil[36], provides the free

36. Decree 451/2001.

movement of workers within the bloc Mercosur and demonstrates a concern of its State-Members with a guarantee of social benefits and better living conditions of workers involved.

5.6.16. Automatic Payment Program

From 01 May 1991, a transitory financing mechanism of the credits due to the multilateral compensation balances (Automatic Payment Program) was incorporated into the Agreement. This mechanism attempts to foresee the occasional liquidity difficulties that the Central Banks of member countries might face at the closing of multilateral compensation periods. This mechanism is multilateral and automatic and consists in postponing the payment of obligations derived from the situations described above for a period of 4 months.

5.6.17. Accession

... and currently have associate member status. Venezuela signed a membership agreement on , but before becoming a full member, its entry has to be ratified by the parliaments of Paraguay and Brazil.

5.6.20. Bilateral Relations

Mercosur, has several agreements with third parties, as follows:

MERCOSUR – Andean Community
Partial Scope Agreement – Framework Agreement for the Creation of a Free Trade Area between the Andean Community and MERCOSUR
Date of Signature: 16 April 1998

MERCOSUR – Andean Community
Economic Complementation Agreement n. 39
Date of Signature: 12 August 1999, Entry into Force: 16 August 1999
Argentina – Colombia, Ecuador, Peru and Venezuela (as Members of the Andean Community)

Economic Complementation Agreement n. 48
Date of Signature: 29 June 2000 | Entry into Force:
01 August 2000

MERCOSUR – Andean Community
Economic Complementation Agreement n. 56
Date of Signature: 06 December 2002

MERCOSUR – Bolivia
Economic Complementation Agreement n. 36
Date of Signature: 17 December1996 | Entry into Force:
02 March 1997
Nineteenth Additional Protocol
Date of Signature: 23 July 2004

MERCOSUR – Colombia, Ecuador and Venezuela
Economic Complementation Agreement n. 59
Date of Signature: 16 December 2003 | Entry into Force:
Argentina: Note EMSUR C.R. n. 5/05, 01/13/05; Colombia:
Dec. n. 141, 01/26/05; Uruguay: Dec. n. 663/85, 11/27/85;
Venezuela: Dec. n. 3.340, 12/20/04; Ecuador:
Decree n. 2675-A, 18/03/05.

MERCOSUR – Chile
Economic Complementation Agreement n. 35
Date of Signature: 25 June 1996 | Entry into Force:
01 October 1996

MERCOSUR – Egypt
Framework Agreement
Date of Signature: 07 July 2004
Interregional Framework Cooperation Agreement
Date of Signature: 15 December 1995 | Entry into Force:
01 July 1999
Argentina: L. 24.964, 10/03/96; Brazil: Dto. Leg. 10, 07/27/99;
Paraguay: L. 976, 08/12/99; Uruguay: L. 17.053, 12/1/98

MERCOSUR – India
Framework Agreement
Date of Signature: 17 June 2003

MERCOSUR – India
Preferential Trade Agreement
Date of Signature: 25 January 2004
Additional Annexes I, II, III, IV
Date of Signature: 19 March 2005 / Entry into Force: 01 June 2009

MERCOSUR – Israel
Framework Agreement
Date of Signature: 08 December 2005

MERCOSUR – Israel
Free Trade Agreement
Date of Signature: 18 December 2007

MERCOSUR – Jordania
Framework Agreement
Date of Signature: 30 June 2008

MERCOSUR – Mexico
Economic Complementation Agreement n. 54
Date of Signature: 05 July 2002

MERCOSUR – Mexico
Economic Complementation Agreement n. 55 – Date of Signature: 27 September 2002
First Additional Protocol to Appendix IV – Date of Signature: 24 June 2004
First Additional Protocol to Appendix I – Date of Signature: 24 September 2003

MERCOSUR – Pakistan
Framework Agreement
Date of Signature: 20 July 2006

MERCOSUR – Peru
Economic Complementation Agreement n. 58
Date of Signature: 25 August 2003

MERCOSUR – Southern African Customs Union (SACU)
Preferential Trade Agreement
Date of Signature: 16 December 2004

MERCOSUR – Turkey
Framework Agreement for the establishment of a Free Trade Area
Date of Signature: 30 June 2008

6. ENVIRONMENTAL LAW

6.1. Sustainable Development and Investment – A New Market with an Increasing Demand

The increasing worldwide acceptance of the concept "sustainable development" must be taken into account when considering investment in Brazil.

Sustainable development is a framework for redefining progress and redirecting economies to enable all people to meet their basic needs and improve their quality of life, while ensuring that the environmental systems, resources and diversity upon which they depend are maintained and enhanced both for their benefit and for that of future generations.

Environmental impact must be considered in any new investment in Brazil. Although in the past the environment was not a priority, today strict compliance with environmental legislation is enforced and it is no longer possible to consider development without taking into account the limitations and responsibilities imposed by environmental factors.

The principles of environmental protection and sustainable development should not, however, be viewed as hindrances to economic development, as just another cost of doing business. Incorporation of environmentally friendly practices is an opportunity for business development – waste reduction, energy efficiency, and pollution prevention make economic sense. So much so that efficiency in business has become inextricably linked with sound environmental practices.

6.2. Brazilian Environmental Law

The Environmental Law is a combination of rules and principles that intend to maintain the perfect balance in the relationship between man and environment. Therefore, because it is a legal field that has no specific subject and an indivisible object, it is considered a diffuse law.

Due to this, it is important for foreign investors interested in Brazil to become acquainted with Brazilian Environmental Law, which is extensive.

It is also important to clarify that in Brazil, the Union, as much as the States, the Federal District and the Municipalities, have competence to legislate about environment matters, according to the articles 21 to 25 and 30 of from the Federal Constitution of 1988.

The Federal Constitution provides that:

> "Article 225. All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations."

The Constitution, which devotes an entire chapter to environmental matters, explicitly requires that the government:

(i) ensure ecological preservation and the control of species and of the environment;

(ii) ensure preservation and integrity of the Brazilian genetic patrimony and to supervise the entities dedicated to genetic material research and manipulation;

(iii) define in all federation units special territories submitted to environmental protection;

(ii) demand environmental impact studies where activities may cause significant degradation of the environment;

(iii) promote environmental education in schools, including awareness of the need to preserve the environment;

(iv) protect plant and animal life, avoiding practices which can expose the environment, causing species extinction or cruelty to animals;

(v) require restoration of environmental degradation caused by mining and control any production or commercialization of substances considered harmful to life and to the environment; and

(vi) implement civil, criminal, and administrative sanctions for activities and conduct considered to be damaging to the environment ("Procedures and activities considered as harmful to the environment shall subject the infractions, be they individuals or legal entities, to penal and administrative sanctions, without prejudice to the obligation to repair the damages caused").

The Environmental Law[37]established the National Environmental Policy, the objective of which is the "preservation, improvement and recuperation of the environment quality, aimed at assuring continued social and economic development, the protection of national security, and human rights."

The Environmental Law is a well-developed regulatory framework which emphasises environmental improvement in addition to environmental protection.

The Environmental Law established the means for implementing environmental policy – establishment of standards for environmental quality and measurement of environmental impact; licensing and review of actual or potential polluting activities; and imposition of criminal or civil penalties on parties that fail to comply with environmental regulations.

The legislation[38] also imposes strict civil liability for environmentally harmful activity (including pollution): liability requires no evidence other than how much environmental damage has been caused and who caused it (there is no requirement that intent or guilt be proven). In addition, liability follows a company regardless of the owner. Where a business that has caused damage to the environment has been acquired by a new owner, the new owner will be responsible for any damage caused, regardless of blame or intent (the parties can contractually provide for a right to indemnification).

The Environmental Crimes Law[39] provides criminal and administrative punishment for specified acts which cause damage to the environment. The acts include pollution, damage to vegetation and animal life, and damage to culturally or historically significant buildings, monuments or sites.

37. The main environmental legislation is Law n. 6.938 of 31 August 1981 (amended by Laws nos. 7.804/89, 8.028/90, 9.960/00, 9.966/00, 9.985/00, 10.165/00, 11.105/05, 11.284/06 and 11.941/09 and regulated by Decrees nos. 97.632/89, 99.274/90, 4.339/02 and 5.975/06 - "The Environmental Law".
38. Brazilian Federal Constitution in its Article 225, paragraph 3, as well as Law n. 6.938/81, Article 14.
39. Law n. 9.605 of 12 February 1998, regulated by Decree n. 3.179/00.

The Environmental Crimes Law holds legal entities administratively, civil and criminally responsible for infringement of environmental laws in instances where a violation is committed by decision of its legal or contractual representative or its collective body (shareholders, directors, etc.), in the interest, or for the benefit, of the entity. In addition, individual representatives of an infringing entity who in any way contribute to an infringement, or knew of an infringement and did nothing to prevent it, can also be held liable. Moreover, the disregard of corporate entity status is also admitted when it represents an obstacle to compensation for the damage caused to the environment.

The Environmental Crimes Law provides for a wide variety of criminal and administrative penalties for environmental law violations, including community service, fines, confiscation, and suspension or cancellation of licences.

Law n. 7.347/85[40] permits public civil actions ("*Ação Civil Pública*") to be brought by Public Attorney's Office, Public Defence Attorney's Office, by Federal Government, States, Federal District and the Municipalities, autonomous government entities, public entities and mixed capital companies and some others specific civil associations.

In addition to licensing requirements, potential administrative and criminal penalties, and potential civil liability, businesses in Brazil are subject to various federal, state and municipal regulations relating to: zoning, air pollution, water pollution, deforestation, use of toxic substances, and hazardous waste management.

It is incumbent upon CONAMA[41] to establish guidelines and technical rules, criteria and standards relating to environment protection and to the sustainable use of the environmental resources. Until 2009, there was 412 Resolutions published by the agency, related to the most relevant and diverse environmental spheres.

6.3. Public Environmental Agencies

In order to achieve the objectives of the National Environmental Policy, the Environmental Law established the National System for the Environment (*Sistema Nacional do Meio Ambiente* – SISNAMA), which is composed by all

40. Amended by Laws nos. 8.078/90, 8.884/94, 9.494/97, 10.257/01 and 11.448/07.
41. An Agency from the Ministry of the Environment.

environmental bodies and entities of federal, state and local governments, as well as the public foundations responsible for the protection and improvement or environmental quality. (www.mma.gov.br/sisnama)

(a) Superior Body (Governing): The Government Council consults with the President of Brazil regarding the preparation of national policy and guidelines relating to the environment;

(b) Consultative and Deliberating Body: The National Council for the Environment (*Conselho Nacional do Meio Ambiente* – CONAMA) is the federal normative agency. CONAMA conducts studies and creates proposals for environmental standards, guidelines and regulations, consulting with the Government Council on environmental policy; (www.mma.gov.br/conama);

(c) Central Body: Executive secretary of the Ministry of the Environment (*Ministério do Meio Ambiente* – MMA) is the executive branch agency responsible for formulating national policy and government guidelines for the environment as well as planning, coordinating, and monitoring activities related to the National Environmental Policy; (www.mma.gov.br);

(d) Executive Agency: The Brazilian Institute for the Environment and Renewable Resources (*Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis* – IBAMA – is responsible for execution and enforcement of all federal environment laws; (www.ibama.gov.br); and

(e) State and Local Agencies: State and municipal agencies regulate the use of land, water and other environmental resources, conduct inspections and grant licenses in their respective jurisdictions.

In 2007, the Law 11.516/07 approved the creation of The Institute Chico Mendes of Biodiversity Conservancy, which is also an autonomous governmental entity as IBAMA, to ensure the application of national policies for the Conservation Units, instituted by Law n. 9.985/00, which established the

National System of Conservation Unities (*Sistema Nacional de Unidades de Conservação* – SNUC); to perform policies for the rational use of natural resources; to foment and perform several programmes connected to biodiversity and environmental education, as researches, conservation, protection and preservation; among others attributions.

The IBAMA, after the creation of The Institute Chico Mendes of Biodiversity Conservancy, has lost some of its functions, remaining only with environmental police power, monitoring and granting environmental licenses and authorizations, control of the environmental quality and authorisation and control of the use of natural resources, with supplementary power to administer and monitor the implementation of new Conservation Units,

6.4. The Environmental Impact Study and Environmental License

An Environmental Impact Study (EIA-RIMA)[42] is required for any project which might significantly impact the environment. This study aims to report on information concerning the modifications and the environmental impact that a given project may cause to the environment. At the end of the study, compensatory measures and environmental programs must be settled in order to restore the balance that will be affected with the development of the project. Such a study may prove beneficial to the business because it will reveal if the proposed location of the project is appropriate before all the investments are made. Also, it is necessary for the entrepreneur to obtain some Environmental Licenses.

Similarly, investments in clean technologies not only can improve productivity, but also save money over the long term by preventing environmental damage, avoiding the significant costs associated with remedial action to restore the environment. This kind of investment can be made with the assistance of international banking institutions (such as the World Bank and the Inter-American Development Bank), also through a national institution, National Bank of Economic and Social Development (BNDES) or through the private banking sector.

Growing environmental concerns, coupled with public pressure and stricter regulations, are changing the way people do business across the world, including in Brazil. While the cost of compliance with environmental legislation

42. Article 225, paragraph 1, IV, of the Brazilian Federal Constitution, regulated by Laws nos. 9.985/00, and 11.105/05, and Resolution n. 001/86 of CONAMA.

can be significant, especially for small – and medium – size companies, far more significant liabilities associated with remediation, cleanups and penalties for breaches of legislation face businesses that fail to anticipate their potential environmental liabilities and to improve their environmental performance. The environment must be considered in any new investment in Brazil.

The Environmental License[43] is another relevant aspect to be considered prior to the installation of an enterprise in Brazil. Its purpose is to tie the economic development to environment preservation.

The Environmental Licensing is an administrative proceeding used by the competent environment bodies, SISNAMA and its agencies, federals as much as state and municipals, to permit the situation, installation, enlargement and operation of enterprises and activities that use environment resources, and/or can be considered effective or potentially pollutants and/or of those that can somehow cause environmental degradation.

There are three stages of the Environmental Licensing:

(i) previous license, that consists in the preliminary stage of planning the enterprise or activity and under which the location will be analyzed and the conception of the enterprise, certifying the environmental viability and establishing the basic requirements to be completed in the next stages;

(ii) installation license, the second stage, controlling projects for pollution as well as will include the analysis and approval of compensatory measures. It specifies the obligation of the enterpriser as remedies to mitigate the environmental impacts, with the use of the best technology available to prevent pollution being an issue, authorizes the implementation of the project according to the environmental control planning; and

(iii) operational license that will authorize the operation of the enterprise, after it is verified it has fulfilled the prior licenses, and it is conditional on the imminent operation of the business.

43. Law n. 6.938/81, Decree n. 99.274/90 Resolution n. 237/97 of CONAMA.

It is important to emphasize that the Environmental License can be revoked or suspended, if some irregularity in the information provided to the environment body for its concession is verified, if severe environmental and health risks are detected and, also, if there is any change or innovation in the industrial process unknown to the environmental body. It is also important to watch for the expiration dates of the licenses.

The purpose of the Environmental Licensing is to guarantee that the preventive measures adopted at the enterprises are consistent with sustainable development.

However, the companies have been finding difficulty in getting the Environmental Licenses they need. Some of the reasons for this are the delay ion the analysis of the proceedings, the high investment costs to meet with the environmental requirements, and also, the complexity of the technical criteria used. All of these arise from the requirements set out in Brazil's wide environmental regulation.

6.5. Clean Development Mechanism (CDM) and Carbon Credits

Countries have been discussing climate change because of their concern with the global warming. Due to this, in 1997, the Kyoto Protocol was signed, which was ratified by Brazil in 2002[44]. With the Protocol the developed countries are committed to reduce the emission of pollutant gases in the atmosphere or to engage in if they maintain or increase emissions of the gases, which can be done elsewhere.

One of these flexible mechanisms is the Clean Development Mechanism (CDM) that permits the participation of developing countries, such as Brazil, in the Protocol.

In Brazil, the CDM may be seen as a source of business, due to the extensive territorial size and as a consequence of the fact that the country has the 07 (seven) environmental necessities: water, energy, biodiversity, wood, mineral, recycling and emission control of pollutants.

Carbon Credits are certificates issued by regulatory agencies, calculated from the emission or non emission commitments of pollutant gases made by the industries of developed countries. Thereby, the companies that do not reach the established thresholds, negotiate with others that have reached theirs, creating a sales market of Carbon Credit.

44. Legislative Decree n. 144/02, that came into force in 2005 (Decree n. 5.445/05).

Furthermore, the Brazilian National Congress is carrying out the Bill of Law n. 2.707/02 "relates to Carbon Credits and Emission Reductions (CER) on development of enterprises related to renewable energy supply.

Thereby, it is possible to assert that Brazil is ready to undertake CDM projects and to trade its Carbon Credits.

6.6. CNDA – Certificate of Absence of Environmental Debt

There is also a Bill of Law n. 2.461/03, under the analysis by the National Congress, for the enforcement of a Certificate of Absence of Environmental Debt.

The Bill proposes the requirement of a Certificate for public bids of services in Public Administration, as well as the concession of loans by Official Credit Establishments.

The restraint would impact on individuals or legal entities that due to an environmental legislation violation had received penalties or had their activities suspended , or thereby, had their permit or licenses revoked.

The Bill of Law was approved by the Environment and Sustainable Development Committee and the Financial and Taxation Committee and now the Constitution, Justice and Citizenship Committee must analyse the document. It is important to refer that it is not necessary the vote of the deputies and senators if all Committees approve the Bill of Law.

However, we emphasize that although there is no Federal Law yet establishing the necessity of the Certificate of Absence of Environmental Debt, in some Brazilian States there are agencies that already issue the Certificate.

6.7. Amazonian Law

Finally, the creation of a Law for the Management of the Amazonian Forest is also under discussion (Bill of Law n.268/06). Its objective is the promotion of collective actions for a harmonic development of the Amazon Basin, the sustainable exploration of the forest, the conservation of water and the respect for local communities.

Debate on this matter has increased in Brazil, because the Amazon includes up to 60% of Brazilian's territory and nine countries. The unoccupied Amazon border line reaches 10.930 km, facilitating drug trafficking and smuggling.

The creation of this new Law is directed to benefit the population of the Amazon region and is aimed at implementing alternative methods of production based on science and technology, as well as preserving the natural resources of the Amazon region.

7. COMPETITION LAW

7.1. Background

In the recent past years Brazil has instituted privatisation and deregulation policies as part of a major structural change from an active industrial policy (which included State-owned monopolistic practices) to a market economy. As it moves toward a free market system, however, it has become increasingly concerned that its antitrust policies accompany this evolution, thereby protecting market economy development by preventing certain forms of non-competitive behaviour.

Brazil's Competition Law dates from 1939 and was enacted during the dictatorial regime of the "Estado Novo". Further legislation followed in 1945 in the form of administrative repression of cartels and trusts, but it was not until the Constitution of 1946 that an express admonition against abuse of economic power was set out.

Article 148 of the 1946 Federal Constitution provided that the law shall repress all and any forms of abuse of economic power, including unions or groups of individual companies of whatever nature with the object of dominating the domestic market, eliminating competition or arbitrarily increasing profits. The premise behind the constitutional provision was on the liberal economic principle that free availability of the means of production and free competition is the basis of a free market economy. Economic power results from having the use of the means of production. Abuse of economic power occurs when these means of production are dominated in certain sectors of economic activity by a company or group of companies. This reasoning later became the basis of the first true competition "antitrust law", Law n. 4.137 of 10 September 1962, which followed the guidelines and the legislation of the American anti-trust system as adapted to the Brazilian legal system.

Law n. 4.137/62 created the Administrative Council for Economic Defence (CADE), an administrative agency with autonomy and independence from the Executive Branch, defining abuse of economic power broadly as domination of domestic markets and elimination of competition by unfair means and monopolistic practices. Due to the military coup of 1964, however, Brazil expe-

rienced almost 20 years of a planned economy, under which circumstances the newly created anti-trust agency played a minor and insignificant role. With the promulgation of the 1988 Federal Constitution and the move toward a free market structure, antitrust considerations returned to their former place of prominence. The 1988 Federal Constitution [45] provided that the law shall repress the abuse of economic power aimed at the domination of markets, the elimination of competition and the arbitrary increase in profits.

Several new laws were enacted, among which was Law n. 8.137/90. This criminal law, which is still in force with a few changes, provided for crimes against the Tax System and Economic Order, establishing penalties, including fines and imprisonment. Crimes punishable by 2 to 5 years incarceration include the abuse of a market position by dominating the market, or by totally or partially eliminating competition, price fixing or discrimination, tying arrangements and exclusivity of advertising to the detriment of competition. The Consumer Protection Code[46] provided basic consumer protection against unfair or abusive business practices and unfair competition.

7.2. Antitrust Law

In June 1994, a new antitrust law was passed which consolidated previous legislation into one simplified regulatory framework and reinforced enforcement mechanisms. Law n. 8.884 of 13 June 1994, as amended (Antitrust Law), establishes antitrust measures in keeping with the constitutional principles of free enterprise and competition and restraint of abuse of economic power. Accordingly, it contains provisions detailing violations of the economic order such as abusively exercising a dominant position and unfair business practices.

Most importantly, the mentioned law elevated CADE to the condition of independent federal agency ("*autarquia federal*"), as it was envisioned to be in earlier legislation, with the authority throughout all of Brazil to enforce the provisions of the Antitrust Law. Moreover, it determined that certain acts and agreements considered potentially anticompetitive must be submitted to CADE for review and approval. Furthermore, certain acts such as mergers, acquisitions or joint ventures must be submitted to CADE for approval if they exceed certain market share or gross annual sales criteria.

45. Article 173, paragraph 4 of the Brazilian Federal Constitution.
46. Law n. 8.078, of 11 September 1990.

CADE is composed of 6 members and a president who are appointed by the President of the Republic after Senate approval. The term of office is 2 years with 1 re-election allowed. The president or members may only be ousted by a Senate decision upon request of the President of the Republic and only as a result of criminal misconduct or other improper behaviour. Besides deciding on mergers and acquisitions, the CADE board also has authority to ensure compliance with the law, order that action be taken to restrain violation of the economic order, approve cease and desist and performance commitments, and request court execution of its decisions. CADE is also assisted by the Attorney General's Office, the Economic Law Office of the Ministry of Justice (SDE) and the Secretariat of Economic Protection of the Ministry of Finance (SEAE) in these endeavours.

Antitrust Law provides CADE with powers for long arm jurisdiction to question acts which although practised abroad may have effects on Brazil and consequently be of competitive concern. Under the Antitrust Law[47], branches, agencies, subsidiaries, offices, establishments, and agents of representatives located in Brazil of foreign companies shall be deemed to be located in Brazilian Territory.

CADE will authorise a merger, acquisition or joint venture subject to the reporting requirement only if it can be shown that the transaction will increase productivity or that competition will not be substantially reduced in a relevant market. If CADE approves the transaction, it may define performance commitments to be assumed by the interested parties so as to ensure compliance with the conditions mentioned above. Failure to comply with CADE reporting requirements may subject the parties to fines and/or criminal action. Finally, a decision by CADE cannot be appealed through the administrative channels, but only directly through the courts, nor can a case under review by CADE be contradicted by any other member of the Executive Branch including the President of the Republic or the Department of Justice.

Article 16 of the Antitrust Law holds the company and each of its managers or officers jointly liable for violations to the economic order. Companies or entities within the same economic group, either "de facto" or "de jure", shall also be held jointly liable for violations of the economic order.

Penalties for violations of the economic order include fines ranging from 1 to 30% of the gross pre-tax revenue for companies. A personal and an exclusive

47. Article 2 of Antitrust Law.

fine may be imposed on managers who are directly or indirectly responsible for violations from 10 to 50% of the fine imposed on the company. It is important to point out that the company cannot pay the fine which must be totally borne by the manager. Mitigating factors include the violator's good faith. Aggravating factors include the severity of the violation and the advantages obtained or envisaged. The statute of limitations runs 5 years from the date of violation or, if violation is repeated or ongoing, after the date the violation has ceased.

The Antitrust Law[48] lists four types of conduct that can be construed as in violation of the economic order: (a) to limit, defraud or harm in any manner free competition and free enterprise; (b) to control or otherwise dominate a relevant market of goods or services; (c) to arbitrarily increase profits; and (d) to exercise in an abusive form a dominant position. A dominant position takes place when a company or group of companies controls a substantial part of a relevant market as a supplier, intermediary, buyer or financier of a product, service or technology relating thereto. A dominant position is presumed when a company or group of companies controls 20% or more of a relevant market. However, the abuse of a dominant position cannot be considered to be an autonomous effect, independent of the other effects mentioned above and which are expressly described in Articles 173 and 174 of the 1988 Federal Constitution.

It is important to note that under the strict liability provisions of the Antitrust Law the parties need not have the intent or guilt to cause any of the violations listed in Article 20. An illustrative list of acts that will be a violation of the economic order if they cause one of the four effects listed above, include collusion among competitors; division of the market; creation of barriers or hindering access to the market; imposing vertical pricing controls and abusive prices or unreasonable price increases.

Concerning monitoring mechanisms, the Antitrust Law[49] provides that any act or agreement that has the effect of limiting or restraining competition or results in control of a relevant market must be submitted to CADE for review. Moreover, any action intended for any form of economic concentration, whether through a merger with other companies, an organisation of companies to control third party companies or any other form of corporate grouping wherein either the company or group of companies accounts for 20% (twenty percent) of the relevant

48. Article 20 of Antitrust Law.
49. Article 54 of Antitrust Law.

market, or has recorded gross revenue in Brazil on its latest balance sheet equal or superior to R$ 400 million, must also be submitted to CADE review.

Furthermore, the Brazilian Securities Exchange Commission (CVM) and the Brazilian Commercial Registry Department of the Ministry of Development, Industry and Foreign Trade (DNRC/MDIC) must report to SDE any change in the control of publicly held companies or registrations of consolidations of companies.

Mergers must be notified to SDE within 15 days from the first binding agreement set by the parties. Failure to abide by the deadline will subject violators to a fine between R$ 63,846 and R$ 6,384,600. The SDE will then promptly submit one copy to CADE and one to SEAE. SEAE will issue a technical report within 30 days to SDE, which will then pronounce on the case within the same time period.

The case and evidence will then be sent to CADE, which shall decide upon them within 30 days. Failure by CADE to reach a decision within the 30 day period will cause the merger to be automatically approved. CADE approval becomes retroactive to the date of the merger, however, all of these time periods imposed on CADE or the other anti-trust agencies may be stayed by requests for clarification or documents considered to be essential, and which are not submitted as requested.

7.3. CADE's Regulations – Mergers and Aquisitions

The formalities and the procedures for the application for the confirmation of the acts foreseen by Article 54 of the Antitrust Law are further regulated by CADE[50] and the Ministry of Justice[51]. The application for the analysis of such acts shall contain the justification for the act and it should also be accompanied by a number of documents pertinent to the transacting parties and relevant market information. According to CADE, the documents required should provide information that will permit a preliminary analysis of each case and which will immediately give a picture of the applicant's behaviour in the market and of the competitive conditions of the sector.

50. CADE's Resolution n. 45, of 28 March 2007 (Interim Regulation of CADE) and Resolution n. 49, of 23 July 2008.
51. The Ministry of Justice Ordinance n. 4 of 5 January 2006.

Resolution n. 45 defines the countdown for the 15 day mandatory notification period as starting from the signing of the first binding document between the parties, that is to say from the date when the parties effectively ceased competing or commenced collaboration. The fee of R$ 45,000.00 shall be charged for the filing of the applications[52].

The application for the analysis of mergers, acquisitions or any other concentration act by antitrust authorities shall be presented through an electronic form. However, the applicant shall present all the support documentation to SDE in up to 2 days counted from the delivery of the electronic form[53].

With regard to reporting requirements, any interested party may consult CADE on the legitimacy of conduct or hypothetical acts or contracts that might be anticompetitive or result in economic concentration[54].

The CADE Board may also define performance commitments to be assumed by any interested party that submitted acts for review under the terms of the Antitrust Law[55]. Such performance commitments shall take into consideration the international competition in the specific industry as well as its effect on employment levels and other relevant circumstances. Performance commitments shall provide for volume or quality objectives to be obtained within predetermined terms.

SDE will monitor compliance. Failure to comply, without good cause, with the performance commitments may cause the approval to be revoked, as well as the opening of an administrative proceeding for the adoption of applicable measures.

7.4. Infraction os the Economic Order

Besides monitoring and compliance activities, another function of SDE is to promote preventive investigations on purported violations of the economic order and commence administrative proceedings with the cooperation of CADE. The preliminary investigation and the administrative procedures are regulated by the Antitrust Law and the Ministry of Justice Ordinance n. 4 of 5 January 2006.

52. Law n. 10.149 of 21 December 2000, and Resolution CADE n. 38 of 26 January 2005.
53. Pursuant to CADE's Resolution n. 49.
54. Articles 102 to 107 of CADE Resolution n. 45.
55. Article 54 of Antitrust Law.

Preliminary investigations may be instigated upon a written and reasonable request of interested parties. Upon evidence that there is a violation of the economic order, SDE may order administrative proceedings to be brought against potential violators within 8 days of the formal complaint, the closing of the preliminary investigation or knowledge of an underlying fact. The defendant will then have 15 days to file a defence, and a further 45 days wherein to produce evidence. Failure to file a defence will result in judgement by default.

At any time during the administrative proceedings, SDE or CADE may adopt preventive measures whenever there are good reasons to suspect that the defendant directly or indirectly may cause irreparable or substantial damage to the market or that the defendant may render the final outcome of the proceedings ineffective. Such measures shall result in the order prompt cessation of the acts causing damage, and the resumption of the previous situation, as well as the imposition of a daily fine.

CADE, or SDE with the approval of CADE, may reach an agreement with the defendant on a commitment to cease any acts under investigation at any time during the administrative proceeding without having such commitment construed as an acknowledgement of guilt by the defendant. Such commitment by the defendant will cause the case to be put on hold while the commitment is being met and will be rescinded after a pre-established time if all the conditions have been fully met.

SDE is provided with broad investigative powers and may subpoena anyone to provide evidence within 15 days. The discovery phase must be concluded within 45 days but may be extended upon good cause when necessary. The defendant may produce any new evidence or documents before the conclusion of the discovery phase and has the right to call a maximum of 3 witnesses. Upon conclusion of the discovery phase, SDE may send the process to CADE for judgement or file an appeal to CADE requesting that the investigation be discontinued.

Upon receipt of the case records from SDE, CADE will then request the Attorney General's Office to prepare an opinion within 20 days. CADE may invite any person to provide clarification on any relevant matter. Before CADE's decision is made both the Attorney General and the defendant may offer final arguments.

CADE's decision in an administrative act must be taken by a majority vote of at least 5 members. The decision must substantiate the violation of the

economic order and shall contain a detailed report of the violating acts and actions to be taken by the proper authorities, the terms for starting and ending the remedial action, any applicable fine, and any daily fine to be applied while the violation is ongoing. SDE shall monitor compliance with the CADE's decision and any total or partial non-compliance shall be reported to CADE's Chairman who shall then request the Attorney General to have the decision enforced by the courts.

7.5. Enforcement of Decisions

CADE's decisions shall be enforced by Federal Courts of the Federal District or by Federal Courts with jurisdiction over the defendant's domicile or headquarters.

In the event that the Courts have sound reason to believe that there might be substantial or irreparable damages, they may order immediate enforcement of all or a part of the action established on CADE's decision, regardless of whether fines have been deposited or bonds have been posted to secure de enforcement. Daily fines for an ongoing violation may be applied, counted from the deadline established by CADE for voluntary compliance up to the date of actual compliance. In those procedures for the collection of fines and enforcing performance compliance, the Courts may order either specific performance or provide for alternative acts that guarantee in practical terms a similar outcome. In the event that a CADE decision requires performance, a suit for damages and losses may be brought if specific performance or obtaining an equivalent outcome is not possible.

Enforcement of a CADE's decision shall be carried out by all means including intervention in the company if necessary. The Courts may order intervention when required to ensure specific performance and may appoint a receiver for that purpose. Court intervention shall be limited to those acts required for compliance with the Court decision that gave rise to such action and shall be effective for a maximum period of 180 days. Intervention costs shall be borne by the defendant. Managers of the defendant companies may also be removed if it is proven that they are preventing the performance of the acts set by the Court. Persons may be held criminally liable for obstruction of the enforcement procedure pursuant to relevant provisions of the Criminal Code.

Recent enforcement of the above provisions of the Antitrust Law by CADE have resulted in many cease and desist orders. Probably the most controversial case involving CADE was an order to a spin-off division in a proposed joint venture between Rhodia S.A. and Sinasa S.A. in the polyester and acrylic fibers market, and an order to partially demerge an acquisition by the Gerdau Group in the plain-steel market.

Another case with considerable impact was the acquisition of the entire share capital of Chocolates Garoto S.A. by Nestlé do Brasil S.A., which may lead to a concentration of 58.4% in the chocolate market. After intense discussions, the Brazilian antitrust authority decided the operation was not possible, taking into account the harm to competition and in order to ensure the welfare of the consumer.

These cases are indicative of the more active antitrust stance that the agency has assumed now that it has become independent.

7.6. Possible Changes in the Law

Competition law regulates monopolies, duopolies, oligopolies and cartels. Common aspects of enactments aimed at preventing anti-competitive activities include restrictions on abuse of a dominant position, predatory pricing, price-fixing and tie-in arrangements. Merger regulation is another common aspect of legislation aimed at limiting anti-competitive concentration of market power. The regulation of these matters is about to be changed in Brazil.

Bill of Law n. 6/2009, in discussion within the House of Representatives, aims to modify the Antitrust Law, providing for several structural alterations to the Brazilian anti-trust system, with the redefinition of the function of its main agencies and the new composition of CADE.

In the new structure, SDE will no longer exist, and its functions shall be thereon performed by CADE. SEAE, in general terms, besides issuing technical opinions on acts of concentration, will centre its activities in promoting competition, the study of the competition aspects of new bills, as well as the competition within specific sectors in the economy, through its own initiative or when requested by the Treasury Department.

Therefore, CADE shall alone concentrate all functions related to the antitrust system, with the assistance of SEAE. If the Bill is approved, CADE will be formed by (i) a Presidency; (ii) the Department of Economic Studies; and (iii)

the Economic Defence Administrative Court, competent to decide upon all procedures related to the Antitrust Law.

Besides its re-structuring, which is intended to provide a faster analysis of the procedures, the new Brazilian anti-trust system will also change its philosophy of performance, following the worldwide trend of focusing its inquiries and combating cartels and other infractions to the economic order.

One of the most relevant modifications brought by the Bill of Law is the one related to the analysis of concentration acts (*e.g.* mergers, acquisitions and joint ventures). Article 88 of such Bill establishes that CADE's analysis of such acts shall precede the consummation of the transaction (the system currently in force provides for a posterior analysis of the transactions), alteration which shall have great influence on concentration procedures. Pursuant to this Bill, CADE shall decide upon the approval of the transaction in up to 240 days from the filing by the applicants.

8. THE BRAZILIAN JUDICIARY SYSTEM

Brazil has a civil law system derived from Roman and Germanic law, strongly influenced by provisions of the Napoleonic Code of 1804 and of the Germanic Code of 1896. In recent years, however, several modifications in the Federal Constitution and minor laws imported some successful initiatives from common law, making Brazilian the law system more heterogeneous.

8.1. Brazilian Judiciary Structure

The Brazilian Judiciary Structure is set out by the Federal Constitution into two different branches of Lower Courts, as follows:

(i) State Courts; and

(ii) Federal Courts.

The Federal Courts are divided into "ordinary" or "specialized matters". The specialized federal Courts can also be divided into: Labour, Military and Electoral Courts, as follows:

8.1.1. Federal Labour Courts

The Labour Courts have the power to conciliate and judge individual and collective disputes between employees and employers as well as other disagreements arising from service relationships. Individual disputes are those that relate to issues concerning the interests of individuals, brought before the courts by the employees themselves against their employers, even when the work is not remunerated, since their professional activity is in dispute. Collective disputes are those that involve the wider interests of a given category of workers and are brought in by the respective trade unions, for example, all cases involving strikes. There is a special chapter in this guide in relation to the Brazilian labour rules (Chapter 12).

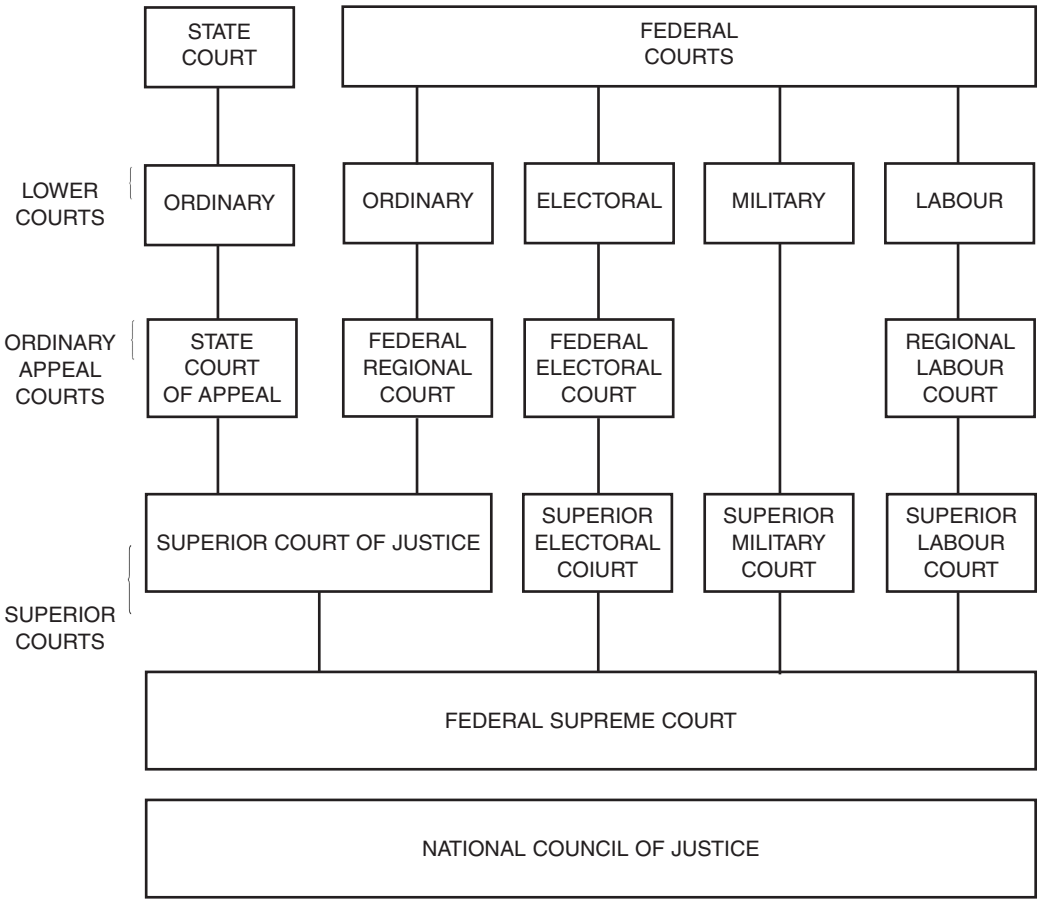
In general, the Federal Constitution grants the right to appeal a decision at least once before a Court of Appeal of superior hierarchy, which is known as

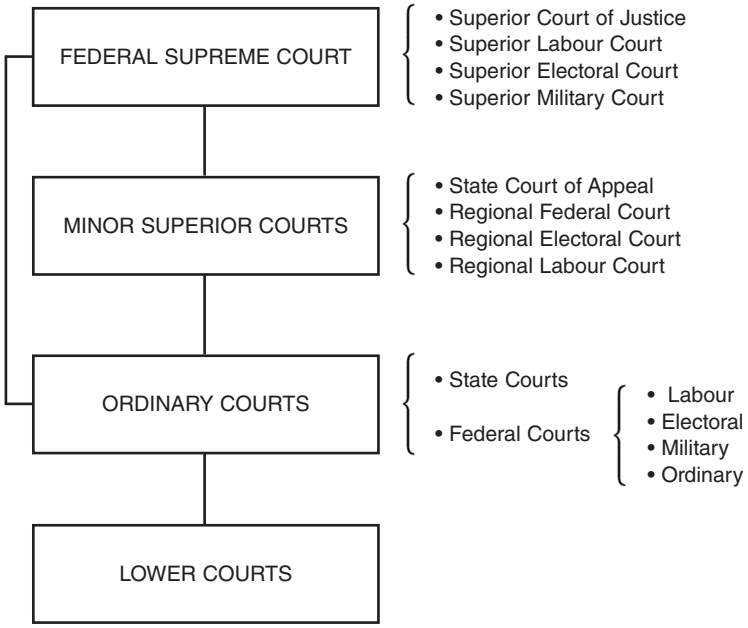
an "ordinary appeal". There are also "extraordinary appeals" to the jurisdiction of the superior courts, as explained below.

The ordinary appeals of the Labour Court are conducted before the Regional Labour Courts (*Tribunal Regional do Trabalho*). There are currently 24 Regional Labour Courts in Brazil.

8.1.2. Federal Electoral Courts

The Electoral Courts have jurisdiction over elections and the process of creation and registration of political parties. They have administrative, civil and criminal jurisdiction. The Federal Constitution states that ordinary appeals from the decisions of the electoral Courts shall be processed before the Regional Electoral Court of Appeal (*Tribunal Regional Eleitoral*). There is a Regional Electoral Court in the capital of each state and in the Federal District.





8.1.3. Federal Military Courts

The Military Courts have jurisdiction over military crimes. Their ordinary appeals are processed by the Superior Military Court (*Superior Tribunal Militar*), which is composed of 15 members, appointed by the President after approval by the Senate (10 agents from the Army, three lawyers and two military judges or representatives of the Military Prosecution Service).

The jurisdiction of the Superior Military Court, also known as Superior Court, is ordinary, being able to re-judge the cause, without any restriction on appeals.

8.1.4. Ordinary Federal Courts

The Ordinary Federal Courts, which are divided into criminal, tax and civil courts, have jurisdiction to hear a number of matters specified in the Constitution, including:

(i) cases to which the federal government, a federal government agency or a federal public company is a party;

(ii) cases between a foreign country and a person residing in Brazil;

(iii) cases related to a treaty or contract celebrated by Brazil with a foreign country or entity;

(iv) crimes against the organisation of labour and, in the cases determined by law, the financial system and the economic and financial order;

(v) crimes committed aboard ships or airplanes;

(vi) immigration matters; and

(vii) disputes over the rights of Indigenous people.

All the appeals from the Ordinary Federal Courts are conducted before the Federal Regional Court (*Tribunal Regional Federal*), which is composed of a minimum of seven judges (1/5 of lawyers and representatives of the Prosecution Service and 4/5 of career judges from the Ordinary Federal Lower Court). There are five Federal Regional Court in Brazil as follows:

(i) Federal Regional Court of First Circuit, involving the following States and the Federal District: Acre, Amapá, Amazonas, Bahia, Goiás, Maranhão, Mato Grosso, Minas Gerais, Pará, Piauí, Rondônia, Roraima and Tocantins;

(ii) Federal Regional Court of Second Circuit, involving the following States: Rio de Janeiro and Espírito Santo;

(iii) Federal Regional Court of Third Circuit, involving involving the following States: São Paulo and Mato Grosso do Sul;

(iv) Federal Regional Court of Fourth Circuit, involving involving the following States: Santa Catarina, Paraná and Rio Grande do Sul; and

(v) Federal Regional Court of Fifth Circuit involving the following States: Alagoas, Ceará, Paraíba, Pernambuco, Rio Grande do Norte e Sergipe.

8.1.5. State Courts

The matters that are not included in the jurisdiction of the Federal Courts, are conducted before the State Courts, which can, initially, be divided into criminal, tax and civil courts.

In certain states, where judicial caseloads are exceptionally high, state legislatures have created specialized civil courts to hear specific types of cases. These include:

(a) Public Finance Courts, which have jurisdiction over litigation involving state or municipal finance secretariats;

(b) Courts of Family and Successions, which have jurisdiction over family matters, including maintenance and inheritance;

(c) Courts of Public Registries, which have jurisdiction over cases involving public notaries and registrations made in Public Registers;

(d) Courts for Minors, which have jurisdiction over minors; and

(e) Courts of Recovery and Bankruptcy, which have jurisdiction over the cases involving the recovery and bankruptcy and recovery of enterprises.

There are also specialised state criminal courts, which includes:

(a) Jury Courts, which have jurisdiction over crimes that involve a malicious intent against human life (e.g., murder); trials for such crimes are decided by public jury;

(b) Courts to Instruct Compliance with Criminal Penalties, which oversee the application of criminal sentences and penalties, and

(c) Police Internal Affairs and Prison Supervisory Courts, which have jurisdiction over police and prison administration actions.

The appeals of the lower Court State Courts are processed by the State Court of Appeals (*Tribunais de Justiça Estaduais*) of each state or of the Federal District.

8.1.6 Special Courts

It must be mentioned that Federal Law n. 9.099/1995 created Special Courts called "*Juizados Especiais*" for the State Courts, with jurisdiction over civil small claims under a more simplified proceeding foreseen in law.

In the cases of small claims, the Plaintiff can choose either to go to a Special Court or to use the general proceedings of the Civil Procedure Code.

The same law created criminal courts for minor offences, establishing also special proceedings, more simplified in relation to the Brazilian Criminal Procedure Code.

According to the said law, ordinary appeals of sentences are not submitted to the State Court of Appeals, but are processed directly by the Special Courts referred to and judged by a body composed of three different judges of the same hierarchy.

After the creation of the Special Courts[56] called *"Juizado Especial"* in the State Courts, there were also created civil and criminal courts in the Ordinary Federal Courts[57]. In 2009 Treasury Special Courts[58] were created and have jurisdiction over litigation with States, the Federal District and Cities, with some exceptions (such as writ of *mandamus*; expropriation actions, division and delineation of real estate; class actions, etc.)

8.1.7 Other Tasks of the Ordinary Courts of Appeal

All the ordinary Courts of Appeals referred to, in addition to having the jurisdiction to process appeals, have primary jurisdiction over a number of matters specified in the Federal Constitution and minor laws (e.g. claims involving certain public authorities).

56. Law n. 9.099/1995.
57. Law n. 10.259/2001.
58. Law n. 12.153.

8.1.8 The Superior Courts

After an appeal is processed by an ordinary Court, it is still possible to again argue the matter in certain cases before the Superior Courts, which can be the following:

(i) Superior Labour Court (*Tribunal Superior do Trabalho*);

(ii) Superior Electoral Court (*Tribunal Superior Eleitoral*);

(iii) Superior Court of Justice (*Superior Tribunal de Justiça*); and

(iv) Federal Supreme Court (*Supremo Tribunal Federal*).

The jurisdiction of each of these extraordinary courts is also defined in the Federal Constitution according to the nature of the matter under consideration, as the following chart demonstrates:

The Superior Labour Court is composed of 27 judges, appointed by the President after the approval by the Senate (1/5 of lawyer, 1/5 of representatives of the Federal Prosecution Service, 3/5 from career judges of the Regional Labour Courts). Basically, the Superior Labour Court has jurisdiction to judge extraordinary appeals against decisions from the Regional Labour Courts which: (i) violate federal law (ii) violate the Federal Constitution; and/or (iii) violates jurisprudential uniformity.

The Superior Electoral Court is composed of a minimum of seven members (some of which are elected: three Justices from the Federal Supreme Court, two judges from the Superior Court of Justice, one judge from the Regional Federal Court, two lawyers appointed by the President with the approval of the Senate). The members of the Superior Electoral Court have a term of office of two years, with only one further term permitted.

In general, the Superior Electoral Court has jurisdiction over extraordinary appeals against decisions from the Regional Electoral Courts which: (i) violate the Federal Constitution; (ii) violate jurisprudential uniformity; (iii) consider the ineligibility or issue of certificates from the federal or state elections; (iv) annuls certificates or judge the validity of elective mandates; and/or (v) denies *habeas corpus*, writ of *mandamus*, *habeas data* or writ of injunction.

The Superior Court of Justice is composed of a minimum of 33 judges, appointed by the President after approval by the Senate (1/3 of judges from the Regional Federal Court of Appeal, 1/3 of the State Court of Appeals, 1/3 between lawyers and representatives of the public prosecution service). It is the court of extraordinary appeal for matters relating to violation of federal law, uniformity of jurisprudence and also it hears appeals in other specific cases, foreseen in the Federal Constitution, including litigation between a country or international organisation against a person who resides in Brazil.

Furthermore, any decision from any ordinary or extraordinary court can be subjected to the control of the Federal Supreme Court, which is the final court of extraordinary appeals, as follows:

Access to an appeal before the Federal Supreme Court is very difficult, as they only analyse the cases connected with violation of the Federal Constitution and uniformity of jurisprudence, that involve collective interests, and therefore, it is a necessary prerequisite that the matter is in the public interest (i.e.: relevant to society).

The Federal Supreme Court is composed of 11 Justices, appointed by the President of the Republic after approval by the Senate (any native Brazilian older than 35 and younger than 55 years old, not necessarily with a degree in Law, but with a renowned knowledge in Law and an excellent reputation). On this subject, it is important to clarify that although the President of the Republic has the right to choose the Justices, the Federal Supreme Court, throughout its entire history, has had a mixed composition with judges, lawyers, representatives of the Public Prosecution Service and politicians.

According to the latest reforms to the Brazilian legal system, the Federal Supreme Court can issue a certain kind of precedent able to bind, not only the Judiciary branch for further decisions, but also the public administration. Such biding precedents, called "*súmulas vinculantes*", have high importance in Brazilian Judiciary System, because directs jurisprudence and show how the Brazilian legal system, Roman in origin, is getting more eclectic with the importation of initiatives from the common law system.

Such *stare decisis*, however, can only be created by the Federal Supreme Court with the aim of giving validity to the interpretation or effectiveness of a determined law, which may result in the unreasonable multiplication of identical suits.

It is important to point out that, in the cases in original jurisdiction of the "ordinary" courts, the extraordinary courts may judge ordinary appeals. Thus, the

fact an extraordinary court is involved does not necessarily mean that such court cannot be responsible for judging appeals of as ordinary nature.

Also, in very specific cases, foreseen in the Federal Constitution, the Extraordinary Courts can also judge cases with original jurisdiction. For example, the process of validation of judgments of foreign court in Brazil is in the original jurisdiction of the Superior Court of Justice. Also, the legal proceedings against the President of Brazil, for criminal offences or litigation between Brazil and another country are in the original jurisdiction of the Federal Supreme Court.

8.2. National Council of Justice

As per the determination of the Constitutional Amendment n. 45, of December 2004, the National Council of Justice was created, which is composed of 15 members, elected for a term of office of two years, with only one re-election being permitted (one Justice from the Federal Supreme Court: one judge from the Superior Court of Justice, one judge from the Superior Labour Court, one judge from the State Court of Appeal, one judge from the Regional Federal Court of Appeals, one federal judge, one judge of the Regional Labour Court, one labour judge, one member of the Federal Public Prosecution Service, one member of the State Public Prosecution Service, two lawyers and two citizens).

Such autonomous body is responsible for the supervision of the Brazilian Judiciary Body, monitoring the aptitude and probity of the judges, receiving complaints in relation to the members and bodies of the Judiciary and preparing half-yearly and yearly statistics to indicate the performance of the Judiciary and for the study of the measures to be taken in order to achieve more efficient access to the Courts.

In a general, the Brazilian judiciary enjoys a good reputation for impartiality and freedom from corruption.

8.3. Legislative Changes Seeking Improved Judicial Agility and Security in the Brazilian Judiciary System

According to one of the first statistics report prepared by the National Council of Justice (an independent body that audits judicial activity)[59], on the

59. http://www.cnj.jus.br

judicial numbers for 2005, it was indicated that the crisis in the Judicial Branch was primarily due to the increase in new cases without, on the other hand, a proportional growth in the judicial structure. By way of example, in 2005, in the federal judiciary, in general, there were only 0.819 judges per 100,000 people. At the appellate level, where resources are generally more abundant, there was an average of 2,829.34 new cases in 2005 for each appellate judge, who already had an average backlog of 13,893.64 cases.

Such situation evidence demonstrated the need to seek a swift solution that shall allow the Judiciary Branch to provide effective access to the Courts, as guaranteed by the Brazilian Federal Constitution. To this effect, since then, a series of reforms to the Civil Procedure Code, dated 1973, were instituted in Brazil in complementation of reforms started in the nineties, seeking to provide a swifter resolution to judicial disputes. In 2005, this objective was actually promoted to the level of constitutional guarantee. Thus, in order to speed these changes up, given that the previous project of a new Civil Code took over twenty-five years to be approved, instead of discussing the adoption of an entirely new procedural code, the legislators chose to apply changes through the passage of several independent laws, with the most important of these having become effective in the past fewcouple of years.

Around 20 relevant laws were passed from 2005 to 2010 and several bills of laws are currently pending approval, with the objective of, for instance: creating greater jurisprudential uniformity; attaching increased value to certain precedents from the Federal Supreme Court; restricting appeals and decisions contrary to the rationale previously established by the Federal Supreme Court; making electronic filing possible; eliminating frivolous proceedings; and facilitating the means of enforcement. Such changes are significant to the point that Brazilian jurists are now required to adopt intense legal update methods to keep up with the law.

Out of the above-described changes, three principal ones merit special emphasis:

(i) the above mentioned change that established the binding precedent ("*súmula vinculante*"), constitutionally prescribed by the Constitutional Amendment n. 45 and regulated by the recent federal Law n. 11.417/2006, which deals with decisions that also bind public administration, shall foreclose many actions and appeals;

(ii) the change that establishes the general decisions from the Superior Courts ("*súmula impeditiva de recurso*") permitting the trial court to refuse submission of an appeal to the appellate court, prescribed by the Civil Procedure Code through the changes introduced by Law n. 11.276/2006, shall reduce the number of appeals relating to matters that have already been subject of judicial rulings by the appellate courts; and

(iii) the change that establishes the legal provision making on line attachments possible through Law n. 11.382/2006, allows the court to immediately freeze the banking accounts of the judgment debtor, including corporate debtors, in order to satisfy a judgment that was not paid voluntarily. This change eliminates the need for several judicial proceedings for enforcement, several of which currently are not concluded due to the inability to locate the judgment debtor's assets.

The report prepared by the National Council of Justice in 2008 indicates a relevant reduction of the caseload in the Brazilian Courts in comparison with 2005, which certainly has a favourable effect in the promotion of greater swiftness in judicial proceedings. However, the delay is still a relevant problem in most Brazilian Courts and other initiatives are required to speed up the judicial proceedings, including changes in the procedural law and, more importantly, increasing the number of courts, judges and staff.

8.4. The Arbitration Law

On 23 September 1996, Law n. 9.307, the "Arbitration Law", was enacted. The Arbitration Law provided for significant changes and made it possible for commercial disputes in Brazil to be definitively settled through arbitration rather than through recourse to the judiciary.

Prior to enactment of the Arbitration Law, inclusion in a contract of an arbitration clause did not oblige a party to the contract to submit a dispute to arbitration. Furthermore, enforceability of an arbitration award required judicial ratification.

The Arbitration Law provides that parties to a contract may refer disputes concerning rights to arbitration and that the parties shall be bound by an arbitration clause. The law provides for a rapid procedure by which a party can enforce such a clause. Furthermore, the Arbitration Law establishes that an arbitration decision, the "arbitration award", shall have the same effect as a sentence pronounced by a judge and can be considered an executable title.

Since the enactment of the Arbitration Law, Brazilian business has been gradually accepting arbitration as a means of terminating disputes rather than submitting all questions to the Judiciary.

In cases of foreign arbitration, Brazilian sovereignty cannot be violated and the foreign arbitration decision must be ratified by the Superior Court of Justice to be valid and enforceable in the Brazilian territory.

9. THE BRAZILIAN FINANCIAL SYSTEM

9.1. Banking Law

Law n. 4.595 of 31 December 1964, also known as the Brazilian Banking Law, and its amendments, were enacted in order to regulate the whole of the Brazilian financial system, and is responsible for its present structure.

In accordance with its Article 17, any "public or private legal entities which have as their primary or accessory activity the assessment, intermediation or application of financial resources of their own or of third parties, in Brazilian or foreign currency, as well as the custody of third parties' properties" are considered to be financial institutions. Additionally, the Banking Law establishes that individuals who regularly or occasionally perform any of the above-mentioned activities shall be treated as financial institutions.

Pursuant to the Banking Law, the Brazilian financial system is composed of:

(a) the National Monetary Council ("*Conselho Monetário Nacional*");

(b) the Central Bank of Brazil ("Banco Central do Brasil");

(c) the Bank of Brazil S.A. (“Banco do Brasil S.A.”);

(d) the National Bank of Economic and Social Development ("*Banco Nacional do Desenvolvimento Econômico e Social*" – BNDES); and

(e) other public and private financial institutions.

9.2. The National Monetary Council

The National Monetary Council, created by Law n. 4.595/64, replaced and abolished the former Council of the Superintendence of Currency and Credit ("*Conselho da Superintendência da Moeda e do Crédito*").

The objective of the National Monetary Council is to establish Brazilian Monetary and credit policies aimed at the economic and social development of Brazil.

The National Monetary Council policy has as its functions[60]:

(a) to adapt the volume of resources of payments to the real necessities of the national economy and its respective development process;

(b) to regulate the internal volume of the Brazilian currency by means of preventing or correcting outbreaks of inflation or deflation of an internal or external origin, as well as preventing or correcting economic depressions and any other unsteadiness;

(c) to regulate the value of the Brazilian currency overseas and the equilibrium in the Brazilian balance of payments, aiming at the best use of resources in foreign currencies;

(d) to orientate the application of public or private financial institutions' resources, in order to help create favourable conditions for national economic development;

(e) to help improve institutions and financial institutions, aiming at the efficiency of the payments system and at the mobilisation of resources;

(f) to protect the liquidity and solvency of financial institutions; and

(g) to co-ordinate monetary, credit, budgetary and tax policies and public internal and foreign debt.

The National Monetary Council is the controller of the Brazilian currency, thus being responsible for the authorisation of the issuance of paper money and for the determination of its characteristics.

It also establishes norms and guidelines concerning exchange policy, approves monetary budgets, regulates credit operations in all their forms, and is responsible for regulating financial institutions as regards to their constitution, functioning and liquidation.

60. Article 3 of Law n. 4.595/1964 (the Brazilian Banking Law).

In addition to the above, the National Monetary Council also issues rules and legislation concerning interest rates, discounts, commissions and charges for banking services and operations, as well as exchange operations and swaps, fixing limits, fees, terms and other conditions.

Law n. 9.069 of 29 June 1995 created the so-called Technical Commission of Money and Credit, which is an advisory commission of the National Monetary Council.

The Technical Commission of Money and Credit is responsible for issuing declarations relating to the activity of the National Monetary Council, as well as proposing regulations concerning specific matters such as the issuance of Brazilian currency.

The National Monetary Council is composed of[61]:

(a) the Minister of the Economy, who is its Chairman;

(b) the Minister of Planning and Budget; and

(c) the Chairman of the Central Bank of Brazil.

The National Monetary Council is assisted by seven Consulting Commissions, which address: the rules and organisation of the Brazilian financial system; the securities market and the futures market; rural credit; industrial credit; housing credit, sanitation and urban infrastructure; public debt; and monetary and exchange policies.

9.3. The Central Bank of Brazil

The Central Bank of Brazil has as its objective the performance and the enforcement of legal norms and rules issued by the National Monetary Council.

Additionally, the Central Bank of Brazil has the following exclusive functions:

(a) to issue paper currency and coins under the conditions and within the limits authorised by the National Monetary Council;

61. Article 8 of Law n. 9.069/95.

(b) to perform any services relating to the money supply;

(c) to determine the amount of compulsory deposits of financial institutions within the legal limits;

(d) to receive compulsory payments and voluntary deposits of financial institutions;

(e) to effect rediscounting and loan transactions with financial banking institutions;

(f) to exercise control over all forms of credit;

(g) to control foreign capital;

(h) to act as custodian of the gold and foreign currency official reserves, and of special drawing rights (SDRs) and with the latter to carry out all the operations provided for in the Convention of Incorporation of the International Monetary Fund;

(i) to inspect financial institutions and apply penalties;

(j) to authorise financial institutions: to operate in Brazil; to establish or relocate their head offices or premises, including abroad; to be reorganised, consolidated, merged or expropriated; to carry out exchange and real credit transactions and the regular saving of federal, state or municipal bonds, shares, debentures, mortgage bills and other credit instruments or securities; to extend the periods granted for operations; and to amend their by-laws;

(k) to establish conditions for the investiture and exercise of any administrative position in private financial institutions, and also for the exercise of any position on advisory, audit or similar bodies, pursuant to the rules issued by the National Monetary Council;

(l) to carry out transactions of purchase and sale of federal government bonds, as an instrument of the monetary policy;

(m) to require the head offices of financial institutions to register the record of firms which have dealt with their branches for more than one year.

Other functions of the Central Bank of Brazil are:

(i) to communicate, on behalf of the Federal Government, with foreign and international financial institutions;

(ii) to promote, as an agent of the Federal Government, co-operation in domestic or foreign loan transactions, as well as being able to undertake such transactions itself;

(iii) to provide for the smooth functioning of the exchange market, the relative stability of exchange rates and the equilibrium of the balance of payments, and for this purpose to buy or sell gold and foreign currency, as well as to effect credit transactions abroad, including those referring to special drawing rights, and to separate the financial and commercial exchange markets;

(iv) to effect the purchase and sale of securities of private and public joint stock companies and State companies;

(v) to issue its own bills, in accordance with conditions established by the National Monetary Council;

(vi) to regulate the performance of cheque and other paper clearance services;

(vii) to exercise payment vigilance in the financial and capital markets over companies which directly or indirectly interfere in such markets, and also over the operational forms or procedures used by such companies; and

(viii) to provide the services of its Secretary's Office, under the control of the National Monetary Council. In accordance with the law in force, the Central Bank of Brazil may only transact with public and private financial institutions. It is, therefore, precluded from conducting operations of any nature with other public or private legal entities, unless expressly permitted by law.

Law n. 4.595/64, Article 13, determines that the duties and services within the competency of the Central Bank of Brazil when not run directly by the institution, will be preferentially contracted with the Bank of Brazil ("Banco do Brasil S.A."), or alternatively with other financial institutions, provided that such contracts are duly authorised by the National Monetary Council.

9.4. "Banco do Brasil S.A." (Bank of Brazil)

Before the enacting of Law n. 4.595/64, the Bank of Brazil used to function as the Central Bank besides operating as a private bank.

The Bank of Brazil is today a commercial bank, although it is also engaged in activities which are not common to commercial banks as an instrument for the administration of financial and credit policies of the Federal Government.

The Bank of Brazil is responsible for the following:

(a) as a Financial Agent of the National Treasury, it may: (i) receive for the credit of the National Treasury proceeds from the collection of federal revenue taxes and from federal credit operations through advances of budget revenue, or any other funds, within legally authorised limits; (ii) effect payments and provisions required for the implementation of the General Budget of Brazil and supplementary laws in accordance with instruction given to it by the Ministry of Finance; (iii) grant surety ship, securities and other guarantees as expressly authorised by law; (iv) acquire and finance inventories of exportable production; (v) execute the policy of minimum prices for agricultural products; (vi) act as paying agent and receiving agent abroad; (vii) execute the service of the consolidated public debt;

(b) as the principal executor of banking services to the Federal Government, including its government agencies, receive on deposit, exclusively, the available funds of any federal entity, including agencies of all the civil and military ministries, social security institutions and other government agencies, commissions, departments, entities under special administrative system and any individuals or legal entities responsible for advanced payments, as expressly authorised by the National Monetary Council pursuant to a proposal of the Central Bank of Brazil;

(c) Execute cheque and other paper clearing services;

(d) collect the voluntary deposits of financial institutions, maintaining the respective accounts;

(e) exclusively receive the deposits relating to the subscription in cash of the capital of legal entities;

(f) on its own account and on account of the Central Bank of Brazil, purchase and sell foreign currency, under conditions established by the National Monetary Council;

(g) be in charge of receipts or payments or other services of interest to the Central Bank of Brazil;

(h) finance the purchase and installation of small and medium-sized rural properties, pursuant to the pertinent legislation;

(i) finance industrial and rural activities; and

(j) promote pagate and orientate credit, including commercial activities, supplementing the activities of the banking network in the financing of economic activities, complying with credit requirements of the different regions of the country, as well as in the financing of imports and exports.

The appointment of the chairman, according to the law, is a prerogative attributed to the President of the Republic of Brazil, after the Senate's approval.

9.5. The National Bank of Economic and Social Development

The National Bank of Economic and Social Development (BNDES) is considered by Law n. 4.595/64 as a public financial institution whose primary objective is the execution of Federal Government Investment Policies. BNDES has two subsidiaries: the BNDESPAR, which objective is the development of the stock market, and FINAME, which is the administrator of the export financing operations.

9.6. Public Financial Institutions

Law n. 4.595/64 defines public financial institutions as auxiliary bodies in the execution of the Brazilian Federal Government credit policy.

As previously mentioned, the National Bank of Economic and Social Development is the main instrument for executing the Federal Government Investment Policy.

The first paragraph of Article 22 of the Banking Law establishes that the National Monetary Council is responsible for regulating public financial institutions.

Notwithstanding the above, the Banking Law (Article 24) determines that the non-federal public financial institutions are subject to the same rules concerning private financial institutions.

9.7. Private Financial Institutions

In general, private financial institutions may only be constituted as stock companies.

The initial capital of private financial institutions shall be fully paid up in Brazilian currency. Subsequent capital increases of financial institutions may also be made by means of the incorporation of reserves or of accumulated profits within the limits established by the National Monetary Council.

At least fifty percent of the initial capital and subsequent increases in the capital of financial institutions authorised to function by the Central Bank of Brazil shall be paid in upon subscription. The remaining amount shall be fully paid up within one year counting from the date in which the subscription occurred or counting from the approval of the increase of the capital by the Central Bank of Brazil.

Private financial institutions (with the exception of investment institutions), will only be able to participate in the capital of other companies when an authorisation is duly issued by the Central Bank of Brazil; however, this authorisation will not be necessary in the event such private financial institutions grant subscription guarantees, provided that such grants comply with the general requirements established by the National Monetary Council.

In general financial institutions may engage in the following activities:

(a) participation in loans and financing operations;

(b) receiving deposits of any nature;

(c) share, obligations and other security acquisition for capital market sale;

(d) transfer of loans obtained abroad;

(e) execution of guarantees;

(f) distribution and placement of any issue of securities and bonds;

(g) operating in the Stock and Commodities Exchange;

(h) issue and/or registration of shares or obligations;

(i) participation in exchange operations;

(j) opening and maintaining accounts; and

(k) participation in gold operations.

In the event of any kind of participation of a foreign financial institution in the capital of a private financial institution, it is necessary, according to Circular n. 3317/06, to complete an application to the Central Bank of Brazil providing the following information: (i) the amount of foreign participation; (ii) the importance of such participation for the Brazilian economy; (iii) the description of the operations practiced by the foreign institution; (iv) the importance of such participation for the foreign institution; (v) the rating of the foreign institution and its economic group; (vi) the indication of any other financial institution, in the event of any bond with the foreign financial institution; (vii) the indication of the supervisory agency of the foreign institution abroad; and (viii) any additional information that may be requested by the Central Bank of Brazil.

9.8. General Rules Concerning Financial Institutions

Law n. 4.595/64[62] establishes that financial institutions shall only operate in Brazil upon previous authorisation of the Central Bank of Brazil or, if foreign, by the decree of the Executive Branch.

The above-mentioned Law[63] establishes the exclusive competence of the Central Bank of Brazil to authorise financial institutions to operate in Brazil; to install or transfer their head offices or premises, including transfer abroad; to be reorganised, consolidated, merged or expropriated; to carry out exchange and real credit transactions and the regular saving of federal, state or municipal bonds, shares, debentures, mortgage bills and other credit instruments or securities; to extend the periods granted for operations; and to amend the by-laws of financial institutions.

On 28 November 2002 the National Monetary Council enacted Resolution n. 3.040, which regulates the requirements and procedures for the incorporation, authorisation, transfer of control and corporate reorganisation of financial institutions in Brazil, as well as the cancellation of the authorisation for such institutions.

With the enactment of Resolution n. 3.040/02, new provisions were incorporated to the already existing rules with the objective of providing the Central Bank of Brazil with more efficient means of evaluating the business objectives as well as the organisational and management structure of financial institutions in Brazil.

62. Article 18 of Law n. 4.595/64.
63. Article 10 of Law n. 4.595/64.

The main innovations introduced by Resolution n. 3.040/02 regarding the incorporation and authorisation of financial institutions in Brazil include: (i) preparation of a business plan by the financial institution in formation, which should contain, at least, details on the organisational structure proposed, specification of internal controls and the establishment of strategic objectives; (ii) the authorisation of the Central Bank of Brazil to access information on all the members of the controlling group and stockholders of the financial institution being incorporated, available at the Federal Revenue and any public or private data base; (iii) the financial capacity of the controlling shareholder or the controlling group, which should be compatible with the size, nature and objective of the business; and (iv) the definition of the standards of corporate governance to be observed, including the details of the incentive structure and the remuneration policy.

In relation to the authorisation, during the first three years of operation a financial institution must demonstrate to the Central Bank of Brazil that its operations are in compliance with the strategic objectives described in the business plan, by means of a Management Report attached to half-yearly financial statements.

This report shall be submitted to an independent auditor. If it is found that the operations are not in compliance with the strategic objectives described in the business plan, the financial institution must give explanations to the Central Bank of Brazil.

With respect to the transfer of control and corporate reorganisation of financial institutions, the rules regarding the incorporation of financial institutions must be observed. However, the Central Bank of Brazil may lift certain conditions depending on the situation.

As for the corporate control structure, Resolution n. 3.040/02 set out that direct ownership interests of financial institutions can only be held by: (i) individuals; (ii) financial institutions and other institutions that are authorised to operate by the Central Bank of Brazil; and (iii) financial holding companies.

Regarding the cancellation of the authorisation to operate a financial institution, it is worth mentioning that it has become mandatory to publish a statement of purpose for such cancellation. Furthermore, the Central Bank of Brazil only grants this cancellation of authorisation providing that all liabilities have been met.

The granting and validity of authorisations from the Central Bank of Brazil are subject to the financial institution complying, at all times, with the minimum capital requirements[64].

9.9. Multiple Banks

Multiple banks are private or public financial institutions constituted as stock companies, which shall have at least two of the following business line, one of which must be either commercial or of investments[65]:

(a) commercial;

(b) investment and/or development, the latter being exclusive for public banks;

(c) real estate credit;

(d) credit, financing and investment; and

(e) leasing.

9.10. Commercial Banks

Commercial banks are private or public financial institutions constituted as stock companies, which operate in the discounting of credit instruments, in exchange operations, in the opening of credits, in the custody of assets, in all types of collections and payments, in taking deposits for the Employee's Dismissal Fund ("*Fundo de Garantia por Tempo de Serviço*" – FGTS), and in exchange operations duly authorised by the Central Bank of Brazil. Those banks are regulated by National Monetary Council's Resolution n. 3265/05.

64. Annexes II and IV of the National Monetary Council's Resolution 2.099 of 17 August 1994, as modified by Resolution n. 2.607/99, Resolution n. 2.692/00 and Resolution n. 3.334/05.
65. National Monetary Council's Resolution n. 2.099/94.

9.11. Investment Banks

Investment banks are private financial institutions constituted as stock companies, whose primary objective is to conduct investment or financing operations in medium and extended terms, aiming at the provision of capital for companies in the private sector, from their own resources, as well as by the collection, intermediation and application of third party resources[66].

The legislation requires that investment banks include in their names the term "investment bank" (*banco de investimento*).

9.12. Development Banks

Development bank is a non-federal public financial institution constituted as a stock company with head-offices in the capital of the state in which its share control is held. It is required to include in its name the term "development bank" (*banco de desenvolvimento*) followed by the name of the Brazilian State where its head-office is located[67].

The primary objective of the development bank is to provide an adequate finance program and to assist projects which promote the economic and social development of the state in which it is located, favouring, especially, the private sector.

In order to comply with its objective, the development bank shall support regional or sectoral programs or projects which:

(a) increase the economy's production capacity, by means of the implementation, expansion or relocation of ventures;

(b) benefit productivity, by means of reorganisation, rationalisation or modernisation of companies and formation of inventories of raw materials and final products or by means of the formation of integrated trade companies;

(c) contribute to the improvement of the local economic environment and local companies by means of the incorporation, merger, associ-

66. National Monetary Council's Resolution n. 2.624/99.
67. National Monetary Council's Resolution n. 394/76.

ation, assumption of the share control and/or the liquidation or consolidation of assets or liabilities;

(d) improve rural production by means of investment in projects with a view to the formation of fixed or semi-fixed capital; and

(e) promote the incorporation and development of production technology, management improvement, the formation and improvement of technical staff, for this purpose being allowed to sponsor technical assistance programs through specialised companies and entities.

9.13. Credit, Financing and Investment Companies

Credit, financing and investment companies were originally regulated in 1959 as financial institutions constituted as stock companies, which have as their purpose the provision of finance for the acquisition of goods and services, as well as for the working capital[68].

They are required to include in their name the term "credit, financing and investment" ("*crédito, financiamento e investimento*").

9.14. Real Estate Credit Companies

A real estate credit company is a financial institution constituted as stock company with the objective of providing financial support to real estate operations relating to the incorporation, construction, sale or acquisition of housing[69].

Its name shall contain the phrase "real estate credit" ("*crédito imobiliário*").

9.15. Credit Cooperatives

Credit cooperatives are financial institutions constituted as legal entities, with non-profit purpose, which consist of a group of individuals who engage in a certain profession or other common activities, with the objective of sharing credits and/or providing services with benefits for the associates[70].

68. Central Bank of Brazil's Resolution n. 1.092/86.
69. National Monetary Council's Resolution n. 2.735/00.
70. Central Bank of Brazil's Resolution n. 3.442/07 and amendments.

It is important to note that credit cooperatives are prohibited from using in their name the term "bank" ("*banco*").

9.16. Leasing Companies

The lLeasing companies must be incorporated as "S.A." companies, and shall be subject, whenever applicable, to the same conditions set forth for the financial institutions, as per Law n. 4.595, from 31.12.1964, and subsequent amendments enacted by the National Monetary Council. Additionally, the leasing companies shall include in their names the term "Leasing" ("*Arrendamento Mercantil*")[71].

The principal objective of a leasing company, which shall be taxed as per Laws nos. 6.099/74 and 7.132/83, is the practice of leasing operations dealing with movable assets produced within Brazilian territory or abroad, or with real properties acquired from third parties to be used by the lessee in its economic activity. In the end of the leasing contract, the lessee has three options: (i) to buy the movable asset; (ii) to renew the leasing contract; or (iii) to return the movable asset to its lessor.

9.17. Stock Brokerage Companies

Stock brokerage companies, which shall be constituted either as stock companies or as private limited liability companies, are those institutions which have the following objectives, among others[72]:

(a) to operate in locations or in systems maintained by stock exchanges;

(b) to subscribe, solely or by means of a consortium with other authorised companies, for the issuance of securities for resale;

(c) to intermediate public offers and distribution of securities in the market;

71. Central Bank of Brazil's Resolution n. 2.309/93 and amendments.
72. Laws n. 4.728/65 and 6.385/76, and National Monetary Council's Resolution n. 1.120/86 and amendments.

(d) to purchase and sell securities on its own or third party's account, in accordance with the legislation enacted by the Securities Commission ("*Comissão de Valores Mobiliários*" – CVM) and by the Central Bank of Brazil;

(e) to administer securities portfolios and the custody of securities; and

(f) to subscribe, transfer and certify endorsements, share certificates, receipt and payment of redemptions, interest and other earnings relating to securities.

For the granting, by the Central Bank of Brazil, of an authorisation to operate, the company must be admitted as a member of a stock exchange and have the approval of the Securities Commission for the exercise of activities in the securities market.

The approval of the Securities Commission will also be necessary for the conducting of the following acts: relocation of the head-quarters; establishment, relocation or closure of branches or offices; alteration in the corporate capital; appointment of managers and other officials, fiscal counsels and members of other corporate bodies; foreign participation in the corporate capital; any other kind of alteration of its by-laws; and liquidation.

Additionally, the Securities Commission shall also be consulted in regard to any alienation in the control of the company, as well as in regard to any kind of change of its legal type, merger, incorporation and split.

9.18. Exchange Brokerage Companies

Exchange brokerage companies must be constituted as legal entities, whose name shall expressly contain the term "exchange brokerage" ("*corretora de câmbio*")[73].

The main objectives of an exchange brokerage company are to intermediate exchange operations and the negotiation of the respective bills of exchange (the latter being exclusively conducted by business individuals organised by official brokers of public funds and brokerage companies), the exchange company

73. According to National Monetary Council's Resolution n. 1.770/90.

provided that is not a member of an exchange shall comply with all rules applying to exchange members companies..

It is important to notice that as of 2006[74], exchange brokerage companies are permitted to operate in exchange operations for their own account.

9.19. Securities Distribution Companies

A Securities distribution company, whose name must contain the term "securities distribution" ("*distribuidora de títulos e valores mobiliários*") shall be constituted either as a stock company or as a limited liability company, with the following objectives, among others[75]:

(a) to subscribe, solely or by means of a consortium with other authorised companies, for the issuance of securities for resale;

(b) to intermediate public offers and distribution of securities in the market;

(c) to purchase and sell securities on its own or a third party's account, in accordance with the legislation enacted by the Securities Commission (CVM) and by the Central Bank of Brazil;

(d) to administer securities portfolios and the custody of securities; and

(e) to subscribe, transfer and certify endorsements, share certificates, receipt and payment of redemption, interest and other earnings relating to securities.

In addition to the necessary authorisation granted by the Central Bank of Brazil for their functioning, securities distribution companies shall also apply for the issuance of a previous and express authorisation before the Securities Commission.

The Securities Commission shall also be consulted with regard to any change in the control of the company, as well as with regard to any kind of transformation of its legal type, merger, incorporation and split.

74. National Monetary Council's Resolution n. 3.356/06.
75. National Monetary Council's Resolution n. 1.653/89.

9.20. Mortgage Companies

Mortgage companies shall be constituted as "S.A" companies and must contain the term "mortgage company" ("*companhia hipotecária*") in their names[76].

Mortgage companies have the following objectives:

(a) to provide finance for the acquisition, production, reorganisation or trade of residential or commercial real properties and urban lots;

(b) to purchase, sell, refinance and manage mortgaged credit of their own or of third parties;

(c) to manage real property investment funds, provided that the necessary authorisation is obtained from the Securities Commission;

(d) to transfer resources for the financing of the production or acquisition of residential or commercial real properties;

(e) to provide loans and finance for mortgage credit with other objectives as described in item (a) above; and

(f) to manage investment funds (CVM Instruction n. 455/07).

Mortgage companies can be transformed into multiple banks; commercial banks; investment banks; development banks; credit, financing and investment companies; real estate credit societies; leasing companies; stock brokerage companies; securities distribution companies or exchange companies.

9.21. Foreign Financial Institutions

For foreign financial institutions to be able to operate in Brazil, they shall obtain prior authorisation[77].

76. Law n. 6.404/76 and National Monetary Council's Resolutions nos. 2.122/94 and 3.425/06, complemented by CVM Instruction n. 455/07.
77. Article 18 of Law n. 4.595/64.

The 1988 Constitution was passed with the intention of facilitating foreign investment in Brazil. At the same time, however, the Constitution imposed strict restrictions on foreign investment in Brazilian financial institutions.

Any opening of new branches of foreign institutions and any increase in foreign ownership of the capital of existing Brazilian financial institutions[78] shall be vetoed pending the enactment of a Complementary Law, in accordance with Complementary Law n. 192.[79] However, such restriction is not applicable in cases where it is in the best interest of the Brazilian government for authorisation to be granted, or in cases of authorisation deriving from an international treaty.

Nowadays, in order to incorporate a foreign financial institution in Brazil, firstly it is necessary to complete an application form to be submitted to the Central Bank of Brazil's analysis[80]. The Central Bank's recommendation and all the additional information requested by the National Monetary Consul's[81], will be submitted for the deliberation of the National Monetary Council and then to the final decision of the President of the Republic of Brazil, who shall, in turn, issue an Executive Decree[82].

It is important to note that besides all information requested for Brazilian financial institutions, in order to grant an authorisation for its constitution, the foreign financial institution shall provide to the Central Bank of Brazil two copies of the legal document that indicates the nomination of the legal representative of the foreign institution with respective translations duly notarized.

9.22. "Money Laundering"

On 03 March 1998, the Federal Government approved Law n. 9.613, which regulates "money laundering" crimes and createds, under the Ministry of Finance, the Counsel for the Control of Financial Activities (COAF) an agency whose function is to accept, examine and identify suspected occurrences of unlawful activities and to discipline and impose administrative penalties.

78. Article 52 of Transitory Provisions of the Constitution.
79. This wording was brought by Constitutional Amendment n. 40, issued in June 2003.
80. Circular n. 3.317/06
81. "Communiqué" n. 10.844/03, modified by Circular n. 3.317/06.
82. Article 52 of Transitory Provisions of the Constitution.

The purpose of this law is to combat crimes relating to "money laundering" (such as the hiding or camouflaging of the nature, origin, disposition, movement or ownership of assets, rights or amounts) and to detect and punish all and any attempts to legalise the assets generated by such crimes. The law makes it possible to have greater control over these kinds of operations and to enable the Central Bank to maintain a closer view of financial transactions.

The groups subject to the law are those companies or other legal entities whose primary or secondary activity is the acquisition, intermediation or administration of financial resources of third parties in Brazilian or foreign currency; the buying or selling of foreign currency or gold as a financial activity or exchange instrument; and real estate activities.

Also included under the legislation are insurance companies and brokers, banks, stock exchanges and futures markets; users of magnetic cards, or their equivalent, which permit the transfer of funds; companies that deal with foreign exchange, leasing, and factoring; individuals or companies dealing in commercial jewels, gemstones and precious metals, objects of art and antiquities; companies that distribute money, goods, services or their respective discounts by lottery and such like; companies that promote the purchase and/or sale of real state; individuals or companies that deal with luxury and very expensive merchandise; branches or representative offices of a foreign institution that operates with any of the above-mentioned; and any company or institution that depends on authorisation of any financial, exchange, securities or insurance markets' government entities.

All of the above groups are required to identify their clients, maintaining an up-to-date client list and, for a minimum of five years, maintain records of all transactions in Brazilian or foreign currency as well as document of all operations having a value which exceeds a level as determined by a qualified authority.

In addition to the loss of their illegally acquired assets to the State, with the exception to the rights of bona fide third parties or others who may have suffered injury, various levels of penalties have been established for offenders:

(a) warnings for irregularities concerning the identification of the clients and the maintenance of the registry of financial transactions within 24 hours;

(b) fines ranging from one percent to two hundred percent of the value of the operation or the derived profit, or a fine of up to R$ 200,000.00

(fines are levied for negligence in correcting cited deficiencies within a designated period or failure to fulfil the requirement to identify the clients and maintain proper registers);

(c) suspension, to a maximum of ten years, in the exercise of corporate administrative responsibilities (suspension results from cases of severe, verified infractions of the law, or specific and recurring transgressions previously penalised by fines); and

(d) cancellation of activities for the repeated incidence of infractions relating to the above suspension penalty.

In the event that the crime of money laundering is practised abroad, any assets resulting from the contravention of a treaty or conversion enacted by the competent foreign authority will be seized and apportioned between the country and Brazil, again with exception to the rights of bona fide third parties similar to the above.

10. INSURANCE AND REINSURANCE

Decree-Law n. 73, of 21 November 1966 and Decree n. 60.459, of 13 March 1967, govern the National System of Private Insurance and thus regulate insurance and reinsurance transactions. The National System of Private Insurance is composed of: (i) the National Council of Private Insurance (CNSP); (ii) the Superintendence of Private Insurance (SUSEP); (iii) reinsurers; (iv) companies duly authorised to operate with private insurances; and (v) admitted insurance brokers.

CNSP is responsible for the issue of: (i) guidelines and rules governing private insurance and reinsurance policies; (ii) guidelines for insurance rates and for investment by insurance companies; (iii) general guidelines for insurance and reinsurance agreements, and; (iv) general accounting and statistical rules.

SUSEP is a quasi-governmental agency associated with the Ministry of Industry and Commerce. Its headquarters are located in the city of Rio de Janeiro. SUSEP is authorised[83] to act as a regulatory agency monitoring and executing the policies issued by CNSP, and overseeing the constitution, organisation, functioning and operation of insurance companies. SUSEP is also authorised to issue rules and guidelines on insurance transactions based on the policies fixed by CNSP and apply penalties, regulate bonds and oversee the extra-judicial liquidation of insurance companies.

The National Institute of Reinsurance (IRB-Re) is a private and public joint stock company. It was granted a monopoly in the reinsurance market when it was created in 1939. Nevertheless, in August 1996, Constitutional Amendment provided for the lifting of IRB's reinsurance monopoly. Therefore, Complementary Law n. 126 of 15 January 2007, finally extinguished the Brazilian monopoly on reinsurance after more than ten years since the initial steps were taken for opening of the market.

Additionally, Law n. 126/2007 grants considerable regulatory power to CNSP and to SUSEP to determine the new framework/regulation of the market and to supervise it. Furthermore, such law provided us with most of what the reinsurance market is expected to be. The provisions of Complementary Law n. 126/07 are:

83. Article 36 of Decree-Law n. 73/66.

(a) All of the original regulatory and monitoring attributions initially vested to the IRB are now transferred to CNSP and SUSEP.

(b) Reinsurance (defined as the assignment of risks from one assignor to a reinsurer) and retrocession (defined as the assignment of reinsurance risks from reinsurers to other reinsurers or insurance companies established in Brazil) may take place with the following kinds of reinsurers:

(i) a "local reinsurer", defined as being a reinsurance company constituted and organised in Brazil as a company by shares, with the sole purpose of operating with reinsurance and retrocession;

(ii) an "admitted reinsurer", defined as being a company headquartered overseas; with a representative office in Brazil; complying with the applicable rules and registered with SUSEP for operating with reinsurance and retrocession as an "admitted reinsurer"; or

(iii) an "occasional reinsurer", defined as being a company headquartered overseas (provided that they are not located in jurisdictions wihich tax th income tax at a rate lower than 20% or in jurisdictions imposing secrecy as to the identity of their shareholders); without a representative office in Brazil; complying with the applicable rules and registered with SUSEP for operating with reinsurance and retrocession as an "occasional reinsurer".

(c) IRB is a local reinsurer. The Brazilian government may offer to acquire the participation of preferential shareholders of IRB (holding approximately forty percent of the capital of IRB) provided that such shareholders use the totality of the resulting proceeds to acquire shares of other reinsurers located in Brazil.

(d) Local reinsurers are subject, "*mutatis mutandi*", to the rules applicable to local insurance companies.

(e) For reinsurers to be authorized as "admitted reinsurers" or "occasional reinsurer", requirements to be met include:

(i) they must be duly authorised, in accordance with the rules applicable within their home jurisdiction, to underwrite domestic and international reinsurance in the sectors they intend to operate in Brazil and they should have commenced those operations more than five years prior to their application in Brazil;

(ii) their financial and economic capacity must not be lower than the minimum requirement established by CNSP/SUSEP;

(iii) they shall maintain, at least, the minimum rating established by CNSP/SUSEP relative to their capacity to pay risk on claims, such rating to be granted by rating agencies; and

(iv) they shall maintain an attorney-in-fact resident in Brazil with powers to receive service of process and notifications in Brazil.

(f) Additionally, "admitted reinsurers" must, amongst other things, comply with the following requirements:

(i) they shall maintain as collaterals to their operations in Brazil, a minimum deposit in an amount of U.S.$ 5,000,000.00 (five million dollars), or equivalent of other foreign currency freely convertible, for reinsurers operating with all line of businesses and U.S.$ 1,000,000.00 (one million dollars) or equivalent in another foreign currency freely convertible only for reinsurance companies operating with in personal insurance, in a bank account (linked to SUSEP), with a bank authorised to deal with exchange operations in Brazil[84]; and

84. Circular SUSEP n. 359/08.

(ii) provide SUSEP with copies of their balance sheets and financial statements periodically.

(g) Reinsurance relating to life and private pension shall be exclusively carried out through local reinsurers.

(h) From 16 January 2010, after the transitional period of three years, the "local (authorised) reinsurers" will have preference over foreign reinsurers offering the same conditions in relation to forty percent of reinsurance amounts transacted in Brazil.

(i) Insurance, reinsurance and/ or retrocession may be contracted in foreign currency in Brazil, subject to the rules enacted by the National Monetary Council (NMC) and by CNSP.

(j) NMC shall regulate bank accounts maintained in foreign currency to be kept by local insurance and reinsurance companies, by foreign reinsurers registered with SUSEP and by insurance brokers.

(k) Mandatory insurance, as well as non-mandatory insurance contracted by individuals resident in Brazil, or by legal entities located in Brazil, insuring risks located in Brazil, must be contracted in Brazil.

(l) Contracting insurance abroad by Brazilian residents or legal entities headquartered in Brazil are only authorized in the following situations:

(i) when the insurance in question is not available in Brazil and not contrary to the Brazilian legislation;

(ii) when the insurance in question covers risks located abroad for individuals, provided that the insurance is valid only during the period of their stay abroad;

(iii) when the insurance in question is the object of an international agreement ratified by the Brazilian Congress;

(iv) when the insurance was legally contracted prior to 16 January 2007 (enactment of Complementary Law n. 126); and

(v) when the insurance covers the risk located overseas of legal entities located in Brazil.

11. REGULATORY ASPECTS OF THE PETROLEUM INDUSTRY

11.1. The Petroleum Monopoly in Brazil

As they relate to an energy source, the activities of the Petroleum Industry have significant importance to the Brazilian economy, since it enables investments and permit a stable interaction between the State and private initiative.

From the 1990's, relaxations to the economic rules of the country made possible the deregulation of certain sectors and the beginning of the process of privatisation.

Under this model, the responsibility for the execution of the services that were, up to that time, the monopoly of the State exercised only by Petróleo Brasileiro S/A (PETROBRÁS), company constituted in 1953 with the objective of performing the activities of the sector of petroleum in Brazil in the name of the Federal Government, was transferred to private enterprise under the supervision of regulating industries.

In this context of the relaxation on the monopoly in the exploitation, development and production of hydrocarbons, on 09 November 1995, the Constitutional Amendment n. 9 was enacted, permitting the Federal Government to let state or private companies be involved, under the regime of free competition, in activities relating to petroleum and natural gas; therefore the Federal Government no longer acts as the exclusive producer and no longer takes all the risks and profits.

Consequently, on 06 August 1997 was enacted the "Oil Law"[85] was enacted, with the objective of regulating the national energy policy and activities relating to the petroleum industry.

11.2. The Oil Law – Law n. 9.478/97

Law n. 9478/97 regulates the national energy policy and activities related to the monopoly of petroleum and for this the National Board of Energetic Policy (CNPE) and the National Agency of the Petroleum, Natural gas and Biofuel (ANP) were established.

85. Law n. 9.478.

The National Energy Policy is guided by the principles and objectives that structure the legal system for the utilization of the energy sources, which are: (i) to preserve the national interest; (ii) to promote development, extend the labour market and value the energy resources; (iii) to protect the interests of the consumer as to the price, quality and offering of the products; (iv) to protect the environment and promote the conservation of energy; (v) to guarantee the supply of derivatives from petroleum in all of the national territory; (vi) to increase, economically, the utilization of the natural gas; (vii) to identify how electric energy may be supplied to diverse regions of the Country; (viii) to utilize alternative sources of energy, by means of the economic utilization of the raw material available and of the applicable technologies; (ix) to promote free competition; (x) to attract investment in the production of energy; (xi) to extend the competitiveness of the Country in the international market; and (xii) to promote development, on an environmental, social, and economic basis, of the part of biofuels in the national energy matrix.

Activities relating to the monopoly of petroleum, according to the said Law, consist of the activities of research, carving up of deposits, production, importing, exportation, refining, improvement, handling, processing, transport, transference, storage, stock, resale and commercialization of petroleum, its basic derivatives and products, natural and condensed gas, as well as the distribution, resale and commercialization of gas ethylic alcohol, the construction and operation of installations and the equipment relating to the exercises of these activities.

However, the activities mentioned above may be practiced by means of concession or authorization by companies or joint ventures incorporated under Brazilian laws, with headquarters and administration in the Country, preceded by biddings promoted by the National Agency of the Petroleum, Natural gas and Biofuel – ANP.

ANP, under a special regime and linked to the Department of Mines and Energy, was established by the Law 9.478/97 with the purpose of promoting the regulation, the contracting and the inspection of the economic activities of the Industry of Petroleum Industry, as well as Natural Gas and Biofuel.

Consequently, it is incumbent on ANP, as the Supervising and Regulating body, to deal with concessions relating to exploitation, development and produc-

tion, elaborate the notices with an invitation to bid and proceed with the biddings, with the purpose of evaluating the technical and financial capacities of future concessionaires, entering into the respective contracts and inspecting their execution and the Governmental involvement in relation to the referred concessions.

Moreover, besides regulating the activities of the concession, ANP has the responsibility of guaranteeing the supply of the national petroleum market, as well as preventing and restraining conduct violating legislation, and dealing with the contracts and authorizations. ANP's regimental structures are regulated by Law[86].

The National Board of Energy Policy – CNPE, is a body assisting the President of the Republic, created by the law n. 9.478/97, which deals with formulation of policies and energy directives, with its structure and functioning regulated by Law[87].

11.3. Joint Ventures in the Petroleum Industry

The appearance of new players in the exploitation, development and production of hydrocarbons, offered by the Constitutional Amendment n. 09/95 and consequent relaxation of the monopoly led to new contractual instruments being entered into in the petroleum and natural gas industry.

Joint ventures have emerged as an important commercial strategy. The specific legislation of the sector foresees the formation of consortiaums in the national oil-producing industry.

Law n. 9.478/1997[88], permits the involvement of joint ventures in the concessions and sets certain requirements that must be included in the invitation to bid, which are: the parties' undertaking to form the joint venture, and an indication of the lead player that will take responsibility for the joint venture and conduct of the operation.

Individually, the joint venture companies are obliged to present the documents required by the invitation in order to evaluate the technical, economic and financial qualifications of the joint venture.

The concession granted to the winning joint venture is conditional on registration of the applicable agreement, so that the only rights granted are those of exploitation, development and production of hydrocarbons, after the formalization of the joint venture.

86. Decree n. 2455/98.
87. Decree n. 3.520/00.
88. Article 38.

PETROBRÁS and its subsidiaries are authorized by law[89] to form consortiaums with national or foreign companies, aimed at expanding activities, uniting technologies and extending investments applied to the oil-producing industry.

In this respect, PETROBRÁS continues to be the only concessionaire, conferring to the others only the right to a percentage of the profits.

11.4. Governmental Financial Interest in Exploitation of the Petroleum

Article 45 of Law n. 9478/97 deals with the applicable governmental financial interest in the exploitation, development and production relating to petroleum and natural gas. They are: payment of signature bonus, royalties, special percentages and percentages for occupying a particular area.

The criteria for the calculation and collection of the sums due to the government by the concessionaires of those activities are regulated by Law[90] and should be set out in the notice with the invitation to bid and in the contract of concession or authorization.

11.5. Alternative Sources of Fuel – The Biofuel

In the recent years, rising petroleum prices, as well as its scarcity, has led the world to seek alternative sources of energy. In this context alcohol has emerged as one of the main alternative sources.

Alcohol is capable of reducing two significant problems: the greenhouse effect and the scarcity of petroleum.

Brazil has a key role in the production of renewable fuels thanks to a perfect combination of climate, territorial size and plenty of water. However, the government must, in the coming years, encourage investment in technology, science and infrastructure to guarantee an efficient production of alcohol.

It is important to mention, finally, that the Law[91] establishes as an objective of the National Energy Policy, the development, on an environmental, social, and economic basis, of the part of biofuels in the national energy matrix.

89. Article 63 of Law n. 9.478/1997.
90. Decree n. 2.705/98.
91. Clause XII, of Article 1 of Law n. 9.478/97.

12. LABOUR LEGISLATION

12.1. General Considerations

The Brazilian Federal Constitution guarantees, to all workers rendering services in Brazil, a number of specific rights, including: protection against arbitrary dismissal, a nationally uniform minimum wage, unemployment insurance, maternity and paternity leave, and occupational accident insurance. In addition, the Constitution prohibits employment discrimination on the basis of sex, age, colour or marital status.

The primary labour legislation enforcing these rights is Law-Decree 5.452 of 01 May 1943, the Consolidated of Employment Laws (*Consolidação das Leis do Trabalho* – CLT). Enacted during a period when the government strictly regulated employment relationships, the CLT took some autonomy away from the parties involved in employment relations.

12.2. Formation of Labour Agreements

Labour Agreements (employment contracts) can either be in writing or implied from the relationship between the parties. Under Articles 2 and 3 of the CLT, an employer-employee relationship exists (and a labour agreement will be implied if a written agreement does not exist) where one party, who must be a natural person, habitually renders services for payment, and is subordinate to and otherwise under the direction of the other party.

All employees in Brazil must have an employee work and social security booklet (*Carteira de Trabalho e Previdência Social* – CTPS) in which employers are required to register the main characteristics of the employment relationship (including information about the employer, as well as about the employee, for instance: name, position, wages, date of hiring, and responsible Union for the professional category).

12.3. The Labour Agreement

Once the employee has been hired, the employer is legally required to follow labour regulations providing for certain basic employee rights and employer

obligations; these cannot be negotiated between the parties. They include rules relating to minimum wage, holidays, maximum working hours, and the "13th salary".

12.3.1. Minimum Wage

The minimum wage in Brazil from 1st January 2010 is R$ 510.00 (approximately $ 360.00 US dollars[92]) per month. However, the minimum wage can vary depending on the professional category of the employee, as established in Collective Bargaining Agreement or Convention (the so-called *Convenção Coletiva de Trabalho* – CCT)

12.3.2. Working Hours

The Constitution provides for "normal working hours not exceeding eight hours per day and 44 hours per week". For certain categories of employees, however, the normal working hours may be reduced (for example, the regular working period of bank employees may not exceed 6 hours per day). The Constitution also provides that the "rate of pay for overtime [must be] at least 50% higher than that of normal work." Employees are also entitled to a weekly rest of at least 24 hours (generally taken on Sunday).

12.3.3. Holidays

For every 12 months of employment, an employee is entitled to paid holiday (vacation) "with remuneration at least one third higher than the normal salary", which is a constitutional right granted to all employees. Where an employer fails to grant an annual holiday, the employee must be remunerated in an amount double that of the holiday payment owed.

12.3.4. Thirteenth Salary

Employers are required to pay an annual year-end bonus, equal to one month's salary, which is known as the "13th salary". This amount must be paid every year by 20 December.

92. 1 USD = R$1,85 (26 January 2010).

12.3.5. Mandatory Fund for Employment Benefit

Each month, the employer shall deposit an amount corresponding to 8% of the employee's gross salary in a bank account, in the name of the employee (Employee Dismissal Fund – *Fundo de Garantia por Tempo de Serviço* – FGTS). During the employment period, the amounts deposited remain blocked and may only be withdrawn by the employee under circumstances defined by law (including dismissal without cause, retirement, death of one of the parties, expiration of the employment agreement, etc).

12.3.6. Protective Measures for Expectant Mothers

The law grants expectant mothers employment stability from the moment the employer is notified until 6 months after childbirth. The employee also has the right to a remunerated maternity leave of 120 days to be granted during the period closest to childbirth (normally 28 days before childbirth and 92 days after childbirth), extensible to 180 days according to Law n.º 11,770 of 9 September 2008. The employee's remuneration during the pregnancy period is funded by the National Social Security Institute (*Instituto Nacional de Seguridade Social* – INSS), and in case the extension is applicable, the 60 additional days are paid by the Employer. The law also provides for a five-day paid paternity leave.

12.3.7. Profit Sharing

Profit sharing is constitutionally prescribed in Brazil and is regulated by Law 10.101 of 19 December 2000, which provides that collective labour agreements are to define the terms of profit sharing plans.

12.3.8. Social Security

Employers are required to contribute 20% of gross salary to the INSS, an additional 5.8% to cover other social security payments (SESC, SENAC, SESI, SESC, etc.), as well as paying an additional variable tax of between 1% and 3% for occupational accident insurance. In 2009, Decree n. 6,957 allowed the increase or reduction of the rate of such insurance (up to 100%), depending on the company's activities.

The employee must also contribute a variable percentage (between 8% and 11%) of his or her gross monthly salary to the INSS. As of 2010, this contribution applies only to the initial R$ 3,416.54 of an employee's monthly salary; any part of the salary received that exceeds such amount is not subject to the contribution.

12.3.9. Other rights established under Collective Labour Agreement "ACT"s

Additionally, there may be additional obligations of the employer arising under any Collective Labour Agreement (ACT) entered into with the employee's trade union. Such Agreements can create additional rights but cannot restrict rights otherwise legally assured. Each professional category in each region has a different ACT.

Employees have a period of one month stability before the execution of ACT's. If an employee is dismissed during this period, the employer will have to pay the severance package considering the new values established on the ACT.

12.4. Labour Agreement Termination

Employment agreements may be terminated for a number of reasons: termination by the employer with or without cause, resignation by the employee, expiration of the employment agreement, death of one of the parties, extinction of the employer or by mutual consent.

Brazilian Labour legislation also stipulates that the termination of labour contracts in excess of one year must be ratified by the relevant Trade Union or Labour Agency (*Delegacia Regional do Trabalho* – DRT), pursuant to Article 477 of the CLT.

The Trade Union, after analysing the payments being effected, notes the termination of the labour contract in the employee's work and social security booklet (CTPS). If the rescission payments are not made within the stipulated timeframe the employee will be entitled to one month's salary as compensation[93].

Pursuant to this matter, article 447 provides for two different situations: a) when the employee works during the period of the advance notice – the

93. Article 477. "The payment of the instalments shall be made within: a) one working day immediately after the termination of the labour contract; or b) ten days from the dismissal notice, if there was no previous notice; indemnification or its waiver."

payment of the indemnities and past due obligations must be done immediately after the termination of the labour contract, thus, after the period of the advance notice; and b) when the employee does not work during the advance notice – the law determines that the payments shall be made within ten days after the dismissal notice (by the employer or employee). If the employee resigns, the employer may require him to work for one month. In this case, the payment must be done in accordance with item "*a*" above. Notwithstanding, if the employer waives this right, the payment must be made within 10 days.

Depending on how the labour agreement is extinguished, the employee receives different remuneration.

12.4.1. Advance Notice

For agreements of an indeterminate duration, a party wishing to terminate a labour agreement without just cause must provide the other no less than 30 days prior notice. During the notice term, the employee may request to work or he may be immediately released by the employer.

The law provides that if the employer does not provide at least 30 days advance notice, the employee must be paid his or her salary in an amount corresponding to the period of the required notice. Where an employee does not provide such sufficient notice, the employer is entitled to retain an amount corresponding to the period of insufficient notice.

12.4.2. Indemnities for Dismissal

When an employee is terminated without just cause, the employer is required to pay a fine equivalent to 50% of the amount deposited in the FGTS accumulated during the entire employment relationship. 40% will be subsequently released to the employee, whilst the remaining 10% will be retained as taxes. In addition, the employee is entitled to receive any salary owed for work performed; remuneration for unused holiday proportionate to the number of months worked in the prior year; with a remuneration which is at least one third higher than the normal salary, and a "pro rata" share of the 13th salary corresponding to the actual period the employee worked that year. In the above mentioned scenario the employee will be entitled to withdraw the amounts deposited with FGTS and to receive unemployment insurance.

Where an employee resigns or an employment contract expires, the employee is entitled to any salary owed for work performed; pay for unused holiday; and a "pro rata" share of the 13th salary, and of the holidays of the year of the termination, in addition to any other past due right.

If the employee resigns, in which the employee unilaterally submit his/her resignation, which may or may not be accepted by the employer; he/she is required to work for one month as advance notice. If the employee refuses to work during this period, he must pay the employer the amount equivalent to one month of his salary as indemnification of the advance notice. It is also possible for the employer to waive this right. Thus, in any case of resignation by the employee, the employer is not required to pay the advance notice.

In the above scenario, the employee will not receive the 40% penalty over FGTS and will not have the right to withdraw the amounts deposited in his/her FGTS or to receive unemployment insurance. Still in this scenario, the employee will be able to withdraw the deposits of the FGTS account plus interest after 3 years from the termination of the employment contract if during this period he/she is not formally hired as an employee.

Where an employee is terminated with just cause, the employee is only entitled to any salary owed for work performed and pay for unused holiday; the employee is not entitled to the 40% fine of the amount deposited as FGTS, and cannot withdraw the balance of the FGTS deposits. Brazilian law establishes a certain number of situation (employee's grave misconducts) in which it is possible to terminate a labour relationship with just cause.

If an employee who has stability of employment is dismissed without just cause, the employer shall pay, in addition to all these rights, all the salary and rights relating to the whole stability period and, depending on the individual case, the Court may order that the employee be reemployed.

12.5. General Labour Procedural Considerations

Prior to the Constitutional Amendment Number 24/99, courts were presided over by panels of judges at all levels, including the courts of first instance. These courts were comprised of panels of conciliation and judgment, the regional labour courts, and the Superior Labour Court.

Nowadays, however, in terms of this Amendment, courts of first instance are presided over by only one judge and no longer by a panel of judges. Apart

from this, they have jurisdiction over collective and individual labour disputes. Individual disputes are those that relate to questions concerning the interests of individuals, brought before the courts by the employees themselves even if not remunerated against their employers in any nature of questions arising from an individual's professional activity.

On the other hand, collective disputes are those that involve wider interests of a given category of workers and are brought by the respective trade unions in, for example, cases involving strikes. From the enactment of the new Constitution, these (collective) disputes may now be resolved by judgments at arbitration.

Whenever these collective disputes refer to the interpretation of labour rules, they can only be resolved by the judicial branch if both parties agreed to it; otherwise, it shall be resolved by judgments of arbitration[94]. However, it shall be pointed out that there are authors and judicial decisions considering such exigency unconstitutional.

The Compilation of Labour Laws[95] establishes that Commissions of Prior Settlement (*Comissões de Conciliação Prévia*) would be in charge of trying to settle disagreements between employees and employers in order to avoid litigation concerning disputes arising from the employment relationship. Although the aforementioned legal dispositions do not impose the creation of these commissions, there are scholars and judicial decisions stating that this creation is an obligation and that lawsuits may not be brought without a prior attempt to reach a settlement agreement before these commissions.

On the other hand, jurisprudence universally accepts that after the opening of a Commission by an employee, there is no penalty for employers who do not make themselves present at the Commission or do not reply to it.

12.6. Brazilian Labour Law for Hiring Employees to Work Abroad

Law n. 7.064, from 1982, was created to regulate the hiring, in Brazil, of employees to work abroad, as well as the transfer of these employees for rendering

94. According to the amendment to the Brazilian Federal Constitution number 45, published on 30 December 2004.
95. Articles 625-A to 625-H, inserted in Compilation of Labor Laws by Law 9.958/2000, published on 13 January 2000.

any services in another country in the field of engineering services and related activities. (Article 1)[96].

Since then, this law may be applied for any activities and all situations whereby an individual is hired in Brazil to work abroad or is transferred from Brazil to another country.

The law[97] foresees 3 scenarios in which it should be applied: I) if the employee whose employment contract was executed in Brazil is transferred abroad; II) if an employee maintains his employment contract with a Brazilian company and is assigned to work abroad; III) if an employee is hired by a Brazilian company to work abroad.

Moreover, the law provides that the most favourable law shall be applied to the employment contract of employees hired in Brazil to work abroad or employees who were transferred from Brazil to another country.

In order to apply the most favourable law, each right must be analyzed separately (e.g. holidays, advanced notice, etc.) and the employee must be entitled to receive the best between both Brazilian and foreign legislation, as determined in article 3 of referred law, which states:

"Art. 3. The company responsible for the employment contract of the transferred employee, notwithstanding the compliance with the laws of the place where the work is being carried out, shall guarantee the employee:

I- the rights set out in this Law.

II- the application of the Brazilian labour protection legislation, when not incompatible with this Law and more favourable than the legislation of the other jurisdiction considered as a whole and in relation to the individual rights."

This provision was established in order to avoid the employee being harm by the relocation.

96. Article 1 This Law regulates the situation of employees hired in Brazil, or transferred by companies such as engineering services, consultants, works and projects, erections, management and related, to render services abroad.

97. Article 2 For the purposes of this Law, transferred shall comprehend: I -the employee who moves abroad, in a situation in which the employment agreement was being carried in Brazilian territory; II -the employee is assigned to a company with headoffices abroad; and, III -those employees which are hired by a Brazilian company to render services abroad.

The Law also provides that the employer is responsible for the transfer expenses, social security contributions, Mandatory Fund for Employment Benefit (FGTS), annual paid vacations in Brazil (after a period of two years) including her family, the expenses to repatriate the employee to Brazil upon the termination of the respective employment contract and for providing medical and social assistance to the employee.

Additionally, it establishes that the advantages granted to the employee by reason of his relocation may be terminated upon his return to Brazil[98].

Finally, the Law stipulates that an authorization from the Ministry of Labour, via its Immigration Department, must be obtained prior to the hiring of any Brazilian workers in Brazil by foreign companies. Such authorization will only be granted if:

a) the foreign company holds at least 5% of a Brazilian company;

b) the foreign company must guarantee all rights foreseen under Brazilian Labour legislation;

c) all expenses related to the relocation must be fully paid by the employer;

d) the period abroad shall not exceed 3 (three) years, except when annual vacation in Brazil is provided;

e) the employer must repatriate the employee under the termination of the employment contract or under exceptional circumstances regarding his health condition and grave family crisis;

f) the foreign employer must have a legal representative in Brazil with the powers to sue and be sued in Brazil;

g) the foreign and the Brazilian companies shall be jointly responsible for compliance with the obligations under the employment contract.

98. Article 10. Transfer additional, "*in natura*" payments, as well as any other advantages that the employee may be entitled of during the period worked abroad shall not be due after returning to Brazil.

The labour regulations[99] determine that the abovementioned authorization must be filed in Portuguese, together with appropriate documents proving the legal existence of the foreign employer; that the foreign company holds a participation of five percent in a Brazilian company; that a representative in Brazil has been appointed; and an individual employment contract in Portuguese, observing the Law number 7.064 of 1982. Documents in a foreign language must be translated into Portuguese by a sworn translator in Brazil.

Moreover, in the event the employee remains abroad for more than three years, or in cases of renewal of the employment contract, the employer will have to request an extension of the authorization, submitting various documents demonstrating that the Law has been observed.

99. Administrative Ruling number 21/2006 from the Ministry of Labour and Employment.

13. CONSUMER PROTECTION LEGISLATION

13.1. General Considerations

The Federal Constitution[100] sets out that the Government shall provide "for the defence of the consumer." As a consequence, the Consumer Defence Code[101] (*Código de Defesa do Consumidor* – CDC), was enacted to govern consumer protection. The CDC articulates a national consumer protection policy that is based on the recognition of the vulnerability of the consumer in the consumer market, and seeks to restrict abusive practises in the consumer market and improve product and service quality while not prejudicing the economic and technological development of the country. By virtue of the same reasoning[102], consumers are entitled to:

(i) life and health protection, regarding consumer relations;

(ii) acknowledgement on products and services;

(iii) protection against misleading or abusive advertisements;

(iv) contractual guarantees;

(v) compensation on damages;

(vi) access to justice and administrative specialized entities;

(vii) facilitated defence of their rights; and

(viii) good quality public services.

The CDC protects consumers by defining basic consumer rights and the obligations of commercial suppliers and by providing for supplier liability and other appropriate sanctions.

100. Article 5º, section XXXII.
101. Law n. 8.078 of 11 September 1990, as regulated by Decree n. 861 of 09 July 1993.
102. Please see Article 6 of CDC.

Some important concepts are given by the CDC, such as "consumer" which is defined[103] as "the natural person or legal entity that buys or uses products or services as the final user". The expression "final user" means that the product or service must be used exclusively by the consumer, and not replaced in the production chain. The consumer concept could also be matched to a whole affected by a product or service.

Furthermore, CDC defines[104] "supplier" as "the person or legal entity, private or public, domestic or foreign, as well as unincorporated organization, which perform the activities of production, assembly, creation, construction, transformation, importation, exportation, distribution or commercialisation of products or services". This law also defines "product" as "any asset, movable or immovable, material or immaterial" and "service" as "any activity provided in the consumer market, by remuneration, including banking, financial, credit and insurance services, with the exception of labour relations".

The concepts of consumer and supplier are broadly defined in order to ensure that the CDC is applicable whenever there is a transaction with an apparent supplier on one side and a consumer on the other.

In this sense, after a long litigation, the Brazilian Supreme Court[105] defined that CDC is applicable to banks and financial institutions.

13.2. Main Aspects of the CDC

In order to provide the consumer protection envisaged by legislation, the CDC established norms already foreseen by Brazilian Courts in the judgement of cases involving consumer relations. Among such norms it is important to note:

(a) Reversal of the burden of proof – by the criteria of the Courts, whenever the consumer is deemed the weaker party, or has shown its allegations to be reasonable, the Courts may invert the burden of proof, transferring to the supplier the obligation to prove that the facts alleged by consumer did not occur, or occurred differently than claimed;

103. Article 2 of CDC.
104. Article 3 of CDC.
105. See judgment of the Direct Claim of Unconstitutionality (*Ação Direta de Inconstitucionalidade – ADIN*) n. 2591.

(b) Strict liability of the supplier – consisting in the liability of the product or service supplier for the repair of the damages caused to consumers by the product or service provided, regardless of fault. The only defences available are the non introduction of the product or service into the market, the non existence of the defect claimed or the complete fault of the consumer;

(c) Subsidiary liability of the seller – consisting in the possibility of holding the seller directly liable whenever the identification of the product supplier is not possible; whenever the product is sold without precise identification of the supplier; or whenever the merchant does not keep perishable products adequately stored;

(d) Disregard of legal entity – the possibility of holding the administrators and shareholders directly responsible by ignoring the legal personality of the relevant company, whenever damages are caused due to abuse of rights, illicit acts or facts, or violation of the bylaws of the company whose legal entity may be disregarded;

(e) Contractual protection – the prohibition and restriction of clauses or contractual practices considered to be abusive to consumers. Abusive clauses or practises are deemed null by the CDC, including the prohibition of any clause which prejudices consumers. In this sense, Law n. 11.785 of 22 September 2008 amended article 54, paragraph 3º, in order to establish a minimum size to the font of the contracts text in order to improve the comprehension of the contract terms by the consumer;

(f) Access to data bases and credit reports – granting access to consumers to their own data bases and credit reports for the purpose of analysing and revising their personal or credit data. If wrong information is held, the consumer has the right to amend it;

(g) Protection from false or misleading advertising – the CDC prohibits false or misleading advertising and provides for fines, impris-

onment and corrective advertising in the same media used by the transgressor; and

(h) Broad liability for infractions – administrative and criminal liability for determined infractions as foreseen in the CDC, without prejudice to applicable civil liability.

13.3. Consumer Defence Organisations

Supplemental to the possibility of individual claims before the Courts, legislation envisaged and established class actions that may be brought concurrently by the Public Ministry, the Federative Union, the States, Federal District and Municipalities, by public consumer defence agencies and civil associations for consumer defence.

The consumer defence agencies include the:

(a) National Department of Consumer Defence reporting to Ministry of Justice (*Departamento de Proteção e Defesa do Consumidor* – DPDC);

(b) Consumer "Police" (*Defesa do Consumidor* – DECON);

(c) Local Consumer Advice and Protection Agencies (*Proteção e Defesa do Consumidor* – PROCON); and

(e) Institute of Weights and Measures (*Instituto de Pesos e Medidas* – IPEM).

Finally, it is necessary to emphasise that the protective measures adopted by the entities above-mentioned include steep fines and indemnities against suppliers that do not comply with the norms set out in the CDC.

14. SPORTS LAW IN BRAZIL

14.1. Introduction

Sport has always intersected with other disciplines, including Law. Indeed, since sport cannot exist without rules and regulations, in a sense sport has its origins in the Law. Today, however, Law has become more important to sport than ever before.

There are few areas of human activity subject to more legislation than sport. There are the "rules of the game", "sporting codes of justice", "technical rules of competition", "player transfer laws", "statutes of sporting entities", "fair-play discipline" and "medical regulation". Without rules, regulations and laws, sport would be chaotic and disorderly.

Due to the great importance of football (soccer) to Brazilian history, culture and society, much of Brazilian sports law is focused on that sport. In Brazil, as in the rest of the world, football is in a state of transformation, transcending its traditional role as a competitive sport and cultural event, and assuming an ever-increasing commercial position. Football has become a US$ 280 billion dollar a year global industry – involving leagues, clubs (teams), owners, players, agents and attorneys; licensing agreements and player contracts; broadcasts of individual games, as well as television shows and networks devoted to football; advertising; manufacturing of football equipment, merchandise, and memorabilia; and stadia and arenas and their concessionaires – all aimed at, and fuelled by, the millions of devoted fans worldwide.

Brazil has more football players than any other country in the world. It also has one of the ten largest economies in the world. Despite this, Brazil accounts for only about 1% of the total amount generated by football.

14.2. Period Prior to the Federal Constitution of 1988

Football was first brought to Brazil in the second half of the nineteenth century by a young Brazilian called Charles Miller when he returned to Brazil after completing his education in England. The first official football match was

played in 1894, but professional football was only introduced in 1933. At that time, however, there was essentially no legislation regulating sports in Brazil.

During the regime of President Getúlio Vargas, it was enacted the first legislation governing sports in Brazil[106] was enacted, which was a copy of Italian legislation in effect at the time and reflected an authoritarian regime. The legislation contained strict directives regarding the organisation and administration of sports entities (professional leagues, federations and clubs). Some years later, Law n. 6.251/1975 was enacted, but did little to change the system.

In 1976, Law n. 6.354 was enacted. This new Law governed the labour relations of professional football players. This legislation covered a number of important subjects, including:

(i) the concepts of employer and employee, within the context of the game as they effect football;

(ii) the contents of the labour contract between an athlete and a club; the conditions that allow a breach of contract for good cause; the conditions under which a club may apply penalties, pecuniary or not, to an athlete; the conditions under which an athlete may refuse to play if his salary is delayed; provision for automatic suspensions of a club which delays an athlete's salary for a period of three months or more;

(iii) the age limit at which a professional athlete may sign a contract;

(iv) the weekly and daily working hours; the annual holiday period;

(v) the conditions to assign and/or transfer an athlete and the athlete's rights when there is a transfer; and

(vi) the "*passe*", a legal bond which connected an athlete to a club even after the termination of the labour contract.

The new legislation further provided that the Labour Courts would only be competent to decide upon labour disputes between professional athletes and

106. Decree Law n. 3.199/1941.

clubs after a final pronouncement from the Brazilian Sports Courts: "Claims will only be admitted to the Labour Court after exhaustion of all appeals to the Sports Courts, which will pronounce a final decision no later than 60 (sixty) days from the commencement of the proceeding.[107]". Although many of the rules provided by Law n. 6.354/1976 have been replaced by subsequent legislation, numerous Articles remain in full force.

14.3. Federal Constitution of 1988

After a new Federal Constitution was adopted in 1988, Brazilian sports entered a new era. For the first time, sports were addressed in Brazilian constitutional legislation, as below:

(i) Freedom of association for lawful purposes[108], except paramilitary[109];

(ii) Creation of sports entities (professional leagues, confederations, federations, clubs) without governmental approval or authorisation, and prohibits State interference in the functioning of associations, provided they engage solely in lawful activities approved in their Articles of Association[110];

(iii) Protection of the human image and voice in sports activities[111];

(iv) The Federal Government, the States and the Federal District share legislative authority over sports[112];

(v) It is a governmental obligation to foster the practice of formal and informal sports, with due regard for: (a) the autonomy of sports entities in their management, organisation and operation; (b) a priority in the allocation of public funds to educational sports and, in

107. Article 29, Law n. 6.354/1976.
108. In Brazil the majority of clubs are still non-profit associations (as opposed to most European Union countries, where clubs are private, for-profit companies).
109. Article 5, XVII, of Brazilian Federal Constitution.
110. Article 5, XVIII, of Brazilian Federal Constitution.
111. Article 5, XXVIII, of Brazilian Federal Constitution.
112. Article 24, IX, of Brazilian Federal Constitution.

specific cases, to high profit sports; (c) the different treatment to be accorded to professional and non-professional sports; and (d) the protection and support of national sports activities[113];

(vi) The Judiciary Branch will consider actions related to sports discipline and competitions only after exhaustion of appeals to the Brazilian Sports Courts, as regulated by law[114];

(vii) The Brazilian Sports Courts will have a maximum of 60 (sixty) days after the filing of a suit to issue a final decision[115]; and

(viii) The government must encourage leisure for the social good[116].

14.4. Brazilian Sports Justice Code (CBJD)

The Brazilian Sports Justice Code (CBJD) was enacted by the Sports Minister and the National Sport Council through the Resolution CNE n. 1, of 24 December 2003, last amended by Resolution CNE n. 29, of 10 December 2009.

Legal sport issues connected to disciplinary infractions and sports competitions that may arise in Brazil shall not be initially judged by Common Courts, but rather by the Sports Justice Court and/or the Supreme Sports Justice Court, where the judges are especially trained in Sports Law. However, all decisions issued by the Brazilian Sports Courts may also be subject to the appreciation of a Brazilian Common Courts, due to a Constitutional provision.

All entities related to the practice of sports in Brazil are demanded to comply with the CBJD, including athletes, arbitrators, clubs etc. The CBJD establishes specific rules regarding the organization, functioning and attributions of the Brazilian Sports Judiciary system, as well as the special procure rules for the cases submitted for appreciation by the Brazilian Sports Courts.

113. Article 217, of Brazilian Federal Constitution.
114. Article 217, paragraph 1, of Brazilian Federal Constitution.
115. Article 217, paragraph 2, of Brazilian Federal Constitution.
116. Article 217, paragraph 3, of Brazilian Federal Constitution.

14.5. Subsequent Legislation: Law Zico, Law Pelé and Current Sports Law

The sports-related provisions of the Constitution led to the enactment of laws governing professional sports. In 1993, the first of these laws, Law n. 8.672, known as Law Zico, was enacted. In 1998, Law Zico was revoked by Law n. 9.615, known as Law Pelé.

From the time of its enactment until the present date, Law Pelé has been amended a number of times; the following analysis focuses on the current state of the law, as amended by Law n. 10.672, of 15 May 2003, which was the government's response to problems of mismanagement and corruption which had plagued professional football in Brazil. The law implemented reforms making football associations and clubs more financially and administratively transparent and holding their management more accountable.

One of the most relevant innovations introduced by these laws, which also proved to be some of the most controversial, deals with the contractual relationship between athletes and clubs and with the financial management of the various entities involved in professional football (leagues, federations, confederations and clubs).

Additionally, professional sports entities in Brazil, although founded on freedom of association and self-regulation, became part of the Brazilian cultural heritage and are currently organised in the social interest. This provided the public prosecutor's office with legal grounds to intervene (where necessary) in the affairs of leagues, federations and clubs since it is the legal responsibility of that office to defend Brazilian cultural heritage and social interests.

In order to provide for increased financial accountability, Law n. 10.672/2003 established that:

(i) professional leagues, federations and clubs (regardless of their legal structure) are considered commercial corporations for financial and administrative purposes (including tax, social security and accounting purposes);

(ii) all leagues, federations and clubs involved in professional sports competitions (regardless of their legal structure), are required to publish independently audited financial statements (for the annual period ending on the last business day in April);

(iii) if a member of the management of a professional league, federation or club unduly appropriates any of the entity's assets (or benefits) for his or her own personal use (or for the use of third parties), those assets and/or benefits shall be recovered; and

(iv) any members of the management of a professional league, federation or club who violate the laws governing sports entities may not, for a period of 5 years, be elected or appointed to any office at any entity or corporation directly or indirectly related to professional sports. In addition, administrative, criminal and civil penalties may also be applied.

The law governing the relationship between an athlete and a club was significantly changed by the new legislation, by determining that the relationship is purely contractual and is concluded when the contract expires or is terminated. The parties to the contract can freely negotiate its terms (subject to certain limitations), including with provisions for a penalty" that must be paid where the contact is prematurely terminated by one of the parties.

Although the value of a penalty clause can be negotiated between the contracting parties, such a payment is limited to one hundred times the amount of the annual compensation provided for in the contract. Further, an automatic reduction of the penalty amount must be made for each year the contract is in effect. The reduction is as follows:

(i) 10% after the first year;

(ii) 20% after the second year;

(iii) 40% after the third year; and

(iv) 80% after the fourth year.

In case of an international transfer of a professional athlete, however, a penalty clause expressly included in the athlete's contract shall not be subject to any limitation.

In order to protect professional athletes from exploitation by agents, the Law limits to a period of one year or less: (i) the term of a power-of-attorney relating to a professional athlete's contract, or (ii) the term of a contract licensing the rights to a professional athlete's image.

The non-professional athlete in development, between fourteen and twenty years of age, can receive financial assistance from a club in the form of a scholarship (freely established by a formal contract) without creating an employer-employee relationship between the parties.

A club which discovers and develops an athlete (including through provision of a scholarship) shall have the right to hire that athlete, when the athlete reaches sixteen years, through a professional contract for a period of not more than five years. A club that develops an athlete and enters into an initial agreement with such athlete shall also have a priority in the first renewal of the contract, which may not be signed for a period longer than 2 years. In other words, the athlete will be able to enter into a contract with a new club only if the proposal made is (financially) better than that offered by the athlete's initial club.

Any club that provides financial support for the development of a non-professional athlete under twenty years of age is entitled to recover those costs if, without its express authorisation, the athlete participates in a sports competition representing another club.

The development costs shall be reimbursed by the sports entity for which the athlete appeared, according to the following values:

(i) 15 times the annual scholarship value effectively paid if the non-professional athlete is between 16 and 17 years of age;

(ii) 20 times the annual scholarship value effectively paid if the non-professional athlete is between 17 and 18 years of age;

(iii) 30 times the annual scholarship value effectively paid if the non-professional athlete is between 18 and 19 years of age; and

(iv) 40 times the annual scholarship value effectively paid if the non-professional athlete is between 19 and 20 years of age.

Companies which obtain the concession, permission or authorisation to broadcast (including by cable television) the sounds and images of a sports competition are forbidden from exhibiting any brand, logo or other mark on the uniforms used in the competition.

Finally, Brazilian Law establishes that the organisation, functioning and attributes of the Brazilian Sports Courts (whose authority is limited to sports competitions and disciplinary infractions) shall be defined in CBJB, making it possible for leagues to create their own decision-making bodies with jurisdiction restricted to their own competitions.

After the hereinabove commented significant Amendment to the Law Pelé, only a few modifications or innovations were made. The main innovations are: Decree n. 5.139 of 12 July 2004 which regulates the application of financial resources[117] and also Law n. 11.118 of 19 May 2005[118].

Decree n. 5.139/2004 regulates the annual destination of total net income of one of the Federal Sports Lottery to the Brazilian Olympic Committee (COB) and to the Brazilian Paralympics Committee (CPB) and the destination of net income of two Lotteries in years of Olympics and Paralympics Games. The main changes introduced by such Decree n. were the following: the application of the financial resources to the COB and that the CPB should obey the principles of the Brazilian Federal Constitution; the resources shall be managed by the Committees or by the incorporated entities through bid proceedings; and such financial resources shall be applied in supporting, development and maintenance sports programs and projects, human resources, technical preparation, subsistence and transportation of the athletes and participation in sports events.

Pursuant to Law Pelé[119], 2% of the financial resources collected from the Federal Lotteries and other sources of Lotteries shall be used to promote sporting activities both formal and informal. In its turn, Decree n. 5.139/2004 determines that 10% of these resources should be invested in high school sports and 5% in college sports.

Other amendment to the Law Pelé was performed by Law n. 11.118/2005, which established that the sports entities' right to withdraw the funds mentioned in item III of Article 8 of Law 9.615/1998 shall perish in 90 days from the date of its release, otherwise they shall be transferred to the

117. According to Article 9 and Article 56, IV of the Law Pelé.
118. Which added paragraphs to the Article 10 of Law Pelé.
119. Article 56, IV of Law Pelé.

Ministry of Sport for use in programs concerning the national policy for the promotion and development of sport. In general, the law has the intention of promoting, supporting and developing sports practice programs.

14.6. Fan's Statute

Rules of consumer protection are the object of Law n. 10.671/2003, which had as main goal the protection of fans and to, once again, assure them of the transparency of competitions.

Leagues, federations and clubs must abide by legal regulations and established rules. In order to ensure this, for each competition, the competition's complete rules and schedule, the list of referees, the name and contact information of an ombudsman for the competition, a list of fans prohibited from attending local sports events, and a written report of the match must be published in the media.

It is the right of the fans that the competition's rules and schedules, as well as the name and contact information for the competition's ombudsman be published 60 days before the beginning of the competition.

No changes in any competition's rules may be made after the rules' definitive publishing, unless the publishing of a new annual calendar of official events for the following year is approved by the National Council of Sports or after two years of competition under the rules.

Additionally, participation of clubs in competitions organised by federations or leagues shall be based exclusively on their respective place in the last competition or championship or in a regular tournament with more than one division.

Fans also have the right of security in the places where sports events take place (inside stadia or arenas), before, during and after competitions. On 13 March 2009 Decree n. 6765 was enacted in order to regulate the presentation of safety technical reports regarding the use of arenas or stadiums on competitions.

Federations or leagues responsible for organising a competition (and their management), shall be jointly responsible with the clubs involved (and their management), independently of the existence of guilt (strict liability), for any loss caused to a fan because of a security failure in a stadium or arena.

14.7. Athlete's Scholarships

In order to encourage the sports practice and the development of Brazilian athletes, the Brazilian government passed Law n. 10.891 of 09 July 2004, which created Athlete's Scholarships.

These scholarships are designated for the athletes participating in the Olympics or Paralympics. The athletes should have a minimum age of 14 years for the National Athlete's Scholarship and a minimum of 12 and no more than 16 years old to be able to receive a Student Athlete's Scholarship. In this case, they will have to be registered in either a public or a private school.

In the Student's category, the athletes who are highlighted, according to the legal parameters, may receive the scholarship. The parameters are: to receive first, second or third place in the individual competitions or being selected amongst the best 24 athletes in group competitions.

In the National Athlete's category, the athlete should finish in first, second or third place on a national event or be in first, second or third place in the national ranking of that discipline.

In the International Athlete's category, the athlete that is part of the national team in that modality, representing the country in South American, Pan American, Parapan American, or Worldwide competitions and who comes in first, second or third place, may receive the scholarship.

And finally, in the Olympic or Paralympics' category, the athlete should be part of a Brazilian delegation in the Olympics or Paralympics Games. The scholarship is given for a period of one year, and if the athlete achieves medals in the Olympics or Paralympics Games, it may be extended.

To receive the Athlete's Scholarship, the athletes cannot have any source of sponsorship; neither receive any pecuniary amount for a payment of any kind. They should be in a full time sport activity routine and bound to a sports practice entity.

In this manner, Brazilian Sports Law seeks to favour the young athletes' access to competitions, supporting practice of sport through scholarships, creating educational and athlete-development programs.

14.8. National Commission of Prevention of Violence and Security in Sports Events

Decree n. 4.960 of 19 January 2004 created the National Commission for the Prevention of Violence and Security at Sports Events (CONSEGUE), in

order to improve security in sports practices environments, and also to focus on promoting the modernization of the promotion of sports events in general in Brazil. With this objective, and pursuant to the provisions of the Fans' Statute, this Commission seeks to create a national policy for prevention of violence and security at sports events, establishing partnerships and conventions with several public and private organizations.

14.9. Tax Benefits

In order to support the individuals and legal entities in sponsoring or donating money to sports and para-sports projects, the Brazilian Government enacted, on 26 December 2006, Law n. 11.438, which establishes certain benefits and incentives for individuals and legal entities promoting and supporting sports activities and projects up to the year 2015.

14.10. FIFA World Cup in Brazil – 2014

The World Cup, the second largest sporting event on Earth, was created by the Frenchman Jules Rimet in 1928, while he was in charge of the most important football institution named *Fédération Internationale de Football Association* (FIFA).

Brazil is known as the "land of football" being the only country to have participated in every World Cup that took place until today and amassing the largest number of titles ever. Therefore, the election of Brazil to for hosting the event in 2014 created great expectations. As a result of its election as the World Cup host country, Brazil will also host the Confederations Cup in 2013.

For the second time since 1950, the World Cup will take place in Brazil, and the following twelve cities have been chosen to host the games: Belo Horizonte/MG, Brasilia/DF, Cuiabá/MT, Curitiba/PR, Fortaleza/CE, Manaus/AM, Natal/RN, Porto Alegre/RS, Recife/PE, Rio de Janeiro/RJ, Salvador/BA and Sao Paulo/SP.

The Brazilian Sports Ministry is directly linked to the Presidency and addresses all sports-related matters, including relating to football and the World Cup. On 14 January 2010, the Brazilian Government has also formed the FIFA 2014 World Cup Administration Committee (Administration Committee),

which has as purpose the definition, approval and inspection of all activities addressed by the Brazilian Government Strategic Plan for the World Cup, and is formed by several governmental bodies. The Administration Committee is coordinated by the Ministry of Sports.

Another relevant entity in this regard is the Brazilian Football Confederation (CBF), which is a civil association under private law constituted by the entities of soccer management (federations) and by the soccer teams (clubs).

To host the event, Brazil has agreed to a series of FIFA demands of an operational and legal nature, such as: (i) to provide for hospitals and parking lots nearby the stadiums, (ii) the host cities must have a hotel chain fully capable of assisting the estimated demand of people for the games, (iii) the public transportation system must be fully capable of attending not only the visitors in the host city, but also connecting to other host cities, (iv) the ports and airports must be modernized and expanded, (v) to facilitate the entry and exit of foreigners, workers or tourists; (vi) to relax foreign exchange and banking rules in order to facilitate the flow of funds and reduce the bureaucracy in customs procedures (importation and exportation).

The stadiums that require renovation or which shall be built, should initiate construction work by 3 June 2010[120], having as deadline for completion 31 December 2012. In case these deadlines are not fulfilled, the World Cup may be transferred to another country. CBF has published guidelines regarding the renovation of the stadiums, stating that the reforms of private stadiums, such as Morumbi Stadium in São Paulo, are under the responsibility of their owners, whilst public stadiums such as Maracanã in Rio de Janeiro and Mineirão in Belo Horizonte shall be paid through Public Private Partnerships (PPP).

FIFA has also demanded tax relief, such as the following: (i) exemption of taxes on the importation of certain goods and commodities, which are related to the taxes IPI, PIS, COFINS, ICMP, etc.; (ii) exemption of taxes on sale; (iii) exemption to FIFA from income taxation (IR), as well as for its subsidiaries and its official sponsors; (iv) exemption of income taxation (IR) for football confederations that are participants of the event; (v) exemption to FIFA from social security contributions that should be paid by employers; (vi) exemption of IOF

120. The initial deadline was 1 January 2010, but it was extended by the Local 2014 World Cup Organizing Committee (COL).

for financial transactions, exchange and insurance that are related to the event. In order to comply with the requirements of FIFA, the federal and state governments are enacting appropriate legislation.

At the federal level, the Bill of Law n. 5310/2009, which deals with special compensation for federal tax debts, has already been submitted to the National Congress for appreciation. The proposed Law determines the establishment of tax credits regarding to the investments to be made by private resources, through Specific Purpose Entities (SPE), for the construction, modernization and renovation of the stadiums chosen to host the World Cup matches. The credits shall be offset against any tax debts arising from federal taxes and contributions, particularly those established by the Law n. 11345/2006, the assignment of credits being forbidden.

Also due to the tax relief, the Federal Government should send a Bill of Law to the National Congress in order to concede exemptions of federal taxes for companies that have contracts with FIFA or its affiliated institutions, in order to relieve essential products and services such as hotels, transport equipment and media from taxes for the World Cup of 2014. The project further aims to limit the taxation on tickets to the games on 10% of their sale value. For the purpose of these beneifits, FIFA shall present Brazilian Federal Tax Authority with a list of the foreign or Brazilian companies and its products, which may be admitted after incorporating a SPE.

Another Bill of Law, numbered 394/2009, is under analysis at the Brazilian Senate, aiming to regulate the use of advertisement spaces, flags, anthems, trademarks, logos and symbols owned by FIFA, national teams and/or athletes, and which are related to 2014 FIFA World Cup or 2013 Confederations Cup. The rules of this Bill of Law eestablish the exclusive ownership by FIFA of all rights related to the referred sports events, including all media rights, marketing, licenses and tickets. However, all rights related to the national teams or athletes are secured to themselves.

At state level, the Brazilian States are also organizing themselves to grant tax benefits for the activities related to the World Cup. The National Council of Tax Policies (CONFAZ) has entered into agreements with each State for the purpose of establishing the rules on tax exemption at State level.

Such agreements allow States to grant tax exemptions on ICMS in operations involving goods for the construction, extension, renovation or upgrading of the stadiums to be used at the World Cup of 2014. The exemption may include the ICMS tax on the importation of goods, when no other similar product is

manufactured in Brazil. Another lot of agreements signed with CONFAZ determined the exemption of ICMS on the transactions and services provided by or to FIFA, including importations, whereas in order to provide for the competitions of the Confederations Cup in 2013 or the World Cup in 2014 and established a Special Customs Temporary Admission system. However, such tax benefits will only be applicable on transactions that are also exempt from federal taxes, such as II, IPI, PIS/PASEP and COFINS.

Some States have also enacted Laws granting tax benefits for FIFA`s events other then the ones related to ICMS, as follows:

- Mato Grosso – State Law n. 9165/2009;
- Rio Grande do Sul – Decree n. 46.029/2008;
- Minas Gerais – Law n. 18.310/2009;
- Pernambuco – Law n. 13.802/2009;
- Ceará – Law n. 14.305/2009; and
- São Paulo – Decree n. 55.634/2010.

There are also legislative initiatives promoted by Municipal authorities for the exemption of municipal taxes, mostly regarding ISS, resulting from services rendered for the World Cup, or even for the Olympic and Paralympic Games, such as is the case of the legislation enacted by the Municipalities of São Paulo[121], Belo Horizonte, Porto Alegre, Recife and Salvador.

Besides to the tax initiatives, the Government is providing for further regulations to attend FIFA´s requirements. The Sports Ministry shall forward to the National Congress the Bill for a World Cup´s General Law that, among other things, shall establish rules to protect trademarks, the rights of companies and minimize the risks of fraud, as determined by FIFA.

14.11. Olympics and Paralympics Games – Rio de Janeiro, 2016

Rio de Janeiro, capital of the State of Rio de Janeiro, was chosen to host the Summer Olympics and the Paralympics Summer Games such events in

121. Law n. 14.863/2008 of the Municipality of São Paulo.

2016. However, the football tournament within the Olympics Games will also be held in the cities of Salvador/BA, Brasília/DF, Belo Horizonte/MG and São Paulo/SP.

On 12 May 2010, the Brazilian Government created the Olympic Public Authority, which is a public consortia formed by the Federal Government, the State of Rio de Janeiro and the Municipality of Rio de Janeiro with the purpose of coordinating the public services, the implementation and the delivery of the necessary infrastructure for the organization and realization of the Olympics Games. On the other hand, an Organizing Committee was established to carry out all execution activities necessary for such sports event (*Comitê Rio 2016*).

In order to secure Rio de Janeiro application as host city of the 2016 Olympics Games, Law n. 12.035/2009 was enacted, establishing the Olympic Act and special rules regarding the 2016 Olympics. As per such Law, foreigners linked to the achievement of Rio 2016 Games are not required to apply for visas, being secured their entry in the country by the presentation of a valid passport, an identity card and Olympics credentials.

Under the mentioned Law, IOC may require the suspension of agreements regarding advertising spaces at airports or in federal interest areas, during the period from 5 July to 26 September 2016, for its exclusive use, or for companies or sponsor entities or for the official employees of the IOC and the Organizing Committee, if related to the Olympics Games.

Law 12.035/2009 further assures the availability of the entire frequency spectrum of radio and television signals necessary for the organization and the achievement of the Olympics Games, in benefit of institutions and individuals listed, whose use is exempt from payment of fees, during the period mentioned above.

Decree n. 7033/2009 was enacted on 15 December 2009 in order to regulate the publishing of all data and information related to the Olympics Games on the Full Disclosure Website of the Federal Government. Therefore, agencies and organizations that manage resources and properties regarding the Olympics Games, including the sponsorship, tax incentives, subsidies, grants and loans, must provide full disclosure of all data and information.

As regards tax issues, the Olympics Games are a good opportunity to benefit from the tax special regime determined by Law n. 11.438/2006, known as the Law for the Encouragement of Sport, and also associate its brands to the performance of Brazilian athletes.

Indeed, Law 11.438/2006 regulates tax incentives to encourage sports activities, for the period from 2007 to 2015, allowing the deduction of income tax for individuals, up to 6% per period of assessment, and companies to the legal limit of 1% per period, of the amounts spent with sponsorship or donation, to support the right projects and sports or para-sports. However, funds from the tax incentive may not be used to pay professional athletes.

The State of Rio de Janeiro has enacted Law 13.987/2010 for the establishment of general rules for the execution of the 2016 Olympic Games ion the city of Rio de Janeiro. Also, the City of Rio de Janeiro has enacted Decree n. 31.182/2009, which created the "Rio Business Office" with powers to identify and articulate investment opportunities in Rio de Janeiro, providing assistance to investors and supporting international missions in Brazil and abroad.

In addition to the above mentioned Law and Decrees in force, there are other Bills of Laws in discussions at the National Congress that may affect the Olympics Games. This is the case of Bill of Law n. 6.364/2009, which regulates the adoption of environmentally sustainable measures related to the infrastructure investments that are necessary to comply with the Olympics Games needs.

Regarding tax matters, the Bill of Law n. 40/2007 provides the exemption from importation fees for special equipment used for sports activities, as per authorization by the Brazilian Olympic Committee. At State level, the Bill of Law n. 2.636/2009 was submitted for the appreciation by the State Assembly intending to regulate tax relief programs for companies located in Rio de Janeiro, which invest in the training of athletes aiming at the 2016 Olympics.

At the date of the drafting of this Legal Guide these were the most relevant Laws in force and Bills in discussion in Brazil. Since the activities related to Sports events that shall take place in Brazil in the next years, namely the World Cup in 2014 and the Olympics Games in 2016, are continually developing, new Laws may be enacted during the next years. Therefore, an updated analysis of these issues may be necessary to fully comprehend the then current legislation in force.

15. COMMERCIAL DEFENCE IN BRAZIL

15.1. Introduction

Commercial defences (antidumping, safeguard and countervailing measures) are important for hindering illicit commercial practices committed by exporting parties or companies, although developed countries commonly use them in a distorted way.

Ever since the World Trade Organisation (WTO) was created in 1995, the number of commercial defence cases has multiplied, particularly antidumping cases, not only in developed countries, their traditional users, but now also being used by developing countries, such as Argentina, Brazil, China, India and Mexico. Nowadays, it is rare to find a successful exporting company that does not face, directly or indirectly, a commercial defence situation in its international markets.

Even in the ambit of the WTO's Dispute Resolution System the most common trade conflict is the so-called commercial defence, particularly antidumping and countervailing measures for subsidies.

Commercial Defence themes are regulated in three specific agreements of the WTO: the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, dealing with antidumping rules aimed at preventing national producers from suffering losses from importing at dumping prices; the Agreement on Subsidies and Countervailing Measures, dealing with the legal instruments available to compensate subsidies that are directly or indirectly granted and, lastly, the Agreement on Safeguards, which is aimed at temporarily increasing the protection of a domestic industry.

In Brazil, Decree n. 1.355 of 30 December 1994, determined the adoption of the agreements signed by the end of the Uruguay Round by the Brazilian Legal System. Therefore, the administrative procedure that regulates the application of antidumping measures is regulated by Decree no. 1.602 of 23 August 1995. In the same way, Decree n. 1.751 of 19 December 1995, provides the rules for the application of countervailing measures, and finally, Decree n. 1.488 of 11 May 1995, deals with the application of safeguard measures.

The Chamber of Foreign Trade – CAMEX, the Secretariat of Foreign Trade – SECEX, and the Department of Commercial Defence – DECOM, are the Brazilian government bodies directly involved with Commercial Defence procedures. All these bodies are part of the Ministry of Development, Industry and Foreign Trade – MDIC.

Besides those government bodies, the Internal Revenue Service of the Ministry of Treasury, the State Ministry of Development, Industry and Foreign Trade, and other ministries, directly or indirectly are involved in the application of definitive measures, depending on the sector involved.

By means of Decree n. 4.732 of 10 June 2003, CAMEX received further powers. The Decree foresees a compulsory previous consultation with CAMEX regarding any foreign trade matter.

Specifically concerning commercial defence measures, CAMEX has the competence to impose antidumping and countervailing measures, that are either provisional or definitive, as well as safeguards.

In short, SECEX, by means of DECOM, is responsible for the processing of Commercial Defence instruments, including the establishment of the criteria for launching investigations. Yet CAMEX is responsible for the decision stage and for the imposition of antidumping and countervailing duties, both provisional and definitive, as well as safeguards.

15.2. The Administrative Procedure of Antidumping and Countervailing Measures

The investigation process begins by means of a petition addressed to SECEX, in writing, presented by the affected domestic industry, which should represent at least 50 % of the national industry of the similar product.

This opening petition should follow the model created by SECEX, otherwise it will not be accepted. For antidumping investigations, Circular SECEX n. 21/95 should be adopted as a model and, in case of countervailing measures, Circular SECEX n. 20/95 is the model foreseen.

The investigation begins when a Circular from SECEX is published in the Federal Official Gazette and all the known interested parties are notified together with the exporting country's government.

In the investigation procedure for subsidies, after the petition is accepted and before the investigation is launched, the government whose products

could become the object of the investigation is invited to take part in a consultation. This consultation is aimed at clarifying the situation of the possible existence of a subsidy, its levels and effects, and also to seek a mutually satisfactory solution.

Brazilian legislation[122] determines that pieces of evidence proving the existence of dumping and the simultaneous injury caused by it, will be taken into account during the investigation. In the same way, regarding investigations on actionable subsidies, besides proof of the subsidy existing itself, evidence on the injury suffered should also be presented[123].

The period to verify the existence of dumping or a subsidy concession should be the 12 months before the investigation is launched. The period may exceptionally last less than 12 months but may never last less than 6 months.

Once the investigation process begins, the instruction will be made through questionnaires sent to the interested parties, who will have 40 days counting from the date they were issued, to return them. Only one extension of 30 additional days will be granted, as long as the request is justified and filed within the 40 days.

In case the interested parties deny access to the necessary information, provide it after a determined date, or create obstacles during the investigation, the judicial order with the preliminary or final decision will be prepared based on the best information available.

At the compulsory hearing[124], the interested parties will be informed of the essential facts under judgement, which form the basis for the Final Determination.

However, the proof that a dumping margin or illegal subsidies exist at a value superior to *de minimis* (2%), and the verification that a significant injury simultaneously occurred in the local industry is not enough. It is essential that such practices be the fundamental cause of the injury so the causal link must be demonstrated.

The antidumping and countervailing duties, either provisional or definitive, may be applied in two distinct forms: by means of an aliquot *ad valorem* over the merchandise's customs value, in CIF, or by means of a specific rate, set in Unites States dollars and converted into the national currency, to be added to the product's entry value.

122. Decree n. 1.602/95.
123. Decree n. 1.751/95.
124. Article 33 of Decree n. 1.602/95 and in Article 43 of Decree n. 1.751/95.

The amounts will be charged, independent of any other tax obligation, on all imports of the investigated product.

No definitive measure will proceed for a period longer than five years after its initial application.

However, the measure may be reviewed, suspended, and even revoked, as long as a minimum period of one year has passed after the imposition of the definitive measure or one year has passed after the most recent review.

After the review is over and in case the duties are increased or reduced, they will also be valid for a period of five years. When it is detected that the duty is higher than the amount necessary to neutralise the injury to the domestic injury, or that its imposition is no longer justified, the due restitution will be determined.

Moreover, there is also the possibility that the duties will be suspended for one year. Such suspension can be extended for one more year, if there are changes in the market, as long as these are no injuries and, in this case, the right to respond should be granted to the domestic industry.

15.3. The Administrative Procedure of Safeguard Measures

Safeguard measures are aimed at temporarily increasing the protection of a domestic industry that is suffering a serious loss or a threat of serious loss due to the increase in the quantity of imports, with the purpose of increasing the competitiveness of the domestic industry during the period the measures are applied.

The investigation should confirm the existence of a serious loss or a threat of loss caused by the increase in imports, taking into account objective and quantity factors[125], regarding the situation of the affected domestic industry.

The Decree also provides that the demonstration of the serious loss will be based on objective evidence such as the increase of exports to Brazil, and not on simple allegations or remote hypothesis, demonstrating the existence of causal link between the increase of imports and the domestic industry's deficit situation.

An undertaking for adjustment should be made, with the purpose of developing the domestic industry by means of a restructuring program to be implemented during the period the measure is applied. The program will be pre-

125. Article 7 of Decree n. 1.488/95.

sented by the domestic industry so that the competent authorities can evaluate whether it is adequate, and only then will it be taken on as an undertaking by the industry. The implementation of the program will be supervised during the period the safeguard measures are applied, so that the measure will be revoked if it is not executed.

The request to apply safeguard measures can be made by SECEX itself, by other interested government bodies and entities and by companies or associations that represent the affected industry, in writing, in accordance with the model prepared by SECEX[126], presented with sufficient evidence, such as demonstrations of increase in imports, the serious loss or threat of serious loss to the domestic industry and the causal link between the two circumstances. The petition should also contain the proposal to the undertaking of the adjustment for the domestic industry.

It is DECOM's responsibility to examine the origin of the petitions for initiating investigation, and, in case it finds enough evidence to determine preliminarily the existence of serious loss or threat of loss due to the increase in imports, the initiation of the investigation procedure will be determined by means of Circular SECEX, published in the Federal Official Gazette. The Ministry of Foreign Affairs must then notify the WTO's Committee on Safeguards on initiation of the investigation.

After the investigation begins, the interested parties have 30 days to request, in writing, hearings, where they will be given the opportunity to present evidence and respond to the allegations made by other interested parties.

In case a serious loss or a threat of serious loss is detected and a safeguard measure is applied, the Ministry of Foreign Affairs will notify the WTO's Committee on Safeguards of this decision and also of the Brazilian government's willingness to hold prior consultations with any government with substantial interest as an exporting country of the product in question. On this occasion, the available information will be examined in order to arrive at a conclusion regarding possible compensation that the Brazilian government would have to provide in consequence of the application of a definitive safeguard measure, respecting the rights and obligations agreed with the WTO.

It is important to note that a provisional safeguard measure can be applied after a preliminary determination of the existence of a serious loss or a

126. Circular SECEX n. 19 of 2 April 1996.

threat of serious loss and of critical circumstances where a delay could cause injury that would be difficult to repair. The WTO's Committee on Safeguards will be notified before the provisional safeguard measure is applied and the consultation with any government involved will be held immediately after the adoption of such measures.

By means of the so-called sunset review, the provisional safeguard measure will have effect for up to 200 days, and may be suspended before the determined due date. In case it is decided that definitive safeguard measures are to be applied, the period that the provisional measure was applied will be taken into account in calculating the relevant total period of effect.

Safeguard measures will be applied to the extent necessary, in the event of serious loss or threat of serious loss to the domestic industry due to the increase in imports. Another requirement necessary for the definitive measure to be applied is the approval of the adjustment program for the domestic industry and the realisation of the consultations with the governments of exporting countries with substantial interests.

The application of safeguard measures observes the principle of non selectivity by which the measures will be imposed on the imported product without taking into account its origin. However, with respect to developing countries, Brazilian legislation[127] foresees special treatment.

Also, Brazilian legislation[128] determines that safeguard measures will be applied during the period the domestic industry needs to prevent or repair the serious loss and to facilitate its adjustment, which shall initially be the maximum period of four years, except when extensions are granted.

In order to promote the development of the domestic industry, after a safeguard measure is applied for over one year, it will be progressively liberalised at regular intervals during its effect.

The period of safeguard application can be extended by means of an investigation by SECEX which will determine whether the application is still necessary to prevent or repair the serious loss or serious threat of loss, and whether the undertaking of adjustment is being properly executed and the WTO obligations are being followed.

The total duration period of a safeguard measure, including the initial application period and any extension period will not exceed ten years and its

127. Chapter X, Article 12 of Decree n. 1.488/95.
128. Article 9 of Decree n. 1.488/95.

extension will not be more restrictive than the one which was in effect at the end of the initial period, therefore providing for progressive liberalisation during the new application period.

When applying safeguard measures or extending the term of effectiveness, the Brazilian Government will try to maintain equilibrium in tariff concessions and other obligations taken on by GATT 1994.

Governments of the countries with a substantial interest as exporters of the product in question will also have the right to respond regarding the case and to request compensation in case the measure is applied at the end of the investigation. The compensation request is justified by the fact that the application of a measure represents a temporary "rupture" in the equilibrium of tariff concessions and other obligations taken on within the ambit of GATT 1994.

16. E-BUSINESS

As in any kind of transaction, there are certain rules and regulations that are applicable to electronic business and its contracts. Electronic business in Brazil is already protected by general legislation such as the Civil Code and its Introductory Law, the Consumer Protection Code, Intellectual Property legislation, Copyright legislation and the Decree nº 3.505/2000 that institutes the Information Security Policy before the federal government agencies.

This general legislation gives to contracts validity (including electronic contracts) and as a result, electronic business transactions are widely undertaken in Brazil.

16.1. The Validity of Electronic Contracts

The Brazilian Government has enacted the Information Technology Bill, under the number 11.077/2004, that essentially provides legal recognition for the digital signatures and for the electronic contracts.

Regarding the validity of contracts (including electronic contracts) Article 104 of the Brazilian Civil Code establishes that the validity of a legal act requires a party with capacity, a legal objective and a form prescribed or not prohibited by law.

Insofar as international contracts are concerned, Article 9 of the Introductory Law to the Civil Code determines that the law of the country where the obligations are contracted shall govern disputes arising in connection with the contractual obligations. Obligations will be presumed to have been contracted in the place of residence of the person proposing the contract.

Furthermore, the precise moment at which the contract was concluded must also be known. Under Brazilian law, if there is not a significant amount of time between the contract being proposed/offered and accepted, it will be considered as a contract between the parties present, as determined by the Civil Code (Article 428), and therefore it will be considered to have been concluded on the date of its being proposed/offered. On the other hand, when a long period of time has elapsed awaiting a response to the proposal of the contract, then this will be known as a contract between absent parties (Article 434 of the Civil

Code) and as such it will be considered to have been concluded on the date of its acceptance. On this basis, if the contract was established by means of an e-mail, for example, it will be considered to be the equivalent of a contract signed through conventional mail (or between absent parties), whereas if the decision to make a contract takes place in chat-rooms, then it is considered to be a contract between the parties present.

16.2. Consumer Protection

Another important aspect of electronic contracts in Brazil is that they are subject to the Consumer Protection Code, like all other contracts, as long as they involve some aspect of consumption.

There is still some controversy as to the application of the Brazilian Consumer Protection Code when the suppliers of goods/services are domiciled abroad. Nonetheless, it is largely accepted that international electronic contracts are subjected to the mandatory laws (laws that cannot be derogated from by contract) of the countries in question may be applied. Accordingly, the Consumer Protection Code, as a mandatory law, applies to international electronic contracts provided that they involve Brazilian consumers.

16.3. Privacy Online

The protection of personal data is a topic that has been discussed fairly recently in Brazil. The issues concerning privacy online are guaranteed by national general legislation such as the Brazilian Federal Constitution of 1988, the Consumer Protection Code and the Brazilian Civil Code.

There has been much discussion on online privacy. Currently, however, there is no specific regulation protecting Internet users' personal data in Brazil.

Notwithstanding the above, the privacy matters are basically foreseenpredicted in the Brazilian Federal Constitution, in the Consumer Protection Code (Law n. 8.078/90), in the Civil Code and other laws, such as Decree n. 4.553/2002, that adopts provisions concerning the protection of secret data, information, documents and materials of interest for the security of society and of the State, within the jurisdiction of the Public Federal Administration; Law n. 9.296/96, regarding the interception of the

communication flow in computer systems, and Law n. 9.610/98, which modifies, updates and unifies the legislation on Copyright and provides other resolutions.

All of them essentially determine that anyone that violates the privacy, the private life, honour and image of others, hasve to indemnify for the material and moral damages caused.

16.4. Security Online

'ICP-Brasil', the Brazilian Public Key Infrastructure (PKI), was created by the Federal Government through Law n. 11.280/06 and Provisional Measure n. 2.200-2/01 in order to ensure the authenticity, integrity and legal validity of electronic documents and signatures. This new regulation sets out the framework for electronic authentication with such authentication being based on the "United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Signatures".

The above-mentioned regulation also amended provisions from the Brazilian Civil Code and Civil Code of Procedure, all with a view to ensure the validity of digital certification and its protection.

16.5. Domain Names

16.5.1. Registration of Domain Names

There has been a growing interest in the registration of a domain name with a "registro.br" top domain level and until recently only companies established in Brazil, and therefore companies that were holders of a CNPJ (Brazilian Federal Taxpayers' Registry) number, could register such a domain name. Nevertheless, FAPESP (the Brazilian agency responsible for the registration of Internet domain names) issued rules that also allow foreign entities without a CNPJ number to register a domain name with a "registro.br address.

Under these rules, a foreign entity aiming to register a domain name without a CNPJ number, has to nominate an attorney-in-fact who is both legally established in Brazil and registered with FAPESP. Furthermore, the foreign entity must provide its attorney-in-fact with the required documents which shall be delivered to FAPESP. Afterwards, FAPESP will grant a temporary identification

number to the foreign entity, which, for the purposes of the registration of the domain name, shall be the temporary substitute for the CNPJ.

During the registration of the domain name with FAPESP, the attorney-in-fact, on behalf of the foreign entity, must designate the people who will be responsible for the communication between the foreign entity and FAPESP, also referred to as the 'IDs'. Such 'IDs' include the administrative ID; the technical ID (used for posting or deleting content from the Web Site at that address) and the institutional ID (used to represent the company in proceedings with FAPESP).

FAPESP's main objective through these rules is to allow foreign entities to be able to register a domain name with a ".com.br" address. The registration process is still somewhat bureaucratic, but it is the first step towards spreading such domain names around the globe.

16.5.2. Trademarks versus Domain Names

Third party registration of domain names that reproduce or imitate well-known trademarks with the aim of obtaining profits from the sale of these domain names for the respective trademark owner (cyber squatting) is becoming, unfortunately, a very common practice.

This practice is increasing in Brazil due to the criteria adopted to confer a domain name, which is based on the principle that the first applicant who satisfies, at the time of the request, the registration requirements foreseen by Resolution CGI.br/RES/2008/008/P of the Brazilian Internet Management Committee, will be the domain name titleholder. This criteria is known worldwide as "first come, first served".

The "first come, first served" criteria is inefficient as to the protection of consumer relations and well-known trademark holder's intellectual property rights, especially due to the lack of an obligation to prove that the trademark was registered before the competent government body, the Brazilian National Industrial Property Institute ("INPI").

Currently, there is no specific legislation that guarantees trademark holders ownership of domain names, and this creates disputes between the parties involved. As a result, the trademark holders resort to the Judiciary or to Arbitration Courts to resolve the issue.

16.6. Internet Banking

In relation to Internet banking, there is no specific law or regulation in Brazil concerning this subject. Thus, the same regulations and controls that are applicable to traditional banking operations are currently applicable to banking products and services offered through the Internet.

Resolutions n. 2.817/01 and n. 2.953/02 from Brazil's National Monetary Council, established the rules regarding the opening of new current accounts by electronic means (including the Internet). According to such rules, financial institutions, when opening a new current account through the Internet, do not need to examine original counterparts of the relevant documentation. These new bank accounts can only be opened by individuals and/or legal entities that are resident and domiciled in Brazil and that already have a current account opened in the original institution or in any other financial institution. Despite the exceptions to the formalities for opening a new current account by the Internet, the manager and the director of the financial institution are not discharged from their responsibility to ensure the true identity of the account holders. Furthermore, the director of the financial institution must still comply with all regulations in force, including the responsibility to carry on the applicable proceedings regarding the prevention of money laundering crimes.

As for the liability of the bank, according to Brazilian legislation, the bank is deemed to be fully responsible for any damages or losses that the client may suffer from the normal performance of its banking operations (including Internet banking). This liability still applies if the bank was not negligent or imprudent and was not responsible for the specific event that caused the damage to the client. Thus, banking institutions in Brazil are bound to the so called "strict liability", i.e. the banks are liable whether the event is their fault or not.

16.7. Purchase and Sale of Securities through the Internet

On 23 December 2002, the Brazilian Securities Commission "CVM" enacted Instruction n. 380, which improved the rules to be followed by electronic brokers when purchasing and selling securities through the Internet.

Instruction n. 380 defines electronic brokers as security and commodity brokers authorised by CVM to deal with securities within self-regulatory organisations that are able to receive orders from their clients through the Internet.

Pursuant to this Instruction, self-regulatory organisations are defined as stock exchanges, commodities and future exchanges and over-the-counter markets, which operate trading systems that receive orders through the Internet.

Moreover, pursuant to Instruction n. 380, electronic brokers' Web Sites must contain: (i) details on how to place an order to purchase or sell securities through the Internet; (ii) the prices of the securities, including the 10 (ten) best available prices, as well as the time when such prices were released; (iii) the costs and fees charged for each operation, including fees charged by self-regulatory organisations or by settlement systems and clearings houses; (iv) the procedures to be followed by the electronic broker when placing its client's orders received via the Internet; (v) details concerning the way in which the electronic broker issues an advice of execution to its clients; (vi) details on the security of the Information Technology "IT" systems, including the use of password and electronic signatures; (vii) the amount of time a client may be connected to the trading system without placing orders; and (viii) a direct link to the CVM's Web Site.

In addition, it was established that electronic brokers' Web Sites must inform their clients of, including, but not limited to: (i) the structure and function of the security markets and their operational risks; and (ii) the power of self-regulatory organisations to cancel trade in view of any breach of law and/or regulations.

Furthermore, Instruction n. 380 determines that electronic brokers must periodically audit their IT systems with the objective of certifying their capacity when processing client's orders. All orders, whether executed or not, must be electronically recorded for a period of 5 (five) years. In addition, those brokers must have contingency plans for peak time periods.

A final point to note is that Instruction n. 380 is in accordance with the recommendations of the International Organisation of Securities Commissions "IOSCO". Accordingly, the new rules aim to show foreign investors that the commitment of the Brazilian regulator is to follow international market trends.

17. FILMING IN BRAZIL

17.1. The Evolution of Brazil's Film Industry

Brazil's cultural diversity has been reflected in its film industry, which began to attract international attention with the "*cinema novo*" (new cinema) movement of the mid-1950's. Since that time, Brazilian films, such as Fábio Barreto's "*O Quatrilho*" (1996), Walter Salles' "*Central do Brasil*" (Central Station) (1998), Fernando Meirelles' acclaimed "*Cidade de Deus*" (2002), Breno Silveira's "2 *Filhos de Francisco*" (2005) and Cao Hamburger's " *O ano que meus pais sairam de férias*" (2006), have been recognised for the quality and originality of their production. This recognition has included a number of highly successful short-length movies and documentaries.

The Brazilian film industry has become a frequent participant in many renowned international festivals, including the Oscars, Cannes Film Festival, the Sundance Film Festival, and the International Film Festival in Berlin.

For more than fifteen years Brazil has implemented two tax policies, known as the AudioVisual and Rouanet Laws which provide financial incentives for film production. In addition, the government has entered into several international agreements and treaties intended to foster international co-operation in the production of films.

In 2001 the National Movie Agency – ANCINE – was created, the official body to development, regulation and inspection of the cinematographic and videophonografic industries, whose objective is to develop the production, the distribution and the exhibition of cinematographic and videophonografic works in diverse segments of market, so as to promote the auto-sustainability of the national industry.

The producer needs to be properly registered before ANCINE in order to produce a film in Brazil.

17.2. Production of Cinematographic and Videographic Foreign Work in Brazil

The filming, record, collection of images, with or without sound, for partial or integral production and for the adaptation of foreign audiovisual work in

the national territory, is regulated by Normative Instruction n. 79/2008 from ANCINE that establishes that these acts should be done under the responsibility of a Brazilian producing company recorded at ANCINE, granted by a contractual instrument signed with the foreign production company or whoever is lawfully responsible for the operation.

Thus, the foreign producer in order to be authorized to produce the audiovisual work in Brazil needs to work in partnership with a Brazilian producing company properly registered in ANCINE.

Regarding the productions of foreign audiovisual works that are strictly journalistic-news they should be communicated to the foreign representatives of the Ministry of Foreign Affairs, which will be the responsible for giving the pertinent authorizations.

ANCINE is responsible for the control and inspection of foreign productions made in Brazilian territory.

17.3. Establishing a Production Company in Brazil

Where a foreign production company intends to film a large-scale production involving a sizable cast and crew or to produce a number of films in Brazil over an extended period of time, it may be best to establish an independent legal entity in Brazil.[129]

17.4. Registration at ANCINE

The production company established in Brazil must be properly registered in ANCINE in order to be able to film and record, as already mentioned.

We note that such application may be done by the internet and, subsequently, ratified by the presentation of documents before ANCINE.

17.5. Investment in Brazil: Foreign Capital and the Exchange Market

Whether a foreign entity is filming a production in Brazil or investing money in (or providing other assets to a Brazilian production company), the foreign capital invested in the project will be governed by Brazilian law. On foreign

129. For more information on Company formation in Brazil see chapter 2 of this book.

investments in film production and/or other activities in Brazil please refer Chapter 1 of this Legal Guide.

17.6. Tax System

The information related to the federal, state and municipal taxes and to social contributions may be found in the Tax Chapter of this legal guide.

17.7. Financial Incentives for Producing Films in Brazil

Two tax initiatives implemented by the Brazilian government have stimulated the development of the country's film industry by creating tax incentives that make investments in film productions more attractive to the private sector. International co-productions allow foreign entities to participate in Brazilian film, television and video projects and to receive the benefits of these tax policies.

17.7.1. *Lei do Audiovisual* (Audiovisual Law)

The Audiovisual Law (Federal Law n. 8.685/93 and modifications) allows individuals and corporations to invest a portion of their income tax, as deductible expenses, in Brazilian independently produced cinematographic audiovisual work, through the acquisition of representative quotas of commercialization rights over the referred works, thus, offering the possibility of making a profit with no risk.

In other words, individuals and corporations have the option of paying their taxes to Brazil's Ministry of Finance or investing a percentage of these taxes in a film. In order to qualify for investments under the Audiovisual Law, the project must have received prior approval from the Brazilian National Agency of Cinema (ANCINE).

Such deduction is limited to 3%, for individuals, and to 1%, for legal entities.

Additionally, until the year 2016, the contributors may deduct the income tax due on the amounts for the sponsorship for the production of cinematographic works that are independently produced, if the projects have been approved previously by the ANCINE. The income tax deduction is limited to 4%, for legal entities, and 6%, for individuals.

In addition, Article 3 of the Audiovisual Law allows foreign film distributors in Brazil to invest up to 70% of any tax due on earnings, profits or other payments in Brazilian film productions (the subsequent production(s) must have received prior approval from ANCINE), limited to R$3 million.

We emphasize that the deductions through the purchase of quotas and through the sponsorship of the visual works are limited to R$ 4 million at any one time.

The Audiovisual regulations also provide for a total exemption from the Contribution for the Development of the Cinematographic Industry (*Contribuição para o Desenvolvimento do Indústria Cinematográfica* – CONDECINE). CONDECINE is an 11% tax on all royalty payments (including copyright) remitted abroad. The exemption applies only if the foreign entity has invested at least 3% of its total investment in Brazilian film projects. In May 2003, this benefit was extended to cable television companies for international programs produced in Brazil and to international co-productions involving a Brazilian company.

17.7.2. *Lei Rouanet* (Rouanet Law)

The Rouanet Law (Federal Law 8.313/91 and Decree 1.494/95), gave individuals and corporations a tax credit for investments in the cultural area. The law provides for an income tax reduction of up 4% for companies (6% for individuals) that either sponsor or make a donation to a Brazilian film, television or video production. The reduction is based on the total amount provided to the production. The donation or sponsorship must comply with the National Program of Cultural Support and the production must have received prior approval from Cultural Ministry (or ANCINE for short length movies).

In addition, it is also possible for entities to add up to 40% of any donation made to a qualifying Brazilian production, or up to 30% of any sponsorship of a qualifying production, to their operating expenses, thus increasing the entity's operational expenses deduction.

17.8. International Treaties and Agreements

Brazil has film co-production treaties with Argentina, Canada, Chile, Colombia, France, Germany, Italy, Portugal, Spain e Venezuela. In addition, on November 11, 1989, Brazil, Argentina, Colombia, Cuba, Ecuador, Nicaragua,

Panama, Venezuela, Peru, Mexico, the Dominican Republic and the United States signed the *Acuerdo Latinoamericano de Coproducción Cinematográfica* (the Latin American Agreement on Film Coproduction).

Furthermore, the Iberian-American cinematographic integration agreement and the Agreement for the Creation of the Latin-American common market of cinematography were signed.

These treaties establish terms which, enable international co-productions to qualify for various types of governmental support, and allow co-produced material to be eligible for investor tax credits.

17.9. Legal Requirements for Film Production in Brazil

In order to produce films, videos or television programs in Brazil, certain legal requirements must be met: work visas must be obtained for any foreign cast or crew members from the Ministry of Labour, permissions to film must be obtained from the proper authorities, and provisions must be made to import any required production equipment.

17.9.1. Visas for Foreign Production Crews

Foreign citizens are permitted to engage in paid activities in Brazil provided that a work visa has been issued by the Ministry of Labour. The visa may be temporary or permanent, and the duration will depend on the type of visa and on the activities.

Foreign production companies unaffiliated with a Brazilian production company must apply directly to the Ministry of Labour for visas for members of their production crew and cast. Unfortunately, the procedure is bureaucratic and takes some time.

When a foreign production company is affiliated with a Brazilian production company the visas for any foreign production crew or cast members can be obtained by the Brazilian company through ANCINE. After the necessary information is provided, ANCINE will give authorization to film in Brazil and will forward all necessary information to the Ministry of Foreign Affairs, which will authorize the consulate(s) to issue the visas. The consulate will issue temporary work visas, the period of which can be expected to be compatible to the film production schedule.

17.9.2. Permission to Film

As noted above, when a foreign production company is associated with a Brazilian film company, ANCINE provides both visas and an authorization to film in Brazil.

17.9.3. Temporary Importation of Production Equipment

While production equipment (cameras, lights, etc.) can be rented or purchased in Brazil, Brazilian law also authorizes the importation of foreign equipment for a limited period.

18. MARITIME LAW

18.1. Introduction

Brazil and Maritime Law have been interrelated since the country was discovered in 22 April 1500 and had in the sea its only means of communication with the world.

During the colonial period in Brazil, the legislation in force, owing to the bonds with Portugal, was the Portuguese Crown Ruling, the *Ordenações Filipinas*. These were in force until Brazilian independence in 1822, following which, it was important for the country to regulate commercial issues.

In 1850, the Brazilian Commercial Code was enacted and became the main source of Maritime Law in the Brazilian legislation. With the advent of Law n. 10.406 of 10 January 2002 (current Civil Code), the Commercial Code was revoked except for the Chapter on Maritime Law which remains in force.

The secondary legal sources are not codified and consist in Brazilian spread legislation and ratified International Conventions and case Law.

Therefore the Brazilian Maritime Law consists in a complex system of legislation, extremely specific, being regulated by public and private International Law of different periods and hierarchies. It requires a great effort from those who work or study this field of the Law in terms of legal interpretation.

Accordingly, Tthe Commercial Code deals with the following matters on Maritime Law:

a) vessels, their ownership, joint owners;

b) rights and duties of the Capitan and crew;

c) maritime contracts such as charter-parties and bills of lading, liabilities arising from these contracts;

d) passengers;

e) ship mortgages and preferred credits over ships;

f) marine insurance;

g) damages caused by collision;

h) abandonment;

i) averages (particular and gross); and,

j) damages in general.

18.2. Conventions

Along with the evolution of internal legislation, many International Treaties regarding Maritime Law have been ratified by Brazil, in particular, those relating to Maritime Safety Traffic, Maritime Pollution and to the Law of the Sea. Some of them were signed in relation to the International Maritime Organization (IMO) and International Labour Organization (ILO).

Among those treaties, the following should be mentioned:

a) The Brussels Convention of 1910 concerning the unification of certain rules of law relating to Collision between vessels enacted by Decree 10.773/14;

b) The Brussels Convention of 1924 referring to several rules concerning limitation of liability of owners of sea-going vessels;

c) The Brussels Convention of 1969 referring to Civil Liability – CLC, particularly concerning civil liability for damage and pollution caused by oil at sea, enacted by the Decree 79.437 of 1977;

d) The International Convention for the Safety of Life at Sea (SOLAS), 1974, enacted by the Decree n. 92.610 of 1986. SOLAS is the most important Convention on regulation of safety of merchant vessels. Although it is dated from 1914, the Convention was updated after the Titanic accident;

e) The International Convention for the Prevention of Pollution from Ships of 1973 – MARPOL, which was modified by the Protocol of 1978, enacted by the Decree n. 2.508/98. The Convention was created after the accident with the vessel Torrey Canyon; and

f) The United Nations Convention on Laws of the Sea of 1982, enacted by the Decree 1530 of 1995.

In turn, it should also be emphasized that Brazil is not a signatory to many important International Treaties, specifically those regarding the Carriage of Goods by the Sea, which normally provides for limitations and exceptions of liability of the ship-owners in maritime disputes such as cargo claims. That is due to the fact that Brazil is keener to protect the interests of the cargo owners, given the country's incipient fleet.

Some of these Conventions are listed below, as follows:

a) the Hague Rules drafted by the International Law Association – ILA and signed in 1921, considered the first global initiative for the unification of certain rules related to the ship-owners' liability. The Hague Rules were later modified by the Hague-Visby Rules;

b) the International Convention for the Unification of Certain Rules related to Bills of Landing, signed at Brussels in 1924, based on the Hague Rules of 1921, which turned to keep its original name (Hague Rules), only now, dated from 1924;

c) the Hague-Visby Rules of 1968, which was latter modified in 1979, being the most important mark of regulation in the field, since it is a final version of the Hague Rules (1924), being adopted in a global scale;

d) the Hamburg Rules of 1978 ("United Nations Convention on the Carriage of Goods by the Sea"), signed by Brazil in 1978, though it was not ratified by the country. The Hamburg Convention has provisions 'pro' cargo owners, given the inauguration of the presumption of guilt of the owners; and.

e) the Rotterdam Rules, adopted by the General Assembly of the United Nations in December 2008 ("United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea"), which aims to update and unify the abovementioned International Conventions.

18.3. Types of Navigation

In Brazil, maritime traffic, including its limits, is mainly regulated by means of Law n. 9.537/97 and Decree n. 2.596/98, which provide the following classification:

1. Open Sea: Navigation through maritime waters which can be divided up as follows:

   (a) Long Course Navigation: Navigation between Brazilian and Foreign Ports;

   (b) Coastal Trade Navigation: Navigation between Ports, by means of Maritime transportation or the Coastal Trade navigation and internal waterway; and

   (c) Pilot Navigation: Navigation for purposes of logistic support to boats and installations in national territorial waters, in relation to activities and exploitation of minerals and hydrocarbons.

2. Internal Navigation: Navigation on internal waterways, such as rivers, lakes, canal, ponds, bays, coves, inlets and maritime areas considered sheltered; and

3. Internal Port Navigation: **N**avigation at ports and water terminals, for assistance in vessels and port installation.

18.4. Maritime Court

The Maritime Court (*Tribunal Marítimo*) is an independent administrative body from the Executive Power, which is ancillary to the Judiciary Power and

bound to the Marine Ministry. Pursuant to Article 10 of Law n. 2.180/54, the Court has jurisdiction over the facts and accidents of maritime navigation (including in rivers and lakes), in addition to other matters related to marine activities.

Thus, for instance, the Maritime Court will exercise its jurisdiction over merchants' ships of any flag of nationality that are in Brazilian territorial waters; over Brazilian merchants' ships at high sea or in territorial waters; and over foreign merchants' ships at high sea, if involved with any incident or maritime accident in which Brazilian citizens or vessels are in danger or involved.

It is worth notingremarking that the decisions of the Maritime Court do not have jurisdictional force, since it is subject to the re-examination of the Judicial Courts, if any of the parties involved in the dispute applies for it. However, notwithstanding its legal nature as an administrative body, the Maritime Court does not only exercise administrative functions. On the contrary, it exercises legal activities while settling disputes involving incidents or accidents of navigation, imposing penalties oin the defaulting party. Thus, it is consolidated in Brazilian Law that the legal nature of the Maritime Courts' jurisdiction is *sui generis*.

18.5. National Agency of Water Transportation – ANTAQ

The National Agency of Water Transportation – ANTAQ is a public legal entity associated with the Ministry of Transportation. It is based in the Federal District with power for setting up branches all over Brazil. The purposes of the Agency are stated in Law n. 10.233 of 2001.

It is an independent regulatory agency responsible for the regulation of the maritime field trough the draft of legislation, the supervision and arbitration on related matters, the elaboration of studies, the granting of concessions, and the integration of the several entities and bodies that composes the Brazilian waterway sector.

Thus, ANTAQ is qualified to proceed under Merchant Navy's direction on matters relating, among others, to national defence, security of navigation and safeguarding of human beings at the sea. Hence, ANTAQ's sphere of responsibilities involves regulating, supervising and managing activities developed by Public Ports, Private Docks and Port Administrations, among others.

18.6. Brazilian Navy

The Brazilian Navy is a part of the Ministry of Defence, responsible for activities, including the defence of Brazilian territorial sea.

It is important to note that the Navy consists of officers, establishments, ships and weapons of war which are for the protection of the nation.

On 9 December 2009, a new class of ships pertaining to the Brazilian Navy, the patrol ships of 500 tons, started its operations. The patrol ships defend the Brazilian property at sea, taking part in patrol activities and marine surveying, also ensuring safety of life at sea, control of maritime pollution and protection of oil fields.

18.7. Maritime Transportations and Economic Data

According to ANTAQ's annual report for the year 2008, the movement of cargo in the Brazilian ports was of 768 million tons. Taking economic aspects into account, this figure indicates that 95% of all the Brazilian foreign commerce is transported through the sea. Therefore, maritime transportation is vital to the development and sovereignty of Brazil. Our capacity to build vessels and have our own fleet is considered a strategic need, mainly due to the country's geographic position. Furthermore, Brazil has got 42,000 km of navigable rivers, 8,000 km of coastline and 65% of the country's population living in an almost 100-kilometre strip from the coast.

18.8. Brazilian´s Fleet

In relation to our fleet, according to ANTAQ, there are 124 registered companies with authorization to perform maritime navigation, being either Long Course navigation or Coastal Shipping navigation. Out of these 124, 21 involve Long Course navigation.

18.9. Ports

The Brazilian port system has considerably improved in the last few years. Currently, Brazil has, approximately, 45 ports. The most important one is the Port of Santos, in the State of São Paulo, which has 12 kilometres of quay,

and it is predicted it will triple its capacity by 2022. The port has a movement of cargo that surpasses 60 million tons per year.

Pursuant to Law n. 8.630 of 1993 also called the "Law of Ports Modernization", Brazilian ports have been reorganized in order to make them more competitive and modern in relation to the international market, allowing the lease of areas and installations to the private sector through public bids.

Furthermore, it is important to mention other legislations that contributed in a direct or subsidiary way to make the ports more efficient, as follows:

(a) Bidding Law – Law nos. 8.666/93 and 8.883/94;

(b) Concession of Law – Law nos. 8987/95 and 9074/95;

(c) Delegation Law – Law n. 9277/96;

(d) Privatization Law – Law n. 9491/97 and Provisional Measure n. 1594/97;

(e) Defence and Competition Law – Law n. 8884/94; and

(f) Consumer Defence Code, Law n. 8078/90.

In addition to the above, the Decree n. 6620 was passed in October 2008, with a view to enhancinge and developing the Brazilian ports. Besides having provisions regulating concessions and authorizations for the creation of new ports, the Decree foresees that all activities performed in the Brazilian ports shall be in accordance with the national environmental legislation, which demonstrates the national concern regarding the protection of the environment.

18.10. Maritime Transport: Restrictions to Foreign Companies

The activity of carriage of goods by the sea in Brazil is mainly regulated by the Law n. 9.432, of January 1997, which establishes the national legal regime for maritime transport.

In general, the Law n. 9.432/97, whilst regulating the shipping activity within the Brazilian territory, preserved the protective measures that has been in

force in the country for decades. The purpose of such measures is to augment the national shipping industry, especially with regards to restrictions concerning foreign vessels operating in Brazilian territorial waters[130].

Thus, according to the Brazilian legislation, the international carriage of goods by the sea is an activity allowed to be carried out by Shipping Companies, ship-owners and vessels from foreign countries. Pursuant to the same rule, such activity (i.e., the international carriage of goods by sea) may also be performed by Shipping Companies and vessels from foreign countries[131], in the country's inland waters.

Nevertheless, in coastal navigation, domestic inland navigation and port and maritime support navigation, goods may only be carried by foreign vessels if chartered by Brazilian Shipping Companies[132].

In this context, the chartering of foreign vessels, either under time, voyage or bareboat charter-parties, by Brazilian Shipping Companies, in order to explore maritime transport under the hypothesis described above, is subject to the authorization of the competent Government authority and to the following requirements[133]:

a) In the event of the absence or unavailability of vessels with Brazilian flag with the same characteristics for the shipping activity intended;

b) In case of public interest, dully reasoned; and

c) When in replacement of a vessel being built in a Brazilian shipyard (for no more than 36 months).

Hence, on 14 August 2007, ANTAQ issued the Resolution n. 843, approving a rule granting authorization to legal persons that has maritime transport as its main object, to operate in international maritime transport (from Brazilian ports to foreign ports), in cabotage and in maritime and port support navigation[134], if the company is dully constituted in accordance to Brazilian law, having also its headquarter in the country.

130. Articles 8 untill 10, of Law n. 9.432/97.
131. Article 5 and 6, of Law n. 9.432/97.
132. Article 7 of Law n. 9.432/97.
133. Article 9 and 10 of Law n. 9.432/97.
134. Article 3 of ANTAQ´s Resolution n. 843/07.

Lastly, the above mentioned Resolution determines that the authorization granted is not transferable[135] and, that the Company must begin its operations within 120 days after the Authorization Term is published in the Federal Official Gazette, under the penalty of having its authorization cancelled[136].

135. Article 3, sole paragraph of ANTAQ´s Resolution n. 843/07.
136. Article 16 of ANTAQ´s Resolution n. 843/07.

19. AGRARIAN LAW

19.1. The Brazilian Agribusiness

The agricultural sector has been of a great importance to Brazilian economy since the beginning of its history, and has greatly expanded since the 1990´s, with successive records in production and exportation, all of this stimulated by production of commodities such as soy, paper, cellulose, ethanol, coffee, beef, pork and chicken, generating millions of jobs and growing the Brazilian economy.

The green revolution and the continued efforts to modernize production have changed the face of Brazilian agribusiness, making it competitive internationally, with extraordinary results for the rural economy and the country as a whole.

Brazilian agribusiness historically plays an important role in wealth decentralization, by leading economic development towards the countryside and generating revenues and opportunities to a population historically forgotten by the State.

Agribusiness is traditionally responsible for around 30% of the Gross Domestic Product (overall of R$ 2,9 trillions in 2008, according to the figures of the Brazilian Institute of Geography and Statistics– IBGE), around 40% of the total exportsation (US$ 72 billion in 2008) and for 37% of employment force in Brazil (17,7 million workers).

19.2. Scope

Agrarian Law appears as a set of laws and administrative rules that regulate all activities that arise from agricultural production, and seeks to protect the natural resources, develop production and secure the welfare of the rural community. These are closely linked to a number of other areas of Law, such as commercial, constitutional, insurance, tax, environmental, labour, among others.

This legal area can also be described as Rural law, or Agriculture law and, currently, Agribusiness Law.

19.3. Legislation and Sources

The Federal Constitution, in its Article 22, subsection I, establishes jurisdiction, in Agrarian Law matters, exclusively to the Federal Union, which differs from other Nations that give the jurisdiction to their States and Municipalities.

Accordingly, the main law governing rural activities is the Land Statute, Law n. 4.504, of 3 November 1964, followed by a number of laws on specific subjects.

Six legal principles that provide the basis of the Agrarian Law: a) Principle of Social Function of Property; b) Principle of Environmental Preservation; c) Principle of the Reformulation of Rural Structure; d) Principle of the Economic and Social Progress; d) Principle of the Social Justice and of Increase in Productivity; and, e) Principle of the Prevailing of the Collective Interest over the Individual Interest.

19.4. Representative Entities and Agencies

In Brazil, there are several representative entities and agencies of the Agrarian sector and related fields. We shall consider only the most important ones here.

19.4.1. Ministry of Agriculture and Food (*Ministério da Agricultura, Pecuária e Abastecimento*)

The Ministry of Agriculture and Food (www.agricultura.gov.br) has the mission to promote the sustainable development and the competitiveness of agribusiness for the benefit of Brazilian society.

There are Federal Police Stations for Agriculture and entities tied to the Ministry that also execute the policies relating to agribusiness, and the Brazilian Company for Agribusiness Research (*Empresa Brasileira de Pesquisa Agropecuária* – EMBRAPA) is the best known in this area.

The Brazilian Company of Agribusiness Research (www.embrapa.br) was created in 26 April 1973, and is an entity tied to the Ministry of Agriculture and Food. Its purpose is to provide solutions for the sustainable development of the rural area, focusing on agribusiness, through the generation, adaptation and transference of knowledge and technologies, for the benefit of several areas of Brazilian society.

19.4.2. Ministry of Agrarian Development ("*Ministério do Desenvolvimento Agrário*" – MDA)

The Ministry of Agrarian Development[137] (www.mda.gov.br) main objective is to create opportunities for the rural population, through the development of activities connected to the land. The Ministry has jurisdiction over the following subjects: agrarian reform; promoting sustainable development in the rural areas; and identification, recognition, delimitation, landmark and registration of the land occupied by the remainder of "*Quilombo*" communities (a Brazilian hinterland settlement).

Its main agency is the National Institute of Colonization and Agrarian Reform (INCRA – www.incra.gov.br)[138]. Nowadays, INCRA is the governmental agency responsible for implementing and managing agrarian policies, including the promotion of agrarian reform in Brazil.

The mission of this institution is to implement the agrarian reform policy and to perform the national agrarian system, contributing to sustainable rural development.

19.4.3. Brazilian Agriculture Confederation ("*Confederação da Agricultura e Pecuária do Brasil*" – CNA)

The Confederation of Agriculture of Brazil (www.cna.org.br)[139], is constituted by the economic groups of agriculture, cattle, rural extractives, fishing, Indian culture and the agribusiness field,

The Confederation studies and seeks solutions on matters relating to rural activities, as well as coordinates and promotes the development, the defence and the protection of the economic groups referred to in the paragraph above.

19.5. Purchasing Rural Properties

The Brazilian Civil Code foresees that no business involving real estate rights can be performed without a public deed, except if established otherwise

137. MDA's structure is regulated by Decree n. 5.033, of 5 April 2004.
138. INCRA was created by Decree-law n.1.110, of 9 July 1970, whose structure was approved by Decree n. 5.735, of 27 March 2006, (modified by Decree n. 5.928, of 13 October 2006).
139. CNA was recognized by Decree n. 53.516, of 31 January 1964.

by special law or if the real estate property value is lower than thirty times the minimum wage in Brazil (R$ 510.00 in 2010). Notwithstanding, the transference of the ownership of real estate property will only be considered as perfected after the registration of the deed before the Land Registry with jurisdiction over the location of the property. Rural properties are also subject to these requirements.

However, when the rural property is to be acquired by a foreign person or entity, special legal provisions must be respected regarding limitations to the area of the land and its use. The Federal Constitution in Article 190 imposed restrictions on foreigners, natural person or legal entity, having ownership or possession of a rural property located in Brazil.

The purchasing restrictions mentioned above are also referred to in Law n. 5.709, of 07 October 1971. Moreover, Article 23 of the Law n. 8.629, of 23 February 1993, extends the restrictions to the leasing of rural properties to foreigners. Also Bill of Law n. 302 of 26 November 2009, presently being passed before the Federal Senate, establishes limitations to acquisition of real estate property by foreigner in Amazonia and Brazilian boarder areas.

19.6. Taxes applied over Agricultural Activities

Several taxes can attach to agricultural activities, such as: the Rural Land Tax (*Imposto sobre Propriedade Territorial Rural* – ITR); Rural Social Security Contribution; Income Tax (Natural Person or Legal Entity); Value-Added Tax on Sales and Services (*Imposto sobre Circulação de Mercadorias e Serviços* – ICMS); Social Contribution on Net Profits (*Contribuição Social sobre o Lucro Líquido* – CSLL); Social Contribution for Finance of Social Security (*Contribuição Social para Financiamento da Seguridade Social* – COFINS); Contribution to the Social Integration Program (Contribuição *para o Programa de Integração Social* – PIS); Contribution to the Formation of the Public Employee Assets (*Contribuição de Formação do Patrimônio do Servidor Público* – PASEP); Contribution of Rural Union and National Service of Rural Apprenticeship (*Contribuição ao Serviço Nacional de Aprendizado Rura* – SENAR); Contribution to the Found of Rural Employee Assistance (*Contribuição ao FUNRURAL*); Contribution to the National Institute of Colonization and Agrarian Reform (*Contribuição ao INCRA*); Fee for Classification, Inspection and Control of animal and vegetable products (*Taxa de Classificação, Inspeção e Fiscalização de produtos animais e veg-*

etais); and, Fee for Environmental Control (*Taxa de Controle e Fiscalização Ambiental*).

19.7. Agrarian Contracts

The legal support for business relationships entered into between rural producers, rural landlords, financial institutions, industries, and others can be found in Commercial, Civil, Banking and others legislations, but the Land Statute, Law n. 4.504, of 30 November 1964, and the Decree n. 59.566, of 14 November 1966, deals with agrarian contracts in a more extensive fashion.

19.8. Rural Credit

Law n. 8.171, of 17 January 1991, that establishes Agricultural Policy, deals with the main objectives of Rural Credit. Rural Credit guarantees the financial aid necessary for Rural Producers, Associations, Cooperatives of Rural Producers and physical or legal entities devoted to rural activities, during the stages of rural production: a) financing expenses with production for one or more periods; b) investment – with the purpose of financing the formation of fixed assets, or semi-fixed, that will last for several harvests; c) commercialization – with the purpose of financing the necessary elements after the harvest, which involves warehousing, transportation, taxation, among others; and, d) industrialization – for transforming the raw-material into rural products.

19.9. Rural Credit Instrument

The Credit Instruments in agribusiness represent credits which result from a loan, or from a purchase and sale on account, transacted between rural producers, between these and rural cooperatives, or by one of these and a third party. In all cases, at least one of the parties involved must be a rural producer or a rural cooperative, and in some of the cases both parties must be.

There are several kinds of Credit Instruments, such as: Rural Bond, Rural Credit Bill; Rural Promissory Note; Rural Duplicate; Note of Rural Product; Note of Rural Product with Financial Liquidation; Certificate of Agribusiness Deposit and Agribusiness Warrant; Certificate of Agribusiness Credit Rights,

Agribusiness Credit Note; Certificate of Agribusiness Receivables; and Agribusiness Commercial Note.

A major objective of the Rural Credit Instruments is to facilitate the transference and circulation of the credits with a future due date, and a common characteristic is that the Instruments can be transferred by endorsement.

The specific legislation for Credit Instrument matters includes Decree-law n. 167, of 14 February 1967, Law n. 8.929, of 22 August 1994, Law n. 10.200, of 14 February 2001 and Law n. 11.076, of 30 December 2004.

The public offer of these credit instruments must be registered at the Securities Commission (CVM) (and the transactions must be operated at the Securities, Commodities and Futures Exchange (*"Bolsa de Valores, Mercadorias e Futuros"* – BM&FBovespa – www.bmfbovespa.com.br).

19.10. Rural Insurance

Rural Insurance is an important instrument of agriculturale policy, in view of the protection provided to the Rural Producer, especially relating to the risks resulting from the climate. The major objective of the Rural Insurance is to offer coverage, which assists the producer, its production, its family, the generation of guarantees to its financer, investor, business partners, and all the people interested in decreasing the risks of rural activities.

Rural Insurance is characterized by the involvement of the producers and private insurance companies, and can cover agricultural, cattle activities, assets of rural producers, products, commercialization of the credit products and, also, the life insurance of the producers. Part of the risk premium is paid by the government, which every year establish a subsidy limitation for rural insurance.

19.11. Environmental Issues related to Agrarian Law

Rural activities are naturally aggressive to the environment and constant attention is needed for the preservation of the ciliar bushes throughout the river systems, the protection of the springs, and reasonable use of the water, observation of the rules on land use and to the products cultivated.

The Principle of Environmental Preservation aims at inducting the society to conciliate economic exploitation with the conservation of natural resources. In this sense, Law n. 4771 of 15 September 1965 (Forest Code),

establishes two important restrictions to the land use. In first place, owners shall preserve forests or other forms of natural vegetation in certain areas of the property specified by article 1, section II of the Forest Code, the so called Permanent Protection Area – APP (*Área de Proteção Permanente*). These protected areas include pieces of lands covered or not by vegetation that may have environmental or human welfare functions, such as preserving water resources, landscape, geological stability, biodiversity and soil protection. In these areas any human intervention depends on a prior approval by the public authorities, otherwise it may typify environmental crime.

Also, owners of lands shall preserve natural vegetation in a minimum percentage of their lands (80% in the Amazon region and 20% in the other regions), excluding the area of the APP's. As per Decree n. 6.514 of 22 July 2008 this reserve (*reserva legal*) must be registered before the Land Registry by 11 July 2011, under certain administrative and pecuniary penalties.

19.12. Labour Law in the Rural Field

Convention n. 14 of 1975, of the International Labour Organization, defines a Rural worker as an individual who works in the rural area, agriculture or handcraft tasks or on similar or connected services.

Rural workers in Brazil have the same rights granted to urban workers, but are subject to specific legislation and to a special Social Security regime. The basic rules for the rural workers are set forth by Law n. 5.889, of 08 June 1973.

20. AVIATION LAW

20.1. Aviation

It is well-known that Brazil is a country with a tradition in the aviation. The most famous Brazilian in this area was Alberto Santos-Dumont, who, in 1906 flew his plane 14 Bis, in Paris. This exploit gave him the reputation as the "Father of Aviation". Without going into historical controversies, it is important to remember that 14 Bis was the first plane to take off, fly, and land without the use of catapults, high winds, launch rails or other external assistance.

In keeping with this tradition, in 1969, the Brazilian aeronautical and avionics company – EMBRAER, was founded. The initial objective was to produce small planes by . The company is now one of biggest aeronautical companies in the world, producing state-of-art executive and commercial airplanes, which delivered 242 aircrafts in 2009.

Nowadays in Brazil 3,500 aerodromes are in operation. Out of these 2,758 are private and 742 public. Furthermore, there are now more than 30 international airports in Brazil and 25 Air Companies.

The Brazilian air fleet consists of more than 15,000 civil airplanes, according to the Brazilian Air Registry – RAB.

20.2. Regulation of Aviation Law

Aviation Law is responsible for the regulation, organization and delimitation of the air navigation system in Brazil. Aviation Law deals with national and international aspects of military and civil aviation, air freight, transport of passengers and airplanes.

Airplanes can be military or civilian. The military ones belong to the Brazilian Air Force – FAB that has the principal objective of guaranteeing security in the national air space. All other airplanes are civilian, independently of whether they are private or public property.

The Brazilian Constitution[140] sets forth that Federal Union has the exclusive competence to legislate on aviation matters. Law n. 7.565, of 19 December

140. Brazilian Federal Constitution, Article 22, subsection I.

1986, the Brazilian Aeronautical Code, is the most important law in this field. There are many other resolutions, norms, rules or procedures, in the midst of which we should highlight Decree 6.780, of 18 February 2009, which approved the National Policy to Civil Aviation – PNAC, aiming the development of the Brazilian civil aviation. .

Moreover, there is a strong relationship between these Laws and regulations and the international conventions on flight. The principal international conventions on aircrafts, flights and air transport, of which Brazil is a signatory country, are: The Warsaw Convention (on air transport), The Chicago Convention (on civil aviation), the Geneva Convention (on the law of airplanes), the Tokyo Convention (on infractions inside airplanes) and the Montréal Convention (on air transport).

It is important to remember that the Montréal Convention, created the International Organization of Aviation – OACI, as an agency of United Nations, with the objective of developing the international civil aviation, promoting security on flights, helping the development of airways, airports, as well as assisting in air travel and creating models and recommending methods.

In Brazil, the Ministry of Defence is responsible for coordinating civil aviation, including the coordination of the airport infrastructure company, which is INFRAERO, one of the largest in the world.

Law n. 11.182, of 27 December 2005, created the National Agency of Civil Aviation – ANAC, an agency linked to the Ministry of Defence, with authority over civil aviation matters. This agency has administrative independence and financial autonomy.

20.3. The Delimitation of Air Space and its Regulation

Air space overlaps national territory, including territorial or jurisdictional waters. According to the national law, Brazil has the supreme right to regulate the air space over its national territory. Using this prerogative, Brazil established that all airplanes coming from abroad need to first land at and can only take off from an international airport, whatever the nationality of the airplane.

20.4. Aircraft Ownership Registry and Air Travel Conditions

The ownership of an aircraft is acquired by construction or by contract (purchase, donation, inheritance, and other means) and all Brazilian civil airplanes must be registered at the National Agency of Civil Aviation – ANAC, through the National Brazilian Registry – RAB, which will provide the nationality and license badge that will identify the airplane. Moreover, it is essential to have a certificate for air travel to be authorized to fly in Brazil, as this certificate indicates that the aircraft is in good order to fly in the air space with security.

20.5. Taxes of the Aeronautical Sector

National air space and airport areas are public assets and it is for this reason Federal Government is competent to regulate their use.

The most important taxes in the sector are:

a) tax to issue the certificate of air travel;

b) tax to homologate airplanes for instrumental flight;

c) taxes for maintenance inspections;

d) airport maintenance taxes to INFRAERO; and,

e) taxes for aeronautical communication.

20.6. Aircrafts Contracts

Airplanes can be owned by individuals or legal entities. We list below some of the contracts that involve aircrafts:

a) Aircraft Rental: the owner transfers to the tenant the use of the aircraft, for a determined period of time;

b) Charter: one of the parties carries out one or more preset trips, during a determined time, in consideration of a payment;

c) Leasing agreement: it is similar to a rental of an aircraft, but in this contract an option to purchase the good or for the renewal of the contract can be included, in favour of the lessee;

d) Mortgage: Brazilian law ensures that an aircraft can be mortgaged to guarantee the debts of its owner; and,

e) Chattel Mortgage: another kind of guarantee by which the ownership or the possession of the aircraft is transferred to the creditor until the credit relationship is liquidated.

20.7. Air Carrier Contract

The carrier, for a cash consideration, transports people or things from one place to another.

In case the contract relates to the transportation of people, the transporter is obliged to: deliver the respective individual ticket or collective ticket; transport the passenger with safety to the destination; refund him if the transportation has been cancelled; board the passenger at the latest four hours after the agreed schedule or refund the price of the ticket; pay all costs of passengers in case of interruption or delay in a journey; and be responsible for the loss and the damage arising from the non-performance of the service.

With regards to contracts of cargo transportation, is important to note that the loads must be carried with the respective air bill, in which all the information relating to the object should be specified, such as the origin and destination, name and address of the sender and of the transporter, the nature of the load and the weight, quantity and value, among others. The transportation by the carrier starts with the receiving of products to be carried by the transporter and persists during the whole period that the same are under its responsibility.

The transporter's responsibility for damages is regulated by the rules of Brazilian Aeronautical Code and by agreements or international conventions on the subject. Thus, any attempt to discharge or restrict this responsibility will be invalid.

For example, in Brazil the transporter is responsible for the damages resulting from the death or injury of the passenger, caused by crash during the transportation, on board the airplane or during the shipping or unloading. Also,

it is responsible for the damages caused by the delay of the transportation and for the damages to the luggage, including all the personal objects of the passengers.

20.8. Insurance of Aircraft

The Brazilian Aeronautical Code determines that all aircrafts, including those that are not operated or used, must have the civil liability insurance. Moreover, the aircraft can be insured against any damage, through specific contracts with insurance companies.

20.9. The Concession for the Rendering of Air Services

Air services can be private or public. Private services are those rendered without remuneration, to the benefit of the operator or the owner of the aircraft. In their turn, public services are those that are available to all citizens and are regulated and supervised by the Government. So, the services of transporting passengers, cargo or mail, sightseeing and all other that imply remuneration to the service provider are public services.

Before rendering public air service the companies must apply for an authorization or a concession. Nowadays, the Defence Ministry is competent to regulate the exploration of public air services.

Authorization is the administrative act that permits: the exercise of an activity; the practice of a legal act or the use of a public asset. The authorization permit these activities, but it does not oblige the authorized person to do it.

Concession is a temporary or precarious transfer of an activity from a public authority to another person (that can be an individual or a legal entity), to be exploited at its own responsibility and risk, but to the benefit of all citizens and obtained through a bidding process. Even if the service is rendered by a private party, it remains public in nature and, because of that, the organization and the regulation are undertaken by the Government.

Concessions can be granted to companies: with headquarters in Brazil; in which at least 4/5 (four fifths) of the capital with voting rights belong to Brazilians citizens; and whose management is exclusively under the charge of

Brazilians. There are several Bill of Laws under analysis of the House of Representatives, with the objective of change and/or eliminate the restriction to foreign capital in air companies.

20.10. The Concession of Airports

The concession for the exploration and administration of airports is allowed by Brazilian Aeronautical Code, but most of the airports are administrated by INFRAERO or by covenants between States and Cities. The concession is obtained through a bidding process.

There is no legal restriction for the construction and/or administration of airports by foreign companies or Brazilian companies controlled by foreigners but restrictions may be imposed by the notices with invitation to the bids.

21. PUBLIC BIDS

21.1. Legal Framework

Public bidding in Brazil has a long and distinguished history. In 1592, the Philippine Ordinance proclaimed that no public works could be awarded without first holding a bid to determine the best technique and price. During the First Empire, at the beginning of the 19th century, Law of 29 of August 1828 provided that a tender should be made to the private sector to ascertain the best offer for public works. Law n. 4.401 of 10 November 1964 established the first norms for public bidding as indicative of the procedural format for procurement of goods and services.

Decree-Law n. 2.300 of 21 November 1986 became the principal legal text regulating federal public bidding and contracts. The 1988 Federal Constitution provided for the extension of Decree-Law n. 2.300/86 to the state and municipal levels.

The enactment of Federal Law n. 8.666 of 22 June 1993 ("Public Bid and Contracts Law") was a landmark in four centuries of Brazilian procurement legislation and a considerable political institutional advance. Soon after it was amended by Law n. 8.883 of 08 June 1994, a further bill was issued on 19 February 1997 purporting to substitute Law n. 8.666/93, without doing so however. Law n. 8.666/93, as amended, is still in force.

21.2. International Competitive Bidding

International competitive bidding is the formal bidding procedure whereby Brazilian and foreign companies bid for government procurement. Law n. 8.666/93, as amended, determines that the Central Bank of Brazil and the Ministry of Finance are responsible for formulating its rules. Article 37 of the 1988 Federal Constitution provides that the principles of legality, impersonality, morality, equality, publicity, administrative probity, conformity to bid notice requirements, amongst others, are to govern the bidding procedure behaviour generally.

Foreign companies, i.e., those not operating in Brazil, are in principle allowed to participate in the competitive bidding process under the same condi-

tions as Brazilian companies and also in certain instances in association with Brazilian companies. A foreign company involved in the bidding process must demonstrate that its activities conform to the rules of its own country. It must also demonstrate that its status as a technical, manufacturing or commercial company meets the necessary technical and financial requirements, as well as the other conditions established in the official bid notice publication.

Generally, documentary proof must be submitted evidencing legal, technical, economic and financial eligibility, as well as good standing with the relevant tax authorities. Such proof must be submitted through original documents, certified by a notary, the bidding agency, or be officially published. A waiver of such requirements is possible in cases of *inter alia*, invitation to bid and contest bidding. Further to maintaining a legal representative in Brazil with express powers to receive service of process, under Article 32, § 4º, of Law n. 8.666/93 foreign companies must also meet the same requirements "as fully as possible" by submitting equivalent documentation, translated by a sworn public translator and certified at a Brazilian consulate with jurisdiction.

Regarding specific compliance factors, the parties to the bidding process must: produce evidence of a consortium agreement, executed by means of a private instrument or public deed; indicate the leader company of the association, which shall meet the conditions to the bid invitation; and present evidence of the following: (i) legal capacity; (ii) technical capacity; (iii) financial standing; and (iv) tax situation. For those foreign companies that do not operate in Brazil, they must associate themselves with a Brazilian company which shall be appointed as the leading company for the bidding purposes. No associated company can participate in the same bidding individually or with other non-associated companies. In an association between Brazilian and foreign companies, the leadership shall always be vested in the Brazilian company (Article 33, § 1º, of Law n. 8.666/93).

For bid award purposes, under Article 42, § 4º, of Law n. 8.666/93 foreign bid amounts shall include an amount equivalent to the taxes payable by Brazilian bidders on the transaction. Under Article 3, § 2º, of Law n. 8.666/93, a preference is applied in favour of the Brazilian bidder in the case of a bid on goods and services produced or rendered by Brazilian domestic companies, produced in Brazil or otherwise produced or rendered by Brazilian companies. It should be noted that, significantly, as of 15 August 1995, by Amendment n. 06 to the Federal Constitution, which revoked legislative provisions restricting for-

eign capital, a Brazilian company incorporated under Brazilian laws with headquarters and administration in the country can operate upon Brazilian authorisation and concession, thus allowing for direct foreign investor participation.

For the bidding particulars that need to be provided under Public Bid and Contracts Law, a formal request for quotation is made in relation appropriate qualification within 3 days of the scheduled bid receipt date. The invitation to bid calls for at least three interested parties, must be at a designated place and be valid for other potential bidders provided they make their intended participation known at least 24 hours before placement of the bids. Should an auction take place, the sale of assets no longer used by the Administration or products legally seized are sold to the highest bidder.

Under the Public Bid and Contracts Law, bids may be waived in cases of war, turmoil, emergency or other public calamity; whenever the bids are placed at a price clearly exceeding that of the domestic market or inconsistent with the official established prices; for acquisition by domestic public entities of goods or services rendered by bodies or agencies of the Public Administration especially created for that purpose; or for national security reasons, established by Decree of the President of the Republic after a hearing of the National Defence Council. Bids are considered "inapplicable" if competitive conditions are absent, such as when material, equipment or items can only be supplied by the manufacturer/producer of an exclusive commercial agent or company or in the case of the contracting of specialised technical services.

21.2.1. Import Procedures Related to International Competitive Bidding

The Department of Foreign Commerce (*Departamento de Comércio Exterior* – DECEX) is the Brazilian agency responsible for regulating import and export, including those transactions of governmental interest, as well as for issuing import and export licenses.

In case of international bidding, the imports can be done using the normal rules for importation (by the bidding company) or using the Drawback – a special rule for importation in which the payment of taxes is suspended. Both rules are set out under SECEX Administrative Rule n. 35, of 24 November 2006, and its amendments.

Drawback as set out in item “D” annex of the mentioned Administrative Rule, is used whenever the import involves raw material, intermediary products

and components for manufacturing in Brazil, for machines and equipment to supply the international market.

Furthermore, such types of imports will have to be carried against payment in convertible currency, proceeding from financing granted by international financial institutions, of which Brazil participates, or by foreign governmental entity, or still, by the Brazilian Development of Economic and Social Bank – BNDES.[141]

In this case, for the concession of the related benefits, the following documents must be presented to DECEX:

(a) Copy of the notice with invitation to the international bid;

(b) Copy of the proposal or the contract for supply, in Portuguese, or by sworn translation;

(c) Technical catalogues and/or specifications and details of the material to be imported;

(d) Declaration of the company bidder certifying that the company won the bidding and that the Regime of Drawback was considered in the formation of the price presented in the proposal;

and

(e) Copy of the financing contract (sworn translation).

After the presentation of the relevant documents, DECEX will either approve or deny the import request through drawback.

21.3. Electronic Procurement

Electronic procurement is ~~also emerging~~ as a means of connecting government buyers to suppliers. The Unified System of Registration of Suppliers (SICAF) is an on-line data bank created by the Ministry of Planning, Budget and Administration to de-regulate and simplify the registration of suppliers.

141. In accordance with Article 5 of Law n. 8.032/1990, amended by Law n. 10.184/2001.

The primary purpose of SICAF is to register individuals and legal entities to participate in public bids held by agencies at all levels of the Public Administration. The benefits of SICAF to suppliers include the following:

(a) sole registration within the Federal Public Administration nationwide;

(b) de-regulating the registration and qualification process;

(c) reduction in the amount of documents to be presented for each bid; and

(d) reduction in the costs of maintaining the registration of the company before the entities of the Federal Government.

Suppliers interested in supplying goods or services to the Federal Government should register with the General System of Services – SISG. Registration is valid for 1 year and proof of registration is provided by publication in the Federal Official Gazette.

The Federal Government on-line buying system (ComprasNet) was developed and is managed by the Secretariat of Logistics and General Services. Parties may obtain on-line information concerning all bids anywhere within the Federal Government including the following:

(a) Bids – consultation on-line of all items that make up the bid and quantities;

(b) New Bid Notices – download of all bid notices in progress;

(c) Preferential Lists – of information concerning bids by material/service or location;

(d) Classified Lists – guides for buying options;

(e) Consult Supplier List Data – follow-up on the status of suppliers registered with SICAF; and

(f) Download of Lines of Material and Service Supply – complete copies obtained on-line.

The A ComprasNet web site also contains information on the suppliers registered with the System of General Services – SIASG.

Policies relating to the administration of material, works and services of the Federal Government are formulated, promoted and implemented, through the Secretariat of Logistics and General Services. Included in these activities are directives on public bidding and administrative contracts with the Federal Government.

22. IMMIGRATION

22.1. Legal Framework

The legal framework for the foreigner's entry and stay in Brazil are provided for Law n. 6815, of 19 August 1980, regulated by Decree n. 86.715, of 10 December 1981 and several resolutions issued by the Brazilian immigration authorities.

An entrance visa in Brazil is defined as a consular authorization registered in the passport of foreigners and which allows them to enter and remain in Brazil, if immigration law requirements are met. Brazilian law provides for the granting of several types of Visas, depending on the nature of the trip. In this regard, the most important types of Visas for foreigners doing businesses in Brazil are the (i) Temporary Visa and (ii) the Permanent Visa.

According to Law n. 6.815, the Ministry of Labour is the governmental body in charge of granting the necessary authorisation for foreign individuals to work in Brazil (including the Permanent Visa for a company's administrators; and the Temporary Visa for foreign employees), without which, visas cannot be granted by the Ministry of Foreign Affairs. Within the Ministry of Labour, visa matters are assigned to the competence of the *Conselho Nacional de Imigração* (CIMIG)

22.2. Permanent Visa

According to Article 16 of Law n. 6.815, a foreigner who wishes to reside in Brazil may obtain the permanent visa. However, such an application will be closely scrutinised by the immigration authorities to determine whether such immigration is desirable for the Country.

Under the "convenience policy", the authorities will consider whether the immigrant will bring in specialised manpower, as defined by National Development Policy, whether he will provide the Country with an increase in productivity or with the transfer of new technologies, as well as whether such immigration will stimulate investment in specific areas.

The primary purpose of this convenience policy is to protect the national labour force and to restrict immigration to only those foreigners who can contribute to the Country's development.

Brazilian immigration authorities implement this policy by filtering the applications for permanent visas and selecting only those of foreigners who, through their expertise, will contribute to the development of the Country, and at the same time, will not deprive a Brazilian worker of employment.

Brazilian authorities favour applications related to inter-company management transfers, but any company in Brazil may offer employment to a foreigner applying for residence in the Country, provided the link between the Brazilian company and the foreign company (the employee's company) can be confirmed.

The personal qualifications and skills of the foreigner applying for the permanent visa must be closely related to one or more of the objectives of the Brazilian company intending to bring in the manpower.

In order to apply for a permanent visa for a company's director or administrator, the foreign partner of the Brazilian company must have (i) made a minimum foreign equity investment in the amount of US$ 200,000.00 (two hundred thousand US dollars), or (ii) a foreign equity investment equal or superior to US$ 50,000.00 (fifty thousand US dollars), plus the promise of generating at least 10 new jobs during the first two years as from the appointment of the foreigner as an executive of the Brazilian company[142].

Foreign individuals intending to come to Brazil to invest in production activities may also apply for a permanent visa. The issue of this type of visa is conditional on the proof of an investment of a sum equal or superior to R$ 150.000,00 (one hundred and fifty thousand Reais), and the investment may be made in a new company or in an already existing one.

Exceptionally, even if the total investment is less than R$ 150.000,00 (one hundred and fifty thousand Reais), the National Immigration Council may grant a permanent visa to a foreigner with an investment project as long as such investment is considered relevant from a social perspective. In this case, a detailed business project containing a plan of investment to employ Brazilian workers must be prepared.

22.3. Temporary Visa for foreign employees

A temporary visa may be granted to foreigners who wish to work in Brazil under a labour agreement with a Brazilian company[143]. The granting of this type

142. According to the Resolution CIMIG n. 74, of 09 February 2007.
143. According to Article 13 of Law n. 6.815.

of visa is also subject to the prior issue of a work permit by the Brazilian Ministry of Labour, which will be responsible for examining and deciding upon the need for foreign manpower for the development of the proposed activities and whether the foreigner indicated for the position in the Brazilian company has any special abilities that cannot be fulfilled by Brazilian manpower.

Under the terms of the prevailing regulations, the candidate for the Temporary Visa for work in Brazil needs to present proof of his professional qualification and experience compatible with the activity to be exercised in Brazil through the submission of diplomas, certificates and declarations, at least demonstrating:

I – two- years of experience in a medium level profession, with a school term of minimum nine years;

II – one-year experience in a superior level profession, including the period from
the conclusion of the respective graduation course;

III – conclusion of a masters course or superior degree; or

IV – three-years experience in exercising a profession, of artistic or cultural nature that does not receive formal education.

The aforesaid requirements shall not be applied in relation to foreign citizens from South America countries until 16 October 2010[144].

The Brazilian company interested in hiring the foreign employee must observe the ratio of 2 Brazilian employees for each foreign hired. The same ratio will also apply in relation to the total pay-roll of the Brazilian Company.

The term of the Temporary Visa for foreign employees is established in the labour agreement and cannot exceed two years. Subject to the prior approval of the Brazilian Ministry of Labour such term can be extended for an additional period of two years.

144. According to Article 3 of Resolution CIMIG n. 80/08.

23. CONTRACT LAW

23.1. Introduction

Contracts in Brazil are mainly subject to the rules set forth by the Brazilian Civil Code. Depending on the features of a given transaction, a contract may also be subject to the Consumers' Protection Code, which sets a further legal protection to the end user of a product. Due to the mutant character of these agreements and its constant evolution, although many types of contracts are covered by the Civil Code, a diversity of contracts is governed by sparse legislation. It is also important to mention the contracts formed through the Internet.

However, before examining some relevant contracts under the scope of Brazilian Law, it is worth remarking upon some specific features and peculiarities of Brazilian Contract Law in general.

Differently from other jurisdictions which do not have codified law (i.e. the common law countries), in Brazil, one of the main peculiarities regarding this subject is the fact that some principles ruling the contracts are provided expressly in the legislation and, under certain circumstances, the contracting parties cannot even waive rights. Notwithstanding, the main principles regarding private contracts in Brazil are: the principle of freedom of will, the principle of *pacta sunt servanda*, the principle of good faith, the principle of relativity of contracts and the social function of the contract.

The *pacta sunt servanda* is the principle that stipulates that the terms of the contract which are agreed by the parties has the status of Law, as if it were written legislation and, therefore, shall be complied with unconditionally by the parties under penalty of breach of the contract. This general principle, tied to the principle of good faith, brings efficiency to the contract and legal safety for the parties to the agreement. The unconditional compliance, however, is not absolute and has its limits in other principles such as the principle of legality, of equality, among others.

On the other hand, the principle of relativity of contracts establishes that the contract is binding upon its parties solely, and not third parties to it, due to the principle that no party can be compelled without prior consent. Through this

theory, although the effects of the contract are restricted only to the parties of the agreement, by way of exception, it can affect third parties in some particular situations foreseen by the legislation[145].

With respect to the principle of good faith[146] it proclaims that the agreement must comply with the values of loyalty and respect. In the same vein, according to the principle of social function of contract, the contract is a mechanism for achieving the common good and the pursuit of social interest[147].

Finally, it is worth observing the theory of exception of changed circumstances (*rebus sic stantibus*) Brazilian Contract Law allows the review of the contract in order to be fit to new circumstances which ariose from unforeseen events. Such events should be supervening and significantly alter the financial balance of the contract; affecting it in such a way that the performance once envisaged by the time of the signing of the agreement was jeopardized.

23.2. Brazilian Law on International Contracts

23.2.1. Governing Law – the Principle of Freedon of Will in Brazilian Legislation

International contracts can establish different governing laws, such as the Law of the exporter's country, the importer's country, the law of a third country chosen by the parties, among others. Thus, the subject of an international contract`s governing law is crucial to establish the extent of the rights and liabilities undertaken by the parties through the Agreement.

However, the definition of the governing law of an international contract will depend upon the interpretation of the Choice of Law clauses or by the domestic rules of the countries involved in the transaction.

Intricacies can be faced by the parties on this matter if the Agreement involves Brazilian Law. Besides the inherent complexity of the subject, Brazilian legislation on governing law and principle of freedom of will applied to international contracts can raise controversy regarding the interpretation of its rules and is somewhat different to the law of other countries.

145. For example, Article 436 until 438 of the Civil Code, that cater exceptions to the principle in the event of a contract made in the benefit of third parties.

146. Articles 187 and 422 of Brazilian Civil Code.

147 Article 5, XXII and XXIII of the Brazilian Federal Constitution and Article 421 of the Brazilian Civil Code.

In order to avoid conflicts of applicable law on disputes that are very likely to arise from international contracts, most of the countries allow freedom of will with regards to the possibility of the parties to choose whatever regulation of whatever country that they want to rule their agreement. The same assertion cannot be stated about Brazilian Law.

In Brazil, there are restrictions concerning the application of the doctrine of freedom of will (in Portuguese, *principio da autonomia da vontade*) in the choice of the governing law of international contracts.

Brazilian domestic rules of international law regarding the above-mentioned subject are mainly provided by Article 9 of the Law of Introduction to the Brazilian Civil Code (hereinafter referred to as LICC).

In general lines, such Article states that the obligations arising from an international contract will be classified and governed by the law of the country in which such obligations were created. That is because the exegesis of paragraphs 1 and 2 of Article 9 of the LICC evidences that Brazilian legislation adopts two rules to establish the governing law of international contracts.

The first rule states that when the contract is executed between physically present parties, the applicable law will be the law of the country in which the contract was signed. The second rule provides that when the contract is fixed between parties which are not physically present, the applicable law will be the law of the contractor`s country.

Therefore, when the parties are silent with regards to the choice of law in their international contract, the definition of the governing law of such contract will be subject to the provisions above-mentioned under Article 9 of the LICC. However, such Article does not make any recognition to the principle of freedom of will. Thus, Brazilian case law has determined the interpretation of the Article in the sense of not accepting the principle of freedom of will to the parties for electing the applicable law in international contracts.

Accordingly, independently of the agreement of the parties to an international contract regarding choice of law, when Brazilian law is considered in the transaction, the governing law of such contract will be subject to the provisions of Article 9 of the LICC. That is, the applicable law will generally be the Law of the country in which the contracts was signed. The exception to the rule is the parties' election of a commercial arbitration in order to solve any disputes arising from the contract, given that Brazilian legislation on arbitration accepts freedom of will.

It is worth noting Bill nº 4.095/95 in the National Congress, which adopts freedom of will that will substitute the LICC in the future.

23.2.2. Jurisdiction

Firstly, it must be noted that pursuant to the Arbitration Law (Law no. 9.307, of 23 September 1996), commercial disputes can be definitively settled through arbitration rather than through recourse to the Judiciary, if the parties to the agreement insert an arbitration clause. The Arbitration Law provides that the parties shall be bound to initiate arbitration procedure by the insertion of an arbitration clause in a given agreement. Furthermore, any arbitration decision shall have the same effect as an award granted by a State Court and shall be enforceable according to its terms.

Considering that the parties were silent regarding the Arbitration Clause, the choice of the competent jurisdiction (Choice of Forum Clause) of the international contract must be considered, and must not be confused with the choice of the governing law of the contract. That is because the choice of forum is the agreement of the parties to the international contract electing which State Court is competent to decide upon any dispute arising from their commercial relation.

According to Brazilian Case Law (consolidated in *Súmula* nº 335 of the Supreme Court), the parties have the freedom of will to decide the forum for dispute resolutions arising from their international contract. Thus, the appointment of a foreign jurisdiction as the forum of an international contract involving Brazilian parties is generally accepted by Brazilian Case Law. The exception is the "adhesion"s contract, in which the parties are not considered as free to choose but merely imposed and bound by the rules of the agreement (i.e. Bill of Lading contract).

Parties to international contracts involving Brazilian Law should be wary that problems may arise to identify the rule on choice of forum which is set in the complex combination of several legal dispositions[148].

Pursuant to Article 12 of the LICC which states the general rule for Brazilian competence, Brazilian authorities will have jurisdiction when the defendant is domiciled in Brazil or when the obligation has to be performed here.

148 Article 12 of the LICC, Article 88 of Brazilian Procedure Civil Code (hereinafter referred to as CPC) together with Article 9 of the LICC.

Articles 88 and 89 of CPC regulates Brazilian international competence, the former determining when Brazilian Courts will have concurrent competence, whilst the latter, determining when Brazilian Courts will be exclusively competent to rule (i.e., disputes over real estate located in Brazil).

Thus, according to Article 89 of CPC, Brazilian Courts will have concurrent competence with foreign jurisdictions when: (i) the defendant, regardless of its nationality, is domiciled in Brazil; (ii) the obligation is to be executed in Brazil; or (iii) the lawsuit was originated from a fact or act that took place in Brazil.

It is also important to remark that parties to international contracts must be alert that Brazil has concurrent jurisdiction in relation to foreign courts even if a lawsuit of equal content is filed abroad, Brazilian authorities being also competent to judge the same claim in the country[149].

In conclusion, whenever an agreement shall be executed in Brazil, the competence of the Brazilian Courts is concurrent with that of any other foreign Court. This shall be the case when the parties to an international agreement appoint a foreign Court as competent to settle a dispute arising from such agreement. Besides the fact that Brazilian Courts would recognize the foreign Court as competent to settle the dispute, Brazilian Courts would also find themselves as concurrent competent to settle the same dispute. In other words, Brazilian Courts shall remain competent, but not solely, they shall compete with the jurisdiction of the foreign Courts appointed by the parties in the international agreement.

23.2.3. Public Order

In general, the Brazilian public order can prevent the application of a foreign legal system, the ratification of foreign awards and the enforcement of foreign judgments.

Brazilian authors and case law state that the concept of public order alters pursuant place and time. Therefore, one situation that nowadays is considered as a matter of public order may in the future not be classified as such. In a way, public order can be considered as formed by the mandatory rules of the Brazilian system.

149. Article 90 of the CPC.

Thus, when construing an agreement under Brazilian Contract Law, it is relevant to determine which rules could be considered as part of the Brazilian public order.

23.3. Types of Contracts

23.3.1. Contract of Sale

In general, the contract of sale is the form of contract whereas a seller has to transfer the possession of the goods sold and the buyer has the duty to pay the price of the goods in return. The contract of sale is regulated by the Brazilian Civil Code in Articles 481 until 508. This type of contract will be considered mandatory and binding on the parties if they agree on its object, price and form of payment[150].

Generally, this agreement ends with the delivery of the goods[151]; however, if the object of this transaction is a real estate property, the sale will only be valid after the registry of the property´s deed before the Real Estate Registry Office[152].

When the parties to the contract of sale are traders as seller and buyer, the agreement takes form of a mercantile contract of sale, the commercial aspect being considered due to the succession of contracts of sale (string sales) involved in these agreements. Thus, the importer buys the goods from a foreign seller and re-sells it in Brazil to the wholesaler (*atacadista*) that subsequently sells the goods to the retailer (*varejista*), and so on.

The mercantile contract of sale is subject to the Civil Code and to specific legislation. Eventually, this agreement may also be subject to the Consumers' Protection Code, for instance, if the importer or buyer is the final consumer of the goods.

Since the date of the signature of the mercantile contract of sale, the buyer undertakes the obligation of timely paying the price for the goods as agreed in the contract and the seller undertakes to transfer the property of the goods sold to the buyer, that is, to deliver the goods in the agreed place and time for delivery. If the seller does fail to comply with his duty of delivery, the buyer can

150. Articles 483 and 488 of Brazilian Civil Code.
151. Article 1.267 of Brazilian Civil Code.
152. Article 108 of Brazilian Civil Code.

opt for terminating the contract or to demand the performance of the contract by the seller, having the right to sue for damages in both cases[153].

As far as transportation is concerned, the liability to arrange the transportation of the goods sold lies with the seller, as much as the liability to pay for the costs of delivery[154]. The rule makes sense given that Article 493 of the Civil Code provides that the place of delivery of the goods sold is the place where the goods were located by the time of the sale, thus, probably with the seller. Also, with regards to the time for the delivery of the goods, the buyer may demand immediate delivery of the goods to the seller, as soon as the sale is concluded[155].

With regards to the place of payment of the price for the goods, it shall be deemed to be the place of the debtor's domicile[156]. Finally, still regarding the payment of the goods, the obligations of the seller (delivery of the sold goods) and of the buyer (payment of the price) are simultaneous and immediately enforceable[157].

However, the seller cannot demand immediate payment from the buyer as soon he places the goods at his disposal. That is because when the mercantile sale's transaction is made through documentary sales, whereby payment is made against the tender of documents that represents the goods, even before delivery, Article 530 of the Civil Code provides that payment will be performed on the date and at the place of delivery set in the documents. Therefore, it is up to the seller, to ensure that the document against which payment is to be made reaches the buyer.

Notwithstanding the abovementioned codified rules regarding commercial contracts of sale, the parties can agree on different terms, by virtue of freedom of contract[158]. In fact, the practice is very common in the market, being very regular in these contracts in order to unify the duties and obligations between the parties, especially if the agreement is made between parties established in different countries.

In this context, following international standard practice for the increase of the dynamism that is inherent to commercial sale transactions, the International Commercial Terms (INCOTERMS) from the International

153. Article 475 of Brazilian Civil Code.
154. Article 490 of Brazilian Civil Code.
155 Article 482 of Brazilian Civil Code.
156. Article 327 of Brazilian Civil Code.
157. Article 134 of Brazilian Civil Code.
158. Article 78 of Brazilian Civil Code.

Chamber of Commerce (ICC) is commonly adopted in Brazilian agreements of commercial contracts of sale, in order to determine the duties of the parties, the passage of risk and the interpretation of commercial terms. In short, the INCOTERMS determine what party does what in the international agreement. Accordingly, the INCOTERMS will be applied to the contracting parties in Brazil when expressly adopted in the respective agreement. It is also important for the parties to note the version to be adopted, as the INCOTERMS are amended from time to time.

23.3.1. Franchise Contract

The franchise contract, or "*franchising*" according to the English terminology, is subject to Law n. 8.955/94 (hereinafter referred to as "Franchise Law"), which was created specifically to regulate this kind of contract, being also a protective measure for the franchisee.

A franchise is a business agreement between two parties, by which the franchisor – the party who owns the business – gives to the franchisee the rights to use the trademark or patent associated with the right to distribute, exclusively or not, products and services and, eventually, the right to use the technology of the operating methods of the franchisor, in exchange for compensation, however, without creating an employment relationship between the parties[159].

A diversity of requirements and procedures must be followed by the franchisor, in order to make full disclosure to potential franchisees of his intentions to prospect a business[160]. Thus, the franchisee is able to make a more informed choice regarding the acquisition of the franchise offered. Accordingly, franchisors are required to provide prospective franchisees with a Franchise Offer, prior to the execution of the franchise agreement, containing general information on the franchisor, the franchise business and the terms of the franchise relationship, including a profile of the ideal franchisee.

The offer must be delivered to the prospective franchisee at least 10 days prior to the execution of the franchise agreement or pre-agreement. In the event of the franchisor's failure to comply with this requirement, the franchisee may argue there has been a violation of the agreement and require the reimbursement

159. According to Article 2 of Franchise Law.
160. Article 3 of Franchise Law.

of all amounts already paid to the franchisor or third parties indicated by same, as franchise fees or royalties, plus damages and losses.

The law further provides that the offer must state whether the franchisee is entitled to exclusivity for a certain territory and under what conditions. It must clearly define the franchisee's obligations with regard to the acquisition of real estate, goods, services, etc., as well as what is being effectively offered by the franchisor in terms of training and know-how. Finally, the offer must contain provisions concerning surviving obligations and non-competition clauses after termination of the agreement.

A draft of the standard franchise agreement utilized by the franchisor must also be submitted, together with the offer, for preliminary examination prior to entering into any definitive franchise agreement.

Therefore, it is clear that the franchisee must receive a complete diagnose of the business organization of the franchisor, prior to entering into the agreement. Furthermore, in the event the information within the offer is distorted, false or missing, the franchisor is liable in terms of Civil and Criminal Law vis-à-vis the franchisee[161]. Equally, the franchisee becomes bind to the strict compliance of the franchisor's standards and rules, given that both parties must ensure the excellence of the trademark under agreement in the market.

23.3.3. Commercial Representation Contracts

A common contract in Brazil, the commercial representation contract is governed by Law nº. 4.886, of 9 December 1965 ("Commercial Representation Law" or "CRL"), amended by Law nº. 8.420 of 1992. Also catered by the Civil Code, it is describe in Article 710 of this statute as the binding legal agreement by which one party undertakes, against a pecuniary compensation, to frequently execute certain commercial operations within a determined area, on behalf of another party, without hierarchical subordination. Such contracts are also known as agency or distribution contract.

The representation agreement must foresee (i) the general conditions and requirements of the representation; (ii) a generic or specific indication of the products which are object of the agreement; (iii) the term of the agreement; (iv) the territory of the representation; (v) the indication – or not – of the exclusivity of the Representative's action in the territory,

161. Article 7 of Franchise Law.

whether partial, total or by term; (vi) the remuneration and payment conditions; (vii) the obligations and liabilities of the contracting parties; (viii) the exclusivity in favor of the Principal, if existing; (ix) the indemnification amounts to be paid to the Representative due to the termination of the agreement without just cause, which cannot be less than 1/12 of all commissions earned during the term of the agreement[162].

The commercial representation is a profession regulated by CRL. The Representative of a commercial representation agreement must be enrolled with the competent State Commercial Representatives Council in order to be entitled to practice its profession and perceive remuneration[163].

Thus, the Principal shall give the Representative 30 (thirty) days prior notice for termination without cause, if the agreement has not a term and has been in force for more then 6 (six) months[164]. If Principal fails to give notice as provided by Law, it shall pay an indemnification amount correspondent to 1/3 (one third) of the commissions earned by the Representative during the last three months of the agreement. This is a mandatory rule which cannot be surpassed by contractual provisions.

Just causes for termination of the agreement by the Representative are the following events: (i) reduction of the Representative's activities against the contractual terms; (ii) breach of the exclusivity, if the case; (iii) the abusive pricing for the products in the territory of the agreement, aiming to reduce the Representative's activities; (iv) the non-payment of Representative's remuneration, and (v) *force majeure*[165].

A minimum compensation to the representative correspondent to 1/12 (one twelfth) of the total amount of commissions earned during the term of the agreement is due when the agreement is terminated without just cause[166]. This is a mandatory rule, part of Brazilian public order, which can neither be altered by the parties' will nor ignored by a foreign decision or award.

23.3.4. Distribution Contracts

It is the agreement by which one of the parties, designated as distributor, undertakes to acquire and have at its own disposal consumer goods, for its further

162. Article 27 of Commercial Representation Law (CRL).
163 According to Articles 2 and 5 of the CRL.
164. Article 34 of the CRL.
165. Article 36 of the CRL.
166. Article 27, item j, of the CRL.

commercialization in the market, at his own account and risk, from another party, named the contractor, which is the owner of the business, in exchange for compensation or an amount over the value of the re-sale.

This contract's legal regime is provided by both the Civil Code and by the Law nº 4.886/65. Although largely mistaken as being the same as the Agency Contract, the Distribution Contract has its particularities. A distinction can be made by analyzing a key fact in Article 710 of the Civil Code[167], namely, which party has the good at his own disposal. Hence, pursuant to the above mentioned Article, the distributor has physical possession of the goods that are to be sold and distributed to buyers.

According to the Civil Code and to the Labor Code, the party regarded as distributor, have no hierarchical relation with the party supplying the goods. Consequently, it will assume all the risks pertaining the business. Additionally, the proponent is impaired of contracting more than one distributor in the same commercial zone with identical functions unless there is an express clause in the contract stipulating the contrary

Both in the agency and distribution contract there is no hierarchical subordination between the contractor and the agent or distributor, in terms of what is understood by Brazilian Law as such[168], although it comes close to an employment relationship bond. Thus, the fact that the commercial representative has to visit the clients with frequency, has fixed terms to receive his payments and fixed minimum prices for the products sold[169], as well as the definition of a delimitated territorial area for the performance of his activities does not implies an employment relationship with the represented.

23.3.5. Bank Contracts – Leasing and Factoring

The denomination Banking Contracts is applied to every contract which has as object the exercise of intermediation, investment of financial assets or any other function dully authorized by the government to a financial institution. Thus, Brazilian Law recognizes as valid several forms of banking contracts, such as the factoring and leasing contracts, which are described below.

167 *"... characterizing a distribution whenever the agent has the good to be traded as his own disposal."*
168 Article 3 of Labor Code (CLT).
169 Article 33 of Law n. 4.886/65.

It is paramount to note that all institutions that wish to be a party either in the factoring contract or in the leasing contract must maintain secrecy in its operations, likewise any other financial institution[170]. Thus, that characteristic enforces the categorization of these contracts as Banking Contracts under the Brazilian legal system.

The factoring contract is a contract which stipulates that a financial institution, which in the contract is denominated as the factor (*faturizadora*), agrees to charge the debtors of another institution or corporation of the other party (hereinafter referred to as *faturizado*), providing this institution with a credit management service.

Thus, in the factoring contract, a bank provides an institution or corporation the services of managing credit, guaranteeing the payment of all the invoices issued by that institution to its debtors.

It is possible to divide the factoring contract on conventional factoring, where the service rendered is management of credit, insurance and financing; and, maturity factoring, which is the form of contract where the only services rendered are the management of credit and insurance.

Turning to the other Banking Contract denominated as leasing contract, pursuant to Brazilian Law, strictly, there is no legislation covering the concept of this contract, but only legal doctrine, case law, and the clauses agreed in the contract by the parties.

Pursuant to legal doctrine concept, the leasing contract is an agreement in which the lessor – the owner of the goods – grants the lessee – the party that will temporarily have the goods -, the option to purchase the goods at the end of the contract. If the lessee decides to do so, he may subtract the amount paid as rent during the term of the agreement from the purchase price.

Aware of the tax impacts arising from such contract, Brazilian legislators disciplined the obligations of the parties to the leasing contract, as far as the Federal Revenue is concerned, on Article 1, Sole Paragraph of Law n. 6.099/74. Regarding this matter, it is important to note that a leasing contract which does not fit the legal definition, as far as the obligations between the parties are concerned, will be considered for taxes purposes merely as a contract of sale with pre determined term[171].

170. Article 1, Paragraph 2 of the Complementary Law n. 105/2001.
171. Article 11, paragraph one of Law n. 6.099/74.

It is allowed to consist as object of the contract in question products of national production as well as products of foreign production which are authorized before the National Monetary Council[172].

There are two forms of leasing contracts: the financial lease and the monetary lease[173]. The Financial leasing is characterized by the absence of significant remaining amount of money when the end of the contract falls due. In the monetary leasing, on the other hand, the remaining amount of money to be paid by the lessee in order to purchase thede good atby the end of the contract is more expressive, given the rule that it cannot exceed 75 per cent of the total amount of the object of the agreement.

Finally, one controversial aspect is the categorization of the leasing contract as a form of banking contract. However, it is clear in Brazilian case lLaw that the option of purchase by the lessee raises the characterizesation of the payment of the instalments during the contract as a financing, rather than a mere rental.

172 Article 10 of Law n. 6.099/74.
173. Central Bank's Resolution no. 2.309/1996.

24. REAL ESTATE LAW

24.1. Legal Aspects on the Acquisition of Real Estate Property in Brazil

Real estate properties in Brazil are divided in 3 (three) major categories in accordance to its location: (i) urban; (ii) rural; or (iii) coastal and boundary.

Foreign individuals and companies can acquire real estate property in Brazil, but it depends on the type of the property chosen.

Urban properties can be acquired by foreigners under the same conditions applicable to Brazilian nationals; however, there are certain limitations applicable to the acquisition of rural, coastal and frontier properties, which are considered of national security.

24.2. Rural Property

The acquisition of rural properties[174] by foreigners, whether individuals or legal entities, is regulated by Article 190 of the Brazilian Constitution and by Law n. 5709/71. Both rules impose the same legal restrictions on the basis of national security.

In this regard, the Law 5.709/71 establishes that a foreigner cannot acquire in Brazil more than 50 modules (normally one module corresponds to 3 hectares – which is an unit of land measuring 10,000 square meters) as determined by INCRA (National Institute of Colonization and Agrarian Reformation), in a continuous or discontinuous area.

According to Law n. 5.709/71, foreign companies can only acquire rural properties for the implementation of agricultural, cattle-raising, industrialization or colonization projects, which must be related to their respective By-Laws/

174. Brazilian authorities are currently discussing the establishment of further restrictions on the acquisition of rural land by foreign individuals and/or foreign legal entities. If approved those restrictions, Law 5.709/01 will be amended in order to reduce from 50 to 15 modules the maximum land to be owned by foreigners within the so called *Amazônia Legal*, which corresponds to approximately 61% of the country's area and is spread over the States of Acre, Amapá, Amazonas, Mato Grosso, Rondônia, Roraima, Tocantins, Pará and the western part of Maranhão.

Articles of Association, and always upon authorization of the Brazilian Agrarian authority – INCRA.

Brazilian Law also establishes limits regarding nationality. Individuals and/or legal entities with the same nationality cannot acquire more than 40% of the properties within the same rural area, for reasons of national security, unless otherwise authorized by the President or by the Secretary of the Treasury.

There are 02 (two) new requirements to all rural properties established by Brazilian law which are: georeferencing and registry of the legal forest reservation.

Pursuant to Decree 5.579/05, all rural properties must be georeferenced, according to a schedule based on the size of the area, prior to November 2011. Georeferencing is mandatory in case of selling the property and for land insurance purposes.

24.3. Coastal and Boundary Property

Brazilian law provides for severe restrictions on the acquisition of properties within coastal and frontier areas, for national security reasons.

The acquisition of boundary properties is also restricted, being subject to prior consent by the National Security Council, pursuant to Article 2, V and VI of Law 6.634/79.

Pursuant to Brazilian Law one, either foreigner or Brazilian national, does not acquire property of real estate located within coastal areas but only the right to use.

Brazilian legislation defines coastal zone as a national patrimony – the geographic space of interaction of air, sea and land formed by the counties directly influenced but not necessarily by those located in the coastline. Also included are those distant until 50 Km from the coastline holding activities of great impact for the coastal zone or its ecosystems.

The definition includes also the territorial sea of 12 nautical miles.

All properties located in coastal area are subject to the payment of specific taxes called *foro* and *laudemio*.

Foro is an annual tax related to the use of the property and is levied on the rate of 0.6% (oint six per cent) over the value of the right of use.

The *laudemio* is paid when the right of use of the property is transferred and is levied on the rate of 5% (five per cent) over the value of the property buildings and improvements.

24.4. The Acquisition of Property – Practical Aspects

As a condition precedent for the acquisition of a real estate property in Brazil, the prospective buyer must apply for its/his/her registration with the Brazilian Taxpayers' Registry (the so-called CPF for individuals and CNPJ for legal entities). Without this registration the final acquisition agreement cannot be executed. Additionally, foreigners must also appoint a resident attorney in Brazil to represent it/him/her before the tax authorities with and has been granted powers to receive service of process.

Brazilian contract law provisions require, as for any other type of contract, that the parties of a sale and purchase agreement be legally authorized to perform such a transaction. In the case of individuals, the parties must have completed the legal age (18 years old) and be mentally healthy; otherwise, the party's legal representative must act on its behalf in order to make the transaction possible. In case of legal entities, the parties must be duly incorporated and regularly represented pursuant to the dispositions of their respective corporate documents.

The Brazilian practice in this field shows that ordinary transactions begin with the execution of a first private pre-contract, by which the buyer binds itself/himself/herself to purchase the property for certain price and conditions, provided that the seller can make evidence within a period of time, usually 30 days, of its good ownership and absence of legal hindrances to complete the proposed transaction. A down payment for an amount equivalent to 10-20% of the agreed price is usually required by the seller in order to take the property out of the market. If the seller is unable to provide evidence of its ownership over the property within the time set for the fulfillment of his obligation, he must return the amount of the down payment in addition to the payment of a fine, which is usually provided in the agreement and which amount may be up to the down payment amount.

According to Brazilian law, an ordinary transaction of purchase and sale of a real estate property requires at least two additional steps: (a) the elaboration before a Notary Public (*Tabelião de Notas*) of a public deed, which reflects the purchase and sale agreement; and (b) the registration of such public deed with the Real Estate Registry Office with jurisdiction over the property. Only after these two steps have been taken, the buyer will have legally acquired the ownership of the property.

Therefore, in case in a given transaction where the parties have signed a pre-contract and the seller has subsequently produced evidence of its good ownership title and its unrestricted freedom to sell the property, the parties sign the public deed of purchase and sale and the buyer simultaneously makes the payment of the balance of the price. Subsequently, the buyer carries out the registration of the acquisition deed before the competent Real Estate Registry Office.

In an ordinary purchase and sale agreement, the seller must present the buyer with the documents attesting his good ownership and absence of hindrances to the proposed transaction. The acquisition of a property in Brazil is subject to the buyer's due diligence on the documents of both the property itself and the seller. Therefore it is highly advisable to proceed with such a due diligence to ensure that the property to be transferred is free of any burdens, claims, debts, litigation, attachments and mortgages of any nature.

Acquisition of lots, houses and apartments in a new condominium will require the purchaser's attention as to whether all registrations and licenses regarding the formation of the condominium have been properly made by the construction company.

A very important aspect in these transactions is the structuring of wiring of funds into Brazil and repatriation of foreign funds from a future sale. It is important to keep in mind that escrow agreements and accounts are alien institutes in the Brazilian legal system. So, a closing may present more difficulties than those foreseen in the other countries or *vis à vis* domestic transactions. Furthermore, the prospective foreign buyer may only repatriate the funds from a future sale of the acquired property if such funds have been remitted through Brazilian banks authorized to operate in the exchange market.

24.5. Legal Aspects on the Rental of Real Estate Properties in Brazil

Urban real estate rent agreements in Brazil are governed by Law 8.245 dated of 18 October 1991 and amended by Law 12.112, dated of 9 December 2009.

Brazilian law provides for 03 (three) major types of rental agreements in Brazil depending on the use of the property: (i) residential; (ii) non residential; and (iii) temporary.

Despite the type of rent agreement there are some common points. First of all, the tenant must provide the landlord with some guarantee on the compli-

ance of its, obligations, that may be a personal guarantee – usually surety or collateral – or via insurance, on a bank guarantee.

Another common point is related to the index used to update the rent value. The most frequently index used is the IGPM (Medium Price Index), nevertheless, the parties may agree any other official inflation index.

The residential lease is entered solely for personal residence purposes and prevents the performance of any commercial/industrial activities in the property. The same rule applies for non residential lease agreements, which are used for the renting of commercial/industrial facilities.

Due to city land use rules the tenant to be must, prior to entering the lease, check if the property is suitable for the intended use. For example, a commercial company must be located in an area that supports commercial business activities, otherwise it may not have all necessary license and hence be prevented from operating in the rented premises.

Recently in Brazil commercial/industrial lease agreements are also been made pursuant to built-to-suit model. In such agreements the future landlord builds the facilities according to the tenant to be instructions and specifications, hence, such agreements are entered for long periods so the landlord is compensated.

Usually beach properties are rented on a temporary basis, such as summer vacations or holidays. In this case it is important to make an inspection prior to signing any documents so as to not be liable for any pre existing damages.

The lease of rural properties is subject to specific rules referred in the Agrarian Law Chapter herein.